IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
WESTERN DIVISION

In re Sanctions Against the United States Attorney's Office for the Northern District of Iowa, and Assistant United States Attorney Kevin C. Fletcher	Case No. 04-MC-0090 **EXPEDITED RULING REQUESTED**

MEMORANDUM OF LAW IN SUPPORT OF KEVIN C. FLETCHER'S MOTION TO DISQUALIFY CHIEF JUDGE MARK W. BENNETT

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Pursuant to 28 U.S.C. §144 and 28 U.S.C. §§ 455(a) and (b), Assistant United States Attorney Kevin C. Fletcher ("AUSA Fletcher") hereby respectfully moves to disqualify Chief Judge Mark W. Bennett ("the Court") from the pending criminal contempt proceeding against Fletcher.

PRELIMINARY STATEMENT

A federal judge must recuse himself from any proceeding in which he harbors a "personal bias or prejudice" against a party, 28 U.S.C. §§ 144, 455(b)(1), or in which his "impartiality might reasonably be questioned," 28 U.S.C. § 455(a). The obligation to recuse under these conditions is rooted in two fundamental principles. First, every litigant is entitled to a "fair trial in a fair tribunal . . . before a judge with no actual bias." *Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997) (internal quotation marks and citation omitted). Second, "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14 (1954)). For this Court to preside over the present contempt proceedings against AUSA Fletcher would violate both of these principles.

This Court and the United States Attorney's Office for the Northern District of Iowa ("NDI Office" or "the Office") have disagreed repeatedly over the issue of criminal sentencing -- in particular over the proper scope of judicial and prosecutorial discretion in the sentencing process. The Office's legal positions have been vindicated repeatedly by the United States Court of Appeals for the Eighth Circuit, which has reversed the Court's sentencing determinations numerous times, and has gone so far as to issue a writ of mandamus preventing the Court from ordering discovery in connection with the Office's sentencing policies.

Thwarted by the Court of Appeals in its effort to rewrite federal sentencing law, the Court has taken the radical step of trying to control the NDI Office's sentencing positions through a pattern of abuse and intimidation. The Court has, in recent years, directed abusive and often obscenity-filled tirades at AUSA Fletcher and his colleagues. Most notably, the Court recently threatened to subject Assistant United States Attorneys ("AUSAs") to severe sanctions and fines, including contempt penalties, if the Office refused to abandon its policies in connection with criminal sentencing. The Court further stated that if the Office did not "back off," it would "make it a war." The Office declined to back down, and AUSA Fletcher was asked by senior management of the NDI Office to place the Court's inappropriate *ex parte* threats on the record. Not long after Fletcher made such a record in open court, the Court initiated this legally baseless contempt proceeding against Fletcher. The inference -- and, at any rate, the appearance -- of retaliation and bias could hardly be clearer.

The Court's conduct violates or appears to violate basic precepts of judicial ethics and raises significant doubts as to whether fundamental fairness and equity will be preserved if this contempt proceeding is not transferred to a neutral tribunal.

FACTUAL BACKGROUND

The relationship between the Court and the NDI Office (and AUSA Fletcher in particular) has been marked by a series of disputes relating to the sentencing of criminal defendants -- in particular, to the Office's sentencing policy with respect to defendants who assist the government in their investigation of other unlawful activity. These include clashes over (1) when a grant of use immunity under U.S.S.G. § 1B1.8 is appropriate, (2) when the government ought to file a motion under 18 U.S.C. § 3553(e), thereby freeing the Court to sentence a defendant to a term

below the otherwise applicable mandatory minimum, and (3) in cases in which a downward departure *is* in order due to a defendant's "substantial assistance," what the extent of that departure should be. On numerous occasions, the Office has sought and received permission from the Solicitor General to appeal adverse rulings from the Court in connection with sentencing, or to seek writs of mandamus from the Eighth Circuit compelling the Court to revise its sentencing determination. Affidavit Of Kevin C. Fletcher ¶13 (hereinafter "Fletcher Aff."). The Government has prevailed repeatedly in these cases. *Id*. ¶ 13 & n.2.

As the record of successful appeals -- many of which were filed in cases handled by AUSA Fletcher -- has grown, so too has the Court's uncontained antagonism toward AUSA Fletcher and the Office. The Court's hostility is reflected in an escalating series of abusive comments directed at AUSA Fletcher, other AUSAs, and the Office, including a string of expletive-filled tirades relating to the Office's objections to the Court's sentencing practices and, more generally, to the Office taking positions divergent from those favored by the Court in criminal cases. For example, during a pre-trial, in-chambers, meeting in *United States v. Nieman*, No. CR03-4023, the Court berated AUSA Michael Hobart, stating: "I'm fucking sick and tired of you always disagreeing with me. How many fucking cases have you researched on the double-jeopardy issue? You're always fucking disagreeing with me without having done any fucking research." Fletcher Aff. ¶ 29.

Sentencing proceedings in *United States v. Naberhaus*, No. CR99-4008, a case in which AUSA Fletcher declined to file a § 3553(e) motion, triggered a similar harangue. Prior to the sentencing hearing in *Naberhaus*, the Court directed Fletcher and defense attorney Al Parrish to appear in chambers and instructed the court reporter to leave the room. The Court then berated

Fletcher for failing to make a § 3553(e) motion, lacing his criticism of the Office's purported efforts to restrict his discretion with repeated uses of the words "fuck" and "bullshit." Fletcher Aff. ¶ 28. The Court also threatened to seek retribution against the Office for its failure to file departure motions under § 3553(e). Upon returning to the courtroom for sentencing, the Court angrily threw back at AUSA Fletcher a letter that Fletcher had submitted to the Court, complaining that it included a blank page. *Id.*

During sentencing proceedings in *United States v. Moeller*, No. CR02-4098, the Court expressed frustration with the Government's decision not to file a substantial assistance motion under 18 U.S.C. § 3553(e). The Court began the sentencing hearing as follows:

> I am holding a gift from our CSOs called an attorney behavior modification tool . . . .
>
> I now understand that I need to use it on Mr. Fletcher because he's only making one of the two substantial assistance motions, but I thought I'd just show it to you.
>
> For the record, it's about a 6 1/2-foot 2-by-4 on a pole totaling about 6 1/2 feet. The 2-by-4 is about 3 feet long and held together with gray tape, and it says ABMT, and then it has attorney behavior modification tool, and it's not quite long enough to reach counsel table, but they may not want to get too close, so I'll put it aside. Hopefully, I won't have to use it often.

Fletcher Aff. ¶ 31; Appendix of Exhibits (hereinafter "App.") Ex. E, at 2. The Court subsequently ordered the government to file a § 3553(e) motion and, on that basis, sentenced the defendant below the statutory minimum. Its decision was reversed on appeal. *United States v. Moeller*, 383 F.3d 710 (8th Cir. 2004).[1]

[1] Other manifestations of the Court's pattern of abusing Fletcher and his colleagues in the NDI Office include characterizing a plea agreement that the government had negotiated as "bullshit," Fletcher Aff. ¶ 26; berating AUSA Michael Hobart and stating, in the presence of others, that Hobart is "not smart

The Court's anger at the Office over sentencing issues has also manifested itself specifically in threats to hold AUSAs in contempt. Most notably, on June 2, 2004, soon after sentencing proceedings in *United States v. Agius* -- in which the Office objected to the Court's recommendation that the defendant by sentenced to boot camp -- the Court confronted Special Assistant United States Attorney ("SAUSA") Shawn Wehde in a hallway outside the courtroom. The Court informed Wehde that it was "fucking sick and tired" of the Office objecting to its sentencing practices and that if the Office did not "back off," the Court would "make it a war." Fletcher Aff. ¶ 35. The Court threatened to "make life a living hell" for AUSAs by, for example, scheduling Saturday court and holding AUSAs in contempt for such things as being late for a court appearance. *Id*. The Court further threatened to "fucking sanction government attorneys" and to impose fines and sanctions so onerous that AUSAs "would not have enough money in their pocketbook to make house payments."[2] *Id*.

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enough to agree with one of my rulings," *Id*. ¶ 30; App. Ex. N, at 28; and stating during a sentencing hearing in *United States v. Hunter*, No. CR99-3005, that the case was "a ridiculous prosecution" and "I gotta wonder about who's got a screw loose in the executive branch of the government," Fletcher Aff. ¶ 27; App. Ex. M, at 2.

[2] This incident with SAUSA Wehde is not the only time the Court has threatened AUSAs with contempt without legitimate basis. On December 6, 2000, during sentencing proceedings in *United States v. Gonzales*, No. CR00-4071, the Court demanded of AUSA Peter Deegan that he explain why the government had declined to file a § 3553(e) motion, and that he reveal the deliberative practices employed by the Office in deciding whether to file such a motion. When Deegan informed the Court that he was not authorized to divulge the substance of any such discussions, the Court responded: "Well, I'm ordering you to answer my question and I'm going to hold you in contempt of court if you don't answer my question." Fletcher Aff. ¶ 19; App. Ex. H, at 5-6. And, on April 22, 2004, during sentencing proceedings in *United States v. Rodriguez-Medrano*, No. CR03-4108, after a government witness did not walk to the proper place in the courtroom, the Court stated that it was "sick and tired" of the Government failing to prepare witnesses properly and that "[i]f it happens again, I'm going to impose a sanction on any assistant U.S. attorney personally." Fletcher Aff. ¶ 32; App. Ex. O, at 2. Similarly, in connection with sentencing in *Naberhaus* (discussed above), the Court threatened to seek retribution against the Office for its frequent failure to file departure motions under § 3553(e).

Upon returning to the office, SAUSA Wehde immediately consulted Charles W. Larson, Sr., the United States Attorney for the Northern District of Iowa, and Janet L. Petersen, Chief of the NDI Office's Sioux City branch. Richard Murphy, Chief of the Criminal Division for the NDI Office, and Judi Whetstine, First Assistant United States Attorney for the Office were informed of the incident soon after. *Id.* ¶ 36; Affidavit of Richard L. Murphy ¶ 6 (hereinafter "Murphy Aff."). SAUSA Wehde also personally informed AUSA Fletcher of the Court's threats. Fletcher Aff. ¶ 36. Senior management of the NDI Office concluded that it was necessary to make an in-court record of the Court's off-the-record and *ex parte* statements to SAUSA Wehde and determined that the next AUSA to appear before the Court for a sentencing hearing in which the Office might contest the Court's sentence would be responsible for making this record. *Id.*; Murphy Aff. ¶ 7. AUSA Fletcher, who was scheduled to represent the United States in the next such proceeding, was asked to make such a record and given guidance as to how, precisely, to do so. Fletcher Aff. ¶ 36; Murphy Aff. ¶ 8.

On June 4, 2004, AUSA Fletcher appeared before the Court for sentencing in *United States v. Saenz*, No. CR03-4089. In answer to the Court's inquiry whether AUSA Fletcher wished to raise any objections to the sentence it had imposed, AUSA Fletcher stated:

> MR. FLETCHER: Yes, Your Honor, I'd like to make a record concerning the extent of the departure. It's my understanding that on this past Wednesday afternoon following the sentencing of the Lorna Agius case . . . the Court apparently told AUSA Shane [sic] Wehde outside the courtroom that the Court was sick and tired of the attorneys in our office objecting to your sentencing recommendation.
>
> THE COURT: That is correct.
>
> MR. FLETCHER: As I understand it, the Court said that if we didn't back off the Court would consider itself at war with our office and make our lives difficult or miserable by doing things

> such as scheduling Saturday court, sanctioning assistant U.S. attorneys for such things as being one minute late for court. It's also my understanding the court said these sanctions would include finding assistant U.S. attorneys in contempt and imposing fines so large we would not have enough money left in our pocket book to make a house payment.
>
> Your Honor, in light of your statement to AUSA Shawn Wehde, I want to proceed carefully and do not want to do anything the Court may consider to be contempt of court. . . .
>
> THE COURT: That's fine. You always have the right to make any objection you want. What's excessive about it?

Fletcher Aff. ¶ 39; Murphy Aff. ¶ 9; App., Ex. R, at 21-22. The Court did not dispute any part of AUSA Fletcher's account of the incident with Wehde. Fletcher Aff. ¶39; Murphy Aff. ¶10; App. Ex. R, at 21-22.

On August 4, 2004 -- just two months after sentencing in *Saenz* -- AUSA Fletcher appeared before the Court in *United States v. Barnett*, No. CR02-4099. Fletcher Aff. ¶ 11; App. Ex. B. Among the issues before the Court in *Barnett* was the continued viability of the United States Sentencing Guidelines in light of the Supreme Court's decision in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), which deemed Washington State's Sentencing Guidelines constitutionally invalid. Fletcher filed a Sentencing Memorandum with the Court in which he acknowledged that the Eighth Circuit's decision in *United States v. Mooney*, No. 02-3388 (8th Cir. July 23, 2004), *vacated on ground of reh'g en banc*, 2004 WL 1636960 (Aug. 6, 2004), had relied on *Blakely* to deem the Guidelines unconstitutional. App. Ex. A. The Memorandum nevertheless emphasized that none of the Supreme Court's prior decisions upholding the federal Sentencing Guidelines had been overruled, and argued that the Court was required to follow these precedents and apply the Guidelines in sentencing Mr. Barnett. AUSA Fletcher drafted the *Barnett* Sentencing

Memorandum in good faith on the basis of his understanding of how the Department of Justice's ("DOJ") post-*Blakely* instructions to federal prosecutors applied to the case at hand, relying on the DOJ's sample post-*Blakely* brief as a template. Fletcher Aff. ¶ 10.

During the sentencing hearing in *Barnett*, the Court asked AUSA Fletcher to reconcile the government's position that the Sentencing Guidelines survived *Blakely* with the Eighth Circuit's contrary decision in *Mooney*. App. Ex. B. Fletcher explained that the Supreme Court's decisions upholding the constitutionality of the Sentencing Guidelines had not been overturned, and stated "that until the U.S. Supreme Court finds the federal sentencing guidelines unconstitutional . . . we should go under that premise." *Id.* at 3.

The Court rejected this argument and stated:

> I'm going to do an order to show cause to sanction you for making that argument because it's an absolutely impermissible argument. It is fine if you want to come in here and say, "You have to follow *Mooney*, but we want to make a record in case *Mooney* is overturned by the circuit or the United States Supreme Court."
>
> But for you to come into court and tell me that I don't have to follow the law of the circuit, I'm going to issue a separate order to show cause why the government should not be sanctioned for making that -- not only is it a frivolous argument, it's an illegal argument, illegal in the sense that if I followed what you asked me to do, I would be violating clearly established law. It's just not a permissible argument.

Id. at 4-5.

On August 5, 2004, the Court issued an Order to Show Cause why sanctions, including contempt, should not be imposed on AUSA Fletcher and the NDI Office. App. Ex. C, at 1. The Court also noted that it was "considering, as a separate and independent matter, referring this conduct for disciplinary proceedings under LOCAL RULE 83.2(g)." *Id.* at 2. Subsequently, in

response to the government's motion requesting clarification as to whether the Court's contempt order included the possibility of criminal contempt sanctions, the Court stated "**it does intend to pursue criminal contempt for the cited conduct**." App. Ex. D, at 1 (bold typeface in original).[3]

On August 6, 2004, the Eighth Circuit *sua sponte* vacated the panel decision in *Mooney* and set the case for reargument *en banc*. On August 13, 2004, SAUSA Wehde appeared before the Court for a sentencing hearing in *United States v. Kolhaas*, No. CR 03-3078. The Court departed below the government's sentencing recommendation, and SAUSA Wehde objected to the extent of the Court's departure. After the hearing, the Court complimented SAUSA Wehde on his handling of the sentencing but stated off the record that "if you guys want to fucking continue with this, you haven't fucking seen anything yet!" Fletcher Aff. ¶ 41.

Following this encounter between the Court and SAUSA Wehde, senior management of the NDI Office determined that AUSA Fletcher should not appear before the Court without another member of the NDI Office present. Murphy Aff. ¶12. On September 17, 2004, Branch Chief Petersen accompanied AUSA Fletcher to the sentencing hearing in *United States v. McMannus*, No. CR03-3068. At this hearing, AUSA Fletcher objected to the Court's decision to allow the defendant to self-report to boot camp. In response to this objection, the Court stated: "I want to know why your office has made a decision to object to it now when on more than a

[3] There is no legal basis for the Court's criminal contempt citation based on AUSA Fletcher's mistaken, but good faith, assessment of whether *Mooney* or preceding Supreme Court decisions dealing with the Sentencing Guidelines was controlling on the Court during the brief period before *Mooney* was vacated. Following the final resolution of the pending motion for recusal, AUSA Fletcher intends to move, before the appropriate Court, for dismissal of that citation.

hundred occasions you've never objected to it. What's your reason? What? Is your baby-sitter telling you what to say?" Fletcher Aff. ¶ 42; App. Ex. T, at 19.

ARGUMENT

THE COURT IS REQUIRED TO RECUSE ITSELF BECAUSE IT HARBORS A "PERSONAL BIAS" AGAINST AUSA FLETCHER AND, AT THE VERY LEAST, THE COURT'S "IMPARTIALITY MIGHT REASONABLY BE QUESTIONED"

Federal law requires the Court to recuse itself from this contempt proceeding. The Court has a documented history of grossly inappropriate and threatening conduct towards AUSA Fletcher and the NDI Office, culminating in the Court's threat this past summer to hold individual AUSAs in contempt so as to leave them "unable to make house payments" if the AUSAs continued to challenge the Court's sentencing practices. This threat prefigured the issuance of the underlying contempt citation to AUSA Fletcher, and calls into question both the legitimacy of the Court's contempt citation and the Court's ability to resolve this citation fairly and objectively. The Court's conduct not only creates an appearance of impartiality (which is itself enough to require disqualification), but also bespeaks *actual bias* against both AUSA Fletcher and the Office. Recusal is therefore mandatory.

A. 28 U.S.C. §§ 144 and 455 (b)(1) Require Recusal When a Judge Harbors Actual Bias Against a Party.

Title 28 U.S.C. §§ 144 and 455(b)(1) requires the disqualification of a federal district judge when that judge harbors "a personal bias or prejudice" against a party. For purposes of § 144, in fact, recusal is mandatory upon the filing of "a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice . . . against him." 28 U.S.C. § 144. When adjudicating a motion to recuse under § 144, it is "not within the province of the trial judge to pass upon the good faith of the defendant[,]" *Morris v. United States*, 26 F.2d

444, 449 (8th Cir. 1928), or otherwise to scrutinize the allegations in the affidavit beyond assessing their facial legal sufficiency. The allegations in an affidavit filed pursuant to § 144 are presumed to be true, and "[i]f the affidavit is legally sufficient, it is the duty of the district judge to disqualify himself notwithstanding [whether] the judge would challenge the truth of such allegations." *Wounded Knee Legal Defense/Offense Comm. v. FBI*, 507 F.2d 1281, 1285 (8th Cir. 1974); *see also Berger v. United States*, 255 U.S. 22, 36 (1921) (noting that "the section withdraws from the presiding judge a decision upon the truth of the matters alleged").[4]

The substantive standards contained in §§ 144 and 455(b)(1) are read *in pari materia*. *See, e.g., United States v. Faul*, 748 F.2d 1204, 1210 (8th Cir. 1984) (discussing §§ 144 and 455(b) and stating that "[a]s grounds for disqualification set out in the statutes are quite similar, both may be considered together"). Typically, "opinions formed by the judge on the basis of facts introduced or events occurring in the course of the current proceedings, or of prior proceedings, do not constitute a basis for a bias or partiality motion" under these statutes, *United States v. Liteky*, 510 U.S. 540, 555 (1994); and "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Id.* However, judicial remarks *will* support a finding of "personal

[4] Section 144 also states that "[a] party may file only one . . . affidavit in any case." 28 U.S.C. § 144. This provision is best read to prohibit parties from filing more than one *motion* to recuse a judge in any case, not to limit a party who has presented a single recusal motion to only one supportive affidavit. *Cf. In re Union Leader Corp.*, 292 F.2d 381, 388 (1st Cir. 1961) ("While the statute permits the filing of only one affidavit, to the extent that this further material may indicate the judge's state of mind regarding the events set forth in the present affidavit we think we may properly consider it."). Some federal courts, however, have construed this component of § 144 literally to permit the filing of one affidavit only. *E.g., United States v. Merkt*, 794 F.2d 950, 961 n.11 (5th Cir. 1986); *United States v. Balistrieri*, 779 F.2d 1191, 1200 (7th Cir. 1985). Should the Court adopt the latter construction, the Murphy affidavit should be considered in connection with AUSA Fletcher's motion for recusal under §§ 455(a) and (b) only. The Fletcher affidavit remains relevant to proceedings under both §§ 144 and 455(a) and (b).

bias or prejudice" when they evince "such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* That is, when the Court makes comments demonstrating an "unfavorable predisposition . . . so extreme as to display clear inability to render fair judgment[,]" a sound basis for disqualification exists. *Id.* at 551. *See also In re Larson*, 43 F.3d 410, 413 n.2 (8th Cir. 1994) (relying on *Liteky* and explaining that recusal is required when a Court exhibits "pervasive bias" against a party); *United States v. Walker*, 920 F.2d 513, 517 (8th Cir. 1990) (assessing whether judge's statements reflected "pervasive bias").

B. 28 U.S.C. § 455(a) Requires Recusal When There Is an Appearance of Bias.

Title 28 U.S.C. § 455(a) states that "[a]ny justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." This provision was added to the recusal statute in 1974 in order "to clarify and broaden the grounds for judicial disqualification," *Fletcher v. Conoco Pipe Line Co.*, 323 F.3d 661, 664 (8th Cir. 2003) (internal quotation marks omitted), and to "promote public confidence in the integrity of the judicial process," *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 859-860 (1988). Under § 455(a), "disqualification is required if a reasonable person who knew the circumstances would question the judge's impartiality, even though no actual bias or prejudice has been shown." *United States v. Tucker*, 78 F.3d 1313, 1324 (8th Cir. 1996). *See also O'Bannon v. Union Pac. R.R. Co.*, 169 F.3d 1088, 1091 (8th Cir. 1999). The Eighth Circuit has likewise explained that "the inquiry whether a reasonable person, knowing all the relevant facts, would discern potential impropriety certainly warrants consideration of a judge's course or pattern of rulings, and also of the judge's course of conduct." *Moran v. Clarke*, 296 F.3d 638, 649 (8th Cir. 2002).

The Supreme Court has repeatedly deemed concerns pertaining to the appearance of impartiality to be particularly acute in the context of contempt proceedings. In *Offutt*, for example, the Court emphasized that district judges must guard against the "easy confusion [between offense to self and obstruction to law] by not sitting themselves in judgment upon misconduct of counsel where the contempt charged is entangled with the judge's personal feeling against the lawyer." 348 U.S. at 14. Similarly, in *In re Murchison*, 349 U.S. 133, 137 (1955), the Court stated that "[f]air trials are too important a part of our free society to let prosecuting judges be trial judges of the charges they prefer." The Eighth Circuit, likewise, has emphasized *Murchison*'s holding that "where a judge was at the same time complainant, indicter, and prosecutor, the judge could not later preside over a contempt proceeding." *Jones v. Luebbers*, 359 F.3d 1005, 1013 (8th Cir. 2004) (internal quotation marks omitted).[5]

C. The Court Is Obligated To Recuse Itself.

The Court's statements to SAUSA Shawn Wehde threatening to initiate contempt proceedings against AUSAs as part of a "war" with the U.S. Attorney's Office are independently sufficient to require its disqualification here. They provide a striking reflection of the Court's hostility toward the NDI Office: "[I]f you guys want to fucking continue with this, you haven't fucking seen anything yet!"; "[I will] fucking sanction government attorneys [such that they will]

[5] *See also Mayberry v. Pennsylvania*, 400 U.S. 455, 464 (1971) (reversing an attorney's contempt conviction where the attorney had insulted the presiding judge and where "marked personal feelings were present on both sides[,]" and noting that "[t]he power of contempt which a judge must have and exercise in protecting the due and orderly administration of justice . . . is most important and indispensable[,] . . . [b]ut its exercise is a delicate one, and care is needed to avoid arbitrary or oppressive conclusions") (internal quotation marks omitted); *Taylor v. Hayes*, 418 U.S. 488, 502 (1974) (reversing attorney's contempt conviction in part because "as the trial progressed, there was a mounting display of an unfavorable personal attitude toward petitioner, . . . so that the contempt issue should have been finally adjudicated by another judge").

not have enough money in their pocketbook to make house payments." Fletcher Aff. ¶35. By revealing the Court's intention to inflict severe financial penalties on AUSAs for reasons unrelated to any specific incident of alleged misconduct, they strongly suggest that the Court has pre-determined the merits of this criminal contempt proceeding, which the Court itself initiated. The Eighth Circuit has held, in this vein, that "[w]hen a judge passes judgment on parties before him without hearing all of the evidence and without a trial, [such conduct is] highly injudicious" and indicates impermissible judicial bias. *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1192 (8th Cir. 1984). *See also In re Antar*, 71 F.3d 97, 100 (3d Cir. 1995).

The Court's threatening comments to SAUSA Wehde, moreover, disclose its intent to sanction AUSAs not for any actual affront to the Court or for conduct that extends beyond the limits of zealous advocacy, but for unrelated and improper purposes. This case does not involve an attorney ignoring a directive to stop badgering a witness, to speak respectfully to the Court, or to abandon a litigation practice that has been found to infringe on the rights of defendants. Rather, the Court threatened to impose sanctions for the routine performance of AUSAs' duties as prosecutors -- including objecting to and appealing sentences that are outside of the Court's discretion to impose. Hence, the Court's statements to SAUSA Wehde are not "[a] judge's ordinary efforts at courtroom administration." *Liteky*, 510 U.S. at 556. They represent, instead, a judge's extraordinary effort to intimidate an entire office of prosecuting attorneys and thereby to confine the discretion that has been conferred upon them by Congress. Indeed, the chain of events at issue here -- the Court's threat to issue sanctions against AUSAs, AUSA Fletcher's placement of the Court's vituperative comments to SAUSA Shawn Wehde on the record, and the subsequent initiation of contempt proceedings against AUSA Fletcher -- suggest a particularly

pernicious deployment of the contempt power. The Court appears to be attempting to punish AUSA Fletcher *not* (as the Order to Show Cause states) for making an arguably maladroit argument as to the status of the Sentencing Guidelines after *Blakely*, but for having the temerity to expose the Court's improper efforts to strong-arm the NDI Office into relinquishing its discretion in connection with criminal sentencing. Thus, AUSA Fletcher may simply have the misfortune to have been selected as the first casualty in the Court's declared "war" on the Office.

The Court's statements to SAUSA Wehde (and its other comments to AUSAs) violate Canon 3(B) of the ABA Code of Judicial Conduct, which requires judges to "be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity," and states that "[a] judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice." Model Code of Judicial Conduct Canon 3(B)(4), (5) (1990).[6] At the very least, they raise the specter of pre-judgment, partiality, and potential

[6] *See also, e.g.*, *In re Schapiro*, 845 So. 2d 170, 171-73 (Fla. 2003) (ordering public reprimand of trial court judge for, *inter alia*, violations of Canon 3(B)(4) of the Florida Code of Judicial Conduct including "routinely berat[ing] and unnecessarily embarrass[ing] attorneys[,]" and "embarrassing and belittling counsel in court"); *In re Flournoy*, 990 P.2d 642, 645 (Ariz. 1999) (suspending trial court judge for, *inter alia*, violations of Canon 3(B)(4) of the Arizona Code of Judicial Conduct, including "repeated outbursts of temper, in which [the Court] shouted at attorneys and litigants, belittled attorneys in the presence of their clients, and gestured in a threatening manner"). In addition, in *McBryde v. Committee to Review Circuit Council Conduct & Disability Orders*, 264 F.3d 52, 54 (D.C. Cir. 2001), the D.C. Circuit took note of the suspension of a federal district judge who had "engaged for a number of years in a pattern of abusive behavior that was prejudicial to the effective and expeditious administration of the business of the courts." *Id.* (internal quotation marks omitted). The abusive conduct at issue included "overreactions and abusive sanctions," "question[ing] [an] attorney in a belittling fashion," and "berat[ing] counsel and disparag[ing] his position." *McBryde v. Committee to Review Circuit Council Conduct & Disability Orders*, 83 F. Supp. 2d 135, 143-45 (D.D.C. 2000). The Special Committee investigating the district judge in that case also concluded that "'the sarcastic and abusive language used by Judge McBryde is itself a cause of concern'" and that "'[t]here was simply no good reason to belittle and attack [the attorneys] in such a repetitive and relentless manner.'" *Id.* at 145 (quoting Report of the Special Committee of the Judicial Council of the Fifth Judicial Circuit, at 39).

abuse of the contempt process to pursue unrelated and improper ends. Disqualification is therefore required under § 455(a).

The Court's obligation to disqualify itself is even more pronounced here because the underlying proceeding is one for contempt. As the Supreme Court emphasized in *Offutt*, when the judge serves in the dual role of charging officer and decisionmaker, there is a heightened risk that the court will appear to be biased. The facts of this case vividly illustrate why this is so. The Court's expressions of hostility toward the NDI Office suggest a danger of its "personal feeling[s]" becoming "entangled" with the contempt proceeding itself, and this entanglement, in turn, can only feed the perception that AUSA Fletcher cannot obtain a fair hearing.

In concluding that the "personal feelings" of the judge in *Offutt* did, in fact, appear to be entangled with the contempt proceeding at issue, the Supreme Court emphasized that "[t]he record disclose[d] not a rare flareup, not a show of evanescent irritation[,]" but indicated, rather, "that instead of representing the impersonal authority of law, the trial judge permitted himself to become personally embroiled with the petitioner." *Offutt*, 348 U.S. at 17. The record here likewise precludes characterizing the Court's conduct as a "rare flareup" or "show of evanescent irritation." The Court's statement that it would "consider itself at fucking war" with the NDI Office, its statements about using its "attorney behavior modification tool" on Fletcher, and its demeaning comment during the *McMannus* hearing -- "Is your babysitter telling you what to say?" -- signal, instead, that the Court has become "personally embroiled with the petitioner."

The manifest excessiveness of the criminal contempt citation at issue here provides further evidence of the Court's bias against AUSA Fletcher. We are unaware of any criminal contempt ever having been initiated, let alone a contempt citation actually having been issued, on facts

resembling those presented here. The Sentencing Memorandum filed in *Barnett* was framed around a sample brief prepared by the Department of Justice to guide U.S. Attorneys through highly uncertain terrain after the Supreme Court's decision in *Blakely*. Fletcher Aff. ¶ 10. Far from trying to hide the Eighth Circuit's *Mooney* decision from the Court, the Sentencing Memorandum expressly cited *Mooney* as adverse precedent. App. Ex. A.

AUSA Fletcher's error (if any) was in presenting to the Court arguments that the government was (and is) making to the Eighth Circuit and the Supreme Court, rather than focusing on the Court's duty as an inferior tribunal to rule in a particular proceeding using the law of the Eight Circuit as it stood on that particular day. But any such error cannot reasonably be held to constitute the willfully contemptuous conduct that is necessary to underwrite a criminal contempt citation, particularly where, as here, the alleged contemnor expressly drew the adverse precedent to the Court's attention. Moreover, the record in *Barnett* demonstrates the inappropriateness of a contempt citation for an independent reason, insofar as it shows that another of the required elements of criminal contempt -- obstructive impact -- is absent. *See* 18 U.S.C. § 401(1). Accordingly, AUSA Fletcher can and will refute the allegation that his submission in *Barnett* is sanctionable. Under the circumstances here, however, federal law dictates that he need not do so before this Court. By initiating contempt proceedings and pressing for criminal contempt sanctions under conditions where this sanction is unprecedented and patently inappropriate, the Court has highlighted its own appearance of bias and the consequent need for another judge to hear any further proceedings.

AUSA Fletcher is also unaware of any case involving remotely analogous facts -- *i.e.*, a similar pattern of verbal abuse and explicit prejudgment -- in which disqualification was not

ordered. And while one must strain to find *any* caselaw (supportive or otherwise) presenting even remotely similar facts -- no doubt because such injudicious conduct is exceedingly rare -- such analogous caselaw as there is confirms that disqualification is required here.[7]

In *Bell v. Chandler*, 569 F.2d 556 (10th Cir. 1978), for example, the Tenth Circuit ordered the disqualification of a district judge in light of his history of confrontation with the U.S. Attorney's Office for the Western District of Oklahoma. The Court of Appeals noted that the district judge had demonstrated "[a]nimus" against the U.S. Attorney and five AUSAs by, *inter alia*, holding them in contempt in prior proceedings without any basis. *Bell*, 569 F.2d at 558-59. The Tenth Circuit further noted that the U.S. Attorney and the trial judge "were engaged in a 'legal tug of war[,]'" *id.* at 559, and concluded that "[t]he facts alleged establish the lack of a likelihood that the United States can obtain a fair and impartial trial if Judge Chandler presides[,]" *id.* at 560. Similarly, in *Alexander v. Primerica Holdings, Inc.*, 10 F.3d 155, 165 (3d Cir. 1993), the Third Circuit relied on § 455(a) to disqualify a trial judge from presiding over a lawsuit in which he had adopted "an adversarial position" toward the plaintiffs. The Court of Appeals took note of the trial judge's premature "observations that petitioners' witnesses may have committed perjury" and explained that this "could be perceived by a reasonable person as an indication that the district court judge -- without having heard all of the testimony -- ha[d] already determined that important witnesses for the petitioners are not credible." *Id.* at 164. The Third Circuit further noted that the trial judge had imputed "bad faith" to the plaintiffs "despite [the] absence of record

[7] Indeed, as noted earlier, *see supra* n. 6, judicial conduct akin to that displayed here has triggered not only disqualification, but sanctions against the judge.

evidence [of bad faith conduct]" and explained that this, too, might lead a reasonable person to believe that the judge was biased against the plaintiffs. *Id.*

If this contempt proceeding goes forward -- rather than being dismissed as deficient on its face -- the issue of AUSA Fletcher's state of mind will likewise be central to determining the merits. This Court is ill-situated to decide this pivotal issue. Its perspective on AUSA Fletcher's conduct and his state of mind is irretrievably framed by personal bias, or so at least any objective observer would conclude. This is, in short, the paradigm case in which recusal is required.

CONCLUSION

For all of these reasons, AUSA Fletcher respectfully moves the Court to recuse itself from this contempt proceeding. AUSA Fletcher also requests that this motion be decided on an expedited basis.

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Respectfully submitted,

/s/

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