

Original

POTENTIAL DEATH PENALTY/LIFE WITHOUT PAROLE CASE

IN THE SUPERIOR COURT OF GORDON COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,

v.

JERRY WILLIAM JONES,

Indictment No.16471

FILED
Clerk Superior Ct., Gordon County

JUL 25 2005

Brian Brannon
Clerk

MOTION FOR RECUSAL OF JUDGE CAREY G. NELSON

Jerry Jones, through undersigned counsel, respectfully moves this Court, pursuant to the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Article I, § I, ¶¶ I, II, IV, V, VII, IX, X, XI, XII, XIII, XIV, XVI, XVII, XVIII, XXIV and XXVIII of the Constitution of the State of Georgia, Superior Court Rule 25, as well as statutory and jurisprudential authorities cited below, and all other applicable constitutional, statutory, treaty, customary international law, evolving international standards, and jurisprudential authority to recuse himself.

1. Jerry Jones is on trial for his life. The State, through the District Attorney, has announced its intention to kill Jerry Jones, a human being, by lethal injection. The United States Supreme Court has repeatedly emphasized that because of the exceptional and irrevocable nature of the death penalty, "extraordinary measures" are required by the Eighth and Fourteenth Amendments to ensure the reliability of decisions regarding both guilt and punishment in a capital trial. Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring). See

also Beck v. Alabama, 447 U.S. 625, 637-38 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); and Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

2. "The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate punishment' in any capital case." Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981, 100 L.Ed.2d 575 (1988). It is well established that when a defendant's life is at stake, a court must be "particularly sensitive to insure that every safeguard is observed." Gregg v. Georgia, 428 U.S. 153, 187, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). This heightened standard of reliability is "a natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different." Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595, 91 L.Ed. 2d 335 (1986).

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

3. Canon 3(E)(1) of the Georgia Code of Judicial Conduct states that "Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to circumstances where the judge has...personal knowledge of disputed evidentiary facts concerning the proceeding." It is not necessary that there be shown "any actual impropriety on the part of the trial court judge. The fact that his impartiality 'might reasonably be questioned' suffices for his disqualification." King v. State, 246 Ga. 386, 390, 271 S.E.2d 630 (1980); Smith v. State, 250 Ga. 438, 439, 298 S.E.2d 482 (1983).

4. The commentary to Canon 3E(1) further provides that:

Under this rule, judges are subject to disqualification whenever their impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. . . . Judges should disclose on the record information that the court believes the parties or their lawyers might consider relevant to the question of disqualification, even if they believe there is no legal basis for disqualification.

5. In this case, undersigned counsel asserts a number of bases for the recusal of Judge Carey Nelson from the case, including Judge Nelson's designation of Jody Overcash—a material witness to the grand jury selection procedures—as his “assistant” precludes the court from impartially and objectively considering her testimony and credibility. Ms. Overcash, Judge Nelson's “assistant” on the issues relating to the defense challenge to the grand jury, is not merely a person with knowledge (the defense contests Ms. Overcash's expertise in this field and would object to characterizing her as an “expert”) on the procedures for selecting grand jurors, she has been intimately involved in the procedure for selecting grand jurors in *this* case because she was the architect and administrator of the selection system in *this* case. Moreover, the Judge has been a party to extrajudicial communications with Ms. Overcash; even if he were to attempt to disregard those communications, the appearance of impropriety has been created by his designation of her as the Court's special assistant. When a question of the Judge's partiality is properly raised, the matter should be referred to another judge.

[W]hen the question of interest or prejudice has properly been raised, it would better serve the interests of justice for the judge to recuse himself and permit another judge to determine the issue. The fact that his impartiality “might reasonably be questioned” suffices for his disqualification. King v. State, 246 Ga. 386, 390 (1980); State v. Davis, 159 Ga. App. 537, 539-540 (Ga. Ct. App., 1981)

I. Relevant Factual Background

6. On July 18, 2005, this Court conducted an evidentiary hearing on Defendant's Motion to Dismiss the Indictment Due to the Unconstitutional Composition of the Grand Jury.

7. Jody Overcash, District Court Administrator for the Seventh Judicial District was also present in the courtroom. As part of her job, Ms. Overcash directs the jury commissioners of Gordon County with respect to the procedures they are supposed to employ in the selection of potential grand jurors. One of her responsibilities is to provide the jury commissioners with the source list they use to compile the grand jury list.

8. Prior to any argument relating to the subject matter of the hearing, counsel for Mr. Jones invoked the rule of sequestration and specifically requested that Ms. Overcash be excluded from the courtroom. The Court indicated that Ms. Overcash's purpose in the courtroom was "to assist" the court with respect to issues before it. This was the first time the defense learned that Judge Nelson had decided to designate a material witness to the grand jury challenge an "assistant." The court refused to exclude Ms. Overcash from the proceedings.

9. In the presence of Ms. Overcash (and over defense objection that such a witness would be permitted to remain in the court during argument and testimony on these issues), counsel argued that the evidence would show that the jury commissioners had violated O.C.G.A. 15-12-40 by not using the driver's license list as a source list for choosing grand jurors.

10. At one point during the testimony of a witness, the Court interrupted counsel's questioning and directed a question about the source lists that were provided to the jury commissioners to Ms. Overcash, who answered the question. (The transcript of this extraordinary exchange has not yet been received by counsel.)

11. At some point during the testimony, Ms. Overcash left the courtroom, and the Court *sua sponte* announced "for the record" that Ms. Overcash was no longer present in the courtroom.

12. Throughout the day, counsel for Mr. Jones examined each Gordon County jury

commissioner about the kinds of source lists that were used in the preparation of the grand jury list. Not a single jury commissioner testified that she or he had ever had access to the full list of individuals who had drivers' licenses in Gordon County. No jury commissioner testified that she had ever even seen such a list. No jury commissioner testified that they had engaged in any process involving sending questionnaires to people from the drivers' license list.

13. A court clerk testified that she believed four of the six testifying jury commissioners had been given access to the full drivers' license list and had selected particular individuals off of that list to be sent questionnaires. This testimony directly contradicted the testimony of the jury commissioners themselves.

14. On July 20, 2005, District Court Administrator Jody Overcash sent an email, attached to this pleading as Exhibit A, to counsel for Mr. Jones, District Attorney Joe Campbell, Jeff Martin (a defense expert) and to the Court.

II. Judge Nelson's designation of Jody Overcash, District Court Administrator for the Seventh Judicial District who administers and directs the procedures for the selection of the grand jurors in Gordon County—and witness to the facts in dispute before this Court—as his "assistant" precludes the Court from impartially and objectively evaluating Ms. Overcash's credibility and testimony (particularly where, as here, her unsworn communications regarding the procedures used by the jury Commissioners have been contradicted by the sworn testimony of other fact witnesses).

15. Ms. Overcash has a professional relationship with Judge Nelson which predates her involvement as a witness in this matter. As a result of that relationship, the Court is familiar with Ms. Overcash's role in administering the jury selection process in Gordon County.

16. Based on the Court's statement that Ms. Overcash was present to "assist" the Court on these matters, the Court made it explicitly clear that this material witness would be treated in a special manner by the court: first, that the court would single out this witness and immunize her from defense efforts to exercise their right to excuse a material witnesses from

hearing the proceedings prior to her testimony, and second, the court associated itself with and placed its trust in and personal imprimatur on a material witness who had a personal and professional interest and bias in insuring that the grand jury selection procedures she designed and implemented are found to be proper and legal.

17. Ms. Overcash's professional responsibility is to effectively manage the budget of the county and help ensure the orderly administration of the justice system. Should the grand jury system she implemented be found unconstitutional, the county would be required to expend considerable time and money reconstituting the grand jury and re-indicting pending cases. Based on the Court's knowledge of Ms. Overcash's institutional responsibilities, it was readily apparent to the Court that Ms. Overcash had a stake in ensuring that the grand jury selection procedures she authorized and directed not be found unconstitutional. The Court's designation of Ms. Overcash as the Court's assistant in and of itself reveals partiality and bias.

18. An unbiased observer would reasonably question Judge Nelson's ability to disregard facts presented to him by someone who he stated that he viewed as an advisor with respect to matters in dispute between adversaries. Most fundamental to assuring a fair trial is the assurance that those who preside over it -- the judges -- are themselves above reproach. "Courts, like Caesar's wife, must be not only virtuous but above suspicion." U'ren v. Bagley, 118 Ore. 77, 245 P.2d 1074, 1075 (1926). The question is not whether the judge actually is biased, but rather whether there is any hint of putative bias:

The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances.

19. The case of In re Kensington Int'l. Ltd., 368 F.3d 289 (3d. Cir. 2004) is instructive. In that case, which involved asbestos litigation, the court appointed attorneys to

assist the court. It came to light that those attorneys had represented the plaintiff's firm in an unrelated bankruptcy case. The judge was required to recuse himself. "[T]here is an almost irrebutable presumption that a judge is "tainted" and must be disqualified where, as here, he surrounds himself with individuals who may not be truly disinterested." *Id* at 308. Similarly, in Edgar v. K.L., 93 F.3d 256 (7th Cir., 1996) the court received information about the subject matter of the litigation from individuals who were putatively supposed to be assisting the court with administrative matters. The Seventh Circuit held that this extrajudicial knowledge, combined with the judge's attestations of faith in his advisors, required that the judge recuse himself.

20. Rice v. McKenzie, 581 F.2d 1114, 1116-17 (4th Cir. 1978). See also Hall v. Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983) (disqualification required "if a reasonable person, knowing all the circumstances, would harbor doubts about his impartiality").

20. Even the possibility of prejudice on the "part of the judge . . . is too high to be constitutionally tolerable" Withrow v. Larkin, 421 U.S. 35, 47 (1975); see also Berger v. United States, 255 U.S. 22, 33-34 (1921); Potashnick v. Port City Construction Co., 609 F.2d 1101, 1111 (5th Cir. 1980) ("Any question of a judge's impartiality threatens the purity of the judicial process and its institutions"); Health Services Acquisition Corp. v. Liljeberg, 796 F.2d 796, 800 (5th Cir. 1986); Chitimacha Tribe v. Harry L. Laws Co., 690 F.2d 1157, 1165 (5th Cir. 1982); King v. State, 246 Ga. 390, 271 S.E.2d 630, 634 (1980).

21. The United States Constitution requires disqualification where there is any hint of impropriety. The Supreme Court held In Re Murchison, 349 U.S. 133, 136, 755 S.Ct. 623, 99 L.Ed. 942 (1955), that:

[a] fair trial in a fair tribunal is a basic requirement of due process. Fairness of course requires an absence of actual bias in the trial of cases. But our system of

law has always endeavored to prevent even the *probability of unfairness* *Circumstances and relationships* must be considered. This Court has said, however, that 'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear, and true between the State and the accused denies the latter due process of law.' Tumey v. Ohio, 273 U.S. 510, 532 [(1927)]. To perform its high function in the best way 'justice must satisfy the appearance of justice. Offutt v. United States, 348 U.S. 11, 14 [(1955)]. (emphasis added)

22. See also Tumey v. Ohio, 273 U.S. 510, 532 (1927); United States v. Columbia Broadcasting, Inc., 497 F.2d 107, 109 (5th Cir. 1974) (" . . . The protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system"). Communication such as that contained in Ms. Overcash's email necessarily taints the Court by providing him with personal knowledge of disputed evidentiary facts.

23. Ms. Overcash, Judge Nelson's "assistant" on the defense challenge to the grand jury, has not provided Judge Nelson with independent, unbiased information about grand jury selection processes, nor has she provided independent, unbiased analysis of the testimony and evidence presented regarding the grand jury selection process used in *this* case. Rather, Ms. Overcash provided the court with her own, first hand account of the grand jury selection procedures used in Gordon County.

24. The facts alleged by Judge Nelson's special "assistant" Ms. Overcash are in direct conflict with other evidence presented to the Court by the defense. However, her designation as the court's "assistant" precludes the court from objectively and independently evaluating her credibility and the reliability of her testimony. Furthermore, even if Ms. Overcash is not called to testify, Judge Nelson has revealed his partiality on the defense challenge to the grand jury by designating the person responsible for setting up the grand jury selection system in Gordon County as his "assistant."

25. Because of the conflict in Ms. Overcash's account and the accounts of the jury

commissioners, were Ms. Overcash to be called as a witness, the Court would be required to make determinations regarding the credibility and believability of Ms. Overcash *versus* other witnesses. Further complicating this issue is the fact that Ms. Overcash was present in the courtroom over the objection of counsel when the defense position with respect to the driver's license list was outlined. Accordingly, the Court would be faced with assessing the effect of exposure to witness testimony and the argument of counsel on his Ms. Overcash's testimony. This assessment would certainly appear to be colored by the fact that it was the Court's own decision to allow Ms. Overcash to remain in the courtroom over objection so that she could "assist" the Court.

26. Despite the Court's interpretation of O.C.G.A. 24-9-61, there is no exception to the rule of sequestration for **fact witnesses** who are supposed to "assist" the Court. Poultryland, Inc. v. Anderson, 200 Ga. 549, 562 (Ga., 1946). Had Ms. Overcash been sequestered as the defense had requested, communication with her regarding witness testimony would have been improper. O.C.G.A. 24-9-61; Norman v. State, 212 Ga. App. 105, 109 (Ga. Ct. App., 1994).

27. Ms. Overcash's email makes it appear that she may have knowledge of what witnesses said after she left the courtroom. If the Court was a source of this kind of information, it would clearly be improper for the Court to then make a determination of whether the Court had influenced the substance or nature of Ms. Overcash's testimony in some way. No matter who informed Ms. Overcash of what happened in court, she was permitted to learn of the testimony only because of Judge Nelson's special designation and exempting her from the rule of sequestration.

28. It would be impossible for Judge Nelson to attempt to decide the defense challenge to the grand jury selection process in an fair and impartial manner. First, the court has

created an appearance of partiality in selecting the architect of the selection process as the court's "assistant." Second, this "assistant" has provided a first hand account of these selection procedures to the court in an extra-judicial communication (email) after receiving information about the testimony of witnesses who testified at the hearing on the defense challenge (and the "assistant" was only able to obtain this information because the court exempted her from the rule of sequestration), the "assistant's" account of the selection process contradicts the accounts provided by sworn testimony of witnesses at the hearing, and the court cannot now independently and objectively evaluate the testimony of the "assistant" / material witness. Third, the "assistant's" contradiction of the sworn testimony of witnesses at the hearing on the defense challenge would cause a reasonable person to call into question Judge Nelson's ability to fairly and impartially consider and evaluate the testimony of the sworn witnesses: his "assistant" in whom he placed his trust and the imprimatur of his office has placed Judge Nelson in the impossible position of crediting her first-hand account and discounting the sworn testimony at the hearing, or discrediting his assistant's account and relying on testimony of the sworn witnesses. The bell cannot be unring. The court has already made its view of Ms. Overcash known and the irreconcilable conflict between her as trusted advisor to the court and as a material witness with a first hand account of the grand jury selection procedures used in *this* case required recusal of the court. The appearance of partiality cannot be cleansed.

Basis II. Judge Nelson's recusal is also required—based on information and belief—on the independent basis that he participated in extra-judicial communications with a material witness (Ms. Overcash) to facts in dispute before him. Because of the Court's pre-existing designation of Ms. Overcash as the Court's "assistant," the Court cannot maintain impartiality and independence with respect to its communications with her.

29. Ms. Overcash's email communication to the Court, while not *ex parte*, was highly

improper.

30. The Court's *sua sponte* questioning of Ms. Overcash during the testimony of another witness was also highly improper.

31. The Court has a duty not to rely on personal knowledge with respect to factual disputes before it. Canon 3(E)(1) states that "Judges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned, including but not limited to circumstances where the judge has...personal knowledge of disputed evidentiary facts concerning the proceeding." It is not necessary that there be shown "any actual impropriety on the part of the trial court judge. The fact that his impartiality 'might reasonably be questioned' suffices for his disqualification." King v. State, 246 Ga. 386, 390, 271 S.E.2d 630 (1980); Smith v. State, 250 Ga. 438, 439, 298 S.E.2d 482 (1983).

32. Ms. Overcash's unsworn out of court e-mail has provided the Court with personal knowledge of disputed evidentiary facts concerning the proceeding. Ms. Overcash's unsworn response to the Court's *sua sponte* question is further unsworn un-cross examined extra-judicial evidence which the Court may not consider. Considering this evidence will deprive Mr. Jones of due process of law and of the right to cross-examine Ms. Overcash regarding the representations she has made to the Court.

33. When a judge inadvertently becomes exposed to extrajudicial evidence, the Court must not rely on that evidence in reaching its decision. Canon 3(B)(7) of the Georgia Code of Judicial Conduct requires that Judges "must consider only the evidence presented." However, in this situation, the Court's own designation of Ms. Overcash as the Court's "assistant," clearly creates the appearance of impropriety where, as now, the Court must disregard extrajudicial communications from that assistant regarding the very subject matter with which she was

supposed to assist. Moreover, the Court *solicited* Ms. Overcash's in court communications, which were also clearly improper

34. When viewed in light of Judge Nelson's statement regarding his view of Ms. Overcash's role, the personal knowledge Judge Nelson gained as a result of Ms. Overcash's email, combined with her response to his question in court, clearly creates a perception that Judge Nelson would be unable to disregard all of Ms. Overcash's communications with the Court and instead rely solely on facts presented in the record.

35. Counsel also has a good faith basis to believe that there have been other communications between the Court and Ms. Overcash on these matters. Based on the court's comment that "Ms. Overcash is here to assist the Court," it appears that Ms. Overcash was present in court at the specific request and invitation of the Court. Ms. Overcash's e-mail regarding the procedures employed for the selection of grand jurors in Gordon County was certainly encouraged by the Court's comments regarding Ms. Overcash's role with respect to this case. The last line of Ms. Overcash's email, "If you have any further questions, please let me know" also invites the question of who the "you" is to whom Ms. Overcash is responding.¹ Even if the Court did not directly request that Ms. Overcash provide additional information regarding grand jury selection procedures, the court's designation of her—an interested party and a material witness—as *the Court's assistant* surely invited these kinds of communications. Unlike provisions for the court to appoint *experts* to assist the court in complex matters where the Court has a duty to inquire *sua sponte*, there is no provision for the Court to employ *independent fact witnesses* as the "Court's assistants" when a motion challenging a grand jury array is filed.

¹ Jeffrey Martin, a defense expert, sent Ms. Overcash an email on July 11 which contained an inquiry regarding the way in which the list containing 31 names had been generated. However, Mr. Martin did not cc the Judge or the DA on his inquiry. It is unclear whether Ms. Overcash's email was in response to Mr. Martin's email or if it was in response to an inquiry from the Court.

36. The presentation of evidence is the responsibility of the parties. Judge Nelson had no more authority to designate Ms. Overcash as the "Court's assistant" for purposes of the grand jury challenge than he would have had the authority to designate an alleged eyewitness to a crime as the "Court's assistant" for purpose of the determination of the guilt of the accused. Just as it would be obviously improper for the Court to request that particular eyewitnesses to a crime in dispute be present in the courtroom "to assist the court," it is also obviously improper for the Court to have made such a request of Ms. Overcash.

37. "Ours is the accusatorial as opposed to the inquisitorial system. Such has been the characteristic of Anglo-American criminal justice since it freed itself from practices borrowed by the Star Chamber from the Continent whereby an accused was interrogated in secret for hours on end." Watts v. Indiana, 338 U.S. 49 (69 S. Ct. 1347, 93 L. Ed.1801) (1949). See also Strickland v. State, 260 Ga. 28, 35 (Ga., 1990). Canon 3(B)(7) of the Georgia Code of Judicial Conduct incorporates the adversarial nature of our system into the ethical rules governing judges and requires that Judges "not investigate facts in a case and must consider only the evidence presented."

38. Any efforts by the court to communicate *ex parte* with Ms. Overcash about the Court's desire for information regarding the procedures employed in the selection of grand jurors in Gordon County would have been grossly improper. Judges may not investigate factual matters in cases pending before them. For them to do so violates the separation of powers and denies the litigants due process of law. "The legislative, judicial and executive powers shall forever remain separate and distinct, and no person discharging the duties of one, shall, at the same time, exercise the functions of either of the others, except as herein provided." Greer v. State, 233 Ga. 667 (Ga., 1975). In Re: Metzbaum, 26 Ohio Misc. 47, 265 N.E.2d 345

(Ct.Com.Pl. Ohio 1970). Nor may a judge compel a prosecutor to investigate and prosecute alleged crimes. Inmates of Attica Correctional Facility v. Rockefeller, 477 F.2d 375 (2nd Cir. 1973). See also Goldstein v. Commission on Practice of the Supreme Court, 2000 Mt. 8, P80 (Mont., 2000) (judge's duties do not include investigation).

39. There is no exception to the rule that judges may not conduct independent investigation. Judges may no more communicate with other court personnel about facts in dispute before them than they may communicate with eyewitnesses to crimes being tried in their courtrooms. In an adversarial system the court must rely on the parties to present relevant information, not seek out such information on its own. Canon (3)(B)(7)(c) specifically requires that judges only consult about pending with those court personnel whose function is to "aid [the judge] in carrying out their adjudicative responsibilities." Ms. Overcash is not a law clerk. While she certainly provides great aid to the court, her function is to provide administrative assistance to the Seventh Judicial District, not to assist the Court by providing factual information. Accordingly, it is improper for the court to consult with her about factual matters pertaining to this case.

40. The duty to refrain from independent investigation does not change when the matters in question relate to the administration of the court system. Indeed, the Code of Judicial Conduct specifically recognizes the temptation to investigate matters close to the bench, and states that "Judges must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3(B)(7) is not violated through law clerks or other personnel on their staff." Canon 3(B)(7)(c) states that judges "shall accord to every person...the right to be heard according to law."

41. Mr. Jones has been denied the right to be heard according to law because he has

been denied the right to confront and cross examine Ms. Overcash, who has inserted herself in proceedings where neither party has called her as a witness. Certainly, Mr. Jones may now elect to call Ms. Overcash and confront her, but this, too, is unfair. Mr. Jones should not be placed in the position of having to decide whether to call and confront a witness because that witness conveyed factual information to the Court in improper forums, namely based on a *sua sponte* question to an unsworn uncalled witness, and a personal email.

42. The Georgia Supreme Court in Pope v. State (I and II) made clear, there is a burden on the trial judges to reveal any possible basis for recusal:

Ideally, the trial judge should have made a disclosure on the record The defendant might have decided to waive any right of recusal and this waiver could have been placed on the record.

43. Under proper circumstances, a trial judge whom counsel is seeking to recuse should and can voluntarily recuse himself. See Ga. Super. Ct. Rule 25.7 (2001). Even if the trial judge does not voluntarily recuse, The Uniform Rules for the Superior Courts specifies that the judge must not determine the merits of the motion to recuse. Rather, the judge only determines “the timeliness of the motion and the legal sufficiency of the affidavit” and “assuming any of the facts alleged in the affidavit to be true, whether recusal would be warranted.” See Ga. Super. Ct. Rule 25.3 (2001). Indeed, if the motion to recuse is timely and if the affidavit is legally sufficient on its face, another judge must be assigned to hear the motion to recuse. Accord State v. Fleming, 245 Ga. 700, 267 S.E.2d 207 (1980). Once the recusal motion is assigned to another judge, the original judge “shall not . . . oppose the motion,” Ga. Super. Ct. Rule 25.3 (2001), and shall not otherwise participate in the recusal proceedings. See Isaacs v. State, 257 Ga. 126, 355 S.E.2d 644 (1987) (improper for trial judge to defend

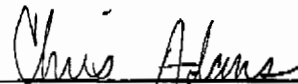
44. It cannot be left up to the defendant to assure that the trial judge is impartial – the

duty rests upon the trial judge to act on any hint of impropriety *sua sponte*. As the Georgia Supreme Court has held, there rests with the trial judge a duty to make "a disclosure on the record [of any basis for recusal]." Pope v. State, 256 Ga. 195, 345 S.E.2d 831, 847 (1986). There is "place[d] on the judge a personal duty to disclose on the record any circumstances that may give rise to a reasonable question about his impartiality." United States v. Murphy, 768 F.2d 1518, 1537 (7th Cir. 1985); accord SCA Services Inc. v. Morgan, 557 F.2d 110, 117 (7th Cir. 1977); United States v. Amerine, 411 F.2d 1130, 1134 (6th Cir. 1969); Code of Judicial Conduct, Canon 3E(1) ("Judges should disqualify themselves in proceedings in which their impartiality might reasonably be questioned. . . ." (emphasis added)).

WHEREFORE, this Defendant respectfully requests:

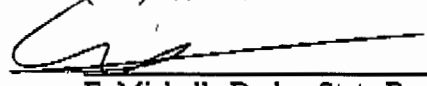
- (a) that Judge Carey Nelson disqualify himself, as required by the Georgia Code of Judicial Conduct and other authorities cited herein, and that this case be assigned to another judge; or, in the alternative;
- (b) that this matter be assigned to another judge for a full, fair and adequate evidentiary hearing on the matter and that upon such hearing an order be entered disqualifying Judge Carey Nelson from presiding over this case; or, in the alternative;
- (c) that Judge Carey Nelson certify this issue for immediate review to the Georgia Supreme Court in the event this motion is denied without a hearing; and
- (d) all such other relief to which this Defendant may be entitled.

Respectfully Submitted,



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Counsel for Jerry Jones

3. I represented Mr. Jones at an evidentiary hearing on his Motion to Dismiss the Indictment Due to the Unconstitutional Composition of the Grand Jury on July 18, 2005.
4. Jody Overcash, the District Court Administrator for the Seventh Judicial District, was present in the courtroom prior to the start of the hearing.
5. Prior to the start of the hearing, I invoked the rule of sequestration pursuant to O.C.G.A. 24-9-61 and specifically requested that it be applied to Ms. Overcash.
6. My request to apply the rule of sequestration to Ms. Overcash was denied. The Court stated, "she is here to assist the Court." (This is counsel's best recollection of the language the Court used. The transcript of hearing is not yet available)
7. Based on Judge Nelson's response to my request to invoke the rule of sequestration, upon information and belief, Judge Nelson previously made arrangements for Ms. Overcash to assist him and be his "assistant" with respect to this matter, and for her to be present during this proceeding.
8. At no time before or after the hearing on July 18, has Judge Nelson provided any notice to defense counsel of any *ex parte* contact he had with Ms. Overcash, nor has the court given either that defense or the state an opportunity to comment upon or object to the court designating the architect of the grand jury selection process used in *this* case (who has first-hand knowledge of the matters at issue here and is obviously a material witness) as Judge Nelson's "assistant" who would be exempted by the court from the rule of sequestration and who would provide extra-judicial communications to the court regarding her first-hand knowledge of the grand jury selection procedures *after* having received ..

information about the testimony of sworn witnesses at the hearing challenging the grand jury selection procedures.

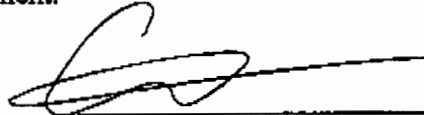
9. Ms. Overcash is a material witness with respect to the procedures employed for the selection of grand jurors in Gordon County. According to testimony elicited at the hearing on July 18, 2005 from both a court clerk and the Jury Commissioners, Ms. Overcash told the Jury Commissioners of Gordon County what procedures they were to use for selecting grand jurors. Ms. Overcash also provided the Jury Commissioners with the source lists she told them they were supposed to use in selecting grand jurors.
10. The nature of the sources that the jury commissioners were provided by Ms. Overcash is in dispute and is a material fact pursuant to O.C.G.A. 15-12-40. Several jury commissioners testified under oath that they never saw a drivers' license list which included information on all persons licensed to drive in Gordon County. This contradicts the testimony of the clerk who testified, and appears to contradict Ms. Overcash's representations in her email.
11. Ms. Overcash sent the e-mail attached as Appendix A on July 20, 2005. In that email Ms. Overcash offers an account of the methods used for the selection of grand jurors which is inconsistent with testimony offered by a Superior Court Clerk who testified and is also inconsistent with the testimony of some of the jury commissioners.
12. As Mr. Jones's attorney, I have been placed in the untenable position of being required to decide whether to challenge and cross-examine the credibility of the judge's handpicked assistant's extrajudicial communication to the judge regarding

the methods used in the grand jury selection process.

13. Upon information and belief, Judge Nelson selected Ms. Overcash to assist him because he was familiar with Ms. Overcash's job responsibilities with respect to the grand jury selection process in Gordon County. For the same reasons that the Court sought to designate her as its "assistant" (her personal knowledge of the procedures employed), it should have been patently obvious to the Court that she was a potential and likely witness. At a minimum, Ms. Overcash's interest in ensuring that the procedures she helped implement were upheld upon judicial review should have been obvious to the Court. The irreconcilable and obvious conflict between Ms. Overcash's role as an interested fact witness (due to her job responsibilities regarding grand jury selection in Gordon County) and her role as the judge's selected assistant who would accordingly be exempt from rules applied to other witnesses in this matter was brought to the Court's attention by my request that she be subject to the Rule of sequestration and by my statement that she was "a potential witness."

14. Ms. Overcash's extrajudicial communication—whether pursuant to direct solicitation by the Judge or pursuant to her understanding of her role based on the Judge's in court designation of her as his assistant--have given the Judge personal knowledge of disputed material facts. Because of the imprimatur of the Court which flows from the designation of Ms. Overcash as the Judge's special assistant, the Judge's ability to disregard extra-judicial communications from her and impartially evaluate her credibility as a witness in this matter is reasonably called into question.

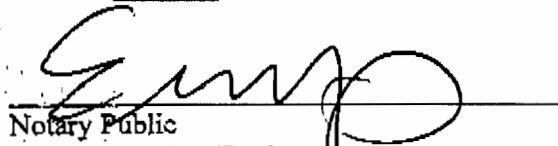
15. The Court's designation of Ms. Overcash as its assistant has denied Mr. Jones important rights, among them the right to due process of law, the right to be tried before an impartial tribunal which respects the separation of powers, the right to confront and cross examine all witnesses against him, and the right to remain free from cruel and unusual punishment.



E. MICHELLE DRAKE

Sworn to and subscribed before me

This the 25 day of ~~January~~ ^{July}, 2005.



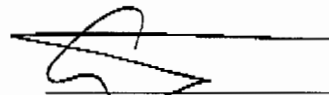
Notary Public
My Commission Expires

Notary Public, Fulton County, Georgia
My Commission Expires August 20, 2005

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been mailed to The Office of the District Attorney for Gordon County via ~~first-class United States Postal Service~~ ^{by hand ins}

this 25 day of July, 2005.



E. Michelle Drake, GA Bar No. 229202
Georgia Capital Defender
225 Peachtree Street NE Suite 900
Atlanta, Georgia 30303
(404) 739-5172

APPENDIX A

E. Michelle Drake

From: Jody Overcash [jodyovercash@bellsouth.net]
Sent: Wednesday, July 20, 2005 9:33 AM
To: 'Chris Adams'; 'Jury Challenge Jeffrey Martin'; emdrake@gacapdef.org; campbell@pac.state.ga.us
Cc: 'Carey Nelson'; brian.brannon@gordon.gscca.org
Subject: Gordon County Drivers List

I have attached a copy of the Gordon County Drivers list from 9/03 that I located on my ex-secretaries computer. I believe this is the list that was used when the jury box was compiled. Back before we started getting complete data on the people listed on the drivers list, the jury commissioners/clerk's office would send out questionnaires to a random sampling of the people on the drivers list (this is the suggested procedure in the Georgia Jury Commissioner's Handbook). If I remember correctly, Gordon County sent out 100 questionnaires and must have only received back the 31 that were on the drivers list. (I have not seen the list that was discussed in court on Monday, so I am only assuming this is correct.) Questionnaires were not mailed to everyone on the list because it would have cost the county too much in time and funds. If you have any further questions, please let me know.