

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION**

UNITED STATES OF AMERICA

v.

No. 3:21cr62 DPJ-LGI

MIKE AUSTIN ANDERSON

**GOVERNMENT’S SUPPLEMENTAL RESPONSE
TO DEFENDANT’S MOTION TO ORDER RECUSAL OF THE OFFICE OF THE
UNITED STATES ATTORNEY FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
FROM THE PROSECUTION OF THIS CASE**

By leave of the Court, the United States of America, by its undersigned Assistant United States Attorneys, hereby makes this Supplemental Response to Defendant’s Motion to Order Recusal of the Office of the United States Attorney for the Southern District of Mississippi from Prosecution of this Case (the “Motion”) (Docket Entry (“DE”) 15). As its Supplemental Response, the United States submits the following:

1. The July 2006 Criminal Proceedings against Mike Austin Anderson in Choctaw Criminal Court Belie Anderson’s Testimony.

During the Court’s hearing on the Motion held on July 30, 2021, Defendant Anderson raised an issue contending that AUSA Kevin Payne had, in his former capacity as a defense lawyer, represented Anderson during a July 26, 2006, proceeding in Choctaw Tribal Court (“CTC”). At the arraignment held on June 24, 2021, this Court had directed Anderson to produce all supporting documents for his claims of conflict-of-interest on an expedited schedule. Anderson replied that he had no further supporting evidence or documents, but was relying upon his motion to speak for itself. The United States filed its Response to the Motion (DE20), addressing solely the Motion’s stated claim that AUSA Payne had previously represented

Anderson as a client of Choctaw Legal Services in Choctaw Tribal Court in 2007. At the hearing on July 30, Anderson took the stand and, for the first time, alleged that Payne had also represented him on July 26, 2006, in Choctaw Tribal Court.

A review of the court records of the Choctaw Tribal Court revealed one instance in July 2006, wherein Kevin Payne entered an appearance in a matter in which Mike Anderson was a defendant. As set forth in the accompanying Declaration of James E. “Jes” Smith and accompanying attachments (Exhibit A), a domestic violence incident occurred between Mike Anderson and Matilda King during July 2006, resulting in charges filed against both Anderson and King in CTC cause no. 762-06. Exh. A ¶ 5. Attorney Smith had already been representing Anderson on pending CTC criminal charges, and Smith continued to represent Anderson in Cause no. 762-06, to include seeking a bond hearing. Attorney Payne represented Matilda King. Exh. A ¶ 5.

Through July and August 2006, Attorney Smith alone represented Anderson, while the Choctaw Tribal Court considered Anderson’s motion for bond and also entertained motions and briefing on use of hearsay evidence in the bond hearings. Exh. A ¶ ¶ 6-9. Attorney Payne represented codefendant King during this time. Exh. A ¶ ¶ 7-8. Both attorneys submitted a joint brief for their respective clients, on the evidentiary issue before the Choctaw Tribal Court. Exh. A ¶ 8.

When Attorney Smith, in October 2006, was on one day unable to attend a court hearing for Anderson on this matter, Smith asked Attorney Steve Settlemires to stand in for Smith. Exh. A ¶ 10. Attorney Payne never represented Anderson during that case. Exh. A ¶ 11.

2. There is No Basis for Recusal of AUSA Payne.

As the Government set forth in its initial brief (DE15) and at the July 30 hearing, there is

no substantial relationship between the present federal criminal matter in this Court and any past matter in Choctaw Tribal Court. According to the Mississippi Bar, “in disqualification motions, the burden is on the former client to prove the substantial relationship” of a former representation in order to disqualify an attorney from representing an adverse opponent in a later case. ETHICS OPINION NO. 106 OF THE MISS. BAR at p.2 (Sept. 13, 1985; amended April 6, 2013) (citing *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 133 (5th Cir. 1981) (“In applying the substantial relationship test, the court should require [the] (former client) to delineate with greater specificity the scope of the prior representation and to demonstrate precisely how the subject matters of the prior representation are connected with the matters embraced within the pending suit.)) (copy attached as Exhibit B). The records of the Choctaw Tribal Court disprove the conclusory allegations by Anderson that AUSA Payne, in 2006 or 2007, represented Anderson in any matter substantially related to the present federal prosecution.

The Mississippi Bar has declared the “controlling ethical principle is that where there is no substantial relationship between the former representation and the present representation and no confidences or secrets of the former client from the former representation are used against the present representation, the attorney may ethically represent a new client against a former client in an unrelated matter.” ETHICS OPINION NO. 128 OF THE MISS. BAR (Dec. 5, 1986; Amended April 6, 2013) (copy attached as Exhibit C). A “lawyer is not required to sterilize his affairs to avoid baseless charges and he need not disqualify himself in a matter concerning a former client unless the terminated employment had some substantial relationship to the anticipated litigation or unless he received some privileged information which might be used in such anticipated litigation to the embarrassment or detriment of the former client.” ETHICS OPINION NO. 90 OF THE MISSISSIPPI BAR at p. 3 (Jan. 19, 1984; Amended April 6, 2013) (citing *Church of Scientology of*

Calif. v. McLean, 615 F.2d 691, 692 (5th Cir. 1980)) (copy attached as Exhibit D).

The record before the Court, including the Declarations of Kevin Payne, Ashley Lewis, and James “Jes” Smith, as well as the accompanying record documents from the Choctaw Tribal Court and the Choctaw Legal Services office, and the sworn testimony of the witnesses at the July 30 hearing, all support the Government’s position. The evidence shows that the specified criminal cases in Choctaw Tribal Court brought by the Tribe against Mike Austin Anderson, bear no substantial relationship to the present indictment in the United States District Court. The weight of the evidence also favors a determination that no privileged, confidential, or secret information was conveyed by Anderson to Payne during any limited encounter they may have had in the one appearance by Payne as a defense counsel in 2007 for the arraignment of Anderson before the Choctaw Tribal Court.

CONCLUSION

For the reasons set forth above, as well as the arguments and evidence offered by the government in its prior submission and before the Court, the defense Motion should be denied.

Respectfully submitted,

DARREN J. LAMARCA
Acting United States Attorney

By: /s/ Kevin J. Payne
KEVIN J. PAYNE MSB100104
Assistant United States Attorney
THEODORE M. COOPERSTEIN MSB106208
Assistant United States Attorney

501 East Court Street, Suite 4.430
Jackson, Mississippi 39201
Telephone No.: 601.965.4480
Facsimile No.: 601.965.4409

CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, I electronically filed the foregoing with the Clerk of the Court using the ECF system to all ECF participant(s) of this record.

Dated: August 6, 2021

/s/ Kevin J. Payne
Kevin J. Payne
Assistant United States Attorney