

IN THE 242ND DISTRICT COURT OF SWISHER COUNTY, TEXAS

and

IN THE COURT OF CRIMINAL APPEALS, AUSTIN, TEXAS

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

**MOTION TO DISQUALIFY
THE DISTRICT ATTORNEY**

JASON JEROME WILLIAMS, by and through undersigned counsel, respectfully moves the Court, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution; Article 1, Sections 10 and 19 of the Texas Constitution; Rules 3.08 and 3.09 of the Texas Disciplinary Rules of Professional Conduct; Texas Code of Criminal Procedure, art. 2.01; and other relevant federal and Texas law, for an Order disqualifying the Swisher County District Attorney’s Office from further involvement in this case. In support of the motion, Mr. Williams states as follows:

A. Brief Statement of the Proceedings

1. District Attorney Terry D. McEachern (“DA”) prosecuted nearly all of the over 100 cases arising out of a drug “sting” based exclusively on the uncorroborated testimony of one undercover police officer, Tom Coleman. This “sting” culminated in the arrest of 46 women and men in Tulia, Texas at dawn on July 23, 1999. The only evidence that the District Attorney presented at any of the defendants’ trials that linked a defendant to the alleged drug transaction was the uncorroborated, unsubstantiated

testimony of Coleman. Coleman did not wear a wire during any of the alleged transactions. No video surveillance was done, and no second officer was available to corroborate his reports. No forensic evidence was presented linking Mr. Williams or any of the other defendants to the alleged drug transaction. Mr. Williams's case is one of these prosecutions directed by District Attorney McEachern which is based on alleged sales of narcotics to Coleman.

2. District Attorney Terry McEachern represented the State at Mr. Williams's trial in January, 2000. On January 14, 2000, after a jury trial at which police officer Tom Coleman was the key prosecution witness, Mr. Williams was convicted of the four separate counts against him and was sentenced to forty-five years in the Texas Department of Corrections on one of these counts. After his appeal was denied, Mr. Williams filed an Application for Writ of Habeas Corpus with the Swisher County 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. District Attorney McEachern 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' discovery or evidentiary hearing motions.

3. On October 6, 2002, Mr. Williams's counsel received notice that this Court 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 an evidentiary hearing 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 of Texas expressly directed this Court to “develop . . . additional facts” and enter findings of fact and conclusions of law within 90 days.

B. Substantive Law Prohibits the District Attorney From Serving as Both Prosecutor and Witness

4. District Attorney McEachern cannot serve as both advocate and witness in Mr. Williams’s case, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, and Article 1, Sections 10 and 19 of the Texas Constitution. District Attorney McEachern prosecuted almost all of the 100 cases that were based on Tom Coleman’s uncorroborated testimony. He actively suppressed *Brady* information in Mr. Williams’s case. He will be called to testify about a contested matter at a hearing pursuant to the Court of Criminal Appeals Order, dated September 25, 2002. *See* Court Order (Sept. 25, 2002). The District Attorney is a witness in Mr. William’s case, and his current involvement in this case violates Mr. Williams’s right to due process under the U.S. and Texas Constitutions.

5. Rule 3.08 of the Texas Disciplinary Rule of Professional Conduct governs the general prohibition against an attorney serving the simultaneous roles of advocate and witness. Rule 3.08(a) states that “a lawyer shall not accept or continue employment as an advocate before a tribunal in a contemplated or pending adjudicatory proceeding if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer’s client.” The comments that accompany Rule 3.08 note that the primary concern in permitting a lawyer to also act as a witness “is the

possible confusion that those dual roles could create for the finder of fact....A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof.” Tex. R. Prof. Conduct 3.08, comment 4.

6. Where it *is* appropriate for a lawyer to serve as a witness, such a dual role can yield conflicts: “If...the lawyer’s testimony concerns a *controversial or contested* matter, combining the roles of advocate and witness can unfairly prejudice the opposing party.” *Id* (emphasis added). The Comments to Rule 3.08 define the Rule’s two principal disciplinary purposes: “the first is to insure that a client’s case is not compromised by being represented by a lawyer who could be a more effective witness for the client by not also serving as an advocate. See paragraph (a). The second is to insure that a client is not burdened by counsel who may have to offer testimony that is substantially adverse to the client’s cause. See paragraph (b).” Tex. R. Prof. Conduct 3.08, comment 9.

7. The comments accompanying Rule 3.08 further assert that “a lawyer should not seek to disqualify an opposing lawyer under this Rule merely because the opposing lawyer’s dual roles may involve an improper conflict of interest with respect to the opposing lawyer’s client, for that is a matter to be resolved between lawyer and client or in a subsequent disciplinary proceeding.” Tex. R. Prof. Conduct 3.08, comment 10. As such, Mr. Williams does not seek to disqualify the District Attorney on account of the impact of his testimony on the State’s case. However, the same comment to Rule 3.08 states that the Rule “may furnish some guidance in those procedural disqualification

disputes *where the party seeking disqualification can demonstrate actual prejudice to itself resulting from the lawyer's service in the dual roles.*" *Id* (emphasis added).

8. Rule 3.09 of the Texas Rules of Professional Conduct, "Special Responsibilities of a Prosecutor," mandates that a prosecutor "shall refrain from prosecuting or threatening to prosecute a charge that the prosecutor knows is not supported by probable cause." Tex. R. Prof. Cond. 3.09(a). It further admonishes that a prosecutor "shall . . . make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense . . . except when the prosecutor is relieved of this responsibility by a protective order of the tribunal." Tex. R. Prof. Cond. 3.09(d).

9. District Attorneys who have substantial experience in the practice of law, combined with the fact that they hold elected office, are required to be held to an even higher standard of conduct than ordinary attorneys. *See Gannett Co. v. DePasquale*, 443 U.S. 368 (1979) ("The Court has recognized that a prosecutor 'is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all' and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a particular and very definite sense the servant of the law ..." (citing *Berger v. United States*, 295 U.S. 78 (1935))). The Tex. Code Crim. Proc., art. 201, explicitly states that "it shall be the primary duty of all prosecuting attorneys, including any special prosecutors, not to convict, but to see that justice is done." District Attorney McEachern is therefore subject to an even more exacting standard than the ordinary attorney contemplated by Rule 3.08 and its caselaw.

10. When Mr. Williams can show that a violation of a disciplinary rule has affected his substantial rights or deprived him of a fair trial, he is entitled to a reversal of his conviction. *Brown v. State*, 921 S.W.2d 227, 230 (Tex. Crim. App. 1996). In *House v. State*, the Texas Court of Criminal Appeals held that Rule 3.08 entitles a defendant to relief on appeal when an assistant District Attorney's dual role as lawyer and witness results in actual prejudice to the defendant's case. 947 S.W.2d 251, 253 n.4 (Tex. Crim. App. 1997). While the court stated that Rule 3.08 does not grant a systemic right to complain about an opposing party's alleged disciplinary rule violations, it held that "if a defendant can make the necessary showing of actual prejudice [that results from that disciplinary rule violation], then he will be entitled to relief on appeal." *Id.*

C. District Attorney McEachern Is A Witness and Must be Disqualified From Representing the State in Mr. Williams's Case

11. The District Attorney's ethical breaches in Mr. Williams's case rise to the level of serious violations of Mr. Williams's right to due process, both under the U.S. and Texas constitutions. The District Attorney has an improper dual role as prosecutor and witness in Mr. Williams's case.

12. Mr. Williams's Application for Writ of Habeas Corpus presents contested claims whose resolution will require testimony from the District Attorney. The record and further evidence suggests that District Attorney McEachern will be called to testify to his personal knowledge, including but not limited to, of when he knew of Agent Coleman's checkered past in law enforcement; his participation in the "sting" operation; Coleman's false accusations against citizens of Tulia, as proven by several defense counsel; the circumstances around and the reasons for which he dismissed specific cases;

Coleman's faulty identification methods; Coleman's fabricated records; Coleman's perjury under oath; Coleman's inconsistencies and unreliability; and the possibility that Coleman did not have the legal authority to be working as an undercover officer for a period of time during his work in Tulia. The extent and timing of this knowledge goes to the heart of this case. The fact that District Attorney McEachern both had information that seriously erodes Coleman's credibility and failed to disclose that information means that his own conduct will be central in the adjudication of this matter. After all, the accuracy and truthfulness of Agent Coleman's testimony were the key elements in the State's case against Mr. Williams. There were no other eyewitnesses or forensic evidence to link Mr. Williams to the alleged drug transaction or to corroborate Coleman's testimony. The State's case was based entirely on Agent Coleman's testimony. In this uncorroborated single eyewitness testimony scenario, any impeachment evidence becomes especially important; indeed, it is virtually the only evidence a defendant could have to make out a defense. The District Attorney will have to testify about his suppression of this evidence. This testimony goes to the heart of Mr. Williams's case. District Attorney McEachern has thus become a key witness in these cases.

13. District Attorney McEachern has on at least one occasion practically admitted his role as a witness in Mr. Williams's case. In the Motion for New Trial proceeding in Mr. Williams's case, District Attorney McEachern testified that "Judge, just as an officer of the Court, I wasn't aware at the time of the trial of the exhibit [Coleman's job application and employment record] that has been introduced for the purposes of this hearing. And that brings us to another conclusion. And I guess I could call myself as a witness, but if I call myself as a witness, I'm going to preclude my office

from staying on any – any case. I am not going to call myself as a witness, but I would state, and I want the record to reflect, that I didn't have knowledge of that exhibit that you have before you" (Jason Williams's Reporters Record, Vol. 3 at 107).

14. The District Attorney's ethical breaches in Mr. Williams's case rise to the level of serious violations of Mr. Williams's right to due process, both under the U.S. and Texas constitutions. *See Duggan v. State*, 778 S.W.2d 465, 468 (noting that prosecutor has constitutional duty to correct false evidence); *Williams v. State*, 513 S.W.2d 54, 56 (noting that if prosecutor knowingly allows false testimony, state violates Mr. Williams's due process rights).

15. Should District Attorney McEachern both serve as a witness and attorney in the case, the Mr. Williams will be deprived of a fair postconviction proceeding. In the interests of fairness and efficiency, District Attorney McEachern should therefore be disqualified from further involvement in this case.

16. The remedy of professional discipline would be insufficient and mismatched to Mr. Williams's concern that he have a fair and impartial adjudicatory proceeding as guaranteed by the United States Constitution, which he could not have were District Attorney McEachern to remain as prosecutor. This will entitle Mr. Williams to relief on appeal. In the interests of fairness and efficiency, the District Attorney should be disqualified at this stage.

WHEREFORE, for the above stated reasons, the Court, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution; Article 1, Sections 10 and 19 of the Texas Constitution; Rules 3.08 and 3.09 of the Texas Disciplinary Rules of

Professional Conduct; Texas Code of Criminal Procedure, art. 2.01; and other relevant federal and Texas law, must issue an Order disqualifying the Swisher County District Attorney's Office from further involvement in this case. Mr. Williams cannot get a fair postconviction proceeding as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution with District Attorney McEachern representing the State in this case.

Respectfully submitted,

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