

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

UNITED STATES OF AMERICA

V.

CRIMINAL NO. 3:21CR62DPJ-LGI

MIKE AUSTIN ANDERSON

**MOTION TO REVOKE OR AMEND
MAGISTRATE JUDGE'S DENIAL OF DEFENDANT'S MOTION TO
ORDER RECUSAL**

hearing requested

Comes now Defendant Mike A. Anderson and files this Motion to Revoke or Amend Magistrate Judge's Denial of Defendant's Motion to Order Recusal. Mr. Anderson asks the District Court to conduct a *de novo* pre-trial hearing or in the alternative, conduct a *de novo* review of the audio recording of the hearing on the motion before Magistrate Judge LaKeysha Greer Isaac on July 30, 2021. After conducting the *de novo* hearing or review, Mr. Anderson asks the Court to revoke the Magistrate Judge's Order and order the Office of the United States Attorney for the Southern District of Mississippi from the prosecution of this case. In support of this Motion, he presents the following:

This appeal of the Magistrate Judge's decision to the District Judge is pursuant to 28 U.S.C. § 636(b)(1). Section 636(b)(1) states:

Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a *de novo* determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Furthermore, Fifth Circuit law calls for a *de novo* review of the Magistrate Judge's decision to deny Mr. Anderson's motion. "Yet, by providing a full thirty days for the district court to issue its ruling after all materials are filed, it also affords sufficient time for a *de novo* review of the issues to which a party objects, as required under 28 U.S.C. § 636(b)(1)". *United States v. Harris*, 566 F.3d 422, 430 (5th Cir. 2009).

In review of the facts and pursuant to 28 U.S.C. § 636(b)(1), Magistrate Issac's findings that purportedly support denial of recusal are that 1) Mr. Anderson did not establish that Attorney Kevin Payne personally and substantially represented him in previous matters, and 2) there is no substantial relationship between prior cases and the current prosecution of Mr. Anderson. These findings are incorrect.

While the Magistrate Judge did find that "Attorney Payne did indeed represent Mr. Anderson in 2007...", the court failed to give weight to Mr. Anderson's testimony. Mr. Anderson testified under oath that he met with Attorney Payne on numerous occasions and discussed confidential information. Upon his own

admissions, Attorney Payne has represented Mr. Anderson in some capacity at least twice in the past in criminal matters.¹ Though the past instances were in tribal court, they are still “substantially related” to the current matter. This is evident as Attorney Payne has used information gleaned from his previous representations against Mr. Anderson, as shown by: Attorney Payne’s central focus on Mr. Anderson’s criminal history during the detention hearing; Attorney Payne’s witness, who testified in detail of his representation of Mr. Anderson—without seeking Mr. Anderson’s approval to discuss such matters²; Attorney Payne’s ability to access information about his prior representations of Mr. Anderson—even when, through due diligence, the undersigned could not; and most importantly, the recent indictments of Mr. Anderson’s sisters, which happened subsequent to the original filing of this motion.

Since these matters are indeed substantially related, the government has the burden of showing that the defendant’s confidentiality remained intact. *Aldridge v. State*, 583 So.2d 203, 205 (Miss. 1991). To make this showing, “the State must show that the assistant district attorney had absolutely no participation in the case, from the time of withdrawal through adjudication; divulged no confidential information; and notified the other party promptly upon becoming aware of the conflict of interest.” *Ousley v. State*, 984 So.2d 985, 988 (Miss.2008); *Eldridge v. State*, 51

¹ See Gov’t Response to Motion to Recuse, Dkt. 20, Exhibit 1, page 5.

² This was objected to by the defense during the hearing.

F.3d. 953, 956 (Miss. 2011). The Mississippi Supreme Court “consistently has held that the subsequent prosecution by an attorney who has previously gained confidential information from the accused relative to the charges against him is inherently incompatible with the right of a criminal defendant to receive a fair trial.” *Id.*

The government, however, cannot meet this “heavy” burden. *Ousley v. State*, 984 So. 2d 985, 988 (Miss. 2008). “Once it is established that the prior matters are substantially related to the present case, ‘the court will irrebuttably presume that relevant confidential information was disclosed during the former period of representation.’” *In re Am. Airlines, Inc.*, 972 F.2d 605, 614 (5th Cir. 1992) (quoting *Duncan v. Merrill Lynch, Pierce, Fenner & Smith*, 646 F.2d 1020, 1028 (5th Cir.); *In re Corrugated Container Antitrust Litigation*, 659 F.2d 1341,1347(5th Cir. 1981)).

It is because of this that Attorney Payne and the Office of the United States Attorney for the Southern District of Mississippi should be recused. Therefore, we believe that a review of Mr. Anderson’s denial of his Motion to Order Recusal is warranted.

WHEREFORE, Mr. Anderson asks this Court to grant his Motion to Revoke or Amend Magistrate Judge’s Denial of Defendant’s Motion to Order Recusal.

Respectfully submitted, November 16, 2021.

MIKE ANDERSON,
Defendant

BY: s/ Jacinta Hall
Jacinta Hall (MB # 101956)
Assistant Federal Public Defender
Southern District of Mississippi
200 S. Lamar St., Suite 200 North
Jackson, Mississippi 39201
Telephone: (601)948-4284
Facsimile: (601)948-5510
Email: jacinta_hall@fd.org

Attorney for Defendant

CERTIFICATE OF SERVICE

I, Jacinta Hall, certify that on November 16, 2021, this Motion was filed with the Clerk of the United States District Court for the Southern District of Mississippi, using the electronic case filing system, which in turn sent an electronic copy of this Motion to all attorneys of record in this case.

s/ Jacinta Hall
Jacinta Hall

Attorney for Defendant