UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 10-2487, 10-3580

UNITED STATES OF AMERICA,
appellee,

v.

SHOLOM RUBASHKIN,
appellant.

ON APPEAL FROM THE U.S. DISTRICT COURT FOR THE NORTHERN DIVISION OF IOWA, EASTERN DIVISION (HON. LINDA R. READE, CHIEF JUDGE)

AMICUS BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ("NACDL") IN SUPPORT OF APPELLANT

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Amici curiae, the National Association of Criminal Defense Lawyers ("NACDL"), is a nonprofit professional bar association that works on behalf of public and private criminal defense attorneys and their clients. Founded in 1958, NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of justice. NACDL has more than 10,000 members nationwide—joined by 90 state, local, and international affiliate organizations with another 30,000 members. Its membership, which includes private criminal defense lawyers, public defenders, law professors, and active-duty military defense counsel, is committed to preserving fairness within America's criminal justice system.

SUMMARY OF ARGUMENT

This case is about limitations on the exercise of prosecutorial power of the United States by Article III judges. In this case, the trial judge was involved in *ex parte* communications with the prosecution without the participation of the defense counsel. These communications involved the judge, in effect, participating in the pre-arrest and pre-raid activities of the U.S. Attorney since the fall of 2007.

This case raises several issues, and Amicus will focus on two of them. First, should a judge preside over a criminal trial when—contrary to the principles of *Morrison v. Olson*, 487 U.S. 654 (1988)—she has been intimately involved with the prosecution in the events leading to this criminal trial? Second, should the trial judge have disqualified herself when (contrary to the principles of 28 U.S.C. §144) she has made herself a witness

involving the events of the disqualification motion and then ruled that her version of the events was the correct one?

This Court should not affirm a criminal prosecution—accompanied by a lengthy sentence—when the trial court had "*made it clear*" that it would "*support the operation in any way possible* . . . ." Harrison Affidavit, ¶8(e) (emphasis added), discussed below. The documents show that United States Attorney's Office "*briefed Chief Judge Reade* regarding the ongoing investigation" and "*Judge Reade indicated full support for the initiative* . . ." Harrison Affidavit, ¶8(b) (emphasis added). She held a weekly "operations/planning meeting" with the U.S. Attorney's Office. Harrison Affidavit, ¶8(k).

The judge was continually involved with this ongoing operation, which she indicated that she would support in any way possible. The Government indicted appellant on a theory that was very different than the theory behind its elaborate raid (a Black Hawk military helicopter and 600 agents in heavy riot gear raided a kosher meat packing plant).

The Chief Judge, as discussed in the next section, was, in effect, part of the prosecution team, which periodically briefed her about progress, operations, and planning in the case. In return, she promised her full "support." She then decided, when the defendant moved for a new trial, that she would rule in favor of her version of events, rather than the version suggested in the documents.

ARGUMENT

1. ARTICLE III COURTS MAY NOT PARTICIPATE IN THE U.S. ATTORNEY'S RAID OR PRE-ARREST ACTIVITIES IN THE MANNER THAT THE TRIAL JUDGE DID IN THIS CASE

Morrison v. Olson, 487 U.S. 654 (1988), makes it quite clear that Article III judges should not be involved in directing prosecutors who try the cases before them. *Morrison*, in order to save the constitutionality of the Independent Counsel statute,[1] decided that it must narrow that statute so that it did not give the Special Division (a three-judge Article III court) any power to direct or supervise the prosecutor (the Independent Counsel). The Chief Judge, in this case, did that which *Morrison* held federal judges should not do: she was involved with the prosecution's *investigative* authority:

> [T]he powers granted by [the statute at issue] are themselves *essentially ministerial*. The Act simply does not give the Division [the three-judge court] the power to '*supervise'* the independent counsel in the exercise of his or her *investigative or prosecutorial authority*.
> 487 U.S. at 681 (emphasis added).

If the statute allowed supervision, the Court said, then it would be unconstitutional.

As discussed more fully below, what the trial court did here went well beyond "ministerial" actions. The trial judge was involved in various briefings; she promised her full "support" for the prosecutorial efforts; she choreographed the raid of the kosher plant.

Morrison concluded that judges should not be supervising prosecutors in the cases over which the judge presides. For example, it ruled that the Special Division could not remove the Independent Counsel because removal allows supervision. In order to save

[1] *Morrison*, in effect, read "require" or "must" to mean "may," because, the Court said, it was its duty "to construe a statute in order to save it from constitutional infirmities." *Morrison v. Olson*, 487 U.S. 654, 682. See also, 2 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law: Substance & Procedure §9.6 (Thomson-West, 4th ed. 2007) (Special Division, a three-judge court, may not supervise the Independent Counsel).

the statute's constitutionality, the Court interpreted the statutory provision relating to termination to mean virtually nothing: "It is basically a device for removing from the public payroll an independent counsel who has served her purpose, but is unwilling to acknowledge the fact. So construed, the Special Division's power to terminate does not pose a sufficient threat of *judicial intrusion into matters that are more properly within the Executive's authority* to require that the Act be invalidated as inconsistent with Article III." *Morrison*, 487 U.S. at 683 (emphasis added).

Morrison construed the statute to deny the Special Division any supervisory role over the counsel "in the exercise of his or her *investigative* or prosecutorial authority." 487 U.S at 681 (emphasis added). The Court added:

> We emphasize, nevertheless, that the Special Division has *no* authority to take any action or undertake any duties that are not specifically authorized by the Act. The gradual expansion of the authority of the Special Division might in another context be a bureaucratic success story, but it would be one that would have serious constitutional ramifications

487 U.S. at 684 (emphasis in original).

The decision whether to prosecute is an inherently executive action, yet documents show that the Chief Judge made it clear that the court was "*willing to support the operation in any way possible*, to include staffing and scheduling." Harrison Affidavit, ¶8(e) (emphasis added). This was improper and denied appellant a fair trial by an impartial judge.

2. THE TRIAL JUDGE'S REFUSAL TO RECUSE HERSELF DID NOT COMPLY WITH PROCEDURES MANDATED BY 28 U.S.C. §144

Section 144 of title 28, United States Code, sets out the basic procedure the trial judge should use in deciding disputed facts in connection with a motion for disqualification:

> 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*. [Emphasis added].
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

Under this section, when a party files a motion to disqualify along with its supporting affidavit, under Section 144, the judge must accept the factual allegations in a properly pleaded affidavit of bias or prejudice as true. *E.g., Williams v. New York City Housing Authority,* 287 F. Supp. 2d 247, 249 (S.D. N.Y. 2003) ("the court must accept all facts included in the affidavit as true," citing *Rosen v. Sugarman*, 357 F.2d 794, 797 (2d Cir. 1966) ("the facts stated in the affidavit are to be taken as true")); *Cooney v. Booth,* 262 F. Supp. 2d 494, 500 (E.D. Pa. 2003) ("When a party files a motion for disqualification and supporting affidavit under Section 144, all factual allegations contained in the affidavit must be accepted as true." [Footnote omitted]), *aff'd,* 108 Fed. Appx. 739 (3d Cir. 2004); *Salt Lake Tribune Pub. Co., LLC v. AT & T Corp*., 353 F.

Supp. 2d 1160, 1175 (D. Utah 2005) (" this court must accept as true the factual allegations in Mr. McCarthey's affidavit to see whether they establish bias or prejudice.").

Compare the judge's Order in this case (disputing certain facts) with the rule in *Sykes* and similar cases: "In passing on the legal sufficiency of the affidavit, the court must assume the truth of the factual assertions even if it 'knows them to be false.'" *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir.1993), quoting *United States v. Balistrieri*, 779 F.2d 1191, 1199 (7th Cir.1985).

The judge is not supposed to testify and may not present her version of events. But she did that here. Her opinion denying disqualification is replete with her statements denying her involvement and supervision. E.g., *United States v. Rubaskin,* Order of Oct. 27, 2010, at 5.

- "The undersigned did not receive any details beyond that."
- "The undersigned's planning was limited to ensuring that a sufficient number of judges, court-appointed attorneys and interpreters would be available and that the court would be able to function efficiently at an off-site location. The undersigned did not tour the Cattle Congress grounds in Waterloo, Iowa."

In contrast, the affidavits filed in this case repeatedly criticize the judge for being involved with, choreographing, supporting, and supervising the Government's planning of the raid that led to this prosecution—all of which gave her "a personal bias or prejudice" that was "in favor of any adverse party," *i.e*., the prosecution. For example, the Affidavit of Mark I. Harrison says—

- "The *court made it clear that* they are willing *to support the operation in any way possible*, to include staffing and scheduling." ¶8(e) (emphasis added). The Chief Judge's *support* "in any way possible" shows that she "has a personal bias or prejudice" that is "in favor of" the Government and thus mandates disqualification under 28 U.S.C. § 144.

- "*Judge Reade met with ICE Resident Agents* in Charge ('RAC'), USAO, Probation staff, USMS, and a United States Magistrate Judge *to discuss 'an overview of charging strategies*, numbers of anticipated arrests and prosecutions, logistics, the movement of detainees, and *other issues related to the CVJ investigation and operation*." ¶8(g) (emphasis added).
- A March 31, 2008 e-mail described a meeting and concluded, "The First Assistant for the Northern District Rich Murphy indicated that he has a meeting this Friday (April 4) with *the Chief Judge* who has *requested a briefing on* how the operation will be conducted. Murphy has requested an operation plan from ICE by COB Wednesday so that he can incorporate it into his presentation." ¶8(i) (emphasis added).
- The Director of Immigration and Law Enforcement (ICE) wanted a document "for his presentation to the judge," because of the "requirement to brief the judge." §8(j) (emphasis added).
- The "*enforcement operation*," *i.e.*, the raid, was planned "[*i*]*n coordination with* the U.S. Attorney's Office of the Northern District of Iowa (USAO) and the *United States District Court in the Northern District of Iowa*," §8k(emphasis added) — *i.e*., the judge is coordinating, with the U.S. Attorney, a massive raid on the kosher plant.
- The *Chief Judge*, ICE, and the *Assistant U.S. Attorney* had "*a weekly operations/planning meeting*" ¶8(m) (emphasis added).
- The chief judge apparently had *ex parte* communications with the U.S. Attorney's Office about the pleas of arrested employees. "What I found most astonishing is that *apparently* Chief Judge Reade had already ratified these deals prior to one lawyer even talking to his or her client. Judge Reade's presence at the meeting seemed to confirm as much. This directly violates Rule 11 plea procedure, which provides that the 'court must not participate in these [plea] discussions.' Moreover, this ratification appeared to have been *ex parte* with the United States Attorney's Office. Indeed, it had to have been *ex parte* because no lawyers had even met with their clients prior to these Rule 11(c)(l)(C) plea bargains being announced." ¶8(p) (emphasis in original; underscoring added).

The Mark Harrison affidavit concludes that Chief Judge Reade engaged in *ex parte* communications. ¶9(e), 9(j), 9(n), 9(o), 9(p), 9(q-u), §10.

The affidavit of Professor Stephen Gillers also expresses concern that the Chief Judge "has a personal bias or prejudice" that is "in favor of" the Government, because of her *ex parte* communications and her expressions of support of the prosecution. He notes that Chief Judge Reade, in her opinion denying recusal, makes many factual assertions

but does not "disclose the extent or contents of the pre-raid meetings between her and the USAO that are recounted in the FOIA responses." ¶12. As Professor Gillers notes, *ex parte* conversations "can create the 'appearance' of 'advantage' independent of the substance of the communications, whenever the substance of the communication occurs." ¶ 18. And, 28 U.S.C. § 144, in turn, requires disqualification because the *ex parte* conversations convey a prejudice "in favor of" the Government,

Professor Gillers concludes that the prosecutors engaged in ethical misconduct because they "should not have participated in any discussion or communication with the Chief Judge that touched on 'strategies' or 'the ongoing investigation' or 'other issues related to the CVJ investigation and operation.'" ¶23(a).

It takes two to tango: if the prosecutors should have not participated in any such discussions with the judge, the judge should not have participated in such conversations with the prosecutors. Those conversations about "strategies," or "the ongoing investigation," or "other issues" all show that the Chief Judge was prejudiced in favor of the Government and thus must disqualify herself both under Section 144 and Section 455.

Professor Gillers' affidavit also concludes that what the Chief Judge did here caused "the 'appearance . . . of . . . advantage" to the government." ¶ 23(b). In that circumstance, Section 144 requires the judge's disqualification.

The Chief Judge, of course, could have avoided all these problems: she should not have discussed strategies and the ongoing investigation and other issues, and could have provided for a court reporter to transcribe what was actually said, so she would not have made herself a factual witness, in violation of Section 144 . ¶23(e). See also, ¶23(h).

Instead, the Chief Judge did not use that procedure and she is now left to deny the allegations — but Section 144 does not allow the Chief Judge that choice. "In passing on the legal sufficiency of the affidavit, the court must assume the truth of the factual assertions even if it 'knows them to be false.' " *United States v. Sykes*, 7 F.3d 1331, 1339 (7th Cir.1993), quoting *United States v. Balistrieri*, 779 F.2d 1191, 1199 (7th Cir.1985). The Chief Judge, in her opinion denying disqualification, does not even claim that her *personal presence* in any of these meetings was necessary. Court personnel could engage in logistics. Then, she would not have been in position to listen to "*charging strategies*

. . . and *other issues related to the CVJ investigation and operation*." Mark Harrison Affidavit ¶8(g) (emphasis added).

Justice Robert Jackson, when he was Attorney General, gave a speech to the U.S. Attorneys in the Department of Justice. His words are worth repeating for they really refer to the present case. When the elaborate raid on illegal immigrants did not bear fruit, the prosecutors found another crime. The trial judge—who was part of the planning and pre-arrest activities—imposed a sentence of over a quarter-of-a century, which served to justify all the resources that the Government employed, with its massive raid more befitting of a bust of a well-armed drug cartel.

> *If the prosecutor is obliged to choose his case, it follows that he can choose his defendants*. Therein is the most dangerous power of the prosecutor: that *he will pick people that he thinks he should get, rather than cases that need to be prosecuted*. With the law books filled with a great assortment of crimes, a prosecutor stands a fair chance of finding at least a technical violation of some act on the part of almost anyone. In such a case, it is not a question of discovering the commission of a crime and then looking for the man who has committed it, *it is a question of picking the man and then searching the law books, or putting investigators to work, to pin some offense on him*. It is in this realm — in which the prosecutor picks some person whom he dislikes or desires to embarrass, or selects some group of unpopular persons and then looks for an offense, that the greatest danger of abuse of prosecuting power lies. It is here that law enforcement becomes personal, and *the real crime becomes that of being unpopular with the predominant or governing group*, being attached to the wrong political views, or being personally obnoxious to or in the way of the prosecutor himself.

Robert Jackson, *The Federal Prosecutor, Address Delivered at the Second Annual Conference of United States Attorneys*, April 1, 1940 [Italics and bold added].[1]

[1] See also, Ronald D. Rotunda, The Case Against Special Prosecutors, Wall Street Journal, Jan. 15, 1990, at p. A8.

CONCLUSION

Based on the foregoing, amicus urge this Court to grant appellant a new trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing brief complies with the type-volume limitations. The brief has been prepared in proportionately spaced typeface using WordPerfect version 12 in Times New Roman14 point type. Based upon the word-count function in WordPerfect version 12, the brief contains 2, 927 words.

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Deborah Ellis