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**Topic:**

**Disqualifying and Recusing Judges, Prosecutors and  
Defense Counsel**

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**DISQUALIFYING AND RECUSING JUDGES, PROSECUTORS  
AND DEFENSE COUNSEL**

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## I. Disqualification & Recusal Of Judges.

### A. Texas Constitutional Grounds.

Disqualification is different from recusal. Disqualification affects the jurisdiction of the judge to sit, and rulings by a disqualified judge are void as they can be raised at any time and cannot be waived. As you will see below, the situation is quite different from recusal.

Article 5, Section 11 of the Texas Constitution provides for automatic disqualification in three instances. It states, in pertinent part, the following:

No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.....

Thus, three **constitutional** disqualifications contained within Article 5, Section 11, are:

1. Where the judge served as a lawyer in the matter in controversy;
2. Where the judge is related to any party to the lawsuit by affinity or consanguinity within the third degree (see Tx. Gov't Code Section 573.023 and Section 573.025 define the computation of the degree of affinity or consanguinity).
3. Where the judge has an interest in the subject matter in controversy.

An interest in the subject matter in controversy includes a financial interest. *See Cameron v. Greenhill*, 582 S.W.2d 775 (Tex. 1979). This can include campaign contributions from attorneys or litigants in a case. *Rocha v. Ahmad*, 662 S.W.2d 77 (Tex. App.-San Antonio 1983, writ dismissed w.o.j.); *Degarmo v. State*, 922 S.W.2d 256 (Tex. App.-Houston [14th Dist.] 1996, writ refused); *J-IV Investments v. David Lynn Mach., Inc.* 784 S.W.2d 106, 108-109 (Tex. App.-Dallas); *Texaco, Inc. v. Pennzoil*, 729 S.W.2d 768, 842-845 (Tex. App.-Houston [1st Dist.] 1987, writ refused n.r.e.).<sup>1</sup> Under the recent opinion of the Supreme Court in

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<sup>1</sup> In *J-IV Investments v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 108-109 (Tex. App.-Dallas 1990), the Court stated:

**Texas courts have repeatedly rejected the argument that campaign contributions might create a bias to prompt recusal.** Illustrative is *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex.App.-San Antonio 1983, no writ), which involved a motion to recuse or disqualify two of the associate justices of the court of appeals because each had accepted campaign contributions from the lawyer for appellee. The court overruled this motion, holding appellee did not show bias. In reaching this result the court stated:

It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who

*Caperton v. Massey Coal*, 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009),<sup>2</sup> it is clear that "[n]ot every campaign contribution by a litigant or attorney creates a possibility of bias that requires a judge's recusal, but this is an exceptional case." The Court concluded:

That there is a serious risk of actual bias - based on objective and reasonable perceptions - when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. *Id.* at 2263-2264.

The Court went on to state that

The inquiry centers on the contributions relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election. *Id.*

Of course, not every "interest" will disqualify a judge. The case law has narrowly interpreted the

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have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

*Id.* at 78; *see also River Road Neighborhood Ass'n. v. South Texas Sports, Inc.*, 673 S.W.2d 952, 953 (Tex.App.-San Antonio 1984, no writ).

In *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 842-45 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.), Texaco filed a motion to recuse the trial judge based on Canon 3C of the Code of Judicial Conduct, the forerunner of Texas Rule of Civil Procedure 18b(2). FN1 **The lead counsel for Pennzoil gave the sum of \$10,000 to the trial judge's campaign fund and also served on the judge's campaign steering committee while the case was pending.** In its motion, Texaco argued that these actions created an appearance of impropriety on the part of the trial judge; however, the court held that the campaign contribution did not constitute an appearance of impropriety. *Texaco*, 729 S.W.2d at 845. In view of these cases, we find no abuse of discretion. We overrule point of error four.

FN1. Rule 18b(2) of the Texas Rules of Civil Procedure provides: Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

(emphasis added). *See also Degarmo v. State*, 922 S.W.2d 256 (Tex. App.-Houston [14th Dist.] 1996, writ ref'd).

<sup>2</sup> In *Caperton*, the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. The appellate court voted 3 to 2, and the issue involved was whether one of the newest members of the appellate court, Justice Benjamin, should have been recused because Don Blankinship, the Chairman, CEO and President of Massey Coal, had spent and/or donated over \$3 million to assist Benjamin's election efforts at a time that the case was pending.

term "interest," requiring "a direct pecuniary or personal interest in the result of the case presented to the judge or court." *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979)(per curiam); accord *Richardson v. State*, 4 S.W.2d 79, 81 (Tex. Crim. App. 1928). Disqualification may not be based on remote or speculative grounds; where "the result of the suit will not necessarily subject [the judge] to a personal gain or loss, he is not disqualified." *Hidalgo Cnty. Water Improvement Dist. No. 2 v. Blalock*, 301 S.W.2d 593, 596 (Tex. 1957). To require disqualification, a judge's interest "must not only be capable of valuation; it must also be direct, real, and certain and must result from the instant litigation. *F.S. new Prods., Inc., v. Strong Indus. Inc.*, 129 S.W.3d 594, 599 (Tex. App.-Houston [1st Dist.] 2003, no pet.); *Richardson v. State*, 4 S.W.3d at 81. Thus, an interest similar to that held by the general public -- as a taxpayer or as a utility rate payer -- is not sufficient. *Elliott v. Scott*, 25 S.W.2d 150, 151 (Tex. 1930); *Scown v. City of Alpine*, 271 S.W.3d 380, 383 (Tex. App.- El Paso 2008, no pet.).

However, "[o]nce a pecuniary interest is shown to exist, the judge is disqualified no matter how slight the interest. *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex.), *cert. denied* 444 U.S. 868 (1979). Accordingly, when the judge has an ownership interest, including ownership of stock in a corporation which is a party to the lawsuit, the judge is subject to disqualification. *Pahl v. Whitt*, 304 S.W.2d 250 (Tex. Civ. App.-El Paso 1957, no writ);<sup>3</sup> *New York Life Ins. Co. v. Sides*, 46 Tex. Civ. App. 246, 101 S.W. 1163 (Austin 1907, no writ);<sup>4</sup> *Sovereign Camp, Woodmen of the World v. Hale*, 56 Tex. Civ. App. 447, 120 S.W. 539 (Tex. App. 1909);<sup>5</sup> *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556 (Tex. App.-Beaumont 1993, writ

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<sup>3</sup> The El Paso Court of Appeals reversed the judgment, finding the trial judge was disqualified, stating the following:

It is our opinion that the trial judge, being a member of the Central Texas Electric Cooperative, Inc. is disqualified to sit in the trial of a case where it is a party, even though he is only one of 5,000 members. It is true that his interest may be very small, and we are certain that the trial judge knew, in holding himself to be qualified, that he could try the case with complete impartiality as to the parties, but that does not seem to be the test.

*Id.* at 252.

The *Pahl* court reasoned that the members of a co-op are much like the stockholders in a corporation: if the co-op makes a profit, the members stand to profit. The court noted that it has long been the case that a stockholder in a corporation is disqualified under Article V, §11 of the Texas Constitution from sitting as a judge in a trial where the corporation is a party. *Id.* at 252, citing *Templeton v. Giddings*, 12 S.W. 851 (Tex. 1889) and *King v. Sapp*, 2 S.W. 573 (Tex. 1886).

<sup>4</sup> There, the judge was a policyholder in the defendant life insurance company, which had no capital stock. The only owners were the policyholders. In holding that the judge was disqualified, the court stated:

We think that this testimony shows that the trial judge, as one of the owners of the appellant company, is one of the owners of, and necessarily directly interested in, the assets of the company, in the proportion that the amount of his policy bears to the aggregate amount of policies issued and outstanding at the time, and that he would necessarily suffer a pecuniary loss by a judgment against the appellant, which would have to be collected out of its assets.

*Id.* at 1163.

<sup>5</sup> There, suit was brought to collect under an insurance policy issued by the Woodmen of the World, a mutual insurance company. The judge was a policyholder in the company. In disqualifying the judge, the

denied).<sup>6</sup>

## **B. Texas Statutory Grounds.**

### **1. Rule 18a. Texas Rules Of Civil Procedure.**

Rule 18a, Texas Rules of Civil Procedure, was recently amended in July 2011. It is entitled "**Recusal and Disqualification of Judges**", and states, in pertinent part, that:

(a) *Motion; Form and Contents.* A party in a case in any trial court other than a statutory probate court or justice court may seek to recuse or disqualify a judge who is sitting in the case by filing a motion with the clerk of the court in which the case is pending. The motion:

- (1) must be verified;
- (2) must assert one or more of the grounds listed in Rule 18b;
- (3) must not be based solely on the judge's rulings in the case; and
- (4) must state with detail and particularity facts that:
  - (A) are within the affiant's personal knowledge, except that facts may be stated on information and belief if the basis for that belief is specifically stated;
  - (B) would be admissible in evidence; and
  - (C) if proven, would be sufficient to justify recusal or disqualification.

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court said:

Each holder of a benefit certificate is an owner of the assets of the order, in proportion that the amount of his certificate bears to all the certificates issued by the order. In other words, the entire assets of the order constitute a general fund in which every holder of a certificate is interested very much in the nature of a stockholder in corporation assets. It certainly disqualifies a judge, when he is a stockholder in a corporation, from sitting as judge in trial of a case in which such corporation is a party.

*Id.* at 540.

<sup>6</sup> There, the disqualification of a judge who was a shareholder in a company who was a party in the case was at issue. In holding that the trial judge was disqualified under Article V, §11 and Rule of Civil Procedure 18b(1)(b), the Court held that disqualification is required if the "interest" of the judge in the case is a direct pecuniary interest in the subject matter of the case. *Id.* at 558. Once a pecuniary interest is shown to exist, the judge is disqualified no matter how slight that interest. *Id.* at 558 (*citing Cameron v. Greenhill, supra*).

(b) *Time for Filing Motion.*

(1) Motion to Recuse. A motion to recuse:

(A) must be filed as soon as practicable after the movant knows of the ground stated in the motion; and

(B) must not be filed after the tenth day before the date set for trial or other hearing unless, before that day, the movant neither knew nor reasonably should have known:

(i) that the judge whose recusal is sought would preside at the trial or hearing; or

(ii) that the ground stated in the motion existed.

(2) Motion to Disqualify. A motion to disqualify should be filed as soon as practicable after the movant knows of the ground stated in the motion.

(c) *Response to Motion.*

(1) By Another Party. Any other party in the case may, but need not, file a response to the motion. Any response must be filed before the motion is heard.

(2) By the Respondent Judge. The judge whose recusal or disqualification is sought should not file a response to the motion.

(d) *Service of Motion or Response.* A party who files a motion or response must serve a copy on every other party. The method of service must be the same as the method of filing, if possible.

(e) *Duty of the Clerk.*

(1) Delivery of a Motion or Response. When a motion or response is filed, the clerk of the court must immediately deliver a copy to the respondent judge and to the presiding judge of the administrative judicial region in which the court is located (“the regional presiding judge”).

(2) Delivery of Order of Recusal or Referral. When a respondent judge signs and files an order of recusal or referral, the clerk of the court must immediately deliver a copy to the regional presiding judge.

(f) *Duties of the Respondent Judge; Failure to Comply.*

(1) Responding to the Motion. Regardless of whether the motion complies with this rule, the respondent judge, within three business days after the motion is filed, must either:

(A) sign and file with the clerk an order of recusal or disqualification; or

(B) sign and file with the clerk an order referring the motion to the regional presiding judge.

(2) Restrictions on Further Action.

(A) Motion Filed Before Evidence Offered at Trial. If a motion is filed before evidence has been offered at trial, the respondent judge must take no further action in the case until the motion has been decided, except for good cause stated in writing or on the record.

(B) Motion Filed After Evidence Offered at Trial. If a motion is filed after evidence has been offered at trial, the respondent judge may proceed, subject to stay by the regional presiding judge.

(3) Failure to Comply. If the respondent judge fails to comply with a duty imposed by this rule, the movant may notify the regional presiding judge.

(g) *Duties of Regional Presiding Judge.*

(1) Motion. The regional presiding judge must rule on a referred motion or assign a judge to rule. If a party files a motion to recuse or disqualify the regional presiding judge, the regional presiding judge may still assign a judge to rule on the original, referred motion. Alternatively, the regional presiding judge may sign and file with the clerk an order referring the second motion to the Chief Justice for consideration.

(2) Order. The ruling must be by written order.

(3) Summary Denial for Noncompliance.

(A) Motion to Recuse. A motion to recuse that does not comply with this rule may be denied without an oral hearing. The order must state the nature of the noncompliance. Even if the motion is amended to correct the stated noncompliance, the motion will count for purposes of determining whether a tertiary recusal motion has been filed under the Civil Practice and Remedies Code.

(B) Motion to Disqualify. A motion to disqualify may not be denied on the ground that it was not filed or served in compliance with this rule.

(4) Interim Orders. The regional presiding judge or judge assigned to decide the motion may issue interim or ancillary orders in the pending case

as justice may require.

(5) *Discovery*. Except by order of the regional presiding judge or the judge assigned to decide the motion, a subpoena or discovery request may not issue to the respondent judge and may be disregarded unless accompanied by the order.

(6) *Hearing*.

(A) *Time*. The motion must be heard as soon as practicable and may be heard immediately after it is referred to the regional presiding judge or an assigned judge.

(B) *Notice*. Notice of the hearing must be given to all parties in the case.

(C) *By Telephone*. The hearing may be conducted by telephone on the record. Documents submitted by facsimile or email, otherwise admissible under the rules of evidence, may be considered.

(7) *Reassignment of Case if Motion Granted*. If the motion is granted, the regional presiding judge must transfer the case to another court or assign another judge to the case.

(h) *Sanctions*. After notice and hearing, the judge who hears the motion may order the party or attorney who filed the motion, or both, to pay the reasonable attorney fees and expenses incurred by other parties if the judge determines that the motion was:

(1) groundless and filed in bad faith or for the purpose of harassment, or

(2) clearly brought for unnecessary delay and without sufficient cause.

(i) *Chief Justice*. The Chief Justice of the Supreme Court of Texas may assign judges and issue any orders permitted by this rule or pursuant to statute.

(j) *Appellate Review*.

(1) *Order on Motion to Recuse*.

(A) *Denying Motion*. An order denying a motion to recuse may be reviewed only for abuse of discretion on appeal from the final judgment.

(B) *Granting Motion*. An order granting a motion to recuse is final and cannot be reviewed by appeal, mandamus, or otherwise.

(2) *Order on Motion to Disqualify*. An order granting or denying a motion

to disqualify may be reviewed by mandamus and may be appealed in accordance with other law.

## **2. Rule 18b, Texas Rules Of Civil Procedure.**

Rule 18b, Texas Rules of Civil Procedure, was also amended in July 2011. It is entitled "**Grounds for Recusal and Disqualification of Judges**", and states the following:

(a) *Grounds for Disqualification.* A judge must disqualify in any proceeding in which:

- (1) the judge has served as a lawyer in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter;
- (2) the judge knows that, individually or as a fiduciary, the judge has an interest in the subject matter in controversy; or
- (3) either of the parties may be related to the judge by affinity or consanguinity within the third degree.

(b) *Grounds for Recusal.* A judge must recuse in any proceeding in which:

- (1) the judge's impartiality might reasonably be questioned;
- (2) the judge has a personal bias or prejudice concerning the subject matter or a party;
- (3) the judge has personal knowledge of disputed evidentiary facts concerning the proceeding;
- (4) the judge or a lawyer with whom the judge previously practiced law has been a material witness concerning the proceeding;
- (5) the judge participated as counsel, adviser, or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;
- (6) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
- (7) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(A) is a party to the proceeding or an officer, director, or trustee of a party;

(B) is known by the judge to have an interest that could be

substantially affected by the outcome of the proceeding; or

(C) is to the judge's knowledge likely to be a material witness in the proceeding.

(8) the judge or the judge's spouse, or a person within the first degree of relationship to either of them, or the spouse of such a person, is acting as a lawyer in the proceeding.

(c) *Financial Interests.* A judge should inform himself or herself about personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the household.

(d) *Terminology and Standards.* In this rule:

- (1) “proceeding” includes pretrial, trial, or other stages of litigation;
- (2) the degree of relationship is calculated according to the civil law system;
- (3) “fiduciary” includes such relationships as executor, administrator, trustee, and guardian;
- (4) “financial interest” means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(A) ownership in a mutual or common investment fund that holds securities is not a “financial interest” in such securities unless the judge participates in the management of the fund;

(B) an office in an educational, religious, charitable, fraternal, or civic organization is not a “financial interest” in securities held by the organization;

(C) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a “financial interest” in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(D) ownership of government securities is a “financial interest” in the issuer only if the outcome of the proceeding could substantially affect the value of the securities;

(E) an interest as a taxpayer or utility ratepayer, or any

similar interest, is not a “financial interest” unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(e) *Waiving a Ground for Recusal*. The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(f) *Discovery and Divestiture*. If a judge does not discover that the judge is recused under subparagraphs (b)(6) or (b)(7)(B) until after the judge has devoted substantial time to the matter, the judge is not required to recuse himself or herself if the judge or the person related to the judge divests himself or herself of the interest that would otherwise require recusal.

### 3. Article 30.01 Of The Texas Code Of Criminal Procudure.

Tex. Code Crim. Pro. art. 30.01 provides that "no judge or justice of the peach shall sit in any case where he may be the party injured." While this provision should be self-evident and hence easily enforced, the application of it can become murkey.

All of the above statutes, statutes, including the ten day time frame of Rule 18a(a), have been held to be applicable to criminal cases. *See e.g., Arnold v. State*, 853 S.W.2d 543 (Tex.Crim.App.1993); *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex.Crim.App.1990). *See also McClenan v. State*, 661 S.W.2d 108, 109 (1983)(addressing recusal under prior statute and prior to that point in time when Rule 18a and Rule 18b were held applicable to criminal cases).

The case law is clear that a person or entity entitled to seek disqualification of a former attorney must proceed in a timely manner and that the failure to do so constitutes a waiver. *See, e.g., Vaughan v. Walther*, 875 S.W.2d 690 (Tex. 1994) (party who waited **six and 1/2 months** to seek disqualification of its former counsel who was representing the other party in this child custody case waived right to seek disqualification); *Turner v. Turner*, 385 S.W.2d 230 (Tex. 1964) (wife who waited **eighteen months** to seek disqualification of her prior counsel who was representing her husband in the divorce waived her right to seek disqualification); *HECI Exploration Co. v. Clajon*, 843 S.W.2d 662 (Tex. App. - Austin 1992, writ denied) (**eleven month** delay between date that HECI learned that its former counsel, Olson, had joined the firm representing Clajon, constituted a waiver of its right to seek disqualification).

Upon presentation of a motion to disqualify or recuse a judge, the judge must either recuse himself or refer the matter to the presiding judge of the administrative region in which he sits. In *Wright v. Wright*, 867 S.W.2d 807, 811 (Tex. App. -El Paso 1993, writ denied), the Court stated:

When a motion to recuse a judge is filed, the judge must either recuse him- or herself or request the administrative judge to assign another judge to hear the motion. *See Tex.R.Civ.P. 18a(c); see also General Motors Corp. v. Evins*, 830 S.W.2d 355, 357 (Tex.App.-Corpus Christi 1992, no writ); *Gonzalez v. Gonzalez*, 659 S.W.2d 900, 901 (Tex.App.-El Paso 1983, no writ). In either case, the judge is prohibited from taking any further action in the case until the motion to recuse has been resolved. *See id.* **The mandatory provisions in Rule 18a, however, never come into play unless and until a timely motion to recuse is filed.** FN2 *Watkins v. Pearson*, 795 S.W.2d 257, 259-60 (Tex.App.-Houston [14th Dist.] 1990, writ denied); *Gonzalez*, 659 S.W.2d at 901.

FN2. In *Gonzalez*, 659 S.W.2d at 901-902, this Court held that a motion to recuse must be presented more than ten days prior to the hearing in order to be considered timely.

*See also Blackwell v. Humble*, 241 S.W.3d 707, 712-13 (Tex.App.-Austin 2007, no pet.); *McElwee v. McElwee*, 911 S.W.2d 182, 185-86 (Tex.App.-Houston [1st Dist.] 1995, writ denied); *In re DeMayo*, No. 09-05-074 CV, 2005 WL 857066, at \*1 (Tex.App.-Beaumont 2005, no pet.) (mem. op. on reh'g) (failure to comply with procedural requisites for recusal waives complaint).

In a criminal case, a trial judge has no duty to recuse or refer if the recusal motion is not timely filed. *De Leon v. Aguilar*, 127 S.W.3d 1, 5 n. 3 (Tex.Crim.App.2004)(orig.proceeding) (“timely filed recusal motion triggers the trial judge's duty to recuse or to refer. The trial judge has no such duty when a recusal motion is not timely filed.”); *Arnold v. State*, 853 S.W.2d at 544-45 (holding that defendant's failure to comply with ten-day notice provision waived appeal of denial to have motion heard by judge other than one assigned to case).<sup>7</sup> *See also Ex parte Ellis*, 275 S.W.3d 109, 122-125 (Tex. App.-Austin 2009), where the Court held that the State waited far too long (i.e., after the Court of Appeals had issued its original opinion) and had been aware of the information contained in its motion to recuse (regarding Justice Waldrop) long prior to the filing of the recusal motion therein.<sup>8</sup> *Ellis* dealt with recusal of an appellate judge, but the analysis (and particularly, the cases cited at 275 S.W.3d at 124 n. 9), are entirely applicable to the recusal of a non-appellate judge.

There are two exceptions to the ten-day notice requirement, to wit: (1) a party does not know the grounds for the recusal ten days prior to trial; or (2) recusal is based on a constitutional disqualification of the judge. *See Jamilah v. Bass*, 862 S.W.2d 201, 203 (Tex.App.-Houston [14th Dist.] 1993, no pet.); *Soderman v. State*, 915 S.W.2d 605, 608 n. 4 (Tex.App.-Houston [14th Dist.] 1996, pet. ref'd, untimely filed) (citing *Buckholts ISD v. Glaser*, 632 S.W.2d 146, 148 (Tex.1982)).

When you consider the filing of a motion to recuse a judge, the grounds most typically available are those expressed by Rule 18b(2), quoted above, which require a judge to recuse himself in any proceeding in which:

- (a) his impartiality might reasonably be questioned;
- (b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding....

When dealing with these grounds, you should remember to take a good look at the Code of Judicial Conduct, which contains pertinent provisions you should consider citing, to wit:

- (1) Canon 1, which provides:

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<sup>7</sup> In *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 421 (Tex. App.-Dallas 2006), the Court noted that "courts of appeals have diverged on whether a judge may deny a recusal motion based on procedural deficiencies...." Nevertheless, the Court of Criminal Appeals has made it quite clear that a judge may deny a motion to recuse if it is untimely without referring the matter in the first instance. *De Leon v. Aguilar*, *supra* at 5 n.3; *Arnold v. State*, *supra* at 544-45.

<sup>8</sup> It is also well settled that a motion to recuse should be filed at the earliest practicable time after the grounds for recusal become known to the parties. *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 422 (Tex.App.-Dallas 2006, no pet.).

**An independent and honorable judiciary is indispensable to justice in our society. 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. The provisions of this Code are to be construed and applied to further that objective;**

(2) Canon 2, which provides, in pertinent part:

A. 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;**  
and

(3) Canon 3, which provides, in pertinent part:

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge **except those in which** disqualification is required or **recusal is appropriate.**

\* \* \*

(4) **A judge shall be patient, dignified and courteous to litigants, jurors, witnesses, lawyers and others with whom the judge deals in an official capacity,** and should require similar conduct of lawyers, and of staff, court officials and others subject to the judge's direction and control.

(5) **A judge shall perform judicial duties without bias or prejudice.**

(6) **A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice,** including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

\* \* \*

(9) A judge should dispose of all judicial matters promptly, efficiently **and fairly.**

Consistent with the provisions of Canons 1, 2 and 3 of the Code of Judicial Conduct quoted above, a judge must be particularly careful in what he or she does and/or says, because "[t]he influence of the trial judge on the jury is necessarily and properly of great weight and his lightest word or intimation is received with deference, and may prove controlling." *Newman v. A.E. Staley Mfg. Co.*, 648 F.2d 330 at 334 (5th Cir. 1981) (quoting *Quercia v. United States*, 289 U.S. 466 (1933)). Indeed, "'jurors hold the robed trial judge in great awe and reverence' and 'his lightest word or intimation is received with deference, and may prove controlling.'" *United States v. Barbour*, 420 F.2d 1319, 1322 (D.C.Cir.1969) (quoting *Hawkins v. United States*, 310 F.2d 849, 852 (D.C.Cir.1962), and *Starr v. United States*, 153 U.S. 614, 626 (1894)).

Indeed, every citizen accused is guaranteed the right to an impartial judge who is not biased against

him. See *Blue v. State*, 41 S.W.3d 129, 138 (Tex. Crim. App. 2000)(Mansfield, J., concurring);<sup>9</sup> *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) (per curiam) ("Trial before 'an unbiased judge' is essential to due process"); *Brown v. Vance*, 637 F.2d 272, 281 (5th Cir. 1981) ("(D)ue process guarantee(s) ... a fair trial before an impartial judge...."). Indeed, as stated in *Bracy v. Gramley*, 81 F.3d 684, 696 (7th Cir. 1996)(Rovner, J., dissenting):

**No right is more fundamental to the notion of a fair trial than the right to an impartial judge.** *Johnson v. Mississippi*, 403 U.S. 212, 216, 91 S.Ct. 1778, 1780, 29 L.Ed.2d 423 (1971) (per curiam); *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955); see also *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 106 S.Ct. 1580, 89 L.Ed.2d 823 (1986); *Ward v. Village of Monroeville, Ohio*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972); *Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). **"The truth pronounced by Justinian more than a thousand years ago, that '[i]mpartiality is the life of justice,' is just as valid today as it was then."** *United States v. Brown*, 539 F.2d 467, 469 (5th Cir.1976) (per curiam). **The constitutions of our nation and of our states, the rules of evidence and of procedure, and 200 years of case law promise a full panoply of rights to the accused. But ultimately the guarantee of these rights is no stronger than the integrity and fairness of the judge to whom the trial is entrusted.** (emphasis added).<sup>10</sup>

Indeed, "[a] judge has a duty not just to be impartial but to appear impartial," *United States v. Denson*, 603 F.2d 1143, 1150 (5th Cir. 1979)(Goldberg, J., concurring and dissenting).

### C. Texas Rules Of Appellate Procedure.

Tex.R.App. Proc. 16.1 to 16.3 control the disqualification or recusal of an **appellate judge or justice**. Accordingly, if you are considering the recusal of an appellate judge or justice, you need to follow

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<sup>9</sup> In *Blue v. State*, *supra*, a plurality of the Court of Criminal Appeals held that a judge's comments to the jury, which tainted the presumption of innocence, were fundamental error of constitutional proportion which required no objection. *Id.* at 132.

<sup>10</sup> In *Bracy v. Gramley*, 520 U.S. 899, 904-905 (1997), the Supreme Court reversed the Seventh Circuit's opinion in *Bracy v. Gramley*, *supra*, essentially vindicating Judge Rovner's position, quoted immediately above in the text of this motion. In so doing, the Supreme Court stated the following:

Of course, most questions concerning a judge's qualifications to hear a case are not constitutional ones, because the Due Process Clause of the Fourteenth Amendment establishes a constitutional floor, not a uniform standard. *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 828, 106 S.Ct. 1580, 1588-1589, 89 L.Ed.2d 823 (1986). Instead, these questions are, in most cases, answered by common law, statute, or the professional standards of the bench and bar. See, e.g., *Aetna*, *id.*, at 820-821, 106 S.Ct., at 1584-1585; *Tumey v. Ohio*, 273 U.S. 510, 523, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927); 28 U.S.C. §§ 144, 455; ABA Code of Judicial Conduct, Canon 3C(1)(a) (1980). But the floor established by the Due Process Clause clearly requires a "fair trial in a fair tribunal," *Withrow v. Larkin*, 421 U.S. 35, 46, 95 S.Ct. 1456, 1464, 43 L.Ed.2d 712 (1975), before a judge with no actual bias against the defendant or interest in the outcome of his particular case. See, e.g., *Aetna*, *supra*, at 821-822, 106 S.Ct., at 1585-1586; *Tumey*, *supra*, at 523, 47 S.Ct., at 441.

these rules, which also incorporate much of the law set forth above. Respectively, these rules provide the following:

**Rule 16.1. Grounds for Disqualification**

The grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas.

**Rule 16.2. Grounds for Recusal**

The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure. In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending.

**Rule 16.3. Procedure for Recusal**

(a) *Motion*. A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.

(b) *Decision*. Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

(c) *Appeal*. An order of recusal is not reviewable, but the denial of a recusal motion is reviewable.

Notably, the procedures covered in Rule 18a quoted above do not apply in the context of an appellate disqualification and/or recusal, but the legal grounds contained within Article V, Section 11 of the Texas Constitution, Rule 18b and Article 30.01 do apply to either disqualification and/or recusal of an appellate judge.

There are a host of policy considerations you will need to consider in deciding whether you are or are not going to move to recuse a trial and/or appellate judge, because regardless of the outcome of the recusal motion, you may ultimately hurt your client and/or yourself.

## **II. Disqualification Of Attorneys.**

### **A. Texas Rules Of Professional Conduct.**

We need to be aware of the following two rules, and we should at least take a look at Rules 1.07 and 1.08 of the Texas Rules of Professional Conduct.

**Rule 1.06. Conflict of Interest: General Rule**

- (a) A lawyer shall not represent opposing parties to the same litigation.
- (b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:
  - (1) involves a substantially related matter in which that person's interests are materially and directly adverse to the interests of another client of the lawyer or the lawyer's firm; or
  - (2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.
- (c) A lawyer may represent a client in the circumstances described in (b) if:
  - (1) the lawyer reasonably believes the representation of each client will not be materially affected; and
  - (2) each affected or potentially affected client consents to such representation after full disclosure of the existence, nature, implications, and possible adverse consequences of the common representation and the advantages involved, if any.
- (d) A lawyer who has represented multiple parties in a matter shall not thereafter represent any of such parties in a dispute among the parties arising out of the matter, unless prior consent is obtained from all such parties to the dispute.
- (e) If a lawyer has accepted representation in violation of this Rule, or if multiple representation properly accepted becomes improper under this Rule, the lawyer shall promptly withdraw from one or more representations to the extent necessary for any remaining representation not to be in violation of these Rules.
- (f) If a lawyer would be prohibited by this Rule from engaging in particular conduct, no other lawyer while a member or associated with that lawyer's firm may engage in that conduct.

**Rule 1.09. Conflict of Interest: Former Client**

- (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
  - (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
  - (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
  - (3) if it is the same or a substantially related matter.

(b) Except to the extent authorized by Rule 1.10, when lawyers are or have become members of or associated with a firm, none of them shall knowingly represent a client if any one of them practicing alone would be prohibited from doing so by paragraph (a).

(c) When the association of a lawyer with a firm has terminated, the lawyers who were then associated with that lawyer shall not knowingly represent a client if the lawyer whose association with that firm has terminated would be prohibited from doing so by paragraph (a)(1) or if the representation in reasonable probability will involve a violation of Rule 1.05.

## **B. Disqualification Of Defense Counsel.**

Defense counsel in a criminal proceeding, pre-indictment or post-indictment, always face potential disqualification initiated by government motion or by the court *sua sponte*.

Prior to an indictment (i.e., during a grand jury investigation), federal court, a federal district judge (with or without a motion from the government) can disqualify you if you represent multiple clients. *See In re Gopman*, 531 F.2d 262 (5th Cir. 1976)(allowing government to move to disqualify counsel during a grand jury investigation due to a conflict of interest based upon the attorney's simultaneous representation of three individuals and their labor union and upholding the district court's disqualification of counsel due to a conflict of interest under the district court's supervisory powers over the grand jury)); *United States v. Garcia*, 517 F.2d 272 (5th Cir. 1975) (post indictment).<sup>11</sup>

Prior to an indictment in state court, it appears that a judge can also disqualify an attorney, although there is less precedent for this type of action. *See e.g., In Re Guerra*, 235 S.W.3d 392 (Tex. App.-Corpus Christi 2003, no pet.)(upholding district court's disqualification of the district attorney and appointing district attorney pro tem to assist the grand jury in its investigation of the district attorney's alleged criminal actions); *cf. Gonzalez v. State*, 117 S.W.3d 831 (Tex. Crim. App. 2003) (discussed below).

In the post indictment setting in federal court, Rule 44 requires the Court to personally inquire into the joint representation of co-defendants by one lawyer or one law firm and take appropriate measures to protect each defendants' right to counsel. The standard the District Court applies is to recognize the presumption in favor of defendant's choice of counsel, overcome only by demonstration of actual conflict or serious potential for conflict of interest;<sup>12</sup> but that unsupported or dubious speculation as to a conflict will

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<sup>11</sup> *Gopman* set forth a very liberal standard for disqualification (public interest due to the appearance of impropriety) in the context of a grand jury investigation. Of course, in the context of a grand jury investigation, a target, subject or witness has no Fifth or Sixth Amendment right to counsel. *See United States v. Mandujano*, 425 U.S. 564 (1976); *Massiah v. United States*, 377 U.S. 201 (1964). Furthermore, in *United States v. Mahar*, 550 F.2d 1005, 1008 (5th Cir. 1977), the Fifth Circuit stated that "[w]hatever **Gopman's exact scope, it does not apply to a criminal defendant....**"

<sup>12</sup> In *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975), the Court stated the following:

"A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing."

However, in *United States v. Trevino*, 992 F.2d 64, 65 (5th Cir. 1993) in denying counsel's motion to withdraw, the Court emphasized its language in *Foxworth* "that a conflict must be more than illusory or imagined."

not suffice. *Wheat v. United States*, 486 U.S. 153 (1988). The Court cannot disqualify counsel based on mere inferences, but must indeed make findings pointing to "a specific conflict, actual or potential." *In re Grand Jury Proceedings*, 859 F.2d 1021, 1026 (1st Cir. 1988). *Cf. United States v. Garcia-Rosa*, 876 F.2d 209 (1st Cir. 1989) [court refused to speculate and found no actual conflict]. Additionally, the Court is expected to adequately consider the possibility that the government is manufacturing a conflict in order to prevent the defendant from having a particularly able defense counsel. *Wheat v. United States*, 486 U.S., at 163. Disqualification of defense counsel in a criminal case, it should be recalled, is not immediately appealable. *Flanagan v. United States*, 465 U.S. 259 (1984). Thus, if you get disqualified, your clients may lose you as their attorney and conceivably, may not even have sufficient financial resources remaining to hire new counsel. Thus, disqualification of defense counsel by government prosecutors can (and is) used as a serious tool to attempt to coerce co-defendants to give up the fight and plead guilty. *See e.g., United States v. Gotti*, 771 F.Supp. 552 (E.D.N.Y. 1991); *United States v. Gotti*, 782 F.Supp. 737 (E.D.N.Y. 1992), *affirmed*, *United States v. Locascio*, 6 F.3d 924 (2nd Cir. 1993).

Post indictment in Texas state courts, the decision of the Court of Criminal Appeals in *Gonzalez*, *supra*, sets forth the legal framework that must be utilized by a state court in resolving whether a defense attorney can be disqualified:

The Federal and Texas Constitutions, as well as Texas statute, guarantee a defendant in a criminal proceeding the right to have assistance of counsel.<sup>FN4</sup> The right to assistance of counsel contemplates the defendant's right to obtain assistance from counsel of the defendant's choosing.<sup>FN5</sup> However, the defendant's right to counsel of choice is not absolute.<sup>FN6</sup> A defendant has no right to an advocate who is not a member of the bar, an attorney he cannot afford or who declines to represent him, or an attorney who has a previous or ongoing relationship with an opposing party.<sup>FN7</sup> Additionally, while there is a **strong presumption in favor of a defendant's right to retain counsel of choice**, this presumption may be overridden by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice.<sup>FN8</sup> However, when **a trial court unreasonably or arbitrarily interferes with the defendant's right to choose counsel, its actions rise to the level of a constitutional violation.**<sup>FN9</sup> **Therefore, courts must exercise caution in disqualifying defense attorneys, especially if less serious means would adequately protect the government's interests.**<sup>FN10</sup>

FN4. *See* U.S. Const., 6th Amend.; Tex. Const., Art. I § 10; Tex.Code Crim. Proc. Art. 1.05.

FN5. *See Ex parte Prejean*, 625 S.W.2d 731, 733 (Tex.Crim.App.1981); *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932)(defendant should be afforded fair opportunity to secure counsel of his own choice); *Chandler v. Fretag*, 348 U.S. 3, 9, 75 S.Ct. 1, 99 L.Ed. 4 (1954)(same); *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942)(same).

FN6. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

FN7. *Id.*

FN8. *Id.* at 158-60, 108 S.Ct. 1692; *Webb v. State*, 533 S.W.2d 780, 784 (Tex.Crim.App.1976).

FN9. *United States v. Collins*, 920 F.2d 619, 625 (10th Cir.1990).

FN10. *United States v. Diozzi*, 807 F.2d 10 (1st Cir.1986).

**In moving to disqualify appellant's counsel of choice, the government bears a heavy burden of establishing that disqualification is justified.**<sup>FN11</sup>

FN11. *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir.1986).

*State v. v. Gonzalez*, 117 S.W.3d 831, 836-837 (Tex. Crim. App. 2003) (emphasis added).

In *Gonzalez*, the state moved to disqualify counsel under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct "because he had personal knowledge bearing directly on the guilt or innocence of his client and the credibility of the State's key witness and was therefore a potential witness whose credibility would be at issue regardless of whether he took the stand." *Id.* at 835. The Court stated the following, which is directly relevant to the instant case:

Counsel may be disqualified under the disciplinary rules **when the opposing party can demonstrate actual prejudice resulting from opposing counsel's service in the dual role of advocate-witness. Allegations of one or more violations of the disciplinary rules or evidence showing only a possible future violation are not sufficient.** In determining whether counsel should be disqualified because counsel is a potential witness, Texas courts use rule 3.08 of the Texas disciplinary rules of professional conduct as a **guideline. The rule does not present the disqualification standard, but does provide considerations relevant to the determination.**

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The comments following the rule recognize that rule 3.08 sets out a disciplinary standard and **is not well suited to use as a standard for procedural disqualification but can provide guidance** in those procedural disqualification disputes where the party seeking disqualification can demonstrate **actual prejudice to itself resulting from the opposing lawyer's service in the dual roles.** The party seeking disqualification, however, cannot invite the necessary actual prejudice by unnecessarily calling the opposing counsel as a witness.

*Id.* at 837-838 (footnotes omitted, emphasis added)

Finally, you should always remember to rely upon *Stearns v. Clinton*, 780 S.W.2d 216 (Tex. Crim. App. 1989), and its progeny, because *Stearns* clearly supports the notion that a judge cannot arbitrarily unappoint (i.e., disqualify) a court appointed attorney over the objection of the defendant. Furthermore, the rationale of *Stearns* should apply with equal force to retained defense counsel, since it is based on the creation of the attorney-client privilege that a court cannot arbitrarily interfere with.

## **C. Simultaneous And Successive Representation Of Multiple Clients**

### **1. Overview.**

When I refer to the term simultaneous representation of multiple clients, I mean exactly that: representation of two or more clients at the same time in one civil and/or criminal proceeding. Successive

representation, on the other hand, means the representation of two or more clients in a civil and/or criminal proceeding at different times. Although simultaneous and/or successive representation of multiple clients has distinct advantages, it also has distinct pitfalls. I personally believe, in light of my prior experience (personal as well as professional),<sup>13</sup> that it should be avoided by the cautious attorney.

## **2. Simultaneous Representation Of Multiple Clients.**

Parallel civil and criminal proceedings commonly generate concerns over simultaneous representation of two or more clients. Typically speaking, the civil and criminal investigations and/or proceedings will not necessarily begin at the same time. This holds true whether you are involved in a state or federal criminal investigation. Indeed, the allegations of civil pleadings and/or responses and/or testimony in civil cases (whether in the form of an answer to a complaint or motion, answers to interrogatories, and/or testimony at depositions, hearings and/or trials) can often times generate a criminal investigation by the federal and/or state authorities.<sup>14</sup> Coupled with the prospect of potential criminal liability lurking in the background of a wide variety of civil proceedings, an attorney must recognize that it is not unusual for defendants in civil proceeding to earnestly and steadfastly deny that they violated any fiduciary duties or were negligent, let alone admit that they violated the criminal law. The typical response from such a business person is that he or she used his or her best business judgment in making decisions. Generally speaking, civil defendants are not thinking about potential criminal liability and their civil attorney is not thinking about criminal liability. Thus, it is not at all uncommon to see one or more defendants in a civil case approach a single lawyer or law firm and retain that lawyer or law firm to represent two or three of them in some complex civil case. The civil defendants will typically represent to the civil attorney that they did nothing wrong or illegal, if the topic is ever broached by the civil attorney. The civil defendants seek joint counsel for a wide variety of reasons, but most typically it is done because they are friends who want to present a common defense while saving money by retaining only one attorney or one law firm. The civil attorney, typically, is not even thinking about the prospect of any criminal investigation or indictment. Later, when

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<sup>13</sup> I had represented client A in connection with a two year, ongoing criminal investigation that was running parallel to an ongoing civil RICO lawsuit. I was not lead counsel for client A in the civil case, but I was involved as counsel for client A in that civil RICO case. Client A was indicted and shortly thereafter, the civil RICO case was settled. Months later, I filed a motion with the Court to switch from client A to client B, who had also been involved in the civil RICO case and who was also indicted along with client A. The motion had waivers of potential conflict of interest of client A and client B attached to the motion. The District Court granted the motion and then, 30 days later disqualified me (essentially on its own motion) due to a conflict of interest. Client A lost my services and client B lost my services, much to the amusement of the AUSA.

<sup>14</sup> For instance, under 18 U.S.C. Section 3057, any judge, receiver or trustee having reasonable grounds for believing that there is a criminal offense involving a bankruptcy proceeding shall report it to the United States Attorney, who shall investigate the facts and report thereon to the judge and, if appropriate, present the matter to a grand jury. Similarly, federally chartered financial institutions, state chartered financial institutions which are covered by FDIC insurance, and federal regulators of such financial institutions all have regulatory obligations to report "suspected criminality" to the FBI and the United States Attorney for the geographic area in which the financial institution is located. See e.g., 12 C.F.R. Section 21.11 (National Banks); 12 C.F.R. Section 353 (state chartered banks insured by the FDIC).

On the state side of the docket, civil forfeiture cases are frequently filed shortly after an arrest and well before an indictment due to the 30 day filing deadline under Tex.Code Crim. Pro. art. 59.04(a)(requiring commencement of proceedings under Article 59 "not later than the 30th day after the date of the seizure."). Thus, parallel civil and criminal proceedings in the state arena are frequently encountered.

a criminal investigation is commenced (and this may or may not be before the conclusion of the civil litigation), the civil attorney representing those co-defendants in the civil case will encounter a difficult if not impossible choice: how to juggle the interests of two or more clients in the civil case when there are criminal overtones even if he, the civil attorney, does not undertake representation of any of his clients on the criminal "front". And if the civil attorney does undertake criminal representation of the same co-defendants as he represents in the civil case (in a pre-indictment or post-indictment time frame), how will he juggle the interests of those clients during the pendency of the criminal investigation and/or indictment? At a minimum, counsel will have to continually re-evaluate the possible effects that choices available to one client may have on another client, in both the civil and criminal cases. Clearly, whether the attorney is representing the clients only in the civil case or also in connection with a criminal investigation (and/or indictment), there is a distinct potential for an actual conflict of interest.

We face these same type of considerations in multi-defendant cases if we accept representation of more than one client. While it may seem sensible for a husband and wife, jointly accused of filing a false income tax return (for example), to retain the same counsel, there are tremendous pitfalls for the clients (as well as us attorneys) if we accept multiple clients.

### **3. The Potential For Conflicts Of Interest.**

Although multiple representation does not per se equate with a conflict of interest, *Burger v. Kemp*, 483 U.S. 776 (1987), we all know that the potential can and often times does exist. In the course of a typical criminal case, we know that if there are two clients and they are both pointing the finger at each other as the person who pulled the trigger, we cannot represent them both. However, in the context of parallel civil and criminal litigation, the potential for conflict of interest is not necessarily as clear cut. Indeed, where counsel originally undertakes joint representation of co-defendants in a civil case where there is no criminal investigation or indictment but a criminal investigation or indictment ultimately is undertaken during the pendency of the civil case, a conflict may well surface. In the context of simultaneous parallel civil and criminal proceedings, an attorney can often times dispose of criminal liability via the civil lawsuit. The way to do this is by a global settlement, discussed elsewhere in this paper. However, the prospect of a global settlement represents the ultimate potential conflict. An example should suffice. If client A wants to resolve his civil and criminal liability and that resolution contains a requirement that client A makes full disclosure of all that he knows about the parallel civil and criminal disputes and client A will implicate client B, the attorney representing client A and B faces the irreconcilable conflict of either intentionally impeding the efforts of client A wishing a global settlement or undertaking action which is detrimental to client B. Opposing the desired settlement agreement would likely breach the fiduciary responsibility that the attorney owes to client A, besides possibly increasing that client's risk of liability or potential for subsequent criminal prosecution. And, of course, negotiating the settlement for A may expose client B to damaging evidence from client A. Withdrawal of representation from one client is one way of eliminating the ethical conflict that the attorney faces, but this course of action is not always practical or sufficient. For example, the attorney may have been retained for the multiple clients at the expense of their corporate employer, or indeed at the expense of one of two co-defendants in the civil case. Retaining individual counsel may simply not be economically feasible for one or both of them. Another consideration is every man's right under the 6th Amendment to retain counsel of his or her choice. Clients may be unwilling to release a hot-shot lawyer or one that they have known for years. Withdrawal of counsel from one co-defendant or from both co-defendants may result in focusing attention on the reasons for the withdrawal, which may give plaintiff's counsel in the civil case and/or the investigator/prosecutor in the criminal proceeding a clue that there is in fact a conflict of interest between client A and B. This could trigger a grant of use immunity by the prosecutor as to client A to ascertain what A knows about client B, or vice versa. Furthermore, it is not clear that withdrawal from client A **or** client B will solve the conflict, as the attorney may have learned information from client A that is detrimental to client B and vice versa. The attorney's continued

representation of either client may be prejudicial to both clients. The solution then may be to obtain an effective waiver of any potential conflict of interest from both clients. *See United States v. Fahey*, 769 F.2d 829 (1st Cir. 1985) [a potential conflict of interest is not a per se violation of defendant's 6th Amendment right]. Obtaining a waiver of any potential conflict of interest, however, is seldom in the government's interest and will normally be opposed by the government in a criminal investigation and/or post-indictment setting because, as we all know, multiple defendants represented by the same attorney may be perceived as acting as a "common front", hindering the government's efforts to make deals or grants of immunity in return for testifying against the co-defendant.

In the event that an attorney engaged in multiple representation survives disqualification by plaintiff's counsel and/or the state or federal prosecutor, the attorney may face one more hurdle: the co-defendants themselves in post-conviction attack or in a malpractice suit for breach of fiduciary duties and deceptive trade practices. For an example of a multiple representation case resulting in constitutionally ineffective assistance of counsel, *see Thomas v. Foltz*, 818 F.2d 476 (6th Cir. 1987).

#### **4. Successive Representation Of Multiple Clients.**

Successive representation of a number of clients who are co-defendants or otherwise implicated in parallel civil and criminal proceedings is somewhat different from simultaneous representation of multiple clients **because there is no dual representation of two clients during any one time period**. The situation most frequently arises when an attorney (Attorney #1) represents one defendant in a civil proceeding (defendant A) and then, upon the advent of a criminal investigation and/or indictment involving a number of defendants (A, B, C and D), Attorney #1 ceases his civil representation of client A and undertakes representation of client B in the criminal case. Client A, in the meantime, hires new counsel (Attorney #2) to represent him in both the civil and criminal cases.

In this situation, Attorney #1 faces obstacles almost as formidable as those involved in simultaneous representation of multiple clients. First, Attorney #1 has presumably (but not necessarily) gleaned information from client A that may be able to be used by him in his defense of Client B. This would depend, in part, upon whether the topics involved in the civil case are sufficiently similar to those involved in the criminal investigation and/or indictment. If information from client A has been obtained by Attorney #1 that would be detrimental to Client A and beneficial to Client B, there may be a conflict of interest. Admittedly, Client A can waive the conflict, but a federal judge is not bound to accept that waiver in a pre-indictment setting or even after indictment. *Wheat v. United States*, *supra*. Furthermore, Attorney #1 may be tempted to use that information detrimental to Client A to assist Client B in extricating himself from the civil and/or criminal cases. This poses true ethical problems, for even if the client signed a waiver of conflict of interest as to Attorney #1, Attorney #1 is still under fiduciary duties to Client A as well as Client B. How does Attorney #1 fulfill his duty to Client B without utilizing the information helpful to client B that he learned from Client A? Conversely, how does Attorney #1 fulfill his duty to former Client A while using the information he obtained from client A to assist Client B? It is truly a morass, unless the attorney has NOT learned information from A that would be helpful to B and that is NOT harmful to A.<sup>15</sup> It is only in this narrow category of cases that I believe that simultaneous representation should be seriously considered, let alone undertaken.

Of course, if successive representation is undertaken in civil or criminal proceedings, there always exists the possibility of disqualification. And in this situation, the former client (client A) can also move to

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<sup>15</sup> Even then, there can be real disputes regarding what information the attorney learned during his representation of each client, thus making limited disclosures at the request of the client, as tactical maneuvers, extremely difficult.

disqualify the attorney from representing client B if the matters upon which the attorney represented client A are substantially related to the matters upon which the attorney currently represents client B. Thus, without client A's consent, there is no future in simultaneous representation.

Clearly, the decision to represent more than one client in a multi-defendant case (and/or where there is a parallel civil and criminal investigation) should not be made lightly. The chances of facing enormous ethical conflicts and possible disqualification after expending considerable time and client money are certainly great. Complete candor and detailed explanations to the respective clients on any potential conflicts is paramount. Proceed in this area with caution.

#### **D. Disqualification Of Prosecutors.**

In Texas, the elected district or county attorney “shall represent the state in all criminal cases in the district courts of his district and in appeals therefrom, except in cases where he has been, before his election, employed adversely.” See Tex. Code Crim. Proc., art. 2.01. The office of a district attorney is constitutionally created and protected; thus, the district attorney's authority “cannot be abridged or taken away.” See *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1 (Tex. Crim. App. 1990). In *Edison*, the Court of Criminal Appeals held that a trial judge could not prevent the elected district attorney and his staff from participating in the prosecution of any case properly brought in that jurisdiction. The Court noted that disqualification or recusal of an elected district attorney constructively removes the district attorney from his elected office in violation of Tex. Gov't Code, Section 41.102 and Tex. Local Gov't Code, Sections 87.013 and 87.018(a). *Id.* at 793 at 5. *Edison* went on to note that if there is a conflict of interest on the part of the district attorney or his staff, the responsibility to recuse themselves is theirs and not that of the trial judge, and if they do not recuse themselves, the remedy is by appeal. *Id.* at 6-7. And, in *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex.Crim.App.1994), the Court held that “[a] trial court may not disqualify a district attorney or his staff on the basis of a conflict of interest that does not rise to the level of a due-process violation.”

Thus, if a prosecuting attorney has formerly represented the defendant in the “same” criminal matter as that currently being prosecuted, he is statutorily disqualified under Tex. Code Crim. Proc. art. 2.01. This is an obvious and actual conflict of interest, *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex.Crim.App.1979),<sup>16</sup> that constitutes a due process violation. *Id.*; *Ex parte Morgan*, 616 S.W.2d 625, 626 (Tex.Crim.App.1981).

Where, however, a defendant claims that a prosecutor has a conflict of interest that does not involve prior representation of the defendant in the same criminal case, the rule is different. In that situation, a prosecutor is not automatically disqualified from prosecuting a person whom he had previously represented, even when it is for the same type of offense.<sup>17</sup> Rather, the rule in this situation is that “a due-process violation

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<sup>16</sup> In *Spain*, *supra* at 134, the Court stated:

When a district attorney prosecutes someone whom he previously represented in the same case, the conflict of interest is obvious and the integrity of the prosecutor's office suffers correspondingly. Moreover, there exists the very real danger that the district attorney would be prosecuting the defendant on the basis of facts acquired by him during the existence of his former professional relationship with the defendant. Use of such confidential knowledge would be a violation of the attorney-client relationship and would be clearly prejudicial to the defendant.

<sup>17</sup> See *Munguia v. State*, 603 S.W.2d 876, 878 (Tex.Crim.App.1980) (county attorney who had represented defendant on prior rape charges was not disqualified from prosecuting him for current aggravated

occurs only when the defendant can establish “actual prejudice,” not just the threat of possible prejudice to his rights by virtue of the district attorney's prior representation. *Landers v. State*, 256 S.W.3d 295, 305 (Tex. Crim. App. 2008). In *Landers*, the defendant attempted to disqualify the elected district attorney who was prosecuting her for a current murder and intoxication manslaughter case because that district attorney had defended her three years earlier in a prior intoxication-assault case that had been reduced to a DWI. The trial court denied the motion to disqualify. *Landers* stated the rule as follows:

We hold that a prosecutor may not be disqualified from prosecuting a criminal action in this State unless and until the trial court determines that an actual conflict of interests exists. In this context, an “actual conflict of interests” is demonstrated where a District Attorney or a member of his or her staff has previously represented the defendant with regard to the charges to be prosecuted **and**, as a result of that former attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial.

*Landers*, *supra* at 305 (footnotes omitted).<sup>18</sup>

*Landers* also noted that this two prong test was different from that employed in civil cases in Texas, where a civil attorney can be disqualified merely upon a showing that the attorney had previously represented the adverse party in “a substantially related matter” under Rule 1.09(a)(3) the Texas Disciplinary Rules of Professional Conduct. *Id.* at 305-306.<sup>19</sup>

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rape charges); *Reed v. State*, 503 S.W.2d 775, 776 (Tex.Crim.App.1974) (special prosecutor not disqualified even though he had previously represented defendant and had knowledge of his prior criminal record where that knowledge was acquired by virtue of his former position as an assistant county attorney).

<sup>18</sup> *Landers* discussed *In re State ex rel. Young*, 236 S.W.3d 207, 212 n. 23 (Tex.Crim.App.2007), where the Court noted that

We have held in the context of a violation of another disciplinary rule, for example, that before he can demonstrate a violation of due-process, a defendant must establish “actual prejudice,” not just the threat, however genuine (as the court of appeals fashioned its rule here), of prejudice. *See House v. State*, 947 S.W.2d 251, 253 (Tex.Crim.App.1997) (“[I]f a defendant cannot show actual prejudice from an alleged disciplinary rule violation by the State, then he will not be entitled to relief ....”).

*Landers* also noted that in *Gonzalez v. State*, *supra*, that the Court had held that in the context of a disqualification of defense attorney, “allegations of one or more violations of the disciplinary rules or evidence showing a possible future violation are not sufficient.” *Cf. Gonzalez v. State*, 117 S.W.3d 831, 837 (Tex.Crim.App.2003) (“Allegations of one or more violations of the disciplinary rules or evidence showing only a possible future violation are not sufficient” to justify attorney disqualification). *Landers* contains an extensive discussion of the law and is an excellent starting point for any motion to disqualify or recuse a prosecutor.

<sup>19</sup> *Landers* also discussed Rule 1.09 -- “substantially related” matters, noting that the Texas Supreme Court had held that “two matters are ‘substantially related’ within the meaning of Rule 1.09 when a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar,” citing *In re EPIC Holdings*, 985 S.W.2d 41, 51 (Tex. 1998), and stated that “[i]n the context of criminal matters, a prosecutor cannot be disqualified from prosecuting a former client if the criminal trials are not closely or substantially related.” *Id.* at 306-307.

Despite the above, you should be aware of *In Re Guerra*, 235 S.W.3d 392 (Tex. App.-Corpus Christi 2003, no pet.). There, the Court of Appeals upheld the district court's disqualification of the district attorney and the appointment of a attorney pro tem to assist the grand jury in its investigation of the district attorney's alleged criminal actions. This case thus appears to provide limited authority to a district court to disqualify or recuse a district attorney. According to the Guerra Court, a prosecutor's primary duty is not to convict but to see that justice is done. TEX. CODE. CRIM. PRO. art. 2.01. "In this regard, any interest that is inconsistent with the prosecutor's duty to see that justice is done is a conflict that could potentially violate a defendant's right to fundamental fairness." *In re Guerra*, 235 S.W.3d 392, 430 (Tex. App. -Corpus Christi 2007, no pet.). "For example, if a prosecutor has a financial stake in the outcome of a prosecution, the conflict between that interest and the duties of the public office clearly presents constitutional concerns." *Id.* At 430-31 (citing *Ganger v. Peyton*, 379 F.2d 709 (4<sup>th</sup> Cir. 1967)).<sup>20</sup>

The concept of a "disinterested prosecutor" is one that we should not forget, although the basis of that right is not crystal clear. The Court of Criminal Appeals, in *Ex parte Reposa*, 2009 WL 3487455 at 10-11 (Tex. Crim. App. October 28, 2009)(not designated for publication) concluded that a prosecutor may be disqualified on the basis of lack of disinterest when a defendant demonstrates that an actual conflict of interest exists which prejudices the defendant "in such a manner as to rise to the level of a due process violation." *Id.* at \*10. Therefore, a defendant who moves to disqualify a prosecutor must show (1) that the prosecutor harbors a lack of disinterest to such a degree that it creates a conflict of interest, and (2) that the defendant suffers a due process violation as a result. *Id.*; see *Gonzalez*, 117 S.W.3d at 839 ("a party seeking to disqualify the opponent's attorney for a violation of an ethical rule must demonstrate that such a violation will result in actual prejudice to the moving party").<sup>21</sup>

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<sup>20</sup> The *Guerra* Court noted that in *Ganger*, the defendant was prosecuted by the same lawyer who was representing Ganger's wife during a pending divorce, which included the same conduct for which Ganger was being prosecuted. 379 F.2d at 711. Declaring the subsequent conviction invalid, the Fourth Circuit stated that "[s]uch a conflict of interest clearly denied Ganger the possibility of a fair minded exercise of the prosecutor's discretion." 379 F.2d at 712. "Because of the prosecuting attorney's own self-interest in the civil litigation, "he was not in a position to exercise fair-minded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser degree of assault, or (3) whether to recommend a suspended sentence or other clemency." 379. F.2d at 713. Accordingly, the Fourth Circuit concluded:

Representing Ganger's wife in the divorce proceeding suggests the strong possibility that the prosecuting attorney may have abdicated to the prosecuting witness (Ganger's wife) in the criminal case the exercise of his responsibility and discretion in making charge decisions. If she did not actually make the decision to prosecute for felonious assault, certainly her interests were influential and those conflicting interests may have impeded appropriate plea bargaining.

379 F.2d at 713.

<sup>21</sup> The fact that a prosecutor does not like your client will not cut the mustard. See e.g., *Gonzalez v. State*, 115 S.W.3d 278, 286 (Tex. App. - Corpus Christi 2004, no pet.) (trial court properly refused to disqualify district attorney where defendant had physically assaulted an assistant prosecutor and the district attorney announced that any attack on personnel of his office would be considered a personal attack on him and that he would prosecute the case himself because this did not establish a due process violation); *Fluellen v. State*, 104 S.W.3d 152, 161 (Tex. App.-Texarkana 2003, no pet.) (fact that the defendant had been involved in a shouting match with the prosecutor over a minor traffic incident did not require the prosecutor's disqualification); *Hanley v. State*, 921 S.W.2d 904, 909 (Tex. App - Waco 1996, pet. ref'd) (defendant failed

### III. Conclusion.

Whether to file a motion to recuse or disqualify a judge or a prosecutor may or may not be an easy decision, depending upon the facts and circumstances. The ramifications of any such motion, whether you file it under seal (to protect the judge or the prosecutor, and to a certain extent, yourself) or not, may not be worth the potential benefits to your client. You may also personally incur the wrath of the judge or prosecutor, for whatever that may or may not be worth. However, there are definitely situations where you may need to do so. Conversely, where a judge or a prosecutor attempts to disqualify you, you need to seriously consider getting TCDLA involved, as the Strike Force may be able to assist and an overzealous judge or prosecutor may back down when TCDLA stands by your side. By conducting ourselves always within the ethical rules, we can hopefully avoid the distraction that such motions can entail.

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to prove that prosecutor's purported "prejudice" and "predisposition" against him rose to the level of a due process violation); *State ex rel. Hilbig v. McDonald*, 877 S.W.2d 469, 470 (Tex. App. -San Antonio 1994) (trial court abused its discretion by disqualifying the prosecutor "not because he had found that the district attorney's office had, in fact, committed any misconduct, but simply because allegations of misconduct had been made"); *Offermann v. State*, 742 S.W.2d 875, 876 (Tex. App. -San Antonio 1987, no pet.) (rejecting defendant's contention that prosecutor was not sufficiently disinterested because he harbored a "personal grudge." *Donald v. State*, 453 S.W.2d 825, 827 (Tex. Crim. App. 1969) (mere presence of a district attorney on bank board of directors did not create conflict of interest where bank was not "in any way connected with the transactions involved" in the fraud prosecution).

**TAB 1**  
Celis' Motion To Recuse Judge Luitjen

NO. 07-CR-4046-E & 08-CR-1365-E

STATE OF TEXAS	§	IN THE 148TH JUDICIAL
	§	
VS.	§	DISTRICT COURT
	§	
MAURICIO CELIS	§	NUECES COUNTY, TEXAS

**MOTION FOR RECUSAL**

TO THE HONORABLE MARK LUITJEN, JUDGE PRESIDING:

COME NOW the Defendant, MAURICIO CELIS, by and through his newly retained "lead counsel" of record for post trial matters, David L. Botsford, and pursuant to Rules 18a & 18b, Texas Rules of Civil Procedure, the Fourteenth Amendment to the United States Constitution; Article 1, Sections 10 and 19 of the Texas Constitution, and Canons 1, 2 and 3 of the Code of Judicial Conduct, presents this his Motion For Recusal, and as grounds therefore, would show this Court the following:

**I.**

**OVERVIEW OF RELIEF REQUESTED**

Defendant Celis respectfully seeks the recusal of the Honorable Mark Luitjen who presided over the trial in the above styled and numbered causes. Recusal is sought not merely in connection with Defendant Celis' timely filed Motion For New Trial (filed in the above styled and numbered causes), but also in connection with all further proceedings regarding Defendant Celis, including his Application For Writ Of Habeas Corpus which has been filed challenging the amount and conditions of Defendant Celis' bond pending appeal in the above styled and numbered causes. As grounds for recusal, the attached affidavits reflect that Judge Luitjen is biased against Defendant Celis and his counsel and in favor of the State and should be recused not merely under the statutory scheme, but also as a matter of due process and due course of law,

FILED-PATSY PEREZ  
2009 APR 24 AM 11:40Z  
CLERK OF DISTRICT COURTS  
NUECES COUNTY, TEXAS

as well as under Canons 1, 2 and 3 of the Code of Judicial Conduct.<sup>1</sup> Additionally, because Defendant Celis seeks a new trial on the basis of Judge Luitjen's bias against Defendant Celis and his counsel and in favor of the State, Judge Luitjen should not preside over or be involved in the resolution of Defendant Celis' Motion For New Trial.

## II.

### STATUTORY SCHEME FOR RECUSAL

Rule 18a, Texas Rules of Civil Procedure, which is entitled "Recusal or Disqualification of Judges", states, in pertinent part, that:

"(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior 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. If the judge recuses himself, he shall enter

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<sup>1</sup> In this connection, Defendant Celis asserts that the due course of law provision of Article I, Section 19 of the Texas Constitution provides more protection to him in the area of impartial judges and judicial bias than that afforded by the due process clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States. *See e.g., Pena v. State*, 226 S.W.3d 634 (Tex. App. -- Waco 2007), reversed on other grounds, *Pena v. State*, \_\_\_ S.W.3d \_\_\_ (Tex. Crim. App. 2009)(PD-1411-07, delivered April 8, 2009).

an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require."

Rule 18b, Texas Rules of Civil Procedure, which is entitled Grounds for Disqualification or Recusal of Judges, states in pertinent part that:

**"(2) Recusal**

A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

These statutes, including the ten day time frame of Rule 18a(a), have been held to be applicable to criminal cases. *See e.g., Arnold v. State*, 853 S.W.2d 543 (Tex.Crim.App.1993); *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex.Crim.App.1990). *See also McClenan v. State*, 661 S.W.2d 108, 109 (1983)(addressing recusal under prior statute and prior to that point in time when Rule 18a and Rule 18b were held applicable to criminal cases).

**III.**

**THIS MOTION FOR RECUSAL IS TIMELY FILED**

Because this motion is being filed well before "ten days before the date set for trial or

other hearing" in this matter, this motion is timely filed pursuant to Tex.R.Civ. Proc. 18a(a).

#### IV.

#### **APPLICANT'S RIGHT TO A HEARING IN THE EVENT JUDGE LUITJEN DOES NOT RECUSE HIMSELF**

Because this motion is verified and states "with particularity the grounds why the judge before whom the case is pending should not sit," and is "made with personal knowledge" or "facts ... stated upon information and belief [where] the grounds of such belief are specifically stated" pursuant to Rule 18a(a), *supra*, Defendant Celis is entitled to an evidentiary hearing in the event Judge Luitjen does not recuse himself.

#### V.

#### **THE ATTACHED AFFIDAVITS**

Although Defendant Celis incorporates by reference all of the attached affidavits to support this motion, in order to give the Court a "flavor" of what the affidavits reflect, the following is proffered.

a. Juror Rogelio Perez "was surprised by the actions of" the Judge and concluded that "[b]ased on what I heard and saw, I thought that it was obvious that Judge Luitjen was biased against Mauricio Celis". According to what Perez saw and heard, and "based on the manner in which Judge Luitjen spoke to attorneys for Celis," Perez "noticed that Judge Luitjen was bothered by the Mexican witnesses that were used by the defense." Perez concluded that "Judge Luitjen was more positive towards the prosecution" and "often acted as if he (Judge Luitjen) wanted to be somewhere else when the defense put on some of their witnesses." (explanation in original).

b. Juror Rosa Rasmussen was also "surprised by the actions" of Judge Luitjen. According

to Rasmussen, "based on what I heard and saw, I thought it was obvious that Judge Luitjen was biased against Mauricio Celis." According to Rasmussen, "[d]uring deliberations, all of the jurors talked about how Judge Luitjen was obviously biased against Mauricio Celis and Celis' defense team." "All of the jurors said that they noticed this." Judge Luitjen's negativity towards Celis "was evident in the manner in which Judge Luitjen spoke with defense attorney Tony Canales" and "was further evident in the facial expressions that Judge Luitjen used while dealing with or talking to the defense." Rasmussen believed "that Judge Luitjen was more positive towards Carlos Valdez and the prosecution."

c. Juror Eric Chavez concluded that "[b]ased on what I heard and saw during the Celis trial, I believed that it was obvious that Judge Luitjen was biased against Mauricio Celis." According to Chavez, Judge Luitjen "often seemed as if he (Luitjen) was not listening when the defense put on some of their witnesses" and that Judge Luitjen, "based on the manner in which (he) spoke to Tony Canales and other attorneys for Mauricio Celis" "seemed upset by the Mexican witnesses that were used by the defense."

d. Juror Noe Adame was also "shocked by the manner that the Judge" "ran his courtroom." According to Adame, "Judge Luitjen favored the prosecution from the start" and Adame concluded that "Judge Luitjen was biased against Mauricio Celis." Adame based these conclusions "on the way that Judge Luitjen spoke to the defense attorneys, especially Tony Canales, and the tone of voice that Judge Luitjen used when talking to the defense." Adame also opined that "[t]he body language that Judge Luitjen displayed while talking to the defense attorneys or listening to the defense witnesses was even negative." Thus, "[i]t was simply clear that the judge was against Celis from the start." Adame, like Juror Rasmussen, stated that

"[w]hen all of the jurors started the deliberations, we talked about how Judge Luitjen favored Carlos Valdez and the prosecution" and that "each juror seemed to agree that the judge was against Mauricio Celis."

e. Juror Juan Resendez also "believed that Judge Luitjen was slightly biased against Mauricio Celis and the defense attorneys representing Celis." This conclusion was "based on the fact that Judge Luitjen was rude when he spoke to the defense attorneys" and that "Judge Luitjen was rude to the defense attorneys whenever (he) would respond to the defense's objections." He too concluded that "Judge Luitjen appeared bothered when the defense's witnesses from Mexico testified because of their lack of knowledge of the English language and the translation problems that this caused."

f. Juror Ismael Vera concluded that Judge Luitjen "favored the prosecution" and that "[b]ased on what I heard and saw, I think Judge Luitjen was biased against Mauricio Celis." She felt "this way because of the manner and tone of voice that Judge Luitjen used when speaking to defense attorney Tony Canales and the other defense attorneys" and concluded "[i]t was evident in the facial expressions that the judge had when talking to the defense team." She also concluded that "Judge Luitjen always seemed to choose in favor of the prosecution when dealing with motions and objections."

g. Juror Roseanne Vega also "noticed that it seemed as if the judge"... "was biased against Mauricio Celis and Celis' attorneys." According to Vega, "[b]ased on what I heard and saw during the trial, I noticed that Judge Luitjen ruled against the defense when he ruled on objections, no matter what the objection was." "In contrast, I noticed that at times during the trial, it appeared that Judge Luitjen was biased in favor of the prosecution." Vega also thought "that

Judge Luitjen was in a hurry to get the trial over with while the defense was putting on their case" and "seemed to rush the defense team while putting on their case." She did "not know why Judge Luitjen was in such a rush to end the trial," but "thought that Judge Luitjen was ready to end the case so that he (Judge Luitjen) could leave."

Even disregarding the attached affidavits of members of Celis' defense team, the juror affidavits paint an exceedingly alarming and disturbing picture of judicial bias and a lack of judicial impartiality. Indeed, any rational person would conclude, based on these seven (7) juror affidavits, that at least seven (7), if not all twelve (12), jurors believed Judge Luitjen was biased against Defendant Celis and in his counsel and in favor of the State. In and of themselves, these seven (7) juror affidavits reflect that Judge Luitjen totally failed to comply with the dictates of Canons 1, 2 and 3 of the Code of Judicial Conduct. They also unequivocally reflect that Judge Luitjen failed to afford Defendant Celis his constitutional rights to an impartial and unbiased judge, a reliable jury verdict, due process of law, due course of law, and to a fair trial.<sup>2</sup>

## VI.

### ASSERTIONS AND FACTS

Defendant Celis asserts that Judge Luitjen (who was appointed to hear these cases) should recuse himself from handling any and all further proceedings in any case relating to Defendant

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<sup>2</sup> Additionally, Judge Luitjen's bias against him and his counsel operated to deprive Defendant Celis of his state and federal constitutional rights to effective assistance of counsel, as said rights are guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 10 of the Texas Constitution. *See e.g., Bethany v. State*, 814 S.W.2d 455, 462 (Tex. App.- Houston [14th Dist.] 1991)(stating that "[w]here a trial judge abandons his position as a neutral arbiter and takes on the role of an advocate," [our system] "cannot function and fairness is lost" and that "[w]here the court...interfer[s] with the ability of an accused's counsel to conduct the defense, the accused is denied his right to effective assistance of counsel.")(explanation added).

Celis because "he has a personal bias or prejudice concerning" both parties -- Defendant Celis (and his counsel) and the State -- and because "his impartiality might reasonably be questioned." Both of these grounds are supported by the attached affidavits, which include seven (7) of the twelve (12) jurors who sat in judgment of Defendant Celis in these cases, as well as additional affidavits from members of Celis' defense team (the contents of which are incorporated herein by reference). These grounds are also reflected by the partial transcripts of portions of the trial attached hereto, as more fully related below. Additionally, under the Code of Judicial Conduct, Judge Luitjen should also recuse himself.<sup>3</sup>

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<sup>3</sup> The following provisions of the Code of Judicial Conduct also dictate that Judge Luitjen should recuse himself, in part due to the allegations of Defendant Celis' Motion For New Trial filed in these cases:

(1) Cannon 1, which provides:

**An independent and honorable judiciary is indispensable to justice in our society. 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. The provisions of this Code are to be construed and applied to further that objective;**

(2) Cannon 2, which provides, in pertinent part:

**A. 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; and**

(3) Cannon 3, which provides, in pertinent part:

**B. Adjudicative Responsibilities.**

**(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required or recusal is appropriate.**

**(5) A judge shall perform judicial duties without bias or prejudice.**

While it might be reasonable for a judge to conclude that he was NOT biased despite the factual observations and conclusions of attorneys and investigators for the defendant on trial, affidavits from jurors are an entirely different matter. The seven (7) jurors whose affidavits are attached hereto have no dog in this hunt, and have previously convicted Defendant Celis of 14 of the 22 counts of the two indictments submitted to them. Despite the need for a judge to be impartial, it is clear from these affidavits that Judge Luitjen did not pass that acid test from the perspective of seven (7) of the twelve (12) jurors, let alone from the perspective of members of the defense team. Having displayed his bias against the Defendant and his counsel and for the State of Texas to the point where seven (7) jurors concluded that he was biased and impartial, Judge Luitjen should recuse himself or be recused if he does not voluntarily recuse himself. And given the allegations of those seven (7) affidavits, Judge Luitjen's "impartiality might reasonably be questioned," also justifying his recusal.

Indeed, in light of the affidavits attached, as well as the issues raised in Defendant Celis' Motion For New Trial and Application For Writ Of Habeas Corpus [contesting the vindictive actions of Judge Luitjen in *sua sponte* increasing the amount of Defendant Celis bond from a

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(6) A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, and shall not knowingly permit staff, court officials and others subject to the judge's direction and control to do so.

(9) A judge should dispose of all judicial matters promptly, efficiently **and fairly**.

The language highlighted above fully supports the recusal of Judge Luitjen, given the allegations and proof attached to Defendant Celis' motion for new trial.

total (on these two cases) of \$15,000 prior to trial<sup>4</sup> to \$700,000 on appeal, imposing "full home confinement" with electronic monitoring as a condition of the appeal bond after the jury recommended community supervision, and as ordering 360 days confinement as a condition of community supervision when the maximum allowable under the statute is 180 days<sup>5</sup>], it is clear that Judge Luitjen should recuse himself because "his impartiality might reasonably be questioned" if he continues to be involved in these cases and attempts to rule on Defendant Celis' Motion For New Trial and Application For Writ Of Habeas Corpus.

There are few characteristics of a judiciary more cherished and indispensable to justice

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<sup>4</sup> Defendant's bond in Cause No. 07-CR-4046-E was set at \$15,000, and the bond in Cause No. 08-CR-1365-E was set at \$0, according to the docket sheets. At the same time, it should be noted that Defendant Celis also had the following charges with the following bonds set prior to the commencement of the instant trial on these two cases:

Cause No. 07-CR-4047: Bond \$15,000;  
Cause No. 07-CR-4048: Bond \$15,000;  
Cause No. 07-CR-4049: Bond \$ 5,000; and  
Cause No. 08-CR-1366: Bond: \$ 0.00

Thus, prior to the trial of the two instant cases, Defendant Celis had posted a total of \$50,000 in bonds to secure his appearance. He has made each and every appearance mandated of him and no motion to revoke any of his bonds was ever made by the State.

<sup>5</sup> It should be noted that the Presentence Investigation Report recommended 180 days confinement as a condition of community supervision. Judge Luitjen *sua sponte* asked the State if they were satisfied with 180 days confinement (to which counsel for Defendant Celis voiced an objection to Judge Luitjen's effort to assist the State), and the State asked for 3.5 years incarceration as a condition of community supervision. While Judge Luitjen did not impose the 3.5 years requested (by his prompting) by the State, he nevertheless exceeded the statutory maximum of 180 days confinement facially authorized by Article 42.12, Section 12(a), Vernon's Ann. C.C.P. While the State cited *Kesaria v. State*, 189 S.W.2d 279 (Tex. Crim. App. 2006) as authorizing consecutive terms of 180 days of incarceration as conditions of community supervision, *Kesaria* specifically noted that there had not been any constitutional issues presented to the Court of Criminal Appeals regarding the imposition of 360 days confinement. In this case, Defendant Celis did raise constitutional objections under separation of powers and due process, so *Kesaria* is not necessarily controlling.

than the characteristic of impartiality. Congress has mandated that justice must not only be impartial, but also that it must reasonably be perceived to be impartial when it enacted 28 U.S.C. Section 455(a). As the Supreme Court noted in *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 859-60 (1988), the purpose of Section 455(a) is "to promote public confidence in the integrity of the judicial process." There can be little doubt that the Texas Supreme Court had the same goal when it enacted Rule 18b in 1988. Judge Luitjen should review the facts reflected in the attached affidavits and then voluntarily recuse himself because a reasonable person, objectively viewing the facts, might reasonably question Judge Luitjen's impartiality in these cases and because he has a bias against Defendant Celis and his counsel and in favor of the State. Failing that, Judge Luitjen should refer this matter to the Presiding Judge of the Administrative Judicial District to assign another judge to sit and hear this Motion For Recusal.

Indeed, Tex.R.Civ. Proc. 18b(2)<sup>6</sup> provides, *inter alia*, that, "A judge *shall* recuse himself in any proceeding in which: (a) his impartiality might reasonably be questioned; (b) he has a personal bias or prejudice concerning the subject matter or a party...." (emphasis added). In determining whether Judge Luitjen's impartiality might reasonably be questioned so as to require recusal, the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have reasonable doubt that the judge is actually impartial. *Burkett v. State*, 196 S.W.3d 892, 896 (Tex.App.-Texarkana, 2006.); *Rogers v. Bradley*, 909 S.W.2d 872, 880 (Tex. 1995)(*statement of Enoch, J.*); *Potashnick v. Port City Constr. Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980); *see also Liteky v. United States*,

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<sup>6</sup> As noted above, the rules of civil procedure govern the recusal and disqualification of trial judges in criminal cases. *Arnold v. State*, 853 S.W.2d 543, 544 (Tex.Crim.App. 1993).

510 U.S. 540, 557 (1994)(*Kennedy, J., concurring, joined by Blackmun, Stevens, and Souter, J.J.*)(recusal "is triggered by an attitude or state of mind so resistant to fair and dispassionate inquiry as to cause a party, the public, or a reviewing court to have reasonable grounds to question the neutral and objective character of a judge's rulings or findings."). Rule 18b calls upon the judge – in the first instance – to assess his impartiality and a reasonable doubt is resolved in favor of recusal. *Ex parte Ellis*, 275 S.W.3d 109, 133 (Tex.App.–Austin, 2008)(*Patterson, J., dissenting*). Judge Luitjen's conduct in this proceeding more than meets the standard embodied in Rule 18b(2)(a), as well as *Burkett* and its progeny.<sup>7</sup>

As recounted above, seven (7) of the twelve (12) jurors believe that Judge Luitjen clearly exhibited his bias against Defendant Celis and his counsel and for the State of Texas. The conclusions of those seven jurors are reinforced by the affidavits of Defendant Celis' defense team also attached. Additional evidence of bias is reflected by the transcripts of portions of the trial attached hereto, which demonstrate that Judge Luitjen, despite the jury's recommendation of community supervision, ordered Defendant Celis to be confined to his home under "full house arrest" with electronic monitoring<sup>8</sup> as a condition of his appeal bond (and *sua sponte* raised

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<sup>7</sup> Defendant Celis asserts that the proper standard should be essentially identical to that embodied within 28 U.S.C. Section 445(a), to wit: if a reasonable man knew of all the circumstances, would he harbor doubt about the judge's impartiality. *See e.g., United States v. Hines*, 696 F.2d 722, 728 (10th Cir. 1982); *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980)); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982). This is a standard that was actually discussed by the Court of Criminal Appeals in *McClenan v. State*, 661 S.W.2d 108, 109 (1983), when dealing with recusal prior to the decision to apply Rule 18a and Rule 18b to criminal cases. "Under section 455(a), the judge is under a continuing duty to ask himself what a reasonable person, knowing all the relevant facts, would think about his impartiality." *United States v. Hines, supra*; *Roberts v. Bailar, supra*.

<sup>8</sup>In regard to Applicant's "full house arrest" and imposition of electronic monitoring (which was first imposed by Judge Luitjen after the jury returned its verdict at the guilt/innocence stage

Celis' bond from \$15,000 prior to trial to \$700,000 on appeal). While Judge Luitjen is quite aware that the conditions of probation do not take effect until the conclusion of the appeal, given the timely filing of notices of appeal in these cases, Judge Luitjen has embarked upon an apparent vindictive effort to confine Defendant Celis to his home for an extended period of time during the pendency of his appeal whereas, if there was no appeal, Defendant Celis would be on community supervision and not confined to his home. Exactly how "full house arrest" has any logical nexus to an appeal bond defies logic, particularly when the jury has recommended community supervision and Defendant Celis would be serving that community supervision if there was no appeal. *See Kniatt v. State*, 239 S.W.3d at 920 (recusal warranted where judge's conduct shows "deep-seated favoritism or antagonism that would make a fair judgment impossible"); *De Leon v. Aguilar*, 127 S.W.3d 1, 6-7 (Tex.Crim.App. 2004).

Indeed, it is clear that Judge Luitjen has a personal bias or prejudice against Defendant Celis and his counsel and has favored the State during the trial. Rule 18b(2)(b) mandates recusal if the judge has a "personal bias or prejudice concerning the subject matter or a party." For all of those reasons set forth above that reasonably call into question Judge Luitjen's impartiality, his recusal also warranted under this provision as well. In this regard, Defendant Celis' adopts

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of the trial on February 19, 2009), it should also be noted that the electronic monitor has not functioned properly and for over the first month of it, he was confined to merely two rooms in his residence: the living room and the bedroom, and could not go into his kitchen. *See* Transcript of March 26, 2009, proceeding at page 79 (attached as **Exhibit 2** to Applicant's Application For Writ Of Habeas Corpus). The Nueces County Probation Department has acknowledged that problem and has sought to rectify it so that Applicant has full range of his residence, but that has still not occurred (although an improvement has been made, Applicant still cannot go into every room of his residence). When this issue was brought to Judge Luitjen's attention during the March 26, 2009, proceeding, he laughed and stated "[i]t looks like he's lost some weight." *See* March 26, 2009, proceeding at page 79, l. 14-15. Judge Luitjen's response also indicates his bias against Applicant.

by reference herein his Motion For New Trial filed in these cases.

**VII.**

**CONCLUSION & PRAYER FOR RELIEF**

Clearly, Judge Luitjen should recuse himself from any and all cases relating to Defendant Celis. At a minimum, Judge Luitjen should recuse himself from hearing Defendant Celis' Motion For New Trial and his Application For Writ Of Habeas Corpus, as Judge Luitjen's impartiality, bias and/or judicial vindictiveness must be addressed on the merits in order to rule upon these two legal pleadings. It is impossible, without violating Canon 1, 2, and 3 of the Code of Judicial Conduct for Judge Luitjen to pass judgment on these matters.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that Judge Luitjen enter an Order voluntarily recusing himself. In the event that Judge Luitjen does not recuse himself, Defendant Celis respectfully prays that this motion be referred to the Presiding Judge of the Administrative Judicial District as directed by Rule 18a, *supra*. As reflected below by the attached "Notice Of Presentment," this motion will be presented to Judge Luitjen within three days of filing.

Respectfully submitted,



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DAVID L. BOTSFORD  
State Bar No. 02687950  
Botsford & Roark  
1307 West Avenue  
Austin, Texas 78701  
512/479-8030 (Tel)  
512/479-8040 (Fax)

**VERIFICATION**

STATE OF TEXAS  
COUNTY OF TRAVIS


BEFORE ME, the undersigned authority, personally appeared David L. Botsford, a person known unto me, and who, upon his oath, did state and depose the following:

My name is David L. Botsford and I have been retained to represent Mauricio Celis in connection with the appeal and other matters in the above styled and numbered causes, including Defendant Celis' Motion For New Trial and his Application For A Writ Of Habeas Corpus. I hereby swear and verify that the facts contained in this motion are true and correct, based on information and belief and/or personal knowledge. I further swear that this motion is not made for purposes of delay and that in my professional opinion (having practiced criminal law for over thirty-one years and being Board Certified in Criminal Law since 1983) this motion is necessary and appropriate under Rule 18b(2), Texas Rules of Civil Procedure.

  
\_\_\_\_\_  
DAVID L. BOTSFORD

Sworn and subscribed to before me, the undersigned authority, on this the 23rd day of April 2009.



  
\_\_\_\_\_  
Notary Public, State of Texas

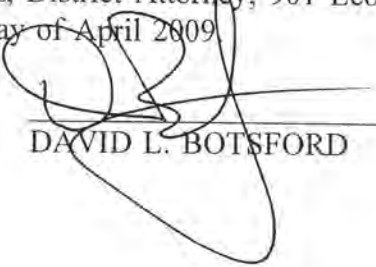
**NOTICE OF INTENDED PRESENTMENT**

Pursuant to Rule 18a(b), Texas Rules of Civil Procedure, notice is hereby given that movant herein (Mauricio Celis, by and through his counsel of record) intend to present the above and foregoing motion to the Honorable Mark Luitjen three days after the filing of such motion (unless otherwise ordered by the judge).

  
\_\_\_\_\_  
DAVID L. BOTSFORD

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, to Mr. Eric Nichols, Assistant Attorney General, P.O. Box 12548, Austin, Texas, 78711, and to Mr. Carlos Valdez, District Attorney, 901 Leopard, Room 206, Corpus Christi, Texas, 78401, on this the 24th day of April 2009.



DAVID L. BOTSFORD

**EXHIBITS**

**AFFIDAVITS OF JURORS**

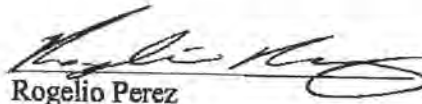
# AFFIDAVIT

STATE OF TEXAS       §  
COUNTY OF NUECES   §

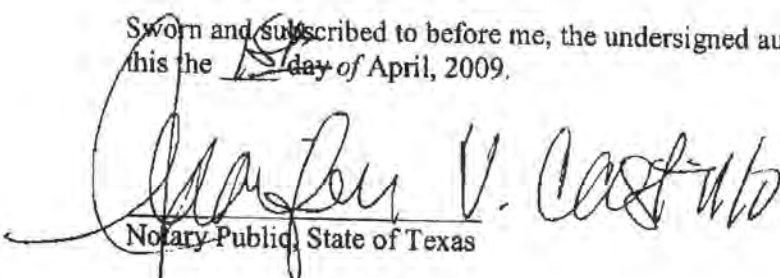
BEFORE ME, the undersigned authority, personally appeared Rogelio Perez, a person known unto me, and who, upon his oath, did state and depose the following:

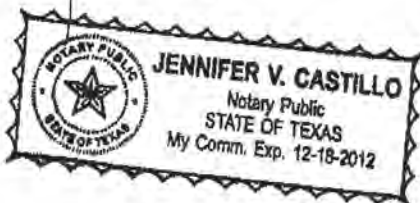
My name is Rogelio Perez, and I served on the jury that heard Cause Nos. 07-CR-4046 and 08-CR-1365, State of Texas vs. Mauricio Celis in the 148th Judicial District Court. During the trial, I was surprised by the actions of Judge, the Honorable Mark Luitjen.

Based on what I heard and saw, I thought that it was obvious that Judge Luitjen was biased against Mauricio Celis. Based on what I heard and saw, I noticed that Judge Luitjen seemed bothered by the Mexican witnesses that were used by the defense. Judge Luitjen seemed bothered when the defense witnesses from Mexico had trouble with the English language. I formed this opinion based on the manner in which Judge Luitjen spoke to the attorneys for Celis. I clearly believe that Judge Luitjen was more positive towards the prosecution. Judge Luitjen often acted as if he (Judge Luitjen) wanted to be somewhere else when the defense put on some of their witnesses.

  
Rogelio Perez

Sworn and subscribed to before me, the undersigned authority, on this the 15 day of April, 2009.

  
Notary Public, State of Texas



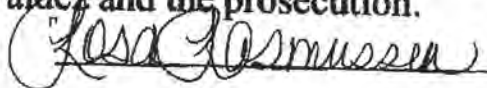
## AFFIDAVIT


STATE OF TEXAS  
COUNTY OF NUECES

BEFORE ME, the undersigned authority, personally appeared Rosa Rasmussen, a person known unto me, and who, upon her oath, did state and depose the following:

My name is Rosa Rasmussen, and I served on the jury that heard Cause Nos. 07-0CR4046 and 08-CR-1365, State of Texas vs. Mauricio Celis in the 148th Judicial District Court. During the trial, I was surprised by the actions of Judge, the Honorable Mark Luitjen. Based on what I heard and saw, I thought that it was obvious that Judge Luitjen was biased against Mauricio Celis. During deliberations, all of the jurors talked about how Judge Luitjen was obviously biased against Mauricio Celis and Celis' defense team. All of the jurors said that they noticed this.

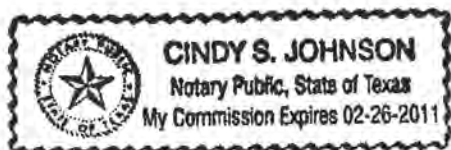
Based on what I heard and saw, I noticed that Judge Luitjen was simply negative towards Mauricio Celis. This was evident in the manner in which Judge Luitjen spoke with defense attorney Tony Canales. This was further evident in the facial expressions that Judge Luitjen used while dealing with or talking to the defense. I believe that Judge Luitjen was more positive towards Carlos Valdez and the prosecution.



 Typed name of Juror

Rosa Rasmussen

Sworn and subscribed to before me, the undersigned authority, on  
this the 1<sup>st</sup> day of April 1, 2009.



A handwritten signature in cursive script, appearing to read "Cindy S. Johnson", written over a horizontal line.

Notary Public, State of Texas

## AFFIDAVIT

STATE OF TEXAS       §  
COUNTY OF NUECES   §

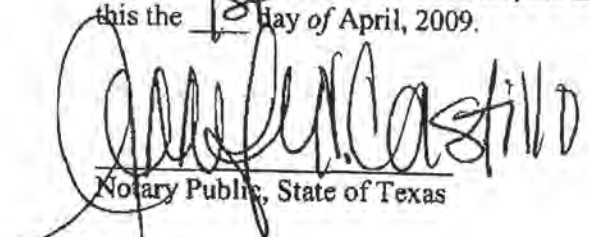
BEFORE ME, the undersigned authority, personally appeared Eric Chavez, a person known unto me, and who, upon his oath, did state and depose the following:

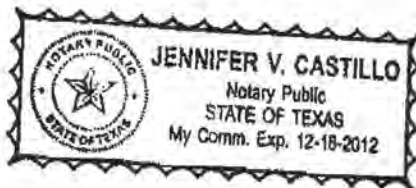
My name is Eric Chavez, and I served on the jury that heard Cause Nos. 07-CR-4046 and 08-CR-1365, State of Texas vs. Mauricio Celis in the 148<sup>th</sup> Judicial District Court. During the trial, I was surprised by the actions of Judge, the Honorable Mark Luitjen.

Based on what I heard and saw during the Celis trial, I believed that it was obvious that Judge Luitjen was biased against Mauricio Celis. Based on what I heard and saw, I noticed that Judge Luitjen seemed upset by the Mexican witnesses that were used by the defense. Judge Luitjen seemed bothered when the defense witnesses from Mexico had trouble using the English language while being questioned. I formed this opinion based on the manner in which Judge Luitjen spoke to Tony Canales and the other attorneys for Mauricio Celis. I truly believe that Judge Luitjen was more positive towards the prosecution. Judge Luitjen often seemed as if he (Luitjen) was not listening when the defense put on some of their witnesses.

  
Eric Chavez

Sworn and subscribed to before me, the undersigned authority, on this the 18 day of April, 2009.

  
Notary Public, State of Texas



**AFFIDAVIT OF NOE ADAME**


STATE OF TEXAS       §  
COUNTY OF NUECES   §

BEFORE ME, the undersigned authority, personally appeared Noe Adame, a person known unto me, and who, upon his oath, did state and depose the following:

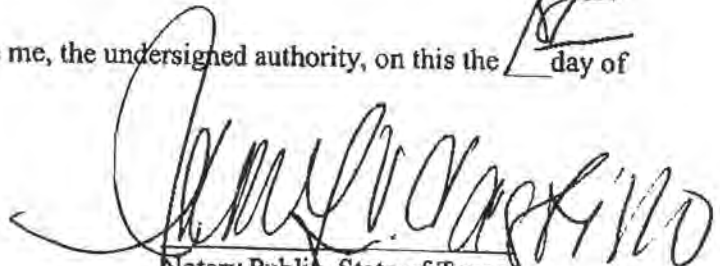
My name is Noe Adame, and I served on the jury that heard Cause Nos. 07-CR-4046 and 08-CR-1365, State of Texas vs. Mauricio Celis in the 148th Judicial District Court. During the trial, I was shocked by the manner that the judge, the Honorable Mark Luitjen, ran his courtroom. Judge Luitjen favored the prosecution from the start. Based on what I heard and saw, I think that Judge Luitjen was biased against Mauricio Celis. Any time that Judge Luitjen made a ruling, it seemed to go in favor of the prosecution and against Mauricio Celis and the defense team.

I am basing this on the way that Judge Luitjen spoke to the defense attorneys, especially Tony Canales, and the tone of voice that Judge Luitjen used when talking to the defense. The body language that Judge Luitjen displayed while talking to the defense attorneys or listening to the defense witnesses was even negative. It was simply clear that the judge was against Celis from the start.

When all of the jurors started the deliberations, we talked about how Judge Luitjen favored Carlos Valdez and the prosecution. Each juror seemed to agree that the judge was against Mauricio Celis.

  
Noe Adame

Sworn and subscribed to before me, the undersigned authority, on this the 18 day of April, 2009.

  
Notary Public, State of Texas



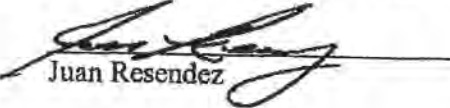
## AFFIDAVIT

STATE OF TEXAS       §  
COUNTY OF NUECES   §

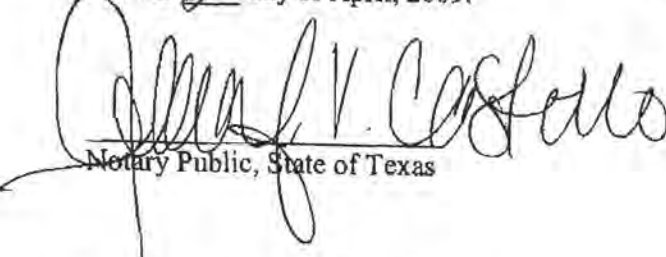
BEFORE ME, the undersigned authority, personally appeared Juan Resendez, a person known unto me, and who, upon his oath, did state and depose the following:

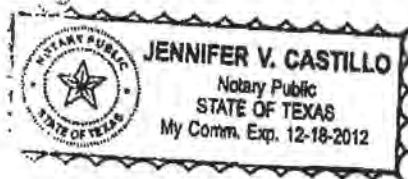
My name is Juan Resendez, and I served on the jury that heard Cause Nos. 07-CR-4046 and 08-CR-1365, State of Texas vs. Mauricio Celis in the 148<sup>th</sup> Judicial District Court.

Based on what I heard and saw during the trial of Mauricio Celis, I believed that Judge Luitjen was slightly biased against Mauricio Celis and the defense attorneys representing Celis. This opinion that I have that Judge Luitjen was biased against Celis' defense team is based on the fact that Judge Luitjen was rude when he spoke to the defense attorneys. Judge Luitjen was rude to the defense attorneys whenever Judge Luitjen would respond to the defense's objections. I further believe that Judge Luitjen appeared bothered when the defense's witnesses from Mexico testified because of their lack of knowledge of the English language and the translation problems that this caused.

  
Juan Resendez

Sworn and subscribed to before me, the undersigned authority, on this the 2nd day of April, 2009.

  
Notary Public, State of Texas



AFFIDAVIT

STATE OF TEXAS       §  
COUNTY OF NUECES   §

BEFORE ME, the undersigned authority, personally appeared Ismael Vera, a person known unto me, and who, upon his oath, did state and depose the following:

My name is Ismael Vera, and I served on the jury that heard Cause Nos. 07-CR-4046 and 08-CR-1365, State of Texas vs, Mauricio Celis in the 148th Judicial District Court. During the trial, I noticed that the actions of Judge, the Honorable Mark Luitjen, favored the prosecution. Based on what I heard and saw, I think that Judge Luitjen was biased against Mauricio Celis. I feel this way because of the manner and tone of voice that Judge Luitjen used when speaking to defense attorney Tony Canales and the other defense attorneys. It was evident in the facial expressions that the judge had when talking to the defense team. Judge Luitjen seemed to rule against the defense team and for the prosecution team when ruling on all of the objections.

Judge Luitjen always seemed to choose in favor of the prosecution when dealing with motions and objections.

  
Ismael Vera

Sworn and subscribed to before me, the undersigned authority, on this the 1<sup>st</sup> day of April, 2009.

  
Notary Public, State of Texas



AFFIDAVIT

STATE OF TEXAS       §  
COUNTY OF NUECES   §

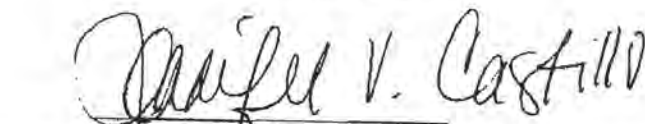
BEFORE ME, the undersigned authority, personally appeared Roseanne Vega, a person known unto me, and who, upon her oath, did state and depose the following:

My name is Roseanne Vega, and I served on the jury that heard Cause Nos. 07-CR-4046 and 08-CR-1365, State of Texas vs. Mauricio Celis in the 148th Judicial District Court. During the trial, I noticed that it seemed as if the judge, the Honorable Mark Luitjen, was biased against Mauricio Celis and Celis' attorneys. Based on what I heard and saw during the trial, I noticed that Judge Luitjen ruled against the defense when he ruled on objections, no matter what the objection was. In contrast, I noticed that at times during the trial, it appeared that Judge Luitjen was biased in favor of the prosecution.

I think that Judge Luitjen was in a hurry to get the trial over with while the defense was putting on their case. Judge Luitjen seemed to rush the defense team while the defense was putting on their case. I do not know why Judge Luitjen was in such a rush to end the trial, but I thought that Judge Luitjen was ready to end the case so that he (Judge Luitjen) could leave.

  
\_\_\_\_\_  
Roseanne Vega

Sworn and subscribed to before me, the undersigned authority, on this the 2 day of April, 2009.

  
\_\_\_\_\_  
Notary Public, State of Texas



**EXHIBITS**

**AFFIDAVITS OF DEFENSE TEAM MEMBERS**

## Affidavit of Claude H. Hildreth

STATE OF TEXAS

§

COUNTY OF HIDALGO

§

BEFORE ME, the undersigned authority, on this day personally appeared, who,  
after being by me duly sworn upon this oath stated as follows:

"1. My name is Claude H. Hildreth. I have resided in Hidalgo County, Texas, since December 1977. I am over the age of 21, of sound mind, having never been convicted of a felony, capable of making this Affidavit, and fully competent to testify on the matters stated herein. I have personal knowledge of the matters stated herein and the statements set forth herein are true and correct.

2. I can testify that I am a 1968 graduate of Lamar University with a degree in Bachelor Business Administration and major in accounting. From 1972 to 1996, I was employed as a Special Agent of the Federal Bureau of Investigation for the United States of America. After completing my training at Washington, D. C. and Quantico, Virginia, I was assigned to the Saint Louis, Missouri; Los Angeles, California and McAllen, Texas offices.

3. I received over one thousand hours of training from the United States Federal Bureau of Investigation. My experience and training includes, but is not limited to, criminal profiling, witness profiling and the gathering of testimonial, tangible (including

but not limited to physical and documentary evidence) and intangible evidence for the purpose of primarily prosecuting white-collar crime and program fraud. (Note, there are many other types of crime that I investigated other than those mentioned.)

4. As a Special Agent of the Federal Bureau of Investigation, I investigated white-collar crime for twenty plus years of my career with the FBI. I have testified many times in state and federal court, in civil and criminal matters concerning matters that I have investigated and provided my opinion as to matters concerning theft, fraud and other violations of law.

5. In 1996, after almost 25 years, I retired from my position as a Special Agent of the FBI. I immediately formed Hildreth Investigations, which is now Hildreth Investigations, LLP. Since my retirement, I have been employed to investigate many internal theft and fraud cases. In many of those cases, I was hired by business entities and municipalities. I have been hired to testify in states, other than Texas, as to my professional opinion concerning individual fraud investigations.

6. In over 37 years as an investigator, I have been present at and testified at hundreds of court proceedings.

7. I was present during the trial styled, State of Texas vs. Mauricio Celis, cause number 07-CR-4046 and 08-CR-1365, in the 148<sup>th</sup> District Court, Corpus Christi, Texas. During this trial I was stunned by the manner in which the Honorable Mark Luitzen treated the defense team and the defendant, Mauricio Celis. I have never seen such blatant bias on the part of a judge. Judge Luitzen routinely and continuously showed disdain for the defendant, the defense team and the defense witnesses. This behavior was

shown in his facial expressions, his tone of voice and the one-sided rulings, which were mostly made for the benefit of the prosecution. Concerning one specific matter which I followed very closely, there were three counts of the indictments concerning fax cover sheets which mistakenly listed Mauricio Celis as an attorney. The evidence was clear, undisputed and overwhelming that Celis had absolutely nothing to do with the clerical error. The defense team moved to have those counts dismissed inasmuch as there was no evidence that Celis had violated any law. With complete disdain, Judge Luitzen denied that motion and sent those charges to the jury. The tone of Judge Luitzen's voice showed disrespect for the defense team. This judge listened patiently to the prosecution but he acted bothered when the defense team had anything to say. It was very clear to me that this judge was biased against Celis from the beginning of the trial.

Further Affiant sayeth not."

Claude H Hildreth

SUBSCRIBED AND SWORN TO before me, the undersigned authority, on this  
21<sup>st</sup> day of April, 2009.



Margaret Hildreth  
NOTARY PUBLIC, STATE OF TEXAS

MY COMMISSION EXPIRES: 4/16/2012

## AFFIDAVIT

STATE OF TEXAS  
COUNTY OF HIDALGO

BEFORE ME, the undersigned authority, personally appeared Joe Hildreth, a person known unto me, and who, upon his oath, did state and depose the following:

My name is Joe Hildreth, and I am employed as a private investigator licensed in the State of Texas. I was present during the trial styled, State of Texas vs. Mauricio Celis, Cause Nos. 07-0CR4046 and 08-CR-1365, in the 148th Judicial District Court. I have over 14 years of experience in law enforcement and private investigations. During that time, I have been present at and testified in many trials.

During the aforementioned Celis trial, I was truly surprised by the manner in which the judge, the Honorable Mark Luitjen, treated the defense team and the defendant. Judge Luitjen favored the prosecution from the start. The Honorable Luitjen rarely gave the attorneys representing the defendant a chance to voice their objections and argue over motions. The Honorable Luitjen seemed to listen more intently to the state's attorneys. Most of Judge Luitjen's decisions went in favor of the prosecution.

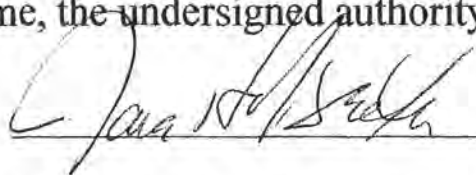
The Honorable Judge Mark Luitjen seemed irritated during the testimony of many of the defense witnesses, especially the witnesses who were Mexican Nationals. The jurors seemed to notice that the judge was bothered by the defense witnesses.

The Honorable Mark Luitjen used a different tone of voice when he was speaking to the defense. Judge Luitjen was often inaudible when responding to the defense attorney. Judge Luitjen's body language even seemed negative and closed off while speaking to or listening to the defense attorneys. It was clear to me that the judge was biased against Celis and the entire defense team from the start.

Joe Hildreth

Joe Hildreth

Sworn and subscribed to before me, the undersigned authority, on  
this the 21<sup>st</sup> day of April, 2009.



Notary Public, State of Texas



**TAB 2**  
Order Granting Recusal Of Judge Luitjen

REPORTER'S RECORD

TRIAL COURT CAUSE NOS 07-CR-4046-E & 08-CR-1365-E

VOLUME 23 OF VOLUMES

THE STATE OF TEXAS \* IN THE DISTRICT COURT  
VS. \* 148th JUDICIAL DISTRICT  
MAURICIO CELIS \* NUECES COUNTY, TEXAS

DEFENDANT'S MOTION FOR RECUSAL

**RECEIVED**  
IN THE 13TH COURT OF APPEALS,  
CORPUS CHRISTI

SEP 16 2009

DORIAN E. RAMIREZ, CLERK  
BY 

On the 15th day of May, 2009, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable J. Manuel Banales, Judge Presiding, held in Corpus Christi, Nueces County, Texas.

Proceedings reported in machine shorthand.

**DELIVERED**  
SEP 16 2009 **DUPLICATE ORIGINAL**  
13th COURT OF APPEALS

1 prongs. The Court grants or denies the Motion to Recuse.  
2 Doesn't have to specify what, doesn't have to specify what the  
3 Court's thinking was. It's a recusal or not, and I would  
4 suggest because I've asked for a recusal in these cases, in  
5 particular the Motion for New Trial and the Writ of Habeas  
6 Corpus contesting the full house arrest as an unconstitutional  
7 condition of bond, that's that separate Writ of Habeas Corpus,  
8 Judge, and, of course, there's some other cases pending. It's  
9 entirely within the Court's discretion. I would ask the Court  
10 to search its heart of hearts and say to yourself "Is the  
11 public's confidence in the judicial system going to be upheld  
12 or diminished if Judge Luitjen is allowed to continue to sit on  
13 these cases?" Because that as said in Murchison, "We must  
14 continuously bear in mind that to perform its high function in  
15 the best way justice must satisfy the appearance of justice."  
16 I appreciate the Court's indulgence very much. Thank you.

17 THE COURT: Thank you. Each case is different.  
18 Each case is guided by its own facts. It may be that in one  
19 case a judge may lose it, as you have suggested the different  
20 ways, Mr. Botsford, that a judge may lose it in one case, but  
21 in all the other cases that he or she may have tried as a  
22 judge, he was perfect and exemplary, but that does not mean  
23 that if he crossed the line in one case, that that should be  
24 overlooked because of his otherwise good record of trying other  
25 cases. It is presumed that every judge who hears a case is

1 going to act impartially and without bias and be fair to all  
2 parties coming before the Court. It is my opinion that if the  
3 public as a whole were to learn and know that a majority of the  
4 jurors who heard the case stated under oath that from what they  
5 saw and heard, the trial judge was biased and prejudiced, that  
6 the public, the reasonable person, wherever he or she may be,  
7 would conclude that the judge in the case was biased or  
8 prejudiced or gave the appearance of being so. The record in  
9 this particular case, I regret to say, supports that finding.  
10 I will, therefore, grant the Motion to Recuse Judge Luitjen.  
11 In all the cases that I hear as Administrative Judge, I have my  
12 staff prepare two orders: one granting, one denying. I will  
13 sign the order that grants the Motion to Recuse. I must assign  
14 now another judge to proceed with the balance of the case.  
15 After reviewing the other motions, I'm concerned about the  
16 timetable. What is the timetable of the case? Is there a date  
17 from which the appellate timetable has already started?

18 MR. BOTSFORD: I don't believe so, Your Honor.  
19 I did see Judge Luitjen's fax to the Court or to Ms. Gutierrez  
20 that he didn't think -- He disagreed with my position that  
21 March 26, 2009 transcript didn't show a sentencing. Notice of  
22 appeal was filed out of an abundance of precaution. The Motion  
23 for New Trial was filed out of an abundance of precaution, but  
24 I don't believe the March 26, 2009 transcript shows a  
25 pronouncement of sentence because he would have had to sentence

**TAB 3**

State's Motion To Recuse Judge Banales

THE STATE OF TEXAS

V.

MAURICIO CELIS

§  
§  
§  
§  
§

IN THE 148<sup>th</sup> JUDICIAL

DISTRICT COURT

NUECES COUNTY, TEXAS

**STATE'S MOTION TO RECUSE  
THE HONORABLE J. MANUEL BANALES**

TO THE HONORABLE JUDGE OF THE COURT:

The State of Texas, by and through the District Attorney of Nueces County, joined by the duly appointed assistant prosecuting attorneys for the State from the Texas Attorney General's Office (hereinafter the "State"), presents this Motion to Recuse pursuant to Rules 18a and 18b of the Texas Rules of Civil Procedure, and Canons 1, 2, 3, and 4 of the Code of Judicial Conduct.

The State seeks the recusal of the Honorable J. Manuel Banales from Cause Numbers 07-CR-4046-E and 08-CR-1365-E, each styled *State of Texas vs. Mauricio Celis*.

**I. PROCEEDINGS LEADING TO MOTION**

Mauricio Celis was convicted by a Nueces County jury on February 19, 2009 on 14 counts of falsely holding himself out as a lawyer, in violation of Tex. Penal Code § 38.122. The trial judge was the Honorable Mark Luitjen, who had been assigned to the cases by Judge Banales, as the Presiding Judge of the Fifth Administrative District. On February 20, 2009, the jury assessed the maximum sentence of 10 years on each of the 14 counts, and recommended that community supervision be imposed. On March 26, 2009, Judge Luitjen conducted a hearing on sentencing, taking into consideration all of the evidence and testimony presented during the trial and punishment phase. On the record Judge Luitjen set forth terms and conditions of

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CLERK OF DISTRICT COURT  
NUECES COUNTY TEXAS

community supervision that he intended to impose through a judgment. These conditions included a term of confinement of 360 days in the county jail and \$1.2 million in restitution to the victims of the offenses on which Celis had been convicted.

On April 24, 2009, Celis filed motions to recuse Judge Luitjen from the two cases leading to the convictions, as well as motions for new trial in those cases. On May 15, 2009, Judge Banales conducted a hearing on – and granted – Celis’s motions to recuse Judge Luitjen. Immediately after granting Celis’s motions, Judge Banales “assigned himself” to the two cases of conviction (Cause Numbers 07-CR-4046-E and 08-CR-1365-E), for an express limited purpose:

I will assign myself the case *for the purpose of the rendition of judgment*.  
Whether I continue after that, *I will determine later on*.

Transcript of Hearing on Defendant’s Motion for Recusal at 94 (May 15, 2009) (emphasis added).<sup>1</sup>

On May 17, 2009, Judge Banales conducted a hearing, ostensibly on the “rendition of judgment.” However, rather than render a judgment on the terms and conditions that the trial judge (Judge Luitjen) had indicated would be imposed, upon argument of counsel Judge Banales entered a wholly new sentence that eliminated requirements that Judge Luitjen had previously set forth for Celis’s community supervision, including a term of confinement, restitution to victims, and other conditions as provided for in Tex. Code Crim. Proc. art. 42.12. Judge Banales entered this wholly new sentence without the benefit of having heard any evidence relating to the underlying criminal cases.

On June 16, 2009, Judge Banales, acting as the Presiding Judge of the Fifth Administrative Judicial Region of Texas, assigned the Honorable Richard Terrell, presiding

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<sup>1</sup>Exhibit 1 (excerpts of May 15, 2009 hearing transcript)

judge of the 79th Judicial District Court, to three other Nueces County cases pending against Mauricio Celis: Cause Numbers 07-CR-4048-E, 07-CR-4049-E, 08-CR-1366-E.<sup>2</sup>

On June 19, 2009, Judge Banales issued a notice setting motions for new trial filed in Cause Numbers 07-CR-4046-E and 08-CR-1365-E for a hearing, before him, on June 26, 2009.<sup>3</sup> This was the first notice to the State that Judge Banales had “assigned himself” to the cases of conviction (Cause Numbers 07-CR-4046-E and 08-CR-1365-E) for purposes other than “rendition of judgment.” In short, Judge Banales notified the State on June 19, 2009 that he intended to conduct a hearing on the motions for new trial on June 26, 2009, rather than assign these matters to another judge, as he had done earlier in the week with the three other cases pending against Mauricio Celis in Nueces County.

In light of Judge Banales’ intent, stated as of June 19, 2009, to assign these cases to himself for purposes of hearing the motions for new trial, the State now moves to remove Judge Banales from any further action in the cases in which Celis has been convicted or charged. The State’s motion is based on abundant evidence, discussed below in the motion, that can and will cause Judge Banales’s impartiality to be reasonably questioned in these cases against Mauricio Celis.<sup>4</sup>

## **II. DISPOSITION OF MOTIONS TO RECUSE**

This motion is presented to Judge Banales for his consideration of two options that are prescribed by law – options that must be exercised prior to taking any further action in these two cases.

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<sup>2</sup>**Exhibit 2** (June 16, 2009 order signed by Judge Banales assigning Judge Terrell to three of the five Mauricio Celis cases).

<sup>3</sup>**Exhibit 3** (June 19, 2009 order setting matters for hearing on June 26, 2009).

<sup>4</sup>Tex. R. Civ. P. 18b(2).

Prior 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. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

Tex. R. Civ. P. 18a(c). In a situation, as here, where the recusal of the presiding judge of the administrative judicial district is at issue, should Judge Banales elect to recuse himself, the appropriate request for another judge for these cases would be to the Chief Justice of the Texas Supreme Court. *Id.* 18a(g); *see also* Tex. Gov't Code Ann. § 74.057. Likewise, should Judge Banales elect not to recuse himself, the request for an assignment of a judge to hear the motions to recuse on their merits would be addressed to the Chief Justice of the Texas Supreme Court. *Id.*; *see also, e.g., Gonzalez Guilbot v. Estate of Gonzalez y Vallejo*, 267 S.W.3d 556, 561-62 (Tex. App. – Houston [14th Dist.] 2008, pet. for review filed Jan 14, 2009) (holding that presiding judge erred in ruling on his own motion to recuse, rather than referring the matter to the Chief Justice for assignment of a judge to hear the motion).

### **III. FACTUAL AND LEGAL BASIS FOR MOTIONS TO RECUSE**

The legal framework for the motions to recuse is set out in Tex. R. Civ. P. 18b, and particularly rule 18b(2), which provides in part that “a judge shall recuse himself in any proceeding in which “his impartiality might reasonably be questioned ... [or] he has a personal bias or prejudice concerning the subject matter or a party.” On the issue of whether Judge Banales’s “impartiality might reasonably be questioned,” the issue is not whether the judge is actually biased. As the United States Supreme Court recently ruled in a recusal case on which the basis of recusal was campaign contributions:

One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State –

West Virginia included – has adopted the American Bar Association’s objective standard: “A judge shall avoid impropriety and the appearance of impropriety.” The ABA Model Code’s test for appearance of impropriety is “whether the conduct would create in reasonable minds a perception that the judge’s ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired.”

*Caperton v. Massey Coal*, 2009 WL 1576573 (U.S. June 8, 2009) (citations omitted).

As the attached evidence indicates, Judge Banales has had long-standing financial and other relationships, not only with Celis’s trial counsel but also with various lawyers and law firms whose conduct is directly at issue in the criminal cases. These criminal cases involve conduct not only by Mauricio Celis, but also conduct by lawyers with whom he served as a “partner” and with whom he shared attorneys’ fees derived from his false representations to be a lawyer. Not less than eight of these lawyers and their firms have provided Judge Banales and his wife, former Nueces County Commissioner Peggy Banales, with campaign contributions between June 1999 and today.<sup>5</sup> In fact, seven of these lawyers and their firms with some connection to the case have made recent contributions and are scheduled to “host” a fundraiser for Judge Banales on June 29, 2009 – the Monday following the hearing that Judge Banales has scheduled on the motions for new trial filed by Celis.<sup>6</sup>

Celis is represented by Tony Canales, Jo Ellen Hewins, David Botsford and others. Tony Canales represented Celis in front of Judge Banales on May 15, 2009 on the motion to recuse Judge Luitjen. Canales represented Celis in the May 18, 2009 “rendition of judgment” hearing. Tony Canales is the named partner in the law firm Canales & Simonson, P.C., and others from that firm also represented Celis at the criminal trial. Canales & Simonson, P.C. is on the “Host

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<sup>5</sup> Exhibits 4 and 5 (campaign finance reports for Judge Banales and Peggy Banales).

<sup>6</sup> Exhibit 6 (flyer for Judge Banales fundraiser).

Committee” for a fundraiser reception to re-elect Judge Banales that is scheduled for Monday, June 29, 2009.<sup>7</sup>

The “Host Committee” for the fundraiser to re-elect Judge Banales also includes attorneys and/or law firms whose conduct was at issue in the criminal cases, as these attorneys and lawyers shared fees, directly or indirectly, with Celis. These attorneys and/or law firms would stand to benefit if Judge Banales were to consider granting new trials in the cases in which Celis has been convicted. Attorneys who shared fees directly or indirectly with Celis whose firms are listed as a part of the host committee include: The Huerta Law Firm, L.L.P.; Sisco, White, Hoelscher & Braugh, L.L.P.<sup>8</sup>; Watts, Guerra, Graft, L.L.P.; and Wigginton Rumley & Dunn, L.L.P.<sup>9</sup> Harris & Greenwell has made the following contributions to Judge Banales: \$2,500.00 on June 26, 1999, \$1,000.00 on March 7, 2000; and \$1,000.00 on August 8, 2001. Andrew Greenwell represented the Defendant in civil litigation that centered around the Defendant falsely holding himself out as a lawyer. A transcript of a hearing in one piece of that civil litigation was introduced as evidence at the criminal trial. Mr. Greenwell also appeared as a witness for the Defendant during pretrial hearings in the criminal cases. Huerta, Hastings, Allison, host committee members, contributed to Judge Banales or his wife \$5,000.00 on June 30, 1999; \$10,000.00 on February 21, 2000, \$1,000.00 on October 21, 2003, and \$500.00 on November 19, 2003. The Huerta Law Firm and Doug Allison also shared fees directly and/or indirectly with the Defendant.

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<sup>7</sup>See Exhibit 6.

<sup>8</sup>Exhibit 7 (State’s Exhibit 37 from Defendant’s jury trial 07-4046-E & 08-CR-1365).

<sup>9</sup>Exhibits 8 and 9 (State’s Exhibits 13C & 22A from the trial of 07-4046-E & 08-CR-1365).

Craig Sico, whose firm is a host committee member for Judge Banales's scheduled June 29, 2009 fundraiser, contributed \$1,000.00 to Judge Banales on July 14, 1999 and contributed \$2,500.00 on October 20, 2005. Robert Wyatt contributed \$1,000.00 to Judge Banales on August 17, 1999, and the Wyatt Law Firm contributed \$1,000.00 to Judge Banales on March 10, 2000. The Wyatt Law Firm shared fees directly and/or indirectly with the Defendant. Jo Ellen Hewins contributed \$200.00 to Judge Banales on September 21, 1999. Ms. Hewins is one of the attorneys that has and continues to represent the Defendant in the criminal proceedings.

Mikal Watts, whose firm is a host committee member for Judge Banales's fundraiser, contributed \$5,000.00 to Judge Banales on September 5, 2001 and contributed \$1,000.00 to Peggy Banales on November 17, 2003. Watts shared fees directly and indirectly with the Defendant, and in fact Celis's acceptance of those fees was the basis for his convictions on Counts 6 - 14 of Cause Number 08-1365-E. Vance Jay Owen contributed \$1,000.00 to Judge Banales on September 5, 2001. Vance Owen was the "partner" of the Defendant during a portion of the time at issue in the criminal cases of conviction. Mrs. Jose Antonio Canales contributed \$500.00 to Peggy Banales on November 17, 2003. Mrs. Canales is the wife of Tony Canales who has and continues to represent the Defendant in the above referenced cause numbers. Mr. Canales's law firm is on the host committee for Judge Banales's fundraiser.<sup>10</sup>

As with the case leading to the United States Supreme Court's decision in *Massey*, this is not a run-of-the-mill criminal case in this community. The criminal investigations of and resulting cases against Mauricio Celis have generated significant public interest within the Corpus Christi community and across the state. This coverage has included dozens of articles

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<sup>10</sup>See Exhibits 4 through 9.

and reports in the local general circulation newspaper, the *Corpus Christi Caller-Times*, and multiple news broadcasts on local television affiliates.<sup>11</sup>

As with the *Massey Coal* case, a case with this type of profile only amplifies the ever-present concern with maintaining the appearance of judicial impartiality. This concern stems from the recognized need for an unimpeachable judicial system in which the public has unwavering confidence. *Richardson v. Quarterman*, 537 F.3d 466, 474 (5th Cir. 2008) (quoting *Potaashnick v. Port City Construction Co.*, 609 F.2d 1101, 1111 (5th Cir. 1980).

Moreover, this matter does not only involve a situation in which Judge Banales's impartiality could theoretically be questioned – although that would be enough under the law. In an Internet age, there is abundant evidence to indicate that the community in which Judge Banales serves as a judge *has in fact* questioned Judge Banales's impartiality and questioned the integrity of the judicial system in Nueces County, Texas. These concerns were stated in, among other places, citizen comments on news stories related to the cases as posted on the online version of the Corpus Christi Caller-Times newspaper. One such comment under the story titled "Celis: Visiting judge biased" states:

the defense lawyers need to shop around and find one they can buy. seems like that is EXACTLY what they are going to do. no one should be able to buy justice. But, i guess these days some people CAN buy anything.

Another comment under the story titled "Visiting Celis judge must step down" states:

Banales. Unbelievable. How much \$CHA CHING\$ has been put into Banales' bank account from Celis donations to Banales campaign in the past? That is the question . Banales should RECUSE himself!...

Comments under the story titled "Celis sentenced to 10 years probation, no jail" state:

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<sup>11</sup>See, e.g.,  
<http://www.caller.com/search/?q=celis&sortby=date&sources=site&image.x=11&image.y=7;>  
<http://www.kiitv.com/results?keywords=celis&searchType=gen&submit=Search;>  
[http://www.kristv.com/Global/SearchResults.asp?vendor=wss&qu=celis.](http://www.kristv.com/Global/SearchResults.asp?vendor=wss&qu=celis)

I think we need an investigation into corruption in Judge Banales' office.

I get the impression that Judge Banales got paid off.

Moreover, under the same article a person refers to a photo of Judge Banales and Tony Canales together at a social function (a "coronation reception" in May 2009) by stating:

interesting turn of events... wasn't it just last week that we Banales and Canales in a photo together on the Caller website...

In the *Massey Coal* case, a similar photograph surfaced of the judge and counsel for one of the parties in a social setting (vacationing) while the case was pending and served as one of the bases for a finding of an appearance of a lack of impartiality. *Caperton*, 2009 WL 1576573 at \*5.

More comments questioning Judge Banales's impartiality and integrity appear in additional news articles that are attached in the exhibits to this motion.<sup>12</sup>

These doubts reasonably held as to Judge Banales's impartiality in these matters were only reinforced by Judge Banales's actions in imposing a sentence that differed from that decided by the judge (Judge Luitjen) who tried the case. In imposing sentence on May 18, 2009, Judge Banales further revealed an underlying bias in favor of the Defendant and against the State. During this hearing, Judge Banales made the following statements, among others:

In addressing Judge Luitjen's imposition of a term of confinement as a condition of probation, Judge Banales stated "That would defeat the purpose of probation, wouldn't it?"<sup>13</sup>

In rejecting the term of community supervision decided by Judge Luitjen, who presided over the trial, Judge Banales further stated:

Assuming that what Mr. Valdez says is true, that this defendant is a con artist of the greatest magnitude, that in and of itself does not warrant incarceration. The

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<sup>12</sup>Exhibit 10 (blog entries questioning Judge Banales's impartiality due to campaign contributions and other financial relationships); Exhibit 11 including the hosting by Celis's defense counsel of Judge Banales and Peggy Banales at a black-tie "coronation reception").

<sup>13</sup>Exhibit 14 at 56-57 (excerpts of transcript of May 19, 2009 "imposition of judgment" hearing).

offenses were of a property nature. The offenses for which this defendant was convicted by the jury do not involve acts of violence. There is no physical injury to anyone. Our jail is crowded with lots of people, and we have crowding issues every day. If the jail were not so crowded, if we had room, then it may be appropriate to put this defendant in jail for a certain period of time, but we're not there. We don't have that luxury, and it is this judge's view that it would be inappropriate to put this defendant in jail at the present time and so, therefore, I will not impose jail time as a condition of community supervision.<sup>14</sup>

In addition, the campaign contributions set forth above, and recounted by the public in challenging Judge Banales's impartiality, only tell part of the story of Judge Banales's connections to the lawyers with an interest in the case. In 1993, Judge Banales unsuccessfully sought the appointment to a federal district judge position in Corpus Christi.<sup>15</sup> Recommendations for such appointments are currently made through a judicial selection committee established by the United States senators from Texas. It was recently announced that Celis's trial attorney, Tony Canales, has been appointed to this committee.<sup>16</sup> It has also been recently announced that a federal judge vacancy will occur in the Corpus Christi Division of the Southern District of Texas in the near future.<sup>17</sup>

Texas courts have consistently held that "[t]he impartiality of the judge is not only a matter of constitutional law but of public policy, as well." *E.g., Johnson v. Pumjani*, 56 S.W.3d 670, 672 (Tex. App. – Houston [14th Dist.] 2001, no writ). In *Bracy v. Gramley*, a federal appellate court noted that pertinent U.S. Supreme Court cases "tell us that ordinarily actual bias is not required, the appearance of bias is sufficient to disqualify a judge." *Richardson v. Quarterman*, 537 F.3d 466, 477 (5th Cir. 2008) (quoting *Bracy v. Schomig*, 286 F.3d 406, 411

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<sup>14</sup>*Id.* at 60.

<sup>15</sup>Exhibit 12 (May 1, 1993 article regarding judicial selection process).

<sup>16</sup>Exhibit 13 (June 21, 2009 article regarding judicial selection committee).

<sup>17</sup>Exhibit 15 (January 28, 2009 article from the Corpus Christi Caller-Times).

(7th Cir. 2002)). Likewise, whether the comments to those news stories are correct or not is not the test. Within the community in which Judge Banales serves there is an appearance that Judge Banales is biased in favor of the Defendant, based on his connections with lawyers representing Celis and implicated by the evidence in the criminal case. For that reason alone, Judge Banales should recuse himself from these cases.

The Texas Rules, in line with the ABA's "objective standard," require that a "judge shall recuse himself in any proceeding in which... his impartiality might be reasonably questioned." *Kniatt v. State of Texas*, 239 S.W.3d 910, 915 (Tex. App. –Waco 2007, pet. ref'd). Furthermore, under the Code of Judicial Conduct, a judge should conduct his or her extra-judicial activities to minimize the risk of conflict with judicial obligations. Code of Judicial Conduct, Canon 4.

In determining whether a judge's impartiality might be reasonably questioned so as to require recusal, the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial. *E.g., Burkett v. State*, 196 S.W.3d 892, 896 (Tex.App.-Texarkana 2006, no pet.). Moreover, the need for a recusal is triggered when a judge displays an "attitude or state of mind so resistant to fair and dispassionate inquiry" as to cause a reasonable member of the public to question the objective nature of the judge's rulings." *Ex parte James W. Ellis*, 275 S.W.3d 109, 117 (Tex. App. -- Austin 2008, no pet.) (quoting *Liteky v. United States*, 510 U.S. 540, 557-558, 114 S. Ct. 1147 (1994)).

As Judge Banales himself stated in deciding to recuse Judge Luitjen:

It is presumed that every judge who hears a case is going to act impartially and without bias and be fair to all parties coming before the Court. It is my opinion that if the public as a whole were to learn and know that a majority of the jurors who heard the case stated under oath that from what they saw and heard, the trial judge was biased and prejudiced, that the public, the reasonable person, wherever

he or she may be, would conclude that the judge in the case was biased or prejudiced or gave the appearance of being so.<sup>18</sup>

The record on this motion to recuse supports precisely the same conclusion. How could any reasonable person conclude that a judge acted fairly and impartially in hearing – much less granting – a motion to grant a new trial for a defendant, when the judge has taken campaign contributions from the defendant’s former “law partner” (Vance Owen) and other lawyers with whom Celis split fees gained by the conduct for which Celis was convicted? How could any reasonable person conclude that a judge acted fairly and impartially in ruling on motions for new trial, when the lawyer representing the defendant has hosted the judge and his wife at a black-tie event last month, and is a lead underwriter for a campaign fundraiser for the judge to be held the Monday after the Friday hearing on the motions? Under the “reasonable person” standard, the integrity of the judicial process, which depends in large measure on maintaining the public’s confidence in the impartiality of its judges, mandates that Judge Banales be recused from further involvement in these matters.

#### **IV. CONCLUSION AND PRAYER**

The State requests the following relief pursuant to this motion:

- (1) That Judge Banales voluntarily recuse himself from any further participation in this case, and refer this matter to the Chief Justice of the Texas Supreme Court for assignment of a judge;
- (2) That in the alternative, should Judge Banales not recuse himself, he shall refer this case to the Chief Justice of the Texas Supreme Court for assignment of a judge to consider this motion;

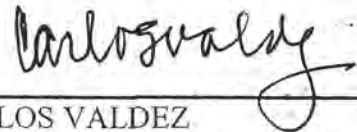
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<sup>18</sup>Exhibit 1 at 88-89.

- (3) That in the event a judge is assigned to consider this motion, that the assigned judge schedule and conduct a hearing on this motion;
- (4) That following such a hearing, this motion be granted and Judge Banales be ordered recused from any further participation in this matter;
- (5) That following such a recusal, that this case should be referred to the Chief Justice of the Texas Supreme Court for assignment of a judge to conduct further proceedings in this case.

The State also requests any other and further relief to which it may show itself to be entitled.

Respectfully submitted,



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CARLOS VALDEZ  
Nueces County District Attorney  
State Bar No. 20426250  
105<sup>th</sup> Judicial District of Texas  
901 Leopard Street, Room 206  
Corpus Christi, Texas 78401  
Phone (361) 888-0410  
Fax (361) 888-0399



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ERIC J.R. NICHOLS  
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Austin, TX 78711-2548  
Phone: (512) 936-1311  
Fax: (512) 370-9947

VERIFICATION

STATE OF TEXAS  
COUNTY OF NUECES

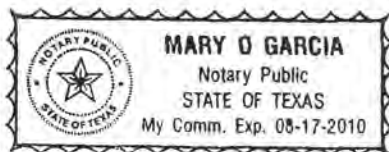
BEFORE ME, the undersigned authority, personally appeared, Carlos Valdez, a person known unto me, and who, upon his oath, did state and depose the following:

My name is Carlos Valdez and I am the District Attorney of Nueces County, Texas. I hereby swear and verify that the facts contained in this motion to recuse are true and correct based on factual information and/or personal knowledge.

Carlos Valdez

CARLOS VALDEZ

SWORN TO AND SUBSCRIBED before me on the 24<sup>th</sup> day of June, 2009.



Mary O. Garcia  
Notary Public, State of Texas

**CERTIFICATE OF SERVICE**

I do hereby certify that a true and correct copy of the above and foregoing State's Motion to Recuse was delivered via regular mail, to David Botsford, 1307 West Avenue Austin, TX 78701 & fax 512.479.8040, Attorney for the defendant, this the 24 day of June, 2009 and via hand delivery to Tony Canales.

  
\_\_\_\_\_  
CARLOS VALDEZ

**TAB 4**  
Celis' Response To State's Motion To Recuse Judge Banales

STATE OF TEXAS	§	IN THE 148TH JUDICIAL
	§	
VS.	§	DISTRICT COURT
	§	
MAURICIO CELIS	§	NUECES COUNTY, TEXAS

**CELIS' REPLY TO THE STATE'S MOTION TO RECUSE THE  
HONORABLE J. MANUEL BANALES**

TO THE HONORABLE J. MANUEL BANALES, JUDGE PRESIDING:

COMES NOW the Defendant, MAURICIO CELIS, by and through his newly retained "lead counsel" of record, David L. Botsford, and presents this his reply to the State's Motion To Recuse, and would respectfully submit the following:

**I.**

On April 24, 2009, Defendant Celis, acting by and through David L. Botsford, filed his motion for new trial and motion for recusal in these cases. In a nutshell, the motion for recusal sought the recusal of then appointed Judge Mark Luitjen due to judicial bias. Similarly, the motion for new trial sought a new trial due to the judicial bias of Judge Luitjen and in the interests of justice.

On May 4, 2009, Judge Luitjen sent an order of referral on the motion for recusal to the Honorable J. Manuel Banales, Presiding Judge of the Fifth Administrative Judicial Region.

On May 8, 2009, Judge Banales, acting in his capacity as the Presiding Judge of the Fifth Administrative Region, entered an order reflecting that the motion for recusal of Judge Luitjen would be heard by Judge Banales on May 15, 2009. Between May 8, 2009, and May 15, 2009, the State did not file a motion to recuse Judge Banales from hearing the motion for recusal.

On Friday, May 15, 2009, Judge Banales heard the aforementioned motion for recusal. After a full and fair hearing, Judge Banales recused Judge Luitjen and stated on the record that he would continue on these cases for purposes of sentencing, which he set for Monday, May 18, 2009, and also noted that whether he would continue on these cases thereafter would be determined at a later point

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J. B. BANALES  
CLERK

in time. After this ruling (which was prior to noon on May 15, 2009) and before the sentencing on Monday morning, May 18, 2009, the State did not file a motion to recuse Judge Banales from presiding over the sentencing.

On May 18, 2009, Judge Banales sentenced Defendant Celis and also modified the terms and conditions of his bond pending appeal. That same day, Judge Banales entered an order appointing himself to these two cases. *See Exhibit 1.*

On June 16, 2009, Judge Banales assigned three other cases pending against Defendant Celis (i.e., Cause Numbers 07-CR-4048-E, 07-CR-4049-E, and 08-CR-1366-E) to be heard by the Honorable Richard Terrell. *See Exhibit 2.*

On June 19, 2009, Judge Banales set these two cases for a hearing on Defendant Celis' motion for new trial (filed on April 24, 2009) and his motion to amend a condition of bond (filed on June 11, 2009) for 8:30 a.m. on Friday, June 26, 2009.

Late on the afternoon of June 24, 2009, at 4:40 p.m. — just slightly more than 8 business hours prior to the then scheduled hearing at 8:30 a.m. on June 26, 2009 — the State filed a document labeled "State's Motion To Recuse The Honorable J. Manuel Banales."

Because of that eleventh hour filing, the hearing set for June 26, 2009, at 8:30 a.m. was canceled as of June 25, 2009, at 11:35 a.m., per email notification from Ms. Emily Jivorec, Administrative Assistant for the Fifth Region. *See Exhibit 3.*

This is a reply to the State's motion to recuse, which contests the State's dilatory tactics because: (1) the motion is untimely, with the failure of the State to promptly move for recusal constituting a waiver and also estopping the State; (2) the State was well aware of the vast majority of the information contained in its recusal motion well prior to the filing of its motion to recuse; and (3) the motion cannot have been filed in good faith because the facts alleged by the State are in no way even remotely similar to those addressed by the Supreme Court in *Caperton v. Massey Coal*,

\_\_\_ U.S. \_\_\_, 2009 WL 1576573 (June 8, 2009), upon which the State relies.

## II.

Rule 18a, Texas Rules of Civil Procedure, which is entitled "Recusal or Disqualification of Judges," states the following (in pertinent part):

"(a) **At least ten days before the date set for trial or other hearing in any court** other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior 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. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require.

(e) If within ten days of the date set for trial or other hearing a judge is assigned to a case, the motion shall be filed at the earliest practicable time prior to the commencement of the trial or other hearing.

(f) If the motion is denied, it may be reviewed for abuse of discretion on appeal from

the final judgment. If the motion is granted, the order shall not be reviewable, and the presiding judge shall assign another judge to sit in the case.

(g) The Chief Justice of the Supreme Court may also appoint and assign judges in conformity with this rule and pursuant to statute.

(h) If a party files a motion to recuse under this rule and it is determined by the presiding judge or the judge designated by him at the hearing and on motion of the opposite party, **that the motion to recuse is brought solely for the purpose of delay and without sufficient cause**, the judge hearing the motion may, in the interest of justice, impose any sanction authorized by Rule 215(2)(b).

(emphasis added).

Rule 18b, Texas Rules of Civil Procedure, which is entitled Grounds for Disqualification or Recusal of Judges, states in pertinent part that:

**"(2) Recusal**

A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

The State seeks recusal under Rule 18b(2)(a) and (b), apparently, due to the quotation of the following language on page 4 of its motion, to wit: "a judge shall recuse himself in any proceeding in which his impartiality might reasonably be questioned...[or] he has a personal bias or prejudice concerning the subject matter or a party."

**III.**

Rules 18a and 18b, Texas Rules of Civil Procedure, including the ten day time frame of Rule 18a(a), have been held to be applicable to criminal cases. See e.g., *Arnold v. State*, 853 S.W.2d 543 (Tex.Crim.App.1993); *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex.Crim.App.1990). See also *McClenan v. State*, 661 S.W.2d 108, 109 (1983)(addressing recusal under prior statute and prior to that point in time when Rule 18a and Rule 18b were held applicable to criminal cases).

The State has conveniently ignored and/or overlooked the fact that its motion is untimely, and has not even seen fit to address the issue of whether it has waived the issue by its dilatory filing. In *Wright v. Wright*, 867 S.W.2d 807, 811 (Tex. App. -El Paso 1993, writ denied), the Court stated:

When a motion to recuse a judge is filed, the judge must either recuse him- or herself or request the administrative judge to assign another judge to hear the motion. See Tex.R.Civ.P. 18a(c); see also *General Motors Corp. v. Evins*, 830 S.W.2d 355, 357 (Tex.App.-Corpus Christi 1992, no writ); *Gonzalez v. Gonzalez*, 659 S.W.2d 900, 901 (Tex.App.-El Paso 1983, no writ). In either case, the judge is prohibited from taking any further action in the case until the motion to recuse has been resolved. See *id.* **The mandatory provisions in Rule 18a, however, never come into play unless and until a timely motion to recuse is filed.** FN2 *Watkins v. Pearson*, 795 S.W.2d 257, 259-60 (Tex.App.-Houston [14th Dist.] 1990, writ denied); *Gonzalez*, 659 S.W.2d at 901.

FN2. In *Gonzalez*, 659 S.W.2d at 901-902, this Court held that a motion to recuse must be presented more than ten days prior to the hearing in order to be considered timely.

See also *Blackwell v. Humble*, 241 S.W.3d 707, 712-13 (Tex.App.-Austin 2007, no pet.); *McElwee v. McElwee*, 911 S.W.2d 182, 185-86 (Tex.App.-Houston [1st Dist.] 1995, writ denied); *In re DeMayo*, No. 09-05-074 CV, 2005 WL 857066, at \*1 (Tex.App.-Beaumont 2005, no pet.) (mem. op. on reh'g) (failure to comply with procedural requisites for recusal waives complaint).

In a criminal case, a trial judge has no duty to recuse or refer if the recusal motion is not timely filed. *De Leon v. Aguilar*, 127 S.W.3d 1, 5 n. 3 (Tex.Crim.App.2004)(orig.proceeding) ("timely filed recusal motion triggers the trial judge's duty to recuse or to refer. The trial judge has no such duty when a recusal motion is not timely filed."); *Arnold v. State*, 853 S.W.2d at 544-45 (holding that defendant's failure to comply with ten-day notice provision waived appeal of denial to have motion heard by judge other than one assigned to case).

Additionally, *Ex parte Ellis*, 275 S.W.3d 109, 122-125 (Tex. App.-Austin 2009), fully supports the conclusion that the State's motion is untimely because, as was the case therein, the State waited far too long (i.e., after the Court of Appeals had issued its original opinion) and had been

aware of the information contained in its motion to recuse (regarding Justice Waldrop) long prior to the filing of the recusal motion therein.<sup>1</sup> While *Ellis* dealt with recusal of an appellate judge, the analysis (and particularly, the cases cited at 275 S.W.3d at 124 n. 9), are entirely applicable to the instant situation.

Notwithstanding the foregoing, there are two exceptions to the ten-day notice requirement, to wit: (1) a party does not know the grounds for the recusal ten days prior to trial; or (2) recusal is based on a constitutional disqualification of the judge. See *Jamilah v. Bass*, 862 S.W.2d 201, 203 (Tex.App.-Houston [14th Dist.] 1993, no pet.); *Soderman v. State*, 915 S.W.2d 605, 608 n. 4 (Tex.App.-Houston [14th Dist.] 1996, pet. ref'd, untimely filed) (citing *Buckholts ISD v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982)). However, neither of these conditions are satisfied herein, and the State has advanced no argument that these exceptions apply.

Accordingly, it appears clear that the State failed to comply with the ten-day provision of Rule 18a. Furthermore, it also appears clear that the State had notice as of May 8, 2009, that Judge Banales was going to handle the recusal hearing, and then, on May 15, 2009, additional notice that Judge Banales would handle the sentencing (and perhaps thereafter retain the two cases for any residual matters, including the motion for new trial, which was then pending). Finally, the State had actual notice that Judge Banales was going to retain these two cases on his docket as of the entry of his May 18, 2009, order.

While a hearing on the motion for new trial was not scheduled until June 19, 2009, the State had ample notice that Judge Banales was handling these cases, and chose to delay the filing of its motion to recuse until 4:40 p.m. on June 24, 2009. By waiting to the eleventh hour, the State failed

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<sup>1</sup> It is also well settled that a motion to recuse should be filed at the earliest practicable time after the grounds for recusal become known to the parties. *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 422 (Tex.App.-Dallas 2006, no pet.).

to move in a timely basis and Rule 18a clearly authorizes a ruling that the State's motion to recuse is untimely. Defendant Celis submits that in fact it should be held to be untimely, either by Judge Banales in the first instance, or by any Judge who might be assigned to this case should Judge Banales decide to refer the matter.<sup>2</sup>

Finally, the State should be estopped from attempting to recuse Judge Banales because of its prior inconsistent conduct in failing to do so (i.e., after Judge Banales' order of May 8, 2009, after the recusal hearing and before the sentencing, and after the sentencing on May 18, 2009, and the entry of the May 18, 2009, order retaining the cases). See e.g., *Arroyo v. State*, 117 S.W.3d 795, 798 (Tex. Crim. App. 2003); *Ex parte Shoe*, 137 S.W.3d 100, 102 (Tex. App. - Fort Worth 2004, no pet.). By not filing a motion to recuse when it became apparent that Judge Banales would hear the cases (beginning with the entry of the May 8, 2009, and continuing onward thereafter), the State failed to take action which was necessary to avoid an estoppel argument. Stated otherwise, by allowing Judge Banales to take over these two cases, the State's action in accepting Judge Banales is inconsistent with its current motion to recuse. It seems clear that the only reason the State has now filed its motion is to attempt to forum shop the Judge who will actually decide the motion for new trial. By failing to move for recusal when virtually all information contained in the State's motion was public record prior to May 8, 2009, the State should be held to be estopped from seeking recusal.

While it does appear that the State did not know about the "fund raiser" for Judge Banales (to be held on June 29, 2009) until some unspecified date, the activities surrounding political fund raisers and campaign contributions are not sufficient under Texas law to justify a motion to recuse

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<sup>2</sup> In *Carmody v. State Farm Lloyds*, 184 S.W.3d 419, 421 (Tex. App.-Dallas 2006), the Court noted that "courts of appeals have diverged on whether a judge may deny a recusal motion based on procedural deficiencies...." Nevertheless, the Court of Criminal Appeals has made it quite clear that a judge may deny a motion to recuse if it is untimely without referring the matter in the first instance. *De Leon v. Aguilar*, *supra* at 5 n.3; *Arnold v. State*, *supra* at 544-45. Accordingly, it appears clear that Judge Banales has the authority to deny the motion to recuse as untimely in the first instance.

and the cases are clear in this regard. For instance, in *J-IV Investments v. David Lynn Mach., Inc.*, 784 S.W.2d 106, 108-109 (Tex. App.-Dallas 1990), the Court stated:

**Texas courts have repeatedly rejected the argument that campaign contributions might create a bias to prompt recusal.** Illustrative is *Rocha v. Ahmad*, 662 S.W.2d 77, 78 (Tex.App.-San Antonio 1983, no writ), which involved a motion to recuse or disqualify two of the associate justices of the court of appeals because each had accepted campaign contributions from the lawyer for appellee. The court overruled this motion, holding appellee did not show bias. In reaching this result the court stated:

It is not surprising that attorneys are the principal source of contributions in a judicial election. We judicially know that voter apathy is a continuing problem, especially in judicial races and particularly in contests for a seat on an appellate bench. A candidate for the bench who relies solely on contributions from nonlawyers must reconcile himself to staging a campaign on something less than a shoestring. If a judge cannot sit on a case in which a contributing lawyer is involved as counsel, judges who have been elected would have to recuse themselves in perhaps a majority of the cases filed in their courts. Perhaps the next step would be to require a judge to recuse himself in any case in which one of the lawyers had refused to contribute or, worse still, had contributed to that judge's opponent.

*Id.* at 78; see also *River Road Neighborhood Ass'n. v. South Texas Sports, Inc.*, 673 S.W.2d 952, 953 (Tex.App.-San Antonio 1984, no writ).

In *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768, 842-45 (Tex.App.-Houston [1st Dist.] 1987, writ ref'd n.r.e.), Texaco filed a motion to recuse the trial judge based on Canon 3C of the Code of Judicial Conduct, the forerunner of Texas Rule of Civil Procedure 18b(2). **FN1 The lead counsel for Pennzoil gave the sum of \$10,000 to the trial judge's campaign fund and also served on the judge's campaign steering committee while the case was pending.** In its motion, Texaco argued that these actions created an appearance of impropriety on the part of the trial judge; however, the court held that the campaign contribution did not constitute an appearance of impropriety. *Texaco*, 729 S.W.2d at 845. In view of these cases, we find no abuse of discretion. We overrule point of error four.

FN1. Rule 18b(2) of the Texas Rules of Civil Procedure provides: Judges shall recuse themselves in proceedings in which their impartiality might reasonably be questioned, including but not limited to, instances in which they have a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

(emphasis added). See also *Degarmo v. State*, 922 S.W.2d 256 (Tex. App.-Houston [14th Dist.]

1996, writ ref'd). Nothing contained in the State's motion to recuse can sidestep the force of these prior cases, which conclusively establish that nothing alleged in the motion to recuse can justify a recusal of Judge Banales.

#### IV.

Furthermore, it bears mentioning that the State has conveniently failed to point out that Mr. Canales and his firm do not represent Defendant Celis in connection with the motion for new trial. Rather, the motion for new trial filed in these cases reflects that only undersigned counsel (Botsford) is representing Defendant Celis. Undersigned counsel (Botsford) has made no campaign contributions to Judge Banales, not that such action would have any significance for the State's motion to recuse.

Moreover, even if the facts alleged by the State were 100% accurate (which Defendant contests), there is no legally sufficient factual basis to support a recusal, given the case law cited above in Section III regarding political contributions under Texas case law. Moreover, the State's attempt to equate the facts alleged in its motion to recuse with the facts addressed by the Supreme Court in *Caperton v. Massey Coal, supra*, is unavailing. Indeed, in *Caperton*, the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of \$50 million. The appellate court voted 3 to 2, and the issue involved was whether one of the newest members of the appellate court, Justice Benjamin, should have been recused because Don Blankinship, the Chairman, CEO and President of Massey Coal, had spent and/or donated over \$3 million to assist Benjamin's election efforts at a time that the case was pending. The Court noted that "[n]ot every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case." *Id.* at \*11. The Court concluded

That there is a serious risk of actual bias - based on objective and reasonable perceptions - when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising

funds or directing the judge's election campaign when the case was pending or imminent. *Id.* at 11.

The Court went on to state that

The inquiry centers on the contributions relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election. *Id.* at 11.

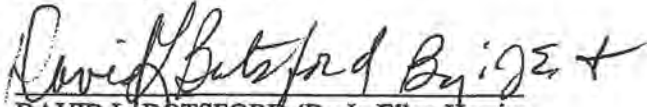
Suffice it to say that the State's motion to recuse alleges nothing remotely resembling that presented in *Caperton* -- an extreme case to be sure -- and the State's effort to "hitch its wagon" to *Caperton* should be denied. Indeed, the State's action in filing this motion devoid of any factual allegations even remotely approaching *Caperton*, is consistent with Mr. Justice Scalia's prediction: "[t]he Court's opinion will reinforce that perception [of eroding public confidence in the Nation's judicial system], adding to the vast arsenal of lawyerly gambits that will come to be known as the *Caperton* claim." *Id.* at 23. Simply stated, the State's motion is deficient for failing to allege the type of facts which would justify a *Caperton* inquiry and should therefore be denied.

WHEREFORE, PREMISES CONSIDERED, Defendant respectfully prays that the motion to recuse Judge Banales be denied, either by Judge Banales in the first instance as untimely, or by any Judge to whom it may be assigned (on all of the legal and factual grounds asserted herein), and for such other relief to which the Court may conclude Defendant Celis is entitled.<sup>3</sup>

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<sup>3</sup> Undersigned counsel is concerned that the State's dilatory tactic is designed to extend the disposition of Defendant Celis' motion for new trial past the statutory deadline contained within Tx. R. App. Proc. 21.8 for deciding the same, to wit: 75 days from May 18, 2009, which is the date that the sentence was orally pronounced and suspended in open court. Additionally, undersigned counsel has onerous time constraints and had made arrangements to travel to Corpus Christi for the hearing on the motion for new trial once it was scheduled for June 26, 2009, at 8:30 a.m. While Defendant Celis believes sanctions are appropriate under Rule 18a(h), he will leave that up to the Court, but is more than prepared to present evidence regarding the disruptive impact of the State's untimely motion and the corresponding amount of time devoted to the preparation of this reply.

Respectfully submitted,

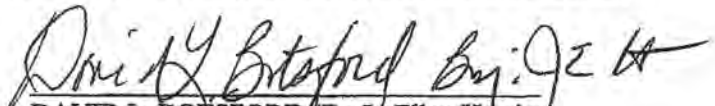
  
DAVID L. BOTSFORD (By Jo Ellen Hewins  
with Express Permission)

State Bar No. 02687950  
Botsford & Roark  
1307 West Avenue  
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512/479-8030 (Tel)  
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J.A. "Tony" Canales  
State Bar No. 03737000  
Jo Ellen Hewins  
State Bar No. 09367857  
Canales & Simonson, P.C.  
2601 Morgan Ave. - P.O. Box 5624  
Corpus Christi, Texas 78465-5624  
361/883-0601 (Tel)  
361/884-7023 (Fax)

**CERTIFICATE OF SERVICE**

Thereby certify that a true and correct copy of the above and foregoing document was mailed, postage prepaid, to Mr. Eric Nichols, Assistant Attorney General, P.O. Box 12548, Austin, Texas, 78711, and to Mr. Carlos Valdez, District Attorney, 901 Leopard, Room 206, Corpus Christi, Texas, 78401, on this the 26th day of June 2009.

  
DAVID L. BOTSFORD (By Jo Ellen Hewins  
with Express Permission)

**DEFENDANTS EXHIBIT 1**

**EXHIBIT 1**



**BEFORE THE PRESIDING JUDGE  
OF THE FIFTH ADMINISTRATIVE JUDICIAL REGION OF TEXAS**

**NO. 09-5AJR-77**


Pursuant to Section 74.056, Texas Government Code, I hereby assign myself, Honorable J. Manuel Bañales, Presiding Judge, to preside in the 148<sup>th</sup> District Court of Nueces County, Texas.

This Judge is assigned to preside in Cause No. 07-CR-4046-E & 08-CR-1365-E, styled THE STATE OF TEXAS V. MAURICIO CELIS from this date until plenary jurisdiction has expired or I, the undersigned Presiding Judge, have terminated this assignment in writing, whichever occurs first.

**IT IS THEREFORE ORDERED** that the Clerk of the Court to which this assignment is made, if it is reasonable practicable, and if time permits, shall give notice of this assignment to each attorney representing a party to a case that is to be heard in whole or in part by the assigned Judge.

**IT IS FURTHER ORDERED** that the Clerk, upon receipt hereof, shall post a copy of this Order in a public area in the Clerk's office and the office of the assigned Court so that attorneys and parties may be advised of this assignment.

**SIGNED** on May 18, 2009.

  
**J. MANUEL BAÑALES**  
PRESIDING JUDGE, FIFTH ADMINISTRATIVE JUDICIAL REGION

**ATTEST:**

  
**ADMINISTRATIVE ASSISTANT**

*Copies to the named Court, Assigned Judge, Local Administrative Judge, District Clerk, file and all counsel noted on request form.*



**DEFENDANTS EXHIBIT 2**

**EXHIBIT 2**



**BEFORE THE PRESIDING JUDGE  
OF THE FIFTH ADMINISTRATIVE JUDICIAL REGION OF TEXAS**

**NO. 09-5AJR-102**


Pursuant to Section 74.056, Texas Government Code, I hereby assign, Honorable Richard Terrell, Active Judge, to the 148<sup>th</sup> Judicial District Court, Nueces County, Texas.

The judge is assigned to preside in Cause Numbers 07-CR-4048-E, 07-CR-4049-E, 08-CR-1366-E, style THE STATE OF TEXAS VS. MAURICIO CELIS from this date until plenary jurisdiction has expired or the undersigned Presiding Judge has terminated this assignment in writing, whichever occurs first. In addition, whenever the assigned judge is present in the county of assignment for a hearing in this cause, the judge is also assigned and empowered to hear at that time any other matters that are presented for hearing in other cases.

**IT IS THEREFORE ORDERED** that the Clerk of Court to which this assignment is made, if it is reasonable and practicable, and if time permits, give notice of this assignment to each attorney representing a party to a case that is to be heard in whole or in part by the assigned judge.

**IT IS FURTHER ORDERED** that the Clerk, upon receipt hereof, shall post a copy of this order in a public area of the Clerk's office or courthouse so that attorneys and parties may be advised of this assignment.

**SIGNED** on June 16, 2009.

  
**J. MANUEL BAÑALES**  
PRESIDING JUDGE, FIFTH ADMINISTRATIVE JUDICIAL REGION

**ATTEST:**

  
**JOANNA MARTINEZ**  
ADMINISTRATIVE ASSISTANT  
Copies to the named Court, Assigned Judge, Local Administrative Judge, District Clerk, file and all counsel noted on request form.

**DEFENDANTS EXHIBIT 3**

**EXHIBIT 3**

Subj: **Motion to Recuse**  
Date: 6/25/2009 11:35:49 A.M. Central Daylight Time  
From: [emily.jirovec@co.nueces.tx.us](mailto:emily.jirovec@co.nueces.tx.us)  
To: [carlos.valdez@co.nueces.tx.us](mailto:carlos.valdez@co.nueces.tx.us), [angelica.hernandez@co.nueces.tx.us](mailto:angelica.hernandez@co.nueces.tx.us),  
[tonyvcanales@canalessimonson.com](mailto:tonyvcanales@canalessimonson.com), [jehewins@canalessimonson.com](mailto:jehewins@canalessimonson.com), [dbotsford@aol.com](mailto:dbotsford@aol.com)  
Mr. Valdez, Ms. Hernandez, Ms. Hewins and Mr. Canales, and Mr. Botsford,

Do to recent developments, the hearing tomorrow, Friday, June 26<sup>th</sup>, is postponed.  
Yesterday, June 24<sup>th</sup>, the State filed a Motion to Recuse the Hon. J. Manuel Banales in Cause Nos. 07-CR-4046-E and 08-CR-1365-E. The Motion was file stamped at 4:30 pm, June 24, 2009. At about 4:50 pm, the State hand walked a courtesy copy of their filed Motion to Recuse to the 5<sup>th</sup> Region Offices. Judge Banales was not in the 5<sup>th</sup> Region Offices but in his 105<sup>th</sup> District Court Office. At about 5:30 pm, June 24<sup>th</sup>, Judge Banales got a call from a reporter from the Caller Times concerning the Motion to Recuse. This was the first time Judge Banales had heard about the Motion to Recuse. He then inquired with the 5<sup>th</sup> Region Staff about the Motion to Recuse. He has not yet read the Motion as he is on the Bench in Kingsville today.

Sincerely,

**Emily L. Jirovec**

*Administrative Assistant for the 5th Region*  
901 Leopard Street, Suite 505  
Corpus Christi, TX 78401  
361.888.0661  
361.888.0902 (Fax)

Thursday, June 25, 2009 America Online: Dbotsford

STATE OF TEXAS

VS.

MAURICIO CELIS

§  
§  
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§  
§

IN THE 148TH JUDICIAL

DISTRICT COURT

NUECES COUNTY, TEXAS

**ORDER**

On this the \_\_\_\_ day of \_\_\_\_\_, came on for consideration the "State's Motion To Recuse The Honorable J. Manuel Banales." The Court has considered the motion and the reply of Defendant Celis, and is of the of opinion that the "State's Motion To Recuse The Honorable J. Manuel Banales" was untimely filed under Tex. R. Civ. Proc. 18a(a). Accordingly, pursuant to *De Leon v. Aguilar*, 127 S.W.3d 1, 5 n. 3 (Tex.Crim.App.2004) (orig.proceeding), *Arnold v. State*, 853 S.W.2d 543 (Tex.Crim.App.1993), and *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex.Crim.App.1990), among other cases, the Court has jurisdiction and authority to deny the motion as not timely filed.

Accordingly, the "State's Motion To Recuse The Honorable J. Manuel Banales" is hereby DENIED as untimely.

---

J. Manuel Banales, Judge Presiding

**TAB 5**  
Order Granting Recusal Of Judge Banales



**LOUIS STURNS**

District Judge  
213th District Court  
Tarrant County Justice Center  
Fort Worth, Texas 76196-0217  
817-884-1529  
lesturns@tarrantcounty.com

July 21, 2009

**VIA FACSIMILE 361-888-0399**

Honorable Carlos Valdez  
Nueces County District Attorney  
901 Leopard Street, Room 206  
Corpus Christi, Texas 78401

**VIA FACSIMILE 512-370-9947**

Honorable Eric J.R. Nichols  
Deputy Attorney General for Criminal Justice  
The Office of the Attorney General  
Post Office Box 12547-MC 048  
Austin, Texas 78711-2548

**VIA FACSIMILE 512-479-8040**

Honorable David Botsford  
Botsford & Roark  
1307 West Avenue  
Austin, Texas 78701

**VIA FACSIMILE 361-884-7023**

Honorable J.A. "Tony" Canales  
Canales & Simonson, P.C.  
2601 Morgan Avenue  
Post Office Box 5624  
Corpus Christi, Texas 78465-5624

RE: 07-CR-4046-E & 08-CR-1365-E;  
The State of Texas v. Mauricio Celis

Dear Sirs:

The Court after considering the evidence presented in a hearing held on July 17, 2009, with both sides represented by highly qualified and competent counsel, concludes that the interest of justice requires granting the State's Motion to Recuse the Honorable J. Manuel Banales.

Judges shall disqualify themselves in all proceedings in which their impartiality might reasonably be questioned. TRCP18(b).

The question of concern here is not whether the State has demonstrated actual bias on the part of Judge Banales, but whether there is an appearance of impropriety that causes a reasonable member of the public to lack confidence in the fairness of the tribunal. Actual bias is not required, the appearance of bias is sufficient to disqualify a judge.” *Richardson v. Quarterman*, 537 F.3d 466, 477 (5<sup>th</sup> Circuit, 2008).

The preamble to the Texas Judicial Code of Conduct states:

“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code of Judicial Conduct are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and highly visible symbol of government under the rule of law.”

Campaign contributions in of themselves do not ipso facto give rise to a requirement of recusal. But it is significant that in this case, attorneys and law firms involved with sharing fees with the defendant were donors to the judge’s re-election campaign. It is furthermore noteworthy that an attorney representing the defendant, as well as other attorneys, some of whom had shared fees with the Defendant, were on the Host Committee for a fund raising event held just three (3) days after the scheduled hearing date.


The fact that Mr. Canales serves on a federal judicial evaluation committee whose recommendation Judge Banales would theoretically seek if he were to apply for a federal judicial appointment in the future is of minimum significance. Likewise, the fact that Judge Banales stated that he would not impose jail time as a condition of probation is not of overriding concern. But the role of campaign contributions; their source, and the timing of the fundraising event casts an ominous shadow over these proceedings. A judge should recuse himself in any proceeding in which his impartiality might be reasonably questioned. And it is principally for this reason that the court grants the State’s Motion to Recuse. The court is mindful of the fact that other Nueces County judges disqualified themselves from the case and commends them for their action.

Page 3

This ruling should not be construed in any manner as being a criticism of the actions taken by Judge Banales, but rather as an attempt to maintain the appearance of fairness to both sides in the Celis case, as well as the public trust in the court system.

The State is Ordered to prepare an order in conformity with this letter and TRCP 18(a) and send it to me by 5:00 p.m. today.

Respectfully,



LOUIS E. STURNS

LES/tb

cc: Honorable Chief Justice Wallace B. Jefferson  
*Via Facsimile 512-463-1365*  
Honorable Judge J. Manuel Banales  
*Via Facsimile 361-888-0779*  
Ms. Diana Barrera, Nueces County District Clerk

**TAB 6**

Fuelberg's Amended Motion To Disqualify Judge Mills

NO. 1015

THE STATE OF TEXAS

VS.

BENNIE FUELBERG

§  
§  
§  
§  
§

IN THE 424<sup>TH</sup> JUDICIAL

DISTRICT COURT OF

BLANCO COUNTY, TEXAS

**AMENDED MOTION TO DISQUALIFY OR RECUSE**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW Defendant Bennie Fuelberg, by and through his undersigned counsel, and pursuant to Art. 30.01 Texas Code of Criminal Procedure, Article 5, Section 11 of the Texas Constitution, and Rules 18a and 18b of the Texas Rules of Civil Procedure, and files this Amended Motion to Disqualify or Recuse. Mr. Fuelberg respectfully moves the judge of this Court, the Hon. Daniel H. Mills, to disqualify or recuse himself. In support of this motion, Defendant submits the following:

I.

Mr. Fuelberg has previously filed a Motion to Disqualify or Recuse. Hearing on the motion is set for October 9, 2009, at 9:00 a.m. This amended motion restates and clarifies the grounds for relief set forth in the original motion.

II.

The indictment in this case alleges one count each of Theft, Misapplication of Fiduciary Property and Money Laundering. The alleged victim in this case is Pedernales Electric Cooperative, Inc. ("PEC"), which provides electric service to residents in Blanco County, Texas. The indictment alleges that the theft and misapplication involved funds in excess of \$200,000.

Fuelberg - Amended Motion to Disqualify or Recuse, Page 1

DEBBY ELSBURY  
CLERK DISTRICT COURT BLANCO COUNTY, TEXAS  
**FILED**

SEP 30 2009

AT 11:40 O'CLOCK  
BY *Debbie Elsbury*



### III.

In order to obtain electric service from PEC, an individual or business must become a member of the electric cooperative by complying with the requirements of Art. I Sec. 1, PEC Bylaws. The Hon. Daniel H. Mills is a resident of Blanco County, obtains electric service from and is a member of PEC. Sec. 161.059 (c) Texas Utilities Code provides that revenues of an electric cooperative shall first be applied to payment of operating and maintenance expenses and the principal and interest on outstanding obligations, and then to the reserves prescribed by the board of directors for improvement, new construction, depreciation, and contingencies. Sec. 161.059 (d) commands that revenues not required for the purposes prescribed by Subsection (c) shall periodically be returned to the members in proportion to the amount of business done with each member for the applicable period. The subsection authorizes the board of directors to determine the manner of the distribution. Art. VIII Sec. 2, PEC Bylaws specifies that the surplus revenues be credited to the individual member's account as "Patronage Capital" which may be retired in whole or in part upon a determination by the board of directors that the financial condition of the Cooperative will not be impaired thereby. The board of directors is authorized to determine the method of retirement of the capital. Each member's Patronage Capital account is an asset owned by that member. Upon dissolution of PEC, each member would have a claim for distribution of that member's Patronage Capital account. Also, members are entitled to distributions from their capital accounts as authorized by the board of directors. In recent years, distributions from the Patronage Capital accounts have been authorized.

### IV.

The amount allocated in a given year to the members' Patronage Capital accounts is directly



related to the profit realized by PEC in that year. In years in which PEC realizes a profit, tax laws provide for adverse consequences unless an allocation is made to the Patronage Capital accounts. In years where a profit is not realized, no allocation is made. Before allocations can be made in the future, the loss from the previous year must be recouped. The PEC board of directors has authorized allocation to the Patronage Capital accounts in years where the coop made a profit. These allocations have been made in most, if not all years during the time span covered by the allegations in the indictment. Consequently, each PEC member's Patronage Capital account balance would be affected by an unlawful appropriation or misapplication of PEC funds as alleged in the indictment because the profits of PEC would be reduced.

V.

Because the Hon. Daniel H. Mills is a PEC member, and the indictment alleges unlawful appropriation and misapplication of PEC funds, he has a direct financial interest in the subject matter of the case. The alleged conduct, if proven, would have directly affected the balance of his Patronage Capital Account. Further, if Mr. Fuelberg is found guilty of the theft or misapplication charges, the State will undoubtedly seek restitution. The decision whether to order restitution will be made by the trial judge. Any restitution ordered will increase the income of PEC in the year in which it is paid, thereby affecting the balance of each PEC member's Patronage Capital account. Accordingly, if the Hon. Daniel H. Mills makes a decision on the amount of restitution to be paid, if any, in this case, that determination will directly affect the balance of his Patronage Capital Account.

VI.

Under Article 5, Section 11 of the Texas Constitution, no judge may sit "in any case wherein the judge may be interested..." Such disqualification is mandatory, and may not be waived by the



parties. Because the Honorable Judge of this Court has a pecuniary interest in the outcome of this case by virtue of being a member of PEC, he is disqualified to preside over the trial of this cause as a matter of law. See, e.g., Pahl v. Whitt, 304 S.W.2d 250 (Tex. Civ. App.-El Paso 1957, no writ)(Trial judge disqualified to sit even though he was only one of some 5000 members of electric cooperative, and even though he was impartial where he stood to receive distribution of surplus revenues under the predecessor to Sec. 161.059 (d) Texas Utilities Code ). Art. 30.01 Texas Code of Criminal Procedure provides that "No judge or justice of the peace shall sit in any case where he may be the party injured..." The term "party injured" in Art. 30.01 must be construed consistent with Art. 5, Section 11 of the Texas Constitution to include circumstances where the judge has a direct pecuniary interest in the outcome of the case and cannot be given a more narrow meaning. Further, Rule 18b (1)(b) Texas Rules of Civil Procedure requires that a judge shall disqualify himself if he knows that, individually or as a fiduciary, he has an interest in the subject matter in controversy.

#### VII.

Because the Honorable Judge in this case has an interest in the outcome of this case disqualification is required as a matter of law under Article 5, Section 11 of the Texas Constitution, Art. 30.01 Texas Code of Criminal Procedure and Rule 18b (1)(b) Texas Rules of Civil Procedure.

#### VIII.

Rule 18b(2)(a) Texas Rules of Civil Procedure provides that a trial judge shall disqualify himself in any case where "his impartiality might reasonably be questioned." Similarly, Rule 18b(2)(b) mandates recusal where the judge "has a personal bias or prejudice concerning the subject matter" of the case. Canon 2 of the Texas Code of the Judicial Conduct requires that the Court avoid even the appearance of impropriety, including acting at all times in a manner that "promotes public



confidence in the integrity and impartiality of the judiciary." Placing this Court in the potentially awkward position of presiding over a case where he stands to benefit financially raises concerns about the Court's ability to remain impartial. At the very least, the *appearance* of impartiality becomes questionable. Because of this and the fact the Honorable Judge of this Court is a member of PEC, and is in effect an alleged victim of the activities charged in the indictment, Rule 18b(2) dictates that he recuse himself from hearing this case.

WHEREFORE, Defendant prays that the Honorable Judge of this court either disqualify or recuse himself from presiding in this case and that he certify that fact to the presiding judge of the administrative judicial district in accordance with Art. 30.02 Texas Code of Criminal Procedure and 18a and 18b of the Texas Rules of Civil Procedure.

Respectfully submitted,



CHRISTOPHER M. GUNTER  
STATE BAR NO. 08624600  
600 WEST NINTH STREET  
AUSTIN, TEXAS 78701-2212  
512-476-2494  
512-476-2497 FACSIMILE  
ATTORNEY FOR BENNIE FUELBERG

#### VERIFICATION

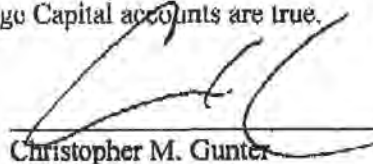
Before me, the undersigned authority, personally appeared Christopher M. Gunter, a person known to me, who upon his oath deposed and said as follows:

"My name is Christopher M. Gunter. I am over the age of eighteen, have never been convicted of a felony, and am fully competent to give this affidavit. I have personal knowledge that

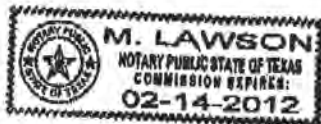
**Fuelberg - Amended Motion to Disqualify or Recuse, Page 5**

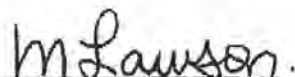


Pedernales Electric Cooperative, Inc. ("PEC") is the alleged victim in this case; and that Daniel H. Mills, Honorable Judge of the 424<sup>th</sup> Judicial District Court, Blanco County, Texas, is a member of PEC." Further, I have personal knowledge from examining the applicable statutes and PEC Bylaws of the manner in which the PEC board of directors is authorized to make allocations to PEC members' Patronage Capital accounts. Based on information obtained from others having direct knowledge of the management of PEC it is my belief that the allegations relating to the procedure utilized by PEC to determine the amount to be allocated to the Patronage Capital accounts and whether distributions have been made from Patronage Capital accounts are true.

  
Christopher M. Gunter

SUBSCRIBED AND SWORN TO BEFORE ME on this the 29 day of September, 2009.



  
Notary Public, State of Texas



**TAB 7**

State's Motion To Disqualify Fuelberg's Attorney

No. 1015

STATE OF TEXAS

§ IN THE 424<sup>TH</sup> JUDICIAL DISTRICT

V.

§ COURT OF

BENNIE FUELBERG

§ BLANCO COUNTY, TEXAS

DEBBY ELSEBURN  
CLERK DISTRICT COURT BLANCO COUNTY, TEXAS

FILED

OCT 01 2009

AT 2:44 PM  
BY *Debbie Elsburn*

**MOTION TO DISQUALIFY COUNSEL**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the State of Texas and hereby makes an application to this Court for an order disqualifying counsel for the defendant from further representation of him in the above-captioned case, and in support thereof would show the Court the following:

On June 17, 2009, the Defendant was indicted on counts of misapplying fiduciary property of a value more than \$200,000; theft of property of a value more than \$200,000; and money laundering of a value \$100,000 or more and less than \$200,000. The Defendant has appeared through Mr. Christopher Gunter. The first court hearing on the case was scheduled for September 4, 2009, but was postponed due to the filing of a motion to disqualify and/or recuse the trial judge assigned to the case.

Prior to the conduct of any further proceedings in this matter, the State moves to disqualify Mr. Gunter from representation of the Defendant in these criminal proceedings, on grounds that an impermissible conflict of interest exists between Mr. Gunter's representation of the defendant and his prior representation of the victim of the crimes alleged in the indictment, Pedernales Electric Cooperative, Inc. ("PEC").

I.

According to information recently provided to the State, Mr. Gunter was retained as counsel for PEC on January 15, 2008, to provide legal advice to PEC "in connection with any criminal investigation that may arise as a result of recent allegations of misuse of PEC funds."

Attachment A (contract). The legal services contract was signed by Bennie Fuelberg, who at the time was PEC's general manager. It has also been recently reported to the State that Mr. Gunter provided at least one invoice to PEC in which he itemized advice and legal services provided to PEC and members of its board of directors. According to information recently received by the State from PEC, the conflict of interest between Mr. Gunter's prior representation of the victim in this case (PEC) and the defendant has not been waived by his former client. Attachment B (8/28/08 letter) and Attachment C (9/17/09 letter). On September 29, 2009, the State received a copy of Mr. Gunter's bill to PEC, which has been heavily redacted by PEC in an effort by PEC to claim and preserve attorney-client privilege. Attachment D.

Rule 1.09(a) of the Texas Disciplinary Rules of Professional Conduct (TDRCP) states:

(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

- (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
- (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
- (3) if it is the same or a substantially related matter.

The conflicts between Mr. Gunter's prior representation of PEC and the defendant in this case fall within the scope of the rule. First, it is apparent from the recently disclosed information concerning Mr. Gunter's prior representation of PEC that he would have had access to confidential PEC information. Second, if convicted of any of the crimes for which he has been indicted, the defendant could be ordered to pay restitution to PEC, the victim of the indicted crime. Hence, Mr. Gunter's current client could be ordered to pay his former client restitution in an amount in excess of \$200,000. Complicating matters further, the former client, PEC, has not consented to the representation of the current client, Bennie Fuelberg. The victim of a crime qualifies as "an opposing party" under the rules governing lawyer conflicts. *E.g., People of Illinois v. Hernandez*, 896 N.E. 2d. 297, 308 (Ill. 2008) (holding that "the *per se* conflict rule

applies whenever an attorney represents a defendant and the alleged victim of the defendant's crime, regardless of whether the attorney's relationship with the alleged victim is active or not, and without inquiring into the specific facts concerning the nature and extent of counsel's representation of the victim.").

The evidence that has recently been provided to the State reveals a substantial relationship between the two representations at issue that warrants Mr. Gunter's disqualification. *NCNB Texas National Bank v. Coker*, 765 S.W.2d 398, 399-400 (Tex. 1989). "The trust necessary in any attorney-client relationship is destroyed if the client must be concerned that any information given the attorney may reappear later in an adversarial proceeding in which his former attorney represents his opponent." *Id.* at 399. To disqualify an attorney, the movant must show that a prior attorney client relationship existed and that the facts are so related to "the pending litigation that it creates a genuine threat that confidences revealed to his former counsel will be divulged to his present adversary." *Id.* at 400. There is also no requirement of showing actual wrongdoing by the attorney or actual use of the former client's privileged information by the former attorney. *Contico International, Inc. v. Alvarez* (Tex. App. - El Paso 1995), 910 S.W.2d 29, 35-36.

The facts of the two representations are identical, misuse of PEC funds. An attorney is bound to keep the confidences of former clients as well as current clients. An attorney may reveal the confidential information of a former client if that client waives the privilege, or it furthers the representation, or the release is related to preventing or exposing a crime, or to resolve a fee dispute. TDCRP Rule 1.05(c). None of those situations apply here. This creates a serious problem for Mr. Gunter. Since Mr. Gunter is constrained by PEC's refusal to waive any privilege, he will be constrained by his duties to his former client PEC in cross-examining PEC directors and employees. There is an "irrebuttable presumption" that Gunter and every lawyer in his firm have confidential information of PEC because of his representation of PEC in this

matter. *National Medical v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996). He cannot use confidential information he obtained as counsel for PEC. Because of the very nature of the indicted crimes, numerous PEC directors and employees are expected to testify at trial.

## II.

The conflicts between Mr. Gunter's prior and current representations not only violate the rules governing lawyers, but may also impair the Defendant's access to competent non-conflicted counsel, creating the possibility of a serious Sixth Amendment issue.

The right of a defendant to counsel of his choice is not absolute. The U.S. Supreme Court has said that the Sixth Amendment does not entitle a defendant to a lawyer who is not a member of the bar, who the defendant cannot afford. "Nor may a defendant insist on the counsel of an attorney who has a previous or ongoing relationship with an opposing party." *United States v. Wheat*, 108 S. Ct. 1692, 1697 (1988); *see also Gonzalez v. State* 117 S.W.3d 831 (Tex. Crim. App. 2003). In *Wheat*, the defendant wanted to be represented by an attorney who had previously represented two co-defendants in the same conspiracy. Bravo, one of those co-defendants and former clients, was going to testify in the trial in exchange for some leniency and had not been formally sentenced. Gomez-Barajas, another of the co-defendants and former clients, had not yet had his plea accepted by the court. The Government asked that the court disqualify the defense attorney, due to concerns that the attorney would be unable effectively to cross-examine Bravo when he was called to testify at Wheat's trial. The court agreed with the Government and disqualified the defense attorney from representing Wheat. *Wheat* at 1695. The district court was allowed to disqualify the defense attorney even though there was a waiver of conflict by Wheat. *Id.* at 1698. The Supreme Court found ample justification for disqualification of an attorney prior to trial even over waivers of conflict:

Unfortunately for all concerned, a district court must pass on the issue whether or not to allow a waiver of a conflict of interest by a criminal defendant not with the wisdom of hindsight after the trial has taken place, but in the murkier pre-trial context when relationships between parties are seen through a glass, darkly. The

likelihood and dimensions of nascent conflicts of interest are notoriously hard to predict, even for those thoroughly familiar with criminal trials. It is a rare attorney who will be fortunate enough to learn the entire truth from his own client, much less be fully apprised before trial of what each of the Government's witnesses will say on the stand. A few bits of unforeseen testimony or a single previously unknown or unnoticed document may significantly shift the relationship between multiple defendants. These imponderables are difficult enough for a lawyer to assess, and even more difficult to convey by way of explanation to a criminal defendant untutored in the niceties of legal ethics. Nor is it amiss to observe that the willingness of an attorney to obtain such waivers from his clients may bear an inverse relation to the care with which he conveys all the necessary information to them.

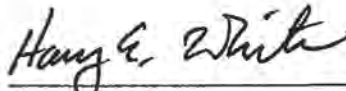
*Id.* at 1699. The representation of Wheat was further complicated for the defense attorney because the co-defendants had varying levels of culpability. *Id.* The Supreme Court later states in the opinion that there is a presumption in favor of a defendant's choice of counsel, "but that presumption may be overcome not only by a demonstration of actual conflict but by a showing of serious potential for conflict." *Id.* at 1700. The Supreme Court grants wide discretion to trial courts in resolving these matters. *Id.* For all the reasons the Supreme Court refused to overrule the trial court's decision to disqualify the conflicted attorney.

The burden of exploring whether or not there is an irresolvable conflict is not merely the State's or the defendant's problem. The Court of Criminal Appeals stated in *Gonzalez* that, "even if the State had not met its burden, the trial court has an independent duty to ensure criminal defendants receive a fair trial that does not contravene the Sixth Amendment's central aim of providing effective assistance of counsel once issues are raised that indicate a concern." *Gonzalez*, 117 S.W.3d at 840.

WHEREFORE, PREMISES CONSIDERED, the State of Texas prays that Mr. Gunter and all other members or associates of his firm be disqualified from serving as counsel in this matter for the Defendant, and for such other and further relief to which the State may show itself

to be entitled.

Respectfully submitted,

A handwritten signature in cursive script, reading "Harry E. White". The signature is written in dark ink and is positioned above a horizontal line.

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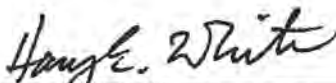
Harry E. White  
District Attorney Pro Tem  
P.O. Box 12548  
Austin, Texas 78711-2548  
Phone: (512) 463-2529  
Fax: (512) 474-4570  
State Bar No. 24013740

### CERTIFICATE OF SERVICE

This is to certify that on the 1<sup>st</sup> day of October, 2009, a true and correct copy of the foregoing MOTION TO DISQUALIFY COUNSEL was forwarded via e-mail and Certified Mail, Return Receipt Requested or hand delivery to the following:

Christopher Gunter  
Gunter & Bennett, P.C.  
600 West Ninth Street  
Austin, TX 78701  
Via Fax 512 476 2497

Paul E. Coggins  
Fish & Richardson P.C.  
1717 Main Street, Suite 5000  
Dallas, TX 75201  
Attorney for PEC  
Via Fax 214 747 2091

  
\_\_\_\_\_  
Harry E. White

No. 1015

STATE OF TEXAS

§ IN THE 424<sup>TH</sup> JUDICIAL DISTRICT

V.

§ COURT OF

BENNIE FUELBERG

§ BLANCO COUNTY, TEXAS

**ORDER DISQUALIFYING COUNSEL**

WHEREAS THE STATE OF TEXAS, having made motion to the Court for an Order disqualifying Christopher Gunter and his law firm from representing the defendant, Bennie Fuelberg in the above referenced matter,

NOW THEREFORE, IT IS HEREBY ORDERED that Christopher Gunter and all other members or associates of his firm and other outside counsel retained by him are disqualified from serving as counsel in this matter.

ORDERED AND SIGNED this \_\_\_\_\_ day of \_\_\_\_\_, 2009.

\_\_\_\_\_  
PRESIDING JUDGE  
424th JUDICIAL DISTRICT COURT  
BLANCO COUNTY, TEXAS

GUNTER & BENNETT, P.C.  
600 WEST NINTH STREET  
AUSTIN, TEXAS 78701

Christopher M. Gunter  
Alan Bennett  
Merri "Gene" Anthes, Jr.  
Baker-Gutierrez - Criminal Law,  
Texas Board of Legal Specialization

Telephone  
Office: (512) 476-2494  
FAX: (512) 476-2497

January 15, 2008

Ms. Kimberly Paffe  
Legal Services Manager  
Pedernales Electric Cooperative, Inc.  
P.O. Box 1  
Johnson City, Texas 78636-0001

RE: Criminal Investigation of Pedernales  
Electric Cooperative, Inc.

VIA FACSIMILE NUMBER  
830-868-4992

Dear Ms. Paffe:

This will confirm that I have agreed to represent Pedernales Electric Cooperative, Inc. (PEC) in connection with any criminal investigation that may arise as a result of recent allegations of misuse of PEC funds. My fee to represent PEC will be \$350 per hour plus expenses.

If this is acceptable, please have Mr. Faelberg approve a copy of this letter and fax or mail it to me.

ATTACHMENT A

I look forward to working with and representing PEC. Please call me if you have any questions.

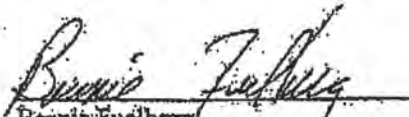
Very truly yours,



Christopher M. Gunter

CMG:ml

APPROVED AND ACCEPTED:

  
Bennie Fuchberg  
General Manager / CEO  
Pedernales Electric Cooperative, Inc.



P.O. Box 1 Johnson City, Texas 78636-0001  
(830) 868-7155 • 1-888-554-4732  
www.pec.coop

September 17, 2009

Harry White  
Office of the Attorney General  
P.O. Box 12548  
Austin, TX 78711-2548

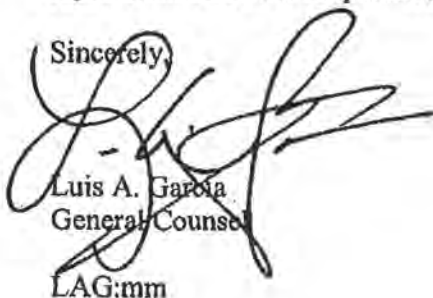
Dear Mr. White:

This letter will confirm the conversation I had with the Office of the Attorney General of Texas ("OAG") regarding Mr. Gunter's representation of Pedernales Electric Cooperative, Inc. (referred to herein as "PEC" or the "cooperative").

On September 4, 2009, I met with you, Mr. Nichols and Mr. Tom Cloudt to discuss pending document requests for the OAG. During the meeting, we discussed PEC's recent response to a member's inquiry of Mr. Gunter's representation of the cooperative. Specifically, we discussed the time period of Mr. Gunter's representation of the cooperative, PEC's refusal to consent to Mr. Gunter's subsequent representation of Mr. Fuelberg, and PEC's continued reservation of the attorney-client privilege between Mr. Gunter and the cooperative.

PEC continues to not consent to Mr. Gunter's representation of Mr. Fuelberg, and does not waive any conflict of interest with respect to such representation. In addition, PEC continues to reserve all of its rights to confidentiality, including but not limited to the attorney-client and work product privileges, in connection with Mr. Gunter's representation of the cooperative.

Sincerely,



Luis A. Garcia  
General Counsel

LAG:mm

ATTACHMENT B



P.O. Box 1 Johnson City, Texas 78636-0001  
(830) 868-7155 • 1-888-554-4732  
• www.pec.coop

August 29, 2008

Mr. Chris Gunter  
Attorney at Law  
Gunter & Bennett  
600 West 9<sup>th</sup> Street  
Austin, Texas 78701

Privileged and Confidential  
Attorney-Client Communication

Re: Your representation of Pedernales Electric Cooperative, Inc. ("PEC")

Dear Mr. Gunter:

I am writing you in your capacity as PEC's counsel in criminal matters, as reflected in your engagement letter of January 15, 2008 (copy enclosed). This letter will confirm that PEC does not consent to your representation of PEC's former General Manager Mr. Bennie Fuelberg in connection with criminal matters, and does not waive any conflicts of interest with respect to any such representation.

In writing this letter, I am acting pursuant to the authority conferred upon me as PEC's General Manager, including the authorization provided to me by PEC's Board in resolutions vesting the General Manager with authority relating to the employment of attorneys for PEC and authorizing me to execute contracts on behalf of PEC containing the terms and conditions I approve.

Sincerely,

Juan Garza  
General Manager

JG:ro

Attachment

ATTACHMENT C

**GUNTER & BENNETT, P.C.**

600 WEST NINTH STREET  
AUSTIN, TEXAS 78701

Christopher M. Gunter\*  
Alan Bennett  
Meril "Gene" Anthes, Jr.

\* Board Certified - Criminal Law  
Texas Board of Legal Specialization

Telephone  
Office: (512) 476-2494  
FAX: (512) 476-2497

**STATEMENT FOR ATTORNEY'S FEES**

**Criminal Investigation Involving**  
**Pedernales Electric Cooperative**

<u>DATE</u>	<u>ACTIVITY</u>	<u>TIME/(HRS)</u>
1/14/8		1.2
1/15/8		.2
1/16/8		
		.3
1/17/8		
		1.75
1/18/8		
		2.5
1/19/8		.6
1/23/8		
		.3
1/25/8		1.5
1/28/8		.1
1/29/8		.5
1/30/8		.5
2/9/8		.1
2/11/8		
		.5
2/19/8		
		.4
2/21/8		.1
2/22/8		.1
2/25/8		
		.4
2/26/8		1.25

3/3/8

3/5/8

3/11/8

3/12/8

3/13/8

3/17/8

3/18/8

3/19/8

3/20/8

3/21/8

3/23/8

3/24/8

3/25/8

3/26/8

3/27/8

3/28/8

4/1/8

4/2/8

4/3/8

4/4/8

4/10/8

4/15/8

4/16/8

4/23/8

4/29/8

4/30/8

5/1/8

.3

.5

.6

.3

.85

5.5

.1

1.2

8.5

1.25

5.75

7.5

10.75

4.0

4.5

.1

1.85

2.5

.4

.2

.1

.1

.1

.6

.9

3.0

.1

5/28/8		
6/9/8		.25
6/12/8		.2
6/16/8		.5
6/18/8		.1
6/19/8		1.3
6/20/8		1.5
6/21/8		.2
6/22/8		5.75
6/23/8		2.5
6/24/8		1.7
6/25/8		.35
7/1/8		1.1
7/2/8		.7
7/3/8		.25
7/9/8		.2
7/11/8		.6
7/16/8		.3
7/17/8		.1
7/18/8		.1
7/21/8		1.3
7/22/8		.2
7/23/8		1.75
7/24/8		4.5
7/25/8		.1
		.2

8/1/8		
8/4/8		.3
8/5/8		6.0
8/12/8		.1
8/14/8		.1
8/15/8		.25
8/19/8		.2
8/20/8		.25
9/12/8		.3
9/15/8		.6
9/18/8		2.0
10/3/8		.25
		<u>.25</u>
	TOTAL HOURS	110.2

110.2/Hours X \$350/Hour = \$38,570

AMOUNT DUE: \$38,570

**TAB 8**

Amicus PEC's Brief In Support Of State's Motion To Disqualify Fuelberg's Attorney

STATE OF TEXAS,

Plaintiff,

v.

BENNIE FUELBERG,

Defendant.

IN THE 424<sup>TH</sup> JUDICIAL DISTRICT COURT

BLANCO COUNTY, TEXAS

**AMICUS CURIAE BRIEF OF PEDERNALES ELECTRIC COOPERATIVE, INC.  
REGARDING PLAINTIFF'S MOTION TO DISQUALIFY COUNSEL**

**TO THE HONORABLE JUDGE OF THIS COURT:**

NOW COMES Pedernales Electric Cooperative, Inc. ("PEC") and files this Amicus Curiae brief regarding Plaintiff's Motion to Disqualify Counsel (the "State's Motion") in this case. In support, PEC would respectfully show the Court as follows:

PEC is a party whose rights will be affected by the Court's decision in this matter, and hereby files this amicus curiae brief to set forth its position on the issues raised by the State's Motion to Disqualify defense counsel. *For the reasons stated below, as the owner of the attorney-client privilege stemming from its prior relationship with Chris Gunter, PEC objects to Mr. Gunter's representation of Defendant Bennie Fuelberg in connection with this case.*

On January 15, 2008, PEC retained the services of Chris Gunter to represent it in connection with the criminal investigation into allegations of the misuse of PEC funds. Although the engagement letter was addressed to Ms. Kimberly Paffe, who was PEC's Legal Services Manager at that time, the letter was executed by Mr. Bennie Fuelberg, PEC's then-General Manager and CEO. See Attachment "A" to the State's Motion.

CLERK DISTRICT COURT - BLANCO COUNTY, TEXAS  
**FILED**

UCL 08 2009

AT 11:40 CLOCK A.M.  
BY Dale Sewell  
DALE SEWELL DEPUTY

Mr. Gunter represented PEC in connection with the criminal investigation from January 15, 2008 until at least July 17, 2008.<sup>1</sup> According to his legal invoice, during the period of this representation, Mr. Gunter met with and interviewed several PEC employees and Board members, received and reviewed PEC documents relevant to the investigation, and interfaced with the Attorney General's office regarding the investigation. During the representation, PEC shared confidential information with Mr. Gunter under the understanding that he represented PEC (and PEC only) in connection with this case, and with the expectation that the sanctity of these privileged communications would be preserved.

According to Mr. Gunter, on or around July 17, 2008, he learned that the criminal investigation focused not on PEC as an entity, but rather on individuals including Mr. Bennie Fuelberg. On August 5, 2008, Mr. Gunter notified PEC (through counsel) that he would be representing Mr. Fuelberg, rather than PEC, going forward. *See* October 14, 2008 Letter from Chris Gunter to Juan Garza, attached hereto as Exhibit "1" and incorporated herein.<sup>2</sup> Fearing that Mr. Gunter's representation of Mr. Fuelberg would necessarily impinge upon PEC's attorney-client privilege, PEC strenuously objected to his representation of Mr. Fuelberg, and refused to waive any conflicts of interest with respect thereto. *See* Attachment "C" to the State's Motion.

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<sup>1</sup> During the attorney-client relationship, Mr. Gunter interacted primarily with Mr. Fuelberg in his capacity as General Manager of PEC. Thus, some of the details about exactly what Mr. Gunter did during the attorney-client relationship, who he interviewed (and why), what documents he received, and what advice he gave are within the exclusive knowledge of Mr. Fuelberg and Mr. Gunter. Although Mr. Gunter contends that his role as PEC's criminal counsel terminated on July 17, 2008, PEC has not been able to determine the date that Mr. Gunter truly ceased acting as its attorney. For example, the invoice Mr. Gunter submitted to PEC for payment includes services between January 14, 2008 and October 3, 2008. *See* Attachment "D" to the State's Motion. As of the date of this brief, and pending a final resolution of this issue by the Court, PEC has not paid Mr. Gunter for the services listed on this invoice.

<sup>2</sup> Mr. Gunter's October 14 letter re-confirms that he "provided general advice and representation to the Board of PEC and various individuals, both past and current, since I was retained January 14, 2008." Mr. Gunter also acknowledged PEC's objection to his representation of Mr. Fuelberg.

PEC's sole interest in this matter is to protect the confidentiality of its privileged communications with Mr. Gunter, and remains steadfast in its refusal to waive the conflict of interest in Mr. Gunter's current representation of Mr. Fuelberg. Although PEC does not wish to unreasonably deny Mr. Fuelberg or any other person the right to counsel of his choice, PEC sees no way that Mr. Gunter can zealously represent Mr. Fuelberg without violating the sanctity and confidentiality of the privileged information he obtained through his prior representation of PEC on this same subject matter. For these reasons, PEC strenuously objects to Mr. Gunter's representation of Mr. Fuelberg in this case.

Several PEC employees have been subpoenaed in this case and have been requested to produce documents. These employees will be present at the hearing to testify about any non-privileged communications and interactions they had regarding Mr. Gunter's prior representation. To the extent that any privileged communications or any privileged documents become at issue in this hearing, PEC would respectfully request that these communications and documents be reviewed in camera in order to preserve the privileged nature of these communications.

Dated: October 7, 2009

Respectfully submitted,

FISH & RICHARDSON P.C.

By: Kiprian E. Mendrygal

Paul E. Coggins  
State Bar. No. 04504700  
Kiprian E. Mendrygal  
State Bar No. 24041472  
1717 Main Street, Suite 5000  
Dallas, Texas 75201  
(214) 747-5070 (Telephone)  
(214) 747-2091 (Telecopy)

Counsel for Party-in-Interest  
Pedernales Electric Cooperative, Inc.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served, via facsimile, upon all counsel of record, as identified below, on October 7, 2009:

Harry E. White  
District Attorney Pro Tem  
P.O. Box 12548  
Austin, Texas 78711-2548  
(512) 474-4570 (fax)

Counsel for Plaintiff, the State of Texas

Chris Gunter  
Gunter & Bennett, P.C.  
600 West Ninth Street  
Austin, Texas 78701  
(512) 476-2497 (fax)

Counsel for Defendant, Bennie Fuelberg

Kiprian E. Mendrygal

Kip Mendrygal

✓ 10/21/08 *QAR* RECEIVED

GUNTER & BENNETT, P.C.  
600 WEST NINTH STREET  
AUSTIN, TEXAS 78701

OCT 14 2008

GM OFFICE

Christopher M. Gunter\*  
Alan Bennett  
Meril "Gene" Anthes, Jr.

\* Board Certified - Criminal Law  
Texas Board of Legal Specialization

Telephone  
Office: (512) 476-2494  
FAX: (512) 476-2497

October 14, 2008

Mr. Juan Garza, General Manager  
Pedernales Electric Cooperative  
P.O. Box 1  
Johnson City, Texas 78636-0001

RE: Criminal Investigation involving Pedernales  
Electric Cooperative

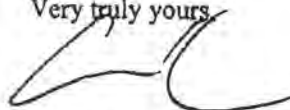
Dear Mr. Garza:

Enclosed you will find my Statement for Attorney's Fees incurred in my representation of Pedernales Electric Cooperative (PEC) and Bennie Fuelberg from January 14, 2008 to the present in connection with the criminal investigation initiated by the Blanco County District Attorney and Texas Attorney General.

As you know, I have provided general advice and representation to the Board of PEC and various individuals associated with PEC, both past and current, since I was retained January 14, 2008. However, I informed Mike Ferrill with Cox Smith Matthews on August 5, 2008, that from that day forward I would only be representing Mr. Fuelberg in the continuing criminal investigation and in any actual criminal case that might arise from this investigation. I am in receipt of your August 29<sup>th</sup> letter and I certainly acknowledge that PEC does not waive any conflicts of interest, if any exist, with respect to my continued representation of Mr. Fuelberg.

Just as PEC has continued to pay the legal fees of Mr. Fuelberg in connection with the various civil claims that have been made against him and PEC, we anticipate the cooperative will continue to pay his legal fees associated with the ongoing criminal investigation and any actual criminal charges that might arise as a result of the investigation.

Very truly yours,



Christopher M. Gunter

CMG:ml  
Enclosure



**TAB 9**

Fuelberg's Response To State's Motion To Disqualify Fuelberg's Attorney

CAUSE NO. 1015

STATE OF TEXAS	§	IN THE 424TH
	§	
VS.	§	JUDICIAL DISTRICT COURT
	§	
BENNIE FUELBERG	§	BLANCO COUNTY, TEXAS

**DEFENDANT BENNIE FUELBERG'S RESPONSE  
TO THE "STATE'S MOTION TO DISQUALIFY COUNSEL"**

TO THE HONORABLE BERT RICHARDSON, PRESIDING JUDGE OF SAID COURT:

COME NOW the Defendant, BENNIE FUELBERG, by and through his newly retained counsel, David L. Botsford,<sup>1</sup> and his counsel of record, Chris Gunter, and would show this Honorable Court the following:

**I.**

**Bennie Fuelberg's Position**

Defendant Bennie Fuelberg submits this response to the State's October 1, 2009, "Motion To Disqualify Counsel." Therein, the State seeks the disqualification of Defendant Fuelberg's counsel of record, Mr. Chris Gunter. In a nutshell, Bennie Fuelberg asserts that his state and federal constitutional rights to counsel of his choice, to due process of law, and to due course of law<sup>2</sup> are far superior to whatever rights, if any, his former client, PEC,<sup>3</sup> and the State of Texas have to even seek the disqualification of Chris Gunter. While the State's motion to disqualify might appear at first blush to facially have merit, it cannot withstand any meaningful let alone

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<sup>1</sup> David L. Botsford has been retained by Defendant Fuelberg for the limited purpose of litigating the State's Motion To Disqualify Counsel. Accordingly, Botsford is not entering a general appearance and will not participate in this case past the conclusion of the litigation relating to the State's Motion To Disqualify Counsel.

<sup>2</sup> See Article I, Sections 10 and 19 of the Texas Constitution and the Sixth and Fourteenth Amendments to the Constitution of the United States. In this regard, Fuelberg asserts that Article I, Sections 10 and 19 provide him more protection than the federal constitutional counterparts.

<sup>3</sup> PEC is a shorthand abbreviation for Pedernales Electric Cooperative.

critical examination. Indeed, the State's motion must be denied on the following grounds, all of which will be addressed during the hearing scheduled for October 9, 2009:

1. PEC has **waived** any right to seek the disqualification of Chris Gunter by waiting more than **thirteen (13) months**<sup>4</sup> (since the date it first learned that Chris Gunter had ceased his representation of PEC and had elected to represent Bennie Fuelberg) to prompt the State to seek Chris Gunter's disqualification;<sup>5</sup>
2. The State of Texas has **waived** any right to seek the disqualification of Chris Gunter by waiting more than **ten (10) months**<sup>6</sup> (since the date it first learned that Chris Gunter had ceased his representation of PEC and had elected to represent only Bennie Fuelberg) before filing the instant motion to disqualify;<sup>7</sup>

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<sup>4</sup> PEC has conceded that it learned that Chris Gunter ceased its representation of PEC as early as July 17, 2008, and no later than August 5, 2008. See "Amicus Curiae Brief Of Pedernales Electric Cooperative, Inc., Regarding Plaintiff's Motion To Disqualify Counsel" at page 2.

<sup>5</sup> The case law is clear that a person or entity entitled to seek disqualification of a former attorney must proceed in a timely manner and that the failure to do so constitutes a waiver. See, e.g., *Vaughan v. Walther*, 875 S.W.2d 690 (Tex. 1994) (party who waited **six and 1/2 months** to seek disqualification of its former counsel who was representing the other party in this child custody case waived right to seek disqualification); *Turner v. Turner*, 385 S.W.2d 230 (Tex. 1964) (wife who waited **eighteen months** to seek disqualification of her prior counsel who was representing her husband in the divorce waived her right to seek disqualification); *HECI Exploration Co. v. Clajon*, 843 S.W.2d 662 (Tex. App. - Austin 1992, writ denied) (**eleven month** delay between date that HECI learned that its former counsel, Olson, had joined the firm representing Clajon, constituted a waiver of its right to seek disqualification).

<sup>6</sup> Mr. Harry White, counsel for the State of Texas, was informed that Chris Gunter was no longer representing PEC and had elected to represent Bennie Fuelberg beginning on August 1, 2008. Subsequently, on November 12, 2008, Mr. White was again informed of the situation. It was also reiterated on February 9, 2009, when Chris Gunter and Terry Kirk appeared in open court when the grand jurors (who returned the instant indictment) were selected and impaneled.

<sup>7</sup> See cases cited in footnote 5, *supra*. In this connection, the State of Texas (as well as PEC) could have sought the disqualification of Chris Gunter from representing Bennie Fuelberg **during the grand jury investigation in this case**. See e.g., *In Re Gopman*, 531 F.2d 262 (5th Cir. 1976) (allowing government to move to disqualify counsel during a grand jury investigation due to a conflict of interest based upon the attorney's simultaneous representation of three individuals and their labor union and upholding the district court's disqualification of counsel due to a conflict of interest under the district court's supervisory powers over the grand jury); *In Re Guerra*, 235 S.W.3d 392 (Tex. App.-Corpus Christi 2003, no pet.) (upholding district court's disqualification of the district attorney and appointing district attorney pro tem to assist the grand jury in its investigation of the district attorney's alleged criminal actions). Additionally, disqualification of counsel during a grand jury investigation cannot violate the constitution, since there is no Fifth or Sixth Amendment right to counsel in the context of a grand jury investigation.

3. The State of Texas moved to disqualify Chris Gunter two days after Chris Gunter demanded that PEC pay his October 2008 invoice for legal fees, thus demonstrating the State's true motivation as nothing more than a thinly disguised effort to aid and assist PEC in its continuing breach of its contractual obligations to Chris Gunter;<sup>8</sup>

4. Chris Gunter cannot be disqualified under the relevant portions of the Texas Disciplinary Rules of Professional Conduct because his representation of his former client, PEC, was not and is not "substantially related" to his representation of Bennie Fuelberg, given the allegations of the instant indictment when compared to the subject matters which arose during the course of Gunter's prior representation of PEC (*see* Rule 1.09(a)(3), Texas Disciplinary Rules of Professional Conduct);

5. Chris Gunter cannot be disqualified under the relevant portions of the Texas Disciplinary Rules of Professional Conduct because he did not learn of any confidential or privileged information during the course of his representation of PEC that even remotely relates to his representation of Bennie Fuelberg, given the allegations of the instant indictment when compared to the subject matters which arose during the course of Gunter's prior representation of PEC (*see* Rule 1.09(a)(2), Texas Disciplinary Rules of Professional Conduct);

6. Chris Gunter cannot be disqualified under the relevant portions of the Texas Disciplinary Rules of Professional Conduct because the vast majority of the documents (excluding, for instance, drafts of proposed settlements in the civil case) which were supplied to him by PEC during his prior representation of PEC were disclosed to the State of Texas pursuant to grand jury subpoenas, which documents, in turn, would be produced to him in discovery by the State during his representation of Bennie Fuelberg if they related to the allegations of the instant indictment (*see* Rule 1.09(a)(2) and 1.05, Texas Disciplinary Rules of Professional

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(let alone a right to counsel of choice under the Sixth Amendment). *See United States v. Mandujano*, 425 U.S. 564 (1976).

Rather than immediately and timely seeking Gunter's disqualification once they learned that Gunter had ceased representation of PEC and was representing Bennie Fuelberg, both PEC and the State of Texas intentionally failed to do so. Instead, PEC and the State delayed any effort to seek disqualification until months after Fuelberg's indictment in this case in June 2009, and then, only in response to: (1) Gunter's demand to PEC for payment of his October 2008 invoice; and (2) Fuelberg's motion to disqualify and recuse the Honorable Dan Mills.

<sup>8</sup> PEC has admitted that it has not paid Chris Gunter's October 2008 invoice. *See* "Amicus Curiae Brief Of Pedernales Electric Cooperative, Inc., Regarding Plaintiff's Motion To Disqualify Counsel" at footnote 1, page 2. That same footnote clearly reflects that PEC is enlisting this Court's assistance in its attempt to continue to avoid its contractual obligations to Chris Gunter since PEC is awaiting "a final resolution of this issue by the Court."

Conduct);<sup>9</sup>

7. Chris Gunter cannot be disqualified under the relevant portions of the Texas Disciplinary Rules of Professional Conduct because the vast majority of all confidential information he learned during the course of his representation of PEC stemmed from the discovery generated in the civil lawsuit against PEC, which discovery has since been made public (absent minor redactions) and hence "generally known" (see Rule 1.05(b)(3), Texas Rules of Professional Conduct);

8. Chris Gunter cannot be disqualified under the relevant portions of the Texas Disciplinary Rules of Professional Conduct because he did not learn of any confidential or privileged information -- either from documents tendered to him by PEC or by virtue of any interviews of PEC employees -- during the course of his representation of PEC that could ever be used to disadvantage of PEC in his representation of Bennie Fuelberg (given the allegations of the current indictment when compared to the subject matters which arose during the course of Gunter's prior representation of PEC)(see Rule 1.05(b)(3), Texas Disciplinary Rules of Professional Conduct);<sup>10</sup>

9. Chris Gunter cannot be disqualified for any alleged conflict of interest because the State has not and cannot demonstrate that there is an actual conflict of interest or a serious potential for a conflict of interest;<sup>11</sup> rather, the State has painted with far too broad of a brush, misrepresented the salient facts,<sup>12</sup> failed to honor its

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<sup>9</sup> None of the documents given to Gunter by PEC, which were in turn delivered by Gunter to the State pursuant to two different grand jury subpoenas, are relevant to the allegations of the instant indictment because they relate to topics far removed from the transactions alleged in the instant indictment. At the same time, had those documents been subject to the attorney-client privilege, they would not have been subject to production under the grand jury subpoenas. And to the extent that they were privileged, PEC waived its privilege by producing the documents. Either way, Gunter's prior exposure to the documents cannot and should be utilized to attempt to justify a disqualification of Gunter.

<sup>10</sup> In other words, there would be no violation of Rule 1.09(a)(2) or (3) of the Texas Rules of Professional Conduct.

<sup>11</sup> See e.g., *United States v. Wheat*, 486 U.S. 153 (1988); *Gonzales v. State*, 117 S.W.3d 831 (Tex. Crim. App. 2003).

<sup>12</sup> The State's "Motion To Disqualify Counsel" at page 3, last full paragraph, alleges that "[t]he facts of the two representations are identical, misuse of PEC funds" (emphasis added). With all due respect to counsel for the State, this statement is misleading at best (if not knowingly and intentionally false), as counsel for the State is fully aware that the transactions contained within the instant indictment were never the topic of any portion of the civil litigation in *Worrell v. PEC*, Cause No. D-1-GN-07-002234, 353rd Judicial District Court of Travis County, let alone discussed or investigated by PEC, the State, or Chris Gunter in the time frame of Gunter's representation of PEC (i.e., between the time frame of January 15, 2008 through

duty of candor to the Court,<sup>13</sup> and failed to even allege even one concrete example of any actual conflict of interest or any concrete example of a serious potential for a conflict of interest;<sup>14</sup> and

10. The State seeks to inflict tremendous financial detriment upon Bennie Fuelberg by moving, at this late date -- more than **ten (10) months** since the date it first learned that Chris Gunter had ceased his representation of PEC and had elected to represent only Bennie Fuelberg -- to disqualify Gunter because it would force Fuelberg to expend hundreds of thousands of dollars to retain new counsel and get that counsel "up to speed" (i.e., a new counsel would be almost a year behind the "eight-ball", and the cost to Fuelberg would be enormous).

## II.

### Burdens And Additional Considerations

Regarding Section I of the State's "Motion To Disqualify Counsel," which is premised upon the Texas Disciplinary Rules of Professional Conduct, the State, as movant, must prove:

- (1) the existence of a prior attorney-client relationship;
- (2) in which the factual matters involved **were so related to the facts in the pending litigation;**

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either July 17, 2008 or even August 5, 2008).

<sup>13</sup> The State utterly fails to allege anything but conclusory allegations, and fails to admit, as it should, that: (1) the transactions embodied within the indictment did not come to its attention and become a portion of the grand jury investigation until well after Chris Gunter had ceased his representation of PEC; and (2) none of the documents tendered to the grand jury by PEC via Chris Gunter during his representation of PEC relate, directly or indirectly, to the allegations of the instant indictment.

<sup>14</sup> PEC also commits these same sins. For instance, it fails to identify any actual conflict of interest or a serious potential for a conflict of interest, alleging only that "PEC sees no way that Mr. Gunter can zealously represent Mr. Fuelberg without violating the sanctity and confidentiality of the privileged information he obtained through his prior representation of PEC **on this same subject matter.**"

Unfortunately, like the State, PEC fails in its duty of candor to the Court by failing to admit, as well it should, that the transactions alleged in the instant indictment were never developed in the civil lawsuit (*Worrell v. PEC, supra*), addressed or known to PEC, the State or Chris Gunter during the course of his representation of PEC. Rather, they became known to PEC, the State, and Chris Gunter only as a result of the investigation conducted by Navigant (which had been retained by PEC as a part of the civil settlement). Navigant issued its Report to PEC and PEC made that report public in December 2008.

(3) that it involved a **genuine threat that confidences revealed to his former counsel will be divulged to his present adversary.**

See *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex.1989) (orig.proceeding).

Regarding Section II of the State's "Motion To Disqualify Counsel," which is premised on a non-specific allegation of a conflict of interest, the following is the legal framework that must be utilized by this Court:

The Federal and Texas Constitutions, as well as Texas statute, guarantee a defendant in a criminal proceeding the right to have assistance of counsel.<sup>FN4</sup> The right to assistance of counsel contemplates the defendant's right to obtain assistance from counsel of the defendant's choosing.<sup>FN5</sup> However, the defendant's right to counsel of choice is not absolute.<sup>FN6</sup> A defendant has no right to an advocate who is not a member of the bar, an attorney he cannot afford or who declines to represent him, or an attorney who has a previous or ongoing relationship with an opposing party.<sup>FN7</sup> Additionally, while there is a **strong presumption in favor of a defendant's right to retain counsel of choice**, this presumption may be overridden by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice.<sup>FN8</sup> However, when a **trial court unreasonably or arbitrarily interferes with the defendant's right to choose counsel, its actions rise to the level of a constitutional violation.**<sup>FN9</sup> Therefore, courts must exercise caution in disqualifying defense attorneys, especially if less serious means would adequately protect the government's interests.<sup>FN10</sup>

FN4. See U.S. Const., 6th Amend.; Tex. Const., Art. I § 10; Tex.Code Crim. Proc. Art. 1.05.

FN5. See *Ex parte Prejean*, 625 S.W.2d 731, 733 (Tex.Crim.App.1981); *Powell v. Alabama*, 287 U.S. 45, 53, 53 S.Ct. 55, 77 L.Ed. 158 (1932)(defendant should be afforded fair opportunity to secure counsel of his own choice); *Chandler v. Fretag*, 348 U.S. 3, 9, 75 S.Ct. 1, 99 L.Ed. 4 (1954)(same); *Glasser v. United States*, 315 U.S. 60, 70, 62 S.Ct. 457, 86 L.Ed. 680 (1942)(same).

FN6. *Wheat v. United States*, 486 U.S. 153, 159, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988).

FN7. *Id.*

FN8. *Id.* at 158-60, 108 S.Ct. 1692; *Webb v. State*, 533 S.W.2d 780, 784 (Tex.Crim.App.1976).

FN9. *United States v. Collins*, 920 F.2d 619, 625 (10th Cir.1990).

FN10. *United States v. Diozzi*, 807 F.2d 10 (1st Cir.1986).

**In moving to disqualify appellant's counsel of choice, the government bears a heavy burden of establishing that disqualification is justified.** <sup>FN11</sup>

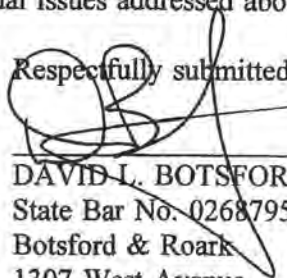
FN11. *United States v. Washington*, 797 F.2d 1461, 1465 (9th Cir.1986).

*State v. v. Gonzalez*, 117 S.W.3d 831, 836-837 (Tex. Crim. App. 2003) (emphasis added).


The "heavy burden" placed upon the State under Section II of its motion and need for a trial court to proceed cautiously, especially if less serious means would adequately protect the government's interests, cut against disqualification in this case.

WHEREFORE, PREMISES CONSIDERED, Defendant Bennie Fuelberg respectfully prays that the State's Motion To Disqualify Counsel be denied and that he be given a full and fair opportunity to demonstrate the legal and factual issues addressed above.

Respectfully submitted,

  
\_\_\_\_\_  
DAVID L. BOTSFORD  
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ATTORNEY FOR BENNIE FUELBERG  
FOR THE LIMITED PURPOSE OF  
LITIGATING THE ISSUE OF  
DISQUALIFICATION OF CHRIS GUNTER

  
\_\_\_\_\_  
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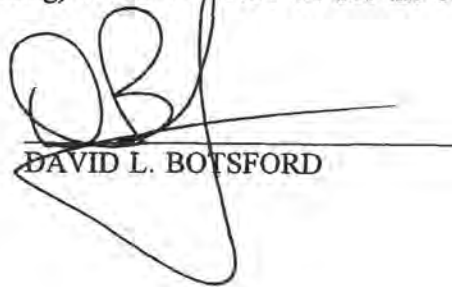
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FUELBERG

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was emailed to Mr. Harry White, District Attorney Pro Tem, at [harry.white@oag.state.tx.us](mailto:harry.white@oag.state.tx.us), Tom Cloudt at [Tom.Cloudt@oag.state.tx.us](mailto:Tom.Cloudt@oag.state.tx.us), Chris at [Chris@gunterandbennett.com](mailto:Chris@gunterandbennett.com), and the Honorable Bert Richardson at [trichardson2@satx.rr.com](mailto:trichardson2@satx.rr.com), and faxed to Mr. Paul Coggins, Counsel for the "Party-in-Interest" (not an amicus, contrary to their pleading) at 214-747-2091 on this the 8th day of October 2009.



DAVID L. BOTSFORD

**TAB 10**

Fuelberg's Supplemental Response To State's Motion To Disqualify Fuelberg's Attorney

CAUSE NO. 1015

STATE OF TEXAS	§	IN THE 424TH
	§	
VS.	§	JUDICIAL DISTRICT COURT
	§	
BENNIE FUELBERG	§	BLANCO COUNTY, TEXAS

**DEFENDANT BENNIE FUELBERG'S SUPPLEMENTAL RESPONSE  
TO THE "STATE'S MOTION TO DISQUALIFY COUNSEL"**

TO THE HONORABLE BERT RICHARDSON, PRESIDING JUDGE OF SAID COURT:

COME NOW the Defendant, BENNIE FUELBERG, by and through his newly retained counsel, David L. Botsford,<sup>1</sup> and his lead counsel of record, Chris Gunter, and would show this Honorable Court the following:

**I.**

**Bennie Fuelberg's Supplemental Response**

In addition to his October 9, 2009, response,<sup>2</sup> Defendant Bennie Fuelberg submits this supplemental response to the State's October 1, 2009, "Motion To Disqualify Counsel." In that motion, the State seeks the disqualification of Defendant Fuelberg's lead counsel of record, Mr. Chris Gunter, under two separate theories: (A) that the State can assert the interests of PEC (i.e., the "real party" in interest) and rely upon civil cases to disqualify Gunter, as if Gunter were actually counsel of record for a new client suing his former client, PEC, and taking positions adverse to PEC and utilizing confidential information he learned while representing PEC to the disadvantage of PEC, as reflected in **Section I** of the State's "Motion To Disqualify Counsel" (the "civil prong" of the State's motion to disqualify); and (2) that there is an actual conflict of interest or a serious potential

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<sup>1</sup> It bears repeating that David L. Botsford has been retained by Defendant Fuelberg for the limited purpose of litigating the State's Motion To Disqualify Counsel. Accordingly, Botsford is not entering a general appearance and will not participate in this case past the conclusion of the litigation relating to the State's Motion To Disqualify Counsel.

<sup>2</sup> Bennie Fuelberg's response was emailed to all parties on October 8, 2009, but not actually file-stamped until the morning of October 9, 2009.

for a conflict of interest, as reflected in **Section II** of the State's "Motion To Disqualify Counsel" (the "criminal prong" of the State's motion to disqualify). Some additional comments are entirely appropriate as to both the "civil prong" and the "criminal prong" of the State's motion to disqualify.

#### **A. Civil Prong Of State's Motion**

Section I of the State's motion to disqualify relies upon the Texas Disciplinary Rules of Professional Conduct. In a nutshell, the State has taken the position that it can move to disqualify Gunter by standing in the shoes of PEC as if this were a civil case, and that it (the State) has the right to seek disqualification of Gunter as if Gunter were actually suing PEC as counsel for Bennie Fuelberg and was also taking a position adverse to PEC while utilizing confidential information he allegedly learned during his prior representation of PEC to the disadvantage of PEC.

Initially, Bennie Fuelberg asserts that the State does not have the legal standing to step into the shoes of PEC and seek Gunter's disqualification as if this were a civil lawsuit where Gunter were representing a subsequent client and suing his former client (PEC). Not one criminal case from an appellate court of Texas has been cited by the State or PEC where the State was allowed to utilize the civil rules of disqualification in a criminal case (and stand in the shoes of the real party in interest, as if counsel was suing his former client), and counsel for Fuelberg has not located any such case. The obvious reason for this absence of authority is that in the context of a criminal case, the Texas Disciplinary Rules of Professional Conduct, while instructive, do not form the proper framework for disqualification of counsel<sup>3</sup> due to the state and federal constitutional rights to counsel of choice, to due process of law, and to due course of law<sup>4</sup> which are entirely absent in the context

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<sup>3</sup> Under *Gonzalez v. State*, 117 S.W.3d 831, 837-938 (Tex. Crim. App. 2003), the Texas Disciplinary Rules of Professional Conduct are "guidelines" that do not present the disqualification standard, but do provide considerations relevant to the determination.

<sup>4</sup> See Article I, Sections 10 and 19 of the Texas Constitution and the Sixth and Fourteenth Amendments to the Constitution of the United States.

of a civil disqualification.

Second, even if Gunter were counsel for a new client suing his former client, PEC, and the civil rules embodied within the Texas Disciplinary Rules of Professional Conduct regarding disqualification dispositively controlled the result of the attempted disqualification (which they do not), the rules regarding disqualification require judicial restraint in a civil case. Recently, in *Smith v. Abbott*,<sup>5</sup> \_\_\_ S.W.3d \_\_\_, 2009 WL 2341839 (Tex.App.-Austin 2009), the Austin Court of Appeals noted the following principles regarding disqualification of counsel in a **civil** case:

Attorney disqualification "is a **severe remedy**," having the potential to cause **"immediate harm by depriving a party of its chosen counsel and disrupting court proceedings."** *In re Sanders*, 153 S.W.3d 54, 57 (Tex.2004) (quoting *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex.1990) and citing *In re Nitla S.A. De C.V.*, 92 S.W.3d 419 (Tex.2002)). Thus, the movant on a motion to disqualify bears a **high burden, and must establish with specificity the basis for disqualification.** *Spears*, 797 S.W.2d at 656. To meet this burden, **mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice.**" *Id.* While the Texas Disciplinary Rules of Professional Conduct are not binding in such matters, courts often look to them as guidelines in determining whether attorney conduct warrants disqualification. *Henderson v. Floyd*, 891 S.W.2d 252, 253 (Tex.1995); *Spears*, 797 S.W.2d at 656. However, **"[e]ven if a lawyer violates a disciplinary rule, the party requesting disqualification must demonstrate that the opposing lawyer's conduct caused actual prejudice that requires disqualification."** *In re Nitla S.A. De C.V.*, 92 S.W.3d at 422. (emphasis added).

*Id.* at \* 5.

Thus, even disregarding the ten (10) grounds asserted in Bennie Fuelberg's "response" filed on October 9, 2009 (all of which are incorporated into this supplemental response as if fully set forth again), this is an area where the Court should proceed with caution, not merely because it is the State's burden<sup>6</sup> to demonstrate the prerequisites for disqualification with factual specificity

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<sup>5</sup> Presumably, this is a case that the District Attorney Pro Tem is aware of, since it involved Greg Abbott, in his official capacity as Attorney General of the State of Texas.

<sup>6</sup> It bears repeating that under *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex.1989) (orig.proceeding), the State must prove:

(even if the State can legally step into the shoes of PEC), but because Bennie Fuelberg has state and federal constitutional rights to counsel of his choice which are elevated above any right to disqualification (in a civil case) embodied within the Texas Disciplinary Rules of Professional Conduct.

Additionally, without waiving any of the ten (10) legal reasons why disqualification should be denied, as reflected in Bennie Fuelberg's October 9, 2009, "response" to the State's motion to

- 
- (1) the existence of a prior attorney-client relationship (between PEC and Gunter);
  - (2) in which the **factual matters involved were so related to the facts in the pending litigation (i.e., the three count indictment against Fuelberg);**
  - (3) that it involved a **genuine threat that confidences revealed to PEC's former counsel (Gunter) will be divulged to its (PEC's) present adversary (which Fuelberg is not).**

Gunter's representation of his former client, PEC, was not and is not "substantially related" to his representation of Bennie Fuelberg, given the allegations of the instant indictment when compared to the factual matters which arose during the course of Gunter's prior representation of PEC in the time frame of January 15, 2008 to July 17, 2008, July 24, 2008 (or even until August 5, 2008). *See* Rule 1.09(a)(3), Texas Disciplinary Rules of Professional Conduct.

An additional practicality of the situation cannot be overlooked or discounted. Gunter, in his representation of PEC, interfaced with Bennie Fuelberg, who was (at least during a portion of Gunter's representation of PEC) the General Manager of PEC, and hence a "high managerial agent" of PEC under V.T.C.A., Penal Code, Section 7.22(b)(2). Bennie Fuelberg, it can safely be assumed, knew far more about PEC and the inner workings of PEC than Gunter could ever have learned in the six plus months that Gunter represented PEC. It is impossible to "strip" from Bennie Fuelberg's mind anything and everything he learned from Gunter, either during Gunter's representation of PEC and/or during Gunter's representation of Fuelberg since late in July 2008/early August 2008 that Gunter notified PEC that he was no longer representing PEC and had elected to represent only Fuelberg. Thus, if Gunter was in fact to be disqualified by this Court, Fuelberg could simply relate to a new counsel everything that he learned from Gunter in both of those time frames. In such a situation, Fuelberg's new counsel would not be in any ethical dilemma whatsoever, whereas Gunter, as Fuelberg's counsel, must live and abide by the Texas Disciplinary Rules of Professional Conduct. What necessarily follows from this practical aspect of the case is that disqualification of Gunter does nothing to assist PEC or the State, other than to force Fuelberg to expend thousands of dollars to obtain a new counsel and get that new counsel up to speed (while simultaneously providing the platform for PEC to continue to ignore its contractual obligation to Gunter by continuing its non-payment of Gunter's invoice).

disqualify, even if PEC was being sued by Gunter's client, Bennie Fuelberg, PEC would have to demonstrate that there was a "substantial relationship" between Gunter's former representation of PEC and Gunter's subsequent representation of Bennie Fuelberg. PEC and the State, although acting in tandem and coordinating on a two-pronged effort to remove Gunter, have failed to raise a fact issue regarding a "substantial relationship" between Gunter's prior representation of PEC and his subsequent representation of Fuelberg (even assuming that the civil standard can be relied upon in a criminal case, particularly when Gunter's client, Fuelberg, is not suing PEC). In this connection, it is well settled that the "substantial relationship" standard requires the former client (PEC) to prove specific factual similarities, liability issues, or strategies from the prior representation that are so closely related to those of the subsequent representation (i.e., the indictment allegations) as to "create[ ] a genuine threat that confidences revealed to [PEC's] former counsel [Gunter] will be divulged to his present adversary [which is not Fuelberg]." *Texaco, Inc. v. Garcia*, 891 S.W.2d 253, 256-57 (Tex.1995)(explanation added); *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d at 398, 399-400 (Tex. 1989)("[t]o hold that the two representations were 'similar enough' to give an 'appearance' that confidences which could be disclosed 'might be relevant' to the representations falls short of the requisites of the established substantial relation standard"); see *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654, 656 (Tex.1990) ("[M]ere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice," see also *In re Meador*, 968 S.W.2d 346, 350 (Tex. 1998)(orig. proceeding)). Conclusory statements about similarities in the representations are not sufficient; instead, **the standard requires sufficiently specific delineation of subject matter, issues, and causes of action presented to enable the trial court to engage in a "painstaking analysis of the facts."** *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris*, 776 S.W.2d 271, 278 (Tex.App.-Dallas 1989, no writ)(emphasis added); *NCNB Tex. Nat'l Bank v. Coker*, *supra* at 400. Likewise, "[a] superficial resemblance between issues

is not enough to constitute a substantial relationship.” *J.K. & Susie L. Wadley Research Inst. & Blood Bank v. Morris*, *supra* at 278. Nor does an attorney's mere generalized knowledge of a client's “inner workings” in regard to selecting experts or fact witnesses, “preparing and responding to discovery requests, formulating defense strategies, trial preparation, and attending settlement conferences” constitute the required “specific factual similarities” between prior and subsequent representations. *In re Drake*, 195 S.W.3d 232, 236-37 (Tex.App.-San Antonio 2006, no pet.). Further, a “substantial relationship” cannot be predicated upon the perceived risk of disclosure of facts that are **common knowledge, within the public domain, or that have already been provided to the present adversary in discovery**. *Metropolitan Life Ins. Co. v. Syntek Fin. Corp.*, 881 S.W.2d 319, 321 (Tex.1994); *Wadley*, 776 S.W.2d at 278.

Another case that is somewhat distinguishable from the present case but still quite relevant is *Landers v. State*, 256 S.W.3d 295 (Tex. Crim. App. 2008). There the defendant attempted to disqualify the elected district attorney who was prosecuting her for a current murder and intoxication manslaughter case because that district attorney had defended her three years earlier in a prior intoxication-assault case that had been reduced to a DWI. The trial court denied the motion to disqualify. In affirming the trial court, the Court held that a district attorney is not automatically disqualified from prosecuting a former client, even when it is for the same type of offense. *Id.* at 304. A due process violation would occur only if there was an actual, not just a theoretical, conflict of interest based on the likely use of confidential communications. *Id.* at 305. In the context of criminal matters, a prosecutor cannot be disqualified from prosecuting a former client unless the prior and current cases are substantially related and it is likely that the prosecutor will use confidential information obtained in the earlier representation. *Id.* at 305. The Court went on to hold that a prosecution for the same type of offense does not by itself make the two proceedings substantially related and that the information the prosecutor learned in his earlier representation of the defendant

was not "confidential information" since the defendant was unable to point to any information that the prosecutor learned or might have learned during his earlier representation that was not already in the public domain. *Id.* at 310. In the present case, PEC and the State are in a worse position than the defendant in *Landers*, because they have been unable to specify *any* confidential information Gunter learned of in his earlier representation of PEC that would likely be used in the defense of Bennie Fuelberg, much less any confidential information not already made public.

The cases cited above which support these important principles bear examination because they reflect that the State has not and cannot demonstrate that there is a "substantial relationship" between Gunter's prior representation of PEC and his subsequent representation of Bennie Fuelberg. The allegations of the civil case did not involve the allegations embodied in the indictment against Fuelberg, and although Navigant *may* have discovered facts underlying the transactions which underlie the indictment allegations, there is no evidence demonstrating when Navigant may have discovered those facts, let alone that Navigant or any other person at PEC disclosed those facts to Gunter.

Of the cases cited above, *In re Drake*, 195 S.W.3d 232, 236-37 (Tex.App.-San Antonio 2006, no pet.) presents a fact situation that is closest to that presented in the successive representation of PEC and then Fuelberg by Gunter. In *Drake*, the San Antonio Court of Appeals held that a lawyer (Drake) who had for almost twenty-two years represented the county tax appraisal district (BCAD) as outside counsel in lawsuits over valuation of property, involving similar defenses and strategies, did not establish a "substantial relationship" with subsequent valuation disputes in which that same counsel (Drake) represented property owners (Shivers and Casper) in two different lawsuits against the county appraisal district (BCAD). *In re Drake*, 195 S.W.3d 232, 236-37 (Tex.App.-San Antonio 2006, no pet.). The Court noted that the appraisal district (BCAD) conceded that the facts surrounding Drake's prior representation of the appraisal district did not relate to the facts of the

current Shivers and Casper lawsuits, 195 S.W.3d at 236, but that the appraisal district's argument was to the effect that the two lawsuits involved the same claims and defenses as past cases in which the former counsel (Drake) had represented the appraisal district (BCAD) because all cases involve the valuation of the particular properties involved. The Court's opinion recites that the district court had concluded that:

(1) the matters in which Drake represented the Shivers and Casper were substantially related to the matters in which Drake formerly represented BCAD; (2) BCAD established, by a preponderance of the evidence, facts indicating a substantial relationship between Drake's former representation of BCAD and his current representation of the Shivers and Casper; and (3) the prior attorney-client relationship between Drake's former representation of BCAD was one in which the factual matters involved were so related to the facts in the pending litigations that it creates a genuine threat that confidential information revealed by BCAD to Drake would be divulged to the Shivers and Casper.

*Id.* at 236.

The Court of Appeals went on to state its criticism of the district court's order, as follows:

The order lists no similar underlying "facts." Instead, the order lists various "similarities" between the past and present matters. For example, the trial court found that while Drake represented BCAD, he advised the district on the type of expert to retain or the type of expert or witness the district would not want questioned; and he engaged in various activities, including preparing and responding to discovery requests, formulating defense strategy, trial preparation, and attending settlement conferences. Although these findings leave no doubt that Drake is familiar with the inner-workings of BCAD, none of the court's findings relate to specific factual similarities between the Shivers and Casper lawsuits and any lawsuits in which Drake formerly represented BCAD. The findings do not relate to (1) the individual characteristics of each property in arriving at market value; (2) the evaluation of each property according to market conditions existing on January 1 of the relevant tax year; (3) the unique set of market dynamics and individual property characteristics that must be considered separately for each property; (4) the applicable criteria for valuation of each property; or (5) the different valuation considerations BCAD brings to bear on each neighborhood in which the properties are located.

The court's findings, which speak only generally of Drake's representation of BCAD, "fall[ ] short of the requisites of the established substantial relation standard." *See Coker*, 765 S.W.2d at 400. It is undisputed that the facts, material to determining the issues to be litigated in the Shivers and Casper cases, are not related to the facts in any prior case in which Drake represented BCAD. Conclusions that valuation issues exist in all cases, without further evidence that the underlying facts are similar, will

not support the trial court's disqualification order. Therefore, the trial court erred in disqualifying Drake on the grounds that he has, in the past, represented BCAD in substantially related matters.

*Id.* at 236-237.

In the present case, the State and PEC have overlooked the facts: not merely the facts surrounding Gunter's representation of PEC from January 15, 2008, through late July 2008/early August 2008, but also the facts underlying the allegations of the instant indictment against Bennie Fuelberg. There is no substantial relationship between the facts involved in Gunter's representation from January 2008 to late July/early August 2008, and the facts involved in the indictment. While the State's "Motion To Disqualify Counsel" at page 3, last full paragraph, alleges that "[t]he facts of the two representations are identical, misuse of PEC funds" (emphasis added), Bennie Fuelberg's October 9, 2009, "response," aptly points out that this statement is misleading at best as counsel for the State is fully aware that the transactions contained within the instant indictment were never the topic of any portion of the civil litigation in *Worrell v. PEC*, Cause No. D-1-GN-07-002234, 353rd Judicial District Court of Travis County, let alone discussed or investigated by PEC, the State, or Chris Gunter in the time frame of Gunter's representation of PEC (i.e., between the time frame of January 15, 2008 through July 17, July 24 or even August 5, 2008). The realization that both could fit under a generic label of "misuse of PEC funds" does not make the underlying facts in substantial relationship with one another, and neither the State nor PEC have elicited any facts at the hearing on October 9, 2009, to even attempt to prove that Gunter's prior representation of PEC is substantially related to his current representation of Bennie Fuelberg. Rather than attempting to elicit facts, they rely solely on the conclusory statement that both representations involve the "misuse of PEC funds." This is no more than the generalization found to be inadequate to justify disqualification in *In re Drake* -- that both representations involved property valuation disputes -- and merely attaching the label "misuse of PEC funds" is indeed merely the type of conclusory allegations

condemned in *In re Drake, supra*, and *Wadley, supra*. And it certainly falls far short of the requirement that the movant provide the court with sufficient information to allow the Court to "engage in a painstaking analysis of the facts." *Wadley, supra* at 278; *In re Drake, supra* at 236.<sup>7</sup>

Finally,<sup>8</sup> one additional comment on the "civil prong" is necessary and appropriate. The State notes that there is an "irrebuttable presumption" that confidences and secrets were imparted to a former attorney, relying on *National Medical v. Godbey*, 924 S.W.2d 123, 131 (Tex. 1996). See State's Motion To Disqualify Counsel at pages 3-4. However, that "irrebuttable presumption" (also called a conclusive presumption) only applies, even in a civil disqualification context, if the movant meets his burden of proving **with specificity the facts that justify a finding of "substantial relationship."** See *NCNB Tex. Nat'l Bank v. Coker, supra* at 400; *In re Drake, supra* at 236. Although not acknowledged by the State, *National Medical* itself cites *Coker* for the proposition that the "conclusive presumption" applies if but only if the "moving party meets" its burden of demonstration all three prongs, including proving **with specificity the facts that justify a finding of "substantial relationship."** *National Medical, supra* at 134-135. Furthermore, it should be noted,

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<sup>7</sup> The State and PEC also failed to elicit any evidence at the October 9, 2009, hearing that Gunter should be disqualified under Rule 1.09(a)(2) of the Texas Disciplinary Rules of Professional Conduct. No witness was able to point to any confidential information that Gunter learned that has not already become generally known. Rule 1.09(a)(2) only applies if there is a "reasonable probability" that a violation of Rule 1.05 will occur if the lawyer is allowed to represent the current client. Rule 1.05(b)(3) prohibits the use of confidential information to the disadvantage of the former client **unless** "the confidential information has become generally known. Virtually everything Gunter learned during his representation of PEC has previously been made public -- by virtue of the publication of all depositions and documents in the civil case as well as by the publication of the Navigant report -- and there is no evidence that Gunter has any confidential information that could be used to the disadvantage of PEC (particularly since PEC could be exposed to corporate criminal liability under V.T.C.A., Penal Code, Section 7.22(b)(2) since Fuelberg was a "high managerial agent" of PEC during the time frame of the allegations of the indictment.

<sup>8</sup> Fuelberg does not repeat all of the ten (10) legal arguments he proffered in his October 9, 2008, response, but notes that his waiver arguments are solid as a rock and independently justify denial of the State's motion to disqualify.

conclusive (or irrebuttable) presumptions have no application in the area of criminal law because they offend due process.<sup>9</sup> Accordingly, this is an additional reason that the civil cases dealing with disqualification of a former attorney should not be relied upon by this Court.

### **B. Criminal Prong Of State's Motion**

As noted in Section II of Bennie Fuelberg's October 9, 2008 "response," under *State v. v. Gonzalez*, 117 S.W.3d 831, 836-837 (Tex. Crim. App. 2003) and *Wheat v. United States*, 486 U.S. 153 (1988), the State bears a "**heavy burden**" of establishing that disqualification is justified and this Court "**must exercise caution**," especially if less serious means would adequately protect the State's interests. Since the State has not articulated one concrete example which would support an inference (let alone a factual basis that would support a conclusion) that Gunter has a conflict of interest<sup>10</sup> or that a serious potential for a conflict of interest exists in his representation of Fuelberg

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<sup>9</sup> In *Regalado v. State*, 872 S.W.2d 7, 10-11 (Tex. App. -Houston [14<sup>th</sup> Dist.], 1994), the Court explained that presumptions are mandatory or permissive. According to the Court:

A permissive presumption allows, but does not require, the trier of fact to infer the elemental or ultimate fact from the proof offered. It places no burden on the accused. A mandatory presumption on the other hand, directs that the elemental or ultimate fact must be found upon proof of the basic fact, unless the accused presents evidence to rebut the presumption. A mandatory presumption is per se violation of the due process rights of the accused, because it impermissibly shifts the burden of proof from the prosecution to the appellant. (citing *County Court of Ulster County v. Allen*, 442 U.S. 140, 99 S.Ct. 2213, 60 L.Ed.2d 777 (1979). See also *Leary v. United States*, 395 U.S. 6, 89 S.Ct. 1532, 23 L.Ed.2d 57 (1969); *Tot v. United States*, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943); *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); *Connecticut v. Johnson*, 460 U.S. 73, 103 S.Ct. 969, 74 L.Ed.2d 823 (1983); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)).

Thus, Fuelberg asserts that **by analogy**, application of the "conclusive presumption" utilized in the civil disqualification arena to disqualification of criminal counsel would offend due process and due course of law, even if it did not otherwise do violence to the state and federal constitutional rights to counsel of choice. In candor, it should be noted that these cases deal with presumptions submitted to juries to determine facts, not presumptions used by a court to determine a legal issue.

<sup>10</sup> In *Foxworth v. Wainwright*, 516 F.2d 1072, 1076 (5th Cir. 1975), the Court stated the following:

on the allegations of the instant indictment, this Court should not override the strong presumption in favor of a defendant's right to retain counsel of choice by disqualifying Gunter. Indeed, this strong presumption may be overridden only by other important considerations relating to the integrity of the judicial process and the fair and orderly administration of justice. Given the total absence of any facts that would reflect that Gunter learned anything at all during his representation of PEC that he could use to Fuelberg's benefit (let alone to PEC's disadvantage), coupled with the fact that virtually everything Gunter learned during his representation of PEC was made public by PEC, there is no conceivable conflict of interest or serious potential for a conflict of interest. Gunter's situation is far removed from that presented in *Wheat* because unlike *Wheat*, Gunter is not involved in the simultaneous representation of **multiple co-defendants** under indictment.

Indeed, in *Wheat*, the defendant (Wheat) submitted his request for a change of counsel on August 22, 1985 (a Thursday). Arguments were scheduled for the following Monday, August 26, 1985, with Wheat's trial scheduled to begin the following day, August 27, 1985. *Id.* at 155. Wheat's requested counsel (Mr. Iredale) was at that time representing two other co-conspirators who were in various stages of trial and/or plea bargaining as to the same charges and transactions. Thus, the case involved the potential **simultaneous representation of three alleged co-conspirators/co-defendants**. The government identified two serious, possible conflicts of interest relating to the

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"A conflict of interest is present whenever one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing."

And in *United States v. Trevino*, 992 F.2d 64, 65 (5th Cir. 1993), in denying counsel's motion to withdraw that Court emphasized its language in *Foxworth* "that a conflict must be more than illusory or imagined." Here, Gunter cannot adduce evidence or arguments on behalf of Fuelberg regarding the indictment allegations that are damaging to PEC, particularly since if Fuelberg is convicted, PEC is subject to corporate criminal liability under V.T.C.A. Penal Code, Section 7.22(b)(2), since Fuelberg was a "high managerial agent" of PEC during the periods of time enumerated in all three counts of the instant indictment against him.

proposed representation of Wheat by Iredale, including the fact that Iredale might have to cross-examine one of his clients if he represented Wheat. This in turn would present an ethical dilemma for Iredale, who would have to either use information he learned from one client to the disadvantage of the other or forego the full bore cross-examination (to the detriment of the other client). In denying Wheat the right to have Iredale represent him, the district court also noted that it was unfortunate that Wheat had not suggested the substitution earlier than two court days before the commencement of trial, a fact which supported the district court's reliance upon his instinct to deny Wheat's choice of counsel. *Id.* at 1696. The Supreme Court held that the district court's denial to allow Iredale to take on representation of Wheat two days before trial was not an abuse of discretion, particularly given the timing of the request, and held that a district court must recognize the **presumption** in favor of a defendant's Sixth Amendment right to counsel of choice, which presumption can only be overcome by a demonstration of an actual conflict of interest or a serious potential for a conflict of interest. *Id.* at 165-167 (Marshall, J., dissenting, but explaining majority opinion). As noted by Mr. Justice Marshall, an unsupported or dubious speculation as to a conflict will not suffice, a view in substantial accordance with the majority opinion. *Id.*

Contrary to *Wheat*, Gunter has been representing Fuelberg for well over a year, and there is no simultaneous representation of multiple co-defendants in the context of the indictment against Bennie Fuelberg. Moreover, given the dearth of facts presented by the State and/or PEC, Bennie Fuelberg respectfully submits that an order disqualifying Chris Gunter would constitute an arbitrary interference with his constitutional rights to counsel of his choice and impose a tremendous financial penalty since he would have to retain new counsel to get up to speed with what Gunter has done since early August 2008.

Finally, *Gonzalez, supra*, totally supports Gunter's position that he should be allowed to continue to represent Fuelberg. In *Gonzalez*, the state moved to disqualify counsel under Rule 3.08

of the Texas Disciplinary Rules of Professional Conduct "because he had personal knowledge bearing directly on the guilt or innocence of his client and the credibility of the State's key witness and was therefore a potential witness whose credibility would be at issue regardless of whether he took the stand." *Id.* at 835. The Court stated the following, which is directly relevant to the instant case:

Counsel may be disqualified under the disciplinary rules **when the opposing party can demonstrate actual prejudice resulting from opposing counsel's service in the dual role of advocate-witness. Allegations of one or more violations of the disciplinary rules or evidence showing only a possible future violation are not sufficient.** In determining whether counsel should be disqualified because counsel is a potential witness, Texas courts use rule 3.08 of the Texas disciplinary rules of professional conduct as a **guideline. The rule does not present the disqualification standard, but does provide considerations relevant to the determination.**

\* \* \*

The comments following the rule recognize that rule 3.08 sets out a disciplinary standard and **is not well suited to use as a standard for procedural disqualification but can provide guidance** in those procedural disqualification disputes where the party seeking disqualification can demonstrate **actual prejudice to itself resulting from the opposing lawyer's service in the dual roles.** The party seeking disqualification, however, cannot invite the necessary actual prejudice by unnecessarily calling the opposing counsel as a witness.

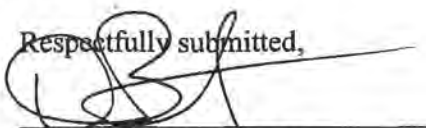
*Id.* at 837-838 (footnotes omitted, emphasis added)

*Gonzalez*, while instructive, is entirely distinguishable from Gunter's situation, because there is no allegation that Gunter will be a witness while simultaneously representing Fuelberg. More importantly, the language quoted above (and emphasized), when compared with the State's motion to disqualify and the evidence adduced during the October 9, 2009, hearing, reflects a total absence of allegation let alone facts which could remotely reflect prejudice to the State. Indeed, the evidence adduced fails to even support an inference that there is even **a possible future violation** of any disciplinary rule by Gunter, who fully intends to continue to abide by the Texas Disciplinary Rules of Professional Conduct. Simply stated, neither *Gonzalez* nor any Texas case supports Gunter's

disqualification given the evidence adduced at the October 9, 2009, hearing.

WHEREFORE, PREMISES CONSIDERED, Defendant Bennie Fuelberg respectfully prays that the State's Motion To Disqualify Counsel be denied.

Respectfully submitted,

  
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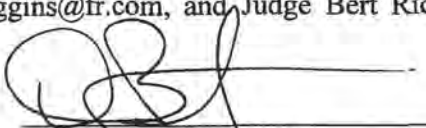
ATTORNEY FOR BENNIE FUELBERG  
FOR THE LIMITED PURPOSE OF  
LITIGATING THE ISSUE OF  
DISQUALIFICATION OF CHRIS  
GUNTER

  
CHRIS GUNTER  
State Bar No. 08624600  
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LEAD COUNSEL OF RECORD FOR  
BENNIE FUELBERG

**CERTIFICATE OF SERVICE**

On October 15, 2009, a copy of this document was emailed to Harry White at [harry.white@oag.state.tx.us](mailto:harry.white@oag.state.tx.us), Paul Coggins at [coggins@fr.com](mailto:coggins@fr.com), and Judge Bert Richardson at [trichardson2@satx.rr.com](mailto:trichardson2@satx.rr.com).

  
DAVID L. BOTSFORD

**TAB 11**

Mitchell's Motion To Disqualify Judge Kent

CAUSE NO. 4-96-4

STATE OF TEXAS	§	IN THE 114TH JUDICIAL
	§	
V.	§	DISTRICT COURT OF
	§	
ANDREW LEE MITCHELL	§	WOOD COUNTY, TEXAS

**DEFENDANT'S SEALED MOTION TO RECUSE/DISQUALIFY THE HONORABLE  
JUDGE CYNTHIA STEVENS KENT,  
AND BRIEF IN SUPPORT**

TO THE HONORABLE CYNTHIA STEVENS KENT, DISTRICT JUDGE:

COMES NOW Andrew Lee Mitchell, Defendant in the above styled and numbered cause and, pursuant to the Fourteenth Amendment to the United States Constitution; Article 1, Sections 10 and 19 of the Texas Constitution, Rules 18a and 18b of the Texas Rules of Civil Procedure; and Canon 3 of the Texas Code of Judicial Conduct, respectfully moves this Court to recuse herself from the instant case. As grounds therefor, Defendant would respectfully show this Honorable Court the following:

**I.**

**ASSERTION AND FACTS**

Defendant respectfully asserts that this Honorable Court should recuse herself and/or disqualify herself because, in light of the situation set forth below, it would be extremely difficult for any jurist to afford Defendant a trial that comports with due process or due course of law. The situation, as related to Mr. Botsford by Mr. Holmes at approximately 8:00 p.m. on January 5, 1999, and as more fully set forth on the record in a closed, in camera and sealed hearing on January 6, 1999, is such that the Court's "impartiality might reasonably be questioned." TEX. RULE

Civ. PROC. 18b(2)(a) (1998).

Indeed, the Court's knowledge of and reaction to an alleged threat against the Court's life by the Defendant renders it necessary and proper that this Court recuse/disqualify herself. The Court's reaction to the alleged threat was two fold: (1) taking additional security precautions; and (2) being alarmed or nervous at seeing the Defendant at a public location (and notifying the FBI of that fact). Although these reactions are perfectly understandable, they do infringe upon the constitutionally mandated presumption of innocence and indicate a level of judicial bias which (again, although understandable) is inconsistent with Defendant Mitchell's rights to a neutral and unbiased judge.

The facts appear to be as follows, based upon what Judge Kent and Mr. David Dobbs stated into the record on January 6, 1999, as supplemented by what Mr. Holmes related to the undersigned on January 5, 1999.

Sometime in late 1997, Defendant Mitchell allegedly threatened to kill Judge Kent and Jack Skeen. This threat was allegedly made in the presence of Mr. Kerry Max Cook, a defendant in an unrelated capital murder case in Smith County (on change of venue to Bastrop, Texas).

In late October 1998, Mr. David Dobbs learned of this alleged threat. Mr. Dobbs notified the FBI of this alleged threat so that the FBI could initiate an investigation. Mr. Dobbs also orally notified Judge Kent of the alleged threat while she was in the State of Nevada teaching at a judicial education program. Shortly

after Mr. Dobbs informed Judge Kent of the alleged threat, Judge Kent called the FBI Agent in charge of the investigation (Garrett Floyd) and spoke with him concerning the alleged threat and the pending investigation.

Thereafter, Judge Kent took additional security precautions based upon the alleged threat, although it appears that Mr. Floyd told her that he had not been able to substantiate the threat to the level where he could initiate charges against Defendant Mitchell. The exact nature of these additional security precautions were not delineated in the record on January 6, 1999.

Thereafter, at some point in time subsequent to late October 1998, Judge Kent encountered Defendant Mitchell at a public restaurant in Tyler, Texas. Seeing Defendant Mitchell made Judge Kent "nervous" or "alarmed."<sup>1</sup> As a result of encountering Defendant Mitchell, Judge Kent called the FBI and reported the encounter.

Counsel for Defendant Mitchell were not made aware of any of the foregoing facts until Judge Kent informed Mr. Clifton "Scrappy" Holmes of the essence of the foregoing during a telephone conversation with Mr. Holmes. According to Judge Kent, she spoke with Mr. Holmes concerning his unavailability for a December 31, 1998, 2:00 p.m. hearing in this case and at that time, related the essence of the foregoing to him. As the record of the January 6,

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<sup>1</sup> The undersigned attempted to take accurate notes during the January 6, 1999, hearing. The record will reflect Judge Kent's statements of "nervous" or "alarmed" (or possibly both).

1999, hearing reflects, Judge Kent believes this was prior to Christmas. However, Judge Kent remembered that the conversation with Mr. Holmes was while Mr. Holmes was either on his way out of state or out of the country for a vacation, which was why he was going to be unavailable on December 31, 1998. Mr. Holmes has represented to the undersigned that it is his memory that this conversation with Judge Kent occurred while he was on the way out of town for that vacation, which was on Tuesday, December 29, 1998. However, the exact date is not of importance.

Indeed, regardless of the exact date of that conversation, Judge Kent related the essence of the situation to Mr. Holmes at that time and supplied Mr. Holmes with the name of the FBI Agent handling the investigation so that Mr. Holmes could speak with him personally. Judge Kent also told Mr. Holmes that although the Court did not put much stock in the alleged threat, the Court had taken additional security precautions just in case.

Subsequently, Mr. Holmes did speak with FBI Agent Floyd, who informed Mr. Holmes that he could not tell Mr. Holmes the identity of the person reporting the alleged threat. Mr. Floyd also informed Mr. Holmes that although he believed the threat had been made by Mr. Mitchell, he had not been able to substantiate the alleged threat. He also informed Mr. Holmes that he had discussed his investigation with Judge Kent.

On the evening of January 5, 1999, the undersigned learned of the essence of the situation when he spoke with Mr. Holmes. The situation was addressed in a closed hearing on January 6, 1999, at

which time the undersigned informed the Court that he was concerned with the situation and that the undersigned wanted to look at the situation and the law. Accordingly, the undersigned informed the Court that he might or might not have to file a motion on the morning of January 7, 1999.

The following additional facts also appear to be relevant to this motion. First, on November 5, 1998, the State's motions for a continuance of the current trial date of January 7, 1999, were addressed in open court by Judge Kent. At that time, the undersigned did not oppose the State's requested continuance. The undersigned did, however, indicate that his non-opposition to the State's motion was not a waiver of his previously filed (and overruled) motion for speedy trial. Judge Kent overruled the State's motions for continuance of the trial date. Second, in a filing in Andrew Mitchell vs. Cynthia Stevens Kent, Judge 114th Judicial District Court, J.B.Smith, Sheriff of Smith County, and the State of Texas, Civil Action No. 6:98cv667, United States District Court, Eastern District of Texas (filed on or about December 8, 1998), Judge Kent opposed a stay of the instant trial. Judge Kent opposed a stay agreed upon by the State of Texas (acting by and through the Attorney General) and the undersigned counsel in connection with Defendant's federal writ of habeas corpus alleging that his retrial was barred by the double jeopardy clause of the Fifth Amendment. Judge Kent's opposition to the agreed stay becomes relevant in light of the facts set forth above, as related to Mr. Holmes by Judge Kent and as reflected on the record on January 6,

1999, as more fully explained below.

The situation is such that this Court should recuse herself. Having been informed of an alleged threat against the Court by Defendant Mitchell, no reasonable jurist could completely disregard such information. In fact, this Court informed Mr. Holmes (and stated during the January 6, 1999, hearing) that she had taken additional security concerns, thus indicating a belief in the substance of the alleged threat. Additionally, the Court's reaction to encountering Defendant Mitchell at a public restaurant and feeling "nervous" or "alarmed" and reporting the encounter to the FBI also indicates a belief in the substance of the alleged threat. Although the undersigned understands that Judge Kent believes that she can be fair and impartial to Defendant Mitchell, Judge Kent's reactions (outlined above) are in fact in derogation of the presumption of innocence embodied in the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution and the due course of law clauses of Article I, Sections 10 and 19 of the Texas Constitution. Moreover, it may be that Judge Kent's opposition to the agreed stay of the trial date identified above was motivated by her knowledge of the FBI investigation into the alleged threat. The Court's impartiality is reasonably called into question.

## II.

### LAW AND ARGUMENT

It is well settled that Judges must recuse themselves from proceedings in which their "impartiality might reasonably be

questioned." TEX. RULE CIV. PROC. 18b(2)(a) (1998). The undersigned must respectfully assert that Judge Kent's "impartiality might reasonably be questioned" in light of the contents of this motion. Because the undersigned does not seek to prejudice his client nor cast stones towards Judge Kent, this motion has been filed "sealed" to protect all involved and concerned.

Although no Texas case on point has been located, the Tenth Circuit has addressed a similar situation in *United States v. Greenspan*, 26 F.3d 1001 (10th Cir. 1994). In *Greenspan*, the defendant was charged in federal court with various drug offenses. The defendant filed a motion to suppress and an evidentiary hearing was held. The trial judge orally denied the motion to suppress at the hearing and entered a written order on March 2, 1993. On March 8, 1993, the defendant filed a motion for recusal of the trial judge based upon the judge's evidentiary rulings and in-court statements. That motion was denied. Also on March 8, 1993, defendant entered a plea of guilty, while reserving the right to appeal the denial of his motion to suppress. *Id.* at 1003-04.

On April 21, 1993, the trial court sentenced defendant. At the sentencing hearing, the defendant amended the affidavit accompanying his prior motion for recusal and renewed the motion based upon allegations that the district judge had received information concerning an investigation into alleged threats on the judge's life by the defendant. That renewed motion for recusal was denied and defendant appealed. *Id.* at 1004.

On appeal, the defendant asserted that the judge should have recused himself in light of circumstances that would cause a reasonable person to question his impartiality. *Id.* at 1005. The Tenth Circuit noted that the trial judge was aware of the allegations at the sentencing hearing and in fact expedited the sentencing hearing in order to "get [Greenspan] into the federal penitentiary system immediately, where he can be monitored more closely" and denied his counsel's request for a continuance. *Id.* at 1005. The Court there stated:

"that under these unique circumstances, the trial judge should have recused himself from sentencing Greenspan. The judge learned of the alleged threat from the FBI, and there is nothing in the record to suggest the threat was a ruse by the defendant in an effort to obtain a different judge. At oral argument, the government conceded that a reasonable person might have questioned the judge's impartiality in light of the judge's knowledge that an investigation was being conducted into alleged threats against him by the defendant. In a case like the present, where there is no inference that the threat was some kind of ploy, the judge should have recused himself...." *Id.* at 1006.

The Court went on to state:

"Combined with the judge's knowledge that an investigation was ongoing concerning alleged threats against him by defendant, the totality of the circumstances surrounding the sentencing hearing could have contributed to an appearance that the trial court was prejudiced against Greenspan. The trial court had accelerated the date of Greenspan's sentencing, for the stated reason that the court wanted to get Greenspan into the penitentiary system as quickly as possible, and the trial court refused to grant a continuance of the sentencing hearing even though defendant's counsel had been appointed only two days before the sentencing date." *Id.*

The Court also stated:

"The bottom line here is that this judge learned of an apparently genuine death threat made against him and against his family under circumstances that made it quite unlikely that the threat was intended as a device to obtain a recusal. The judge obviously took the threat very seriously, and chose to accelerate court procedures in order to reduce the risk to him and his family as he perceived it. Under such circumstances, it is obvious to us that a reasonable person could question the judge's impartiality. **Even if this judge were one of those remarkable individuals who could ignore the personal implications of such a threat, the public reasonably could doubt his ability to do so.**" *Id.* at 1007 (emphasis added)

Measured against *Greenspan*, the instant case clearly merits recusal by the Court. There is no suggestion that the alleged threat -- made in late 1997 (while the case was stayed pending discretionary review by the Court of Criminal Appeals) -- was a ruse by the Defendant to obtain a different judge. Additionally, Judge Kent's admitted reactions to the alleged threat and the investigation thereof -- to take additional security precautions and report to the FBI a chance public encounter with Defendant which either made her "nervous" or "alarmed" -- are alone sufficient to raise the specter of partiality. Also, Judge Kent's denial of the State's motions for continuance on November 5, 1998, in the face of non-opposition by Defendant Mitchell, and opposition to the agreed upon stay of the trial by the Attorney General and Defendant Mitchell in the federal habeas corpus action, now appear (at least facially) to have been in response to the alleged threat. A reasonable person could and indeed would question Judge Kent's impartiality. In the words of the Tenth Circuit, **"even if (Judge Kent) were one of those remarkable individuals who could ignore the personal implications**

of such a threat, the public reasonably could doubt (her) ability to do so." Recusal is necessary and appropriate.

WHEREFORE, PREMISES CONSIDERED, Defendant Mitchell respectfully prays that this Honorable Court grant this motion and recuse herself from the instant case and, if she will not recuse herself, that she immediately forward this motion to the presiding judge of the administrative judicial district, so that a hearing on this motion may take place before him or some other judge designated by him. See TEX. RULE CIV. PROC. 18a(d) (1998).

Respectfully submitted,

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State Bar No. 02687950  
1307 West Ave.  
Austin, Texas 78701  
512/480-9764  
512/480-9768 (Fax)

STATE OF TEXAS  
COUNTY OF WOOD

BEFORE ME, the undersigned authority, personally appeared David L. Botsford, a person known unto me, and who, upon his oath, did state and depose the following:

My name is David L. Botsford and I drafted the above and foregoing motion. I have personal knowledge of the facts contained herein and I swear that they are true and correct.

---

DAVID L. BOTSFORD

Sworn and subscribed to before me, the undersigned authority, on this the \_\_\_\_ day of January 1999.

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Notary Public, Wood County

### **Certificate of Service**

I hereby certify that on this the 7th day of January 1999, a copy of the above and foregoing document was hand-delivered to Mr. David Dobbs, Assistant District Attorney, Smith County, Texas.

---

David Botsford

**TAB 12**

Ford & Newton's Joint Motion To Disqualify Judge

NO. B03-63, NO. B03-64, NO. B03-65  
NO. B03-66, AND NO. B03-67

STATE OF TEXAS	§	IN THE 198TH
	§	
VS.	§	JUDICIAL DISTRICT COURT
	§	
FRANK FORD	§	KERR COUNTY, TEXAS

NO. B03-68, NO. B03-69, NO. B03-70  
NO. B03-71, AND NO. B03-72

STATE OF TEXAS	§	IN THE 198TH
	§	
VS.	§	JUDICIAL DISTRICT COURT
	§	
TOM NEWTON	§	KERR COUNTY, TEXAS

**SEALED JOINT MOTION FOR RECUSAL**

TO THE HONORABLE JUDGE OF THIS COURT:

COME NOW the Defendants, FRANK FORD, by and through his attorney, David Botsford, and TOM NEWTON, by and through his attorney, Stanley Schneider, and pursuant to Rules 18a & 18b, Texas Rules of Civil Procedure, the Fourteenth Amendment to the United States Constitution; Article 1, Sections 10 and 19 of the Texas Constitution, and Canon 3 of the Texas Code of Judicial Conduct, present this their Sealed Joint Motion For Recusal, and as grounds therefore, would show this Court the following:

**I.**

**SEALED MOTION**

Because undersigned counsel do not seek to prejudice their clients nor cast stones towards Judge Ables, for whom they have the utmost respect, this motion has been filed "sealed" to protect all involved and concerned.

## II.

### STATUTORY SCHEME

Rule 18a, Texas Rules of Civil Procedure, which is entitled "Recusal or Disqualification of Judges", states, in pertinent part, that:

"(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior 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. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require."

Rule 18b, Texas Rules of Civil Procedure, which is entitled Grounds for Disqualification or Recusal of Judges, states in pertinent part that:

## "(2) Recusal

A judge shall recuse himself in any proceeding in which:

- (a) his impartiality might reasonably be questioned;
- (b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

These statutes, including the ten day time frame of Rule 18a(a), have been held to be applicable to criminal cases. *See e.g., Arnold v. State*, 853 S.W.2d 543 (Tex.Crim.App.1993); *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex.Crim.App.1990). *See also McClenan v. State*, 661 S.W.2d 108, 109 (1983)(addressing recusal under prior statute and prior to that point in time when Rule 18a and Rule 18b were held applicable to criminal cases).

### III.

#### ASSERTION & FACTS

Defendants respectfully assert that Judge Ables should recuse himself from handling the ten instant indictments because "his impartiality might reasonably be questioned" and he may "have personal knowledge of disputed evidentiary facts concerning the proceeding." Stated differently, Defendants respectfully submit that it would be extremely difficult for any Kerr County jurist to afford Defendants a pretrial hearing and a trial that comports with due process or due course of law. Explanation is necessary and appropriate.

Each of the ten indictments state, in pertinent part, that Defendant Ford or Defendant Newton:

...on or about the 15th day of October, 2001, and before the presentment of this indictment, in said county and state, did then and there knowingly and with the intent to obtain a benefit, solicit or receive from a public servant, to wit: grand juror, [individual name of alleged grand juror omitted] information that said public servant had access to by means of his/her office, and that said information had not been made public...." (explanation added)

On July 8, 2003, Defendants Ford and Newton filed their "Joint Motion To Dismiss The Indictments" (which is adopted herein in its entirety for purposes of brevity). That motion contains the following allegations:<sup>1</sup>

The Defendants respectfully submit the following allegations to demonstrate to this Court that their prosecution in the above styled and numbered cases is based on "intentional and purposeful discrimination", to wit: that the Defendants have been singled out for prosecution while others in Kerr County (and elsewhere), similarly situated, have not been prosecuted, and that the Special Prosecutor's (Mr. Rudkin's) discriminatory selection of them for prosecution has been invidious, in bad faith, and in retaliation for their lawful actions as counsel of record in a federal civil rights lawsuit currently pending against Kerr County and two officials of Kerr County (Deputy Sheriff Carol Twiss and Assistant District Attorney Donnie Coleman).<sup>2</sup> Furthermore, the Defendants assert that their prosecution constitutes a classic example of prosecutorial vindictiveness. The following facts are proffered:

1. In October 1998, Harold Shields, a decorated veteran and Kansas businessman, moved with his wife to retire in the Texas Hill Country. Harold Shields and his wife became residents of Ingram, Texas, which is located within the boundaries of Kerr County, Texas.
2. On November 15, 1999, Kerr County Deputy Sheriff Carol Twiss (a female), acting as an investigator for the Kerr County Sheriff's Office, received a report that a minor child (KS) was the victim of aggravated sexual assault.
3. On November 17, 1999, KS was interviewed by Judy Brown, Child Protective Services. Also present was Deputy Sheriff Twiss. KS claimed to have been sexually molested by two relatives and two family friends. One of the family friends allegedly had the initials "M.B.". For ease of reference, Ms. Brown and Deputy Twiss referred to this perpetrator as "Mr. M." Based on KS's statement, the alleged molestation began in approximately 1996 when KS was four or five

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<sup>1</sup> Footnote numbers 2 through 14 reflected below are verbatim reproductions of footnotes 1 through 13 of the "Joint Motion To Dismiss The Indictments." Additionally, **Exhibit 1** through **Exhibit 26**, identified in bold below, were so numbered in the "Joint Motion To Dismiss The Indictments" and are attached to this motion in identical numerical order.

<sup>2</sup> The acts of Defendant Newton and Defendant Ford have been completely lawful under the laws of Texas and such acts are protected by the First and Fourteenth Amendments of the Constitution of the United States as well as Article I, Sections 10, 13 and 19 of the Texas Constitution.

years old. Deputy Twiss began what can only be referred to as a constitutionally-deficient investigation of KS's allegations regarding "Mr. M."

4. On December 7, 1999, KS was interviewed a second time and based upon an unconstitutionally, impermissibly-suggestive lineup, KS stated that the photograph of Harold Shields "looked like" "Mr. M". Deputy Twiss consulted with Assistant District Attorney Donnie Coleman (a female), and sought and obtained investigative advice from Coleman. Twiss, acting in reliance on that advice, continued to investigate KS's claims of molestation.

5. In March 23, 2000, Harold Shields was indicted in Cause No. B00-68, 198th Judicial District Court, Kerr County. *See Exhibit 1*. The indictment alleged that Harold Shields had committed aggravated sexual abuse of KS. The grand jury consisted of twelve citizens of Kerr County, Texas, which constituted the July 1999 Term of the 198th District Court Grand Jury (also referred to as 198.GJ.20). *See Exhibit 2*.<sup>3</sup> This same grand jury also indicted Ben Fife, the grandfather of KS, for aggravated sexual abuse of KS. The grand jury which indicted Mr. Shields and Mr. Fife was presented the case by Assistant District Attorney Donnie Coleman. Although no grand jury transcripts were made, the only testimony presented was that of Deputy Sheriff Twiss.

6. Overwhelming evidence existed as of March 2000 that demonstrated that Harold Shields was not "Mr.M". For instance, Harold Shields was medically incapable of having an erection and thus could not have physically inserted his penis into KS's vagina or anus. Harold Shields also did not live in the same town (Hunt) that KS claimed "Mr.M" lived in (Shields lived in Ingram).<sup>4</sup> Harold Shield's mailbox and vehicle did not match the description KS had given Twiss regarding "Mr.M's" mailbox and vehicle. Furthermore, although KS claimed that "Mr.M" lived alone, Harold Shields lived with his wife. Additionally, although KS claimed that "Mr.M" had a computer in his house on which he showed her pornographic

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<sup>3</sup> The names of the grand jurors were as follows: 1. Jim Westbrook (foreperson); 2. Elaine Terrell; 3. Brian Oehler; 4. Kathleen Boyce; 5. Ginger Stehling; 6. Felip Delgadillo; 7. Linda Worden; 8. Gail Steward; 9. Catherine Romero; 10. Roy Thompson; 11. Judith Pace; and 12. Laynetta Thomas.

<sup>4</sup> In fact, KS identified a particular house in Hunt, Texas, as being the house of "Mr.M", but that house was not connected to Harold Shields and a search of that residence resulted in no evidence to corroborate KS's claims.

material, Harold Shields and his wife had no computer in their residence. Most importantly, Harold Shields moved to Kerr County approximately two years after KS claimed that "Mr.M" had begun his pattern of sexual abuse. Simply stated, Harold Shields was innocent, but was falsely accused by Deputy Twiss and Assistant District Attorney Coleman through their joint presentation to the Kerr County grand jury, which indicted Harold Shields after that joint presentation.

7. On Monday, December 12, 2000, Assistant District Attorney Coleman interviewed KS for the first time during the midst of a criminal prosecution of Ben Fife. At that time, KS recanted as to "Mr.M".

8. On December 13, 2000, Assistant District Attorney Coleman moved to dismiss the pending indictment against Mr. Shields. That same day, the motion to dismiss was granted by Judge Prohl. *See Exhibit 3.*

9. On April 6, 2001, over a year after the expiration of the term of the grand jury which returned the state criminal indictment against Harold Shields (i.e., Cause No. B00-68) a federal civil rights lawsuit was filed by Harold Shields in United States District Court, Western District of Texas. *See Exhibit 4.* That lawsuit was originally styled Harold Shields vs. Carol Twiss, Cause No. SA-01-CV-289 (hereinafter referred to as the "federal civil rights lawsuit", for purposes of brevity) and named as a defendant only Deputy Sheriff Carol Twiss. This federal civil rights lawsuit was filed by Defendant Tom Newton of the San Antonio law firm of Allen, Stein & Durbin, P.C. Defendant Frank Ford is a member of that same law firm and has assisted Defendant Newton in the preparation and prosecution of the federal civil rights lawsuit, although he was not named as counsel on the original complaint.

10. On August 8, 2001, Assistant District Attorney Donnie Coleman was deposed in the federal civil rights lawsuit. During that deposition, Coleman was asked questions by Defendant Newton about whether certain exculpatory evidence/information (i.e., matters identified above in paragraph 6) was disclosed to the grand jury that had indicted Harold Shields in Cause No. B00-68. Without invoking any type of assertion of privilege (grand jury secrecy or otherwise), Coleman disclosed whether certain information was or was not supplied to the grand jury (i.e., whether the grand jury was or was not informed of certain exculpatory information). *See e.g., Exhibit 5* (deposition at pages 85-105 and 117-123). By virtue of Coleman's voluntary responses during the deposition, information that was

and/or was not presented to the grand jury became public knowledge. Stated differently, by virtue of Coleman's violation of Article 20.02, Vernon's Ann. C.C.P., and her failure to even attempt to assert any type of privilege (grand jury secrecy or otherwise),<sup>5</sup> information presented and/or not presented to the grand jury was made public.<sup>6</sup>

11. On August 10, 2001, Deputy Sheriff Carol Twiss was deposed in the federal civil rights lawsuit. During that deposition, Deputy Sheriff Twiss was asked questions by Defendant Newton about whether certain exculpatory evidence/information (i.e., matters identified above in paragraph 6) was disclosed to the grand jury that had indicted Harold Shields in Cause No. B00-68. Without invoking any type of assertion of privilege (grand jury secrecy or otherwise), Twiss disclosed whether certain information was or was not supplied to the grand jury (i.e., whether the grand jury was or was not informed of certain exculpatory information). *See e.g.*, **Exhibit 6** (deposition at pages 173 to 183). By virtue of Twiss' voluntary responses during the deposition, information that was and/or was not presented to the grand jury became public knowledge. Stated differently, by virtue of Twiss' violation of Article 20.02, Vernon's Ann. C.C.P., and her failure to even attempt to assert any type of privilege (grand jury secrecy or otherwise),<sup>7</sup> information presented and/or not presented to

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<sup>5</sup> Defendants assert that Coleman was not entitled to assert any such privilege after the expiration of the term of the grand jury that indicted Harold Shields. Moreover, since Coleman had moved to dismiss the indictment and the District Court had granted that motion to dismiss, there was absolutely no need for any grand jury secrecy regarding Harold Shields' indictment by that grand jury. However, Coleman (and the individual grand jurors) was subject to Article 20.02, Vernon's Ann. C.C.P., and violated it by voluntarily disclosing what occurred before the grand jury. The Special Prosecutor, however, has not prosecuted Coleman for this violation of Texas law.

<sup>6</sup> Certainly, using information for her own benefit and the benefit of Kerr County in the federal civil rights lawsuit would also entail violating Section 39.06, at least under the interpretation apparently given to that statute by the Special Prosecutor.

<sup>7</sup> Defendants assert that Twiss was not entitled to assert any such privilege after the expiration of the term of the grand jury that had indicted Harold Shields. Stated otherwise, there was absolutely no legitimate reason for Twiss to assert grand jury secrecy. Moreover, Twiss, as a witness before the grand jury (which term had expired before her August 2001 deposition), had a valid First Amendment right to testify at her deposition about what she had testified to before the grand jury. *See e.g.*, *Butterworth v. Smith*, 494 U.S. 624 (1990) (holding that a state may not, consistent with the First Amendment, prohibit a grand jury witness from revealing his or her own testimony after the term of the grand jury has ended). Of course, Twiss was facially subject to Article 20.02, Vernon's Ann. C.C.P., and could have been prosecuted for divulging information at her deposition. The Special Prosecutor has not seen fit to prosecute her for her apparent violation of Article 20.02,

the grand jury was made public.<sup>8</sup>

12. On September 18, 2001, "Plaintiff's Second Amended Complaint And Jury Demand" was filed, with leave of court, in the federal civil rights lawsuit. This second amended complaint added Assistant District Attorney Donnie Coleman and Kerr County, Texas, as defendants. *See Exhibit 7.*

13. On October 19, 2001, "Defendant Kerr County and Deputy Carol L. Twiss' First Amended Answer" was filed in the federal civil rights lawsuit. *See Exhibit 8.* At page 5 of that joint, first amended answer, Kerr County and Twiss, acting by and through their counsel, Charles S. Frigerio and Hector X. Saenz, stated the following regarding Twiss' testimony before the grand jury:

Defendant Deputy Twiss asserts unto the Court that she was called before the Kerr County Grand Jury to provide evidence of her investigation. Defendant Deputy Twiss provided the facts of the investigation concerning Plaintiff Shields' involvement but did not make a recommendation to the Grand Jury. The impartial Kerr County Grand Jury, after having heard all of the evidence, independently decided to indict Harold Shields for aggravated sexual assault of the minor female child in question. Defendant Deputy Twiss is entitled to the protective shroud of "good faith" qualified immunity for her actions as an investigator, as a matter of law.

14. In October 2001, based upon what can only be called "incredible" deposition testimony by Deputy Sheriff Twiss and Assistant District Attorney Coleman, Defendant Newton instructed one of the employees of the firm to contact some members of the grand jury that had indicted Harold Shields in Cause No. B00-68 in order to verify with them whether certain exculpatory information had or had not been presented to them, as testified to by Twiss and Coleman during their respective depositions in August 2001 in the federal civil rights lawsuit. For purposes of this motion only, it should be assumed that there was contact with some of the former grand jurors.<sup>9</sup>

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Vernon's Ann. C.C.P.

<sup>8</sup> Certainly, using information for her own benefit and the benefit of Kerr County in the federal civil rights lawsuit would also entail violating Section 39.06, at least under the interpretation apparently given to that statute by the Special Prosecutor.

<sup>9</sup> According to the ten indictments in the instant cause numbers, on or about October 15, 2001, Defendant Newton and Defendant Ford spoke with five different former members of the grand jury

15. On October 26, 2001, Defendant Newton filed "Plaintiff's Designation Of Potential Witnesses And Exhibits" in the federal civil rights lawsuit and named all twelve of the Kerr County former grand jurors who had indicted Harold Shields as being potential fact witnesses. See **Exhibit 9**.

16. On October 31, 2001, Judge Prohl's court coordinator, Becky Henderson, called Defendant Newton and Defendant Ford to inquire as to why one or both of them had contacted members of the expired Kerr County grand jury that had indicted Harold Shields in Cause No. B00-68.

17. In early November 2001, Defendant Tom Newton contacted Dawn Carmody, counsel in the federal civil rights lawsuit for Donnie Coleman, and attempted to arrange an agreed-upon date for deposing some of the former grand jurors who had served on the expired grand jury that had indicted Harold Shields in Cause No. B00-68. No agreement was reached.

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which had indicted Mr. Shields in Cause No. B00-68, to wit:

Name of Grand Juror	Corresponding Indictment Number
Jim Westbrook	Cause No. B03-63 (Ford) Cause No. B03-72 (Newton)
Kathleen Boyce	Cause No. B03-64 (Ford) Cause No. B03-68 (Newton)
Ginger Stehling	Cause No. B03-67 (Ford) Cause No. B03-71 (Newton)
Judith Pace	Cause No. B03-66 (Ford) Cause No. B03-70 (Newton)
Laynetta Thomas	Cause No. B03-65 (Ford) Cause No. B03-69 (Newton)

Defendants do not concede that each of these former grand jurors was actually contacted, let alone that any "information that has not been made public" was obtained from them. In fact, due to the testimony of Coleman and Twiss in August 2001, no information was obtained from any former member of the grand jury that constituted "information that has not been made public", as said term is utilized in V.T.C.A., Penal Code, Section 39.06(c) & (d), under which Defendant Newton and Defendant Ford have been indicted.

18. On November 6, 2001, notices of depositions were issued by Defendant Newton in the federal civil rights lawsuit. These notices of deposition scheduled the depositions of three of the former grand jurors who had sat on the grand jury that had indicted Harold Shields in Cause No. B00-68. The three former grand jurors were Ginger Stehling, Roy Thompson, and Laynetta Thomas. At or about the same time, at the request of Defendant Newton, subpoenas were issued to Stehling, Thompson and Thomas in the federal civil rights lawsuit. See **Exhibit 10** (Stehling), **Exhibit 11** (Thompson) and **Exhibit 12** (Thomas).

19. On November 21, 2001, Carol Twiss, acting by and through her counsel, Dawn Carmody, filed a "Motion For Protection And Motion To Quash Subpoenas For Oral Video Depositions Of Kerr County Criminal Grand Jury Members" in the federal civil rights lawsuit. This motion sought to quash the depositions of the former grand jurors identified above. See **Exhibit 13**.

20. On November 21, 2001, Kerr County, acting by and through its counsel, Charles Frigerio and Hector Saenz, and Carol Twiss, acting by and through her counsel, Charles Frigerio and Hector Saenz, filed a document entitled "Defendants Kerr County and Deputy Twiss' Motion To Quash Depositions Of Grand Jury Members." See **Exhibit 14**. This motion sought to quash the depositions of the former grand jurors identified above.

21. On November 30, 2001, Defendant Tom Newton filed "Plaintiff's Consolidated Response To Motions To Quash And For Protection" and therein sought to demonstrate that taking the depositions of the three former grand jurors was necessary and appropriate to demonstrate whether exculpatory information was or was not presented to the grand jury. As reflected in said motion, Defendant Newton had in fact caused an employee of his law firm to contact by telephone members of the grand jury, the information obtained from those former grand jurors led Defendant Newton to believe that Twiss and Coleman had testified inconsistently before the Kerr County grand jury and in their respective depositions in the federal civil rights lawsuit, and that Twiss and Coleman had waived any privilege to grand jury secrecy, particularly since no transcript of Twiss' testimony to the grand jury had been prepared. See **Exhibit 15**.

22. On January 7, 2002, United States District Judge Fred Biery, acting for United States District Judge H.F. Garcia, signed an order in the federal civil rights case quashing the subpoenas for the

depositions of the grand jury members. *See Exhibit 16.*<sup>10</sup>

23. On January 7, 2002, the Attorney General of the State of Texas, acting as amicus, filed a motion for protection and motion to quash subpoenas for oral video depositions of Kerr County criminal grand jury members. *See Exhibit 17.*

24. On January 10, 2002, Defendants Newton and Ford filed "Plaintiff Harold Shields' Motion To Strike The Amicus Emergency Motion For Protection And Motion To Quash". *See Exhibit 18.* They also filed a "Motion To Reconsider" urging the district court to reconsider its Order of January 7, 2002, identified above in paragraph 22. *See Exhibit 19.*

25. On January 22, 2002, Twiss and Kerr County filed "Defendant's Response To The Plaintiff's Motion To Reconsider". *See Exhibit 20.*

26. On February 8, 2002, United States District Judge Edward Prado signed an order (filed on February 11, 2002) denying the motion to reconsider filed on January 10, 2002. *See Exhibit 21.*

27. On March 18, 2002, Defendant Newton and Defendant Ford filed a "Petition for Disclosure of Grand Jury Proceedings" in the 198th Judicial District Court, Kerr County, Texas. This petition was assigned Cause No. 02-171-B in the 198th Judicial District, Kerr County, Texas. This petition sought to allow the depositions of the former grand jurors which had indicted Mr. Shields in Cause No. B00-68. *See Exhibit 22.*<sup>11</sup>

28. On April 5, 2002, Defendant Newton and Defendant Ford filed "Petitioner's Brief Regarding Particularized Need" in Cause No. 02-171-B. *See Exhibit 23.*

29. On April 8, 2002, a hearing was held on the Petition For Disclosure of Grand Jury Proceedings in Cause No. 02-171-B, 198th Judicial District, Kerr County, Texas. This hearing was held before

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<sup>10</sup> This Order was filed on the docket as having occurred on January 7, 2001, whereas the Order itself clearly reflects that it was signed on January 7, 2002. Thus, it incorrectly appears as the first item on the docket sheet of the federal civil rights lawsuit.

<sup>11</sup> This petition was accompanied by an exhibit volume containing 19 separately numbered exhibits, which is not attached to this motion due to the volume of materials. However, it will be offered at a hearing on this motion.

Judge Stephen Ables. *See Exhibit 24*. During this hearing, Judge Ables focused upon whether a prosecutor had a duty to present exculpatory information to a grand jury. Although case law was submitted to Judge Ables and Defendant Newton pointed out that there was no need for continued secrecy of the grand jury (given the depositions of Twiss and Coleman in August 2001), Judge Ables noted that there was a criminal statute that makes it illegal to talk to grand jurors, although he did not specify which statute he was referring to. *Id.*, at page 61-63.<sup>12</sup> Judge Ables orally denied the petition that day. *See Exhibit 24*.

30. On April 26, 2002, Judge Ables signed a written judgment denying the petition for disclosure in Cause No. 02-171-B. *See Exhibit 25*.

31. On May 14, 2002, Defendant Newton and Defendant Ford perfected an appeal from Judge Ables' judgment in Cause No. 02-171-B to the Court of Appeals for the Fourth Judicial District in San Antonio (Cause No. 04-02-00402-CV). *See Exhibit 26* (Docket Sheet).<sup>13</sup>

32. On February 24, 2003, mediation of the underlying federal civil rights lawsuit was held. Mediation did not result in settlement.

33. On February 26, 2003, a mere two days after mediation was unsuccessful in the underlying federal civil rights lawsuit, Defendant Tom Newton and Defendant Frank Ford were both indicted by a Kerr County grand jury for 10 alleged violations of V.T.C.A., Penal Code, Section 39.06(c) (five indictments each). These indictments were returned despite the fact that Section 39.06(d) clearly is not applicable (see Defendant's Joint Motion To Quash The Indictments).

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<sup>12</sup> Counsel for Defendant Newton and Defendant Ford have located no Texas statute that renders it a crime for an attorney, in the exercise of his fiduciary duties, from questioning a former grand juror about whether exculpatory information was or was not presented to a grand jury. Obviously, after the expiration of the term of the grand jury, there is little need for secrecy as to a citizen who has been indicted, and whose indictment has subsequently been dismissed. Moreover, after Twiss and Coleman testified about the testimony that was and was not presented to the grand jury, any issue of grand jury secrecy was waived. Additionally, Defendant Newton and Defendant Ford were exercising their client's First Amendment right to access to courts. *See discussion, infra*.

<sup>13</sup> This appeal is currently pending, with the case having been submitted to the Court on November 14, 2002.

34. The federal civil rights lawsuit is set for docket call and a jury trial in United States District Court on June 6, and 16, 2003 (respectively).

35. Defendant Newton and Defendant Ford are caucasian males.

36. Defendant Newton and Defendant Ford are attorneys licensed by the Supreme Court of Texas and the United States District Court for the Western District of Texas, and are in good standing.

37. Deputy Sheriff Twiss and Assistant District Attorney Coleman, both of whom violated Article 20.02, Vernon's Ann. C.C.P., by disclosing during their August 2001 depositions what had and had not been presented to the Kerr County grand jury, are both caucasian females. Neither has been charged with any violations of Article 20.02.<sup>14</sup>

38. The members of the grand jury that indicted Harold Shields and who allegedly provided "information that has not been made public" to Defendant Newton and/or Defendant Ford, and who violated Article 20.02, Vernon's Ann. C.C.P., have not been charged with any such violation.

39. Counsel for Deputy Sheriff Twiss and Kerr County, as reflected in their October 19, 2001 "Defendant Kerr County and Deputy Carol L. Twiss' First Amended Answer", utilized in that pleading information that had been conveyed to the grand jury by Deputy Twiss. They have not been charged with any violation of Article 20.02 or Article 39.06(c).

The factual assertions of the "Joint Motion To Dismiss The Indictments",<sup>15</sup> including the proposition that Ms. Becky Henderson (Court administrator for the 198th & 216th District Court's) will be a

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<sup>14</sup> Certainly, using information for their own benefit and the benefit of Kerr County in the federal civil rights lawsuit would also entail violating Section 39.06, at least under the interpretation apparently given to that statute by the Special Prosecutor.

<sup>15</sup> Paragraph 34 of the "Joint Motion To Dismiss The Indictments" is no longer accurate, as summary judgment in favor of Kerr County and Coleman and Twiss was recently granted. Additionally, paragraph 31 is no longer accurate in that the Fourth Court of Appeals has since entered a split opinion holding that there is no duty upon a Texas prosecutor to present exculpatory information to a grand jury. However, these two factual developments do not impact upon the merits of this motion to recuse.

witness, are such that a reasonable person might question the impartiality of Judge Ables if he were to handle these cases. Indeed, Judge Ables will have to rule on and make credibility decisions regarding witnesses [including but not limited to the District Attorney (Mr. Sutton), the Special Prosecutor (Mr. Rudkin), Ms. Henderson, and other representatives of Kerr County] in determining the merits of the "Joint Motion To Dismiss The Indictments". The same will hold true regarding other motions filed by the Defendants, including their "Joint Motion to Quash the Indictments Due To The Prosecutor's Failure To Present Exculpatory Information To The Grand Jury And/Or To Instruct The Grand Jury On The Law Relating To Section 39.06(c & d) Of The Texas Penal Code" and their "Joint Motion to Quash the Indictments", both of which are adopted herein for purposes of brevity. Furthermore, as reflected in numbered paragraph 29 of the "Joint Motion To Dismiss The Indictments", Judge Ables rendered an oral opinion at the hearing held on April 8, 2002, to the effect that there was a criminal statute that rendered contact with any former grand jurors illegal. Having voiced an opinion that the conduct discussed at the April 8, 2002, hearing was illegal, when in fact there is absolutely no case law interpreting Sections 39.06(c) & (d), V.T.C.A., Penal Code, it appears that Judge Ables' impartiality might reasonably be questioned.

In light of the factual allegations of the indictment, the facts and circumstances surrounding this case, and the issues which will have to be ruled upon prior to trial, it is clear that Judge Ables should recuse himself because "his impartiality might reasonably be questioned" if he handles this case.<sup>16</sup> Additionally, to the extent that he has discussed Ms. Henderson's telephone conversations

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<sup>16</sup> Defendants submit that the proper standard should be essentially identical to that embodied within 28 U.S.C. Section 445(a), to wit: if a reasonable man knew of all the circumstances, would he would harbor doubt about the judge's impartiality. See e.g., *United States v. Hines*, 696 F.2d 722, 728 (10th Cir. 1982); *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980)); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982). This is a standard that was actually discussed by the Court of Criminal Appeals in *McClenan v. State*, 661 S.W.2d 108, 109

of October 31, 2001 (reflected above in paragraph 16), with Judge Prohl and/or Ms. Henderson, he may have personal knowledge of disputed evidentiary facts. The same holds true regarding statements made by Defendant Tom Newton at a hearing on April 8, 2002 (in connection with the Petition For Disclosure of Grand Jury Proceedings in Cause No. 02-171-B, 198th Judicial District, Kerr County, Texas, reflected in paragraph 29 above).

There are few characteristics of a judiciary more cherished and indispensable to justice than the characteristic of impartiality. Congress has mandated that justice must not only be impartial, but also that it must reasonably be perceived to be impartial when it enacted 28 U.S.C. Section 455(a). As the Supreme Court noted in *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 859-60, 100 L. Ed.2d 855, 108 S. Ct. 2194 (1988), the purpose of Section 455(a) is "to promote public confidence in the integrity of the judicial process." There can be little doubt that the Texas Supreme Court had the same goal when it enacted Rule 18b in 1988. This Honorable Court should review the facts in their entirety and then voluntarily recuse itself because a reasonable person, objectively viewing the facts, might reasonably question the Court's impartiality in these cases.

WHEREFORE, PREMISES CONSIDERED, Defendants respectfully pray that this Honorable Court enter an Order voluntarily recusing himself. In the event that the Court does not do so, Defendants respectfully pray that the Court refer the matter as directed by Rule 18a, *supra*. As reflected below by the attached "Notice Of Presentment," this motion will be presented to the Court within three days of filing.

Respectfully submitted,

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(1983) when dealing with recusal prior to the decision to apply Rule 18a and Rule 18b to criminal cases. "Under section 455(a), the judge is under a continuing duty to ask himself what a reasonable person, knowing all the relevant facts, would think about his impartiality." *United States v. Hines, supra; Roberts v. Bailar, supra*.

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**ATTORNEY FOR TOM NEWTON**

**VERIFICATION**

STATE OF TEXAS  
COUNTY OF TRAVIS

BEFORE ME, the undersigned authority, personally appeared David L. Botsford, a person known unto me, and who, upon his oath, did state and depose the following:

My name is David L. Botsford and I represent Frank Ford in the above styled and numbered causes (as to Ford). I hereby swear and verify that the facts contained in this motion are true and correct, based on information and belief and/or personal knowledge. I further swear that this motion is not made for purposes of delay and that in my professional opinion (having practiced criminal law for over twenty-five years and being Board Certified in Criminal Law since 1983) this motion is necessary and appropriate under Rule 18b(2), Texas Rules of Civil Procedure.

\_\_\_\_\_  
DAVID L. BOTSFORD

**NOTICE OF INTENDED PRESENTMENT**

Pursuant to Rule 18a(b), Texas Rules of Civil Procedure, notice is hereby given that movants herein (Frank Ford and Tom Newton, by and through their counsel of record) intend to present the above and foregoing motion to the Honorable Stephen Ables three days after the filing of such motion (unless otherwise ordered by the judge).

\_\_\_\_\_  
DAVID L. BOTSFORD

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the above and foregoing document was (faxed)(mailed, postage prepaid), to Mr. Kurtis Rudkin, Special Prosecutor, at 910 N. Main Street, Suite 1, Boerne, TX 78006 (Fax number 830-249-6315) on this the 21st day of July 2003.

\_\_\_\_\_  
DAVID L. BOTSFORD

NO. B03-68, NO. B03-69, NO. B03-70  
NO. B03-71, AND NO. B03-72

STATE OF TEXAS	§	IN THE 198TH
	§	
VS.	§	JUDICIAL DISTRICT COURT
	§	
TOM NEWTON	§	KERR COUNTY, TEXAS

NO. B03-63, NO. B03-64, NO. B03-65  
NO. B03-66, AND NO. B03-67

STATE OF TEXAS	§	IN THE 198TH
	§	
VS.	§	JUDICIAL DISTRICT COURT
	§	
FRANK FORD	§	KERR COUNTY, TEXAS

**ORDER**

BE IT REMEMBERED that on this date came on to be heard the Defendants' "Sealed Joint Motion For Recusal", and the Court having considered same, is of the opinion that the Court (should recuse itself) (should refer the matter to the Presiding Judge of the Administrative Region for assignment to a judge to hear the motion).

SIGNED on this the \_\_\_\_ day of \_\_\_\_\_, 2003.

\_\_\_\_\_  
JUDGE PRESIDING

**TAB 13**

Woodall's Sealed Motion To Disqualify Appellate Judge

**NO. 08-07-00015-CR**

**IN THE COURT OF APPEALS  
FOR THE EIGHTH DISTRICT OF TEXAS  
EL PASO, TEXAS**

**PHYLLIS ANNE WOODALL,  
Defendant - Appellant**

**V.**

**THE STATE OF TEXAS,  
Plaintiff - Appellee**

**On Appeal from the 171st District Court  
El Paso County, Texas,**

**SEALED MOTION FOR RECUSAL**

**TO THE HONORABLE DAVID WELLINGTON CHEW, CHIEF JUSTICE OF SAID  
COURT:**

Comes Now Appellant, Phyllis Anne Woodall, by and through her counsel on appeal only, David L. Botsford, and pursuant to Rules 18a and 18(b)(2)(a) & (b), Texas Rules of Civil Procedure and Rule 16.1 through 16.3, Texas Rules of Appellate Procedure, presents this her "Sealed Motion For Recusal," and as grounds therefore, would respectfully show the following:

**I.**

**SEALED MOTION**

Because undersigned counsel does not seek to prejudice his client, cast any negative inference towards Chief Justice Chew (for whom he has the utmost respect),<sup>1</sup> or generate any

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<sup>1</sup>Undersigned counsel has no doubt that Chief Justice Chew, upon receiving this motion and realizing that he has previously represented Woodall (as more fully set forth below), will take whatever action he deems necessary and appropriate to ensure compliance with Canon 2 of the Texas Code of Judicial Conduct.

publicity regarding this appeal, this motion has been sent to the Court for filing as a "sealed" motion.

## **II.**

### **CONFERENCE WITH COUNSEL FOR THE STATE**

Undersigned counsel has discussed the essence of this motion with counsel for the State, Mr. Tom Darnold, and informed him that this motion would be sent to the Court for filing as a "sealed" motion. Although Mr. Darnold did not voice any opposition to this motion being filed "sealed," he requested undersigned counsel to state that upon receipt of this motion, he would take whatever action the State deemed necessary and/or appropriate.

## **III.**

### **STATUTORY SCHEME**

Rule 18a, Texas Rules of Civil Procedure, which is entitled "Recusal or Disqualification of Judges", states, in pertinent part, that:

"(a) At least ten days before the date set for trial or other hearing in any court other than the Supreme Court, the Court of Criminal Appeals or the court of appeals, any party may file with the clerk of the court a motion stating grounds why the judge before whom the case is pending should not sit in the case. The grounds may include any disability of the judge to sit in the case. The motion shall be verified and must state with particularity the grounds why the judge before whom the case is pending should not sit. The motion shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence provided that facts may be stated upon information and belief if the grounds of such belief are specifically stated.

(b) On the day the motion is filed, copies shall be served on all other parties or their counsel of record, together with a notice that movant expects the motion to be presented to the judge three days after the filing of such motion unless otherwise ordered by the judge. Any other party may file with the clerk an opposing or concurring statement at any time before the motion is heard.

(c) Prior 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. If the judge recuses himself, he shall enter an order of recusal and request the presiding judge of the administrative judicial district to assign another judge to sit, and shall make no further orders and shall take no further action in the case except for good cause stated in the order in which such action is taken.

(d) If the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and shall take no further action in the case after filing of the motion and prior to a hearing on the motion. The presiding judge of the administrative judicial district shall immediately set a hearing before himself or some other judge designated by him, shall cause notice of such hearing to be given to all parties or their counsel, and shall make such other orders including orders on interim or ancillary relief in the pending cause as justice may require."

Rule 18b, Texas Rules of Civil Procedure, which is entitled Grounds for Disqualification or Recusal of Judges, states in pertinent part that:

**"(2) Recusal**

A judge shall recuse himself in any proceeding in which:

(a) his impartiality might reasonably be questioned;

(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

These statutes, including the ten day time frame of Rule 18a(a), have been held to be applicable to criminal cases *See e.g., Arnold v. State*, 853 S.W.2d 543 (Tex.Crim.App.1993); *DeBlanc v. State*, 799 S.W.2d 701, 705 (Tex.Crim.App.1990). *See also McClenan v. State*, 661 S.W.2d 108, 109 (1983)(addressing recusal under prior statute and prior to that point in time when Rule 18a and Rule 18b were held applicable to criminal cases).

Moreover Rules 16.1 and 16.2, Texas Rules of Appellate Procedure, provide that the grounds for disqualification of an appellate court justice or judge are determined by the Constitution and the laws of Texas, and that the grounds for recusal are the same as those provided in the Rules of Civil Procedure. Rule 16.3, entitled "Procedure For Recusal" states the following:

(a) Motion. A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.

(b) Decision. Before any further proceeding in the case, the challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

(c) Appeal. An order of recusal is not reviewable, but the denial of a recusal motion is reviewable.

This motion has been filed as promptly as possible after Woodall learned that one of the justices who would consider her appeal was in fact her former attorney, the Honorable Chief Justice David Chew.<sup>2</sup> In fact, this motion has been filed just shortly after the filing of the State's brief (the filing of which was extended by Orders of this Court) and prior to the scheduling of any oral argument, which has been requested by both sides.

#### IV.

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<sup>2</sup> After Woodall transmitted notification of the foregoing to undersigned counsel, undersigned counsel verified the matter to the best of his ability. After conducting legal research, undersigned counsel ascertained that he had a duty to file this motion and has done so in good faith.

## ASSERTION & FACTS

Woodall respectfully moves the Chief Justice to recuse himself in this appeal because: (1) his impartiality might reasonably be questioned;<sup>3</sup> (2) he has a personal bias or prejudice concerning Woodall; and (3) he may have personal knowledge of disputed evidentiary facts. In support of these three grounds, the following is proffered.

Woodall<sup>4</sup> has previously been represented in an "immigration law matter" by Chief Justice David Chew. Although Woodall does not recall the exact year of this representation, it was obviously prior to January 1, 1995, when Chief Justice Chew was originally sworn in to this Court. Due to Woodall's incarceration since her conviction in 2006, she is not in a position to locate the documentation which would affirmatively reflect the exact nature of the Chief Justice's prior representation (and whether the Chief Justice represented merely Woodall or also Coutta and/or the Naked Harem). Nevertheless, Woodall believes that the Chief Justice, when reminded of this prior representation of her on this immigration law matter, would voluntarily recuse himself because (a) he would conclude that his impartiality

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<sup>3</sup> Woodall submit that the proper standard should be essentially identical to that embodied within 28 U.S.C. Section 455(a), to wit: if a reasonable man knew of all the circumstances, would he would harbor doubt about the judge's impartiality. *See e.g., United States v. Hines*, 696 F.2d 722, 728 (10th Cir. 1982); *Roberts v. Bailar*, 625 F.2d 125, 129 (6th Cir. 1980)); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1982). This is a standard that was actually discussed by the Court of Criminal Appeals in *McClenan v. State*, 661 S.W.2d 108, 109 (1983) when dealing with recusal prior to the decision to apply Rule 18a and Rule 18b to criminal cases. "Under section 455(a), the judge is under a continuing duty to ask himself what a reasonable person, knowing all the relevant facts, would think about his impartiality." *United States v. Hines, supra*; *Roberts v. Bailar, supra*.

<sup>4</sup> Woodall recalls that this matter related to INS Form I-9's maintained by the Naked Harem and an investigation by the INS regarding those Form I-9's. Woodall was (and still is) is a 50% owner of The Naked Harem, along with Jeannie Coutta.

might reasonably be questioned if the general public knew that he was going to be reviewing the conviction and sentence of one of his prior clients<sup>5</sup> and/or fee payors (if in fact the Naked Harem was the client and Woodall, although a co-owner, was merely the fee payor); (b) he would recall that he has a personal bias or prejudice against Woodall (as a client and/or fee payor), due to certain controversies and disagreements that arose during the course of his representation of Woodall;<sup>6</sup> and (c) he might conclude that the confidential information he learned during the course of his prior representation of Woodall could relate to the underlying appeal, thus potentially possessing personal knowledge of disputed evidentiary facts.

The current appeal by Woodall involves allegations of prostitution at the Naked Harem, including evidence that prostitution had been ongoing at the Naked Harem as far back as the early 1990's (a date that Woodall believes predates her retention of the Chief Justice as counsel). Woodall does not have a good recall of the facts conveyed to the Chief Justice while he was in private practice working on the matter for which he was retained, or the amount of the legal fees paid,<sup>7</sup> but does recall a "falling out" between the Chief Justice

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<sup>5</sup> Again, it is not clear to undersigned counsel whether the prior client would be Woodall, Woodall and Coutta, and/or the Naked Harem and/or Woodall and/or Coutta along with the Naked Harem.

<sup>6</sup> Woodall recalls that there was not merely a "falling out," so to speak, but that she made certain accusations against the Chief Justice relating to the matter, the nature of the advise he had given her, and ultimately refused to pay the remaining balance of the legal fee after consulting with a different attorney.

<sup>7</sup> The payment of campaign contribution to a judge does not per se subject him to recusal on the grounds that a reasonable person might question his impartiality. *Aguilar v. Anderson*, 855 S.W.2d 799 (Tex.App.--El Paso 1993, writ ref'd). At the same time, the payment of legal fees to a former Judge who was employed as an attorney for a litigant, as

and herself and a distinct controversy regarding the legal advice and legal fees. She has just recently learned that the Chief Justice will be involved in assessing the merits of her appeal and has instructed undersigned counsel to file this motion due to her concerns.<sup>8</sup>

Regarding the first prong of this motion, the question is whether a "reasonable person," possessed of all of the facts, could conclude that the Chief Justice's impartiality might reasonably be questioned. There is a dearth of Texas case law addressing the topic of recusal where an appellate judge has previously represented the citizen ten or fifteen years prior to the appeal. While prior representation by a judge in the matter of controversy would constitute a disqualification under Rule 18b(1), undersigned has located no case where the issue of recusal in the context of prior representation on an apparently unrelated matter was involved. Indeed, a judge's prior representation of one of the parties in a proceeding does not **automatically** warrant disqualification. *National Auto Brokers Corp. v. General Motors Corp.*, 572 F.2d 953 (2nd Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979).

At least one federal case is fairly instructive. In *Wessmann v. Boston School Committee*, 979 F. Supp. 915 (D.Mass. 1997), Judge Nancy Gertner addressed 28 U.S.C. Section 455(a) and (b), which are virtually identical to Rule 18b and which have been "dubbed" the "appearance of bias" (i.e., Section 455(a)) and "bias in fact" (i.e., Section

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well as the discussion of confidential matters which appear to arguably relate, at least generally, to a topic significantly intertwined in the appeal, presents a different situation.

<sup>8</sup> Undersigned counsel, retained solely as Woodall's appellate counsel, has no "dog" in this hunt, but feels compelled to comply with Woodall's directive as part of his fiduciary duties to her as her appellate counsel. Based on Woodall's communications to undersigned counsel, undersigned counsel believes this motion is meritorious and that the Chief Justice should recuse himself.

455(b)(1)). Therein, Judge Gertner thoughtfully and intelligently discussed a motion to recuse her. The first argument was based on her prior membership in a group ("the Lawyers Committee"), and the second argument was based on her prior representation of a different group ("CBEB") in a prior case involving the desegregation of the Boston schools.

As to the first argument, Judge Gertner reviewed the applicable federal decisions and concluded that the appropriate test under the "appearance of bias" prong of Section 455(a) is "whether a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality." *Id.* at 916 (quoting federal cases). Judge Gertner's review of the federal cases supported her conclusion that her impartiality could not reasonably be questioned merely because she had been involved in a group that advocated legal positions relating to civil rights. She thus declined to recuse herself on this basis.

However, as to the "bias in fact" argument, Judge Gertner concluded that submissions by the City of Boston in the then current litigation before her raised the possibility that she might confront disputed evidence with which she was personally familiar because of her prior representation of "CBEB." Although she recognized this as a very narrow issue, Judge Gertner granted the motion to recuse to avoid the possibility that down the road, she would "rediscover some personal knowledge of relevant disputed facts." *Id.* at 919.

Thus, as to the third prong of this motion, because the same potential that Judge Gertner found sufficient to justify her recusal exists regarding Chief Justice Chew, recusal should be granted.

And, as to the second prong of the motion, it would appear that a "bias" and "prejudice" must come from an extra-judicial source, but of course, that is exactly what

Woodall believes the source to be. Again, undersigned counsel does not desire to describe the nature of the conflict in a pleading that might reach the press (even though it is being filed "sealed"), it appears that the "falling out" between the Chief Justice and Woodall, coupled with the non-payment of outstanding legal fees by Woodall due to that "falling out" (and coupled with what Woodall said to the Chief Justice regarding the legal services and advice he gave to her) constitutes a bias and prejudice. Indeed, it appears that the prior engagement with the Chief Justice was terminated with less than a satisfactory meeting of the minds and that recusal is entirely appropriate.

There are few characteristics of a judiciary more cherished and indispensable to justice than the characteristic of impartiality. Congress has mandated that justice must not only be impartial, but also that it must reasonably be perceived to be impartial when it enacted 28 U.S.C. Section 455(a). As the Supreme Court noted in *Liljeberg v. Health Servs. Corp.*, 486 U.S. 847, 859-60, 100 L. Ed.2d 855, 108 S. Ct. 2194 (1988), the purpose of Section 455(a) is "to promote public confidence in the integrity of the judicial process." There can be little doubt that the Texas Supreme Court had the same goal when it enacted Rule 18b in 1988. Chief Justice Chew should review the facts stated above, plus his own memory of the situation, and then voluntarily recuse himself because a reasonable person, objectively viewing the facts, might reasonably question the Court's impartiality in this case, even if a "bias" or "prejudice" does not exist within his memory and even if he does not believe he will recall "some personal knowledge of relevant disputed facts."

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully requests that Chief Justice Chew voluntarily recuse himself and/or take such other action as is appropriate

under the statutory scheme quoted in the text of this motion.

Respectfully submitted,

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Austin, TX 78701  
(512) 479-8030 (Tel)  
(512) 479-8040 (Fax)

STATE OF TEXAS  
COUNTY OF TRAVIS

Before me, the undersigned authority, personally appeared David L. Botsford, a person known unto me, and who, upon his oath, did state and depose the following:

My name is David L. Botsford and I have prepared the above and foregoing document. I have personal knowledge of the contents of this motion, as related to me by Phyllis Woodall and Jeannie Coutta, the two co-owners of the Naked Harem, and I swear that the motion is true and correct to the best of my knowledge, information and belief.

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David L. Botsford

Sworn and subscribed to before me, the undersigned authority, on this the \_\_\_\_ day of July 2008.

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Notary Public

**CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing instrument was mailed to Mr. Tom Darnold, Appellate Section, El Paso District Attorney's Office, 500 E. San Antonio, Suite 201, El Paso, Texas 79901, on July 17th, 2008.

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David L. Botsford

**TAB 14**  
Unfiled Motion To Recuse Appellate Judge  
Fuelberg v. State

**NO. 03-11-00317-CR**

**IN THE COURT OF APPEALS  
FOR THE THIRD DISTRICT OF TEXAS  
AUSTIN, TEXAS**

**BENNIE FUELBERG,**  
Defendant - Appellant

V.

**THE STATE OF TEXAS,**  
Plaintiff - Appellee

**APPELLANT'S MOTION TO DISQUALIFY AND/OR RECUSE  
THE HONORABLE DAVID PURYEAR**

TO THE HONORABLE JUSTICES OF THE COURT OF APPEALS:

COMES NOW Appellant, BENNIE FUELBERG, by and through his counsel of record, and pursuant to Tex.R.App. Proc. 16.1 to 16.3, Article V, §11 of the Texas Constitution, Tex.R.Civ.P.18b, and Tex.Code Crim. Proc. art. 30.01, as they currently exist,<sup>1</sup> respectfully submits this his Motion To Disqualify And/Or Recuse The Honorable David Puryer, and would show this Court the following:

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<sup>1</sup> Tex. R. Civ. P. 18a and 18b have been amended since the date of the disqualification/recusal hearing in the trial court. The current versions are applicable to this motion.

## **I.**

### **RELEVANT PROCEDURAL HISTORY**

Oral argument in this case was originally scheduled for Wednesday, March 6, 2013, before Justices Puryear, Pemberton and Rose. On February 28, 2013, the Clerk of the Court arranged a conference call with counsel for all parties<sup>2</sup> and the aforementioned Justices. At that time, counsel were informed by Justice Puryear that an issue had been recognized that needed to be addressed, thus giving rise to the conference call. Justice Puryear informed all counsel that due to the disqualification issues raised by Appellant Fuelberg and Appellant Demond regarding the trial judge, who had been a "customer/member" of PEC, he needed to disclose that he too was a "customer/member"<sup>3</sup> of PEC. Justice Puryear also informed all counsel that a preliminary determination had been made that he was not disqualified to sit in this case.<sup>4</sup> Undersigned counsel expressed his appreciation to Justice Puryear for the

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<sup>2</sup> Counsel for Appellant Walter Demond in a separate but related appeal were also on the conference call.

<sup>3</sup> Based on undersigned counsel's notes, this was the term that Justice Puryear uniformly used throughout the conference call. Upon inquiry from undersigned counsel, Justice Puryear related that he was a "customer/member" due to his ownership of property in Hays County, but that the property was not his primary residence.

<sup>4</sup> In essence, Justice Puryear stated that he had no "financial interest" in the outcome of these cases because the judgments -- both of which directed restitution to be paid not to PEC, but rather to a law firm for the benefit of Clark Thomas and its

disclosure and requested an opportunity to consider the legal issues and whether Appellant Fuelberg's appeal should be submitted to the panel on March 6, 2013. It was agreed that counsel would notify the Court of their respective positions by 3:00 p.m. on Monday, March 4, 2013, and that the situation would be revisited at that time.

On March 1, 2013, at approximately 2:40 p.m., undersigned counsel sent an email to Mr. Jeffrey Kyle, Clerk of the Court, with a request for additional factual information relating to Justice Puryear's relationship with PEC.<sup>5</sup>

On March 1, 2013, at approximately 4:38 p.m., Mr. Kyle sent an email to all counsel with an attached letter dated March 1, 2013, canceling the oral argument and submission on March 6, 2013, pending further notification from the Court.

Although undersigned counsel personally knows Justice Puryear to be of the highest integrity, this motion must nevertheless be submitted.

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insurance carrier -- negated any potential economic benefit to Justice Puryear as a "customer/member" of PEC. Therefore, Justice Puryear had no financial interest in the outcome of the case.

<sup>5</sup> This email sought information relating to how long Justice Puryear has been a PEC "customer/member," the balance of his capital account with PEC, whether he has previously received distributions from PEC and if so, the dates and amounts, and whether he was a member of the class action lawsuit (i.e. the May 2007 class action lawsuit filed against PEC, styled *Worrall v. PEC*, D-1-GN-07-002234, 23RR55-56; 23RR147-148; 23RR245-246, which led to this Court's decision in *Hall v. Pedernales Electric Cooperative, Inc.*, 278 S.W.3d 536 (Tex. App.-Austin 2009)). As the Appellant briefs in Fuelberg and Demond reflect, this civil lawsuit involved allegations related to those included in the indictments against Appellant Fuelberg and Walter Demond.

## II.

### PROVISIONS OF TEXAS LAW RELEVANT TO THIS MOTION

#### A. Texas Rules of Appellate Procedure.

Tex.R.App. Proc. 16.1 to 16.3 have direct application to this motion in that they (1) define the grounds for disqualification and recusal of an appellate court justice and (2) provide the procedure by which motions to disqualify and recuse are determined regarding an appellate court justice. These three rules state the following:

##### Rule 16.1. Grounds for Disqualification

The grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas.

##### Rule 16.2. Grounds for Recusal

The grounds for recusal of an appellate court justice or judge are the same as those provided in the Rules of Civil Procedure. In addition, a justice or judge must recuse in a proceeding if it presents a material issue which the justice or judge participated in deciding while serving on another court in which the proceeding was pending.

##### Rule 16.3. Procedure for Recusal

(a) *Motion.* A party may file a motion to recuse a justice or judge before whom the case is pending. The motion must be filed promptly after the party has reason to believe that the justice or judge should not participate in deciding the case.

(b) *Decision.* Before any further proceeding in the case, the

challenged justice or judge must either remove himself or herself from all participation in the case or certify the matter to the entire court, which will decide the motion by a majority of the remaining judges sitting en banc. The challenged justice or judge must not sit with the remainder of the court to consider the motion as to him or her.

(c) *Appeal*. An order of recusal is not reviewable, but the denial of a recusal motion is reviewable.

#### **B. Texas Constitution.**

Given the language of Rule 16.1, it is clear that Article V, §11 of the Texas Constitution applies to the disqualification prong of this motion. It states, in pertinent part, that "[n]o judge shall sit in any case wherein the judge may be interested...."

#### **C. Texas Civil Statutes.**

As reflected by the language of Rules 16.1 and 16.2, the grounds for disqualification and recusal of an appellate court justice are the same as those provided in the Rules of Civil Procedure. There are two rules that potentially have application: Tex.R.Civ.P.18a and Tex.R.Civ.P.18b. However, Tex.R.Civ.P.18a is not applicable for two reasons: (1) it relates to proceedings in "any trial court other than a statutory probate court or justice court," Tex.R.Civ.P.18a(a); and (2) Rule 16.3, quoted above, governs the procedure relating to an appellate court justice. Accordingly, Rule 18a has no application to the instant motion.

However, Rule 18b, which is entitled "Grounds for Recusal And

Disqualification Of Judges," is applicable and states the following, in pertinent part:

(a) *Grounds for Disqualification.* A judge must disqualify in any proceeding in which:

\* \* \*

(2) the judge knows that, individually or as a fiduciary, the judge has an interest in the subject matter in controversy; or

(b) *Grounds for Recusal.* A judge must recuse in any proceeding in which:

(1) the judge's impartiality might reasonably be questioned;

\* \* \*

(6) the judge knows that the judge, individually or as a fiduciary, or the judge's spouse or minor child residing in the judge's household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

\* \* \*

(c) *Financial Interests.* A judge should inform himself or herself about personal and fiduciary financial interests, and make a reasonable effort to inform himself or herself about the personal financial interests of his or her spouse and minor children residing in the household.

(d) *Terminology and Standards.* In this rule:

\* \* \*

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

\* \* \*

(C) the proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

\* \* \*

(E) an interest as a taxpayer or utility ratepayer, or any similar interest, is not a "financial interest" unless the outcome of the proceeding could substantially affect the liability of the judge or a person related to him within the third degree more than other judges.

(e) *Waiving a Ground for Recusal.* The parties to a proceeding may waive any ground for recusal after it is fully disclosed on the record.

(f) *Discovery and Divestiture.* If a judge does not discover that the judge is recused under subparagraphs (b)(6) or (b)(7)(B) until after the judge has devoted substantial time to the matter, the judge is not required to recuse himself or herself if the judge or the person related to the judge divests himself or herself of the interest that would otherwise require recusal.

#### **D. Texas Code Of Criminal Procedure.**

Given the language of Rule 16.1 regarding disqualification (i.e., "[t]he grounds for disqualification of an appellate court justice or judge are determined by the Constitution and laws of Texas"), Tex.Code Crim. Proc. art. 30.01 also applies to this motion.<sup>6</sup> It states that "no judge or justice of the peace shall sit in any case where he may be the party injured."<sup>7</sup>

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<sup>6</sup> Tex.Code Crim. Proc. art. 30.01 is clearly one of the "laws of Texas."

<sup>7</sup> It is currently unclear whether Justice Puryear is an injured party since it is unknown exactly when Justice Puryear became a "customer/member" of PEC. That is, he may or may not have been a victim of the offenses alleged in the indictments. In this regard, March 13, 2007 was the ending date of the offenses alleged in all three counts of the indictment. This date coincided with the date of the last payment by Clark Thomas to William Price and Curtis Fuelberg with funds Clark Thomas had obtained from PEC pursuant to an alleged false billing scheme. The State originally took the position that the conspiracy did not terminate in March 2007, but extended until January 2008, but the trial court expressed difficulty in understanding how any conspiracy could have continued past the termination of the objective of the conspiracy. *See* Section C(1) of Appellant Fuelberg's Brief. Later, the State took the position that the conspiracy did not terminate until the December 15, 2008, publication of the Navigant Report. *See* Section (C)(2&3) of Appellant Fuelberg's Brief. The trial court adopted this date of December 15, 2008, for purposes of allowing the introduction of statements of alleged co-conspirators. Given the trial court's determination, and without waiving his POINT OF ERROR NOS. 3 to 6 which attack that determination, it is Appellant Fuelberg's position for purposes of this motion (and this motion only) that if Justice Puryear was a "customer/member" of PEC at any date prior to December 15, 2008, then he would be a victim of the crimes alleged in the indictment and the alleged continuing conspiracy in furtherance thereof as found by the trial court.

### **III.**

#### **MOTION TO DISQUALIFY.**

Appellant respectfully asserts that Justice Puryear is disqualified from participating these two cases due to the following provisions of Texas law:

- (1) Article V, §11 of the Texas Constitution;
- (2) Tex.R.Civ.P. 18b(a)(2); and
- (3) Tex.Code Crim. Proc. art. 30.01.

Under Article V, §11 of the Texas Constitution, "[n]o judge shall sit in any case wherein the judge may be interested....". Under Tex.R.Civ. P. 18b(a)(2), a judge is disqualified if "has an interest in the subject matter in controversy." And under Tex.Code Crim. Proc. art. 30.01, no judge "...shall sit in any case where he may be the party injured."

Although the exact details of Justice Puryear's relationship with PEC are not fully known, as a "customer/member" of PEC, it does appear that he has a interest in the subject matter in controversy. He has a capital account (of an undetermined value) and is entitled to periodic distributions from PEC and may have received periodic distributions from PEC, all of which may have been affected by the alleged theft and misapplication by Appellant Fuelberg and Appellant Demond. More importantly, assuming that Justice Puryear was a "customer/member" of PEC during any portion

of the time frame alleged in the indictment -- between November 14, 1996 and March 13, 2007 -- or as argued by the State during trial -- up until December 15, 2008 when the Navigant Report was published -- then he would be "the party injured." See footnote 7, *supra*.

The case law has narrowly interpreted the term "interest," requiring "a direct pecuniary or personal interest in the result of the case presented to the judge or court." *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex. 1979)(per curiam); accord *Richardson v. State*, 4 S.W.2d 79, 81 (Tex. Crim. App. 1928). Disqualification may not be based on remote or speculative grounds; where "the result of the suit will not necessarily subject [the judge] to a personal gain or loss, he is not disqualified." *Hidalgo Cnty. Water Improvement Dist. No. 2 v. Blalock*, 301 S.W.2d 593, 596 (Tex. 1957). To require disqualification, a judge's interest "must not only be capable of valuation; it must also be direct, real, and certain and must result from the instant litigation. *F.S. New Prods., Inc., v. Strong Indus. Inc.*, 129 S.W.3d 594, 599 (Tex. App.-Houston [1st Dist.] 2003, no pet.); *Richardson v. State*, 4 S.W.3d at 81. Thus, an interest similar to that held by the general public -- as a taxpayer or as a utility rate payer -- is not sufficient. *Elliott v. Scott*, 25 S.W.2d 150, 151 (Tex. 1930); *Scown v. City of Alpine*, 271 S.W.3d 380, 383 (Tex. App.- El Paso 2008, no pet.).

However, "[o]nce a pecuniary interest is shown to exist, the judge is

disqualified no matter how slight the interest. *Cameron v. Greenhill*, 582 S.W.2d 775, 776 (Tex.), *cert. denied* 444 U.S. 868 (1979). Accordingly, when the judge has an ownership interest, including ownership of stock in a corporation which is a party to the lawsuit, the judge is subject to disqualification. *Pahl v. Whitt*, 304 S.W.2d 250 (Tex. Civ. App.—El Paso 1957, no writ);<sup>8</sup> *New York Life Ins. Co. v. Sides*, 46 Tex. Civ. App. 246, 101 S.W. 1163 (Austin 1907, no writ);<sup>9</sup> *Sovereign Camp, Woodmen of the*

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<sup>8</sup> The El Paso Court of Appeals reversed the judgment, finding the trial judge was disqualified, stating the following:

It is our opinion that the trial judge, being a member of the Central Texas Electric Cooperative, Inc. is disqualified to sit in the trial of a case where it is a party, even though he is only one of 5,000 members. It is true that his interest may be very small, and we are certain that the trial judge knew, in holding himself to be qualified, that he could try the case with complete impartiality as to the parties, but that does not seem to be the test.

*Id.* at 252.

The *Pahl* court reasoned that the members of a co-op are much like the stockholders in a corporation: if the co-op makes a profit, the members stand to profit. The court noted that it has long been the case that a stockholder in a corporation is disqualified under Article V, §11 of the Texas Constitution from sitting as a judge in a trial where the corporation is a party. *Id.* at 252, citing *Templeton v. Giddings*, 12 S.W. 851 (Tex. 1889) and *King v. Sapp*, 2 S.W. 573 (Tex. 1886).

<sup>9</sup> There, the judge was a policyholder in the defendant life insurance company, which had no capital stock. The only owners were the policyholders. In holding that the judge was disqualified, the court stated:

We think that this testimony shows that the trial judge, as one of the owners of the appellant company, is one of the owners of, and

*World v. Hale*, 56 Tex. Civ. App. 447, 120 S.W. 539 (Tex. App. 1909);<sup>10</sup> *Gulf Maritime Warehouse Co. v. Towers*, 858 S.W.2d 556 (Tex. App.—Beaumont 1993, writ denied).<sup>11</sup>

Justice Puryear has an ownership interest in PEC, just as did the trial judge --

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necessarily directly interested in, the assets of the company, in the proportion that the amount of his policy bears to the aggregate amount of policies issued and outstanding at the time, and that he would necessarily suffer a pecuniary loss by a judgment against the appellant, which would have to be collected out of its assets.

*Id.* at 1163.

<sup>10</sup> There, suit was brought to collect under an insurance policy issued by the Woodmen of the World, a mutual insurance company. The judge was a policyholder in the company. In disqualifying the judge, the court said:

Each holder of a benefit certificate is an owner of the assets of the order, in proportion that the amount of his certificate bears to all the certificates issued by the order. In other words, the entire assets of the order constitute a general fund in which every holder of a certificate is interested very much in the nature of a stockholder in corporation assets. It certainly disqualifies a judge, when he is a stockholder in a corporation, from sitting as judge in trial of a case in which such corporation is a party.

*Id.* at 540.

<sup>11</sup> There, the disqualification of a judge who was a shareholder in a company who was a party in the case was at issue. In holding that the trial judge was disqualified under Article V, §11 and Rule of Civil Procedure 18b(1)(b), the Court held that disqualification is required if the "interest" of the judge in the case is a direct pecuniary interest in the subject matter of the case. *Id.* at 558. Once a pecuniary interest is shown to exist, the judge is disqualified no matter how slight that interest. *Id.* at 558 (citing *Cameron v. Greenhill*, *supra*).

who equated his ownership in PEC to that of owning five shares of the stock of Ford Motor Company.

During the February 28, 2013 conference call, Justice Puryear essentially stated that since restitution had not been ordered to be paid to PEC under the judgments in the Fuelberg and Demond cases, he had no financial interest. Appellant understands the logical appeal of Justice Puryear's conclusion, but must respectfully point out that if this case is reversed and a new trial ordered on the basis that the original trial judge was disqualified and/or should have been recused, a new trial judge would not be bound by the original trial judge's conclusion that PEC would not receive any restitution. Thus, a new trial judge could conceivably order restitution to PEC. The Court should be aware that the restitution hearing held in the trial court was hotly contested. *See* 55RR1-218. It reflects that PEC was seeking millions of dollars in restitution for itself (not for Clark Thomas). *Id.* It is certainly unclear whether a new trial judge would make the same decisions as the original trial judge regarding restitution (assuming, for purposes of argument only, a conviction at a retrial). A decision granting a new trial in either of these cases could result in the payment of restitution to PEC and given the fact that PEC originally requested millions of dollars in restitution, PEC would undoubtedly reurge its positions at any new restitution hearing. For this reason, Judge Puryear's logical conclusion that he was not

disqualified has a dimension that he may not have fully contemplated and which, at least in undersigned counsel's opinion, mandates disqualification.

#### **IV.**

#### **MOTION TO RECUSE.**

Although Justice Puryear did not mention recusal during the February 28, 2013, conference call, undersigned counsel represented that he wanted to also consider recusal because Appellant had raised disqualification and recusal of the original trial judge. After due consideration, Appellant respectfully asserts that Justice Puryear should recuse himself or be recused from sitting in these appeals due to the following provisions of Texas law:

- (1) Tex.R.Civ.P. 18b(b)(1); and
- (2) Tex.R. Civ. P. 18b(b)(6).

Under Tex. R. Civ. P. 18b(b)(1), a judge must recuse himself or be recused in any proceeding in which "the judge's impartiality might reasonably be questioned." And under Tex. R. Civ. P. 18b(b)(6), a judge must recuse himself or be recused if "the judge knows that [he] ... individually" "has a financial interest in the subject matter in controversy or in a party to the proceeding."

In determining whether recusal is appropriate, an objective standard is used and the proper inquiry is whether a reasonable member of the public at large, knowing all

the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial. *Burkett v. State*, 196 S.W.3d 892, 896 (Tex.App.—Texarkana, 2006.); *Rogers v. Bradley*, 909 S.W.2d 872, 880 (Tex. 1995)(*statement of Enoch, J.*); *Scown v. City of Alpine*, 271 S.W.3d 380 (Tex. App.—El Paso 2008, no pet.). It is the appearance that is paramount.

In light of Justice Puryear's interest as a "customer/member" of PEC and his apparent status as a party injured by the crimes alleged in the indictments, it naturally follows that a reasonable person might question Justice Puryear's impartiality under Rule 18b(b)(1). Recusal is entirely appropriate.

Furthermore, under Rule 18b(b)(6), Judge Puryear "has a financial interest in the subject matter in controversy or in a party to the proceeding."

## **V.**

### **PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Appellant respectfully prays that the Honorable David Puryear disqualify and/or recuse himself and that a new Justice be assigned to the panel to hear oral arguments on whatever date submission and oral arguments are rescheduled for, or in the event that Justice Puryear does not disqualify and/or recuse himself, that the entire Court, sitting en banc, determine this motion and that oral arguments and submission be rescheduled only after further proceedings as

mandated and/or authorized by Tex. R. App. Proc. 16.3, including an appeal, if necessary, to the Court of Criminal Appeals from any denial of the motion to recuse and/or mandamus to the Court of Criminal Appeals from any denial of the motion to disqualify.

Respectfully submitted,

/s/ David L. Botsford  
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### **VERIFICATION**

Under penalty of perjury, I, David L. Botsford, do hereby swear that the facts contained in this motion are true and correct, based upon what I learned during the February 28, 2013, conference call identified in this motion, and the email I sent to Mr. Jeffrey Kyle, Clerk of the Court, on March 1, 2013. I am making this motion in good faith in order to attempt to provide effective assistance of counsel on appeal to Bennie Fuelberg and to avoid any potential argument that a decision not to move to disqualify and/or recuse Justice Puryear could be used against Appellant Fuelberg in this or any court as an admission or a waiver of his POINT OF ERROR NOS. 1, 2 and 7.

/s/David L. Botsford

### **CERTIFICATE OF SERVICE**

This is to certify that a true and correct copy of the foregoing motion has been emailed to Mr. Bill Davis, Assistant Solicitor General, at bill.davis@texasattorneygeneral.gov, and to counsel for Walter Demond at their respective emails (jho@gibsondunn.com and dgeyser@gibsondunn.com) on this the 4th day of March 2013.

/s/ David L. Botsford  
David L. Botsford