IN THE 242ND DISTRICT COURT OF SWISHER COUNTY, TEXAS
and
IN THE COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS

JASON JEROME WILLIAMS,	)	
Applicant,	)	Nos. 51,824 – 01, -02, -03, -04
v.	)	(Trial Court Cause Nos. B-3340-9907-CR, B-3341-9907-CR, B-3342-9907-CR, B-3356-9908-CR)
STATE OF TEXAS,	)	
Respondent.	)	

MOTION TO DISQUALIFY OR RECUSE TRIAL COURT

Recent extrajudicial and public comments made by the Honorable Judge Edward Self reflect that he has prejudged the merits of the Jason Jerome Williams's Application for Writ of Habeas Corpus, before hearing any evidence in these proceedings. Consequently, Judge Self's comments undermine both the appearance of impartiality and the integrity of these proceedings. Accordingly, Mr. Williams, by and through undersigned counsel, respectfully moves the Court, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article 1, Sections 10 and 19, and Article 5, Section 11 of the Texas Constitution; Art. 30.01, Tex. Code Crim. Proc.; Tex. R. Civ. Proc. 18; and other relevant law, for an Order disqualifying or recusing[1] the trial court from further involvement in this case. In support of the motion, Mr. Williams states as follows:

[1] The disqualification of a judge is a constitutional matter affecting the jurisdiction and power of the court to act, and cannot be waived. *See Ex parte Washington*, 442 S.W.2d 391 (Tex. Crim. App. 1969). The recusal of a judge, on the other hand, is a statutory matter and can be waived if not properly brought before the court. *See* Tex. R. Civ. Proc. 18.

Statement of the Proceedings

1. Mr. Williams filed an Application for Writ of Habeas Corpus with the Swisher County District Court on January 7, 2002. He then filed a Motion for Discovery on January 29, 2002, and a Motion for Evidentiary Hearing on February 1, 2002. His Application was transferred to the Court of Criminal Appeals on February 22, 2002. The District Attorney made no response to any of the claims presented in Mr. Williams's Application. He also made no opposition to any of the motions filed in conjunction with his Application. Furthermore, the District Court took no action on Mr. Williams's discovery or evidentiary hearing motions.

2. On October 6, 2002, Mr. Williams's counsel received notice that the Court of Criminal Appeals remanded, on September 25, 2002, three of Mr. Williams's cases, Writ No. 51,824-01 (Trial Court Cause No. B-3341-99-07-CR), Writ No. 51,824-03 (Trial Court Cause No. B-3356-99-08-CR), Writ No. 51,824-04 (Trial Court Cause No. B-3342-99-07-CR) for further fact-finding in the convicting court because this Court "believe[s] that Applicant has alleged facts which, if true, might entitle him to relief " and that "additional facts need to be developed." *See* Court Order (Sept. 25, 2002) at 1. The Court of Criminal Appeals expressly directed this Court to allow for the development of "additional facts" and enter findings of fact and conclusions of law within 90 days.

3. In light of this Order – as well as Article 11.07 of the Texas Criminal Code of Procedure, Article 1, §§ 10 and 19 of the Texas Constitution, and Amendments V, VI and XIV of the United States Constitution – applicant Jason Jerome Williams respectfully requested, on October 17, 2002, that the Court allow him to conduct discovery on an expedited basis and to hold an evidentiary hearing following the completion of discovery. In addition to a Motion for Expedited Discovery and Evidentiary Hearing, Mr. Williams's counsel filed two Motions of

Non-resident Attorney Seeking Permission to Participate in Texas Proceedings, and a Motion for a Hearing on the Motions filed on October 17, 2002.

4. On October 25, 2002, Mr. Williams filed thirteen additional motions: (1) Motion For Court to Give Notice As To How It Will Comply With Court of Criminal Appeals's Order Dated 9/25/02; (2) Motion to Disqualify District Attorney; (3) Motion for Hearing on Motion to Disqualify District Attorney Filed 10/25/02; (4) Application to Take Deposition of Tom Coleman; (5)Application to Take Deposition of District Attorney Terry McEachern; (6) Application to Take Deposition of Sheriff Larry Stewart; (7) Application to Take Deposition of Commander Michael Amos; (8) Application to Take Deposition of Sergeant Jerry Massengill; (9) Application to Take Deposition of Linda Swanson; (10) Application to Take Deposition of Sheriff Kenneth Burke; (11) Application to Take Deposition of James Collier Adams; (12) Application to Take Deposition of Custodian of Records of Texas Commission on Law Enforcement Officer Standards and Education; and (13) Motion for Hearing on All Applications to Take Depositions Filed on October 25, 2002.

5. As of this date, the District Attorney has not responded to any of the motions described in paragraphs three and four above, and the District Court has not decided any of these motions.

Factual Background Relevant to This Motion

6. In its Order dated September 25, 2002, the Court of Criminal Appeals ordered the trial court to conduct further fact finding "because this Court cannot hear evidence." *See* Court Order (Sept. 25, 2002) at 2. It further stated that "[s]ince this Court does not hear evidence . . . this application for a post-conviction writ of habeas corpus will be held in abeyance pending the trial court's compliance with this order." *See* Court Order (Sept. 25, 2002) at 3. The Order

specifically states that the trial court should (1) "make findings of fact as to whether Officer Coleman's testimony concerning these offenses was corroborated by any other evidence"; (2) "the nature of any such evidence"; (3) "what alleged impeachment information concerning Coleman was known to the State at the time of trial"; and (4) "whether any of this alleged impeachment material was revealed to defense counsel before trial in these causes." *See* Court Order (Sept. 25, 2002) at 2-3. The Order directs the trial court to make specific findings of fact relating to Mr. Williams's claim that the State suppressed exculpatory and impeachment material concerning its key witness, Tom Coleman, and others, in violation of the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution; Article I, Sections 10 and 19 of the Texas Constitution; *Brady v. Maryland,* 373 U.S. 83 (1963), and other relevant federal and state law. *See* Mr. Williams's Application for Writ of Habeas Corpus at 18-22. The Order further states that the trial court should also "make any further findings of fact and conclusions of law which it deems relevant and appropriate to the disposition of Applicant's application for habeas corpus relief." *See* Court Order (Sept. 25, 2002) at 2.

7. The Honorable Judge Self has presided over all but two of the trials as well as over almost all of the plea colloquies arising out of the arrest of 46 women and men in Tulia, Texas at dawn on July 23, 1999.

8. In Mr. Williams's case, Judge Self relied on his rulings in some of these related cases, particularly on the *Brady* issue, as the basis for his findings in Mr. Williams's case. Kregg Hukill, Mr. Williams's trial counsel, filed a Motion for New Trial, and alleged that the State had not complied with its constitutional obligation when it failed to disclose any *Brady* evidence to Mr. Williams prior to or during the trial (Jason Williams's Reporter Record (RR), Vol. 3 at 81 – 108). To gather and present evidence in support of this motion on March 22, 2000, Mr. Hukill

attempted to subpoena Coleman's employment records and job application, in the hopes of clarifying rumors circulating in the town about Coleman's past professional conduct (RR, Vol. 3 at 101). He also presented to the trial court, as exhibits, a certified copy of the proceedings in Cochran County (in reference to the criminal charges against Coleman and Coleman's payment of restitution which resulted in a dismissal of those charges) (RR, Vol. 3 at 82). Mr. Hukill then elicited testimony from Sheriff Larry Stewart and Sergeant Jerry Massengill about Coleman's past history in law enforcement (RR, Vol. 3 at 84-100). Immediately after hearing the testimony, Judge Self granted the District Attorney's motion to quash the subpoena duces tecum, and stated that "those records [Coleman's employment records and job application] have already been ordered to be produced to the Court for in camera inspection and sealing and attached to the record for appeal purposes in other cases. So, we'll make those same orders as applies to these four cases. I know that the records from the Task Force have been supplied and furnished in those other cases and sealed. . . .I will order that those records be produced in court for in camera inspection, sealed, and attached to the record in the event of an appeal." (RR, Vol. 3 at 101-102). After hearing the District Attorney argue that "it's a witch hunt to allow after the fact to go in and try to, you know, allow somebody to start asking about everybody's background on what they might have ever done, you know. It's so voluminous that it would be impossible to ever supply the Defense with that kind of information," (RR, Vol. 3 at 106), Judge Self denied Mr. Williams's Motion for New Trial, declaring as a matter of law that the sought-after information did not constitute discoverable material.

9. Judge Self declared the impeachment material on Coleman's background inadmissible in each of the Coleman-based trials and Motions for New Trial in which the *Brady* issue was raised in his courtroom.

10. On October 10, 2002, the Amarillo Globe-News quoted Judge Self as stating to the newspaper in an interview, in part, that "[t]he trial court can resolve the facts by ordering affidavits, sending written questions or conducting a hearing. I'm going with the affidavits first to see if we can get these questions answered." Greg Cunningham, *Tulia Cases Returned to Trial Courts*, Amarillo Globe-News, Oct. 10, 2002, at 5C ("Exhibit A").

11. On October 31, 2002, The Tulia Herald printed a "Letter to the Editor" by Judge Self. *See* "Letter to the Editor," The Tulia Herald, Oct. 31, 2002, at Page Two A, ("Exhibit B"). On that date, Judge Self was running for re-election. Judge Self's conduct in the July 23, 1999 "sting" cases was an election issue. *See* Greg Cunningham, *Self wins 242nd District Judge Race*, Amarillo Globe-News, Nov. 7, 2002, *available at* http://www.amarillonet.com/stories/110702/ele_selfwins.html ("Exhibit C"). Judge Self's letter on Oct. 31, 2002 reads as follows:

> "Dear Editor:
>
> Until now, I have ignored Alan Bean's and Gary Gardner's attacks against me.
>
> However, Bean and Gardner now assert that I intentionally withheld admissible evidence from jurors in Swisher County so that they wouldn't know the truth about alleged events in Tom Coleman's past that Bean and Gardner say affects Coleman's credibility. Nothing could be further from the truth.
>
> The ***truth*** is: some defense attorneys subpoenaed certain records from the Swisher County District Attorney, the Sheriff of Swisher County, the Treasurer of Swisher County, the custodian of records of the Amarillo Narcotics Task Force, and Tom Coleman; the District Attorney filed a Motion to Quash those subpoenas on the grounds that the records subpoenaed were neither relevant nor admissible; and, after a hearing where both sides presented their arguments, I reviewed the records. I found that some of the records were potentially relevant and ordered those records turned over to the defense. However, I found that certain other records were, in fact, neither relevant nor admissible according to the Rules of Evidence, and granted the State's motion as to the inadmissible records. ***None*** of those records were public records nor were any of them submitted by the defense attorneys.
>
> However, to make sure that my ruling was correct, I ordered that the records be placed in an envelope, the envelope sealed by the Clerk, and sent to the Court of Appeals. I took that action so the Judges on the Court of Appeals could review the records themselves and determine if my ruling was correct.

> The Court of Appeals affirmed (upheld) my ruling and stated: 'Thus, (the) evidence . . . would not have been admissible, and there is no duty to turn over inadmissible evidence.'
>
> Bean asserts that he 'begged' me to 'let it be sooner' and that I 'rejected his advice.' The ***truth*** is: Bean has never spoken to me about these cases: Bean has not sent any of his writings to me; Bean has not filed any written document with the Court; neither Bean nor Gardner were parties to the cases, are not parties to the cases, and will never be parties to the cases; and, the only times I have ever even seen Bean or Gardner in connection with these cases is when one or both of them sat as spectators in the courtroom. Of course, Bean and Gardner, like any other citizens, are welcome to observe court at any time, as long as they do not disrupt the proceedings.
>
> The ***truth*** is: my name is on the ballet [*sic*], not Tom Coleman's; in the 4 ½ years I have been on the bench, I have presided over hundreds of trials, not just the trials involving Tom Coleman; and, more than 90 percent of the cases I have presided over have been upheld by the Court of Appeals.
>
> I appreciate all of the support I have received from the good citizens of Swisher County.
>
> Ed Self, 242nd District Judge"

12. On November 7, 2002, the Amarillo Globe-News reported various extrajudicial statements by Judge Self, including explicit references to the Tulia drug "sting" cases, made in the context of his recent reelection to the Swisher County District Court. Judge Self was quoted as saying, "I think this shows that they're partly tired of all the talk about the drug bust. I think it's also that the voters in Swisher County believe their officials do their jobs properly and act within the law." Greg Cunningham, *Self wins 242nd District Judge Race*, Amarillo Globe-News, Nov. 7, 2002 *available at* http://www.amarillonet.com/stories/110702/ele_selfwins.html.

Argument

13. Recent public comments made by the Honorable Judge Self reflect that he has prejudged the merits of Mr. Williams's case, before hearing any evidence in these proceedings. Judge Self has sent the public a message that he will not impartially adjudicate Mr. Williams's case; accordingly, under Texas law, he should be disqualified or recused from further involvement in this matter. Disqualification or recusal of the trial judge is mandated because

there is compelling evidence of both actual bias and prejudgment, and also of the appearance of bias and impropriety.

I. Judge Self Must Be Disqualified From Presiding Over Further Proceedings In Mr. Williams's Case Because His Public Comments Demonstrate Bias, Which Is Of Such Character That It Denies Mr. Williams Due Process

14. The right to an impartial judge is a bedrock constitutional right. In the words of the United States Supreme Court, "[a] fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). The Due Process clause "may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. But to perform its high function in the best way, 'justice must satisfy the appearance of justice.'" *Murchison*, 349 U.S. at 136; *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986). *See United States v. Jordan*, 49 F. 3d 152, 157 (5th Cir. (Tex.) 1995).

15. Bias is a common law ground for judicial disqualification when the bias is of such character that it denies a defendant due process. *See Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992); *McClenan v. State*, 661 S.W.2d 108, 109 (Tex. Crim. App. 1983). To rise to a level requiring disqualification, the bias alleged must "stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case." *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966); *see also Kemp*, 846 S.W.2d at 306. The United States Supreme Court defines "extrajudicial source" as "a source outside the judicial proceeding at hand – which would include as extrajudicial sources earlier judicial proceedings conducted by the same judge (as are at issue here)." *Liteky v. United States*, 510 U.S. 540, 545 (1994) (interpreting *Grinnell* as to the meaning of "extrajudicial source."). However, an exception to the extrajudicial source rule exists when "such pervasive

bias and prejudice is shown by otherwise judicial conduct as would constitute bias against a party." *United States v. Holland,* 655 F.2d 44, 47 (5th Cir. 1981) (finding bias requiring judicial disqualification when the trial court judge made remarks that reflected a personal prejudice against the appellant for successfully appealing his conviction on the basis of the judge's actions during the prior trial).

16. "A trial judge ruling on a motion alleging bias as a ground for disqualification must decide whether the movant has provided facts sufficient to establish that a reasonable man, knowing all the circumstances involved, would harbor doubts as to the impartiality of the trial judge." *Kemp*, 846 S.W.2d at 305. *See also*, *Chitimacha Tribe of Louisiana v. Harry L. Laws Co*., 690 F. 2d 1157, 1165 (5th Cir. 1982).

17. The Texas Code of Judicial Conduct serves as a measure by which to evaluate a judge's conduct. The Code is "intended . . . to state basic standards which should govern the conduct of all judges and to provide guidance to assist judges in establishing and maintaining high standards and personal conduct." *Preamble.* As such, its provisions set forth the fundamental standards by which the propriety of a judge's conduct is assessed. The Code is particularly concerned with the preservation of the integrity and independence of the judiciary. The underlying premise of the Code as expressed in Canon 1 is that "[a]n independent and honorable judiciary is indispensable to justice in our society" and that "[a] judge should participate in establishing, maintaining, and enforcing high standards of conduct, and should personally observe those standards so that the integrity and independence of the judiciary is preserved." Canon 1, Tex. Code. Jud. Conduct. Canon 2 further states that "[a] judge shall comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 2, Tex. Code. Jud. Conduct. While a

violation of the Code of Judicial Conduct, standing alone, may not constitute reversible error, judicial bias which manifests a lack of independence of the judiciary and which denies a defendant due process of law is grounds for disqualification. *Kemp v. State*, 846 S.W.2d 289, 305-306 (Tex. Crim. App. 1992).

18. The Texas Code of Judicial Conduct explicitly states that "[a] judge shall abstain from public comment about a pending or impending proceeding which may come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case." Canon 3B(10), Tex. Code. Jud. Conduct. Furthermore, the Texas Code of Judicial Conduct mandates that a judge "shall conduct all of the judge's extra-judicial activities so that they do not: (1) cast reasonable doubt on the judge's capacity to act impartially as a judge; (2) interfere with the proper performance of judicial duties." Canon 4A. Lastly, Canon 5, which is titled "Refraining from Inappropriate Political Activity," states that "[a] judge or judicial candidate shall not . . . make a statement that would violate Canon 3B(10)." Canon 5(1), Tex. Code Jud. Conduct.

19. Judge Self's "Letter to the Editor" plainly violates Canon 3B(10), Canon 4A, and Canon 5 of the Tex. Code. Jud. Conduct. On September 25, 2002, the Court of Criminal Appeals ordered the trial court to conduct further fact-finding on the precise claim that is the subject of Judge Self's "Letter to the Editor." In his letter, Judge Self defends himself against allegations from town residents that he withheld *Brady* material -- material that the District Attorney never disclosed to defense counsel -- from defense counsel who represented defendants arrested in the July 23, 1999 drug "sting." Judge Self goes on to write that the Seventh Court of Appeals, Amarillo, vindicated his rulings by affirming the convictions in the cases in which the Judge sealed the evidence, declaring the evidence subpoenaed "neither relevant nor admissible

according to the Rules of Evidence." *See* Judge Self's "Letter to the Editor" (hereinafter "Exhibit A"). Judge Self offers as proof of the "correctness" of his ruling the fact that "[t]he Court of Appeals affirmed (upheld) my ruling and stated: 'Thus, (the) evidence . . . would not have been admissible, and there is no duty to turn over inadmissible evidence.'" *See* "Exhibit A." Furthermore, the Judge closes his letter stating that "in the 4 ½ years I have been on the bench, I have presided over hundreds of trials, not just the trials involving Tom Coleman; and, more than 90 percent of the cases I have presided over have been upheld by the Court of Appeals." *See* "Exhibit A."

20. The Judge's overarching concern for vindication of his prior *Brady* rulings in the "sting" cases, as demonstrated in his "Letter to the Editor," indicates that he has prejudged Mr. Williams's habeas application, that he cannot be an objective finder of fact, and that he must be disqualified under the law from presiding over further proceedings in Mr. Williams's case. Based on his statements in his letter, the Judge does not appear to even contemplate the possibility that his prior *Brady* rulings might be wrong. A reasonable person reading the "Letter to the Editor" would almost certainly be able to predict Judge Self's finding of facts in Mr. Williams's postconviction case. Indeed, a reasonable person may even infer from the judge's letter that Judge Self has an inappropriately personal stake in seeing that these cases are not overturned. The letter indicates that Judge Self cannot objectively consider Mr. Williams's claims – claims which the Court of Criminal Appeals stated that "if true, might entitle Mr. Williams to relief." *See* Court Order (Sept. 25, 2002) at 1. Such prejudgment violates Mr. Williams's right to due process and fairness.

21. Judge Self's most recent comments to the press underscore his bias and prejudgment in the instant matter. By pronouncing that "I think this shows that they're partly

tired of the all the talk about the drug bust" and that "I think it's also that the voters in Swisher County believe their officials do their jobs properly and act within the law," Judge Self further evinced his desire to vindicate his conclusions as to the cases that have come before him – and those that have yet to come before him. Moreover, by his reference to "officials do[ing] their jobs properly and act[ing] within the law," Judge Self improperly aligned himself with the State, by suggesting that no wrongdoing in the way of *Brady* violations or other forms of misconduct had taken place. This clearly goes to the heart of the issues to be raised in this case, and as a result, is yet another demonstration of, at the very least, the appearance of Judge Self's partiality. Greg Cunningham, *Self wins 242nd District Judge Race*, Amarillo Globe-News, Nov. 7, 2002 *available at* http://www.amarillonet.com/stories/110702/ele_selfwins.html.

22. While Canon 3B(10), Tex. Code Jud. Conduct, does permit judges to make public comments in the course of their official duties and to explain for public information the procedures of the court, Judge Self's statements, particularly in his "Letter to the Editor," do not fall within this exception. The Judge's "Letter to the Editor" does not contain mere statements made in the course of his official duty, nor does it constitute public information on court procedures. Moreover, the judge's statements in his "Letter to the Editor" are not mere statements on a policy issue related to a dispute, leaving the decision-maker capable of judging a particular controversy fairly on the basis of its own merits. Instead, the judge's letter involves statements on the merits by the very person who must make findings about the contested factual issue of prosecutorial misconduct. The rulings about which Judge Self wrote concern the very same facts that are in dispute and whose determination will have a critical effect on the liberty and due process interests of Mr. Williams. Certainly, given the Judge's statements in the "Letter

to the Editor" and most recently in the Amarillo Globe News, a reasonable person, knowing all the circumstances involved, would harbor grave doubts as to the impartiality of the trial judge.

II. Judge Self must either recuse himself or be recused from presiding over further proceedings in Mr. Williams's case because a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial

23. Texas Rules of Civil Procedure 18(a) and 18(b) provide grounds and procedures for recusal and disqualification of judges in civil cases. Texas Code of Criminal Procedure Art. 30.01 provides grounds for disqualification in criminal matters, while the grounds and procedures for recusal under Texas Rules of Civil Procedure 18(a) and 18(b) apply to criminal cases. *See Arnold v. State*, 853 S.W.2d 543, 544 (Tex. Crim. App. 1993). *See, e.g., Kelly v. State*, 18 S.W. 3d 239 (Tex. App. Amarillo 2000), *Stafford v. State*, 948 S.W. 2d 921 (Tex. App. Texarkana 1997), *Sanchez v. State*, 926 S.W. 2d 391 (Tex. App. El Paso 1996), *Soderman v. State*, 915 S.W. 2d 605 (Tex. App. Houston 14 Dist. 1996), *Williams v. State*, 746 S.W. 2d 333 (Tex. App. Fort Worth 1988).

24. Rule 18(b) states that a judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned. "A judge 'shall recuse himself in any proceeding in which . . . his impartiality might reasonably be questioned' . . . The language is imperative and mandatory, not permissive or discretionary; the standard is objective, not subjective." *Rogers v. Bradley*, 909 S.W. 2d 872, 873 (Tex. 1995). It is "virtually impossible to articulate a bright line test" to govern recusal; the determination "must be made on a case-by-case fact-intensive basis." *Williams v. Viswanathan*, 65 S.W. 3d 685, 688 (Tex. App. Amarillo 2001). In determining whether to recuse a judge, the inquiry should be whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial. *See Sears v. Olivarez*, 28 S.W. 3d 611,

613-614 (Tex. App. Corpus Christi 2000). *See, e.g.*, *Williams*, 65 S.W. 3d at 687; *Ludlow v. DeBerry*, 959 S.W. 2d 265, 281 (Tex. App. Houston 1997), *Aguilar v. Anderson*, 855 S.W.2d 799, 804-805 (Tex. App. El Paso 1993) (Osborn, C.J., concurring), *Woodruff v. Wright*, 51 S.W. 3d 727, 736 (Tex. App. Texarkana 2001).

25. The statutory language mandates recusal whenever impartiality "might reasonably be questioned." Tex. R. C. P. 18(b)(2)(a).[2] There is no requirement that partiality be demonstrated. Rather, the "appearance" of impropriety is sufficient to trigger recusal. *See Woodruff*, 51 S.W. 3d at 738. The "trial court's duty [is] to determine whether the movant [has] provided facts sufficient to establish that a reasonable member of the public at large, knowing all the facts involved in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial." *Richardson v. State*, 83 S.W. 3d 332, 358 (Tex. App. Corpus Christi 2002). *See also*, *Degarmo v. State*, 922 S.W. 2d 256, 267 (Tex. App. Houston 14

[2] The appearance of impartiality standard is by no means unique to the Texas courts. *See, e.g., Ham v. State*, 540 So. 2d 805, 807-808 (Ala. Crim. App. 1988) (no reasonable basis to question judge's impartiality); *Giralt v. Vail Village Inn Assoc.*, 759 P.2d 801, 804 (Colo. App. 1988) (court must eliminate every semblance of reasonable doubt as to its impartiality); *LaBow v. LaBow*, 13 Conn. App. 330, 334 537 A. 2d 157, 161 (Conn. App. 1988) (controlling standard is whether reasonable person who is aware of all circumstances would question impartiality); *Scott v. United States*, 559 A. 2d 745, 754 (D.C. App. 1989) (appearance of partiality is sufficient); *Weber v. State*, 547 A. 2d 948, 952 (Del. Super 1988) (disqualification required when impartiality might reasonably be questioned); *Love v. State*, 569 So. 2d 807, 810 (Fla. App. 1990) (ex parte communications violates appearance of impartiality); *Isaacs v. State*, 257 Ga. 126, 355 S.E. 2d 644 (Ga. 1987) (fact that judge's impartiality may reasonably be questioned is sufficient for disqualification); *People v. DelVecchio*, 129 Ill. 2d 265, 275, 544 N.E. 2d 312, 317, 135 Ill. Dec. 816, 821 (Ill. App. 1989) (guiding principle is whether the average person, acting as judge, could not hold nice, clear, and true balance between the State and the accused); *State v. Strayer*, 242 Kan. 618, 625-626, 750 P. 2d 390, 396 (Kan. 1988) (question whether facts create a reasonable doubt not in judge's or litigant's mind but in mind of a reasonable person with knowledge of all the facts); *Pierce v. Charity Hosp. of Louisiana at New Orleans*, 550 So. 2d 211, 215 (La. App. 1989) (facts must show that observer could reasonably perceive that court was biased); *Boyd v. State*, 321 Md. 69, 86, 581 A. 2d 1, 9, (Md. 1990) (test is whether reasonable person knowing and understanding all the facts would recuse judge); *Olson v. Olson*, 392 N.W. 2d 338, 341 (Minn. App. 1986) (where circumstances give bona fide appearance of bias judge should recuse); *Rutland v. Pridgen*, 493 So. 2d 952, 954 (Miss. 1986) (recusal warranted if reasonable person would harbor doubts about impartiality); *Commonwealth v. Lemanski*, 365 Pa. Super. 332, 339, 529 A. 2d 1085, 1088 (Pa. Super. 1987) (recusal is required whenever there is substantial doubt as to a jurist's ability to preside impartially); *State v. Neeley*, 748 P. 2d 1091, 1094 (Utah 1988) (a judge should recuse himself when his "impartiality" might reasonably be questioned) ; *State v. Brown*, 177 W. Va. 633, 641, 355 S.E. 2d 614, 622 (W. Va. 1987) (where a challenge to a judge's impartiality is made for substantial reasons which indicate that the circumstances offer a possible temptation as to the average man as a judge not to hold the balance nice, clear and true between the State and the accused, a judge should recuse himself).

Dist. 1996) (determining that the issue is whether the movant has provided facts sufficient to establish that a reasonable person, knowing all the circumstances involved, would harbor doubts about the impartiality of the trial judge).

26. The "appearance of impartiality" standard has also been analyzed in the context of the federal recusal statute, 28 U.S.C. § 455(a). *See, e.g.*, *United States v. Microsoft Corp.,* 253 F.3d 34, 107-119 (2001). Texas courts have recognized that the language of Texas Rule of Civil Procedure 18b(2)(a) is substantially identical to that of 28 U.S.C. § 455(a) and have therefore relied on cases interpreting Section 455(a) when considering motions for recusal and disqualification. *See, e.g.*, *Ludlow v. Deberry*, 959 S.W.2d 265, 271 n.3 (Tex. App. 1997); *Monroe v. Blackmon*, 946 S.W.2d 533, 537 (Tex. App. 1997). In *United States v. Microsoft Corp.,* the D.C. Circuit disqualified a judge based on statements to the media about a pending case, and at the decision's core was a concern for the "appearance of impartiality."

> Judge Learned Hand spoke of "this America of ours where the passion for publicity is a disease, and where swarms of foolish, tawdry moths dash with rapture into its consuming fire...." LEARNED HAND, THE SPIRIT OF LIBERTY 132-33 (2d ed. 1953). Judges are obligated to resist this passion. Indulging it compromises what Edmund Burke justly regarded as the "cold neutrality of an impartial judge." Cold or not, federal judges must maintain the appearance of impartiality. What was true two centuries ago is true today: "Deference to the judgments and rulings of courts depends upon public confidence in the integrity and independence of judges." CODE OF CONDUCT Canon 1 cmt. Public confidence in judicial impartiality cannot survive if judges, in disregard of their ethical obligations, pander to the press.

Id. at 115.

27. The *Microsoft* court worried that members of the public might "reasonably question whether the District Judge's desire for press coverage influenced his judgments" and concluded, therefore, that the judge's "interviews with reporters created an appearance that he was not acting impartially." *Id.* at 115. The appearance of impartiality, interpreted through

statutory provisions, ethical codes and the reasonable person standard, is critical in determining whether a judge may sit. It is the concern for the appearance of impartiality that has led the federal courts to disqualify judges for making even limited public comments about cases pending before them. *See*, *e.g., In re IBM Corp*., 45 F.3d 641 (2d Cir. 1995). Close cases are resolved in favor of disqualification. *In re Boston's Children First*, 244 F.3d at 167 (quoting *Nichols v. Alley*, 71 F.3d 347, 352 (10th Cir. 1995) ("if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal")).

28. Judge Self announced to the media that his rulings have been correct and that the prosecution acted properly – notwithstanding that these are the very facts at issue in Mr. Williams's petition – facts "which if true, might entitle [Williams] to relief." *See* Court Order (Sept. 25, 2002) at 2. The facts of this case necessitate a determination that the judge be disqualified or recused. The judge's "Letter to the Editor" would necessarily lead a reasonable person to question whether the judge was acting impartially. A letter to the editor, by its very nature, is one which expresses an opinion to the public at large. For a judge to use such a vehicle to discuss a pending case is a clear violation of his ethical duties and creates the appearance of complete partiality. *See In re Boston's Children First*, 244 F.3d 164 (1st Cir. 2001) (holding that a judge who wrote a letter to the editor and made a statement to the press clarifying what she interpreted as misrepresentations regarding her orders must be disqualified because her impartiality might reasonably be questioned). A reasonable person would have to question whether the desire for election publicity that presumably impelled Judge Self to submit his letter would impact the merits of the pending matter. Moreover, a reasonable person that read Judge Self's comments after the election, namely his conclusion that "the voters in Swisher County believe their officials do their jobs properly and act within the law," would conclude that Judge

Self's continuing defensive posture, which positions him more as an active adversary than an impartial arbiter, undermined any potential appearance of impartiality. *See* Greg Cunningham, *Self wins 242nd District Judge Race*, Amarillo Globe-News, Nov. 7, 2002, *available at* <http://www.amarillonet.com/stories/110702/ele_selfwins.html>.

29. The judge's interviews with the Amarillo Globe News likewise undermine the appearance of impartiality. As the court in *Microsoft* noted,

> we think it safe to assume that these interviews were not monologues. Interviews often become conversations. When reporters pose questions or make assertions, they may be furnishing information, information that may reflect their personal views of the case.

Microsoft 253 F.3d at 113.

Interviews with journalists undercut the appearance of impartiality because, by their very nature, they involve *ex parte* communications where a party is providing the judge with information in addition to simply seeking it. Even if the journalist in this case provided no independent information to the judge, the fact of the interviews, due to the nature of media interviews generally, would lead a reasonable person to question the impartiality of the judge.

30. Furthermore, the Texas courts have repeatedly underscored the compelling public policy interest – as distinct from any constitutional, statutory or common law grounds – in ensuring the appearance of an impartial judiciary. "The impartial standard has been adopted in order that the public, *i.e.*, the person on the street, might have confidence in the judiciary and to protect judges from unjustified complaints about their being partial in their decision." *Aguilar*, 855 S.W. 2d at 804-805 (Osborn, C.J., concurring).

> Public policy demands that a judge who tries a case act with absolute impartiality. It further demands that a judge appear to be impartial so that no doubts or suspicions exist as to the fairness or the integrity of the court. Judicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the principles on which the judicial system is based."

CNA Insurance Company v. Scheffey, 828 S.W. 2d 785, 792 (Tex. App. Texarkana 1992). One of the most fundamental components of a fair trial is a neutral and detached judge. *See Johnson v. Pumjani*, 56 S.W. 3d 670, 672 (Tex. App. Houston 2001). Moreover, the *Pumjani* court went on to observe that the impartiality of a judge is not only a matter of constitutional law but of public policy, as well. *See id*.

> Beyond the demand that a judge *be* impartial, however, is the requirement that a judge *appear to be* impartial so that no doubts or suspicions exist as to the fairness or integrity of the court. The judiciary must strive not only to give all parties a fair trial but also to maintain a high level of public trust and confidence. The legitimacy of the judicial process is based on the public's respect and on its confidence that the system settles controversies impartially and fairly. Judicial decisions rendered under circumstances that suggest bias, prejudice or favoritism undermine the integrity of the courts, breed skepticism and mistrust, and thwart the very principles on which the judicial system is based. The judiciary must be extremely diligent in avoiding any appearance of impropriety and must hold itself to exacting standards lest it lose its legitimacy and suffer a loss of public confidence.

Sun Exploration and Prod. Co. v. Jackson, 783 S.W. 2d 202, 206 (Tex. 1989).

31. Disqualification of a judge from acting in a proceeding in which he is not wholly free, disinterested, and independent is intended not merely for the benefit of the parties to the suit, who are entitled to the cold neutrality of an impartial judge, but for the general interests of justice, by preserving the purity and impartiality of the courts, and the respect and confidence of the people for their decisions. *See* 46 AM JUR. 2D, *Judges* § 86. Moreover, judicial tribunals must not only be, but must appear to be, impartial, so that where circumstances are such as to create in the mind of a reasonable person a suspicion of bias, disqualification may be warranted although there is no proof of actual bias. *See id*.

32. Texas Rule of Civil Procedure 18a makes clear that when a recusal motion is filed, "[p]rior to any further proceedings in the case, the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such

motion." Tex. R. C. Pr. 18a(c). When presented with a motion to recuse, therefore, a judge has two, and only two, options. The judge must either recuse himself or refer the motion to the presiding judge of the administrative judicial district; a judge does not have the option of doing nothing. *See Brosseau v. Ranzau*, 911 S.W. 2d 890, 892 (Tex. App. Beaumont 1995). *See also, In Re Rio Grande Valley Gas Co*., 987 S.W. 2d 167, 178 (Tex. App. Corpus Christi 1999); and *Winfield v. Daggett*, 846 S.W. 2d 920, 922 (Tex. App. Houston 1993).

WHEREFORE, for the above stated reasons, the Court, pursuant to the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution; Article 1, Sections 10 and 19, and Article 5, Section 11 of the Texas Constitution; Art. 30.01, Tex. Code Crim. Proc.; Tex. R. Civ. Proc. 18; and other relevant law, must issue an Order disqualifying or recusing the trial court from further involvement in this case.

Respectfully submitted,

ELAINE R. JONES
Director-Counsel

_____
GEORGE H. KENDALL
VANITA GUPTA
NAACP Legal Defense & Educational Fund, Inc.
99 Hudson St., 16th Floor
New York, NY 10013
(212) 965-2239

JEFF BLACKBURN
Attorney at Law
SBOT# 02385400
718 W. 16th St.
Amarillo, TX 79102