UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
----------X
UNITED STATES OF AMERICA,

v. 12-1239

JIMMY COURNOYER,
Defendant-Appellant.
----------X

MEMORANDUM OF LAW IN OPPOSITION TO
GOVERNMENT'S MOTION TO DISMISS

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PRELIMINARY STATEMENT

Defendant-Appellant Jimmy Cournoyer respectfully submits this Memorandum of Law in Opposition to the Government's Motion to Dismiss his interlocutory appeal. As demonstrated below, the government's motion should be denied and the Court should find that it has jurisdiction to hear Mr. Cournoyer's interlocutory appeal under the collateral order doctrine because the issue presented on appeal is the district court's final, formal rejection of Mr. Cournoyer's motion for reassignment; the issue presented is separate from the issue of guilt or innocence on the underlying charges; and adjudication of the important rights asserted in the motion will be irretrievably lost if review awaits final judgment.

STATEMENT OF FACTS

On February 17, 2012, the United States Attorney's Office for the Eastern District of New York filed a letter under seal addressed to the Clerk of the Court and the Honorable Sandra L. Townes, stating that "the above-captioned case [*United States v. Cournoyer*, 12-CR-065 ("*Cournoyer*")] is presumptively related to *United States v. United States v.* [sic] *Randolf Square*, 08 CR 916 (SLT) ("Square")." Gov't Relations Letter (Under Seal) at 1.[1] Without elaboration, the government stated that "a grand jury returned an indictment charging defendant Cournoyer in Counts One, Two and Three with the same drug trafficking conspiracies charged in Counts Two, Three and Four of the indictment in *Square*" and requested reassignment of this case from the Honorable Jack B. Weinstein to the Honorable Sandra L. Townes. Gov't Relations Letter at 2.

[1] A copy of this letter was provided to counsel by electronic mail. Although the reason for sealing asserted in the letter is no longer applicable, the letter is not attached as an exhibit to this motion because the government's motion to unseal the letter (12-CR-65 Docket Entry 39) has not yet been granted. On information and belief, copies of the letter were sent to the Honorable Sandra L. Townes and the Honorable Jack B. Weinstein on or about February 17, 2012. Counsel will provide hard copies upon request.

Four days later, on February 21, 2012, a sealed indictment was filed against Mr. Cournoyer, an arrest warrant was issued, and Mr. Cournoyer was arrested in the Southern District of Texas.[2] *See* Exhibit A, Docket in 12-CR-065 (SLT) at Docket Entries 2 and 3 and unnumbered entry noting arrest dated 2/21/2012. On March 7, 2012, the case was reassigned to the Honorable Judge Townes, and a superseding indictment was filed naming Mr. Cournoyer and three codefendants. Exhibit A at Docket Entry 9 and unnumbered entry noting reassignment dated 3/7/2012. Significantly, one of the codefendants named in the superseding indictment is a defendant in a pending case in this District, *United States v. Curatola, et al.*, 10-CR-991 (JS) (AKT) ("*Curatola*").[3]

On March 9, 2012, counsel entered a notice of appearance for Mr. Cournoyer, who was arraigned on that same date and pled not guilty on all counts. Exhibit A at Docket Entries 8 and 14.

Two days before Mr. Cournoyer's arraignment, and before any of the other defendants had appeared in the case, Chief Judge Carol Bagley Amon ordered reassignment of the case as a related case to *Square*. No reason for the reassignment appears on the docket, nor was any order issued stating a reason for the reassignment. Exhibit A at unnumbered entry dated 3/7/2012.

On Friday, March 16, 2012, Mr. Cournoyer moved for reassignment to the randomly selected District Court, arguing (1) that the reassignment violated the Due Process Clause of the

[2] Although the Docket Entry indicates that Mr. Cournoyer was arrested on February 21, 2012, in the Southern District of Texas, Mr. Cournoyer, a Canadian citizen, was actually detained in Mexico on or about February 16, 2012 and forcibly removed and/or abducted or kidnapped from Mexico to the United States shortly thereafter. Thus, Mr. Cournoyer was arrested before this case was even filed.

[3] That defendant, Jose Alejandro Castillo-Medina, filed a separate motion for reassignment to the District Court presiding over *Curatola*. *See* Exhibit A at Docket Entry 23. On April 6, 2012, the Honorable Judge Seybert denied that motion for reassignment. *See* Exhibit A at Docket Entry 45.

United States Constitution, (2) that the cases were not related and the current[4] Local Rules of the United States District Court of the Eastern District of New York were not followed, (3) that the Local Rules in effect on February 17, 2012 were not followed, and (4) that case law in the Second Circuit mandated reassignment. *See* Exhibit B, Defendant Jimmy Cournoyer's Letter Motion for Reassignment, dated March 16, 2012.

On the following Monday, March 19, 2012, the Honorable Sandra L. Townes denied the Motion for Reassignment without opinion. *See* Exhibit C, Denial of Motion. On March 23, 2012, the Honorable Jack B. Weinstein concurred in the denial. Exhibit D, Order Denying Motion for Reassignment.

On March 28, 2012, Mr. Cournoyer appealed the denials. On April 5, 2012, the government filed the Motion to Dismiss to which this Motion in Opposition timely responds.

ARGUMENT

I. This Court Has Jurisdiction To Hear This Appeal

The government's Motion to Dismiss should be denied because this Court has jurisdiction to hear this interlocutory appeal because the order appealed from meets all of the criteria required by the Supreme Court and by this Circuit.

A. The Rule of Finality and the Collateral Order Doctrine Govern Interlocutory Appellate Jurisdiction.

"The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . ." 28 U.S.C. § 1291. In addition, "[s]ection 1292 allows appeals from certain interlocutory orders, decrees and judgments . . . other than final judgments when they have a **final and irreparable effect** on the rights of the parties." *Cohen v. Beneficial*

[4] The current version of the Local Rules of the United States District Court for the Eastern District of New York was adopted on March 1, 2012.

Indus. Loan Corp., 337 U.S. 541, 545 (1949) (emphasis supplied) (holding that a District Court's order refusing to apply a statute was appealable because the order "did not make any step toward final disposition of the merits of the case and will not be merged in final judgment. When that time comes, it will be too late effectively to review the present order and the rights conferred by the statute, if it is applicable, will have been lost, probably irreparably.") (*Id*. at 546).

In exercising that jurisdiction, "The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. § 2106.

The Supreme Court has explained that there is a "small class" of decisions "which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen*, 337 U.S. at 546. According to the rule established in *Cohen*, an interlocutory order is appealable if it "relate[s] to matters outside the stream of the main action and would not be subject to effective review as part of the final judgment in the action." *Parr v. United States*, 351 U.S. 513, 519, 76 S.Ct. 912, 916 (1956).

This Court has recognized a limited power of review under the collateral order doctrine, which is "a narrow exception to the general rule that interlocutory orders are not appealable as a matter of right." *Whiting v. Lacara*, 187 F.3d 317, 319 (2d Cir. 1999) (citing *Schwartz v. City of New York*, 57 F.3d 236, 237 (2d Cir. 1995)). The collateral order doctrine provides for review of "trial court orders affecting rights that will be irretrievably lost in the absence of an immediate

appeal." *Germano v. Dzurenda*, 2012 WL 75380 at *1 (2d Cir. Jan. 11, 2012) (citing *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430-31 (1985)). "The Court has warned that the requirements of the collateral order exception to the final judgment rule should be applied 'with the utmost strictness in criminal cases.'" *United States v. Blackwell*, 900 F.2d 742, 747 (4th Cir. 1990) (citing *Flanagan v. United States,* 465 U.S. 259, 265, 104 S.Ct. 1051, 1055 (1984)).

In a criminal case, for a matter to fall within the collateral order doctrine, it must be "(1) the trial court's complete, formal, final rejection of the claim; (2) collateral to, and separable from, the issue of guilt or innocence; and (3) an adjudication of an important right that would be lost irreparably if review awaited final judgment." *Blackwell*, 900 F.2d at 746-47 (referencing *United States v. MacDonald,* 435 U.S. 850, 858-60, 98 S.Ct. 1547, 1551-52 (1978)). *See also Abney v. United States*, 431 U.S. 651, 659-60, 97 S.Ct. 2034, 2040-41 (1977) (holding that an interlocutory appeal of a District Court's denial of a motion to dismiss the indictment on double jeopardy grounds was properly before the Court because it was "a complete, formal, and, in the trial court, a final rejection of a criminal defendant's double jeopardy claim . . . collateral to, and separate from, the principal issue at the accused's impending criminal trial . . . [and] the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of double jeopardy claims were postponed until after conviction and sentence."); *United States v. Culbertson*, 598 F.3d 40, 45 (2d Cir. 2010) ("[T]he 'collateral order doctrine' was established to permit appeals from a limited class of orders which finally determine claims of right separable from, and collateral to, rights asserted in the action, and too important and too independent of the cause of action to require entry of final judgment as a pre-condition.") (internal citations omitted).

In making the determination of whether a particular interlocutory appeal meets *Cohen*'s criteria for review, "**the decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order**.'" *Mohawk Indus., Inc. v. Carpenter*, 130 S. Ct. 599, 605, 175 L. Ed. 2d 458 (2009) (emphasis supplied) (citing *Will v. Hallock*, 546 U.S. 345, 352-53, 126 S.Ct. 952 (2006)). Where the propriety of an interlocutory appeal has been upheld, the Supreme Court has found that the case, "in addition to satisfying the other requirements of *Cohen*, involved 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 266, 102 S. Ct. 3081, 3083, 73 L. Ed. 2d 754 (1982) (quoting *McDonald*, 435 U.S. 860).[5]

Thus, "the Supreme Court has applied the collateral order doctrine to permit interlocutory appeals in criminal cases 'only when observance of [the rule of finality] would practically defeat the right to any review at all.'" *United States v. Culbertson*, 598 F.3d at 46 (citing *Cobbledick v. United States,* 309 U.S. 323, 324-25, 60 S.Ct. 540, 84 L.Ed. 783 (1940)).

In the instant case, each of the conditions set forth in *Cohen* is satisfied. **First**, the orders appealed from are the trial court's complete, formal, and final rejection of the motion to have the case reassigned to the randomly selected judge. The motion was denied without opinion by the Honorable Sandra L. Townes on March 19, 2012. See Exhibit C. Thereafter, on March 22, 2012, the Honorable Jack B. Weinstein, to whom the case had originally been assigned through

[5] Similarly, the Supreme Court has drawn "the crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges. . . . The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not." *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 269, 102 S. Ct. 3081, 3085, 73 L. Ed. 2d 754 (1982) (internal citations omitted). In the instant matter, because Mr. Cournoyer is not seeking the dismissal of charges, the Court has jurisdiction to hear this appeal.

the district court's random assignment procedure, issued an Order effectively concurring in the denial, stating that, "No adequate reason for questioning the Chief Judge's decision [to reassign the case] is stated. The motion is denied." Exhibit D.

Second, the question of reassignment is collateral to and separate from the issue of guilt or innocence. The motion to reassign the case to the original randomly selected judge concerns an issue collateral to the question of whether or not the defendant is or is not guilty of the narcotics and firearms crimes alleged in the indictment. The motion challenges the manner in which the government asked the district court to reassign the case as "related" to another pending case, arguing that at least one additional case pending in the Central Islip courthouse of the Eastern District of New York is arguably also related to the instant case, and that the government's request for reassignment amounts to an attempt at impermissible "judge-shopping." *See* Exhibit B.

Third, adjudication of the important rights asserted in the motion will be irreparably lost if review awaited final judgment. The motion seeks vindication and protection of an important Constitutional right—the right not to be deprived of liberty without the Due Process of law—and asserts that the tactics employed by the government in order to have the case heard by a particular judge threatens the public's interest in an impartial judiciary and the defendant's right to a fair trial. *See* Exhibit B. The right at issue is separate from the question of Mr. Cournoyer's guilt or innocence, and, if it is not protected now, its assertion will be irretrievably lost. If the case proceeds to trial as reassigned, the right to every element of a fair trial including the procedural protection of trial by a randomly selected judge in accordance with the district court's Local Rules and as set forth in the case law discussed below, will be irretrievably lost. *See Hollywood Motor Car Co., Inc.*, 458 U.S. at 266 (interlocutory appeals is proper where a case,

"in addition to satisfying the other requirements of *Cohen*, involved 'an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial").

Moreover, the Second Circuit has noted that, "no federal court has held that prosecutorial judge shopping is a *per se* basis for habeas relief. In contrast, numerous courts of appeals have held that such judge-shopping, without more, *does not* mandate a new trial." *Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir. 2004) (emphasis in original). Thus, if the Court declines this appeal, Mr. Cournoyer will be without effective relief in the future.

As the Supreme Court stated in *Mohawk Indus. Inc.*, "**the decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order**.'" *Mohawk Indus., Inc.*, 130 S. Ct. at 605 (emphasis supplied). As set forth below, a substantial public interest in the appearance of an impartial judiciary, as well as Mr. Cournoyer's right to a fair trial, are at stake. Therefore this Court should find that it has jurisdiction to hear this appeal.

B. The Due Process Clause of the Constitution and the Public's Confidence in an Impartial Judiciary Is Endangered.

The Court should find that it has jurisdiction to hear this appeal because adjudication of the important right asserted—the right to a fair trial according to the Due Process Clause of the Fifth Amendment— is at stake and will be irretrievably lost if review awaits final judgment.

The Fifth Amendment of the United States Constitution provides that "No person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. CONST. AMEND. V. "A fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness. . . . [T]o perform its high function in the best way,

justice must satisfy the appearance of justice." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 625, 99 L. Ed. 942 (1955) (internal citations omitted).

"The impartiality of the adjudicator, be it judge or jury," is a right "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). Thus, it is axiomatic that all criminal proceedings must have "the appearance of evenhanded justice which is the core of Due Process." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). Moreover, "[w]ise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting).

Thus, permitting one party to choose which judge will preside over a case, even if that judge is in fact impartial, creates the appearance of partiality, which has been consistently condemned by the courts. *See Francolino*, 365 F.3d at 141 ("a criminal justice system in which the prosecutor alone is able to select the judge of his choice to preside at trial . . . raises serious concerns about the appearance of partiality."); *United States v. Pearson*, 203 F.3d 1243, 1264 (10th Cir. 2000) (prosecutorial judge shopping "arguable threatens the independence of the judiciary"). *See also generally*, *United States v. Potashnick*, 609 F.2d 1101, 1111 (5th Cir. 1980) (discussing the "recognized need for an unimpeachable judicial system in which the public has unwavering confidence" that is the basis for the "overriding concern with appearances" that pervades the Code of Judicial Conduct and the ABA Code of Professional Conduct," because, "[a]ny question of a judge's impartiality threatens the purity of the judicial process and its institutions.").

The Supreme Court "repeatedly has recognized [that] due process demands impartiality on the part of those who function in judicial or quasi-judicial capacities." *Schweiker v. McClure*, 456 U.S. 188, 195, 102 S.Ct. 1665 (1982). Thus:

> While a defendant has no right to any particular procedure for the selection of the judge—that being a matter of judicial administration committed to the sound discretion of the court—he is entitled to have that decision made in a manner free from bias or the desire to influence the outcome of the proceedings.

Cruz v. Abbate, 812 F.2d 571, 574 (9th Cir. 1987). *See also Pearson*, 203 F.3d at 1257 (citing *Cruz*) (assuming without deciding that the Due Process Clause of the Fifth Amendment entitled the defendant to an impartial method of assigning his case to a particular judge and that the prosecution's manipulation of the system deprived him of that right).

While the Second Circuit has held that in a post-conviction setting a defendant is required to show that actual prejudice resulted from prosecutorial judge-shopping, the Court has also noted that a lower standard might apply if the issue were being examined in the pre-trial context. *See Francolino*, 365 F.3d at 143. In addition, when it can be shown that a prosecutor has steered a case to a particular judge, prejudice should be presumed because "in these circumstances it is so likely that case-by-case inquiry into the prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *United States v. Cronic*, 466 U.S. 648, 658 (1984)). When a prosecutor is allowed to select a judge, the perception of unfairness alone is enough to undermine the integrity of the judicial system, irrespective of whether actual prejudice ever materializes.

Thus, it is clear that reassignment to the original randomly selected judge could have been warranted without a showing of actual prejudice, if the public could reasonably question a judge's ability to remain impartial. In the instant case, because of the minimal and unsubstantiated nature of the government's allegations of relatedness, it is submitted that the

public could question the government's motives for the relatedness letter, which could damage "the appearance of evenhanded justice which is at the core of due process." *Mayberry*, 400 U.S. at 469 (Harlan, J., concurring); *see also United States v. Antar*, 53 F.3d 568 (3d Cir. 1995) ("[i]f there is an appearance of partiality, that end the matter [because] impartiality and the appearance of impartiality in a judicial officer are the sine quo non of the American legal system.")

Additionally, Mr. Cournoyer asserts that the procedures followed by the government in seeking reassignment of the case away from the original randomly selected judge and the coincident appearance of improper judge shopping endanger the public's confidence in an impartial judiciary. In so asserting, Mr. Cournoyer does not claim that he has personally been actually prejudiced by the district court's denial of his motion for reassignment. Rather, the actual prejudice alleged concerns the interest of the public in an unbiased judiciary and the prejudice to the "appearance of evenhanded justice which is the core of Due Process," *Mayberry*, 400 U.S. at 469 (Harlan, J., concurring), that will result if the government's reassignment procedure and the district court's denial of Mr. Cournoyer's motion without opinion are upheld.

Therefore, because the protections afforded to every defendant in the Due Process Clause of the Fifth Amendment are endangered by the government's reassignment of the case away from the original randomly selected judge without an adequate examination of the facts and because the public's interest in an unbiased and impartial judiciary is endangered by the appearance of improper judge shopping, this Court should deny the government's motion to dismiss and hear this appeal.

II. Reviewability of the Denial of a Motion for Reassignment Is a Matter of First Impression In This Court and the Government's Citations Are Inapposite.

After extensive research, defendant-appellant has found no previous case in which this Court considered the interlocutory appealability of a district court's denial of a motion for

reassignment of a case to the original, randomly selected judge. The government cites the Supreme Court's decision in *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 799 (1989), for the proposition that only a limited number of motions have been found to be immediately appealable in criminal cases. However, the Supreme Court does not indicate that the list in *Midland Asphalt* is exhaustive, and where the issue of appealability of a given type of motion has never before been raised, it is respectfully submitted that this Court should view the *Midland Asphalt* list as potentially incomplete and should examine the instant interlocutory appeal on its merits.

Moreover, the government's citations to *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) and *United States v. Miller*, 14 F.3d 761, 765 (2d Cir. 1994) demonstrate that, contrary to the government's assertions, every factor of the *Coopers & Lybrand* test is satisfied and interlocutory review is authorized. The third *Coopers & Lybrand* factor, which the government asserts requires dismissal of Mr. Cournoyer's appeal, requires that an appealable collateral order must "be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand*, 437 U.S. at 468. As interpreted by *Midland Asphalt*, the Supreme Court's prior decisions in cases concerning interlocutory appeals "manifest the general rule that the third prong of the *Coopers & Lybrand* test is satisfied only where the order at issue involves an asserted right the legal and practical value of which would be destroyed if it were not vindicated before trial." *Midland Asphalt*, 489 U.S. at 799. This Circuit has agreed that, "An interlocutory appeal in a criminal matter is justified only when the right to be vindicated is lost if appellant is made to wait until the entry of a final judgment before appealing." *Miller*, 14 F.3d at 765.

In this case, Mr. Cournoyer seeks review of the denial of a motion to reassign the case pending against him because the reassignment was made based on boilerplate assertions of

relatedness between two generically-charged marijuana conspiracies, because the Local Rules of the District Court for the Eastern District of New York were not followed, and because the reassignment (which was made on the basis of a sealed letter to which Mr. Cournoyer had no opportunity to respond) violated his right to a fair trial as set forth in the Due Process Clause of the Constitution of the United States and as interpreted by the Supreme Court and by this Circuit. The government's mischaracterization of Mr. Cournoyer's claim as a "right to trial before a judge assigned in a manner consistent with the applicable local rules" and its assertion that Mr. Cournoyer "may seek vindication of this right in an appeal from a final judgment," Gov't. Motion to Dismiss at 7, miss the mark.

The right that Mr. Cournoyer asserts is the right to be protected by the Due Process Clause of the United States Constitution—a right far more significant than the government's motion admits. If that right is not protected now, it will be irretrievably lost. The government's motion assumes that Mr. Cournoyer will be found guilty and that, therefore, there will be a final judgment to appeal. Regardless of the outcome of the underlying case against him, however, Mr. Cournoyer asserts that the claimed right to a fair trial free from even the appearance of impartiality cannot be adequately vindicated on final appeal. The right asserted is "a right not to be tried" in violation of the United States Constitution, which "necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial." *Hollywood Motor Car Co., Inc.*, 458 U.S. at 269. If the Court hears this interlocutory appeal, this Court can resolve Mr. Cournoyer's claim, protect his right to a fair trial and to the protections of the Due Process Clause of the United States Constitution and protect the interest of the public in an impartial judiciary as set forth in section I(B), *supra*. If the Court declines to hear this appeal, Mr.

Cournoyer's right to a fair trial and the protection of the public's confidence in the impartiality of the judicial system will be irretrievably lost.

CONCLUSION

Wherefore, for the reasons set forth above, the government's motion to dismiss Mr. Cournoyer's interlocutory appeal should be denied.

Dated: April 15, 2012
New York, NY

_____/s/_____
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U.S. District Court
Eastern District of New York (Brooklyn)
CRIMINAL DOCKET FOR CASE #: 1:12-cr-00065-SLT All Defendants

Case title: USA v. Cournoyer et al

Date Filed: 01/20/2012

Assigned to: Judge Sandra L. Townes

Defendant (1)

Jimmy Cournoyer
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Pending Counts	**Disposition**
CONTINUING CRIMINAL ENTERPRISE (1)	
ATTEMPT/CONSPIRACY - MARIJUANA - IMPORTATION/EXPORTATION (2)	
CONSPIRACY TO DISTRIBUTE MARIJUANA (3)	
ATTEMPT/CONSPIRACY - NARCOTICS - IMPORTATION/EXPORTATION (4)	
CONSPIRACY TO DISTRIBUTE NARCOTICS (5)	
VIOLENT CRIME/DRUGS/MACHINE GUN (6)	
MONEY LAUNDERING - INTERSTATE	

COMMERCE
(7)

Highest Offense Level (Opening)

Felony

Terminated Counts **Disposition**

None

Highest Offense Level (Terminated)

None

Complaints **Disposition**

None

Assigned to: Judge Sandra L. Townes

Defendant (2)

Mario Racine
also known as
Diego

Pending Counts **Disposition**

ATTEMPT/CONSPIRACY - MARIJUANA - IMPORTATION/EXPORTATION
(2)

CONSPIRACY TO DISTRIBUTE MARIJUANA
(3)

ATTEMPT/CONSPIRACY - NARCOTICS - IMPORTATION/EXPORTATION
(4)

CONSPIRACY TO DISTRIBUTE NARCOTICS
(5)

MONEY LAUNDERING - INTERSTATE COMMERCE
(7)

Highest Offense Level (Opening)

Felony

Terminated Counts **Disposition**

None

Highest Offense Level (Terminated)

None

Complaints **Disposition**

None

Assigned to: Judge Sandra L. Townes

Defendant (3)

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Pending Counts **Disposition**

ATTEMPT/CONSPIRACY - NARCOTICS - IMPORTATION/EXPORTATION
(4)

CONSPIRACY TO DISTRIBUTE NARCOTICS
(5)

MONEY LAUNDERING - INTERSTATE COMMERCE
(7)

Highest Offense Level (Opening)

Felony

Terminated Counts **Disposition**

None

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Assigned to: Judge Sandra L. Townes

Defendant (4)

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Pending Counts	**Disposition**
ATTEMPT/CONSPIRACY - MARIJUANA - IMPORTATION/EXPORTATION (2)	
CONSPIRACY TO DISTRIBUTE MARIJUANA (3)	
MONEY LAUNDERING - INTERSTATE COMMERCE (7)	

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Assigned to: Judge Sandra L. Townes

Defendant (6)

Alessandro Taloni

Pending Counts	**Disposition**
ATTEMPT/CONSPIRACY - NARCOTICS - IMPORTATION/EXPORTATION (4)	
CONSPIRACY TO DISTRIBUTE NARCOTICS (5)	
MONEY LAUNDERING - INTERSTATE COMMERCE (7)	

Highest Offense Level (Opening)

Felony

Terminated Counts	**Disposition**
None	

Highest Offense Level (Terminated)

None

Complaints	**Disposition**
None	

Assigned to: Judge Sandra L. Townes

Defendant (7)

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Designation: Retained

Pending Counts	**Disposition**
ATTEMPT/CONSPIRACY -	

MARIJUANA - IMPORTATION/EXPORTATION
(2)

CONSPIRACY TO DISTRIBUTE MARIJUANA
(3)

MONEY LAUNDERING - INTERSTATE COMMERCE
(7)

Highest Offense Level (Opening)

Felony

Terminated Counts **Disposition**

None

Highest Offense Level (Terminated)

None

Complaints **Disposition**

None

Plaintiff

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Date Filed	#	Docket Text
02/21/2012	2	REDACTED INDICTMENT by USA as to Jimmy Cournoyer (Marziliano, August) (Entered: 02/21/2012)
02/21/2012	3	ORDER FOR ISSUANCE OF Arrest WARRANT as to Jimmy Cournoyer. Ordered by Magistrate Judge Cheryl L. Pollak on 1/20/2012. (Marziliano, August) (Entered: 02/21/2012)
02/21/2012	4	MOTION to Unseal *Indictment* by USA as to Jimmy Cournoyer. (Marziliano, August) Modified on 2/21/2012 (Marziliano, August). (Entered: 02/21/2012)
02/21/2012	5	ORDER granting 4 Motion to Unseal Document 4 MOTION to Unseal Document *Indictment*, 3 Order for Warrant, 2 Redacted Document as to Jimmy Cournoyer (1). Ordered by Magistrate Judge Lois Bloom on 2/21/2012. (Marziliano, August) (Entered: 02/21/2012)
02/21/2012		INDICTMENT UNSEALED as to Jimmy Cournoyer (Marziliano, August) (Entered: 02/21/2012)
02/21/2012		Case unsealed as to Jimmy Cournoyer (Marziliano, August) (Entered: 03/01/2012)
02/21/2012		Arrest of Jimmy Cournoyer in Southern District of Texas. (Barrett, C) (Entered: 03/06/2012)
02/28/2012	7	Rule 5(c)(3) Documents Received as to Jimmy Cournoyer. (Attachments: # 1 Non-Public Docket Sheet) (Barrett, C) (Entered: 03/06/2012)
03/07/2012		ORDER REASSIGNING JUDGE as to Jimmy Cournoyer reassigned to Judge Sandra L. Townes. Senior Judge Jack B. Weinstein no longer assigned to the case. Ordered by Chief Judge Carol Bagley Amon on 3/7/2012. (Bowens, Priscilla) (Entered: 03/07/2012)
03/07/2012	9	REDACTED INDICTMENT by USA as to Jimmy Cournoyer, Mario Racine, Bobby Galebi, Jose Alejandro Castillo-Medina. (Lee, Tiffeny) (Entered: 03/09/2012)
03/07/2012	10	MOTION to Unseal Case by USA as to Bobby Galebi. (Lee, Tiffeny) (Entered: 03/09/2012)
03/07/2012	11	MOTION to Unseal Case by USA as to Jimmy Cournoyer, Mario Racine, Jose Alejandro Castillo-Medina. (Lee, Tiffeny) (Entered: 03/09/2012)

03/07/2012	12	ORDER unsealing indictment and arrest warrant as to Bobby Galebi (3). Ordered by Magistrate Judge Robert M. Levy. (Lee, Tiffeny) (Entered: 03/09/2012)
03/07/2012	13	ORDER Unsealing Case and arrest warrants as to Jimmy Cournoyer (1), Mario Racine (2), Jose Alejandro Castillo-Medina (4). Ordered by Magistrate Judge Robert M. Levy on 3/7/2012. (Lee, Tiffeny) (Entered: 03/09/2012)
03/07/2012		INDICTMENT UNSEALED as to Jimmy Cournoyer, Mario Racine, Bobby Galebi, Jose Alejandro Castillo-Medina. (Lee, Tiffeny) (Entered: 03/14/2012)
03/09/2012	8	NOTICE OF ATTORNEY APPEARANCE: John C. Meringolo appearing for Jimmy Cournoyer (Meringolo, John) (Entered: 03/09/2012)
03/09/2012	14	Minute Entry for proceedings held before Magistrate Judge James Orenstein: Initial Appearance and Arraignment as to Jimmy Cournoyer (1) on Counts 1,2,3,4,5,6,7 held on 3/9/2012. Defense counsel John Meringolo and AUSA Douglas Pravda were present. Plea entered by Jimmy Cournoyer: Not Guilty on counts ALL. Order of Detention entered with leave to reapply. Status Conference set for 3/22/2012 at 10:30 AM in Courtroom 4B South before Judge Sandra L. Townes. Order of Speedy Trial entered to extend from 3/9/12 to 3/22/12. (Tape #11:31-11:36) (Manuel, Germaine) (Entered: 03/12/2012)
03/12/2012	15	ORDER OF DETENTION PENDING TRIAL as to Jimmy Cournoyer. Ordered by Magistrate Judge James Orenstein on 3/9/2012. (Manuel, Germaine) (Entered: 03/12/2012)
03/12/2012	16	ORDER OF EXCLUDABLE DELAY as to Jimmy Cournoyer. Time excluded from 3/9/12 until 3/22/12. So Ordered by Magistrate Judge James Orenstein on 3/9/2012. (Manuel, Germaine) (Entered: 03/12/2012)
03/16/2012	17	Letter MOTION for Related Case Designation *To Be Set Aside and For Case To Be Returned To The Randomly Selected Judge* by Jimmy Cournoyer. (Attachments: # 1 A. Docket 12-CR-065, # 2 B. Indictment 10-CR-991, # 3 C. Indictment S-5 08-CR-916, # 4 D. Administrative Order 2008-04) (Meringolo, John) (Entered: 03/16/2012)
03/19/2012	18	CJA 23 Financial Affidavit by Bobby Galebi. Forwarded from the U.S. District Court, Central District of CA. (Manuel, Germaine) (Entered: 03/19/2012)
03/19/2012	19	ORDER denying 17 Motion for Related Case Designation To Be Set Aside as to Jimmy Cournoyer (1). So Ordered by Judge Sandra L. Townes on 3/19/2012. (Manuel, Germaine) (Entered: 03/20/2012)
03/19/2012	24	REDACTION INDICTMENT as to Alessandro Taloni, John R. Taschetti (Siegfried, Evan) (Entered: 03/28/2012)
03/19/2012	25	Order to Unseal Indictment as to Alessandro Taloni. Ordered by Magistrate Judge Joan M. Azrack on 3/19/2012. (Siegfried, Evan) (Entered: 03/28/2012)
03/23/2012	21	ORDER RESPECTING TRIAL as to Jimmy Cournoyer re 17 Letter MOTION for Related Case Designation filed by Jimmy Cournoyer: Defendant moves this court for reassignment to another judge, Jack B. Weinstein. The Chief Judge had reassigned the case from that judge to Judge Sandra L. Townes. *See* unnumbered docket entry, Mar. 7, 2012. No adequate reason for questioning the Chief Judge's decision is stated. The motion is denied. Ordered by Senior Judge Jack B. Weinstein, on 3/22/2012. (Barrett, C) (Entered: 03/26/2012)

03/23/2012	26	Order to Unseal Indictment as to John R. Taschetti. Ordered by Magistrate Judge Joan M. Azrack on 3/23/2012. (Siegfried, Evan) (Entered: 03/28/2012)
03/23/2012	28	Minute Entry for proceedings held before Magistrate Judge Joan M. Azrack: Arraignment as to John R. Taschetti (7) Count 2,3,7 held on 3/23/2012. Plea entered by John R. Taschetti (7) Count 2,3,7. by John R. Taschetti Not Guilty on counts all. Defendant released on $350,000 bond. Order of Excludable Delay entered from 3/23/2012 to 5/1/2012. (Tape #2:25-2:36) (Siegfried, Evan) (Entered: 03/28/2012)
03/23/2012	29	NOTICE OF ATTORNEY APPEARANCE: John M. Murphy, Jr appearing for John R. Taschetti (Siegfried, Evan) (Entered: 03/28/2012)
03/23/2012	30	ORDER Setting Conditions of Release. Ordered by Magistrate Judge Joan M. Azrack on 3/23/2012. (Siegfried, Evan) (Entered: 03/28/2012)
03/23/2012	31	ORDER OF EXCLUDABLE DELAY as to John R. Taschetti. Time excluded from 3/23/2012 until 5/1/2012. Ordered by Magistrate Judge Joan M. Azrack on 3/23/2012. (Siegfried, Evan) (Entered: 03/28/2012)
03/25/2012	20	NOTICE OF ATTORNEY APPEARANCE: Clara Sophia Kalhous appearing for Jose Alejandro Castillo-Medina (Kalhous, Clara) (Entered: 03/25/2012)
03/26/2012	32	CJA 20 as to Bobby Galebi: Appointment of Attorney Richard Palma for Bobby Galebi. Ordered by Magistrate Judge Ramon E. Reyes, Jr on 3/26/2012. (Siegfried, Evan) (Entered: 03/28/2012)
03/26/2012	33	Minute Entry for proceedings held before Magistrate Judge Ramon E. Reyes, Jr: Arraignment as to Bobby Galebi (3) Count 4,5,7 held on 3/26/2012. Plea entered by Bobby Galebi (3) Count 4,5,7. by Bobby Galebi Not Guilty on counts all. Order of Detention entered. Order of Excludable Delay entered from 3/26/2012 to 5/1/2012. Status Conference set for 5/1/2012 10:00 AM in Courtroom 4B South before Judge Sandra L. Townes. (Tape #3:46-3:58) (Siegfried, Evan) (Entered: 03/28/2012)
03/26/2012	34	ORDER OF DETENTION as to Bobby Galebi. Ordered by Magistrate Judge Ramon E. Reyes, Jr on 3/26/2012. (Siegfried, Evan) (Entered: 03/28/2012)
03/26/2012	35	ORDER OF EXCLUDABLE DELAY as to Bobby Galebi. Time excluded from 3/26/2012 until 5/1/2012. Ordered by Magistrate Judge Ramon E. Reyes, Jr on 3/26/2012. (Siegfried, Evan) (Entered: 03/28/2012)
03/26/2012	36	CJA 23 Financial Affidavit by Bobby Galebi (Siegfried, Evan) (Entered: 03/28/2012)
03/27/2012	22	NOTICE OF ATTORNEY APPEARANCE Steven Lawrence Tiscione appearing for USA. (Tiscione, Steven) (Entered: 03/27/2012)
03/27/2012	23	Letter MOTION for Related Case Designation *To Designate This Case As Related to United States v. Curatola, 10-CR-991* by Jose Alejandro Castillo-Medina. (Kalhous, Clara) (Entered: 03/27/2012)
03/28/2012	27	Rule 5(c)(3) Documents Received as to Alessandro Taloni (Siegfried, Evan) (Entered: 03/28/2012)
03/28/2012	37	Letter *in Support of Defendant Jose Alejandro Castillo-Medina's Motion for Reassignment* as to Jimmy Cournoyer (Meringolo, John) (Entered: 03/28/2012)
03/28/2012	38	NOTICE OF APPEAL (Interlocutory) by Jimmy Cournoyer re 19 Order on Motion for

		Related Case Designation, 21 Order,,. Filing fee $ 455, receipt number 0207-5392698. Appeal Record due by 4/2/2012. (Meringolo, John) (Entered: 03/28/2012)
03/30/2012	39	First MOTION to Unseal Document by USA as to Jimmy Cournoyer, Mario Racine, Bobby Galebi, Jose Alejandro Castillo-Medina, Alessandro Taloni, John R. Taschetti. (Tiscione, Steven) (Entered: 03/30/2012)
04/02/2012	40	MEMORANDUM in Opposition re 17 Letter MOTION for Related Case Designation *To Be Set Aside and For Case To Be Returned To The Randomly Selected Judge*, 23 Letter MOTION for Related Case Designation *To Designate This Case As Related to United States v. Curatola, 10-CR-991* (Attachments: # 1 Exhibit Administrative Order, # 2 Exhibit Relation Letter, # 3 Exhibit Order by Judge Weinstein, # 4 Exhibit Castillo-Medina Sentencing Memorandum, # 5 Exhibit Castillo-Medina Supplemental Sentencing Letter) (Tiscione, Steven) (Entered: 04/02/2012)
04/05/2012	41	Minute Entry for proceedings held before Magistrate Judge Cheryl L. Pollak: Arraignment as to Jose Alejandro Castillo-Medina (4) Count 2,3,7 held on 4/5/2012. Plea entered by Jose Alejandro Castillo-Medina (4) Count 2,3,7. by Jose Alejandro Castillo-Medina Not Guilty on counts all. Order of Detention entered. Order of Excludable Delay entered from 4/5/2012 to 5/1/2012. Status Conference set for 5/1/2012 10:00 AM in Courtroom 4B South before Judge Sandra L. Townes. (Tape #3:05-3:14) (Siegfried, Evan) (Entered: 04/06/2012)
04/06/2012	42	ORDER OF EXCLUDABLE DELAY as to Jose Alejandro Castillo-Medina. Time excluded from 4/5/2012 until 5/1/2012. Ordered by Magistrate Judge Cheryl L. Pollak on 4/5/2012. (Siegfried, Evan) (Entered: 04/06/2012)
04/06/2012	43	ORDER OF DETENTION as to Jose Alejandro Castillo-Medina. Ordered by Magistrate Judge Cheryl L. Pollak on 4/5/2012. (Siegfried, Evan) (Entered: 04/06/2012)
04/06/2012	45	ORDER denying 23 Motion for Related Case Designation as to Jose Alejandro Castillo- Medina (4). Defendant's application is DENIED. The above mentioned case is properly before Judge Townes. So Ordered by Judge Joanna Seybert on 4/6/12. (Valle, Christine) (Entered: 04/11/2012)
04/09/2012	44	NOTICE *that no transcript is requested for interlocutory appeal (Second Circuit Form B)* as to Jimmy Cournoyer (Meringolo, John) (Entered: 04/09/2012)
04/12/2012	46	MOTION for Bill of Particulars by Jose Alejandro Castillo-Medina. (Attachments: # 1 Notice of Motion) (Kalhous, Clara) (Entered: 04/12/2012)
04/12/2012	47	MOTION for Discovery *Omnibus Discovery Motion* by Jose Alejandro Castillo-Medina. (Attachments: # 1 Notice of Motion) (Kalhous, Clara) (Entered: 04/12/2012)

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March 16, 2012

BY ECF and HAND DELIVERY
Honorable Sandra L. Townes
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 111201

Honorable Jack B. Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

Re: ***United States v. Cournoyer, et al.*, 12-CR-065 (SLT)**

Dear Judge Townes and Judge Weinstein:

Jimmy Cournoyer respectfully submits this Letter Motion for Reassignment of this case to the Honorable Jack B. Weinstein, who was originally randomly selected in accordance with the procedures set forth in Local Rule 50.2 of the Local Rules for the United States District Court for the Eastern District of New York. The Due Process Clause of the Constitution of the United States, this Court's Local Rules, and the case law of this Circuit mandate reassignment to the randomly selected Court.

Statement Of Facts

On February 17, 2012, the United States Attorney's Office for the Eastern District of New York filed a letter under seal addressed to the Clerk of the Court and the Honorable Sandra

L. Townes, stating that "the above-captioned case [*United States v. Cournoyer*, 12-CR-065 ("*Cournoyer*")] is presumptively related to *United States v. United States v.* [sic] *Randolf Square*, 08 CR 916 (SLT) ("Square")." Gov't Relations Letter (Under Seal) at 1.[1] Without elaboration, the government stated that "a grand jury returned an indictment charging defendant Cournoyer in Counts One, Two and Three with the same drug trafficking conspiracies charged in Counts Two, Three and Four of the indictment in *Square*" and requested reassignment of this case from the Honorable Jack B. Weinstein to the Honorable Sandra L. Townes. Gov't Relations Letter at 2.

Four days later, on February 21, 2012, a sealed indictment was filed against Mr. Cournoyer, an arrest warrant was issued, and Mr. Cournoyer was arrested in the Southern District of Texas.[2] *See* Exhibit A, Docket in 12-CR-065 (SLT) at Docket Entries 2 and 3 and unnumbered entry noting arrest dated 2/21/2012. On March 7, 2012, the case was reassigned to the Honorable Judge Townes, and a superseding indictment was filed naming Mr. Cournoyer and three codefendants. Exhibit A at Docket Entry 9 and unnumbered entry noting reassignment dated 3/7/2012. Significantly, one of the codefendants named in the superseding indictment is a defendant in a pending case in this District, *United States v. Curatola, et al.*, 10-CR-991 (JS) (AKT) ("*Curatola*").

On March 9, 2012, counsel entered a notice of appearance for Mr. Cournoyer, who was arraigned on that same date and pled not guilty on all counts. Exhibit A at Docket Entries 8 and

[1] A copy of this letter was provided to counsel by electronic mail. Although the reason for sealing asserted in the letter is no longer applicable, the letter is not attached as an exhibit to this motion because the government has not moved to unseal the document. On information and belief, copies of the letter were sent to the Honorable Sandra L. Townes and the Honorable Jack B. Weinstein on or about February 17, 2012. Counsel will provide hard copies upon request.

[2] Although the Docket Entry indicates that Mr. Cournoyer was arrested on February 21, 2012, in the Southern District of Texas, Mr. Cournoyer, a Canadian citizen, was actually detained in Mexico on or about February 16, 2012 and forcibly removed and/or abducted or kidnapped from Mexico to the United States shortly thereafter. Thus, Mr. Cournoyer was arrested before this case was even filed.

14. A status conference is currently scheduled before the Honorable Judge Townes on March 22, 2012.

The reassignment was ordered by Chief Judge Carol Bagley Amon. No reason for the reassignment appears on the docket, nor was any order issued stating a reason for the reassignment. Exhibit A at unnumbered entry dated 3/7/2012.

ARGUMENT

I. The Case Must Be Reassigned Because The Reassignment Violated The Due Process Clause Of The United States Constitution.

Due Process and the rules of this Court weigh overwhelmingly in favor of random assignment of criminal cases between judges in this District. Compelling circumstances should be required before that system is circumvented and such circumstances do not exist in this case. As detailed in Section II, *infra*, the government has made only minimal and insufficient allegations to justify having *Cournoyer* heard by this Court as a "related case." Moreover, in its eagerness to have *Cournoyer* reassigned as a "related case" to *Square*, the government overlooked the fact that another pending case in this District—*Curatola*—was unarguably more closely related than *Square*.

Because a thorough examination of the government's argument makes clear that any connection between *Square* and *Cournoyer* is, at best, minimal and tangential, it is submitted that no saving of judicial resources sufficient to justify sidestepping the random assignment system exists, nor is the reassignment away from the randomly selected judge in the interest of justice.

A. Random Assignment Of Cases Assures The Appearance Of Impartiality And The Public's Confidence In An Unbiased Judicial System.

"The impartiality of the adjudicator, be it judge or jury," is a right "so basic to a fair trial that [its] infraction can never be treated as harmless error." *Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (quoting *Chapman v. California*, 386 U.S. 18, 23 (1967)). Thus, it is axiomatic that all criminal proceedings must have "the appearance of evenhanded justice which is the core of Due Process." *Mayberry v. Pennsylvania*, 400 U.S. 455, 469 (1971) (Harlan, J., concurring). Moreover, "[w]ise observers have long understood that the appearance of justice is as important as its reality." *J.E.B. v. Alabama*, 511 U.S. 127, 161 n.3 (1994) (Scalia, J., dissenting).

Thus, permitting one party to choose which judge will preside over a case, even if that judge is in fact impartial, creates the appearance of partiality, which has been consistently condemned by the courts. *See Francolino v. Kuhlman*, 365 F.3d 137, 141 (2d Cir. 2004) ("a criminal justice system in which the prosecutor alone is able to select the judge of his choice to preside at trial . . . raises serious concerns about the appearance of partiality."); *United States v. Pearson*, 203 F.3d 1243, 1264 (10th Cir. 2000) (prosecutorial judge shopping "arguable threatens the independence of the judiciary"). *See also generally*, *United States v. Potashnick*, 609 F.2d 1101, 1111 (5th Cir. 1980) (discussing the "recognized need for an unimpeachable judicial system in which the public has unwavering confidence" that is the basis for the "overriding concern with appearances" that pervades the Code of Judicial Conduct and the ABA Code of Professional Conduct," because, "[a]ny question of a judge's impartiality threatens the purity of the judicial process and its institutions.").

B. The Matter Should Be Randomly Assigned To Discourage "Judge-Shopping."

The Second Circuit has emphasized its disapproval for prosecutorial judge-shopping, calling it "certainly unsightly" and noting that it results in a proceeding "lack[ing] the appearance of impartiality." *Francolino*, 365 F.3d at 141.[3] Random case assignment systems, such as the one expressly approved by the judges of this court in accordance with the statutory command found in 28 U.S.C. § 137, have been well understood by both the bench and the bar to "prevent judge shopping by any party, thereby enhancing public confidence in the assignment process." *United States v. Mavroules*, 798 F.Supp. 61, 61 (D.Mass.1992). Indeed, it has been noted by at least one commentator that, "random assignment protects the integrity of the judicial system by leaving the pairing of cases and judges to chance." Christine S. Studzinski, The Law of the Lawyer, 44 No. 4 Prac.Law. 7 (June 1998).

Courts have also recognized the role that random assignment procedures play in promoting fairness and impartiality and in reducing the dangers of favoritism and bias. *See State v. Sprint Comms. Co.*, 699 So.2d 1058, 1063 (La. 1997). For this reason, attempts to manipulate the random case assignment process are subject to universal condemnation. *See United States v. Conforte*, 457 F.Supp. 641, 652 (D.Nev.1978), aff'd, 624 F.2d 869 (9th Cir.); *see also* Jonathan L. Entin, The Sign of "The Four": Judicial Assignment and the Rule of Law, 68 Miss.L.J. 369 (1998) (noting that "[m]anipulation of judicial assignments can deprive litigants of their right to a fair hearing and contravene basic principles of due process"); Kimberly Jade Norwood, Shopping for Venue: The Need for More Limits on Choice, 50 U. Miami L. Rev. 267, 300

[3] New York's State courts agree that, "Courts must be independent and free from outside supervision, especially by any of the litigants. It can never be the duty or prerogative of the [prosecutor] to weigh the experience and diligence of the judges before whom he appears as attorney for one of the parties[.]" *McDonald v. Goldstein*, 191 Misc. 862, 868; 83 N.Y.S.D. 620, 625 (N.Y. Sup. Ct. 1948).

(1996) (stating that because judge-shopping "would invite public skepticism of the ability to receive justice in our court system and would cheapen the judicial process . . . judge shopping is still 'universally condemned' by the courts") (citing cases).

C. The Defendant Should Not Be Required To Show That "Actual Prejudice" Will Result.

While the Second Circuit has held that in a post-conviction setting a defendant is required to show that actual prejudice resulted from prosecutorial judge-shopping, the Court also noted that a lower standard might apply if the issue were being examined in the pre-trial context. *See Francolino*, 365 at 143. Requiring Mr. Cournoyer to show that actual prejudice would result in the future is simply impossible. Rather, when it can be shown that a prosecutor has steered a case to a particular judge, prejudice should be presumed because "in these circumstances it is so likely that case-by-case inquiry into the prejudice is not worth the cost." *Strickland v. Washington*, 466 U.S. 668, 692 (1984) (citing *United States v. Cronic*, 466 U.S. 648 (1984) (collecting cases)). When a prosecutor is allowed to select a judge, the perception of unfairness alone is enough to undermine the integrity of the judicial system, irrespective of whether actual prejudice ever materializes.

Thus, it is clear that reassignment could be warranted without a showing of actual prejudice, if it can be demonstrated that the public could reasonably question a judge's ability to remain impartial. In the instant case, because of the transparency of the government's desire to have the case heard before this Court, it is submitted that the public could question that desire and it could damage "the appearance of evenhanded justice which is at the core of due process." *Mayberry*, 400 U.S. at 469 (Harlan, J., concurring); *see also United States v. Antar*, 53 F.3d 568 (3d Cir. 1995) ("[i]f there is an appearance of partiality, that end the matter [because]

impartiality and the appearance of impartiality in a judicial officer are the sine quo non of the American legal system.")

D. The Government's Attempt To Avoid Random Assignment Should Be Reversed Because *Square* And *Cournoyer* Are Not Sufficiently Related.

The government's letter claims that reassignment is proper because "a grand jury returned an indictment charging defendant Cournoyer in Counts One, Two and Three with the same drug trafficking conspiracies charged in Counts Two, Three and Four of the indictment in *Square*." Gov't Relations Letter at 1. In seeking reassignment, however, the government ignored the more closely related *Curatola* case, pending in this District.

The defendants in *Curatola*, one of whom—Jose Alejandro Castillo-Medina—is also charged in the superseding indictment in *Cournoyer*, are charged with a conspiracy to distribute marijuana "[o]n or about and between March 1, 2010 and November 16, 2010" in the Eastern District of New York and elsewhere. *See* Exhibit B, Superseding Indictment filed on February 3, 2011 in case no. 10-CR-991. That indictment alleges specific instances of illegal activity that mirror several of the counts alleged in *Cournoyer* far more than do the allegations in any of the counts in *Square*.

Square	***Cournoyer***	***Curatola***
Count Two: Continuing Criminal Enterprise from "[i]n or about and between January 2000 and February 2009" including the following violations: • Conspiracy to import marijuana from January 2000 through February 2009 • Conspiracy to distribute marijuana from January 2000 through January 2009 • Importation and distribution of marijuana in or about November 2005 • Importation and distribution of marijuana in or about December 2005 • Importation and distribution of marijuana in or about October 2007 • Importation and distribution of marijuana in or about February 2008 • Importation and distribution of marijuana in or about March 2008	**Count One**: Continuing Criminal Enterprise from "[i]n or about and between January 2002 and October 2011" within the Eastern District of New York and elsewhere including the following violations: • Conspiracy to import marijuana from January 2002 to October 2011 • Conspiracy to distribute cocaine from January 2002 to October 2011 • Marijuana trafficking (importation and distribution) in or about March 2010 • Marijuana trafficking (importation and distribution) in or about **June 2010** • Marijuana trafficking (importation and distribution) in or about July 2010 • Marijuana trafficking (importation and distribution) in or about **August 2010** • Marijuana trafficking (importation and distribution) in or about September 2010 • Marijuana trafficking (importation and	**Count One**: Conspiracy to distribute 100 or more kilograms of marijuana "[o]n or about and between March 1, 2010 and November 16, 2010" within the Eastern District of New York and elsewhere. **Count Two**: Conspiracy to import marijuana "[i]n or about and between June 2010 and November 16, 2010" within the Eastern District of New York and elsewhere. **Count Three**: distribution and possession with intent to distribute marijuana on or about May 13, 2010. **Count Four**: distribution and possession with intent to distribute marijuana on or about May 15, 2010. **Count Five**: distribution and possession with intent to distribute marijuana on or about May 23, 2010. **Count Six**: distribution and possession with intent to distribute marijuana on or about May 27, 2010. **Count Seven**: distribution and possession with intent to distribute marijuana on or about **June 22, 2010**. **Count Eight**: distribution and possession with intent to distribute marijuana on or about **June 24, 2010**.

• Importation and distribution of marijuana in or about May 2008 • Importation and distribution of marijuana in or about July 2008 • Importation and distribution of marijuana in or about November 2008 • Importation and distribution of marijuana in or about January 2009 • Importation and distribution of marijuana in or about February 2009	distribution) in or about October 2010 • Marijuana trafficking (importation and distribution) in or about **November 2010** • Marijuana trafficking (importation and distribution) in or about April 2011 • Cocaine trafficking (attempted exportation and distribution) in or about April 2011 • Marijuana trafficking (importation and distribution) in or about May 2011	**Count Nine**: importation of marijuana on or about **August 10, 2010.** **Count Ten**: distribution and possession with intent to distribute marijuana on or about **August 10, 2010**. **Count Eleven**: distribution and possession with intent to distribute marijuana on or about **August 11, 2010**. **Count Twelve**: importation of marijuana on or about **November 4, 2010**. **Count Thirteen**: distribution and possession with intent to distribute marijuana on or about **November 4, 2010**. **Count Fourteen**: possession of marijuana with intent to distribute on or about **November 16, 2010**.
Count Three: Conspiracy to import 1,000 kilograms or more of marijuana in or about and between January 2000 and February 2009 in the Eastern District of New York and elsewhere	**Count Two**: Conspiracy to import 1,000 or more kilograms of marijuana in or about and between January 2002 and October 2011 in the Eastern District of New York and elsewhere	
Count Four: Conspiracy to distribute 1,000 kilograms or more of marijuana in or about and between January 2000 and February 2009 in the Eastern District of New York and elsewhere	**Count Three**: Conspiracy to distribute 1,000 or more kilograms of marijuana in or about and between January 20002 and October 2011 in the Eastern District of New York and elsewhere	

As is apparent from the above chart, both *Cournoyer* and *Curatola* charge the defendants with marijuana distribution and possession with the intent to distribute and/or the importation of marijuana within the Eastern District of New York and elsewhere between March 2010 and November 2010. In contrast, the indictment in *Square*[4] charges marijuana importation and distribution from 2005 through 2009—a period not covered by the specific allegations in either *Cournoyer* or *Curatola*.

Moreover, one of the defendants charged in *Cournoyer* is also charged in *Curatola*, and none of the same defendants are charged in *Cournoyer* and *Square.* In *United States v. Russo*, 11-CR-030 (SLT), the government indicted 39 defendants including Theodore Persico, Jr., who was also a defendant in the pending case of *United States v. Bombino, et al.*, 10-CR-147 (SLT). The government argued stringently that because one defendant was the same in each case, the cases were related. In the instant case, however, the government ignored the pending indictment in *Curatola*, omitted any mention of that matter or of the similarity between *Curatola* and *Cournoyer*, and, moreover, omitted the common defendant, Mr. Castillo-Medina, from the original indictment filed in *Cournoyer* in order to mislead the Court and select the judge of the government's choosing based on a boilerplate allegation of relatedness between *Cournoyer* and *Square.*

Because of the government's calculated omissions in its letter to the Court regarding the relationship between *Cournoyer* and *Square*, and because of the significant danger that the government's actions here could be seen as an attempt to manipulate the judicial system, thus degrading the public's confidence in an impartial judiciary, the reassignment of *Cournoyer* is not in the interests of justice and the case should be returned to the randomly selected judge.

[4] *See* Exhibit C, Superseding Indictment filed on February 2, 2011 in case no. 08-CR-916 (SLT).

For all of the reasons set forth above, having *Cournoyer* heard in this Court will result in no saving of judicial resources sufficient to negate the compelling interest in random assignment of criminal cases and is not in the interest of justice.

II. This Case Must Be Reassigned Because The Cases Are Not Related And The Current Local Rules Were Not Followed.[5]

This Court follows specific procedural rules in order to determine whether a case is related to a prior action. When a case is improperly assigned as related, the court to which it was assigned has the ability to correct that error by sending the case back to the clerk for reassignment. *See Ukranian Nat'l Ass'n of Jewish Former Prisoners of Concentration Camps & Ghettos v. United States*, 205 F.R.D. 102 (E.D.N.Y. 2001) (erroneous designation of cases as related may be corrected by sending them back for reassignment).

While Mr. Cournoyer recognizes that those rules relate to "the internal management of the caseload of the court and shall not be deemed to vest any rights in litigants or their attorneys," the Local Rules were adopted pursuant to 28 U.S.C. § 137, which states that "[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court" and that "[t]he Chief Judge of the district court shall be responsible for the observance of such rules and orders." *Id*.

Local Rule 50.2(b) provides that "[a]ll cases shall be randomly assigned by the clerk or his designee in public view in one of the clerk's offices" with certain exceptions that are not relevant here. "Any objection by a party to designation of a judge or to place of trial shall be made by letter or motion to the judge assigned in a criminal case, within fourteen (14) days from

[5] The following analysis recognizes that the current Local Rules were adopted on March 1, 2012. Section III, *infra*, analyzes the facts of this case under the former Local Rules, which were in effect when the government's letter requesting reassignment was sent on February 17, 2012.

arraignment or from initial notice of appearance, whichever is earlier." Local Rule ("L.R.") 50.2(f)(1).

Local Rule 50.3.2 governs related criminal cases, and provides that "[a]ll criminal cases shall be randomly assigned upon filing." L.R. 50.3.2(a)(2). The Local Rule further states in relevant part:

> (b) Relevant Considerations in Relating Cases
>
> > (1) There shall be a presumption that one case is "related" to another when the facts of each arise out of the same charged criminal scheme(s), transaction(s), or event(s), even if different defendants are involved in each case.
> >
> > (2) **The presumption shall be overcome upon a determination by the relevant judges that reassignment would not achieve a significant savings of judicial resources or serve the interests of justice**. [. . .]
>
> (c) Obligation of the United States Attorney's Office
>
> > (1) It is the affirmative obligation of the United States Attorney's Office ("USAO") to give notice to all relevant judges whenever it appears that one case may be presumptively related to another pursuant to Section (b)(1). Such notice shall be by letter and **filed together with the indictment**, information or Federal Criminal Rule 7(b) motion and addressed to each of the judges concerned. The letter shall set forth the facts relevant to deciding whether the indictment or information should be related to another case. The letter shall in addition state clearly whether its purpose is solely to provide notice to the Court under this rule, or whether the USAO seeks reassignment.
> >
> > (2) The USAO may move for leave to file a notice required by the rule ex parte and under seal for good cause shown. **The USAO shall promptly move to unseal the notice once the need for ex parte and sealed filing no longer exists. Absent leave of court, the USAO shall publicly file a notice indicating that an ex parte sealed filing pursuant to this rule is being submitted.** [. . .]
>
> (d) Input from Defendants
>
> . . . [A]ny defendant may request that a case previously assigned to a judge as related be reassigned to the original judge on the ground that it was not properly related. Such requests shall be made by filed letter in both cases, addressed to both judges.

L.R. 50.3.2(b)-(d) (emphasis supplied).

"No case shall be reassigned except in the interest of justice and the efficient disposition of the business of the court." L.R. 50.4.

Based on these local rules, Mr. Cournoyer moves for reassignment of the case pending against him to the original, randomly selected judge on the ground that it was not properly related.

A. The Cases Are Not Related Factually.

The government's relations letter states without elaboration that the conspiracies charged in Counts One, Two, and Three of this indictment are "the same" as the drug trafficking conspiracies charged in Counts Two, Three, and Four of the indictment in *United States v. Square*, 08-Cr.-916 (SLT) ("*Square*"). However, this boilerplate recitation without evidentiary support should be insufficient to demonstrate that "the facts of [*Cournoyer* and *Square*] arise out of the same charged criminal scheme(s), transaction(s), or event(s)." L.R. 50.3.2(b)(1).

A comparison of the indictments[6] as set forth in the chart on pages 8 and 9, *supra*, demonstrates that, although the charged conduct possesses facial similarity in that both cases concern (at least in part) the importation and distribution of marijuana, the government has alleged no facts that indicate that the two conspiracies or Continuing Criminal Enterprises are related. The timeframes are not the same, the defendants are not the same, and the broadly worded allegations of marijuana importation, distribution, and possession with the intent to distribute do not demonstrate anything more than that both cases involve narcotics. The

[6] For purposes of this analysis, we assume that the government is referring to the latest indictment (S-5) filed in *Square* on February 2, 2011 and to the first indictment filed in *Cournoyer* on February 21, 2012.

government has not alleged a single specific fact that demonstrates that the conspiracies are related.

The *Cournoyer* indictment charges that overt acts were committed between March 2010 and May 2011, while the *Square* indictment covers a period that *ends* in February 2009. Mr. Cournoyer is charged with the attempted importation and distribution of cocaine, which the defendants in *Square* are not.

Finally, during at least part of the period alleged in the *Square* indictment, Mr. Cournoyer was imprisoned and could not, therefore, have participated in any of the acts charged in the *Square* indictment. For three years starting in 2000, he was under house arrest, and from December 2, 2005 to April 2006, he was incarcerated in Canada.

Therefore, because it is not evident that the cases are related, the presumption has not been met and the case should be reassigned to the Honorable Jack B. Weinstein pursuant to the original lawful and proper random assignment.

B. Even If The Cases Are Factually Related, Reassignment To Judge Townes Would Not Achieve A Significant Savings Of Judicial Resources Or Serve The Interests Of Justice.

The government has alleged that reassignment would "likely result in a significant savings of judicial resources and serve the interests of justice." Gov't Relations Letter at 2. However, the truth of this assertion is far from clear. Local Rule 50.3.2(b)(2) requires more than a "likely" saving of judicial resources, providing that the presumption of relatedness "shall be overcome" if the court finds that reassignment "would not achieve a significant savings of judicial resources or serve the interests of justice." L.R. 50.3.2 (b)(2).

In this case, reassignment would not achieve a significant savings of judicial resources because, as set forth in Section II (A), *supra*, there is no evidence that the two conspiracies are

related other than the government's allegation that the two, generically-described enterprises operated in approximately the same time period in approximately the same location. Moreover, as is evident from an examination of the docket in *Square*, that case was filed in 2008; has 55 defendants, many of whom have already been sentenced and several of whom (on information and belief) are cooperating with the government); and a trial date is set for April 23, 2012.

Relation of *Cournoyer* to *Square* without regard for the more closely related case of *Curatola* would not conserve judicial resources or serve the interests of justice for the defendant, Mr. Castillo-Medina, who is charged in both *Cournoyer* and *Curatola*. Nor would judicial economy be served by having a court in this courthouse and in the Central Islip courthouse presiding over two factually related matters with similar allegations.

Therefore, reassignment of *Cournoyer* as a related case would not conserve judicial resources or serve the interests of justice and this case should be returned to the Honorable Jack B. Weinstein.

C. The Proper Procedures Were Not Followed.

The government failed to follow the proper procedures for reassignment as a related case and therefore, the case should be returned to the randomly selected judge. The Local Rules require that the United States Attorney's Office ("USAO") give notice by letter "**filed together with the indictment**," that two cases may be related. L.R. 50.3.2(c)(1) (emphasis supplied). Moreover, where the letter is filed under seal, the "**USAO shall promptly move to unseal the notice once the need for ex parte and sealed filing no longer exists. Absent leave of court, the USAO shall publicly file a notice indicating that an ex parte sealed filing pursuant to this rule is being submitted**." L.R. 50.3.2.(c)(2) (emphasis supplied).

In the instant matter, it is plain from the docket of the case that the government did not follow the procedures set forth in the Local Rules. The government's letter, which was incorrectly sent four days before the indictment was filed, appears nowhere on the docket nor does the required public notice that an *ex parte* filing was submitted. Thus, had counsel not contacted the government directly to request a copy of the relations letter that counsel speculated must have been sent, Mr. Cournoyer would have been denied the opportunity to contest the reassignment of this case away from the randomly assigned judge.

Therefore, because the procedures for reassignment were not followed, the case should be returned to the Honorable Jack B. Weinstein.

III. This Case Must Be Reassigned Because The Cases Are Not Related And The Local Rules In Effect On February 17, 2012 Were Not Followed.

Anticipating that the government will argue that the current version of the Local Rules was not yet in effect when its letter requesting reassignment was sent on February 17, 2012 or when Mr. Cournoyer was indicted on February 21, 2012, Mr. Cournoyer submits that the government failed to follow the version of the Local Rules in effect on those dates.

The version of the Local Rules in effect on February 17, 2012, when the government sent its relations letter, provides for random assignment of all cases (*see* L.R. 50.2) unless a newly filed case is found to be related to a previously filed case:

> (a) "Related" Case Defined.
>
> A case is "related" to another for purposes of this guideline when, because of the similarity of facts and legal issues or because the cases arise from the same transactions or events, a substantial saving of judicial resources is likely to result from assigning both cases to the same judge and magistrate judge.
>
> * * *
>
> (c) Criminal Cases.

> Criminal cases are "related" only when (A) a superseding indictment is filed, or (B) more than one indictment or information is filed against the same defendant or defendants, or (C) when an application is filed by a person in custody that relates to a prior action. **Other cases will be deemed "related" only upon written application by a party, upon not less than ten days' notice to each other party, to the judge presiding over the earlier assigned case**. The application will be granted only if substantial saving of judicial resources is likely to result from assigning both cases to the same judge, or is otherwise in the interest of justice.
>
> * * *
>
> e) Assignment of Related Cases.
>
> Related cases shall be assigned by the clerk to the judge to whom was assigned the case with the lowest docket number in the series of cases . . .
>
> (f) Case erroneously assigned as related.
>
> The designation of cases as related may be corrected sua sponte by the judge to whom they are assigned, by returning to the clerk for reassignment cases erroneously so assigned. The failure to assign related cases appropriately shall be corrected only by agreement of all the judges to whom the related cases are assigned; if they agree, they may transfer the later filed cases as provided in paragraph (e), and notify the clerk of that action.

L.R. 50.3 (emphasis supplied).[7]

As subsection (c) makes clear, there are essentially two categories of "related" cases. The first category includes cases that are automatically related. Such automatic relation occurs "only when (A) a superseding indictment or information is filed, or (B) more than one indictment or information is filed against the same defendant or defendants, or (C) when an application is filed by a person in custody that relates to a prior action." L.R. 50.3(c). This case presents none of those circumstances, and thus requires an application of the second class of cases, which "will be deemed 'related' only upon written application by a party, **upon not less than ten days' notice to each other party**, to the judge presiding over the earlier assigned case. The

[7] Effective April 15, 1997 (version as accessed through the website of the United States District Court for the Eastern District of New York includes amendments through October 19, 2010).

application will be granted only if a substantial saving of judicial resources is likely to result from assigning both cases to the same judge; or is otherwise in the interest of justice." *Id*. (emphasis supplied).

In addition, the procedure for random assignment of cases as set forth in the Administrative Order issued by then-Chief Judge Dearie provides that:

> Effective March 3, 2008 and pending further order of the Court or action by the Board of Judges, and notwithstanding any provision of Rule 50.3 of the Rules for the Division of Business Among District Judges, the Clerk of the Court is directed to assign all criminal cases randomly, **unless** the United States Attorney certifies in writing at the time of filing that a case to be assigned satisfies one of the three conditions in Rule 50.3(c), or involves the same specific conduct that is a subject of a pending case.

Exhibit D, Administrative Order 2008-04 (emphasis supplied).

A. The Mandated Procedure Was Not Followed.

While dealing, as here, with a case that is not automatically related, the Local Rules make clear that all cases are to first be assigned by the Clerk's Office to the judge with the oldest case of those a party alleges to be related. L.R. 50.3(e) ("Related cases shall be assigned by the clerk to the judge to whom was assigned the case with the lowest docket number in the series of cases. The Clerk shall advise the judge of such assignment of a 'related case'"). Only after the case is assigned to that judge can the case be "deemed" related, and "only upon written application by a party, upon not less than ten days' notice to each other party, to the presiding judge over the earlier assigned case." L.R. 50.3(c).

Thus, the clerk must first make a preliminary determination of whether a case is related, then assign the case to the judge the clerk deems appropriate, and the issue of relatedness will then be decided by that judge. If that judge determines that the clerk erred in assigning the case as related, that error "may be corrected sua sponte by the judge to whom [the erroneously

designated case is] assigned, by returning to the clerk for reassignment cases erroneously so assigned." L.R. 50.3(f).

In the instant case, although the government sent its letter to the Clerk of the Court and to the Court whom it wished to accept the case as related, the government blatantly violated the Rules, which provide for 10 days' notice to the parties for any such request. If the government's method of operation were appropriate, there would be no need to include the notice provision in subsection (c) because all relatedness designations would be made before defendants were even arrested, and thus there would be no party to notify. Subsection (f) would thereby become superfluous because no judge would ever determine that the clerk had erroneously assigned a case as related, if, as in the instant case, the court itself had already made the determination that it should hear the matter.

Further, Chief Judge Amon reassigned this case as a "related case" two days before Mr. Cournoyer was arraigned and before any of the other defendants had even been arrested. Thus, no defendant was given the requisite 10 days' notice regarding the government's application, nor was any defendant permitted to challenge that request. Such circumstances fly in the face of the random assignment system and increase the danger that the public might reasonably question the impartiality of the assignment in this case.

B. The United States Attorney Did Not Meet The Requirements Of The Administrative Order.

As set forth above, Administrative Order 2008-04 (the "Order") instructs that "the Clerk of Court is **directed** to assign **all** criminal cases randomly, **unless** the United States Attorney certifies in writing at the time of filing that a case to be assigned satisfies one of the three conditions in Local Rule 50.3(c), or involves the same specific conduct that is a subject of a pending case." Exhibit D (emphasis supplied). The Order creates a strong presumption in favor

of random criminal case assignment, and appears to reflect then-Chief Judge Dearie's view that criminal cases should only rarely be assigned outside of the random assignment procedures in the Eastern District of New York Division Guidelines. The Order carves out a narrow exception to the general rule of random criminal case assignment—an exception that requires that the United States Attorney herself sign the certification. The Order does not authorize signatures by Assistant United States Attorneys as was done in this case.[8]

In presenting their *ex parte* letter to the Court, the Assistant United States Attorneys presented no authority to the Court to indicate that the United States Attorney had delegated her authority under the Order to issue this "related case" certification to them or to anyone else. The government's related case letter therefore violated the clear and unambiguous procedural requirements of the Order and should be rejected.

Moreover, the Order requires the United States Attorney to present the "related case" certification to the Clerk of Court at the time the relevant indictment is filed. In this case, the government failed to follow this procedure, instead sending the *ex parte* relations letter to the Court without any public notice. Because the Order was intended to infuse greater transparency

[8] Congress has often used this same requirement as a means for cautioning prosecutors to use their power and authority only after careful and thorough review. *See*, *e.g.*, *United States v. Giordano*, 416 U.S. 505, 528, 94 S.Ct. 1820, 1832 (1974) (finding that "the provision for pre-application approval" of wiretap application by a specific law enforcement official "was intended to play a central role in the statutory scheme," and that "suppression must follow when it is shown that this statutory requirement has been ignored"); *United States v. Weyhrauch*, 544 F.3d 969, 972 (9th Cir. 2008) (certification for interlocutory appeal must be made personally by the United States Attorney); *United States v. Male Juvenile*, 148 F.3d 468, 472 (5th Cir. 1998) (certification for juvenile to be tried as an adult requires certification by the United States Attorney). Certification made by someone other than the United States Attorney is valid only if the United States Attorney properly delegates his or her authority to that other person and if a certification is accompanied by documents establishing that other person's authority to sign. *See*, *e.g.*, *Weyhrauch*, 544 F.3d at 975 (ordering the government to prove proper certification under 18 U.S.C. § 3731 by the United States Attorney or proper delegation to an Assistant United States Attorney); *Male Juvenile*, 148 F.3d at 472 (vacating adjudication of juvenile as adult for improper certification).

and to add clear procedural safeguards in the "related case" designation process for criminal cases in the Eastern District of New York, the government's failure to follow the Order's mandate cannot be disregarded as a mere technical error.

C. The Government's Failure To Comply With Administrative Order 2008-04 Should Be Construed As A Waiver Of Its Opportunity To Avoid Random Case Assignment.

As set forth above, the government violated the Eastern District of New York Division Guidelines and the Order and did so outside of the public's view and before any of the defendants in this case were even aware of the pending indictment. The Court should, therefore, find that the government's decision to disregard the procedural requirements of this District invalidates its "related case" designation request. Indeed, because the Order requires that any "related case" certification be made with the Clerk of the Court "at the time of filing" of an indictment—a condition that was not met here—the government effectively waived its opportunity to avoid random case assignment. This Court should not allow the government to retroactively cure the defects. To do so would undermine the clear intent of the Order. Therefore, the Court should find that the reassignment of this matter as a related case was erroneous and the case should be returned to the Honorable Jack B. Weinstein, who was originally selected through the random assignment procedure.

IV. This Case Must Be Reassigned In Conformity With Case Law In This Circuit.

The current version of the Local Rules cited in Section II, *supra*, was enacted March 1, 2012, and there is not yet significant case law interpreting the cited provisions regarding reassignment and the determination of relatedness. However, the plain language of the provision provides for a presumption of relatedness "**when the facts of each arise out of the same charged criminal scheme(s), transaction(s), or event(s)**, even if different defendants are

involved in each case." L.R. 50.3.2(b)(1) (emphasis supplied). Because the government has not demonstrated that the Local Rule's language is satisfied, the presumption of relatedness has not been met and the case should be returned to the Honorable Jack B. Weinstein.

The Supreme Court has "stated time and time again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 1149 (1992). *See also United States v. Albertini*, 482 U.S. 675, 680, 105 S.Ct. 2897, 2902 (1985) ("Courts in applying criminal laws generally must follow the plain and unambiguous meaning of the statutory language."); *United States v. Locke*, 471 U.S. 84, 95, 105 S.Ct. 1785, 1793 (1985) ("deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill, generally requires us to assume that the legislative purpose is expressed by the ordinary meaning of the words used") (internal quotations omitted).

Thus, in the Second Circuit, courts are obliged "to give effect, if possible, to every clause and word of a statute, and to render none superfluous" or without meaning. *Collazos v. United States*, 368 F.3d 190, 199 (2d Cir. 2004) (internal citations and quotations omitted). In the instant Local Rule, the presumption of relatedness arises "when the facts of each [case] arise out of the same charged criminal scheme(s), transaction(s), or event(s)." L.R. 50.3.2(b)(1). However, as set forth in Sections I and II, *supra*, the government has failed to demonstrate that the facts of the two cases are in any way related other than by the mere fact that each case charges multiple defendants with marijuana trafficking in the Eastern District of New York.

In *United States v. Escobar*, 803 F. Supp. 611 (1992) the Honorable Jack B. Weinstein, held that the requirements of L.R. 503.2's predecessor, Rule 50.3(a), required a threshold test for relatedness to be met in all cases, writing that "[i]t is only after the court determines that the

threshold test [for relatedness] has been satisfied that it then can look to the specific requirements for criminal cases." *Escobar*, 803 F. Supp. at 619.

In *United States v. Agate*, No. 08-CR-76 (NGG), 2008 WL 699513 (E.D.N.Y. March 13, 2008), the government sent an *ex parte* memorandum to two judges asking each to consider accepting *Agate* as a related case. The government bypassed the procedural requirements then in place and gave no notice to the public or to the defendants of the "judge-shopping" attempt. After more than half of the 62 defendants objected to the Honorable Nicholas G. Garaufis' acceptance of *Agate* as a related case, Judge Garaufis returned the case to the Clerk's Office for random reassignment.

In *United States v. Robert Simels, et al.*, 08-CR-60 (DLI), the government attempted the same "judge-shopping" strategy, filing an *ex parte* letter with the judge whom it preferred. After briefing by counsel for both sides, the Honorable Dora L. Irizarry, who had accepted *Simels* as a related case, returned it to the Clerk's Office for random reassignment.

Finally, in *United States v. Andrew Russo, et al.*, 11-CR-30 (SLT), the Honorable Sandra L. Townes returned the case for random reassignment after counsel for the defendants objected to the government's *ex parte* "judge-shopping" attempt. In *Russo*, Judge Townes found that random reassignment was proper despite the fact that one defendant, Theodore Persico, was charged both in *Russo* and in the allegedly related case of *United States v. James Bombino*, 10-CR-147 (SLT), and despite RICO allegations stemming from conduct of members of the same charged enterprise—the Colombo Organized Crime Family—in both cases.

In contrast to *Agate*, *Simels*, and *Russo*, the government's allegations of relatedness between *Cournoyer* and *Square* are much more tenuous and vague. Because the government has not met the threshold for the applicable presumption of relatedness and because the interests of

the public and the defendants in the appearance of judicial impartiality far outweigh the potentially minimal conservation of judicial resources that would result from reassignment of *Cournoyer* as a related case, the case should be returned to the Honorable Jack B. Weinstein, who was originally selected in accordance with this Court's random assignment procedure.

Moreover, because the government disregarded the more closely related case of *Curatola* and did not inform the Court of the relationship between *Curatola* and *Cournoyer*, the reassignment of *Cournoyer* as related to *Square* should be reversed in order to avoid the appearance of prosecutorial judge-shopping or impropriety.

Conclusion

Wherefore, for the reasons set forth above, Jimmy Cournoyer respectfully moves for reassignment of this case to the Honorable Jack B. Weinstein as originally assigned through the Court's random selection procedure.

/s/
John C. Meringolo

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March 16, 2012

BY ECF and HAND DELIVERY
Honorable Sandra L. Townes
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 111201

Honorable Jack B. Weinstein
United States District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, NY 11201

The application is ___granted. X denied.
SO ORDERED.
s/ SLT
Sandra L. Townes, U.S.D.J.
Dated: March 19, 2012
Brooklyn, New York

Re: ***United States v. Cournoyer, et al.*, 12-CR-065 (SLT)**

Dear Judge Townes and Judge Weinstein:

Jimmy Cournoyer respectfully submits this Letter Motion for Reassignment of this case to the Honorable Jack B. Weinstein, who was originally randomly selected in accordance with the procedures set forth in Local Rule 50.2 of the Local Rules for the United States District Court for the Eastern District of New York. The Due Process Clause of the Constitution of the United States, this Court's Local Rules, and the case law of this Circuit mandate reassignment to the randomly selected Court.

Statement Of Facts

On February 17, 2012, the United States Attorney's Office for the Eastern District of New York filed a letter under seal addressed to the Clerk of the Court and the Honorable Sandra

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

– against –

JIMMY COURNOYER, et al.,

Defendants.

ORDER RESPECTING TRIAL

12-CR-065

JACK B. WEINSTEIN, Senior United States District Judge:

Defendant moves this court for reassignment to another judge, Jack B. Weinstein. The Chief Judge had reassigned the case from that judge to Judge Sandra L. Townes. *See* unnumbered docket entry, Mar. 7, 2012. No adequate reason for questioning the Chief Judge's decision is stated. The motion is denied.

SO ORDERED.

Jack B. Weinstein
Senior United States District Judge

Dated: March 22, 2012
Brooklyn, New York