

Hearing nears on motions to dismiss of Judge Joseph, court officer

Unusual number of amici in 'unprecedented' case

By: Kris Olson October 24, 2019

With preliminary matters before a magistrate completed, the cases against Newton District Court Judge Shelley M. Richmond Joseph and her former court officer are ready to be handed over to U.S. District Court Judge Leo T. Sorokin.

The first order of business for Sorokin will be to hear the defendants' motions to dismiss the indictments against them, on which Joseph and Wesley MacGregor have an army of amici lined up behind them.

While federal prosecutors and Joseph and MacGregor's counsel have honed in on arguments related to statutory interpretation and constitutional concerns, the amici are generally seeking to widen Sorokin's scope, highlighting the implications of allowing the prosecution to proceed.

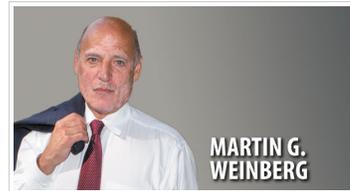
"This case really goes to the heart of judicial independence and asks important questions about what is the job of a judge," said Matthew R. Segal, legal director of the ACLU of Massachusetts, who helped author an amicus brief on behalf of a group of retired state judges.

The issues raised by the defense in their motions to dismiss "stand at the intersection of state judicial independence and the outer perimeter of federal obstruction statutes," noted Boston defense attorney Martin G. Weinberg, who is not involved in the case.



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— Martin G. Weinberg, Boston



Weinberg called the issues facing Sorokin "difficult and delicate," due in no small measure to the unique underlying facts.

"Whether the issues are resolved pre-trial or instead within the cauldron of a jury trial, they hold great significance both for Judge Joseph and more generally for the balance of federal powers and state judicial sovereignty," he said.

Joseph's attorney, Thomas M. Hoopes of Boston, and the U.S. Attorney's Office declined to comment on the pending motions to dismiss. MacGregor's attorney, Rosemary C. Scapicchio of Boston, did not respond to a request for comment.

Testing immunity's limits

Joseph's memorandum of law in support of dismissal begins simply: "This case is unprecedented."

One of the ways in which that is the case, the brief continues, is that "no judge has ever faced criminal charges for acts that did not involve personal financial gain, fraud, self-dealing, or civil-rights violations."

However, prosecutors dispute that contention at length in their reply, rattling off a litany of examples in which judges had been prosecuted for other types of crimes.

The parties seem to agree that assessing whether Joseph should benefit from judicial immunity hinges on whether she was engaged in "judicial acts" when she allegedly conspired to allow an undocumented immigrant who had appeared in her courtroom on

Trial(s) may not be 'speedy'

In terms of when the trial of Newton District Court Judge Shelley M. Richmond Joseph and court officer Wesley MacGregor might occur, the parties have requested that the 70-day clock on trying the case not start running until after the hearing on the motions to dismiss and other motions is held.

drug and fugitive charges to evade a plain-clothes Immigrations and Customs Enforcement agent who had shown up at the Newton courthouse on April 2, 2018.

To her defense team, Joseph's acts "lie at the heart of the judicial task."

"The Supreme Court and lower courts alike have recognized that exercising control over courtroom proceedings and individuals in the court is a quintessentially judicial activity," they assert in their brief.

The government predictably disagrees, describing her conduct — "using a ruse to impede a federal immigration proceeding by helping an undocumented immigrant evade arrest by an immigration officer" — as extrajudicial.

What Judge Joseph did was just as ineligible for judicial immunity as if she had "created a ruse to impede a grand jury investigation by helping a criminal defendant who happened to be a friend exit the back of the courthouse to evade service of a grand jury subpoena by an FBI agent waiting in the front lobby," the prosecution argues.

Joseph acknowledges that the U.S. Supreme Court has only once confronted the question of whether judicial immunity can bar a federal criminal prosecution, in the 140-year-old *Ex parte Virginia*. While the U.S. attorney shares the view of courts that read *Virginia* as prohibiting the assertion of judicial immunity in a criminal proceeding, Joseph believes that interpretation is incorrect.

Statute under microscope

Joseph and MacGregor's challenges to the statutes under which they are charged, 18 U.S.C. §§1505 and 1512(c)(2), boil down to two key words: whether their behavior was "corrupt," and whether they interfered with a "proceeding," as those terms are defined in the statutes.

Both Joseph and MacGregor say the government has adopted an overly broad definition of what it means to have acted "corruptly."

"The indictment is devoid of any allegation of fraud or self-interest, instead alleging only that the actions of a state court judge within the scope of her lawful authority on matters before her in her judicial role violate the statute," Joseph's brief reads.

But, citing the U.S. Supreme Court's decision in *United States v. Aguilar*, the government argues that for a defendant to have "the evil intent to obstruct," all that is needed is "knowledge that [her] actions are likely to affect" an existing or foreseeable judicial proceeding, a definition under which the actions of both Joseph and MacGregor qualify.

Both Joseph and MacGregor also say that the indictment fails to allege that they obstructed a "proceeding" because, while ICE had issued a federal immigration detainer and a civil immigration warrant for the arrest of the man they allegedly helped escape, formal Immigration and Nationality Act removal proceedings had not begun.

But prosecutors respond that Joseph and MacGregor both knew that the ICE officer wanted to arrest the man in order to detain him for an immigration proceeding concerning his removability.

The two sides are also doing battle over whether charges under §1512(c)(2) are limited to actions involving "evidence impairment," like shredding documents or harassing witnesses to discourage their testimony.

Constitutional challenges

Beyond the facial challenges to the statute, both Joseph and MacGregor assert that if the federal obstruction-of-justice statutes apply to the failure of a sitting state judge and her court officer to assist the federal government in enforcing federal immigration law, their prosecution would violate the 10th Amendment.

"As the federal government has conceded in many contexts, the 'anti-commandeering' principle prohibits it from directing state officers — including state judicial officers — to assist in the enforcement of federal immigration law," Joseph's brief states, citing to the Supreme Court's 2017 decision in *Lunn v. Commonwealth*, among other cases.

The brief adds that the federal government is not allowed to "achieve the same result by casting a command as a prohibition."

"But that is exactly the purpose and effect of Judge Joseph's prosecution: to punish her for doing something that the federal government cannot force her to do — assist it in enforcing the federal immigration laws," the brief states.

But prosecutors point to guidance issued by the Trial Court administration in the aftermath of the *Lunn* decision,

clarifying that court personnel, including judges, should not actively impede ICE.

Joseph and MacGregor also each say that the statutes they have been charged under are unconstitutionally vague, depriving them of fair notice that they might be breaking the law.

Boston attorney Howard M. Cooper, who helped author an amicus brief on behalf of the Massachusetts Association of Criminal Defense Lawyers, finds the vagueness argument particularly compelling.

It would have been inconceivable for a judge to understand she could be charged for the conduct Joseph is alleged to have engaged in, he said.

"No judge in her right mind would ever think that could happen," Cooper added.

Amici rebutted

In addition to MACDL, the roster of amici lining up behind Joseph and MacGregor includes a group of distinguished legal scholars who speak to the state sovereignty and constitutional issues in the case; the Attorney General's Office; the American Immigration Lawyers Association and Justice at Work, which discuss the chilling effect the prosecution creates on noncitizens' willingness to come to court; and a group of dozens of retired judges known as the Ad Hoc Committee for Judicial Independence.

Cooper acknowledged that it is unusual for such large segments of the bar to step up and file amicus briefs in support of motions to dismiss in a federal criminal case.

"But the reason it's unusual is because the charges are so unusual," he said.

MACDL's brief comes from the perspective of attorneys who deal daily with the challenges of convincing undocumented people, both parties and witnesses, to come to court, Cooper said.

"The idea that ICE can arrest people in courthouses fails to recognize what is needed for the fair administration of justice," he said.

The Ad Hoc Committee for Judicial Independence argues that Joseph's conduct, far from being criminal, "was the product of what is well understood to be a judge's broad discretion to manage her courtroom, including the movement and conduct of parties who appear before her."

In its response to the motions to dismiss, the government responds directly to two of the amici's arguments. Prosecutors call "untrue" the idea that they are impeding immigrants' right to access the courts, saying that right would "remain the same" whether Joseph and MacGregor are prosecuted or not.

"The argument raised by these amici is a thinly veiled attempt to justify Judge Joseph's crimes as a response to an allegedly unlawful act by the ICE Officer," the government argues. "That contention is based on a misunderstanding of both the law and the facts."

Segal noted that the government has essentially acknowledged that its theory is a less-than-modest one.

In short, the government argues that state court judges will not be chilled in the performance of their duties because grand juries will weed out specious prosecutions, and the government will not even

Beyond that, the parties have indicated that they would not necessarily be looking to meet that 70-day benchmark.

"The parties submit that the ends of justice served by permitting counsel for the parties the reasonable time necessary for effective preparation, taking into account the exercise of due diligence, outweighs the best interest of the public and the Defendants in a speedy trial," the parties wrote in their recent joint memorandum.

On Oct. 22, Joseph and MacGregor also filed objections to Magistrate Judge Donald L. Cabell's order denying them certain categories of discovery material, including statements made to the grand jury of the defense attorney who was part of the sidebar conversation during which Joseph went "off the record" and allegedly disabled the recording system in her courtroom for just under a minute.

Those objections highlight the possibility that Joseph and MacGregor will at some point be compelled to request to be tried separately, in part because Joseph's defense may necessarily entail undercutting MacGregor's defense on the additional perjury charge he is facing. MacGregor is alleged to have lied to the grand jury about whether he knew that ICE was in the courthouse waiting for the release of the undocumented immigrant.

"At this juncture, it appears that the defendant Joseph cannot help but argue that virtually every single employee of the small courthouse DID know that ICE was there and that it would be preposterous to suggest that she would knowingly participate in any scheme to let the non-citizen out in a manner so obvious to all the court world so as to avoid ICE," Joseph's objection reads.

The joint memorandum notes that Joseph had, through counsel, rejected the offer of a deferred prosecution agreement the government had extended to her, while MacGregor had not yet responded to his plea offer.

But the parties call a trial a "certainty" if their motions to dismiss are not allowed. The government has estimated that a trial would last approximately one week, with the defendants expecting it to last up to 10 days.

bring cases if it does not believe it can meet its burden of demonstrating corrupt intent.

But Segal said knowing that crossing the federal government could result in being prosecuted would be enough to alter judges' behavior.

"It would be cold comfort to tell judges, 'Maybe the grand jury will decline to indict you,'" Segal said, adding that it is "often a judge's job to displease prosecutors."

The government also acknowledges U.S. District Court Judge Indira Talwani's recent ruling in a case brought by district attorneys of Suffolk and Middlesex counties and immigration advocates. Talwani granted a preliminary injunction, ordering ICE to stop "civily arresting parties, witnesses, and others attending Massachusetts courthouses on official business while they are going to, attending, or leaving the courthouse."

But prosecutors note that Talwani's ruling does not extend to individuals who are brought to a courthouse in federal or state custody, as was the case with the undocumented immigrant Joseph and MacGregor allegedly helped escape.

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