

IN THE CRIMINAL COURT OF TENNESSEE AT CHATTANOOGA
THE ELEVENTH JUDICIAL DISTRICT
DIVISION ONE

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|------------------------|---|---------------------------|
| STATE OF TENNESSEE | * | |
| | * | |
| vs. | * | |
| | * | |
| MICHAEL ANDERSON | * | CASE NO. 279332 |
| ANDRE LAVELL BALLARD | * | CASE NOS. 267837, 280737, |
| | * | 280908 |
| CHRISTOPHER B. BETTIS | * | CASE NO. 282945 |
| MARY JEAN BLAIR | * | CASE NO. 256491 |
| FRANCIS A. BRANAN | * | CASE NO. 283592 |
| BILLY JOSEPH BRYANT | * | CASE NOS. 268882, 268952 |
| | * | 268953 |
| ALLISON R. BURKETT | * | CASE NO. 282369 |
| JEFFERY LEE BUSH | * | CASE NOS. 262888, 269950 |
| JEREMY M. CAREATHERS | * | CASE NOS. 279254, 279338 |
| | * | 279490 |
| BRANDON BARRY CLAYBORN | * | CASE NOS. 275780, 275781, |
| | * | 276354, 277500 |
| MELISSA DAWN CONNAR | * | CASE NOS. 274989, 275108, |
| | * | 283762, 283845 |
| DIONE M. CORNES | * | CASE NO. 283348 |
| JOHN MICHAEL COX | * | CASE NOS. 280752, 283766 |
| CARTER I. CROOKS | * | CASE NOS. 280510, 280512, |
| | * | 280513, 284617, |
| | * | 281016 |
| ERICA J. DAVIS | * | CASE NO. 280515 |
| DAVID R. DUNCAN | * | CASE NO. 283087 |
| ELISHA D. GILREATH | * | CASE NO. 283095 |
| JOSEPH A. GODSEY | * | CASE NO. 284133 |
| TADARRIAN GORE | * | CASE NO. 283178 |
| CHARLES E. HAINS, SR. | * | CASE NO. 283690 |
| TYRONE ANTONIO HEARD | * | CASE NOS. 281638, 283639 |
| CAROLYN HEATH | * | CASE NOS. 283998, 284074 |
| ALLEN D. HENDLEY | * | CASE NO. 259313 |
| BRUCE WILLIAM JAY | * | CASE NO. 248464 |
| ALEXANDDRIA JONES | * | CASE NO. 283739 |
| CHARLES JONES | * | CASE NO. 278869 |
| DEXTER LASHON JONES | * | CASE NOS. 265656 |
| RONALD WAYEN KIDD | * | CASE NO. 282830 |
| ALONZO C. LEWIS | * | CASE NO. 282990 |

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|------------------------------|---|-----------|-----------------|
| JEFFERY J. MARSHALL | * | CASE NO. | 271303 |
| NANCY L. MORGON | * | CASE NO. | 279113 |
| DEBRA ANN MYERS | * | CASE NO. | 284560 |
| JAMES MICHAEL NOEL | * | CASE NOS. | 271493, 283742 |
| ROXIE NORWOOD | * | CASE NO. | 282318 |
| RALPH EDWARD OLDHAM | * | CASE NOS. | 277621, 280949, |
| | * | | 283131 |
| MICHAEL PANTAGES | * | CASE NOS. | 276559, 284735, |
| | * | | 284739, 284741 |
| ROBERT E. PARKS, JR. | * | CASE NOS. | 265680, 266936 |
| MARGARET PORTER | * | CASE NO. | 283864 |
| CURTIS POWELL | * | CASE NOS. | 282594, 270003, |
| | * | | 270068, 270069 |
| TENNA REED | * | CASE NOS. | 282757, 283471 |
| AMANDA SANDERSON | * | CASE NOS. | 283839, 283867 |
| MATTHEW SIMPSON | * | CASE NO. | 283715 |
| ANTHONY DAVID SMITH | * | CASE NOS. | 265904, 277369, |
| | * | | 283029 |
| KIMBERLY STARK | * | CASE NO. | 283948 |
| JONATHAN W. STREUN | * | CASE NOS. | 278659, 284760 |
| ROBERT ALBERT TANNER, III | * | CASE NO. | 281821 |
| FREDERICK LEBRON TAYLOR, JR. | * | CASE NO. | 283874 |
| MARCUS L. THOMAS | * | CASE NO. | 284490 |
| TYLAN D. THOMAS | * | CASE NO. | 280838 |
| BREATHA VAUGHN | * | CASE NOS. | 280002, 280143 |
| JOSHUA ZIEGLER | * | CASE NO. | 281402 |
| | * | | |
| Defendants. | * | | |

AMENDED MOTION FOR RECUSAL

The District Public Defender for the 11th Judicial District, States of Tennessee, files this Amended Motion for Recusal and states as follows:

Comes the District Public Defender for the 11th Judicial District, counsel of record for the above-named defendants pursuant to Rule 10 of the Tennessee Supreme Court Rules, and, for the reasons set forth below, and in the attached Affidavits and transcripts, and moves this Court for recusal (disqualification) due to the court’s personal bias and prejudice against the Public Defender and her Assistant Public Defender, Mary Ann Green. This Motion is made pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the

Tennessee Constitution, Art. 1, Sections 8 and 16; Article VI, Section 11; Tennessee Supreme Court Rule, 10, Code of Judicial Conduct, Canon 1, Rule 1.2; Canon 2, Rules 2.2, 2.9(C), and 2.11; *Bean v. Bailey*, 280 S.W. 3d 798 (Tenn. 2009); *Alley v. State*, 882 S. W. 2d 819 (1994); *Caperton v. Massey Coal Company*, 556 U.S. 868, 129 S. Ct. 2252; other applicable law, and in accordance with Defendants’ rights to due process and a full and fair proceeding. The multi-facted factual bases for this Motion are set forth below. Counsels’ Affidavits related to the factual basis for this Motion are attached hereto and incorporated in their entirety by reference as **EXHIBIT A**.

The attached Affidavits of Mary Ann Green, Assistant Public Defender, and Ardena J. Garth, District 11 Public Defender, show that the Judge has created an environment in this Court of hostility and disrespect toward the Public Defender and her Assistants, creating at a minimum the appearance of impropriety. There is an appearance that this Court has a “personal bias or prejudice concerning . . . a party’s lawyer” as contemplated by Rule 10, Canon 2, Rule 2.11 (A)(1),

The Court entered an Order in the pending Jesse Mathews’ Case, Case No. 280020, on or about May 6, 2011, attacking the integrity and performance of Assistant Public Defender, Mary Ann Green. Ms. Green is assigned to this Division of the Criminal Courts as an Assistant Public Defender. (A copy of that Order is attached hereto and incorporated herein in its entirety by reference as **EXHIBIT B**.) Pages 3 through 7 of that Order include a lengthy diatribe against the appointment of the Public Defender, and in particular Assistants Mary Ann Green and Karla Gothard. He stated that “. . . staffing issues necessitate the appointment of defense counsel other than the Public Defender.” He further stated “Also, the Court finds that the past trial performance in death penalty cases of Attorneys Gothard and Green and their post conviction

actions and claims in such cases necessitate the appointment of counsel other than the Public Defender. In his conclusion of that Order, he wrote “. . . a pattern of post trial claims of error/ineffective assistance weighs heavily against the appointment of the Public Defender as counsel herein.” He fails to mention the fact that all of the cases or the post conviction hearings on those cases discussed in this opinion criticizing the Public Defender occurred while he was the prosecuting attorney during his employment as an Assistant District Attorney in Hamilton County, Tennessee.

The Judge’s lack of impartiality was exacerbated by his questioning of both Ms. Green and Ms. Garth from the bench on August 14, 2012, in the matter of State of Tennessee v. Frederick Anderson, Docket #280227. (A copy of the Motion for Recusal filed by Mr. Anderson and a transcript of the proceeding on August 14, 2012, is attached hereto and incorporated in its entirety by reference as **COLLECTIVE EXHIBIT C**.) During that hearing while Mr. Anderson was being questioned by Assistant District Attorney Lance Pope, the Court interjected his comment to an answer given by Mr. Anderson: (Exhibit C, at pp 18-19):

Q. You do not agree with me that Ms. Green’s potential representation of Jesse Mathews is completely unrelated to her performance at your trial?

A. No.

Q. Okay. And tell me how they are related?

A. Well, I mean, I don’t think it’s due to the relation of the case. I think it’s due to Judge Steelman’s feelings towards Ms. Green’s being able to represent Mr. Mathews. He took her off the case and assigned two other attorneys, which means it shows bias against Ms. Green.

At this point, the Judge erroneously states:

“Well, just so you understand, Mr. Anderson, Ms. Green was never on that case. The record should reflect that.”

However, Ms. Green, along with Karla Gothard of the Public Defender’s Office, had been assigned the case after the appointment of the Public Defender in the General Sessions Court of Hamilton County, Tennessee, to represent Mr. Mathews, and pursuant to that appointment had conducted a lengthy preliminary hearing in General Sessions Court, and had expended many hours investigating and preparing for the case in anticipation that the appointment would be made in Criminal Court. The Judge did not have any type of open hearing before he entered the Mathews’ Order, and he did not notify the Public Defender, Ms. Green or Ms. Gothard of his intent to remove the Public Defender from representation of Mr. Mathews.

In the same hearing on Mr. Anderson’s cases on August 14, 2012, the Judge stated from the Bench: (Exhibit C, pp. 109-114 (*emphasis added throughout*)):

The Court planned on continuing to be as fair to Mr. Anderson in the matter as the Court had been during the trial, even going to the extraordinary step of helping to secure for trial a witness that was deemed to be critical, and about whom it was represented to the Court that Mr. Anderson could not receive a fair trial. So this Court didn’t look away. This Court did not say, ‘Well, tough luck, Ms. Green, you waited until the night before trial, you’re not ready, let the chips fall where they may.’ **The Court instead, perhaps to a fault, got involved in the matter to help see that what the attorney failed to do, the Court got it done.**

So in some instances, Mr. Anderson, the Court, **more so than your attorney**, ensured that you got a fair trial, according to what was represented to the Court.

I stated in the record in November that the attorneys were competent in their representation, and they were, and that last statement does not regard that. **That last statement regards a sloppiness on the part of attorneys who have a witness who supposedly is necessary in order for a fair trial . . .**

Again, on the day before trial, the defense finally got around to getting the State the expert witness report as if they're supposed to be able to proceed to trial the next day with it. **That's actually a pretty good defense tactic if the Court is incompetent enough to let you get away with that, but the Court doesn't allow that kind of thing to be pulled in here. It undermines justice.**

....

The Court made a prior finding in that matter that it is the pattern of certain public defenders – and it's attributed to Ms. Garth as the public defender in this county because she allows these assistants to work for her - - to undermine the work of the Courts and the juries in this county by falling on their sword post-conviction and claiming all manner of incompetence. That's got to stop. Courts have to stop looking the other way.

It should be noted that this Judge has never found the Public Defender to be guilty of ineffective assistance of counsel.

The Judge went on to say at p. 112:

And with the caseload that the public defender's office has in this county, I can't believe that they would spend the kind of time that's been spent up here all day today, much less forcing the Court to have to deal with it, for the Court to

hear testimony about how unusual it was and uncommon it was and, therefore, significant that it was that the Court got involved in this matter.

The Judge seemed to lose track of the fact that Ms. Green was before the Court as a witness, and that it was not her Motion being heard by the Court. He went on to further criticize Ms. Green as follows at p. 113:

You know what's unusual? It is unusual for the Court to get involved in matters where the public defender comes in on the day before trial and says "I'm not ready," but the judge says "No, were going to be ready, we're going to trial. We got people that expected to have a trial, you were one of them, the Court's one of them, and we're having a trial tomorrow. If I've got – if the Court's got to get on the phone and call a witness, we'll have a trial tomorrow.

Then, for some unknown reason, and without provocation, the following exchange occurred:

Judge: I have the court reporter in this courtroom and she's transcribing what's being recorded here. If there's anybody here with a recording device that's recording what's going on at this time, I want it turned over to the deputy. Anybody?

From a courtroom of people, he then singled out the Public Defender, Ms. Garth, who was there as an observer, and asked:

The Court: "Ms. Garth, are you recording the Court?"

Ms. Garth: Are you ordering me to respond to that, Your Honor?"

The Court: I'm asking you a question as a member of the bar: Are you recording the Court?

Ms. Garth: Are you ordering me to answer that?

The Court: I (*sic*) tell you what I'll do, I'll put you under oath. Do you swear or affirm to testify truthfully?

Ms. Garth: Yes, I do.

The Court: All right. Are you recording the Court?

Ms. Garth: I am not.

The Court: All right. Thank you.

Ms. Green, are you recording the Court?

Ms. Green: I don't think I have a recorder, Your Honor.

The Court: Can you give a straight answer, Ms. Green: Are you recording the Court?

Ms. Green: I can give a straight answer and I am not recording the Court.

The Court: I would have preferred that to start with. Thank you.

The entire transcript of this proceeding reflects that the Court inquired at length of Ms. Green during the Anderson hearing. What the transcript does not reflect is the body language of the Judge, as well as his facial expressions, intonation and other evidence of hostility toward the Public Defender and in particular, Ms. Green. The Judge, in effect, took over a hearing on a Motion filed by Mr. Anderson's attorney, and used it as an opportunity to make a venomous attack on the Public Defender.

On August 15, 2012, the Judge again exhibited a lack of impartiality in his proceeding subsequent to the filing of Motions for Recusal in cases assigned to the Public Defender and scheduled for disposition on that date. After the Motions were filed, and without ruling on them, he questioned the Public Defender, and then called eleven different Defendants and questioned them individually, while insisting their counsel remain silent. (See Transcript of proceedings on August 15, 2012, attached hereto and incorporated in its entirety by reference as **EXHIBIT D.**)

The Judge personally contacted a witness for Ms. Green's client, Fredrick Anderson, prior to his trial and interrogated her during an *ex parte* proceeding, specifically violating Rule 2.9(C) of Canon 2, Rule 10 Code of Judicial Conduct.

The Judge exhibited a personal bias or prejudice against Ms. Green, and the Public Defender, in his Order in the Jesse Mathews' Case, as well as his questions and comments in the August 14, 2012, hearing on the Fredrick Anderson Case and at the proceedings on August 15, 2012. He even went so far as to question the management of the Public Defender's Office by his comment at **p. 112, Exhibit C**, regarding the employment of certain Assistant Public Defenders.

The Preamble to Rule 10, Code of Judicial Conduct, states that "An independent, fair and impartial judiciary is indispensable to our system of justice. The United States legal system is based upon the principle that an independent, impartial, and competent judiciary, composed of men and women of integrity, will interpret and apply the law that governs our society. Thus, the judiciary plays a central role in preserving the principles of justice and the rule of law. Inherent in all the Rules contained in this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to maintain and enhance confidence in the legal system." The following Canons, in addition to other law, are relied upon by the Public Defender in making this Motion for Recusal:

Canon 1, Tennessee Supreme Court Rule 10, states as follows:

A Judge shall uphold and promote the independence, integrity, and impartiality of the Judiciary, and shall avoid impropriety and the appearance of impropriety.

Canon 2, Tennessee Supreme Court Rule 10, states as follows:

A Judge shall perform the duties of judicial office impartially, competently, and diligently.

Rule 2.2 states: A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.

Rule 2.3 (A) states: A Judge shall perform the duties of judicial office, including administrative duties, without bias or prejudice.

Rule 2.9 (C) states: A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed.

Rule 2.11 (A) states: A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

- (1) The judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of facts that are in dispute in the proceeding.**

Petitioner makes this Motion pursuant to Tenn. Sup. Ct. R. 10B, which took effect July 1, 2012. Consistent with the requirements of Rule 10B it is asserted that this Motion is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. Tenn. Sup. Ct. R. 10B, § 1.01. The supporting affidavits required by Section 1.01 are made collective **Exhibit A** to this Motion. Petitioner notes that, under the new rule, he is entitled to “an accelerated interlocutory appeal as of right” from a denial of this motion and the appeal is reviewed as *de novo*. Tenn. Sup. Ct. R. 10B, § 2.01. Also, it should be noted that Tenn. Sup. Ct. R 10B. Sec. 1.03 provides: “Upon the filing of a motion pursuant to section 1.01, the judge shall act promptly by written order and either grant or deny the motion. If the motion is denied, the judge shall state in writing the grounds upon which he or she denies the motion.”

The Tennessee Constitution provides that, “[n]o Judge of the Supreme or Inferior Courts shall preside on the trial of any cause in the evident of which he may be interested” Tenn.

Const. art, VI, § 11. The Tennessee Supreme Court has explained that,

[t]his provision is intended ‘to guard against the prejudgment of the rights of litigants and to avoid situations in which the litigants might have cause to conclude that the court had reached a prejudged conclusion because of interest, partiality, or favor.

Bean, 280 S.W.3d at 803 (quoting *State v. Austin*, 87 S.W.3d 447, 470 (Tenn. 2002)).

Commentary to Rule 10, Canon 2, Rule 2.11 Comment (1) notes that “[u]nder this Rule, a judge is disqualified whenever the judge’s impartiality might be reasonably questioned, regardless whether any of the specific provisions of paragraphs (A)(1) through (6) apply.” The Tennessee Supreme Court has observed that this Rule exists “because ‘the appearance of bias is as injurious to the integrity of the judicial system as actual bias.’” *Bean*, 280 S.W.3d at 805 (quoting Tenn. Sup. Ct. R. 10, Canon 3(E)(1)); *see also id.* At 803 (observing “that it is important to preserve the public’s confidence in a neutral and impartial judiciary.”); *State v. Reid*, 213 S.W.3d 792, 815 (2006) (adopting the Tennessee Court of Appeal’s analysis that “[t]he preservation of the public’s confidence in judicial neutrality requires not only that the judge be impartial in fact, but also that the judge be perceived to be impartial.”) (quoting *Kinard v. Kinard*, 986 S.W.2d 220, 228 (Tenn. Ct. App. 1998)); *Alley*, 882 S.W.2d at 822-23 (“When considering a motion to recuse, a trial court must consider more than whether or not the judge has a personal bias against the movant To maintain public confidence, courts must avoid the appearance of partiality as well as partiality itself.”). As a consequence, circumstances that create a reasonable question as to a judge’s impartiality require recusal regardless of whether such circumstances are expressly enumerated in Rule 10.

Of course, “[i]t . . . goes without saying that trial before a biased or prejudiced fact finder is a denial or due process.” *Wilson v. Wilson*, 987 S.W.2d 555, 562 (Tenn. Ct. App. 1998) (citing *Leighton v. Henderson*, 414 S.W.2d 419 (1967)). Additionally, however, “because perception is also important, a party does not have to prove actual bias or prejudice,” *Id.* Rather, **“the standard is objective; even if a judge subjectively believes he or she can be fair and impartial, the judge should disqualify himself or herself upon request whenever ‘the judge’s impartiality might be reasonably questioned’”** *Smith v. State*, 357, S.W.3d 322, 341 (Tenn. 2011) (emphasis added). This objective test requires recusal whenever “a person of ordinary prudence in the judge’s position, knowing all of the facts known to the judge, would find a reasonable bias for questioning the judge’s impartiality,” *Alley*, 882 S.W.2d at 820; *see also id.* At 820-21 (pursuant to the language of Tennessee’s Supreme Court in *Cameron and Leighton* and in accordance with sound ethical principles and the standard set forth in our Code of Judicial Conduct, a trial judge must consider a motion to recuse objectively as well as subjectively.”).

The requirement of an objective appearance of impartiality applies not only to bias against a party, but also to bias against a party’s attorney and bias about the factual and evidentiary issues underlying the case. As the Tennessee Court of Appeals has explained,

In the Anglo-American system of justice, the ideal for a judge is one who is ‘independent of governmental, political, social, economic, or other predisposing influences. The judge can accordingly approach the decision of any question in a case guided solely by legal knowledge and judicial experience and temperament.’ **Although this ideal is one that is difficult to achieve, it is a fundamental principle of due process that a judge presiding at trial ‘must be sufficiently neutral and free of preconceptions about the factual issues to be able to render a fair decision.’** (emphasis added)

Alley, 882 S.W.2d at 819-20 .