



Although Section 455 does not specify any particular procedure for ruling on a recusal motion, except for its waiver provisions, see 13A Charles Alan Wright et al., Fed. Prac. & Proc. Juris. 3d § 3550 (2008), the section is specifically addressed to the judge whose recusal is in question. Section 455(a) states that “[a]ny . . . judge shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.” 28 U.S.C. § 455(a) (emphasis added). Similarly, Section 455(b) provides that “[h]e shall also disqualify himself” under several other circumstances enumerated in that section. 28 U.S.C. § 455(b) (emphasis added). Compare 28 U.S.C. § 144 (requiring “another judge” to rule on a recusal motion if the supporting affidavit meets the threshold “sufficiency” test).

“The weight of authority indicates that it is perfectly proper, indeed the norm, for the challenged judge to rule on a recusal motion pursuant to section 455.” Recusal: Analysis of Case Law Under 28 U.S.C. §§ 455 & 144 Part 1. VII (Federal Judicial Center 2002). Judge Johnson, in In re Corrugated Container Antitrust Litigation, 614 F.2d 958 (5th Cir.),<sup>1</sup> noted the substantial precedent for this position by stating that:

No case referred to by defendants or located in an exhaustive search of the authority suggests any negative inference that can be drawn from the fact that the judge to whom a motion to recuse [pursuant to 28 U.S.C. §§ 144 and 455] is directed rules on the motion. “[I]t is for the judge who is the object of the affidavit [of bias] to pass on its sufficiency.” 13 [Charles Alan] Wright, [Arthur R.] Miller & [Edward H.] Cooper, [Federal Practice and Procedure] § 3551 at 375. “[W]hile the statute undoubtedly permits referring the disposition of an affidavit of bias to another judge, . . . the adoption of such a procedure as a general rule would be unwise.” United States v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1213, 59 L.Ed.2d 454 (1979) (citation omitted); see United States v. Olander,

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<sup>1</sup>Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1981) (adopting as binding precedent all decisions of the United States Court of Appeals for the Fifth Circuit handed down prior to close of business on September 30, 1981).

584 F.2d 876, 883 (9th Cir. 1978); In re Union Leader Corp., . . . 292 F.2d [381,] at 384 [(1st Cir.), cert. denied, 368 U.S. 927 (1961)].

Id. at 963 n. 9. See also Schurz Communications, Inc. v. FCC, 982 F.2d 1057, 1059 (7th Cir. 1992) (Posner, J.) (“Section 455 clearly contemplates that decisions with respect to disqualification should be made by the judge sitting in the case, and not by another judge.”) (quoting United States v. Balistrieri, 779 F.2d 1191, 1202-03 (7th Cir. 1985)); 13A Wright, supra, § 3550 (“it is entirely proper for the challenged judge to pass on the matter himself”).

While the judge has the discretion to transfer a recusal motion, as Judge Johnson noted, a transfer of a recusal motion is “unwise.” Other courts have also discouraged such procedure. In Chitimacha Tribe v. Harry L. Laws Co., Inc., 690 F.2d 1157, 1162 (5th Cir. 1982), the Fifth Circuit explained the reasons to avoid this “irregular” practice:

Although, the practice has been permitted in the past, see e.g., United States v. Grinnell Corp., 384 U.S. 563, 582-83 n. 13, 86 S. Ct. 1698, 1709-10 n. 13, 16 L. Ed. 2d 778 (1966); Tenants & Owners in Opposition to Redevelopment v. United States Dep't of Housing & Urban Dev., 338 F.Supp. 29, 31 (N.D.Cal.1972), it is not to be encouraged. The challenged judge is most familiar with the alleged bias or conflict of interest. He is in the best position to protect the nonmoving parties from dilatory tactics. See United States v. Haldeman, 559 F.2d 31, 131 (D.C.Cir.1976), cert. denied, 431 U.S. 933, 97 S.Ct. 2641, 53 L.Ed.2d 250 (1977) (submitting § 144 motions to fellow judges for decision is “at most permissive.”). Referring the motion to another judge raises problems of administrative inconvenience and delay. Parrish v. Board of Com'rs of Alabama State Bar, 524 F.2d 98, 107 (5th Cir.) (Gee, J., specially concurring), cert. denied, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1975). Although the matter is ultimately within the discretion of the challenged judge, recusal motions should only be transferred in unusual circumstances.

See also 32 Am. Jur. 2d Federal Courts § 54 (2005) (noting that only exceptional circumstances justify the transfer of a recusal motion).

Nor should this Court hold an evidentiary hearing on Defendant’s recusal motion. “A motion for disqualification does not confer upon Defendants a right to make a record in open court nor does

it confer upon them a right to an evidentiary hearing.” In re Lieb, 112 B.R. 830, 835 (Bankr. W.D. Tex. 1990). See also 13A Wright, supra, § 3350 (providing that a Section 455 motion can be supported by an affidavit, a verified memorandum, or a statement of facts in some other form). The Court has discretion over whether to hold an evidentiary hearing prior to ruling on a disqualification motion. United States v. Cherry, 330 F.3d 658, 666 n.13 (4<sup>th</sup> Cir. 2003). Instead of conducting an evidentiary hearing, the Court may conduct an independent investigation of the facts. See, e.g., United States v. Bremers, 195 F.3d 221, 226 (5<sup>th</sup> Cir. 1999) (“[t]he analysis of a 455(a) claim must be guided . . . by an independent examination of the facts and circumstance of the particular claim”). For example, in United States v. Morrison, 153 F.3d 34 (2<sup>d</sup> Cir. 1998), the appellate court approved of the district judge’s “reasonable efforts” to ascertain her husband’s and friend’s possible involvement with the defendant. Id. at 49 n.4.

Defendant’s request for a hearing also discounts the statutory and ethical obligations under which this Court must make its recusal decision. “[A] judge is under an affirmative, self-enforcing obligation to recuse himself sua sponte whenever the proper grounds exist” pursuant to Section 455. <sup>2</sup> United States v. Kelly, 888 F.2d 732, 744 (11<sup>th</sup> Cir. 1989). Further, “judges have an ethical duty to ‘disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification.’” American Textile Mfrs. Institute, Inc. v. The Limited, Inc., 190 F.3d 729, 742 (6<sup>th</sup> Cir. 1999) (quoting Porter v. Singletary, 49 F.3d 1483, 1489

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<sup>2</sup>In language virtually identical to 28 U.S.C. § 455(a), Canon 3(C)(1) of the Code of Conduct for United States Judges provides, “A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.” Code of Judicial Conduct, Canon 3(C)(1), reprinted in 175 F.R.D. 363, 368 (1998).

(11th Cir. 1995)).<sup>3</sup> “[B]oth litigants and counsel should be able to rely upon judges to comply with their own Canons of Ethics.” Id. (quoting Porter, 49 F.3d at 1489). Therefore, “litigants (and, of course, their attorneys) should assume the impartiality of the presiding judge.” Id. In light of a judge’s ethical and statutory responsibilities, an attorney for a party should not demand a hearing to question a judge about his lack of impartiality. See Porter, 49 F.3d at 1489. “Such investigations, of course, would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process – all to the detriment of the fair administration of justice.” Id.

Applying the foregoing principles, this Court should retain jurisdiction over the Motion, and should render a decision based on the record before it and any additional factual information in its possession that may be relevant to the disqualification inquiry.

**II. The U.S. Marshals’ Unsolicited Disclosure To This Court Of Information Concerning The Postal Inspectors’ Investigation Into Juror Harassment And Potential Obstruction Of Justice Does Not Require Disqualification.**

Defendant contends that recusal is required under 28 U.S.C. §§ 455(a), (b)(1), and (b)(5)(iv). All of his arguments rely, as a factual matter, on the unsolicited communication by the U.S. Marshals Service to this Court, in April 2007, of information concerning the Postal Inspectors’ investigation into the post-verdict, anonymous mailing of material to at least five co-workers of two jurors (Jurors 7 and 40) who sat in this case. See Mot., Ex. A at 2. The anonymously-mailed material purported to be emails about the case exchanged between Jurors 7 and 40 during jury deliberations, and was

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<sup>3</sup> See also ABA Model Code of Judicial Conduct Canon 3(E)(1) cmt. (2000) (providing that a judge is obligated to “disclose on the record any information that a judge believes the parties or their lawyers might consider relevant to the issue of disqualification, even if the judge believes there is no real basis for disqualification”).

identical to material appended to Defendant's motion to reconsider the denial of his motion for a new trial ("Motion to Reconsider") (Doc. #519). Id. In their April 2007 conversation with the Court, the Marshals reported that the Postal Inspectors had concluded that the purported emails were not authentic, but that the Inspectors had not yet determined who had sent copies of the purported emails to the co-workers. Id. at 3.

Defendant's Motion should be denied. Under Section 455, a judge is as much obliged not to disqualify himself when the circumstances do not warrant disqualification as he is to disqualify himself when the circumstances do so warrant. See In re Aguinda, 241 F.3d 194, 201 (2<sup>nd</sup> Cir. 2001). "[A] judge, having been assigned to a case, should not recuse himself on unsupported, irrational, or highly tenuous speculation." United States v. Greenough, 782 F.2d 1556, 1558 (11<sup>th</sup> Cir. 1986); see also United States v. Snyder, 235 F.3d 42, 46 (1<sup>st</sup> Cir. 2000) ("A trial judge must hear cases unless there is some reasonable factual basis to doubt the impartiality or fairness of the tribunal."<sup>4</sup>) But that is precisely what Defendant would have the Court do here. As set forth below, none of the grounds cited by Defendant warrants recusal.

**A. Recusal Is Not Required Under Sections 455(b)(1) Or 455(b)(5)(iv).**

As relevant here, Section 455(b) requires a judge to disqualify himself "[w]here he has . . . personal knowledge of disputed evidentiary facts concerning the proceeding," 28 U.S.C. § 455(b)(1), or where the judge is "likely to be a material witness in the proceeding," id. § 455(b)(5)(iv).

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<sup>4</sup> A decision on recusal is reviewed for an abuse of discretion, Christo v. Padgett, 223 F.3d 1324, 1333 (11<sup>th</sup> Cir. 2000), a "standard [that] has been described as allowing a range of choice for the district court, so long as that choice does not constitute a clear error of judgment," Kelly, 888 F.2d at 745.

Defendant's theory of recusal under Section 455(b) is that the Court possesses information material to his new-trial claim that the Marshals' ex parte conversation with the Court in April 2007 violated his Fifth and Sixth Amendment rights. Mot. at 4-5. Defendant's theory is flawed for two separate and independent reasons: the April 2007 conversation, on its face, was not improper and it did not prejudice Defendant.

1. The April 2007 Communication Was Not Improper.

To begin with, the April 2007 conversation was hardly the classic ex parte communication -- i.e., one between a party and the court -- that Defendant makes it out to be. See Black's Law Dictionary (8<sup>th</sup> ed. 2004) (defining "ex parte" as "[o]n or from one party only, usu. without notice to or argument from the adverse party," and defining "ex parte communication" as "[a] communication between counsel and the court when opposing counsel is not present") (emphases added). Defendant repeatedly refers to the Marshals as "representatives of the Government," Mot. at 2, 8, but the Marshals were not acting on behalf of the prosecution in this case when they briefed the Court on the Postal Inspectors' investigation. See Mot., Ex. A at 2-3.<sup>5</sup> And while the U.S. Marshals Service is located within the Department of Justice, see 28 U.S.C. § 561(a), its "primary role and mission" is to provide security for the federal courts and to enforce federal court orders, id. § 566(a). See generally Allmond v. Akal Security, Inc., 558 F.3d 1312, 1314 (11<sup>th</sup> Cir. 2009) ("The United States Marshals Service is responsible for securing the federal courts."); Ballard v. Spradley, 557 F.2d 476, 481 (2<sup>nd</sup> Cir. 1977) ("The raison d'être of the Marshal Service is to service the federal

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<sup>5</sup> The only information the undersigned government attorneys have about this Court's contact with the U.S. Marshal is contained in the "Stemler letter," and they rely upon no other factual information in making this Response. The United States submits that, for the reasons stated herein, no further factual development is needed to dispose of the Motion.

forum in civil as well as criminal litigation.”); see also Pennsylvania Bureau of Correction v. U.S. Marshals Service, 474 U.S. 34, 47-48 (1985) (Stevens, J., dissenting) (noting that “[t]hroughout our history, the marshals have played an important role in the administration of justice,” and that “[t]he closeness of the relationship” between the court and the marshal is derived “from the cooperative nature of the shared mission to administer justice”). The Marshals routinely have discussions with court personnel, and district judges themselves, about court matters outside the presence of parties and counsel, and such conversations are not treated as ex parte communications giving rise to potential constitutional violations.

In any event, regardless of how the April 2007 conversation is characterized, it was entirely proper for the Marshals to provide, and for this Court to receive, information about the Postal Inspectors’ investigation. Defendant appears to concede in his new trial motion that ex parte communications are permissible in “some limited circumstances.” Doc. # 953 at 52; see United States v. Adams, 785 F.2d 917, 920 (11<sup>th</sup> Cir. 1986) (“[I]n some situations the trial judge may find an ex parte conference necessary.”). The post-verdict communication here related to an ongoing criminal investigation. See United States v. Simms, 385 F.3d 1347, 1352 (11<sup>th</sup> Cir. 2004) (“Ex parte communications are . . . justified in order to protect a continuing criminal investigation and the safety of persons placed at risk by those investigations.”). The purpose of that investigation was to investigate post-verdict juror harassment, not -- as Defendant claims -- to determine whether the purported juror emails were authentic. It was undertaken in response to anonymous mailings to the jurors’ co-workers and was based on the jurors’ own complaints to the Marshals Service. See Mot., Ex. A at 2. The purpose of the anonymous mailings appears obvious -- to harass Jurors 7 and 40 and potentially to obstruct justice. The mailings occurred one month after the jurors had testified

publicly at the November 17, 2006, evidentiary hearing on Defendants' new trial motion, and only one week after this Court had denied Defendants' motion. See Doc. #518. The purported emails contained references to extrinsic material and purported to undermine both this Court's ruling and the public testimony of Jurors 7 and 40 that they had been exposed to only limited extraneous information during the course of deliberations. See Doc. #519, Exs. 23, 24. The testimony of Jurors 7 and 40 made them easy targets for harassment by someone trying to perpetuate the discredited allegations of juror misconduct; the anonymous mailer invariably sought to undermine the jurors' credibility as witnesses in the post-trial proceedings or to exact some sort of payback against the jurors for their verdict. Either scenario presented troubling and potentially criminal conduct, of which this Court (and the Marshals Service) needed to be apprised. See also 28 U.S.C. § 466(e)(1)(A) (authorizing Marshals Service to "provide for the personal protection of Federal jurists, court officers, witnesses, and other threatened persons in the interests of justice where criminal intimidation impedes on the functioning of the judicial process or any other official proceeding"). That responsibility arose not only because the targeted jurors sat in a trial over which this Court presided, but also because the Court, as the Chief Judge, has a duty to ensure the fair and orderly administration of justice in this District -- a duty which includes an obligation to protect petit jurors who served so that citizens will continue to perform their civic duty to serve on juries.

This case is similar to United States v. Phillips, 664 F.2d 971 (5<sup>th</sup> Cir. 1981) (Unit B)<sup>6</sup>, superseded by rule in United States v. Huntress, 956 F.2d 1309 (5<sup>th</sup> Cir. 1992), where the court held

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<sup>6</sup> See Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11<sup>th</sup> Cir. 1982) (adopting as binding precedent all prior decisions of Unit B of the former Fifth Circuit regardless of date of issuance).

that disqualification was not required under § 455, even though attorneys for the United States, separate from the trial prosecutors, briefed the trial judge ex parte on three separate occasions before the trial about the defendants' plots to flee the country, intimidate and "eliminate" witnesses and kill the judge. Id. at 1000-01. In one of the meetings, government attorneys told the court about their investigation into obstruction of justice, and the trial judge told them they could continue the investigation, including by making consensual surreptitious tape recordings. Id. at 1003 n.41. The former Fifth Circuit held that the district court was not required to recuse itself because the ex parte meetings were entirely proper; the information had "enable[d] the judge to perform his continuing duty to conduct an orderly trial and to take appropriate measures designed to protect the participants therein." Id. at 1003. See United States v. Jackson, 430 F.2d 1113 (9<sup>th</sup> Cir. 1970) (holding that disqualification was not required where the prosecuting AUSA informed the trial judge ex parte about alleged threats to witnesses which led the trial court to revoke the defendants' bail bonds). Moreover, in Phillips, the information about the defendants' flight plans was "highly relevant to the court's determination on bond revocation," and the trial court was not "impermissibly involved in the government's investigation . . . and did not direct the investigation." Phillips, 664 F.2d at 1003. Similarly, here, the information concerning the Postal Inspectors' investigation was relevant to this Court's oversight of proceedings in its courtroom and to the fair and orderly administration of justice in the District, and the Court neither was involved in nor directed the Postal Inspectors' investigation.<sup>7</sup>

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<sup>7</sup> Defendant relies on United States v. Rhynes, 196 F.3d 207, 215 (4<sup>th</sup> Cir. 1999), see Mot. at 6-7, but that case has no legal significance here because the court of appeals in Rhynes did not hold that recusal was required, as the district judge had recused himself.

Because the Marshals' April 2007 communication with the Court was proper on its face, it does not support a claim for a new trial, or even for an evidentiary hearing. The absence of a viable claim removes any possibility that this Court possesses knowledge of "disputed evidentiary facts" relevant to the new trial proceeding, 28 U.S.C. § 455(b)(1), or that it will "be a material witness in the proceeding," *id.* § 455(b)(5)(iv).

2. Defendant Was Not Prejudiced By The April 2007 Communication.

Even if Defendant has an arguable claim that the April 2007 communication violated his Fifth and Sixth Amendment rights, recusal is still not warranted because Defendant cannot establish, as he must to prevail on his new trial claim, that he was prejudiced by that communication. *See, e.g., Rushen v. Spain*, 464 U.S. 114, 118-19 (1983) (holding that an unrecorded *ex parte* conversation between a trial judge and juror is reviewed for harmless error); *United States v. Swindall*, 971 F.2d 1531, 1550 (11<sup>th</sup> Cir. 1992) ("[T]he *ex parte* conference did not affect the fairness of the rest of the trial and thus cannot be grounds for reversal of the remaining counts."); *Adams*, 785 F.2d at 921 (holding that portions of *ex parte* communications raising an appearance of impropriety did not give rise to reversible error because defendant was not prejudiced by them, and citing *United States v. Walsh*, 700 F.2d 846, 858 (2<sup>nd</sup> Cir. 1983), for the proposition that "*ex parte* contacts do not require reversal if they do not affect [the] fairness of trial").

Defendant's core complaint is that the Court learned of the Postal Inspectors' conclusion that the purported juror emails were not authentic while his Motion to Reconsider, which was based on the same material, was still pending. *See* Mot. at 4-5. But, much to Defendant's chagrin, that information ultimately was not material to his then-pending motion to reconsider because, as the

Court of Appeals recognized in affirming Defendant's conviction, this Court assumed arguendo that the purported emails were authentic when it ruled on Defendant's motion. United States v. Siegelman, 561F.3d 1215, 1242 (2009). Even with that assumption, this Court concluded, and the Court of Appeals agreed, that Defendant was not entitled to a new trial. Id. at 1242-43.

The Court's assumption that the purported emails were authentic precludes Defendant from establishing, in connection with his new trial claim, that he was prejudiced by the Marshals' April 2007 communication with this Court. See Simms, 385 F.3d at 1352-53 (holding that defendant was not prejudiced by ex parte communications between government and district court on the first day of trial because, even if disclosed, the information would not have altered the course or results of trial). The lack of prejudice will ultimately defeat Defendant's claim, and renders this Court's knowledge of the April 2007 communication immaterial to the new trial proceeding. For that reason alone, Sections 455(b)(1) and (b)(5)(iv) do not require this Court's disqualification.

**B. Recusal Is Not Required Under Section 455(a).**

Section 455(a) provides that a "judge . . . shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." Whether a court must recuse itself under § 455(a) is evaluated on an objective basis. Liteky v. United States, 510 U.S. 540, 548 (1994). The test is "whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt about the judge's impartiality." Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988); accord Kelly, 888 F.2d at 744-45. Section 455(a)'s requirement of reasonableness is important, because "there is the need to prevent parties from . . . manipulating the system for strategic reasons, perhaps to obtain a judge

more to their liking.” FDIC v. Sweeney, 136 F.3d 216, 220 (1st Cir. 1998) (internal quotation marks omitted). See Snyder, 235 F.3d at 46 (noting that § 455 “modified, but did not eliminate, the duty to sit doctrine”) (citations and quotations omitted). A judge’s failure to recuse is reversible error only where a conflict of interest is readily apparent and the risk that the judge will not be impartial is substantial. See United States v. Young, 39 F.3d 1561, 1570 (11th Cir. 1994).

In this case, an informed, objective observer would not reasonably question this Court’s impartiality. As already discussed, the Court’s receipt of information concerning the Postal Inspectors’ investigation was fully consistent with its responsibilities to jurors and to the fair and orderly administration of justice. See Part II.A.1, supra. After receiving that information, the Court gave Defendant every benefit of the doubt about the authenticity of the purported emails, and still denied his motion for a new trial. As the Court of Appeals concluded, this Court’s denial of Defendant’s new trial motion, even based, as it was, on the assumption that the purported emails were authentic, was entirely proper because each juror had testified under oath about the extent of their exposure to extrinsic evidence and other matters of potential misconduct, and nothing they revealed warranted a new trial. Siegelman, 561 F.3d 1236-43. And of course, Defendant has no ground for seeking this Court’s recusal merely because he disagrees with the rulings of this Court (or the Court of Appeals). See Liteky, 510 U.S. at 549 (“the recusal statute was never intended to enable a discontented litigant to oust a judge because of adverse rulings made”) (citations and quotations omitted).

Nor would an informed, objective observer reasonably question this Court’s impartiality in subsequent proceedings. Defendant notes that, following the April 2007 communication, the Court “sentenced [him] to 82 months in prison (Doc. 627), and denied [his] motion for appeal bond,

immediately remanding him to custody. (Doc. 617).” Mot. at 9. But those decisions were fundamentally fair. The Court held a three-day sentencing hearing, during which it overruled the government’s request that Defendant’s offense level be enhanced for obstructing justice, and went on to sentence Defendant to a term of imprisonment that was 15 months below his Guidelines range (as calculated by the Court). Sent. Tr., vol. II, at 158-59; *id.*, vol. III, at 298-300. And, the Eleventh Circuit eventually upheld this Court’s decision denying Defendant release on bond pending appeal. Order at 3, 11<sup>th</sup> Cir. Case No. 07-13163 (Jan. 7, 2008). Contrary to Defendant’s suggestion, the Court’s sentence and bail decision reinforce the conclusion that recusal is not warranted under Section 455(a).

Because no reasonable person, fully informed of the anonymous mailings and the Court’s assumption (in Defendant’s favor) that the purported emails were authentic, “would entertain a significant doubt about the judge’s impartiality,” disqualification is not required. *Parker*, 855 F.2d at 1524. See *United States v. Breen*, 243 F.3d 591, 598 (2d Cir. 2001) (holding that the trial judge did not abuse his discretion by not recusing where the AUSA met *ex parte* with the judge during the trial about the criminal investigation of a setting juror); *United States v. Alcantara-Rueda*, D.C. No. CR-02-02807-GT, 2003 WL 22701134 at \*1 (9<sup>th</sup> Cir. Nov. 14, 2003) (“[T]he mere fact that a[n *ex parte*] communication took place does not necessarily demonstrate that the judge’s impartiality might reasonably be questioned.”).

### **III. Conclusion**

In summary, this Court’s recusal from the new trial motion is not warranted because the Court does not have “material” information or “disputed evidentiary facts” concerning his motion for a new trial, and an informed, objective observer would not reasonably question this Court’s

impartiality. Defendant's claims to the contrary are merely assertions based on what he believes is relevant and important – assertions already rejected by the Court of Appeals. Defendant's Motion should be denied.

Respectfully submitted this the 28th day of July, 2009.

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**IN THE UNITED STATES DISTRICT COURT FOR  
THE MIDDLE DISTRICT OF ALABAMA  
NORTHERN DIVISION**

<b>UNITED STATES OF AMERICA</b>	)	
	)	
<b>v.</b>	)	
	)	<b>CR. NO. 2:05-CR-119-MEF</b>
<b>DON EUGENE SIEGELMAN and</b>	)	
<b>RICHARD M. SCRUSHY</b>	)	

**CERTIFICATE OF SERVICE**

I hereby certify that on July 28, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

Respectfully submitted,

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