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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

UNITED STATES OF AMERICA,
Plaintiff,

vs.

DAVID ROLAND HINKSON,
Defendant. □)

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) □ Case No.: CR-04-0127-C (RCW)

MOTION TO RECUSE JUDGE TALLMAN
OR IN THE ALTERNATIVE TO EXCLUDE

EVIDENCE □ □ Defendant David R. Hinkson hereby moves Judge Tallman to recuse himself from the above case pursuant to 28 USC §455 or in the alternative, to exclude evidence under Fed. R. E., 403 of the false statements of the government informant who is a criminal who was seeking to take advantage of defendant's situation in order to obtain a lighter sentence for himself as the probative value of such statements is outweighed by the danger of unfair prejudice, confusion of issues or misleading the jury and as grounds therefore, show as follows:

The Court should recuse itself under 28 U.S.C. § 455(a) from any further participation in this case where false threats are allegedly made that may affect the security of the presiding Court and have been communicated ex parte [one-sided] directly to the Court.

Defendant respectfully moves that this Court to recuse itself pursuant to 28 U.S.C. § 455(a), which provides that a federal judge "shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." The "substantive standard for recusal" is "whether a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *United States v. Hernandez*, 109 F.3d 1450, 1453 (9th Cir. 1997) (internal quotations and punctuation omitted). Recusal thus may be required "even absent any evidence of actual bias." *Mangini v. United States*, 314 F.3d 1158, 1161 (9th Cir. 2003).

In this case, on December 8, 2004, the Court was "informed of the alleged threat" and was "told that the U.S. Marshals Service was conducting an investigation into its legitimacy, but has thus far received no assessment of the credibility of any alleged threat." (See Dkt. #113, Order.) The Court presumably had off-the-record, ex parte communications with someone from the U.S. Marshals Service of Boise, Idaho. Such communications place the Court in the midst of the investigation.

Such communications may have resulted in this Court obtaining "personal knowledge of disputed evidentiary facts concerning the proceeding." 28 U.S.C. § 455(b)(1); see generally *Edgar v. K.L.*, 93 F.3d 256, 259-62 (7th Cir. 1996) (holding that a district judge's in-chambers, off-the-record discussions with experts required disqualification).

How the Court is to be advised of the legitimacy of any alleged threat, when the Court is to be advised thereof, who will do the advising, under what circumstances the advisement will take place as well as the other facts and circumstances of this case, are all issues that may undercut the appearance of impartiality required of a judicial officer evaluating and ruling upon the entire panoply of other necessary issues, including motions in limine, voir dire, the admissibility of in-court evidence in the case against defendant, jury instructions, etc.

This Court has become an alleged victim of threats purportedly made by defendant. Characteristically, in

this case, such threats have been shown to be baseless, groundless, false and frivolous. (See defendant's Motion for Temporary Release, Dkt. #s106-109 and the expose of the criminal, Mariana Raff, and the false accusations attributed to her by the government that defendant was an international terrorist seeking to hire her Mexican-national brothers as hit-men to murder federal officials in Idaho, when after 17 months the FBI performed a routine investigation that should have been conducted in April, 2003, which showed that the statements attributed to Raff were totally baseless, groundless, false and fraudulent.) However, a reasonable person might well question the impartiality of one judge reviewing the sufficiency of the evidence regarding a crime allegedly committed against the Court itself. Likewise, one reasonably might question the impartiality of a judge called upon to consider whether a person accused of such a crime should be temporarily released before and/or during trial to a setting less restrictive than jail, which would allow defendant the opportunity to receive treatment for depression, while he participates in the preparation of his defense.

Where the presiding judicial official in a case is said to be the target of a threat, recusal is a certain result. Even where a judicial colleague is threatened, Federal courts have been sensitive to recusal issues. For example, in the mail bombing murder of former Eleventh Circuit Judge Robert Vance, all Eleventh Circuit judges recused themselves from the appeal and a special panel from outside the Circuit was appointed. *United States v. Moody*, 977 F.2d 1420, 1423 (11th Cir. 1992). And, in the Oklahoma City bombing case, the Tenth Circuit ordered recusal of an Oklahoma City federal district judge – and assigned the case to a judge from outside the entire state of Oklahoma – where the Oklahoma City federal courthouse and some staff had been affected by the crime, even though the judge himself had not been injured. *Nichols v. Alley*, 71 F.3d 347 (10th Cir. 1995). One exception to this trend is *United States v. Harrelson*, 754 F.2d 1153, 1164-66 (5th Cir. 1985), where the court declined to require recusal of an in-District colleague of the murdered federal judge; that decision seems aberrational and later Fifth Circuit case law more strictly requires an appearance of impartiality. See, e.g., *United States v. Jordan*, 49 F.3d 152, 156-58 (5th Cir. 1995).

A reasonable observer could question virtually every aspect of how the proceedings have been handled after the December 8, 2004, advisement. In making this statement, we do not suggest that the Court has actual bias. The test is not how the judiciary would view the situation, however, and a court must be "mindful that an observer of our judicial system is less likely to credit judges' impartiality than the judiciary." *Jordan*, 49 F.3d at 157. With this standard in mind, a reasonable outside observer could question not simply the general propriety of this Court's presiding over issues raised by pretrial motion which were ruled upon and denied after December 8, 2004 (during a time when defendant was not advised of the alleged threats, no record was made of the advisement and no hearing was held concerning said advisement) but also, the same may be said of the Court presiding over the entire case from this point forward.

In the alternative, defendant moves that any statements by the government's latest informant be excluded as the probative value would be substantially outweighed by the danger of unfair prejudice, confusion of issues and misleading the jury. Fed. R. E. Rule 403.

This Motion to Recuse is not intended to impugn the Court's good faith or to suggest actual bias. The new allegations of threats, irrespective of the source, strike at the heart of our justice system and should be decided through a process that not only is free from any actual bias but also bears the full appearance of impartiality. The Court should immediately reassign the entire case so that no delay occurs in addressing, inter alia, temporary pre-trial release.

Dated this 30th day of December, 2004

Wesley W. Hoyt

CERTIFICATE OF SERVICE

I certify that on this ____ day of _____ 2004 I have served a true and correct copy of the foregoing MOTION TO RECUSE JUDGE TALLMAN OR IN THE ALTERNATIVE TO EXCLUDE EVIDENCE upon the persons named below by the method so indicated:

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