

**IN THE DISTRICT COURT OF THE VIRGIN ISLANDS
DIVISION OF ST. CROIX**

UNITED STATES OF AMERICA

vs.

STEPHANIE BARNES,

Defendant.

Criminal Case No. 3:19-cr-47-RM

OPPOSITION TO MOTION FOR RECUSAL/DISQUALIFICATION

The United States of America, by and through Delia L. Smith, United States Attorney for the District of the Virgin Islands, and Assistant United States Attorneys Jill Koster and Evan Rikhye, responds in opposition to Defendant's "Motion for Recusal/Disqualification," filed on June 1, 2022 (D.E. #s 418 & 418-1) (hereafter "Barnes' Motion").

Barnes' Motion seeks the recusal and disqualification of Chief Judge Robert A. Molloy (hereinafter "the Court") pursuant to 28 U.S.C. §§ 144 and 455(a) citing a variety of grounds, including alleged personal relationships he has with members of the Golden family and government witness Racquel Concepcion. *See* D.E. # 418 at 3). The motion is accompanied by an 18-page affidavit penned by Barnes herself,¹ but is not otherwise supported by any

¹ Although not cited as a basis for recusal, Barnes includes in her affidavit a baseless claim that government counsel made racist remarks about

actual evidence in the record. Instead, it relies on wild accusations, rumors, innuendo, and speculation, transparently employed by Barnes to manufacture a conflict of interest where none exists so she can (1) avoid adverse rulings on her pending motions for judgment of acquittal and a new trial; and (2) be sentenced by a judge who did not sit through her three-week trial, listen to the extensive and detailed evidence of her crimes, and personally observe her behavior throughout, which are relevant factors to be considered when fashioning an appropriate sentence under 18 U.S.C. § 3553(a). For the reasons that follow the government urges the Court to deny the motion.

1) Barnes' Motion Cites an Improper Statute and is Untimely

In her quest to disqualify the Court, Barnes cites 28 U.S.C. § 144 and 28 U.S.C. § 455(a). Regardless of which statute her claims are assessed under, the result compelled by law is the same: her claims fail.

Notably, 28 U.S.C. § 144 is not even applicable to the District Court of the Virgin Islands because:

The District Court of the Virgin Islands is not among the district courts enumerated in the Judicial Code but, instead, is created by the Revised Organic Act of the Virgin Islands, ch. 558, § 21, 68 Stat. 506; it is given a different name and both the court and its

her in arguing for detention near the end of the trial. (*See* D.E. # 418-1 at 17). That is untrue, and it should be noted that Barnes has not quoted from, or cited to, any transcript from the trial in support of her claim. The government is in the process of ordering the trial transcripts and will be happy to supplement this filing, if needed, to further refute Barnes' claim.

judges possess attributes different from those of federal district courts and district judges. The mere appellation ‘district court,’ therefore, does not compel its inclusion within the scope of § 144.”

Government of the Virgin Islands v. Gereau, 502 F.2d 914, 931 (3rd Cir. 1974) (rev’d on other grounds). Even if it were applicable, Barnes has failed to meet its procedural requirement that motions for recusal “shall be accompanied by a certificate of counsel of record stating that it is made in good faith.” 28 U.S.C. § 144. No such certificate was attached to Barnes’ Motion.

The glaring omission of a good faith certification is concerning because “the attorney’s certificate plays a critical role in the recusal process.” *S.E.C. v. Loving Spirit Found.*, 392 F.3d 486, 496 (D.C. Cir., 2004). A party cannot “manufacture” grounds for recusal by filing unfounded or uncertified claims against a court. *See id.* at 497. “The certification requirement is not simply a *pro forma* procedural obligation but is key to the integrity of the recusal process.” *Klayman v. Judicial Watch, Inc.*, 744 F.Supp.2d 264, 273 (D.D.C. 2010). “Because the Court must accept as true all factual allegations asserted in the affidavit, even if the Court knows such allegations to be untrue, the certification requirement is essential to guard against the removal of an unbiased judge through the filing of a false affidavit.” *Id.* (citing *Loving Spirit Found.*, 392 F.3d at 496. “The certification requirement therefore serves as a ‘check on abuse of the recusal process,’ assuring the Court that the statements

in the affidavit are made in good faith.” *Id.* “Counsel’s failure to make this certification is grounds for denying the motion.” *United States v. Miller*, 355 F. Supp. 2d 404, 406 (D.D.C. 2005). On that basis alone, Barnes should be denied relief under 28 U.S.C. § 144.

Turning next to Barnes’ reliance upon 28 U.S.C. § 455(a), that statute states that a judge “shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” Although Barnes does not cite to it, her motion and affidavit also appear to rely upon 28 U.S.C. § 455(b)(1), which requires disqualification when a judge “has a personal bias or prejudice concerning a party.”

The Supreme Court teaches that courts should apply an objective standard and determine whether a reasonable person with knowledge of all the facts of the case would question the judge’s impartiality. *See Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860-61 (1988); *Cheney v. United States District Court for the District of Columbia*, 541 U.S. 913, 924 (2004); *Edelstein v. Wilentz*, 812 F.2d 128 (3d Cir. 1987).

“Discretion is confided in the district judge in the first instance to determine whether to disqualify himself because the judge presiding over a case is in the best position to appreciate the implications of those matters alleged in a recusal motion.” *In re Kensington Int’l Ltd.*, 353 F.3d 211, 224 (3rd Cir. 2003) (internal quotation marks and citations omitted). “This principle

rings particularly true where, as here, the [Court] has presided over (i) an extraordinarily complex litigation (ii) involving a multitude of parties (iii) for an extended period of time.” *Id.* As the Court is well aware, the instant matter has been pending since 2019, and as to Barnes the charges were adjudicated via a complex, multi-faceted trial that lasted for three weeks in December 2021. Even now, as Barnes awaits sentencing, pending before the Court are Barnes’ motions for judgment of acquittal and for a new trial. As such, there can be no dispute that the Court “is in the best position to appreciate the implications of those matters raised in a recusal motion.” *Id.*

While judges should recuse themselves if there is a reasonable basis to question their impartiality, “a judge has an equally affirmative duty to preside in the absence of such proof.” *Id.* A district judge “is obligated not to recuse himself without reason,” because a “judge who removes himself whenever a party asks is giving that party a free strike.” *New York Housing Development Corp. v. Hart*, 796 F.2d 976, 981 (7th Cir. 1986). The concern about “judge-shopping” is especially acute in the instant matter because Barnes has waited until this late date—almost six months after the jury rendered its verdicts of guilt, and just before Barnes’ sentencing—to file her recusal motion.

Indeed, Barnes’ tardiness in filing this motion casts doubt upon its legal sufficiency. Although the Third Circuit has not directly addressed this specific

issue, other circuits require that a motion for disqualification be brought “at the earliest moment after knowledge of the facts demonstrating the basis for such disqualification.” *Travelers Ins. Co. v. Liljeberg Enters., Inc.*, 38 F.3d 1404, 1410 (5th Cir. 1994). The Second Circuit uses a four-factor analysis for determining the timeliness of a motion: (1) whether the movant has participated in a substantial manner in trial or pretrial proceedings; (2) whether granting the motion would waste judicial resources; (3) whether the motion was made after entry of judgment; and (4) whether the movant can show good cause for delay. *Apple v. Jewish Hosp. & Med. Ctr.*, 829 F.2d 326, 333 (2d Cir. 1987). The Third Circuit limits this analysis where a judge has knowledge of potential bias but does not disclose it; in that circumstance, the movant will be relieved of the timeliness requirement. *In re Kensington Int’l Ltd.*, 368 F.3d 289 (3d Cir. 2004).

Barnes waited to file her affidavit alleging bias until after she was convicted on all counts at trial, rather than at the earliest moment of her knowledge of the claimed conflicts of interest. Using the Second Circuit’s factors as enunciated in the *Apple* decision, (1) Barnes has already participated in a substantial manner in the trial, which is over; (2) granting the motion would waste judicial resources in that it would require a significant time investment for another judge to review the trial transcripts in order to rule on the pending motions for judgment of acquittal and a new trial, as well as to

prepare for Barnes’ sentencing; (3) Barnes’ Motion was made just prior to the entry of judgment; and, (4) Barnes has not given a legitimate reason for failing to raise these issues sooner. These factors strongly suggest that Barnes’s Motion is untimely and should be denied on that basis.

2) *Barnes’ Affidavit Contains Blatant Falsehoods*

Barnes’ Motion fails to cite the trial transcript or the record more broadly in support of any of her claims. And her affidavit is merely a pastiche of untruths, post-hoc rationalizations, and abject speculation which falls short of meeting her burden to bring about the Court’s recusal.

Barnes complains about the Court’s statement, in ruling on an evidentiary objection she raised, that her testimony on cross-examination was in one instance inconsistent. That statement was plainly true and was made to explain the Court’s ruling—not to discredit Barnes. (She discredited herself by making the inconsistent statements to begin with.) In any event, the jury was instructed to disregard anything the Court did or said at trial during their deliberations. Relying on well-established Supreme Court precedent, the Third Circuit held in *United States v. Bertoli*, 40 F.3d 1384 (3d Cir. 1994) that “judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge.” *Id.* at 1412 (quoting *Liteky v. United States*, 114 S.Ct. 1147, 1157 (1994)). As the Supreme Court explained: “They

may do so if they reveal an opinion that derives from an extrajudicial source; and they *will* do so if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible. *Liteky*, 114 S.Ct. at 1157. But neither are true here; the Court's comment derived from a judicial source (i.e., events occurring in court) and revealed only that he was listening carefully enough to Barnes' testimony to observe her obvious inconsistencies.

Barnes also complains about the Court's decision to quash Barnes' subpoena of Virgin Islands Governor Albert Bryan. Barnes expounds at great length about what Governor Bryan would have testified to, had he been called as a defense witness at her trial. *See* D.E. # 418-1 at 4-8. However, there is no evidence in the record or elsewhere to support Barnes' claims. The summary provided is pure speculation, seemingly conjured up in Barnes' own fervid imagination. The Court will recall numerous instances at trial where Barnes insisted her counsel assert facts while cross-examining government witnesses only to have the witness testimony demonstrate that her assertions were patently false. There is no legal authority for the proposition that if a judge quashes a subpoena for a defense witness, that ruling somehow demonstrates bias mandating disqualification of the judge.

Barnes further complains that: "Judge Molloy, who resides in the St. Thomas – St. John District, positioned himself to preside over this case in the St. Croix district . . . to effectuate Golden's vendetta against me." *See* D.E. #

418-1 at 12. This is a mind-boggling assertion given that Barnes *herself* filed the motion seeking transfer of the trial from St. Thomas to St. Croix. *See* D.E. #s 198 & 265. Had Barnes not requested a transfer of the case, it would have remained in St. Thomas, yet she now falsely claims the Court “positioned himself” to preside over the case in St. Croix.

Barnes also makes a claim regarding a purported conversation between her jury consultant, Antonio Messer, and the Court. *See* D.E. # 418-1 at 9-10. Although not part of the record in this case, it is notable that Mr. Messer has expressly denied the occurrence of any such conversation with the Court in his statements to the media. According to the viconsortium.com website: “Mr. Messer, when reached by the Consortium, unequivocally denied Ms. Barnes's claims. ‘It's totally untrue, such a conversation never took place,’ he said.” *See* <https://viconsortium.com/vi-crime/virgin-islands-building-case-of-alleged-web-of-conflicts-of-interest-stephanie-barnes-demands-recusal-of-judge-molloy-new-trial>, accessed on June 8, 2022.

But perhaps most startling is Barnes’ assertion that the Court engaged in “behavioral manipulation” of the jury by asking them if they enjoyed the lunches and snacks provided during the course of the trial. This is a preposterous allegation, aimed at creating a malign impression over the routine provision of meals to the jury. If that were enough to support recusal, it would require the recusal of nearly every judge, and possibly the retrial of

nearly every case, that has gone to trial in this country. Based on their collective experience participating in criminal cases in the District of the Virgin Islands, the District of Arizona, the Eastern District of California, the Northern District of Indiana, the Eastern District of North Carolina, the Eastern District of Virginia and the Northern District of Mississippi, undersigned counsel have observed that a judge's casual pleasantries directed to a jury are the norm and not in any respect concerning, much less grounds for recusal.

This response to Barnes' Motion does not exhaustively address every assertion in her affidavit. Some assertions can be effectively addressed only by the Court or following further investigation by the government. Should the Court wish for the government to undertake an investigation into any of Barnes' claims, the government will do so and supplement this filing thereafter. However, the government does not believe any such investigation is required for the Court to reject all of Barnes' claimed grounds for its recusal.

The Third Circuit has said, in evaluating an affidavit filed under 28 U.S.C. § 144, that while factual allegations made in support of motions for disqualification must be accepted as true, "conclusory statements and opinions . . . need not be credited." *United States v. Vespe*, 868 F.2d 1328, 1640 (3rd Cir. 1989). Barnes' affidavit is replete with conclusory statements and opinions as well as her own conspiratorial musings. The D.C. Circuit has advised, again

when evaluating a claim for disqualification under 28 U.S.C. § 144, that an affidavit in support of a recusal motion must meet “exacting standards.” *Miller*, 355 F. Supp. 2d at 406 (internal quotation and citation omitted). “The affidavit must be strictly construed; it must be definite as to time, place, persons and circumstances. Assertions merely of a conclusionary nature are not enough, nor are opinions or rumors. And the affidavit must give fair support to the charge of a bent of mind that may prevent or impede impartiality of judgment.” *Id.* As was the case in *Miller*, Barn’s affidavit is not definite. It offers no specifics and no proof. It baldly alleges bias and requires the reader to make numerous inferences favorable to Barnes which are unsupported by evidence. The government submits that this Court’s impartiality cannot reasonably be questioned based on Barnes’ affidavit.

Instead, the government believes Barnes is wielding her recusal motion as a calculated tactical tool and urges the Court to consider whether attacks on his impartiality are simply subterfuge to circumvent anticipated adverse rulings on her motion for acquittal and a new trial, and in hopes of being sentenced by a judge less familiar with her history and characteristics and the nature and extent of her criminal activity as well as her complete unwillingness to take responsibility for her past actions. *See Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 162 (3rd Cir. 1993).

While it is undisputed that a judge must avoid participating in any proceeding in which his impartiality might reasonably be questioned, a judge has a concomitant duty to avoid yielding in the face of unfounded insinuations. Barnes must not be allowed to “cast sinister aspersions, fail to provide a factual basis for those aspersions, and then claim that the judge must disqualify h[im]self because the aspersions, *ex proprio vigore*, create a cloud on [his] impartiality. To hold otherwise would transform recusal motions into tactical weapons which [litigants] could trigger by manipulating the gossamer strands of speculation and surmise.” *In re: United States*, 158 F.3d 26, 35 (1st Cir. 1998) (internal citations and quotations omitted).

Respectfully submitted on this, the 13th day of June, 2022,

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