

IN THE  
SUPREME COURT OF THE UNITED STATES

October Term 1996

NUMBER \_\_\_\_\_

ON APPLICATION TO THE HONORABLE JUSTICE ANTHONY M. KENNEDY  
FOR ISSUANCE OF A CERTIFICATE OF NECESSITY  
UNDER 28 U.S.C. SECTION 291(a)

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IN THE MATTER OF A COMPLAINT FILED BY  
LESTER SWARTZ, PRO-SE APPLICANT

-AND-

BEFORE THE CHIEF JUDGE  
OF THE ELEVENTH JUDICIAL CIRCUIT

Miscellaneous Docket No. 94-1244

IN RE: The Complaint of L.S. against United States  
Circuit Chief Judge Gerald Bard Tjoflat under the  
Judicial Conduct and Disability Act of 1980, 28  
U.S.C. Section 372(c)

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## JURISDICTIONAL STATEMENT

The Honorable Justice Anthony M. Kennedy of the Supreme Court of the United States has jurisdiction to act upon this application pursuant to Rule 22 of The Supreme Court Rules. Applicant believes that a "need" has arisen in the above-styled matter for the issuance of a certificate of necessity, and further, that the Chief Justice and the Circuit Justice of the Supreme Court of the United States would have jurisdiction to act accordingly in the above-styled matter pursuant to 28 U.S.C. Section 291(a) which states in pertinent part:

"The Chief Justice of the United States may, *in the public interest*, designate and assign temporarily any circuit judge to act as a circuit judge in another circuit judge in another circuit upon presentation of a certificate of necessity by the chief judge *or the circuit justice of the circuit where the need arises*." (emphasis added)

### ON THE APPLICATION TO JUSTICE KENNEDY FOR THE ISSUANCE OF A CERTIFICATE OF NECESSITY

Applicant believes that he has a clear and undisputed right to the issuance of a certificate of necessity pursuant to 28 U.S.C. Section 291(a) and as grounds therefore would show:

1. Applicant relies here on the purpose of the complaint procedure as set forth in the *Rule 1(a) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability (Illustrative Rules)* as found on page 1761 of Volume II of the *Research Papers of the Nation Commission on Judicial Discipline and Removal* (Commission), which states in pertinent part:

"The purpose of the complaint procedure is to improve the administration of justice in the federal courts by taking action when judges have engaged in conduct that does not meet the standards expected of federal judicial officers ... The emphasis is on correction of conditions that interfere with the proper administration of justice."

2. Moreover, applicant also relies here on the fact "*public accountability*" was a primary goal of *The Judicial Councils Reform and Judicial Conduct and Disability Act of 1980*, hereinafter referred to as the "*1980 Act*", 28 U.S.C. Section 372(c). (See page 105 of the *Final Report of the Commission* dated August 2, 1993).

3. Based on the above, on November 4, 1994 applicant, in all good faith, filed a 372(c) misconduct complaint under the *1980 Act* against Circuit Chief Judge Tjoflat, case # 94-1244, a copy of the same is attached hereto and part of the composite and marked Exhibit A.

4. On or before April 20, 1995, **all Circuit Judges in active service senior to Circuit Judge Edmondson** disqualified themselves or were otherwise unavailable from ruling on the subject 372(c) complaint.

5. On April 20, 1995, Circuit Judge J.L. Edmondson recused himself from ruling on the subject 372(c) complaint, a copy of the same is attached hereto and part of the composite and marked Exhibit B and are found on pages 1 through 7 of that same Exhibit B.

6. Judge Edmondson explains in Exhibit B why the complaint had come to him on page 1, in paragraph 1, in pertinent part that:

" ... The complaint has come to me ... because the judges of the Circuit Court who were *senior* to me in active service disqualified themselves or were otherwise unavailable." (emphasis added)

7. Circuit Judge Edmondson also determined and admits on page 6 of Exhibit B that:

"Also, if no active circuit judge of this Circuit could act (because of reasons of disqualification or otherwise) to review this 372 complaint against the Chief Judge, I think the Chief Justice of the United States, acting per *U.S.C. [Section] 291(a)*, could designate a circuit judge from outside the Circuit to review the complaint. Again, ***I cannot conclude that a necessity exists*** that justifies my acting on the present complaint for the purposes of *Sections 372(c)*

*(1)(2).and(3). given the potential appearance of impropriety that looms over this matter.* (emphasis added)

8. Then, starting on June 19, 1995 and ending on or about August 7, 1995, **each and every circuit judge junior to Circuit Judge Edmondson** subsequently disqualified themselves, many of whom did so "*for reasons substantially similar to those set forth in Judge Edmondson's order of April 20, 1995*" Noteworthy here, the Clerk of the Eleventh Circuit Court of Appeals informed applicant after the latter received Judge Edmondson's recusal, that there were no prior written orders of recusals. However, copies of all other recusals are attached hereto and are made part of Exhibit B, and are found on pages 8 through 13 of that same Exhibit B.

9. Applicant did and still does rely on Circuit Judge Edmondson's representations in his order of recusal, especially where Judge Edmondson states " ... *I cannot conclude that a necessity exists* that justifies my acting on the present complaint for the purposes of *Sections 372(c)(1)(2), and (3), given the potential appearance of impropriety that looms over this matter.*" (emphasis added), and in light of the recusals by all the other circuit judges in regular active service, applicant justly expected a certificate of necessity to be issued by the chief judge.

10. As further argument that a certificate of necessity should be issued here, applicant relies upon the opinion of the late Justice Marshall in *Meeropol v. Nizer*, 429 U.S. 1337. In short, *Meeropol* involved an application for the issuance of a certificate of necessity directed to, as said, the late Justice Marshall, who wrote, in his opinion in chambers at page 1339, in pertinent part:

"[Section 291(a)] assignments have been made where an entire court has disqualified itself, See, e.g., *United States v. Isaacs*, 493 F.2d 1124, 1167-1168(CA7), cert denied, 417 US 976, 41 L.Ed. 2d 1146, 94 S.Ct. 3183 (1974); cf. *United States v. Manton*, 107 F. 2d 834 (CA 2 1938), cert. denied 309 US 664, 84 L.Ed. 1012, 60 S.Ct. 590 (1940). **In such cases the circuit judges themselves make the decision not to sit thereby ... causing the "need" under**

*Section 291(a) for the issuance of a certificate of necessity. Such need is plain to anyone looking at the situation, and the duty to issue the certificate must be considered purely a ministerial act* to deal with an administrative problem, whether performed by the chief judge of the circuit *or the circuit justice*. See "An Act to amend the Judicial Code to authorize the Chief Justice of the United States to assign circuit judges to temporary duty in circuits other than their own." 56 Stat 1094 (Dec. 29, 1942); HR Rep No. 2501, 77th Cong 2d Sess (1942); S Rep No. 1606, 77th Cong 2d Sess (1942). (emphasis added)

11. But, on August 23, 1995, Circuit Chief Judge Tjoflat, who applicant believes plainly has a personal interest in this matter, after all active circuit judges had already recused themselves, failed to duly issue the subject certificate of necessity. Instead, Circuit Chief Judge Tjoflat invoked the Rule of Necessity and simultaneously dismissed the subject complaint which had been lodged directly against him. A copy of Circuit Chief Judge Tjoflat's order is attached hereto and made part of the composite and marked Exhibit C.

12. Accordingly, on or about September 22, 1995, but only to preserve any right to a review of the chief judge's orders, applicant timely petitioned the judicial council so to do. A reproduction of applicant's petition is attached hereto and part of the aforesaid Exhibit C.

13. Applicant did and still does vehemently maintain that each voting member of the council also has an interest in the outcome of these matters because there are presently before the subject judicial council for review, *Section 372(c)* complaints which had been lodged against each of the voting members of the council, which were also dismissed by Chief Judge Tjoflat. Miscellaneous Docket Numbers 94-1184 through 95-1201.

14. Further, that in addition to the law cited in *Meeropol, supra.* and based upon *their own decisions to recuse themselves* in the subject *372(c)* matters., applicant further intensely argues that the subject Circuit Judges were and still are disqualified from acting as the council appellate

members of the judicial council. In further support of applicant's belief here, as Judge Edmondson so eloquently and judiciously concluded, starting at the top of page 4 of Exhibit B, that since:

**" ... the circumstances underlying [the complaint] against the Chief Judge are closely tied to the same circumstances that underlay [the complaint] against [the circuit judges] ... it would appear to be of questionable propriety for [the council judges] to rule on the complaint against the Chief Judge.**

[The circuit judges should also] recall that the Code of Conduct for United States Judges says that "a judge should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary" and that a "judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned." **Given the close tie between [the complaint] against [the circuit judges] and [the complaint] against the Chief Judge, [it should be reasonable to] conclude that -- if [the council judges] were to [affirm the dismissal of] the complaint against the Chief Judge -- it might appear to a reasonable person that the Chief Judge and [the council judges] have exchanged favors about these complaints. This appearance of impropriety seems especially likely considering that [the circuit judges] cannot say with reasonable certainty that the 372 process will break down ... if [they] do not act. *No necessity compels [them] to act; alternatives seem to exist.*"**

15. Applicant would further show here, that on May 22, 1996, it will be *eight months* since applicant filed for a petition to review the subject 372(c) complaint, and to date of this filing applicant has yet to receive a decision from that council. As such, there are now the appearances of impropriety, including but not limited to, that it seems there has been egregious delay based upon the judges' improper animus and prejudice against this applicant.

16. As such, in order to give appearance that fairness is also a fundamental part of the 372(c) process, and also to avoid any impropriety or appearance of impropriety of bias and/or prejudice, one reasonably could conclude, that *no necessity should compel the subject circuit judges to act*

*as appellate council members here either, since alternative means of review plainly exist.* Applicant further argues, believes, and agrees in relevant part with Judge Edmondson, that if any of the subject circuit judges were to act here, even as appellate council members, it would appear improper, contrary to their *Oath of Office*, their duty, and the law, and/or inconsistent with any and/or all of the relevant canons of their *Code of Judicial Conduct*.

17. Furthermore, according to *Rule 18(c) of the Illustrative Rules* found on page 1784 in Volume II of the *Research Papers of the Nation Commission on Judicial Discipline and Removal*, it seems clear that even Chief Judge Tjoflat may not partake in the council's decision. *Rule 18(c)* states in pertinent part:

"If a petition for review of a chief judge's order dismissing a complaint ... is filed with the Judicial Council ... the chief judge will not participate in the council's consideration of the petition."

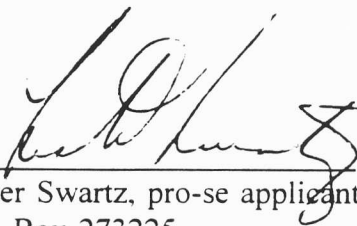
18. Consequently, for all of the reasons contained herein, applicant maintains that it appears that the Eleventh Circuit Judicial Council would be absent a quorum of the requisite appellate judges, and hence, applicant's petition for review of the subject 372(c) complaint cannot properly be acted upon there. As such, that a "need", if not a dire "need", crystal clearly exists here, and as such, applicant has a clear and undisputed right under these circumstances to have a certificate of necessity duly issued by the Honorable Justice Kennedy to the Chief Justice pursuant to 28 *U.S.C. Section 291(a)*, and further, in accordance with the intended goals and purpose of the "1980 Act", the *Illustrative Rules*, the law cited in *Meeropol*, in search for the truth in these matters, and in particular, ***in the public interests***.

19. In conclusion, by reason of all of the serious underlying sequence of events and appearances of impropriety which surrounds the subject 372(c) complaints lodged against Circuit

Chief Judge Tjoflat and the voting members of the subject judicial council, sadly, applicant would add for the record here, that applicant now strongly believes that the integrity of the subject and relevant (1) United States Courts, their judgments, and their officers of the court, i.e. the subject attorneys who are members of the bar of the relevant courts; (2) the Judicial office(s) (3) the Judicial Council and its decisions, have all been brought into very serious disrepute here, all to the prejudice of the courts and this applicant's confidence in the administration of justice therein, and further, to the prejudice of this applicant's respect for and confidence in all of the aforesaid.

WHEREFORE, applicant prays that the most Honorable Justice Kennedy will duly issue the subject certificate pursuant to *28 U.S.C. Section 291(a)* to the Chief Justice of the Supreme Court of the United States to the end the Honorable Chief Justice will, *in the public interests*, designate and assign temporarily any circuit judge, and hopefully a Justice or former Justice, who might also be able to act as a Chief Circuit Judge in the Eleventh Circuit under the provisions of *28 U.S.C. Sections 42, 43, 294, and/or 296*, and further, that the Honorable Chief Justice will take any further action that he may deem just and proper.

Respectfully submitted,



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