



THOMAS E. BROWN
CIRCUIT JUDGE

JERRY R. LAWSON
COURT REPORTER

Circuit Court
Eleventh Judicial District – West
Jefferson and Lincoln Counties

301 E. 2nd
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KATHY SMOKE
CASE COORDINATOR

PATTI CONGLETON
TRIAL ASSISTANT

September 11, 2007

Ms. Christina Swarns, Director
Criminal Justice Project
NAACP Legal Defense and Educational Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013

Mr. George H. Kendall
Holland & Knight
195 Broadway, 24th Floor
New York, NY 10007

Mr. Kent G. Holt
Office of the Attorney General
Criminal Department
323 Center Street, Suite 1100
Little Rock, AR 72201

Re: Kenneth Reams v. State of Arkansas
Jefferson County Circuit No. CR 93-301-3

Dear Ms. Swarns, Mr. Kendall and Mr. Holt:

Enclosed please find a file-marked copy of the Court's Order of Recusal as well as a copy of the Court's letter to the Chief Justice of the Arkansas Supreme Court requesting the appointment of another trial judge to hear this matter. I deeply regret having to recuse in this matter, but based upon the findings of this Court in its Order of Recusal, recusal is imperative.

Cordially yours,

A handwritten signature in cursive script that reads "Thomas E. Brown".

Thomas E. Brown

TEB:ks



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September 12, 2007

Chief Justice Jim Hannah
Arkansas Supreme Court
Justice Building
625 Marshall Street
Little Rock, AR 72201

Re: Kenneth Reams v. State of Arkansas
Jefferson County Circuit No. CR 93-301-3

Dear Chief Justice Hannah:

I regret to advise you that I have recused in the hearing of a Rule 37 Petition filed by Kenneth Reams, currently an inmate on Arkansas Death Row. During the course of the proceedings, testimony developed that I believe required my recusal. I am enclosing a copy of my Order of Recusal.

Mr. Reams filed a Rule 37 Post-Conviction Relief Action and, unfortunately, it languished without any action by anyone for almost 9 years. Therefore, I think it imperative that a new judge with criminal trial experience be promptly appointed to hear this matter and request that you enter an Order appointing a new judge. Since Judges Jones, Dennis and Wyatt have recused in this case and Judges Jamison and Benton do not hear criminal matters, an outside judge will have to be appointed.

In addition, if at all possible, I would ask that a court reporter also be assigned to the judge, as I contemplate this case will take at least five actual trial days. Since we handle juvenile cases and are in court almost every day, this would be most disruptive if he has to continue as the court reporter for this case. In the alternative, if he must remain the court reporter, I would ask leave to have a special court reporter assigned to me for my cases and that those days not be held against my court reporter. I recognize that this is an unusual request, but we are concerned that he would be forced to continue being the court reporter on this case and having to "burn" several of his 20 days by getting another court reporter to stand in - either in my courtroom or in this case.

Also, there are space and time considerations with the other courtrooms in the Jefferson County Courthouse. Perhaps the new judge would like to hear this matter in the Lincoln County

Courthouse, as that is utilized occasionally by the Jefferson County judges. However, counsel for the Petitioner and the State will have to agree on utilizing that courthouse.

By copy of this letter, I am notifying all of the attorneys for the Petitioner and the Attorney General's Office on behalf of the State of Arkansas.

Cordially yours,

A handwritten signature in cursive script that reads "Thomas E. Brown".

Thomas E. Brown
Circuit Judge

TEB:ks

cc/encs: Ms. Christina Swarns
Mr. Kent G. Holt
Mr. Norman J. Chachkin
Mr. John W. Walker
Mr. George H. Kendall
Mr. David R. Raupp

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ARKANSAS
SIXTH DIVISION

KENNETH REAMS

PETITIONER

VS.

NO. CR-1993-301-3-6

STATE OF ARKANSAS

RESPONDENT

ORDER OF RECUSAL

Comes now the Court, *sua sponte*, and as and for its Order of Recusal herein, states, finds and orders as follows:

This matter is a Rule 37 Petition under the Arkansas Rules of Criminal Procedure initiated by the Petitioner, Kenneth Reams, in 1997 after his conviction was affirmed by the Arkansas Supreme Court. This matter was originally assigned to Judge Fred Davis, and for reasons unknown to this Court, languished until 2006 when the three Circuit Judges in this Judicial District - Judges Berlin Jones, Jodi Dennis and Rob Wyatt - all recused in this matter due to clear and distinct conflicts of interest. The other two judges in this Judicial District do not handle criminal proceedings but focus rather on domestic relations and probate matters. This Court has handled criminal matters in the past, and therefore this case was transferred to this Court as the last remaining court that could hear this type of proceeding.

Upon receipt of this case, this Court initiated contact with counsel for the State of Arkansas and counsel for the Petitioner to begin the process of scheduling hearings. Hearings were initially scheduled for May of 2007 at which time all parties agreed to try the Rule 37 Petition in August of 2007.

FILED

SEP 12 2007

FLORA C. COOK
Circuit Clerk
JEFFERSON COUNTY, ARKANSAS

At the August, 2007 hearings, Petitioner presented testimony and numerous exhibits/evidence to initiate establishment of his claim. Four days of testimony was presented at which time an interruption in the proceedings occurred.

This Court was not initially aware of the factual background of this case nor did this Court deem it appropriate to know the factual background of the case. The primary claim in the Rule 37 Petition alleges an ineffective assistance of counsel at the trial court level and that either (a) trial counsel did a poor job in selecting a jury panel; (b) trial counsel failed to adequately ensure that African-American minorities were selected to serve on the panel; or (c) that the Prosecuting Attorney's office in the Eleventh Judicial District had for many years, and had at time of trial, a practice of intentionally excluding African-Americans from sitting on a jury panel or, more importantly, being selected as actual jurors.

Additionally, Petitioner sought to prove that trial counsel was ineffective in not properly securing mitigation evidence or even adequately investigating mitigation evidence claims; failing to follow through with a Motion to Suppress a statement allegedly coerced from the Defendant; and insufficiently presenting evidence of claims of mental disease or defect and/or mental retardation at the time of the commission of the crime or at the time of the trial. There was lengthy testimony presented by an expert in the area of mitigation.

In order to establish proof concerning the issues of discriminatory practices by the Prosecuting Attorney's office and/or discrimination in the issues of jury selection, co-counsel for Petitioner, Ms. Johanna Steinberg, elicited testimony from Mr. Gene McKissic, a local attorney. Mr. McKissic testified that he was an intern with the Prosecuting Attorney's office during the summer of 1975 and upon graduating from law school in May of 1976, worked at the

Prosecuting Attorney's office during that summer and after receiving his law license became a Deputy Prosecuting Attorney for the Eleventh Judicial District which, at that time, consisted of five Southeast Arkansas counties. Mr. McKissic testified that he was so employed as a Deputy Prosecuting Attorney until the fall of 1977, approximately fourteen months while he was a licensed attorney.

Mr. McKissic testified that in 1993, his criminal practice consisted of about 40% to 50% of his total practice both in state and federal court proceedings. He further testified that in 1993, he was one of the county's "public defender contractees" and handling cases before the Honorable Berlin Jones. He testified that in his opinion, in 1993 the exclusion of black jurors was largely unchanged, and in death penalty cases, black jurors were targeted for removal.

Mr. McKissic gave testimony that expressed his personal opinion that it was the policy and practice of the Prosecuting Attorney's office in the Eleventh Judicial District to intentionally and systematically exclude African-Americans from being "initially selected" as part of the general *venire* panel and generally were not called to appear at the courthouse as potential jurors and finally, when questioned during *voir dire* proceedings were routinely and systematically excluded from actual selection by the Deputy Prosecuting Attorney trying the particular case.

Mr. McKissic testified that he tried some cases as a "second chair deputy prosecutor" and some cases on his own as lead counsel. He further testified that it was the practice to select "one black juror" to cover up the racism of the Prosecuting Attorney's office. He stated that there was a "profile", that is a known quantity who was to "go along" with whatever the other jurors wanted. He said that generally these were older black males or females but also middle-aged black men were acceptable. Young black men were not. He said that in the early 1990s perhaps

one to three black African-Americans were seated on jury panels, but for the most part, African-Americans were excluded. He also testified that the judges in office in 1993 would never honor ~~*Batson* principles as found in the United States Supreme Court *Batson v. Kentucky*.~~ He also testified that there were numerous racial comments from judges when he first began practicing law in 1976. These were the same judges that ruled on *Batson* claims after 1986.

He also testified that the Deputy Prosecuting Attorney that he worked with on several of the trials was Fred Davis, but that the Prosecuting Attorney's office did not seek to secure a death penalty until 1980.

Mr. McKissic testified that he has in his thirty years of practice tried about one hundred criminal jury cases in Southeast Arkansas, many of which were in Jefferson County (this county). He further testified that from 1978 until well into the 1990s, it was his opinion, both personally and professionally, that the Prosecuting Attorney's office persisted in intentionally and systematically excluding African-Americans from becoming sitting members of a particular jury, thus precluding them from hearing cases and making decisions. He further testified that whenever African-Americans were selected as members of a jury, the Prosecuting Attorney's office did their best to ensure that these would be older black men or women who would "simply do as they were told or follow the white man's authority".

Mr. McKissic also testified that there were two "older judges" who, at least in his opinion, tacitly assisted in this exclusionary process by accepting these exclusions of minority potential jurors. Although his testimony was that this occurred in the '70s and '80s, that even after the Supreme Court's decision in *Batson v. Kentucky*, this process continued and those two

“older judges” simply accepted neutral explanations of the Prosecutor in excluding minority jurors.

Mr. McKissic testified that this practice continued well into the ‘90s, and therefore was a practice of the Prosecuting Attorney’s office when Kenneth Reams was tried and convicted for capital murder in December of 1993.

The following day there was testimony from a police officer concerning various issues and an attempt to locate the Police Department’s investigative file concerning the Petitioner Kenneth Reams. At the conclusion of this testimony, this Court, on its own motion, recessed the proceedings, summoned counsel to the bench and disclosed the following facts and information so that counsel would have an opportunity to make whatever motions they deemed appropriate.

This Court disclosed to counsel that the Judge’s wife was a good friend of the wife of the deceased during the 1980s. While this Court did not have much direct interaction or association with the widow of the deceased during the 1980s and into the 1990s, since this is a small town, this Court knows the widow of the deceased. Of greater concern to this Court was the testimony by Mr. McKissic. This Court revealed to counsel that the Judge was a Deputy Prosecuting Attorney from February, 1980 through August of 1984 (almost 5 years). Counsel for Petitioner requested some time to discuss this matter, the recess continued through lunch, and after lunch counsel for Petitioner requested to *voir dire* the Court. While the Court was not under oath, since the Court is its own officer, this Court considered himself to be under a *defacto* oath and obligated to reveal any and all information remembered by this Court. Quite frankly, this Court could not remember a great deal about many matters, but answered questions propounded by

counsel and volunteered information on his own. Some of the information volunteered was as follows:

1. This Court was a Deputy Prosecuting Attorney for the Eleventh Judicial District from February, 1980 through August, 1984. Also, from June, 1990 until December, 1990, this Court was assigned to handle drug cases only. At that time, the Eleventh Judicial District consisted of three counties - Arkansas, Jefferson and Lincoln. The other two counties had been placed into another judicial district. During the last six months of 1980, there was only the elected Prosecuting Attorney, Wayne Matthews, and this trial judge as the sole Deputy Prosecuting Attorney. During that particular span of time, the Trial Judge tried, on his own, twelve criminal jury trials. Wayne Matthews, the elected Prosecutor, tried other criminal matters throughout the district during that period of time. The Court also advised attorneys for the Petitioner that he could not recollect any "older judges" and that the judges in office handling criminal cases during the late 1970s and early 1980s and into the early 1990s were the Honorable Randall Williams and the Honorable H. A. Taylor. Randall Williams heard civil and criminal matters through the '70s and '80s and retired in 1992. The Honorable H. A. Taylor (now deceased) heard criminal matters from the mid-'70s until his death in May of 2004. In 1992, the Honorable Berlin Jones was elected to replace Randall Williams and heard criminal and civil matters beginning January 1, 1993. At that time, the Court's recollection was that both of those other judges were in their early forties and early fifties in the '70s and '80s.

2. This Court advised the attorneys that in January of 1981, a third Deputy Prosecuting Attorney was hired to replace the one that had left in July, 1980, and that attorney lasted for six months. At that time, Steve Dalrymple was hired on July 1, 1981 and remained in

that job until elected Municipal Court Judge in the late 1980s. Another person hired was Greg Robinson in 1982. Generally speaking, there were only one or two Deputy Prosecuting Attorneys and the elected Prosecutor up until July of 1982 when funds were generated by the State of Arkansas to hire an additional Deputy Prosecutor. The primary function of the new Deputy Prosecuting Attorney was to try criminal cases arising out of crimes committed in the penitentiary in Lincoln County.

3. This Court advised that at no time in this Court's recollection nor during his employment as a Deputy Prosecuting Attorney was he ever advised, formally or informally, by innuendo or suggestion or in any other manner that he should seek to exclude minorities from being seated in a criminal jury trial. This Court testified that after leaving the Prosecuting Attorney's office, he was a criminal defense attorney in a substantial part of his practice and tried many criminal cases from 1984 through 1990 and did not observe these practices or procedures at the Prosecuting Attorney's office in the selection of jurors in this judicial district.

Of great concern to this Court is that this Court has now been forced into a position of being "tantamount to a witness" in these proceedings as this Court's personal and independent recollection of the practices and policies of the Prosecuting Attorney's office for a five year period during the early 1980s and at least through 1990 directly contradict the testimony of Mr. McKissic. Recognizing that opinions and perceptions can vary based upon an individual's character, education, culture and background, this Court is still persuaded that it has become "almost a witness" in this matter. This Court is also concerned that the testimony of Mr. McKissic is, in a left-handed manner, a swipe at the integrity of this particular judge and at least by innuendo asserts that this particular judge, while a Deputy Prosecuting Attorney, engaged in

these practices for five years in the early 1980s. This causes the Court great concern, and this Court has given this matter much thought and prayer.

The question is not whether or not this Court can be intellectually or emotionally fair and impartial in making a proper disposition of this matter. This matter has the greatest of judicial and societal import. A man's life is literally at stake. Therefore, this Court believes that it must be extra circumspect in examining itself as to whether or not recusal is appropriate or even imperative. The Code of Judicial Conduct (Canon 3) reflects that a judge shall disqualify himself in a proceeding in which the judge's impartiality might reasonably be questioned...including whether the judge has...personal knowledge of disputed evidentiary facts concerning the proceeding. The other issues concerning recusal do not apply.

While Arkansas law generally requires that motions for recusal be filed, served upon opposing counsel and state with specificity the reasons and rationale for seeking a trial judge, or any judge, to step aside and recuse himself or herself, it is incumbent upon a judge to examine his own circumstance and recuse himself or herself when the need arise. This Court recognizes that under Section F, whenever a judge discloses on the record concerns about disqualification, the parties may set that aside and agree to waive it. However, this Court is of the opinion that since this matter holds such great import to the life of the Petitioner, this Court would not entertain any such request or agreement to waive disqualification except for matters that are minor or *deminimis*. There are no minor or *deminimis* matters that this Court has found in this proceeding.

Further, under Arkansas law the recusal of a judge is generally left to the sole discretion of that judge. This Court must act upon its own volition. This Court recognizes that the

Arkansas Supreme Court has held that the “rule of necessity” may override the rule of disqualification. In fact, this particular Court sought permission to avoid the recusal rule in 1994 when a Deputy Prosecuting Attorney was running against this Court for election and normally courts are required to recuse in any proceeding in which the political opponent is a party or attorney. However, since this Court was the only court handling juvenile cases and it would have been chaotic and catastrophic, the rule of necessity applied and this Court was permitted to continue to hear juvenile court matters even though the Deputy Prosecuting Attorney was running against this Court for that position.

Having said that, this Court is still convinced that it becomes “almost a witness” in these proceedings when it has personal knowledge or personal opinion that the testimony of one of the witnesses is either in error or misperceived. In fact, should the Court act upon its own perceptions and recollections, it would call into serious question the credibility of the witness as presented. Thus, it is quite reasonable to assume, at least from the Petitioner’s point of view, that on that issue of ineffective assistance of counsel in the *Batson* type case, this Court would in essence have personal knowledge of disputed evidentiary facts. This Court so much as said so in its *voir dire* to counsel.

It is the appearance of partiality that weighs heavily with this Court. Once this disclosure has been made to Petitioner and his attorneys, there is no way Petitioner, especially the Petitioner, could ever perceive that the Court could be considered fair and impartial regardless of whether or not the attorneys agree. It is the appearance of impartiality that is paramount.

Therefore, after great reflection, a review of the trial court notes concerning Mr. McKissic’s testimony, self-examination and introspection, this Court is of the distinct and clear

opinion that it must step aside and recuse itself in the hearing of this matter. This Court clearly recognizes that a great deal of time, effort and energy has been placed into these proceedings since this Court took over the handling of this case. This Court is cognizant of the fact that large sums of money have been expended both on behalf of the State and on behalf of the Petitioner in the pursuit of justice in this matter. Clearly, the family of the victim, Mr. Turner, has a great need for closure in this matter, and the Petitioner also has need for some finality. This Court deeply regrets having to recuse in this case because so much has already been done. However, when a new judge is appointed, this new judge can examine the transcripts of those witnesses and will hear additional evidence and testimony. Perhaps, the witnesses, evidence and testimony will be presented anew to another judge. That is not for this Court to decide.

This Court is also aware that it has given Petitioner's counsel until September 17, 2007 to reach a decision as to whether or not to file a Motion to Recuse. This Order of Recusal will supercede that prior directive. As disclosed to Petitioner's and State's attorneys, while this Court will take no further legal action in this matter, this Court will, pursuant to our Rules, notify the Arkansas Supreme Court and the Administrative Offices of the Courts and request another judge be assigned to hear the case. This Court will advise in writing that the other two judges in this judicial district do not hear criminal matters and are thus not appropriate to hear this case. The Administrative Offices of the Courts and the Supreme Court of the State of Arkansas will assign another judge to hear this case. The only difficulty this Court foresees is locating an appropriate courtroom in which to hear these lengthy matters. However, this Court will leave that to the new judge. Perhaps the courtroom in Lincoln County might avail everyone, but that will be left to the new judge.

This Court personally apologizes to all of the parties, witnesses, attorneys and the Petitioner for having to recuse in this matter. It is regrettable that this Court should recuse, but none of this testimony was foreseen by anyone and therefore the only appropriate action is for this Court to recuse itself.

Therefore, this Court hereby recuses itself from hearing any further matters or proceedings in this case and will be promptly notifying the Supreme Court of the State of Arkansas to assign a new judge to hear this matter.

IT IS SO ORDERED this 11 day of September, 2007.


THOMAS E. BROWN
CIRCUIT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused the foregoing Order to be served by First Class Mail upon the following persons at the following addresses:

Ms. Christina Swarns
NAACP Legal Defense & Educational
Fund, Inc.
99 Hudson Street, 16th Floor
New York, NY 10013

Mr. Kent G. Holt
Office of the Attorney General
Criminal Department
323 Center Street, Suite 1100
Little Rock, AR 72201

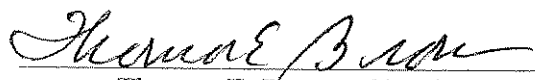
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1723 Broadway
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Holland & Knight
195 Broadway, 24th Floor
New York, NY 10007

Mr. David R. Raupp
Office of the Attorney General
Criminal Department
323 Center Street, Suite 100
Little Rock, AR 72201

Dated this 11 day of September, 2007.


Thomas E. Brown, Circuit Judge