

Attorney at that time and in charge of the investigation." The indictment shows that Robert J. Grace was the United States Attorney on the date of issuance of the indictment.

[1] In the *Amerine* case we held that the disqualification rule of 28 U.S.C. § 455 (1964) applies mandatorily to the situation where the trial judge has previously been "of counsel" in the same "case." We are not inclined to extend the mandatory disqualification holding of *Amerine* to require a Judge to disqualify himself without regard to prejudice because of some prior general supervisory responsibilities as United States Attorney over all federal criminal investigations in his district.

[2] A "case" does not, of course, necessarily come into being with the happening of the offense. The critical point for *mandatory* disqualification is, we think, the initiation of the prosecution. For purposes of 28 U.S.C. § 455, we believe that a "case" begins with the first formal prosecutorial proceeding (arrest, complaint or indictment) which is designed to bring a named alleged offender before the court.

The record currently before us does not allow for a conclusive determination as to when in relation to the District Judge's term of office as United States Attorney this "case" was initiated. It may well be that the District Judge was clearly never "of counsel" in this "case" within the meaning of 28 U.S.C. § 455. Or, as in *Amerine*, there might have been a prior complaint about this same offense and offender during the present Judge's term as United States District Attorney.

In addition, some consideration of the facts pertaining to any possible disqualification under the other clauses of § 455 may be warranted.¹ See *Adams v. United States*, 302 F.2d 307 (5th Cir.

1. "Any justice or judge of the United States shall disqualify himself in any case in which he has a substantial interest, * * * or is so related to or connected with any party or his attorney as to ren-

1962). (Majority and dissenting opinions).

The case is remanded to the District Court for any necessary implementation of the record and for further consideration of the disqualification issues under the holding of *United States v. Amerine*, *supra*, and this opinion.



Samuel MONTGOMERY, a minor by his father and next friend, Jessie Montgomery, Ind., etc., Plaintiff-Appellant,

v.

OAKLEY TRAINING SCHOOL et al.,
Defendants-Appellees.

No. 29347.

United States Court of Appeals,
Fifth Circuit.

May 6, 1970.

Appeal from orders of United States District Court for the Southern District of Mississippi, Dan M. Russell, Jr., J., adopting desegregation plan for reform schools. The Court of Appeals held that plan was adequate insofar as it required that juveniles be assigned to schools regardless of race, though it did not call for transfer of juveniles previously assigned, but that plan should provide for integration of facilities, activities and faculty and for periodic reports to district court.

Affirmed in part, reversed in part, and remanded.

1. Reformatories ↩2

Plan for desegregating state's two reform schools was adequate insofar as

der it improper, in his opinion, for him to sit on the trial, appeal, or other proceeding therein." 28 U.S.C. § 455 (1964).

it required that boys 15 years or older be assigned to one school regardless of race, and that younger boys and all girls be assigned to other school regardless of race, though it did not transfer children previously assigned on segregated basis, where both schools were integrated as result of the order, where all children previously assigned would be paroled within a few months, and where there was testimony that transfer might interrupt rehabilitation.

2. Reformatories ↩

Plan for desegregating state reform school system should provide for integration of classrooms, dormitories, athletic programs, and all activities and services, for integration of faculty without waiting for filling of vacancies on nonracial basis and without consideration of concentration of one race in particular school, for integration of nonprofessional as well as professional members of staff, and for periodic reports to district court until it should decide that dual system has been completely replaced by unitary, integrated system.

Reuben V. Anderson, Fred L. Banks, Jr., Melvyn R. Leventhal, John A. Nichols, Jackson, Miss., Jack Greenberg, Norman Chachkin, Jonathan Shapiro, New York City, Jerris Leonard, Asst. Atty. Gen., Civil Rights Div., U. S. Dept. of Justice, Washington, D. C., for plaintiff-appellant.

Will S. Wells, Asst. Atty. Gen., Jackson, Miss., for defendants-appellees.

Before THORNBERRY, CLARK and INGRAHAM, Circuit Judges.

PER CURIAM.

This is an appeal from two orders of the United States District Court for the Southern District of Mississippi, dated December 4, 1969 and January 2, 1970, which adopt a desegregation plan for the state's two juvenile reform schools.¹

1. This appeal was expedited in accordance with the procedures outlined in Section III of Singleton et al. v. Jackson Municipi-

The appeal is before us on appellant's motion for summary reversal.

There are two juvenile reform schools in Mississippi: Oakley Training School, which was all-black and Columbia Training School, which was all-white. Both schools accommodated both boys and girls. The two schools are 125 miles apart. Children are assigned to the schools by the state's juvenile judges.

The desegregation plan ordered by the district court prohibits the assignment of children to a training school on the basis of race. The order requires that juvenile boys fifteen years old or older, regardless of race, be assigned to Oakley Training School, and that boys under fifteen years of age, regardless of race, be assigned to Columbia Training School. Girls of all ages, regardless of race, are also to be assigned to Columbia Training School.

Appellants make four complaints of the plan: First, the plan does not transfer to integrated institutions those children assigned on a segregated basis by juvenile judges prior to November 1, 1969. Secondly, it does not adequately provide for faculty integration. Thirdly, the plan does not provide for periodic reports. Fourthly, the plan is silent as to the integration of dormitories, classrooms and other activities.

[1] Appellant's contention that the plan's pupil assignment is inadequate is rejected by this Court. Under the plan adopted by the district court, children are being assigned to each of the two schools without regard to race and both schools are presently integrated. It would serve no purpose to transfer from one school to the other those children who entered the training schools before November of 1969. Most of these children will be paroled by May of 1970, and all of them will be paroled by the end of the summer of 1970. The superintendents of these schools testified that transferring these students from one

pal Separate School District et al., 5th Cir. 1970, 419 F.2d 1211, 1222.

Cite as 426 F.2d 271 (1970)

school to the other might interrupt their rehabilitation and delay their parole. This would benefit no one. This Court recognized in *Crum v. State Training School for Girls*, 5th Cir. 1969, 413 F.2d 1348, that the "state's duty to dismantle the dual system of segregated schools applies to reform schools as well as to public schools," and we hold here that the district court's method of juvenile assignment effectively dismantles the dual system of segregated student assignment in the reform schools of Mississippi.

[2] While we hold that the district court's plan adequately provides for student assignment, we agree with the appellants that the plan is deficient concerning periodic reports, faculty integration, and the integration of facilities and activities. We therefore remand to the district court the following instructions adopted from Judge Wisdom's opinion in *Crum v. State Training School for Girls*, *supra*, at 1350:

[First], the district court should require the plan to provide for integration of classrooms, dormitories, athletic programs, and all activities and services. The faculty must be integrated without waiting for the filling of vacancies on a non-racial basis. The pattern of teacher assignment to any particular school should not be identified as tailored for a heavy concentration of either negro or white students in the school. Professional and non-professional members of the staff must be integrated.

[Secondly], the plan should provide for periodic reports to the district court until such time as the district court should decide that the dual system has been completely replaced by a unitary, integrated system.

The order appealed from is affirmed in part and reversed in part and remanded for further proceedings consistent with this opinion. The mandate shall issue immediately, and no stay will be granted for filing Petition for Rehearing or Petition for Writ of Certiorari.

Costs of the appeal will be assessed equally between the opposing parties. See Rule 39(a), Federal Rules of Appellate Procedure.



PORT CONSTRUCTION COMPANY,
Appellant in No. 17,615,

v.

VIRGIN ISLANDS HOUSING AUTHORITY,
Appellant in No. 17,616.

Nos. 17615, 17616.

United States Court of Appeals,
Third Circuit.

Argued Jan. 30, 1970.

Decided April 2, 1970.

Rehearing Denied in No. 17615
May 25, 1970.

Action by construction contractor to recover overall loss it sustained in construction of housing project as result of delays alleged to be due to defendant housing authority's breaching of contract. The District Court, Division of St. Thomas and St. John, Walter A. Gordon, J., dismissed case and denied authority's claim for counsel fees and motion for security for costs. Contractor appealed and authority cross-appealed. The Court of Appeals held that where contract awarded for construction of housing project specified that no payment would be made to contractor for damages because of hindrance or delay from any cause in progress of work, whether such hindrance or delay be avoidable or unavoidable, contractor was precluded from recovering, though delays were alleged to be due to housing authority's breach of contract.

Orders affirmed.

See also, D.C., 284 F.Supp. 774.

1. Territories ↩25

Where contract awarded for construction of housing project specified