

COLLETTE JOSEY COVINGTON : 14TH JUDICIAL DISTRICT COURT
AND JADE COVINGTON

VS. NO. 2001-2355 :

MCNEESE STATE UNIVERSITY : PARISH OF CALCASIEU
AND THE BOARD OF SUPERVISORS
FOR THE UNIVERSITY OF
LOUISIANA SYSTEM : STATE OF LOUISIANA

FILED _____ DIVISION "F" – JUDGE CARTER

**SUPPLEMENTAL MEMORANDUM IN OPPOSITION TO ATTORNEY
GENERAL CRIMINAL DIVISION'S MOTION AND INCORPORATED
MEMORANDUM TO RECUSE THE TRIAL JUDGE**

MAY IT PLEASE THE COURT:

Plaintiffs COLLETTE JOSEY COVINGTON and JADE COVINGTON, ("Plaintiffs" or "Covington") respectfully submit, through undersigned counsel, their Supplemental Memorandum in Opposition to the Attorney General Criminal Division's Motion and Incorporated Memorandum to Recuse the Trial Judge.

I. INTRODUCTION

A. Case Facts

Covington vs. McNeese was filed in 2001 following wheelchair-bound Collette Covington's January 31, 2001 accident in a McNeese restroom which failed to comply with the Americans with Disabilities Act ("ADA") and related state and federal statutes. This case uncovered a pattern of discrimination by McNeese State University and the University of Louisiana System (collectively, "McNeese") against Collette Covington and other disabled students and the willful failure to comply with federal laws for the disabled for at least 20 years. Covington has spent the last nine years suffering through difficult and expensive litigation to establish her right to attend McNeese in a wheelchair and to compel McNeese to comply with the ADA.

Much of McNeese's discrimination has been knowing and willful, such as its decision to continue designing new buildings on campus that are inaccessible to the disabled, even years after Covington sued under the ADA.¹ Covington has already prevailed in a plaintiff's summary judgment which has been unanimously affirmed to the

¹ Because McNeese has spent so much money building non-compliant facilities in the last few decades, its remediation costs will be significantly higher than they would have been had it complied with the law in the first place.

Supreme Court and has established her entitlement, as a matter of law, to bring an action to compel McNeese to make the necessary alterations for the disabled. Furthermore, the U.S. Department of Justice Civil Rights Division has learned of McNeese's actions and has launched its own investigation of McNeese which McNeese admits has uncovered substantial violations and has resulted in significant settlement negotiations between the State of Louisiana and the Federal Government which are likely to cost tens of millions of dollars.

McNeese has already provided documents admitting that its compliance costs will be approximately \$15 million, and it has received emergency appropriations of \$8,471,100 from the Louisiana Legislature to begin work on 1.3 million square feet of buildings. However, until Covington is able to secure an injunction establishing her rights to enforce this decree and to receive past-due discovery from McNeese outlining their plans for compliance, she is unable to determine when the various parts of campus will be accessible to her and is unable to resume her classes at McNeese. Approximately six months ago, Covington filed for a preliminary injunction² and six consolidated motions to compel.

B. Recusal Facts

Only 48 hours before the trial judge was to issue a mandatory compliance order against McNeese compelling it to begin the remediation process and ordering it to provide Covington with the documents she needs, two attorneys with the Louisiana Attorney General Criminal Division who have never made an appearance in *Covington* and have no known relationship to the *Covington* case, filed a Motion to Recuse the Trial Judge in *Covington* and 13 other cases.³

Those two attorneys allege that Judge Carter, "would be unable to conduct a fair and impartial trial" in *Covington* because Judge Carter's sons are facing prosecution and because Judge Carter made two "disparaging comments" about attorneys in the Criminal Division of the Attorney General's Office. These alleged comments were made more than two years ago, in an unidentified 2007 case.⁴

² As noted, *infra*, this is not the first time Covington has filed for a preliminary injunction.

³ The Criminal Division has since represented to the Court that more cases will be added to this Motion.

⁴ The Criminal Division attached a partial transcript and referred to this case as "recusal hearing"

The Criminal Division attorneys failed to provide full transcripts or explain the context of Judge Carter's statements, they failed to establish how Judge Carter's statements satisfy the requirements of Louisiana Code of Civil Procedure 151 (discussed, *infra*), and they failed to, in any way, particularize the alleged bias with respect to the *Covington* case.

On December 15, 2009, Judge Ware held a hearing and determined that *Covington* should be consolidated with the 13 other cases for the purposes of determining whether Judge Carter should be recused from all present and future cases in which any attorney employed by or working through a contract relationship with any division of the Louisiana Attorney General's Office anywhere in the State makes an appearance. Judge Ware consolidated the cases for the purpose of an evidentiary hearing but recognized that the unique circumstances of each of these 14 cases could result in different recusal outcomes.⁵

The *Covington* Plaintiffs previously submitted a Memorandum addressing the facts and circumstances which are unique to the *Covington* case. Some of these facts and circumstances include:

- (1) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge has already caused and will cause substantial prejudice and irreparable harm in violation of the Louisiana Code of Civil Procedure due to the timing of the State's Motion only 48 hours before a preliminary injunction whose facts were not in dispute;
- (2) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge is untimely and inappropriate given the mature procedural posture of the case, which has been pending for nine years;
- (3) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge is untimely and unwarranted given that liability, discrimination, and the most significant issues of fact and law have already been determined by summary judgment and affirmed to the Supreme Court and that the remaining issues are either to be tried by a jury or must be rendered by the trial judge as a matter of law;
- (4) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge is unsupported by any evidence of prior bias in the *Covington* case, and Judge Carter's rulings against the Attorney General's clients have been so narrow that they have had to be expanded by the appellate courts;
- (5) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge is unsupported by any evidence of bias against Adam Ortego, the assistant attorney general who last represented the Defendants in *Covington*, and to whom Judge Carter referred to in open court as his "favorite lawyer";

in its original Memorandum.

⁵ As noted in *Burton, infra*, a recusal **must** be based on the specific merits of **each** case ("Each case must be examined on its own facts.").

(6) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge is unsupported by any evidence of prior or current bias against Mike Veron or the Veron Law Firm, who now represent the Defendants in the *Covington* case. Indeed, these lawyers were once hired by Judge Carter as his private lawyers;

(7) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge is particularly inappropriate since Judge Carter provided, in open court, his personal and stated belief that the Attorney General's client, McNeese State University, and its administration are "good" and want the best for the community;

(8) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge is particularly inappropriate since Judge Carter's own daughter has been employed by McNeese, the client to whom the Criminal Division now claims Judge Carter cannot be fair;

(9) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge will cause substantial prejudice by the fact that Judge Carter is in the best position to award the Plaintiffs their mandatory injunctive relief and attorney fees, since he has witnessed the attorneys' work and the parties' positions for the last nine years; and

(10) The Defendants'/Criminal Division's Motion to Recuse the Trial Judge will cause substantial prejudice by the fact that a new judge would be required to spend an extensive period of time reviewing the thousands of pages in the suit record to make determinations that could more easily be made by Judge Carter.

These facts and arguments are incorporated into this Supplemental Memorandum, which further addresses the issues of law and the appropriate standard for granting or denying a recusal.

C. Recusal Introduction

"Law is the only sport where the best players sit on the bench."
—*Unknown Author*

A motion to recuse a judge should not be taken lightly, as it calls into question not only that judge's ability to render fair decisions, but the impartiality of the entire judicial system. The liberal granting of recusals also interferes with the normal functioning of the random allotment system that protects the integrity of case assignments and prevents inappropriate forum shopping.

As a matter of first impression, it may seem harmless for a Court to grant a recusal to a party who feels prejudiced by a particular judge. However, the improper granting of a recusal, like the improper denial of a recusal, is reversible error. The Criminal Division has raised the stakes in this Motion by requesting recusal as to potentially dozens of cases without even offering a particularized showing of bias as to each case, or even as to any attorney involved in each case. If such a precedent were established, Louisiana's court system would quickly grind to a halt as parties rush to proliferate mass, groundless class action recusals in order to secure a litigation advantage.

In a community such as Calcasieu Parish, almost every judge has served as opposing counsel, often in contentious cases, against attorneys and law firms who routinely appear before them. Our judges have presided over the personal affairs of the attorneys who appear in front of them, such as when these attorneys get divorces or become involved in litigation. Our judges have all had friends and family members prosecuted (whether for traffic or larger offenses) by members of the bar who regularly appear in front of them, and they have undoubtedly sentenced friends and family members of attorneys who regularly appear in front of them. Our judges have all received campaign contributions from members of the bar who regularly appear in front of them, and many routinely rule on cases in which their sometimes bitter political opponents appear in front of them. Our judges socialize and attend church with members of the bar who regularly appear in front of them, and they probably avoid socializing with other members of the bar who regularly appear in front of them. And from time to time, judges accuse those lawyers of improprieties which may or may not be justified. Such is the nature of a small community.

But these actions rarely constitute grounds for recusal. And one judge's criticism of the actions of a particular lawyer or lawyers in the Baton Rouge Attorney General's Criminal Division two years ago does not warrant having that judge removed from any case in which hundreds of lawyers with the Attorney General's offices throughout the State have or will someday make an appearance. And it certainly does not warrant having that judge removed from any case in which private practitioners hired by the Attorney General's Office appears.

As noted by the Third Circuit in *O'Neill vs. Thibodeaux, et al.*, 709 So.2d 962 (La.App. 3 Cir. 03/06/98), when a trial judge was accused of bias because he maintained a social relationship with the defendant in a case before him:

Trial judges are not required to live their lives in a vacuum, cut off from society in order to prevent instances such as this from occurring. It would be impossible for a trial judge to remain aloof in small towns such as Eunice, where most people know each other, especially the judges. If we hold that the trial judge should have recused himself in this instance, all trial judges will be hard pressed to know when he/she should hear a matter or should be recused. This would exact a high price, especially in those smaller judicial districts which have only one or two trial judges. Judges are not required to disassociate themselves from friends and acquaintances upon taking the bench.

The integrity of our judiciary depends not only on the impartiality of our judges,

but the impartiality of the system which assigns those judges. Being assigned a judge is not *voir dire*, and the parties are not entitled to make peremptory challenges until their firm or office finds a judge to their liking who has never questioned or criticized their prior actions. If the Attorney General's Office Criminal Division's Motion is granted, it will have a chilling effect on judicial candor and will send the message to the public and the bar that recusing and selecting a judge is just another part of the pre-trial process.

II. STANDING

As a threshold matter, Plaintiffs in the *Covington* case challenge the standing of Attorneys Kurt Wall and Terri Lacy to bring an action to recuse the trial judge in the *Covington* case. Neither Mr. Wall nor Ms. Lacy have enrolled in *Covington*, and they have not suggested that they are proper parties to intervene in this suit or that they represent McNeese State University or the University of Louisiana System, the defendants in this case. Yet, their filings have effectively shut down a nine-year-old case and have prevented the Plaintiffs from receiving a mandatory preliminary injunction in a case whose facts have already been established by summary judgment.

La. C.C.P. Article 863 requires that, "every pleading of a party represented by an attorney shall be signed by at least one *attorney of record* in his individual name, whose address shall be stated." [emphasis added]. Because Mr. Wall and Ms. Lacy are not attorneys of record in *Covington*, their Motion to Recuse the Trial Judge has not been signed by an attorney of record, in his individual name, as required by Article 863.

As non-attorneys of record, Mr. Wall and Ms. Lacy's only other possible right to make an appearance in *Covington* would be by intervening of behalf of some party with an interest in the *Covington* case. La. C.C.P. Article 1091, *et seq.* provides the grounds and procedure under which a party may intervene in a lawsuit. Under Article 1091, an intervener must possess a "justiciable right" in the cause of action in which he intervenes. The Louisiana Attorney General's Office Criminal Division has demonstrated no "justiciable right" in the *Covington* case. Therefore, they have no authority to intervene in *Covington* and attempt to have the trial judge recused.

Thus, the Plaintiffs in *Covington* challenge the standing of Mr. Wall and Ms. Lacy to make their appearances. If McNeese wishes to hire Mr. Wall and Ms. Lacy to represent them, this defect could easily be corrected. Alternatively, an attorney of record,

such as Adam Ortego or the Veron Law Firm could sign the pleadings and argue why Judge Carter should be recused. However, these procedures have not been followed, and Plaintiffs object to these two attorneys making arguments and filing Motions in a case in which they are not representing a client.

III. RECUSAL STANDARD AND ARGUMENTS

A. La. C.C.P. Article 151 requires that the Criminal Division prove by a preponderance of the evidence that Judge Carter harbors an actual bias against McNeese State University, the University of Louisiana System, Mike Veron, Rock Palermo, or Adam Ortego, the parties and attorneys involved in the *Covington* case, and that this bias is so great that Judge Carter cannot be fair in the *Covington* case.

1. Judge Carter is presumed to be impartial.

The appropriate standard for determining whether a judge may be involuntarily recused in Louisiana is La. C.C.P. Article 151. Article 151 protects the integrity of the judicial selection process in civil cases by strictly limiting the grounds for recusal and establishing a presumption that all judges are impartial and fit to render decisions in cases assigned before them.⁶ The standard language cited by every circuit to explain this presumption is the same:

A judge is presumed to be impartial. The party seeking to recuse cannot merely allege lack of impartiality; he must present some factual basis. And bias, prejudice, or personal interest must be of a substantial nature and based on more than conclusionary allegations.

The Third Circuit used these words in *McCoy vs. Calamia, et al.*, 653 So.2d 763 (La.App. 3 Cir. 4/5/95) while citing *Pierce vs. Charity Hospital*, 550 So.2d 211, 213 (La.App. 4 Cir. 1989), *writ denied*, 551 So.2d 1341 (La. 1989).⁷ Thus, the Criminal Division must rebut this presumption by showing not only actual bias, but that such bias is substantial.

⁶ Both historically and today, a party seeking to have a judge recused carries a high burden. In the historic case of *Marbury vs. Madison*, for instance, Chief Justice John Marshall wrote the Supreme Court opinion determining whether his own actions as Secretary of State were proper. In rural Louisiana, it is still common for single judge courts to rule on matters in which the judges have some unavoidable personal knowledge and to hear cases where the parties or attorneys consist of relatives, friends, enemies, football rivals, political rivals, and every other imaginable relationship. These judges are entitled to rely upon the reputation, both good and bad, of counsel who have appeared in front of them before. There is nothing improper, or, in many cases, even preventable, about this, as long as it does not interfere with a judge's ability to impartially follow the law in each specific case before him.

⁷ The Fifth Circuit used these words in *Couvillion vs. Couvillion*, 769 So.2d 747 (La.App. 5 Cir. 9/26/00), while citing *Tamporello vs. State Farm Mut. Auto Insu. Co.*, 95-458, at 6 (La. App. 5 Cir. 11/15/95), 665 So.2d 503, 506. The First Circuit used these words in *Use vs. Use, et al.*, 654 So.2d 1355 (La.App. 1 Cir. 4/7/95) while citing *Earles vs. Ahlstedt*, 591 So.2d 741 (La.App. 1 Cir. 1991).

2. Article 151 requires a case-specific review of the facts in *Covington*.

Under Article 151, the Criminal Division cannot force Judge Carter to be recused from the *Covington* case unless it can prove, by a preponderance of the evidence, that Judge Carter:

(1) is a witness **in the [Covington] cause** [it is not sufficient that he is a witness in another cause, as the Attorney General Criminal Division alleges];

(2) has been employed or consulted as an attorney **in the [Covington] cause** or has previously been associated with an attorney during the latter's employment **in the [Covington] cause**, and the judge participated in representation **in the [Covington] cause**;

(3) is the spouse of a party, or of an attorney employed **in the [Covington] cause** or the judge's parent, child, or immediate family member is a party or attorney employed **in the [Covington] cause**; or

(4) is biased, prejudiced, or interested **in the [Covington] cause** or its outcome or biased or prejudiced toward or against the parties or the parties' attorneys or any witness **to such an extent that he would be unable to conduct fair and impartial hearings [in the Covington cause]**.⁸ La. C.C.P. Article 151, *emphasis added*.

Article 151 makes it clear that the Criminal Division's burden is not simply to show that Judge Carter has some perceived bias against some attorney with the Attorney General's Office, but that he has an actual and specific bias directed at one of the attorneys appearing before Judge Carter **in the Covington case** and that this bias is so great that Judge Carter's ability to render fair decisions would be affected **in the Covington case**.

The Third Circuit explains in *Wm. T. Burton Industries, Inc. vs. Ellis Busby*, 348 So.2d 1328 (La. 3d Cir. 1977), that a recusal inquiry must be conducted on a case-by-case basis:

The burden of proof rests on plaintiff in the instant suit to establish facts and circumstances which will justify a conclusion, or at least an inference, that the trial judge is interested **in the cause**. The law does not prescribe a test which should be applied in determining whether the trial judge has such an interest. **Each case must be examined on its own facts**, therefore, to determine whether there should be a recusation. [citing *State Department of Highways vs. McDonald*, 329 So.2d 898 (La. App. 2 Cir. 1976).]

Even the Criminal Division admits that its burden is to show that Judge Carter is, "biased or prejudiced toward or against *the parties* or the *parties' attorneys* or any witness to such an extent that he would be unable to conduct fair and impartial hearings." The Criminal Division has not presented any allegations of bias against Rock Palermo,

⁸ The permissive recusal provisions are not discussed because the Criminal Division does not allege any of them.

Mike Veron, or Adam Ortego, the last three attorneys who represented the defendants in *Covington*. The Criminal Division has also not presented any evidence of bias against McNeese State University or the University of Louisiana System, the Defendants in *Covington*. Therefore, the Criminal Division has not met its burden under Article 151 with respect to *Covington*.

3. La. Code of Criminal Procedure Article 671, the Code of Judicial Conduct, and the American Bar Association Canons do not govern recusals in the *Covington* case.

The Attorney General Criminal Division has cited La. Code of Criminal Procedure Article 671, the Code of Judicial Conduct, and the American Bar Association Canons as grounds for recusal. But these are not the appropriate standards for determining whether a judge may be involuntarily recused from a civil case. *Covington* is a civil case and, therefore, the only relevant statute is La. C.C.P. Article 151.

In *Chauvin vs. Sisters of Mercy Health Systems, et al.*, 818 So.2d 833 (La.App. 4 Cir. 5/8/02) at 835, the Fourth Circuit explained that it is improper to involuntarily recuse a judge on grounds other than those specifically identified in Article 151. The Fourth Circuit specifically held that:

The basis for plaintiffs' motion to recuse is not among the statutory grounds for recusal under LSA-C.C.P. art 151. The list of grounds for recusal is exclusive, not illustrative, and there **must be a statutory ground** for recusing a judge. *Citing Pierce vs. Charity Hosp.*, 550 So.2d 211, 215 (La.App. 4 Cir.1989).

It is well known that Article 151's statutory recusal grounds in a civil case are much harder to prove than Article 671's grounds in a criminal case. Indeed, the Third Circuit has held that it is so difficult to involuntarily recuse a judge in a civil case that a judge **may face disciplinary action** for not voluntarily recusing himself long before Article 151 requires him to be involuntarily recused. In *O'Neill, supra*, the Third Circuit addressed this high burden under Article 151, noting that:

[f]or instance, C.C. P. art. 151(B) may not recite, as does C.Cr.P. art. 671, that a judge "shall be recused" for any of the enumerated grounds, but his conduct in sitting in such a case may well constitute conduct that brings the office into disrepute, and be of such a serious nature as to warrant discipline.

While the Code of Judicial Conduct or ABA Canons might help a judge determine whether to voluntarily recuse himself, they not allow others to force him to be recused. Certainly, the Code of Judicial Conduct does have the "force of law", as the Criminal Division suggests; however, that force of law is limited to a judge being

disciplined by the Louisiana Supreme Court, not being forcibly recused by the Criminal Division.

4. Article 151 requires a showing of actual bias, not the appearance of bias.

A trial judge may voluntarily recuse himself under the Code of Judicial Conduct, if he believes that he is unable to conduct fair and impartial hearings in a particular case, or if he is concerned that there is an appearance of bias in a particular case. However, if a trial judge determines that he is able to conduct fair and impartial hearings and a party attempts to forcibly have him recused, Article 151 demands that the party provide proof, by a preponderance of the evidence, of *actual* bias, not merely the appearance of bias.

In *Chauvin, supra*, at 835, the Fourth Circuit explained that, "[a] mere appearance of impropriety, not statutorily listed in LSA-C.C.P. art 151, cannot be a basis for recusal."

In *Brown vs. Brown*, 877 So.2d 1228 (La.App. 2 Cir. 07/21/04), a judge made numerous sarcastic comments about a party's personal life, dating life, poverty, and parenting skills. The Second Circuit noted at 1238:

In this instance, although the comments made by the judge during testimony might be construed to *appear biased*, we conclude that it does not rise to the level of showing *actual bias*.⁹

The Criminal Division's attached transcript excerpts indicate that Judge Carter considers himself capable of rendering fair decisions. Under Article 151, the Criminal Division must negate that evidence and show actual statutory bias against a particular party or lawyer in the *Covington* case, rather than the mere appearance of bias.

5. Article 151 requires the Criminal Division to prove that any actual bias has actually affected Judge Carter's rulings in *Covington*.

La. C.C.P. Article 151 makes it clear that the Criminal Division must prove that Judge Carter's actual bias is severe enough that, "he would be unable to conduct fair and impartial hearings" in the *Covington* case. This principle is a fundamental component to Article 151, since every judge likely harbors some sort of bias, yet this bias usually does not affect his judgment or ability to render fair decisions in particular hearings or trials. The Fourth Circuit discussed this requirement in a case where there was evidence that a judge showed favoritism toward a particular lawyer:

Moreover, even if Plaintiff were able to show that Judge Medley was harboring a secret conflict of interest with regard to her attorney, there is nothing in the record indicating that Judge Medley's alleged bias affected

⁹ For a more thorough discussion of *Brown vs. Brown*, see Section E.

the outcome of trial. *Pyle vs. Weaver, et al.* 958 So.2d 753 (La.App. 4 Cir. 5/16/07).

In *Use vs. Use, et al.*, 654 So.2d 1355 (La.App. 1 Cir. 4/7/95), the First Circuit affirmed that the record itself is best way to evaluate whether bias has occurred, noting at 1361 that:

A review of the trial transcript, the record of pretrial proceedings, and the trial judge's oral reasons for judgment indicate the trial judge comported himself with fairness and diligence toward all the parties throughout long and tedious litigation. Recusal based on this single comment would only have delayed the litigation further.

Despite a nine year case history, the Criminal Division cannot point to a single ruling or comment by Judge Carter in *Covington* to substantiate a claim of bias. As noted, Judge Carter has granted the Defendants every contenance that they asked for and Judge Carter allowed the Defendants three hearings before ruling against them. The Defendants' appeal resulted in an incredibly one-sided appellate opinion which broadened Judge Carter's rulings against the Defendants. The Defendants in *Covington* have no basis for complaining of bias.

6. Article 151 prohibits a recusal based on a judge's bias toward other lawyers in a firm or office.

Article 151 requires that any bias must be strictly directed at the parties or attorneys who appear in a matter. Indeed, under Article 151, a judge may not be recused even if he is actively represented in private litigation by the law partner of an attorney appearing in front of him. While this sounds shocking, it highlights the high burden required for recusal and reinforces Article 151's mandate that a judge must have some particularized relationship with **the** lawyers (not co-workers or partners of the lawyers) or in **the** cause in which the judge is being recused from.

The Third Circuit has upheld this provision of Article 151. In *Richard vs. Wijayasuriya, et al.*, 645 So.2d 708 (La.App. 3 Cir 10/5/94), the plaintiffs alleged that one of the judges involved in their case was actively represented by a lawyer with the defendant's law firm. The Third Circuit, citing Article 151 (B)(2), noted that, "[i]n this case the judge did not employ an attorney representing any of the parties so there was no basis under La. Code Civ. P. art. 151 for **even a permissive** recusal of Judge Hebert."

Thus, the Attorney General Criminal Division must show, by a preponderance of the evidence, not only alleged bias, but that this alleged bias was directed at the client or

attorney **appearing in the Covington case** and that the alleged bias will **specifically** prejudice Judge Carter's ability to conduct fair and impartial hearings **in the Covington case**.¹⁰ The Attorney General Criminal Division has presented no such evidence.

B. The cases cited by the Attorney General's Office are inapplicable to Covington

The Attorney General Criminal Division cites a number of cases in its brief, but not a single case cited by the Attorney General Criminal Division directly interprets the recusal standards of La. C.C.P. Article 151, which applies to the *Covington* case. *Covington* will address each of these cases.

1. State vs. LeBlanc is inapplicable because it interprets La. C.Cr.P. Article 671 rather than La. C.C.P. Article 151.

On page 6 of its brief, the Criminal Division cites *State vs. LeBlanc*, 367 So. 2d 335, 1979 La. LEXIS 7379 (La. 1979), for the proposition that, "the appearance of partiality is enough to warrant a judge's recusal." On page 9 of its brief, the Criminal Division continues, claiming that, ". . . even the appearance of partiality, as well as partiality itself, outweighs the inconvenience caused by the recusal of the trial judge." This interpretation is severely flawed for several reasons.

State vs. LeBlanc is a criminal case involving recusal under La. C.Cr.P. Article 671, which is inapplicable to *Covington*. Moreover, the facts in *State vs. LeBlanc* are grossly different from the facts in *Covington*. The judge in *LeBlanc* presided over the trial of a criminal defendant in a case where the judge and his son together represented the Sheriff's Department as a two-man law firm. The judge failed to disclose that representation and violated the defendant's Constitutional rights by failing to take a transcript of the trial. Because there was no transcript, there was no way to determine whether the judge was biased during the trial, and the appellate court granted a new trial. In no way do the facts in this criminal case bear any resemblance to the facts in *Covington*.

2. In Re Judge Henry Lemoine is a disciplinary hearing which is inapplicable to determining whether Judge Carter should be recused in Covington.

¹⁰ This requirement is logical. If this Court sets a precedent that any of the 500 lawyers in the Louisiana Department of Justice or any of the innumerable attorneys who contract for the Louisiana Department of Justice can no longer appear before a judge because that judge criticized one or two attorneys with that office, where will this line of reasoning end? Can a judge no longer criticize an attorney without risking being recused from hearing cases by that entire firm as well as any lawyer contracted by that firm? If a judge can so easily be recused in so many cases involving so many lawyers, at what point does our entire system of random allotment become corrupted?

On page 6 of its brief, the Criminal Division cites *In Re Judge Henry Lemoine*, 686 So. 2d 837 (La. 1997), for the proposition that, "[t]he grounds within this [criminal] statute are not illustrative; they are exclusive" and "[t]he Louisiana Supreme Court has also held that where the grounds for recusal are proven, the judge himself has no discretion and must grant the motion."

The Criminal Division is correct in noting that the recusal grounds are exclusive, and that an involuntary recusal may not be granted unless Article 151's statutory requirements are met, and if those requirements are met, the judge must recuse himself. However, as noted, *supra*, those requirements have not been met in *Covington*. Furthermore, *In Re Judge Henry Lemoine* is a disciplinary hearing, not a civil recusal hearing under Article 151. The facts in this case are also distinguished. A Pineville judge was subject to a disciplinary action for deciding cases in which he had an active financial interest in the outcome of the cases that he was deciding. In no way do these facts support a recusal of Judge Carter in the *Covington* case.

3. *In Re: Judge Perrell Fuselier*, is inapplicable because it is a disciplinary case rather than a recusal case.

On page 6 of its brief, the Criminal Division cites *In Re: Judge Perrell Fuselier*, 837 So. 2d 1257 (La. 2003), for the proposition that, "Louisiana jurisprudence has supported this position, and held that the Code of Judicial Conduct is binding on all judges, and the Code of Judicial Conduct has the force of law."

This case had nothing to do with recusal; instead, it was a disciplinary hearing. While the Code of Judicial Conduct is binding on all judges, neither it, nor the *Fuselier* case, is instructive as to whether Judge Carter should be involuntarily recused from the *Covington* case. Indeed, as explained in Section III (B) of this brief, if a judge believes that he should recuse himself to avoid violating the Code of Judicial Conduct because of the appearance of bias, he may do so. However, if he chooses not to recuse himself, he may only be recused under Article 151, not the Code of Judicial Conduct.

In any event, the *Fuselier* case has no similarity to the *Covington* case whatsoever. In *Fuselier*, an Oakdale City judge was brought before the Disciplinary Board and suspended for 120 days after he made numerous improper legal rulings in criminal cases, such as accepting guilty pleas without prosecutors present and improperly instituting, authorizing, and participating in the court's worthless check program.

Furthermore, he contacted the employer of a criminal defendant, causing her to be fired from her job. No similar accusations have been made against Judge Carter, and there is no actual or perceived bias in Judge Carter continuing to handle the *Covington* case.

4. *Louisiana Bar Association vs. Harrington*, is inapplicable because it is a disciplinary case rather than a recusal case.

On page 6 of its brief, the Criminal Division cites *Louisiana Bar Association vs. Harrington*, 585 So.2d 514 (La. 1990), for the proposition that, ". . . the Code of Judicial Conduct has the force of law." Once again, this was another disciplinary case that had nothing to do with recusal. In this strange case, an attorney represented a client with a dispute over the sale of carpet. The attorney "barged into Mrs. James' new home, without permission, callously threatening and loudly confronting her, in a totally unprofessional manner" and attempted to collect his client's alleged debt, in violation of federal law. The attorney was suspended from practicing law for 18 months.

Harrington does not discuss Article 151 or the standards for judicial recusal at all. And while it *Harrington* allegedly stands for the proposition that the Code of Judicial Conduct has the force of law, that force of law pertains only to the disciplining of attorneys and judges, not to their involuntary recusal, which is governed exclusively by Article 151 in civil cases.

Clearly, the cases, statutes, and arguments relied upon by the Criminal Division are inapplicable to *Covington* and the other civil cases, and the appropriate standard of review in *Covington* and the other civil cases is limited to La. C.C.P. Article 151.

D. The Criminal Division's Motion to Recuse is untimely in *Covington*.

In January, 2007, five years after filing suit, Judge Carter granted summary judgment to Ms. Covington. That judgment was signed in late 2007 and appealed by McNeese throughout 2008. All that remains in *Covington* is for that judgment to be enforced through a preliminary injunction and for attorney fees and damages to be awarded. Only two days before that judgment was to be enforced through a preliminary injunction, the Attorney General Criminal Division filed a motion to recuse the trial judge.

The Third Circuit has held that a court may not consider a recusal motion following the rendering of a judgment, unless the grounds for the recusal were discovered

after judgment was signed and the recusal motion was filed immediately. In *O'Neill vs. Thibodeaux, et al.*, 709 So.2d 962 (La.App. 3 Cir. 03/06/98), the Third Circuit, citing La. C.C.P. Article 154, held:

A party desiring to recuse a judge of a district court shall file a written motion therefor assigning the ground for recusation. This motion shall be filed prior to trial or hearing unless the party discovers the facts constituting the ground for recusation thereafter, in which event it shall be filed immediately after these facts are discovered, but **prior to judgment.**

A judgment has already been signed and appealed in *Covington*, thus making the Criminal Division's Motion untimely. Furthermore, by the Criminal Division's own admission, it has been aware of Judge Carter's alleged bias for at least two years, and, indeed, previously attempted to have Judge Carter recused in other cases as far back as 2007. If the Criminal Division had grounds to recuse Judge Carter in 2007, why would it wait two years—until 48 hours before *Covington's* preliminary injunction—to suddenly decide that Judge Carter should be recused in *Covington*? Such a strategy violates the Third Circuit's mandate in *O'Neill* that a recusal motion must be made prior immediately after facts warranting a recusal are discovered and, in any event, prior to the signing of a judgment.

E. Judge Carter's statements regarding attorneys and witnesses in his courtroom do not trigger recusal under La. C.C.P. Article 151.

The Criminal Division attached several statements to their brief which allegedly shows a bias by Judge Carter against the Criminal Division. It is significant that each of these statements occurred in specific, isolated cases and directed at specific attorneys not involved in *Covington*. It is also significant that each statement was presented with little or no context, and at no time did these transcripts ever suggest that Judge Carter's comments about certain Criminal Division attorney or attorneys would have any bearing on his rulings in *Covington*.

Furthermore, the transcripts appear to be taken out of context. Rather than show bias, these transcripts reflect the words of a judge following his duties under the Code of Professional Conduct to ensure the integrity of the attorneys who appear in front of him, to investigate the facts and circumstances surrounding the criminal cases that he is bound to decide, and to maintain the dignity of his courtroom.

The first full quote (other than partial sentences not provided in any context) cited by the Criminal Division as evidence for Judge Carter's bias occurred in another recusal

hearing, presumably filed by the Criminal Division as well:

AG: That's right. You believe that a police officer has been using the Attorney General's Office to manipulate this case, and let me bring you one more thing on page 18. 'This is not the biggest case the Attorney Generals have in my court. They don't want to try nothing. They never try nothing.'

CARTER: That's right.

AG: They plead people down from a felony to misdemeanors all the time, but this is your big case. That makes me suspicious that it might be political and I wanted you to talk to me about whether or not that's so because if it is, it's interfering with the operation of this Court and it's contemptuous conduct in my opinion and I want an explanation for that. Now you responded by filing a motion to recuse which tells me you must have something to hide.'

CARTER: Yea, it does. It's been my experience that--

AG: So the A.G.'s office has something to hide.

The Attorney General Criminal Division ended this quote with its own leading question, but it failed to provide Judge Carter's answer, which continues:

CARTER: Look, listen. I'm trying to help the lawyer to understand that he may need to do a little more homework, okay, because I don't like to surprise folks, okay. So I'm telling the lawyer that in my experience I know that police officers have a close relationship with prosecutors. That's understandable and that's acceptable, but when it gets to a point where you file a motion just to accommodate the police officer, if in fact that was the case, I did not. . . [transcript exhibit ends]

Clearly, Judge Carter testified that he was concerned about the conduct of a single, unidentified lawyer involved in an unnamed criminal case. Judge Carter had a basis for believing that this attorney had engaged in improper behavior which was interfering with his Court. Rather than hold that lawyer in contempt of court or otherwise take punitive action, which a biased judge might do, Judge Carter apparently attempted to resolve his concerns with the attorney and gain more information about the conduct in question. This is a characteristic of a good, fair, and thorough judge.

Next, the Criminal Division provides a transcript quote from Judge Ritchie, who stated that, "Judge Carter expressed, as I said, too many opinions, and rather strong opinions, about the motivations of the Attorney General's Office. . . ." Only one page of Judge Ritchie's transcript is provided, and it is unclear what opinions Judge Ritchie is referring to or what the final outcome of his ruling was. Furthermore, Judge Ritchie's opinion that Judge Carter had too many opinions about the motivations of the Attorney General's Office is limited to one criminal case under specific circumstances which have nothing to do with the *Covington* case.

The law is clear that judges may comment on the conduct of attorneys or witnesses before their court. In *Brown vs. Brown*, 877 So.2d 1228 (La.App. 2 Cir. 07/21/04), *discussed, supra*, a judge made numerous sarcastic comments about a party's personal life, dating life, poverty, and parenting skills. The Second Circuit noted at 1238:

In this instance, although the comments made by the judge during testimony might be construed to appear biased, we conclude that it does not rise to the level of showing actual bias. Regarding the statements made during the court's oral reasons for judgment, the statements represent impressions and conclusions drawn from the trial judge's participation as presiding judge in the trial of the defendant. Where the alleged bias or prejudice stems from testimony and evidence presented in the proceedings, the bias or prejudice is not of an extrajudicial nature as would warrant recusal. *Citing State vs. Williams*, 601 So.2d 1374 (La. 1992).

Likewise, any reasonable comments or concerns by Judge Carter about the actions of attorneys or witnesses involved in cases before him are permissible and expected, given the nature of Judge Carter's mandate to render decisions and maintain order in his courtroom. Other circuits have adopted this conclusion.

In *Sons vs. Delaune, et al.*, 634 So.2d 1212 (La.1st Cir. 1993), a judge stated on the record, "I do not like Mr. Sons." Mr. Sons, the plaintiff in a personal injury lawsuit, filed a motion to recuse the trial judge, alleging that this showed bias against him. The trial judge did not dispute that he made a statement to that effect based on the party's failure to appear for an independent medical exam. However, the judge claimed that he could, nevertheless, be impartial in the case. The First Circuit agreed.

In the Third Circuit case of *McCoy, et al. vs. Calamia*, 653 So.2d 763 (La.App. 3 Cir. 4/5/95), a doctor was sued in a malpractice case. During the suit, the judge made comments on the record that there is hostility between the legal and medical professions and blamed lawyers for that hostility. The defendant physician won his suit, and plaintiffs appealed, alleging that the judge was biased in favor of doctors. The Third Circuit held at 26 that, "upon examining these allegations we must conclude that they do not show bias of such a substantial nature as to support a motion to recuse."

Clearly, judges are allowed to give their reasonable opinions in cases before them, and doing so does not make them biased. The statements provided by the Criminal Division's Exhibit "B" do not support involuntary recusal under Article 151.

F. Judge Carter's investigation of the facts in a case involving his son does not trigger recusal in *Covington* under La. C.C.P. Article 151.

The Criminal Division also cites testimony regarding private statements made by Judge Carter in a case involving his son, which he does not preside over. On page three of the Criminal Division's brief is a quote from Jennifer Williams, who apparently called Judge Carter seeking his advice as a fellow fact witness in that case. During that conversation, she says that Judge Carter warned her that she might be subjected to misleading cross examination in the case.

If Judge Carter and Jennifer Williams were both fact witnesses whose testimony differed (for whatever reason), there is nothing improper about Judge Carter trying to determine whether these differences were based on differences in perception or because of outside influence. There is no evidence that Judge Carter attempted to influence Jennifer Williams' testimony, and Judge Carter never definitively stated that he knew that she had been pressured. Instead, he merely suggested it to her privately as a theory, which he is entitled to investigate. Furthermore, Judge Carter's concern about this witness's testimony or the actions of a Criminal Division lawyer involved in that case does not reflect any bias in the *Covington* case.

Finally, the Criminal Division suggests that Judge Carter cannot be fair to any attorney in the Attorney General's Office or any private counsel hired by the State because the Criminal Division is prosecuting Judge Carter's sons. However, the family members of judges are prosecuted every day for both major offenses and minor ones. Indeed, judges themselves are not above the law, and they are routinely prosecuted, even if just for traffic violations. These judges are all "personally interested" in their cases and their family members' cases, yet they are not automatically recused from any civil or criminal case in which any employee or contract attorney of the local district attorney or the state attorney general office is involved.

There is no basis under Article 151 for a recusal in *Covington* because of anything involving Judge Carter's sons or because of Judge Carter's private conversation with a fact witness to a case that he is not presiding over. As noted, Article 151 requires that any bias by a judge be directed to the *specific* lawyers or the *specific* cases which a moving party seeks to have the judge recused from. Even if the Criminal Division could prove that their theory of Judge Carter's motives and bias are correct, there is nothing to connect these motives and bias to any of the attorneys or clients appearing in *Covington*.

G. The Criminal Division must prove that Judge Carter's statements were untrue and unreasonable.

Even assuming, *arguendo*, that Judge Carter's statements had been directed to an attorney or party in the *Covington* case, these statements would still fail to satisfy the requirements of Article 151 unless the Criminal Division could prove that they were untrue and unreasonable. The *Covington* Plaintiffs have not been provided with the full transcripts referenced by the Criminal Division. However, if Judge Carter had any basis whatsoever for accusing the particular Criminal Division attorneys of delaying proceedings, forum shopping, playing politics, engaging in conspiracies, and avoiding trial, then Judge Carter not only had a right to make his statements, but he may have had an **obligation** to make the Criminal Division aware that its behavior would not be tolerated in his courtroom.

Judges get paid to maintain order in their courtrooms and assure that the lawyers who appear before them do not engage in unethical behavior. If Judge Carter believed that such behavior was occurring, he had a clear right under the First Amendment of the United States Constitution to speak out against that behavior and a clear obligation under the Louisiana Rules of Professional Conduct and the Judicial Canons, to investigate this behavior and place the offending attorneys on notice of his concerns. This does not constitute bias.

1. There is a factual basis for Judge Carter to accuse the Attorney General's Office of delaying proceedings and avoiding trial in *Covington*.

There is no evidence or even allegation that Judge Carter accused the Attorney General's Office of delaying the *Covington* case or of avoiding trial in the *Covington* case. However, Judge Carter would have been justified in doing so, and such comments from the trial judge would not only have been warranted, but expected under the *Covington* circumstances.

The *Covington* case has been pending for nearly nine years, in large part because the Attorney General's Office (while representing McNeese) has requested numerous continuances and filed appeals that the Third Circuit recognized, *sue sponte*, as frivolous. Ms. Covington filed her summary judgment and preliminary injunction on January 24, 2006, after spending years trying to persuade the Defendants to accommodate her at

McNeese in her wheelchair. The Defendants, through the Attorney General's Office, asked the Plaintiffs to agree to continuances on March 23, 2006, April 27, 2006, and again on June 23, 2006.

On each occasion, the Defendants, through the Attorney General's Office, persuaded Plaintiffs to agree to the continuances under the false promise that if they were granted more time, they would provide accommodations for Covington to return to McNeese in her wheelchair. The Defendants, through the Attorney General's Office, failed to honor any of these promises and merely used this time to delay Covington's right to have her case adjudicated by nearly a year.

Only days before the summary judgment hearing, the Defendants, through the Attorney General's Office, placed Covington on notice of an alleged procedural defect in her petition. While the Plaintiffs disputed that defect, out of an abundance of caution, they were forced by the Defendants, through the Attorney General's Office, to file a continuance on November 14, 2006 as they corrected the alleged defect.

On January 4, 2007, the Defendants, through the Attorney General's Office, entered into an informal stipulation to again delay the Plaintiffs' preliminary injunction. This delay was premised upon the Defendants' promise, made through the Attorney General's Office, that they would promptly accommodate Covington in her wheelchair at McNeese and pay her attorney fees if she prevailed on summary judgment.

Covington prevailed on summary judgment on January 24, 2007. Judgment was not signed until October 4, 2007, because the Defendants, through the Attorney General's Office, refused to agree to the form of any of the Plaintiffs' proposed judgments. After providing ample notice, Plaintiffs were eventually forced to submit a proposed judgment to the Court without approval of the Attorney General's Office. Once again, McNeese, through the Attorney General's Office delayed Ms. Covington's right to justice by nearly another year.

Rather than honor its agreement to accommodate Ms. Covington, the Defendants, through the Attorney General's Office, appealed the summary judgment. The Third Circuit referred to that appeal, *sue sponte*, as “frivolous”, a “concoction”, “completely irrational”, “indefensible”, having “audacity”, and “absurd”. The Defendants, through the Attorney General's Office, appealed to the Supreme Court, where its writs were

unanimously denied.

Covington prevailed on summary judgment three years ago and prevailed on her appeal one year ago. The Attorney General's Office continues to defend its clients' refusal to comply with the trial court's January, 2007 directive to upgrade the McNeese campus to comply with the ADA, and there is still no preliminary injunction in effect to protect Ms. Covington's rights as a wheelchair-bound student at McNeese.

In 2009, Covington was forced to re-file her preliminary injunction as well as six motions to compel to force the Defendants, represented by the Attorney General's Office, to answer discovery, some of which is four years overdue and has neither been answered nor objected to despite repeated requests. Some of this discovery would likely help Ms. Covington learn about any compliance upgrades being planned at McNeese so that she might be able to establish a timeline for returning to school.

Covington's motions to compel and her latest preliminary injunction have been pending for months, yet Covington has been prevented from having her hearings because of these continued delay tactics. This very recusal Motion is perhaps the most egregious delay tactic, and it was filed only 48 hours before Ms. Covington's October 15, 2009 hearings were scheduled and only days after McNeese urged the trial court *to delay* ruling on Ms. Covington's Preliminary Injunction until the State had the opportunity to sign a settlement agreement with the U.S. Department of Justice.

Given these circumstances, Judge Carter would have been more than justified in saying that the Attorney General's Office delays proceedings and avoids trial. Yet he has never made such a comment in *Covington*. Unbelievably, the Criminal Division wants Judge Carter recused from *Covington* for saying, in a different case, what he should have said in *Covington*.

2. There is a factual basis for Judge Carter to accuse the Attorney General's Office of forum shopping

While lawyers may legitimately chose to file their case in a forum which they consider to be more favorable (or less unfavorable) to their cause of action such as a plaintiff filing in state court rather than federal court or a defendant removing the case from state court to federal court, it is not generally acceptable in our system of justice for one party to have unilateral discretion to pick a particular judge to hear his case from among a group of judges. Nor should a party be permitted to deselect a judge from a

group of potential judges who might hear his case simply because he feels that particular judge might not be as hospitable to his cause as the other judges. The rules of procedure, local rules, and the rules of ethics all have stringent safeguards to prevent this from happening. The process for assignment of a case to the particular judge is mandated by law to be a strictly random process to be conducted by a third party such as the Clerk of Court in a way to insure that there is no meddling or interference from either the judges, the parties, or anyone else. This process is essential to safeguard both the integrity and the appearance of integrity of our system.

As discussed earlier, the courts and the legislature, recognizing the potential abuse of the sanctity of the judicial system through the recusal process, carefully defined and limited the circumstances under which a judge can be involuntarily recused to narrow circumstances where there is clear evidence that proves such an actual, case specific bias of the judge such that he or she would be unable to conduct fair and impartial proceedings. The danger of an overly broad recusal standard is that parties will seek to gain an advantage by attempting to recuse a judge whom they fear would not be as favorably disposed to their particular type of case or arguments as another judge might be. For example, if a lawyer who represents plaintiffs perceives that a judge is conservative, slow to find liability in cases, or consistently makes small damage awards, he might be tempted bring an action to permanently recuse that judge because he has been reprimanded or warned by that judge in the past. If the plaintiff's lawyer were able to remove a judge or even all the judges whom he considered to be conservative, it would give him a great advantage in his plaintiff cases.

Similarly, if a prosecutor's office is able to permanently remove all judges (or a particular judge) who it considers to be inhospitable to the prosecution or overly exacting of its requirements of proof of the prosecution, then it will be left with only those judges which are more hospitable to the prosecution or less exacting to the disadvantage of those accused of crimes and their defense attorney representatives. The Legislature feared this slippery slope, so it purposefully mandated that recusal of a judge requires such a high burden of proof of such bias that it is impossible for him to be fair in the matter.

Here, the Criminal Division indicts Judge Carter in broad, sweeping terms based only upon his making private comments expressing disapproval of certain trial tactics by

a particular lawyer in the Criminal Division. These comments were not made to the media or the jury, and they appeared to be designed to solicit the sort of information that judges should be asking of prosecutors in order to assure that prosecutorial misconduct is not occurring in his courtroom. Yet based on these comments, the Criminal Division asks us to infer that Judge Carter harbors such a degree of prejudice that he could not possibly fairly decide the merits of any case in which any lawyer with the Attorney General's Office or its contract attorneys are involved, whether criminal or civil. Furthermore, the Criminal Division claims that this bias does not just extend to the particular matter at that particular time, but in all matters at all times including forever into the future. Such an astonishing claim of bias is an attack on the integrity of Judge Carter and the integrity of our entire judicial system.

It is noteworthy that the Criminal Division does not even indicate that Judge Carter took any prejudicial action against the attorney or attorneys in question, such as citing them for contempt, barring them from presenting evidence, invoking an investigation of them, or referring anyone for disciplinary action; nor did he threaten to do so. The Criminal Division makes no allegation of any prejudicial action actually taken by Judge Carter against them, only that they fear he cannot be fair despite Judge Carter's assurances to the contrary. Indeed, by notifying the Attorney General's Office of his concerns prior to any trial, he made them aware of those concerns so that they would know about them and avoid engaging in them.

In a time of heightened concern about shocking injustices caused by prosecutorial misconduct of the very nature mentioned by Judge Carter, that the Attorney General's Office would bring an action to remove him from hearing any cases in which it is involved because he indicated he would be vigilant for indices of prosecutorial misconduct based on his past observations in his courtroom should be a matter of concern to judges everywhere and to everyone concerned with the integrity of the justice system.

As an example, in a recent U.S. Supreme Court case, *Pottawattamie County v. McGhee*, 547 F.3d 922, 925 (8th Cir. 2008), Docket No. 08-1065 of the U.S. Supreme Court, argued Nov. 4, 2009, dismissed on January 10, 2010 because of a settlement reached by the parties, reportedly of \$12 million), two defendants were convicted of murder and sentenced to life in prison. They served 25 years, eventually being released

after files were discovered that proved that the prosecutors framed the defendants by coaching the lead witness to fabricate his testimony at trial and failing to disclose exculpatory evidence. Defendants sued the prosecutors. The prosecutors contended that they enjoyed absolute immunity from liability under state statute. The trial court dismissed the plaintiffs' case, but the Eighth Circuit reversed. The U.S. Supreme Court issued writs and the matter was argued on November 4, 2009. Though the US Supreme Court Justices seemed to disagree on the issue of the availability of absolute immunity, they were in unanimous agreement as to the horror of the conduct of the prosecutors and the damage it did to the justice system.

A long litany of cases of equally shocking cases of prosecutorial misconduct creating grave injustices could be cited where greater vigilance by a judge could have prevented an injustice and, on the other hand, where because of a judge's vigilance such an injustice was prevented. Indeed, it is the duty of a judge in a criminal case to be vigilant for the possibility overreaching by prosecutors (or any other parties) who often have the decided advantage of the power and resources of the state with very broad discretion, and a judge should be applauded, not condemned to recusal, when he expresses concerns as to a prosecutor's conduct.

Covington does not mean to imply in any way that the prosecutors to whom Judge Carter addressed his remarks or the movers in this action for recusal of Judge Carter are or have been guilty of any prosecutorial misconduct of any kind. Yet it is troubling that they would bring an action to recuse Judge Carter for simply attempting to fulfill his duty to control the proceedings in his courtroom and to be alert to prevent possible serious injustices from happening in his courtroom not only to the detriment of the defendant, but to the Constitution, the justice system, and the rule of law. To attempt to remove a judge, to punish him for daring to even question the prosecutorial actions or methods is a bad precedent and should not be encouraged, but discouraged.

It is clear that the Attorney General's Office finds a tactical advantage to not having its cases heard in Judge Carter's court and that they might have to work harder to gain his confidence. However, having a tactical advantage or having to work harder to engender the confidence of the judge is not a sufficient ground for having a judge recused.

IV. CONCLUSION

The requirements for recusal under La. C.C.P. Article 151 have not been met, and it is unlikely that they will be met after an evidentiary hearing. Therefore, the *Covington* plaintiffs pray that the Criminal Division's Motion be denied and that Judge Carter be allowed to proceed with ruling on the Plaintiffs' pending Preliminary Injunction and Six Consolidated Motions to Compel as soon as possible.

Respectfully submitted,

SETH HOPKINS
Louisiana Bar Roll Number 26341
1318 Dowling Street
Houston, Texas 77003
(337) 527-7071

JAMES HOPKINS
Louisiana Bar Roll Number 06990
P.O. Box 205
208 East Napoleon Street
Sulphur, Louisiana 70664
(337) 527-7071

CERTIFICATE OF SERVICE

I CERTIFY I have requested service of process on all counsel and have further served all counsel, by depositing copies in the U.S. mail, each properly addressed and with proper postage prepaid.

Sulphur, Louisiana, this _____ day of January, 2010.

SETH HOPKINS