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FILED UNDER SEAL

United States v. Schock, No. 16-cr-30061

January 17, 2017

The Honorable Sue E. Myerscough
United States District Judge
319 U.S. Courthouse
600 E. Monroe Street
Springfield, IL 62701

Re: *United States v. Schock*, No. 16-cr-30061

Dear Judge Myerscough:

As happens so often in this matter, we are constrained to reply to the government's grossly erroneous statements, this time with regard to its letter of January 17, 2017. We shall do so as briefly as possible while accurately informing Your Honor.

As an initial matter, Your Honor admitted Mr. Terwilliger in Court on April 9, 2015, after he had applied to be admitted during the grand jury litigation.[1] His appearance in the captioned case was until today pending the administrative step of completing the oath before a judge and which was completed today before Magistrate Judge Schanzle-Haskins.

Contrary to the government's representation in its letter to Your Honor, our letter pointedly does not "request" Your Honor's recusal. Rather, it suggests that recusal is appropriate under the circumstances. This was an intentional distinction because a judge may conclude on her own to recuse, either without a request from a party or without regard to the source of information that could give rise to an objective basis to question impartiality. *See Roberts v. Bailar*, 625 F.2d

[1] Mr. Terwilliger moved on April 6, 2015 for leave of Court pursuant to Local Rule 83.5(F) to appear in court pending approval of his Application for Admission to practice in the Central District of Illinois. *See* Mot. for Leave of Court Pursuant to Local Rule 83.5(F), *In re Grand Jury Subpoena #0714-SGJ-002330*, No. 3:15-mc-3005 (Filed Under Seal, Apr. 6, 2015). On the same date, Mr. Terwilliger's co-counsel Jeffrey B. Lang moved Mr. Terwilliger's admission to practice in the Central District of Illinois. Your Honor permitted Mr. Terwilliger to appear as counsel for Mr. Schock on April 9, 2015, and at every hearing thereafter in the grand jury litigation. Notably, the government has never objected to Mr. Terwilliger's appearance in court until now.

125, 128 (6th Cir. 1980) ("Section 455(a) is a self-executing provision for the disqualification of federal judges . . . the section sets forth a mandatory guideline that federal judges must observe sua sponte."); *see also Wilson v. Chicago*, 710 F. Supp. 1168, 1169 (N.D. Ill. 1989) ("The language of § 455 suggests that rather than providing the means of relief for parties suffering from bias, it is a self-executing standard of conduct for the judiciary.").

Likewise, our letter was filed under seal in recognition that a judge may recuse him or herself without any explanation, as Chief Judge Shadid appears to have done previously in this matter. We also recognized that the privacy of the parties named in the emails, in light of the circumstances of the motion, merited filing the letter under seal. There is no requirement, and the government points to none, that such correspondence concerning recusal needs to be public, nor is there any prohibition on making it so. Rather, such matters are entrusted to the good judgment and discretion of the judge involved. Moreover, there is no procedural requirement that a party must file a motion in order to bring the grounds supporting disqualification to the attention of the court. Indeed, as one commentator has observed, 28 U.S.C. § 455 "is silent on procedure," but parties are free to "suggest to the judge that grounds for disqualification exist." 13D Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3550 (3d ed 2016).

Third, we are also constrained to note that a party does not "waive" a basis for either a suggestion of recusal or a motion for disqualification. Here there was no waiver as none of the prerequisites for relinquishment of a known right, if there was one, were established on the record. Your Honor did not ask the parties to waive any grounds for disqualification, and Mr. Schock did not affirmatively indicate that he did so. *See* 28 U.S.C. § 455(e); Tr. of Arraignment 4-5. The Seventh Circuit has cast doubt on the validity of such a "waiver." *See In re Nat'l Union Fire Ins. Co.*, 839 F.2d 1226, 1231 (7th Cir. 1988). Moreover, a suggestion of a basis for an objective third party to question impartiality can, as here, be the result of cumulative circumstances as they develop, rather than being a static circumstance grounded in but one consideration.

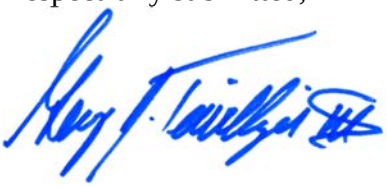
Fourth, there is no reason for the government's baseless speculation that Your Honor's ruling on the motion for change of venue within the district bears any relation to our letter regarding recusal, as the case may well remain in the Springfield Division regardless of whether Your Honor continues to preside. Moreover, given the importance of the issue, Mr. Schock took additional time to consult an ethics expert before sending his letter. Lawyers have a duty to zealously represent their clients and if at any time a good faith conclusion is reached that there is a basis for judicial disqualification, counsel has a duty to the client to raise it. This case is in its infancy and the government's suggestion that our letter on the subject is untimely is, therefore, baseless.

The government's suggestion that our letter was untimely is curious given the circumstances by which the emails in question were brought to our attention. Regardless of whether we had access to these emails, among the hundreds of thousands that have been gathered in this matter, the fact remains that they were affirmatively brought to our attention by the government. Not only did the government bring these emails to our attention, it did so within the context of Mr. Schock's

motion to transfer venue. The emails were provided shortly after the government's response but before Your Honor ruled. Although the government cryptically stated that it would leave the relevance of the emails to our judgment, the only reasonable conclusion that could be drawn from the subject matter of the emails was that the government intended to signal that Chief Judge Shadid was already disqualified, or that the government would seek to disqualify him. It is remarkable that the government would now suggest that our letter is untimely, in light of its central role in bringing the issue before Your Honor.

Finally and most notably, the government nowhere disputes the facts upon which our suggestion for recusal is based.

Respectfully submitted,



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