IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

MERVIN SANDERS — APPELLANT

VS. — NO. 2008-CP-1052

STATE OF MISSISSIPPI — APPELLEE

REPLY BRIEF OF APPELLANT

OCTOBER 9, 2009

INTRODUCTION

For the most part, a re-reading of the Brief of Appellant will suffice to answer the (non)arguments advanced by the State in its Brief for the Appellee served on September 10, 2009. I offer a few points in reply that may be helpful.

A FEW POINTS IN REPLY

1. THE NATURE OF MISSISSIPPI RULE OF CIVIL PROCEDURE 60(B)

Relief from a default judgment must be requested by a formal application as required by Rule 60(b). Because the request is for relief from a final disposition of the case, the party in default must take affirmative action to bring the case before the trial a second time.

Rule 60(b) is available to a party for relief from a final judgment based on:

(1) fraud, misrepresentation, or other misconduct of an adverse party;

(2) accident or mistake;

(3) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(4) the judgment is void;

(5) The judgment has been satisfied released, or discharged, or a prior judgment which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment

should have prospective application;

(6) any other reason justifying relief from the judgment.

Mississippi rule of Civil Procedure 60(b). Upon a motion, made within a reasonable time, and for reasons (1), (2), and (3) not more than six months after judgment, the court may relieve a party fort the aforesaid reasons.

In this case sub judice the petitioner filed a 60(b)(4), there no time on this motion.

See state of Mississippi, Ex Rel Mississippi Bureau of Narcotics v. One (1) Chevrolet Nova Automobile and Nine Thousand Eight Hundred dollars Cash seized Money 573 So.2d 789 (Miss. 1990).

Rule 60(b) specifies certain limited grounds uopn which final judgment may be attacked, even after the normal procedure of motion for new trial and appeal are no longer available. The rule simplifies and amalgamates the procedural devices available in prior practice. Prior to MRCP 60(b), Mississippi recognized the following procedure devices for relief from judgment, other than by appeal.

Writ of Error Coram Nobis. Generally, this device was for review or errors of fact, not of law, which substantially affected the validity of the judgment but which was not discovered until after rendition of the judgment. See Petition of Brow, 251 Miss. 25, 168 So.2d 44 (1964). It was instituted as an independent action.

It is important to keep in mind the nature of these proceeding. They have their origins in the writ of habeas corpus. Justice Holmes has taught us that 'habeas corpus cuts through all forms and goes to the very tissue of the structure. It comes in from the outside...and although evry form may have been preserved opens the inquiry whether they have been more than an empty shell." Frank v. Mangum, 237 U.S. 309, 346, 35 S.Ct. 582, 59 L.Ed. 969, 988 (1915) (holmes, J., dissenting). See also Olmstead v. United States, 277 U.S. 438, 485, 48 S.Ct. 564, 72 L.Ed. 944 (1928) (Brandeis, J., dissenting) ("[T]o declare that in the administration of the criminal law the end justifies the means-to declare that the government may commit crimes in order to secure the conviction of a private criminal-would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face.') In this state the right finds its origins in Miss. Const. Art. 3, 21. The process of habeas corpus in Mississippi has been given substantial procedural elaboration in the Uniform Collateral Post-Conviction Relief Act, Miss.. Code §§ 99-39-1 to 99-39-29. Its core meaning and effect remain grounds in the Constitution.

2. A CRIMINAL CONVICTION MAY BE SET ASIDE PURSUANT TO MISSISSIPPI RULE OF CIVIL PROCEDURE 60 (B) BECAUSE "ITS FUNCTIONAL EQUIVALENT OF AN APPLICATION FOR POST-CONVICTION RELIEF. BY STATUTE, A POSTCONVICTION RELIEF MOTION MUST BE FILED

AS AN ORIGINAL CIVIL ACTION. MISS. CODE ANN. § 99-39-7

See Cook v. State 921 So.2d 1282 (Miss. Ct. App. 2006):

However, by statute, a PCR motion must be filed as an original civil action. Miss. Code Ann. § 99-39-7 (Supp. 2005).

See Stringfellow v. Stringfellow 421 So.2d 221 (Miss. 1984): Mississippi Rule of Civil Procedure ~~is~~ very nearly identical to the Federal Rule of Civil Procedure; The difference being the time limitation within which 60(b) motions must be filed. In situations such as these, wher the two rules are so similar, we have said that we will consider authoritative federal constructions when determining what our construction of our rule ought to be.

See Gonzalez v. James v. Crosby 545 U.S. 528, 125 S.Ct. 2646, 162 L.Ed.2d 480 (2005): Petitioner Aurelio Gonzalez pleaded guilty in florida Circuit Court to one count of robbery with a firearm. He filed no appeal and began serving his 99-years sentence in 1982. Some 12 years later, petitioner began to seek relief from his conviction.

Rule 60(b) allows a party to seek relief from a final judgment, and request reopening of his case, under a limited set of circumstances including fraud, mistake, and newly discoverd evidence. Rule 60(b)(6), the particular provision under which petitioner brought his motion, permits reopening when the movant shows "any...reason justifying relief from the operation of the judgment" other than the more specific circumstances set out in

Rule 60(b)(1)-(5). See Lijeberg v. Health Services Acquisition Corp., 486 U.S. 847. 863, n. 11, 100 L. Ed. 2d 855, 108 S. Ct. 2194 (1988); Klapprott v. United States, 335 U.S. 601, 613, 93 L,Ed. 266, 69 S.Ct. 384 (1949)) (opinion of Black, J,). The mere recitation of these provisions shows why we give little weight to resopondent's appeal to the virtues of finality. That policy consideration, standing alone, is unpersuassive in the interpretation of a provision whose whole purpose is to make an exception to finality. The issue here is whether the text of Rule 60(b) itself, or of some other provision of law, limits its application in a manner reevant to the case before us.

See Hamilton v. A.C. Newland 374 F.3d 822, 825 (2004):Hamilton relies on two pieces of evidence to support his actual innocence claim. first, his co-defendant, Murray Lodge, signed a declaration that was attached to hamilton's original habeas petition stating that Hamilton was not present during the murder. Second,,in 1993, during the trial of another co-defendant, a state trial judge found that the police officers who had investigated the murder had committed perjury and manipulated evidence..

[2] Rule 60(b) is the appropriate rule to invoke when one wishes a court to reconsider claims it has already decides. In this cas Hamilton seeks to have the district court reconsider its prior ruling that AEDPA's statute of limitations, 28 U.S.C. § 2244(d), bar his claims. We therefore conclude that his motion

should have been treated as a 60(b) motion and evaluated under the ordinary rule governing such motions.

A court may relieve a party from a final judgment for one of six reasons listed in Rule 60. Clauses (1) through (5) provide specific reasons for granting relief, while clause (6) acts as a catch-all allowing the court to grant relief for "any other reason justifying relief from the operation of the judgment." Fed.R. Civ. P. 60(b). Clause (1) through (3) cannot be raised more than one year after the netry of judgment, whereas clauses (4) through (6) must be brought "within a reasonable time." Fed.R.Civ.P. 60(b).

[3] Hamilton brought his motion for reconsideration under Rule 60(b)(6), a provision this court has "sparingly and as an equitable remedy to prevent manifest injustice." United States v. Alpine Land & Reservoir Co., 984 F.2d 1047, 1049 (9th Cir. 1993). A party is entitled to relief under Rule 60(b)(6) wher "extraordinary circumstances prevented [him] from taking timely circumstances prevent or correct an erroneous judgment." Greenawalt v. Stewar, 105 F.3d 1268, 1273 (9th Cir. 1997) (citations and quotation marks omitted); see also Ackermann v. United States, 340 U.S. 193, 200-02, 71 S.Ct. 209, 95 L.Ed. 207 (1950).

In this case sub judice the defendant have show that one can be relief from a criminal conviction under Mississippi Rule of Civil Procedure 60(b)(4).

3. THE APPELLANT'S MOTION WAS TIMELY.

Mississippi Rule of Civil Procedure 60(b), Clauses (1) through (3) cannot be raised more than six months after the entery of judgment, whereas clauses (4) through (6) must be brought "within a reasonable time". See Stringfellow v. Stringfellow 451 So.2d 221 (Miss. 1984): MRCP 60(b) is very nearly identical to the Federal Rule of Civil Procedure; the difference being the time limitation within which 60(b) motions must be filed. In situations such as these, wher the two rules are so similar, we have said that we will consider authoritative federal constructions when determining what our construction of our rule ought to be.

See Liljeberg v. Health Services Acquisition Corp. 486 U.S. 847, 873-874, 100 L.Ed.2d 881, S.Ct. 2210 (1988): In addition, the motion to set aside the judgment was made by respondent almost 10 months after judgment was entered ion March 1982; although relief under Rule 60(b)(6) is subject to no absolute time limitation, there can be no serious argument that the time elapsed since the entry of judgment must weigh heavily in considering the motion. Finally, and most important, Judge Schwartz determined that Judge Collins did not have actual knowledge of his conflict of interest during trial and that he made no rulings after he acquired knowledge. n4 I thus think it very unlikely that respondent was subjected to substantial

injustice by Judge Collins' failure to recuse himself, and believe that the majority's use of Rule 60(b)(6) retroactively to set set aside the underlying judgment is therefore unwarranted.

> n4 The majority's opinion suggests a number of troubling hypothetical situations, only one of which will demonstrate the difficulties inherent its decision. Support Judge Doe sit on a bench trial involving X Corp. and Y Corp. The Judge rule for X Corp., and the judgment is affirmed on Appeal. Ten years later, officials at Y Corp. learn that, unbeknownstr to him, Judge Doe owened several shares of sock in X Corp. Even in the face of an independent factual finding that Judge Doe had no knowledge of this ownership, the Court construction of § 455(a) and Rule 60(b) would permit the final judgment in X Corp.'s favor to be set aside if the"appearance of impartiality" were not deemed wholly satisfied. Such a result will adversely affect the reliance placed on final judgment and will inhibit development premised on their finality.

Justice O'connor, dissenting.

For the reasons given by Chief Justice Rehnquist, ante at 871-873, I agree that "constructive knowledge" cannot be the basis for a violation of 28 U.S.C.(a). the question then remains whether respondent is entitled to a new trial because there are other "extraordinary circumstance," apart from : 455(a) violation found by the Fifth Circuit, that justify "relief from the operation of the judgment." See Fed. Rule Civ. Proc. 60(b)(6); Ackermen v. United States, 340 U.S. 193, 199, 95 L.Ed. 207, 71 S.ct. 209 (1950); Klapprott v. United States, 335 U.S. 601, 613, 93 L.Ed. 266, 69 S.Ct. 384 (1949). Although the Court collects an impressive arrary of argument that might support the granting of such relief, I believe the issue should be addressed in the first instance by the courts below. I would therefore remand this case

with appropriate instruction.

4. THE APPELLANT HAVE MADE "AN ADEQUATE SHOWING OF EXCEPTIONAL CIRCUMSTANCES. UNDER MISSISSIPPI RULE OF CIVIL PROCEDURE 60(B)(4), OF EXTRAORDINARY RELIEF, SHOULD BE GRANTED UNDER MISSISSIPPI CODE OF JUDICIAL CONDUCT CANON 3C(1)(A).

Their no misunderstanding about Circuit Court Judge Joe N. Pigott, was the defendant judge in four (4) prior litigation berfore he presided over the defendant 1991 trial and sentencing hearing.

See Stringfellow v. Stringfellow, 451 So.2d 219, 221 (Miss. 1984): MRCP 60(b) is very nearly identical to the Federal Rule of Civil; the difference being the time limitation within 60(b) motions must be filed. In situations such as these, where the two rules are so similar, we have said that we will consider authoritative federal constructions when determining what our construction of our rule ought to be.

See Collins v. Dr. C.V. Joshi and Neshoba County General Hospital: 611 So.2d 902 (Miss. 1992): In davis the case went to jury verdict. Her it was disposed of by directed verdict. There may be circumstances in which a failure to recuse might be deemed harless error but we decline to enter such an analysis here. It should suffice to say that in the trial of a case, the effect of bias is often undectible from the record and the proper course in all but the ost unusual circumstances is to reverse. In the words

of United States Supreme Court in Liljeberg v. Health Service Acquistion Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988)dealing with the appropriate remedy for failure to recuse under the Federal statue identical to Canon 3 C., "it is appropriate to consider the risk that the denial of relief will produce injustice in other cases, and the risk of undermining the public's confidence in the judicial process.

At 858 Ligeberg 486 U.S., In considering whether the Court of Appeal properly vacated the declaratory relief judgment, we are to address two questions. We must first determine whether § 455(a) can be violated based on an appearance of partiality, even though the judge was not conscious of the circumstance creatin the appearance of impropriety, and second, whether relief is available under Rule 60(b) when such a violation is not discovered until after has become final.

> The goal of section 455(a) is to avoid even the appearance of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even thought no actual partiality exists, because the judge actually has no interest in the case or because the judge is pure heart and incorruptible. the judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of pariality. Hall Small Business Administration, 695 F.2d 175, 179 (5th Cir. 1983). Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would actual knowledge." 796 F.2d at 802.

In this case sub judice Judge Joe N. Pigott did have actual knowledge of his prior rule in the defendant case. See (R. 395-3960:

> By the Court: Very well, of course this same Judge is the Judge of the Circuit Court of Lincoln County, and I have independent recollection of having sentenced Mr. Sanders on those two occasions, the first of which was in the old courthouse before it was torn down, and the second time in the new courthouse after it was built. All right.

See Hall v. Small Business Administration, 695 F.2d 178 (5th Cir. 1983): The Code of judicial Conduct, adopt by the Judicial Conference of the United States, states: A judge shall disqualify himself in a proceeding in which his impartiality might reasonably be questioned...." Code of Judicial Conduct, Canon 3(C)(1), reprinted in 69 F.R.D. 273, 277 (1975). By statute adopted in 1974 that etchical standard was converted into mandate: evry justice, judge and magistrate is required to disqualify himself in any proceeding in which his U.S.C. § 455 (1976 § Supp. IV 1980). This disqualification may be waived n but the judges is forbidden to accept a waiver unless "it is preceded by a full disclosure on the record of the basis for disqualification. Id. § 455(e) (Supp. Iv 1980).

> n1 28 U.S.C. 455(b) (1976 relates to disqualification for other reasons, such as interest in the case or bias. this provision may not be waived. Id. § 455(e)(Supp. IV 1980)

At 695 F.2d 180: A Judge is required merely to disclose the basis for disqualification, not "every incident or factual detail which contribute to the overall impression of partiality." United States v. Conforte, 457 F. Supp. at 655 (footnote ommitted). In this case, however, the magistrate and his law clerk failed fully to disclose the basis on which a reasonable person might "harbor doubts about the magistrate's impartiality." Potshnick, 609 F.2d at 1111. Therefore, the SBA did not waive its right to seek recusal of the magistrate. n3

> n3 The statute expressly require the judge to state reason for his potential disqualification on the record. If the parties desire to waive the disqualification and consent to his sitting, Advisory Opinion No. 25 of the Advisory Committee on Judicial Activities, which antedates the statute, states a recommended procedure:
>
> In order that there be no question about the voluntary character of the consent, the committee reiterates the recommendation contained in Advisory Opinion No. 20, namely; that the judge advice counsel at the earliest practible time, through the clerk of the court or in some other appropriate way, of the reason for his disqualification, and ask counsel to reply in writing to the clerk whether they wish the judge to hear the case or participate in the hearing of an appeal. Unless all parties request the judge to continue, the clerk should tell not judge which parties did not make such request, and the judge should not act in the case.

28 U.S.C. 455 DISQUALIFICATION OF JUSTICE, JUDGE, OR MAGISTRATE

(a) Any justice, judge or magistrate of the United States shall disqualify himself in any proceeding in which impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following

circustances:

(1) Where he has personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning;

(d) For the purpose of the section the following words or phrases shall have the meaning indiccated:

(1) "proceding" includes **pretrial, trial, appellate review, or other stages of litigation;**

Mississippi Code of Judicial Conduct Canon 3 C(1)(a) is very idential to 28 U.S.C. 455 (a)(b)(1);

() A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

As this Court is aware, Rule 8.04.B4 expressly states that "[t]the trial shall not participate in any plea discussion. Courtney v. State, 704 So.2d 1352 (Miss. 1997). Fermo v. State, 370 So.2d 930 (Miss. 1979) Despite this Rule Judge Joe N. Pigott personally participated in and directed plea discussions. See (R. 407. And Judge Joe N. Pigott participated in the defendant Revocation of Probation. See (R. 412-413).

The Mississippi Supreme Court re-affirmed and expanded on this stand, In re Frank Melton, 2007 Miss. Lexis 254 (Miss., Apr. 19, 2007). See a copy of the rule attach hereto.

OPINION

EN BANC

Defendant's Emergency Application for Extraordinary Relief under Rules 21(c), 21(e) and 27 of the Mississippi Rules of Appellate Practice. Requesting that this Court enter an Order Recusing Judge Tomie Green is granted. Order entered.

See brief of Frank Meltom page 10.

V. VACATING THE ARREST WARRANT

This Court should exercise Emergency Extraordinary Relief by vacating or stay the arrest warrant. This Action is the only course which will eliminate the recusal taint associated with the warrant being issued by a trial judge who should be recused because of both the existence of legitimate issues concerning bias and lack of impartiality as well as because of the existence of the material conflict resulting from the trial judge being a material witness at any probation revocation hearing. Furthermore, a cursory review of the actual facts demonstrates conclusively that there has not been any probation violation.

~~See~~ John Patrick Liteky, Charles Joseph Liteky and Roy Law-Rence Bourgeois v. United States, 510 U.S. 555, 114 S.Ct. 1157, 127 L.Ed.2d 484 (1994): Opinion formed by the judge on the basis of facts introduced or evens occurring in the course of the current proceeding, or of prior proceeding, do not constitute a basis for a bias or partiality motion unless they display a deep-seated favoritism or antagonism that would make fair

judgment impossible. Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinary do not support a bias or partiality challenge. they may do so if they reveal an opinion that derives from an extrajudicial soure; and they will do so if they reveal such a high degree of favoritism or antagoism as to to make fair judgment impossible. An example of the latter (and perhaps of the former as well) is the statement that was alleged to have been made by the District Judge in Berger v. United, 255 U.S. 22, 65 L.Ed. 481 S.Ct. 230 (1921), A World War I espionage case against German-American defendants: **"One must a very judicial mind, indeed, not [to be] prejudiced against the German American." because their "hearts are recking with disloyalty."**

Judge Joe N. Pigott showed antagonism at the time of trial that Attorney John P. Price wanted to withdraw as Counsel. See (R. 270, line 10-23, 271, line 17-28):

> By Mr. Price:---Your Honor, that the attorney has investigated the facts of this case and has concluded that a strong case of proof exists which would almost certainly result in a conviction and has advised his client of such facts; that the Defendant, if convicted, is facing substantial punishment, and that he has refused to follow my recommendation.

271, line 17-28:

> By Mr. Lampton: Your Honor, Mr. Price asked earlier on for discovery, and the State of course complied with that. He has seen our file and talked to our witnesses, and----
>
> By the Court:T ---I fell that he is well prepared

prepared to represent Mr. Sanders. Sometimes you have uncooperative defendant and about all we can do is make sure that he has his rights protected, and you are there available.

The Attorney John P. Price was not prepared for trial. This was favoritism for the State. See (R. 298-300):

By Mr. Price: Please the Court, we object to that statement being admitted. The basis of that primarily besides inadequate Miranda warning is that the State of Mississippi has failed to furnish us notice in discovery. I have something like-thirty-five pages of Bureau of Narcotics' report. I have the sheet that is ordinary furnished to us telling us what statements and that sort of thing exist, and this is the first I have ever heard of any oral statement from any person including a detailed three-page report of the entire incident from the Bureau of Narcotis which made no mention of----I do have a copy of the Waiver, but there is no mention of any statement, it was not furnished to us in discovery.

By Mr. Lampton: Didn't we sit down with Agent Oster and he told you what was said prior to today?

By Mr. Price: Not that I remember.

By Mr. Lampton: Back in the, one of the witness

By Mr. price: Not that I can recall. I am not saying it absolutely did not happen, but I don't recall it. There is certainly no mention of it in any of----

By Mr. Lampton :--No sir, it's not

By Mr. Price --It's not in the discovery,

page 300:

By The Court; Well, if it was not revealed to the defense, it wouldn't be admitted.

By Mr. Lampton: Your Honor, it was not documented, and if Mr. Price doesn't remember that -- if you want to **walk out and ask Craig and see if he can refresh your memory; if not, I will just withdraw it.**

By Mr. Price: I have no recollection of that. Let me ---.

(OFF THE RECORD.)

By Mr. price: Your Honor, he says he mention it to me, but I have no recollection. We have talked several times, but nothing to that specifically.

By Mr. Lampton: Your Honor, let me --------I'm not to put the Court in the position of having to decide that. I should have document that, and I'm sure Mr. Price doesn't remember. I---

By the Court: All right.

By mr. Lampton: I would ask the Court to rule on whether it was voluntary, and whether it could be used to impeach-----

By the Court: Well, I hear no evidence to indicate that it is anything other than voluntary, and it apparently would otherwise be admissible.

See Collins v. Transport, 543 So.2d 166 (Miss. 1989): The Court then proceeded to find that a settlement had been effected and ordered it enforced.

No man may serve as judge of his own cause. Dr. Bonham's case, 8 Co. Rep. 14a, 118a, 77 Eng. Rep. 646, 652 (K.B. 1610); In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942, 946 (1955). We doubt a more powerful principle may be found in our law. we have labeled it "the ancient first priciple of justice. "Bell v. City of bay St. Louis, 467 So.2d 657, 662 (Miss. 1985). The priciple's power extends beyond the case of the judge-litigant to that of the judge-witness, to the case where the judge judge his own credibility as a player in the events whose truth is sought.

Elementary notions of due process afford a corollary principle: that a judge who is otherwise qualified to preside at trial or other proceeding must be sufficiently netural and free of disposition to be able to render a fair decision. No person should be required to stand trial before a judge with a "bent of mind." Berger v. United States, 255 U.S. 22, 41 S.Ct. 230, 233,

65 L.Ed. 481 (1921; Wolfram, Modern Legal Ethics § 17.5.5 Independence and Neutrality, 989 (1986).

In this case sub judice the defendant will show that Judge Joe N. Pigott did stay independence and neutrality, he act as both witness and trier of fact. Judge Joe N. Pigott violated the Mississippi Rules of Evidence 605 when he testify at the Sentenceing Hearing as a witness to the prior convictions to be as See (R. 395-396).

> By Mr. Lampton: Your Honor, the State would also also offer as an exhibit in this hearing a certified copy from the Circuit Court of Lincoln County, Mississippi in Cause Number 10,376, the unlawful sale more than one ounce of marijuana, wherein the defendant Mervin Sanders was sentenced to serve eight years in in the Mississippi Department of Corrections. That sentence was to run consecutive to the sentences in 9991 and 9992. This document was certified on the 7th day of March of 1991, by Karen Maxwell, and it bears the seal of the Court, of the Circuit Court of Lincoln County.
>
> By Mr. Price: For the record, we could make the same objection as to the form of the certification.
>
> By the Court: very well, well, of course, this same Judge is the Judge of the Circuit Court of Lincoln County, and I have independent recollection of having sentenced Mr. Sanders on those two occasions, the first of which was in the old courthouse before it was torn down, and the second time in the new courthouse after it was built. All right.

Defendant would show that Judge Joe N. Pigott had no memory of the Order that he sign in the Circuit Court of Lincoln County, Mississippi. In February 1, 1985 to run the same Sentences in Cause Number 999, 9992 and 10,372 concurrently. After he had ran them consecutive in September 16, 1983. See (R. 423).

ORDER

This cause came for hearing on Motion to run sentences concurrently and the Court having reviewed the record in these causes and the Motion filed herein is of the opinion that the Motion is well taken:

It is therefore ordered and adjudged that the sentences of confinement in cause 9991, 9992 and 10,376 as to the Defendant Mervin Sanders shall run concurrently.

ORDER AND ADJUDGED this is the 1st day of February 1985.

This Order was did by Judge Joe N. Pigott

Defendant would shown unto this Court that Judge Joe N. Pigott, had no memory of the Order that he sign in the Circuit Court of Lincoln County, Mississippi. In February 1, 1985 to run these sentences in cause number 9991, 9992 and 10,372 concurrently. See (R. 399).

By the Court: And hoped that you wouldn't violate the law any more and then, of course, you did, and I to sentence you September 16, 1983 to eight years for the charge of sale of more then one ounce of marijuana, and you had to serve --- how long did you serve?

By The Defendant§ Did two years.

By the Court: And that was with the hope that you would just put out of your mind ever dealing with marijuana or cocaine or any other controlled substance. We gave you a second chance, we gave you a pretty light sentence, and we let the other sentences run --they ran consecutive but for some reason they let out extremely.

(R. 427) is the commitment Order from the Circuit Court of Lincoln County. To Commissioner of the Department of Corrections in September 28, 1983. And (R. 432) which show I had 18 years. (R. 428) shown that Department of Corrections, corrected the sentence on February 1, 1985 by Order of Judge Joe N. Pigott to 8 years, see (R. 436).

This issue was argue in the Appeal at page 58-61 which show the following.

The defendant would show that Judge Joe N. Pigott was bias or prejudice toward the defendant when he rule the search was proper. But in the same like case he rule the search was improper. Also he had the same plaintiff's attorney, the same judge, the same court term and the same argument. See (R. 434 and 435.

[New Article 235 Friday November 1, 1991]

> Sanders attorney John P. Price admitted Sanders had the cocaine but said the informant enticed him to do wrong.
>
> "It an absolutely clear case of entrapment, "Price said.
>
> He also objected to officer search of Sanders car without warrant, but Judge Joe N. Pigott said they had the legal right to do so since they had probable cause he was breaking the law.

[New article R. 434, Thursday November 7, 1991]

> A trial came to halt Wednesday after a defendant testified that officer's search his car without his consent.
>
> Marvin Anthony Giacone, 23, 312 Third St McComb was charge in Pike county Circuit Court with burglary and grand larceny in connection with April 16, theft of gun from the home of Francis and Caroln Myers, 821 Pear Ave.
>
> Police Officer said they received and anonymos tip fingering Giacone and arrested him in June 13, finding some of the missing gun in his car. Myers said Giacone was a friend of his son's and had visited the house before. he said the gun were worth 8.00 to $9.00.
>
> Detective Jimmy Carruth said he obtained Giacone consent to search the car, but Giacone said officers search his car without his consent."

> Detective Perry Ashely said he didn't recall Giacone giving verbal consent.
>
> Judge **Joe N. Pigott** would not let prosecutors refer to the recovered gun. He also ruled out a confession singed by Giacone. At this point prosecutors decided to drop the charges.
>
> In this case we had no other evidence to go forward with, said Assistant District attorney Jerry Rushing.

Further, the Mississippi Supreme Court has stated that [e]very litigant is entitled to nothing less than the cold neutrality of an impartial judges, who must posses the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence aliunde the record." Jenkins v. Forest County Gen. Hosp.,—542 So.2d 1180, 1181-82 (Miss. 1989).

See Collins v. Dr. C?V. Joshi and Neshoba County General Hospital 611 So.2d 898, 900-901 9Miss. 1992): We note that Davis v. Josh, Gen. and Neshoba County General Hospital, 611 So.2d 904 (Miss. 1992) (on pet. rehearing), also has the same plaintiffs attorney, the same defendant, the same trial judge, and the same recusal motion with the same argument; this Court reversed and remanded for a New Trial. in the case here decided, the trial directed a verdict. Because his failure to recuse and ruling and our in like case, we must reverse and remand.

Defendant have shown that he has been denied due process as requiored by the Mississippi Constitution Arricle 3, § section 14 and United States Constitutional Amendment 14 which includes a fair and impartial trial. For the reason above the defendant

should be given a New trial.

See Payton v. State 939 So.2d 465 (Miss. 2006): Stands as the seminal case on the issue of disqualification of a judge under Section 165 of the Mississippi Constitution of 1890. ("A judgment entered by a judge who has been disqualified in the manner prescribed in the statutes is void"), abrogated on other grounds by Matter of Benson, 141 Ore. App. 458, 919 P.2d 496 (Or. 1996); McElwee v. McElwee, 911 S.W. 2d 182, 186 (Tex. Ct. App. 1995) (" If a judge is disqualified under the Texas Constitution, he is without jurisdiction to hear the case, and there, any judgment he renders is void and a nullity"). The State has cited to us no authority which contradicts the proposition that, once recused, ajudge should take no further action in the case.

In this case sub judice the defendant is in prison, a sentence of thirty (30) years, as an habitual offender without parole, probation, good time, or early release and to pay a $30.000 fine on a void judgment.

CONCLUSION

Mervin Sanders respectfully request that this Court to reverse and render a fair judgment. The Court reverse the Judgment of the Circuit Court of Pike County, and enter judgment here Ordering that Mervin Sanders be discharged from custody.

Respectfully submitted,

Mervin Sanders

Mervin Sanders #06438 pro se

CERTIFICATE OF SERVICE

I, Mervin Sanders #06438, the undersigned authority have this day and date have cause to be mailed a true and correct copy of the forgoing and attached instrument to the following person(s).

Honorable Michael Taylor

Circuit Court Judge

Post Office Bos 549

Honorable Jimm Hood, Attorney General

Post Office Box 220

Jackson, Mississippi 39205

Respectfully Submitted,

Mervin Sanders

Mervin Sanders #06438

October 9, 2009

Mayor Frank Melton: From county lockup back to City Hall

RELEASED

Rick Gary/The Clarion-Ledger

Jackson Mayor Frank Melton arrives at his northeast Jackson home after being released Thursday evening from the Hinds County Detention Center.

Serial: 138671

IN THE SUPREME COURT OF MISSISSIPPI

No. 2007-M-00339

FILED

MAR 0 8 2007

IN RE: FRANK MELTON *Petitioner*

SUPREME COURT CLERK

The Court, having considered Defendant's Emergency Application for Extraordinary Relief Under Rules 21(c), 21(e) and 27 of the Mississippi Rules of Appellate Practice Requesting that this Court Enter an Order Vacating Criminal Arrest Warrant Issued by Judge Tomie Green, finds that it should be granted.

SO ORDERED, this the 8th day of March, 2007.

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CLARIONLED [illegible]

[redacted]

Mayor out of jail after court kicks judge off case

[illegible] is [illegible] interim mayor [illegible] would only last a [illegible]

City Council members fol[illegible] [illegible] Mayor Frank M[illegible]

[illegible]

[illegible] the city's embattled and contro[illegible]versial first-term mayor.

INSIDE

- Melton jail [illegible] 4A
- [illegible] pushes [illegible] 4A
- Court [illegible] judge's rulings 4A

Melton was released from the Hinds County Detention [illegible] on Thursday [illegible] after the court nullified Hinds County Circuit Judge Tomie Green's arrest warrant and removed her from Melton's bond revocation case.

The court gave no [illegible] removing her, though Melton attorney Dale Danks [illegible] motions seeking Green's recusal — questioned her fairness.

Melton, 57, had been jailed since early Wednesday after he left a local hospital, ending a weeklong wait for law enforcement to arrest him on charges he violated the terms of his probation on misdemeanor gun charges.

See MELTON, 4A

Dale Danks Jr., attorney for Mayor Frank Melton, speaks outside Melton's home.

[illegible]
released from jail

Melton: 'My sleep was best ... I've had in 6 months'

Rick Guy/The Clar[illegible]

Jackson Mayor Frank Melton walks up the driveway through the gates of his northeast Jackson home after speaking briefly to the media on Thursday.

From 1A

On Thursday, he avoided the media [illegible] was driv[illegible] [illegible] on to his home in northeast Jackson.

[illegible]

"It puts (Melton) above the law and sends a message to other defendants who violate their probation that the state Supreme Court can step in and [illegible]," Green said. "It [illegible] hurting the people of Jackson. The lawyers and the court made it about me and not about him. And I haven't committed any crime."

Hanks' [illegible] motion against Green was filed [illegible] and cited as grounds for the judge's recusal recent statements Green made to *The Clarion-Ledger.*

"We are very gratified and pleased that after a week's battle [illegible] to [illegible] hoping the city can now get back to being [illegible] the mayor [illegible] properly recuperate from the stress of heart surgery," Hanks said. "And the city as a whole can come back together and start addressing the needs of the city without these types of distractions."

Melton recently had double-bypass surgery in Texas.

City Attorney Sarah O'Reilly-Evans said Melton resumed his job as mayor immediately after his release, which rescinds an order he filed appointing Bluntson, Ward 1 councilman and a Melton backer, interim mayor.

Shortly after Bluntson was introduced at a news conference, the council's majority, in another news conference outside City Hall, called for the mayor to resign.

Melton said he was surprised the four council members called for him to quit: Council President Ben Allen, Ward 2 Councilman Leslie McLemore, Ward 6 Councilman Marshand Crisler and Ward 7 Councilwoman Margaret Barrett-Simon claimed Melton has severely failed the city.

Melton said he wants to work with them as he did for several months in the past, but will no longer let his "kindness" be taken as a weakness.

"For them to call for my resignation at this point in time, it tells you where their agenda is. Everything I try to start, they're going to stop," Melton said. "It is very clear to me that those four members of the council want me to fail. Without question, they want me to fail. They're not the only ones."

Allen said he thought Melton could redeem himself if he changed his ways, listened to solid advisors and got serious about being the mayor.

The four council members have begun a challenge that could force Melton to bring his department heads before them.

"One reason we went ahead is we don't think (Melton) will change. You don't understand. I have been pleading and cajoling with that man since he went into office," Allen said.

Melton intends to bring his department heads before the council for confirmation, though he doesn't expect those such as Fire Chief Todd Chandler to be confirmed. He has served for 18 months unconfirmed.

Crisler agreed with Allen that they have tried to work with Melton. But "at the end of the day, it's not us. It's him," Crisler said.

Next, the tough side of Melton will emerge, he said. There will be respectful dialogue, but the council won't be the only ones pointing fingers this time, Melton said.

"They have sat there for years and years and let this city get in terrible shape and expect me to do miracles in 18 months," Melton said. "I will d[illegible] thing I can to work with them [illegible] and legitimate way. But I am n[illegible] to have anyone disrespected."

A key Melton supporter, Councilman Kenneth Stokes, [illegible] tioned Melton soon will res[illegible] nighttime roadblocks and came[illegible] that put residents at ease.

Though Melton was bann[illegible] using police equipment and i[illegible] from carrying firearms, Stokes [illegible] presence is calming.

"I just hope that in the long [illegible] mayor will not be crushed by th[illegible] rience. He'll get back out there a[illegible] crime. That's what we need. W[illegible] crime fighter," Stokes said.

■

Staff writers Nicklaus Lo[illegible] Jimmie Gates and Andrew [illegible] contributed to this report.

PAGE 3

*2007 Miss. LEXIS 194, **

In Re: Frank Melton

2007-M-00339

SUPREME COURT OF MISSISSIPPI

2007 Miss. LEXIS 194

March 15, 2007, Decided

NOTICE: **[*1]** DECISION WITHOUT PUBLISHED OPINION

SUBSEQUENT HISTORY: Remanded by In re Melton, 2007 Miss. LEXIS 254 (Miss., Apr. 19, 2007)

PRIOR HISTORY: Hinds Circuit Court 1st District; LC Case #: 06-0-719; Ruling Judge: Tomie Green. In re Melton, 2007 Miss. LEXIS 177 (Miss., Mar. 8, 2007)

OPINION

EN BANC

Defendant's Emergency Application for Extraordinary Relief under Rules 21(c), 21(e) and 27 of the Mississippi Rules of Appellate Practice **[*2]** Requesting that this Court enter an Order Recusing Judge Tomie Green is granted. Order entered.

EXHIBIT–A

Danks, Miller, Hamer & Cory

An Association of Professional Corporations
Attorneys at Law

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Kenneth C. Miller
Eric T. Hamer
Michael V. Cory, Jr.
Eric W. Ray

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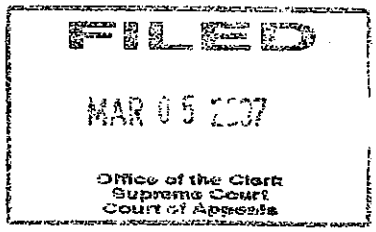
March 5, 2007



Via Hand Delivery
Betty Sephton, Clerk
Mississippi Supreme Court
Post Office Box 249
Jackson, Mississippi 39205-0249

Re: Frank Melton

Dear Ms. Sephton:

We are this day delivering for filing a Petition for Emergency, Extraordinary Relief under Mississippi Rules of Appellant Practice, Rules 21(e), 27 and 8(c). The Writ urges the Court to Stay an Arrest Warrant and Order the Recusal of Circuit Court Judge Tomie Green, or Stay the Arrest Warrant while Judge Green considers the Motion to Stay Arrest Warrant and Recusal that has this day been filed with the Hinds County Circuit Clerk and delivered to Judge Green. We have included copies of the Motion filed with Judge Green which incorporates the facts, arguments and authorities presented in this Writ. This matter concerns the elected Mayor of Jackson, Frank E. Melton who less than two (2) weeks ago underwent a double by-pass surgery.

Counsel for Mr. Melton, are available at the Court's discretion.

Yours very truly,

Dale Danks, Jr.

cc: Mayor Frank Melton
Honorable Joe Webster
Craig Washington, Esq.
Jim Hood, Attorney General
Merrida Coxwell, Jr., Esq.

ORIGINAL

IN THE SUPREME COURT OF MISSISSIPPI
NO. 2007-M-339

FILED
MAR 05 2007
Office of the Clerk
Supreme Court
Court of Appeals

IN RE: FRANK MELTON

DEFENDANT'S EMERGENCY APPLICATION FOR EXTRAORDINARY RELIEF UNDER RULES 21(e) AND 27 OF THE *MISSISSIPPI RULES OF APPELLATE PRACTICE* REQUESTING THAT THIS COURT ENTER AN ORDER RECUSING JUDGE TOMMIE GREEN AND VACATING THE CRIMINAL ARREST WARRANT ISSUED BY JUDGE GREEN, OR IN THE ALTERNATIVE, TO STAY THE EXECUTION OF THE WARRANT PURSUANT TO RULE 8(c) PENDING A FINAL DETERMINATION ON THE RECUSAL MOTION FILED IN THE UNDERLYING CIRCUIT COURT ACTION

Of Counsel:

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Facsimile: 601.948.7097

MOTION# 2007-589

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the Justices of this Court may evaluate possible disqualification or recusal.

Frank Melton, Defendant, Appellant.

Dale Danks, Jr., Kenneth C. Miller, Eric T. Hamer, Michael V. Cory of Danks, Miller, Hamer & Cory, attorneys for Frank Melton.

Merrida Coxwell, Coxwell and Associates, PLLC, attorney for Frank Melton

Jim Hood, Attorney General for the State of Mississippi.

Honorable Tomie T. Green, Circuit Court Judge for Hinds County, Mississippi.

Honorable Joe Webster, specially appointed Circuit Court Judge

SO CERTIFIED, this the 5th day of March, 2007.

DALE DANKS, JR., ESQ.

Comes now, Frank E. Melton, by and through his counsel, and files this Application for issuance of an Extraordinary Writ pursuant to Rules 21(e) and 27 of the Mississippi Rules of Appellate Procedure, and for a Stay pursuant to Rule 8(c), and in support thereof demonstrates the following:

I. SUMMARY OF RELIEF REQUESTED

Mr. Frank E. Melton respectfully requests that this Court grant the following Emergency Relief:

1. That Circuit Court Judge Tomie Green be recused from hearing any further or additional matters relating to the State of Mississippi v. Frank E. Melton, cause numbers 06-0-719 and 06-0-720, presently pending in the Circuit Court of the First Judicial District of Hinds County, Mississippi, including the alleged probation revocation of Frank E. Melton arising out of three (3) misdemeanor pleas on November 15th, 2006. (See attached as Exhibit "1").

2. That the Arrest Warrant (See attached as Exhibit "2") issued by Judge Green on March 1, 2007, be vacated or stayed pending the reassignment of the aforesaid causes to another Judge and until such time as the newly appointed judge can independently review the probable cause basis for the issuance of the warrant. Judge Green is a fact witness in this cause due to the reason she personally participated in plea discussions. Counsel for Frank Melton have filed a Motion requesting the transcription of the plea discussions with Judge Green and such transcript is not accessible to the defense at the time of the filing of this Writ.

3. Judge Green should immediately be recused based on the fact that on November 20, 2006, (See attached as Exhibit "3") she transferred all pending matters against Mr. Melton to the Hinds County Circuit Senior Judge explaining in her Order the existence of *ex parte* contact and

communications with persons outside the judicial system and outside the presence of counsel; further Judge Green stated she might be a witness in the future cases. In the Order (Exhibit "3"), Judge Green retained jurisdiction over plea negotiations that she participated in with Mr. Melton. These reasons alone require Judge Green's recusal.

4. Alternatively, Petitioner requests this Court to Stay the Execution of the Warrant issued by Judge Green, pending a final resolution of the Motion for Recusal filed in the underlying matter. Counsel for Mr. Melton have filed a Motion to Recuse and request for Judge Green to stay the arrest warrant simultaneously with the filing of this Extraordinary Writ. The relief sought from Judge Green is not practical based on her comments to the *Clarion Ledger* on March 3, 2007, wherein she states that Mr. Melton "would remain in jail while she allowed the State time to prepare." (See attached CL article as Exhibit "4").

II. PROCEDURAL HISTORY

Mr. Frank E. Melton is the Mayor of the City of Jackson, Mississippi, having been elected by the citizens in June 2005. Mayor Melton's present legal issues began on September 15th, 2006, when a Hinds County grand jury returned indictments against him. (See Exhibit "1"). The indictments that are the basis for this Extraordinary Writ include two misdemeanor counts and one felony count for unlawfully possessing and carrying a concealed handgun on public property, private property and an educational facility.

These cases were initially assigned to Judge Winston L. Kidd who recused himself on September 18, 2006. (Order; see attached as Exhibit "5"). The cases were subsequently assigned to Judge Tomie Green.

On September 28, 2006, Frank Melton turned himself in to the Hinds County Sheriff's

Department. At that time, Judge Tomie Green entered an Agreed Order Setting Bail and Conditions of Release and setting bail for the Defendant at fifty-thousand dollars ($50,000.00), which was immediately posted. (Agreed Order Setting Bail and Conditions for Release attached as Exhibit "6")

The trial of the charges alleging possession of a concealed weapon (indictments 06-0720CRD and 06-0719CRG) was set for November 15, 2006. (See attached as Exhibit "7"). Trial commenced as scheduled on November 15, 2006, and a jury was empaneled on the same day. On the morning of November 16, 2006, the Defendant filed an Extraordinary Writ with the Mississippi Supreme Court based on improper limitations on counsel for the Defendant during voir dire. (Writ attached as Exhibit "8" and *Voir Dire* transcript; attached as Exhibit "9").

On November 16, 2006, following extensive plea negotiations with the trial court, Mayor Melton pleaded guilty to the two misdemeanor gun possession charges and no contest to the lesser included misdemeanor offense with regard to the felony indictment.

With the Extraordinary Writ (Exhibit "8") still pending before this Court, Judge Green by Order dated November 20, 2006, (Exhibit "3") transferred other unrelated indictments pending against Mr. Melton to the Senior Circuit Judge for reassignment. In the transfer Order, Judge Green stated she had *ex parte* communications and was a potential witness in subsequent proceedings, yet Judge Green retained jurisdiction over Cause Number 251-0719 and 251-0720, solely for the purpose of enforcing the Court's Order pursuant to the plea agreement and probation requirements entered therein. (Exhibit "3"). Judge Green retained jurisdiction because of the existence of a sealed "Plea Agreement" that was personally negotiated by her and not a part of the formal sentencing record.

Following a request from the Senior Circuit Judge, this Court appointed Judge Webster to preside over the remaining charges. (See attached as Exhibit "10").

III. STATEMENT OF FACTS NECESSARY FOR AN UNDERSTANDING OF THE GROUNDS FOR RELIEF

1. Prior to the start of the trial on November 14, 2006, there were multiple conversations with the prosecutors from the Attorney General's office concerning a possible plea deal. After extensive discussions with these prosecutors, an agreement was reached which provided for the Defendant to plead guilty to two (2) misdemeanor counts and a *nolle prosequi* on the felony count with one (1) year non-reporting probation period.

2. At approximately 1:00 p.m. on November 14, 2006, the prosecutors and defense counsel went into chambers with Judge Green and advised her of the proposed plea agreement. The plea agreement was rejected by Judge Green. Following Judge Green's rejection of the proposed plea deal, Judge Green became actively involved in negotiating a plea agreement satisfactory to her, insisting on several additional conditions including, among other things, that Frank Melton be monitored with an ankle bracelet for a period of six (6) months. (See affidavits of Dale Danks, Michael Cory, and Paul Luckett; see attached Exhibits "11", "12", and "13" respectively).

3. Mr. Melton ultimately rejected the plea proposals from Judge Green and *voir dire* commenced. Following the completion of *voir dire* and the selection of the jury, the Court was recessed for the day. On the morning of November 15, 2006, before the trial was scheduled to resume, the Defendant filed an Emergency Extraordinary Writ (Exhibit "8") requesting the immediate stay of the trial and the recusal of the trial judge, based on her conduct during *voir dire*.

4. Prior to making opening statements on November 15, 2006, Judge Green summoned attorneys for the prosecution and defense to meet with her in her chambers. While in chambers, Judge Green, on her own, initiated and led further plea negotiations. While the Defendant does not

recall the exact sequence of these events without the benefit of the transcript from these proceedings, after some discussions with the prosecutors and counsel for the defendant, Judge Green requested to speak with the Defense Attorneys alone, which was agreed to by the prosecutors. After further fruitless plea negotiations which included Judge Green insisting, among other things, on Mr. Melton agreeing to wear an ankle bracelet, Judge Green asked to speak with the Defendant personally while in the presence of only the Defense Attorneys. During these plea discussions, Judge Green advocated to Frank Melton that he accept additional probation conditions which included the wearing of an electronic monitoring bracelet for a lesser period of time. During these negotiations with the trial judge, Mr. Melton was specifically advised by the Court that the plea agreement she was proposing would not affect Mayor Melton's ability to carry out the duties of the office of mayor; that he could still go where ever he wanted, including traveling to Texas. While the Trial Court advocated and encouraged the Defendant to accept an agreement to wear an ankle bracelet for a three (3) month period as a condition of probation, she assured the Defendant that this would not interfere with his ability to perform his duties as Mayor or his right to travel freely.

4. After prolonged plea negotiations directly with the trial court, Mr. Melton ultimately accepted a plea deal offered by the trial court which included, among other things, a twelve month supervised probation period with the Defendant wearing an ankle bracelet for monitoring purposes for a period of three months. The trial judge also agreed to keep certain conditions of the plea deal confidential and directed that the record of the plea negotiations be sealed. Thereafter the prosecutors were notified and advised of the complete substance of the plea deal negotiated and proposed by the trial court, and the prosecutors advised that they had no objection to the plea deal.

5. After Mr. Melton and the prosecutors agreed to the Court's plea deal, all parties appeared

in open court at which time the routine plea procedure was followed.

6. Thereafter, on November 25, 2006, the Court entered its Sentencing Order. (Sentencing Order; attached as Exhibit "14").

7. Following the formal sentencing on November 15, 2006, and within the time required, Mr. Melton reported to his probation officer, Dennis Grant, and the ankle bracelet was placed on him. During the course of this initial meeting, the probation officer advised Frank Melton that it was his responsibility to contact the probation officer every Monday by telephone and to see his probation officer once a month. Frank Melton also was advised to keep his probation officer up to date with where he was going and what he was doing and, in particular, if he left the state.

8. With regard to the remaining Indictments (See Exhibit "10") involving the damage done to the house on Ridgeway Street, on December 7, 2006, counsel for the District Attorney's office and counsel for the Defendant met with Judge Webster for a status conference. During the course of this status conference, counsel for the Defendant requested clarification concerning the Defendant's existing bond requirements. In response to this inquiry, Judge Webster specifically advised counsel for Mr. Melton that he had jurisdiction of the existing bond requirements. Judge Webster advised Mr. Melton's counsel that there was no prohibition against Mr. Melton being in the presence of minors, but instead, that the bond conditions only precluded Frank Melton from directly supervising minors other than his own relatives. Furthermore, in response to questions by Defense Counsel concerning Judge Webster's interpretation of the bond order, Judge Webster stated that the conditions of the bond did not in any way preclude Frank Melton from carrying out his duties as Mayor and using city and police equipment as he deemed appropriate in the course of his duties as mayor. Judge Webster also advised that he would handle any issues concerning alleged violations of the bond.

9. Judge Green relinquished jurisdiction over any bond conditions and Judge Webster has jurisdiction over the remaining indictments as well as the enforcement, interpretation, and modification of bond requirements. (See Exhibit "3").

10. On Thursday, March 1, 2007, Frank Melton was scheduled to leave the State for a Broadcast Music Inc., board meeting. Prior to this travel, Mr. Melton provided his probation officer with his itinerary and schedule. (See attached as Exhibit "15"). After receiving no response from his probation officer concerning his approval of this trip, and prior to leaving town March 1, 2007, Frank Melton called his counsel who advised him not to leave town until Frank Melton had confirmed with his probation officer that the trip was fine. After leaving another message, the probation officer called and advised that Frank Melton had to get his lawyer to get permission from Judge Green. Despite previous out of state travel being approved by the probation officer, this was the first time that Court permission was being required. Counsel for Mr. Melton then personally attempted to see Judge Green in her chambers and was advised by the Court administrator that she was on a conference call and was with someone but that he could wait. While waiting, counsel for Mr. Melton witnessed Sheriff McMillian go in to see Judge Green. Shortly thereafter, the Court Administrator advised counsel for the Defendant that he should submit any request he may have in writing. Following those instructions counsel returned to his office to send a letter to Judge Green requesting permission for Frank Melton to proceed with his travel plans. While drafting a letter, but prior to sending it to Judge Green, counsel learned from Sheriff's Deputy Steve Bailey that the subject Warrant had been issued. (See Exhibit "2").

11. The Warrant for the arrest of Frank Melton alleged the following specific probation violations: (1) staying out past curfew without prior permission or authority on 1/3/07 and 2/10/07;

(2) participating in unauthorized police raids on February 10, 2007 after curfew hours; (3) spending the night in the presence of minor children, on 1/3/07 and was out past curfew on 1/3/07; and, (4) failing to notify PCS of medical procedures, changes and conditions in a timely manner at request of the Court.

12. Although counsel has received no personal contact or information from Judge Green, she apparently has spoken with the *Clarion Ledger,* which has reported that according to Judge Green, Frank Melton is going to be arrested and that she would hold a hearing within two weeks of the his arrest to give State Attorney Jim Hood time to prepare. She is also quoted as stating, "I can't imagine Jim Hood getting together what he needs to get together in that type time by early next week." (See Exhibit "4").

13. After the purported curfew became an issue to Mr. Melton's counsel, on or about January 9, 2006, counsel telephoned the probation officer to inquire about the basis for any curfew. Mr. Melton's counsel was advised by the probation officer that he had nothing in writing from the Court establishing a curfew, but that it was "an unwritten policy". Furthermore, and irrespective of whether or not an enforceable curfew existed, Mr. Melton advised the probation officer of his activities and was not instructed by the probation officer to cease any of his activities.

14. One basis for the purported revocation is Mr. Melton's trip to Texas for a heart procedure. It was not until Mr. Melton got to Texas that he had an emergency by-pass surgery. This emergency surgery was outside of his control and the probation officer verbally pre-approved his travel plans, as had been the prior custom and practice. (See attached as Exhibit "16"). Mr. Melton advised the probation officer he would return on January 28, 2007, but in fact he could not return until February 4, 2007, due to emergency double by-pass surgery.

15. Counsel would also point this Court to the fact that Mr. Melton had the bracelet place on his leg November 16, 2006. By Judge Green's private, sealed agreement it should have been removed February 16, 2007.

IV. REQUEST FOR RECUSAL

As this Court is well aware, Canon 3.E of the Mississippi Code of Judicial Conduct provides in part that:

> (1) Judges should disqualify themselves in proceedings in which their impartiality might be questioned by a reasonable person knowing all the circumstances or for other grounds provided in the Code of Judicial Conduct or otherwise as provided by law, including but not limited to instances where:
>
> > (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

The Mississippi Supreme Court re-affirmed and expanded on this standard in Dodson v. Singing River Hospital System, 839 So.2d 530, (Miss. 2003). In Dodson, the Court held that a Chancellor should have recused himself from a case in which one party was represented by a firm of attorneys with whom the Chancellor had a number of ties. Among other things, the Court reaffirmed that recusal is required when "evidence presented...produces[s] a reasonable doubt as to a judge's impartiality. Id. At 3 (citing inter alia, Farmer v. State. 770 So. 2d 953, 956 (Miss. 2000), and Tubwell v. Grant, 760 So. 2d 687, 688 (Miss. 2000). The Supreme Court stated that "we must be forever mindful of our duty to guard jealously the public's confidence in the judicial process" and reversed the Chancery Court's judgment and remanded the case for a new trial before a different trial judge. Id. at 4.

Further, The Mississippi Supreme Court has stated that "[e]very litigant is entitled to nothing less than the cold neutrality of an impartial judge, who must possess the disinterestedness of a total stranger to the interest of the parties involved in the litigation, whether that interest is revealed by an inspection of the record or developed by evidence included in the record." Jenkins v. Forest County Gen. Hosp., 542 So.2d 1180, 1181-82 (Miss. 1988). The Mississippi Supreme Court expects that all trial judges will abide by the oath of office and "administer justice without respect to persons" while striving to "faithfully and impartially execute and perform all of their duties." In re Blake, 912 So. 2d 907, 917 (Miss. 2005). The Blake Court adopted a test requiring that one view all circumstances. Id. In other words, where a reasonable person, knowing all circumstances, would conclude there is prejudice of such a degree that it adversely affects the client, the judge should recuse himself. Id.

The Appellate Courts are being called upon increasingly to address questions of partiality at the trial court level. Recently, the Mississippi Supreme Court concluded a trial judge was in error not to recuse herself where her "statements indicate she has already determined that fault lies with the defendants." Mississippi United Methodist Conference v. Brown, 929 So.2d 907, 911 (Miss. 2006). Here, the Mississippi Supreme Court once again affirmed that "[i]mpartiality is viewed under the totality of the circumstances analysis using an objective reasonable person, not a lawyer or judge standard". Id., citing Hathcock v. Southern Farm Bureau Cas. Ins., 912 So.2d, 849 (Miss. 2005). "If a reasonable person, knowing all the circumstances, would harbor doubts about the judge's impartiality, he is required to recuse himself." Aetna Casualty and Surety Co. v. Berry, 669 So. 2d 56, 74 (Miss. 1996).

Immediate emergency recusal in this case is warranted for the following reasons:

A. The trial judge violated Rule 8.04(B)(4) of the *Uniform Circuit and County Court*

Rules by directly involving herself in and participating in the plea negotiations;

B. The trial judge is a material witness with respect to any revocation hearing;

C. The trial judge has already acknowledged a conflict in her Transfer Order; citing *ex parte* contact and extra judicial communications outside the presence of defense counsel and prosecutors, and stating that she could be a potential witness; Code of Judicial Conduct 3B(7), and;

D. Previous actions of the trial judge would cause a reasonable person knowing all the circumstances to harbor doubts about her impartiality to preside over any probation revocation hearing.

A. The trial judge violated Rule 8.04 B.4. UCCCR by personally participating in the plea negotiations

Judge Green personally participated in and directed plea discussions with Mr. Melton in violation of Rule 8.04 B.4. of the Uniform Circuit and County Court Rules. As this Court is aware, Rule 8.04 B.4. expressly states that "[t]he trial judge shall not participate in any plea discussion." Courtney v. State, 704 So.2d 1352 (Miss.1997). Fermo v. State, 370 So.2d 930 (Miss.1979). Despite this Rule, Judge Green encouraged Mr. Melton to enter into a plea and even discussed the terms she would accept after rejecting the State's offer the prior day. The terms and assurances that were made in the plea discussions with Judge Green, and the specific statements and assurances she gave to the Defendant concerning the effect of accepting the plea deal she was proposing on his ability to travel as well as carry out his duties as Mayor, now serve as the basis for the Warrant she signed. These actions, standing alone, require immediate recusal and stay of the arrest warrant Judge Green signed.

Furthermore, the fact that Judge Green actively participated in and explained the implications

of the plea bargain that she accepted calls into question her ability to fairly and impartially conduct a subsequent probation revocation hearing that necessarily involves the presentation of evidence concerning her own conversations and representations. Judge Green will be a necessary witness to the chamber discussions. See Brent v. State, 929 So.2d 952 (Miss. 2006) (holding that a judge who issued a search warrant cannot be the same judge to determine if the issuance of that warrant was constitutional).

Some of these terms and conditions, encouraged by Judge Green, are not contained in the Court's Sentencing Order but were made with Judge Green and were sealed by her. Counsel for Mr. Melton has requested a copy of the transcript from these sealed proceedings but has yet to receive a copy of the same or been advised by the trial judge when the same will be forthcoming. (See letter from Danks as Exhibit "17").

Under these circumstances, the trial judge fails the requirement that she be completely free from "personal knowledge of disputed evidentiary facts concerning the proceeding," and it is clear that a reasonable person, knowing all of the circumstances, would harbor doubts about her impartiality. Brent, Supra.

B. The trial judge is a material witness with respect to any revocation hearing

The direct and active participation in the plea agreements and assurances given by Judge Green to secure a plea bargain makes her a material witness to any hearing involving the actual conditions of probation and the sentencing order. To the extent there is any disagreement whatsoever concerning the actual terms of the probation that was agreed to and implemented in the trial court's Sentencing Order (and which is obvious based on the disparity between the alleged probation violations and the actual facts), the trial judge has clearly put herself in the position of being a

material witness. Mr. Melton is entitled to enforcement of the representations made by the Court's plea bargain. Lewis v. State, 776 So.2d 679 (Miss.2001).

C. The trial judge acknowledged the existence of a material conflict in her Transfer Order

On November 20th, 2006, only five (5) days after accepting Mr. Melton's guilty plea, and while the Writ of Mandamus (See Exhibit "8") was still pending before this Court, Judge Green transferred the additional causes to the Senior Circuit Court Judge for Hinds County stating that she had "improper contact and might be a witness." (See Exhibit "3"). Judge Green, in the same Order, claimed to retain jurisdiction of Mr. Melton's plea and probation while at the same time judicially acknowledging some form of *ex parte* contact and her status as a possible witness. While the nature and substance of this *ex parte* communication is unknown to Frank Melton and his counsel, a reasonable person would conclude that if Judge Green was not in a position to preside over the remaining indictment involving Frank Melton, then she is not in a position to preside over any revocation hearing or issue a warrant based on alleged probation revocation of which she may be a witness. Without question, Judge Green does not possess "disinterestedness of a total stranger to the interest of the parties involved in the litigation". Jenkins, supra at 1181-1182. For this reason alone, immediate recusal is required.

D. Previous actions of the trial judge would cause a reasonable person knowing all the circumstances to harbor doubts about her impartiality to preside over any probation revocation hearing

A reasonable person should also know about Judge Green's *animus* toward the City of Jackson on matters involving Mayor Frank Melton. Frank Melton, along with the City of Jackson Police Department detectives, Marcus Wright and Michael Recio, are under indictment with respect

to actions taken involving a drug house located on Ridgeway Street in Jackson, Mississippi. Not content to allow the criminal justice system to work, the purported owner of the Ridgeway Street duplex obtained a temporary restraining order (TRO) and then preliminary injunction prohibiting all City of Jackson employees and elected officials from exercising their First Amendment freedom of speech when discussing the Ridgeway Street duplex. This Court subsequently dissolved, on Summary Order, the injunction. (See attached as Exhibit "28").

Judge Green's treatment of the civil/injunctive component of the Ridgeway Street incident was unprecedented. Judge Green reportedly made numerous procedural and substantive errors, belittled counsel for the City and improperly shifted the burden of proof. See generally,Writ for Extraordinary Relief filed in the Supreme Court of Mississippi, No. 2006-m-01969, incorporated by reference. As a direct result of Judge Green's conduct towards the City of Jackson arising from an incident involving Mayor Frank Melton, the City filed a Writ of Mandamus seeking Recusal of Trial Judge. (Writ filed in the Supreme Court of Mississippi, 2006—01969 as Exhibit "19"). Apparently, instead of defending against the City's attempt to have Judge Green recuse herself, Judge Green transferred "all pending cases" involving the City of Jackson to the Senior Judge. (Order attached as exhibit "29").

In civil matters involving the City of Jackson and the actions of Mayor Frank Melton, Judge Green has removed herself. It stands to reason that where Judge Green finds it necessary to cease involvement in civil cases involving the City of Jackson and Frank Melton, it is likewise necessary for her to cease involvement in any criminal matters involving Frank Melton.

An additional example calling into question Judge Green's impartiality occurred during the course of the *voir dire* examination by Defense counsel at the underlying trial which resulted in three

(3) misdemeanor pleas. The Defendant filed an Extraordinary Writ concerning Judge Green improperly limiting the Defendant's constitutional and common law rights and as well as making demeaning comments directed at counsel, all of which warranted recusal consistent with the standards set forth in the case In re: Blake, 912 So.2d 907 (Miss. 2005). (See Exhibit "8", and Exhibit "9").

V. VACATING THE ARREST WARRANT

This Court should exercise Emergency Extraordinary Relief by vacating or staying the arrest warrant. This action is the only course which will eliminate the recusal taint associated with the warrant being issued by a trial judge who should be recused because of both the existence of legitimate issues concerning bias and lack of impartiality as well as because of the existence of the material conflict resulting from the trial judge being a material witness at any probation revocation hearing. Furthermore, a cursory review of the actual facts demonstrates conclusively that there has not been any probation violation.

The first contention from Affidavit of Probation Violation (See Exhibit "2") is that Frank Melton violated his probation when he was out past midnight on two (2) occasions without prior permission or authority. Mr. Melton contests the contention that a curfew was actually part of the plea agreement or subsequent Sentencing Order. Moreover, Mr. Melton was engaged in his duties as Mayor and he actually notified the probation officer of his expected activities on both January 3, 2007 and February 10, 2007. The probation officer never indicated that there was any problem with the Mayor engaging in any of those activities. (See attached Exhibit "18", letter to Probation Officer Grant and Exhibit "19", letter to Probation Officer Grant)

As to the contention that Frank Melton violated his probation when he "participated in

unauthorized police raids" on February 10, 2007, Mr. Melton was present during police activities on that date. However, the presence of Mr. Melton as Mayor during activities of the Jackson Police Department is not a violation of any condition of his probation. Furthermore, regardless of whether the Warrant is suggesting that it was not "authorized" for him to be present on these police raids, or whether the Warrant is suggesting that these police raids themselves were "unauthorized", neither of these occurrences in and of themselves constitutes a violation of any term of the probation.

As to the contention that Frank Melton violated his probation by spending the night in the presence of minor children on January 3, 2007, this activity does not constitute a violation of any condition of his probation. Furthermore, Judge Green transferred jurisdiction of the bond requirements to Judge Webster.

On January 9, 2007, Mr. Melton received a letter from Dennis M. Grant, his probation officer. The letter was copied to Judge Green, Judge Webster, Honorable Dale Danks and District Attorney Faye Peterson. (See attached as Exhibit "20"). It is obvious from this letter that the probation officer met with Judge Green regarding the clarifications of probation conditions. For the first time, Mr. Melton and his counsel were informed of probation conditions that heretofore did not exist.

The warrant also alleges that Frank Melton violated his probation by allegedly failing to timely notify his probation officer of certain changes in his medical procedures. This contention apparently relates to Frank Melton traveling to Texas on January 22, 2007, for the purpose of having a heart catheterization on January 24, 2007, and the insertion of a defibrillator on January 25, 2007. Prior to taking this trip for necessary medical purposes on January 19, 2007, Frank Melton provided to his probation officer a letter advising of the dates and purposes for his plans to travel to Texas, as well as the names of his physicians and contact numbers. (See attached as Exhibit "21",January 19, 2007

letter). Frank Melton also provided his probation officer with a signed medical authorization prior to departing for Texas. (See attached as Exhibit "22", Authorization). After arriving in Texas and undergoing the catheterization, it was determined by Frank Melton's medical doctors that it was necessary for him to actually undergo double by-pass heart surgery. This double by-pass procedure was performed on January 25, 2007. Four days after this surgical procedure, Frank Melton called the probation officer and reported the change in circumstances. (See attached as Exhibit "23" Cell phone records of Frank Melton, reflecting a call on January 29, 2007 from hospital after double by-pass surgery).

Despite these efforts to provide timely information to his probation officer, on January 31, 2007, Judge Green entered an Confidential Order Regarding Probation, advising that Mr. Melton "appeared to be in violation of his probation" because he allegedly had not provided contact information; had not returned to intensive supervision; had not advised his probation officer or the court of any change in his medical condition; and had not advised this probation officer or the court of his anticipated return date. The Order further provided that in order to be excused from any violation of this probation, Mr. Melton must provide sealed certification and provide certain documents from his cardiologist in Texas on or before February 2, 2007. (See attached as Exhibit "24" Confidential Order Regarding Probation).

Counsel for the Defense received the Confidential Order Regarding Possible Probation Violations by mail on February 2, 2007. In response, counsel for the Defendant faxed and mailed a letter to Judge Green providing additional information, advising that counsel only received the Order on the date compliance was requested by and requesting additional time if the Defendant was unable to fully comply with the Order. (February 2, 2007 letter, Ex. "25"). One or two days later counsel for

the Defendant received a call from Judge Green's court administrator advising that the Defendant had until February 6, 2007 to comply with the requirements of the Order. By letter dated February 6, 2007, counsel for the Defendant hand-delivered to Judge Green a copy of the medial records containing the information that was requested. (February 6, 2007 letter, Exhibit "26"). Also on February 5, 2007, the Defendant, Frank Melton, faxed a letter to his probation officer giving him additional information and advising him that he had returned to Jackson, Mississippi on February 4, 2007. (February 5, 2007 letter, Exhibit "27"). After this additional information was sent, nothing further was heard from the trial court or the probation officer with regard to this particular issue until the Warrant was issued. (Affidavit of Frank Melton, See Exhibit "30").

VI. IT IS NOT PRACTICABLE TO WITHOLD A RULING ON THIS APPLICATION PENDING RESOLUTION OF THESE MATTERS BY THE UNDERLYING TRIAL COURT AND SUBSEQUENT APPEAL

As this Court is aware, Frank E. Melton is the duly elected Mayor of Jackson, Mississippi. Without notice to Mr. Melton's counsel or the prosecutor, Judge Green has executed an Arrest Warrant for Mayor Melton charging a probation revocation. Judge Green personally participated in the plea bargain process in violation of URCCC, Rule 8.04 B.4. Judge Green personally met with and imposed conditions on Mr. Melton in chambers that formed part of the plea bargain. This makes Judge Green a witness to the terms and conditions of probations, which are not found in the Sentencing Order. (See Exhibit "14").

On November 20, 2006, Judge Green transferred jurisdiction of all other cases involving Mr. Melton to the Hinds County Senior Judge, retaining jurisdiction of the present case and all matters of the plea bargain and probation.

The Code of Judicial Conduct, Mississippi Supreme Court Cases, and other reasons found

herein required that Judge Green not participate in a revocation hearing and established without equivocation that Judge Green should not have been the judge who made a determination as to whether or not a probation violation occurred. As a fact witness, Judge Green should not have acted as a judge and executed an arrest warrant. Brent v. State, 929 So.2d 952 (Miss.2006).

Judge Green has publicly commented that Mr. Melton would remain in jail while she provided the State an opportunity to prepare. Apparently, without discussing this issue with the respective attorneys, Judge Green had pre-determined the issues. It should be clear from the foregoing that Judge Green has previously "transferred" all matters relating to Mr. Melton and the City of Jackson out of her jurisdiction. Though she may have styled the disposition of the cases a "transfer", it is in fact a clear and unequivocal basis of judicial disqualification and recusal.

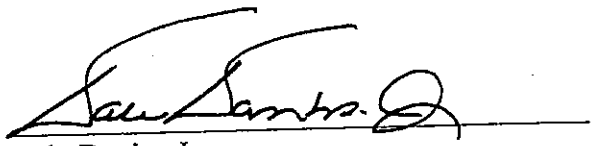
Mr. Melton returned to Jackson at the demand of his probation officer and against the advice of his Texas doctors. There is absolutely no clear and present danger that Mayor Melton poses either a flight risk or danger to the community. As set forth herein, the reasons listed for a possible probation revocation are suspicious at best. Judge Green as a potential fact witness to unknown and contested terms of probation that are not contained in the Sentencing Order, should not have executed an arrest warrant or have any official action as a trial judge.

VI. CONCLUSION

Counsel for Mr. Melton request this Court to either disqualify Judge Tomie Green and Stay the Arrest Warrant, or in the alternative stay Judge Green's Arrest Warrant until such time as she can act on the Motion to Recuse filed with her on Monday, March 5, 2007, and her actions in the event she should deny recusal, can be appealed to this Court. Presently, Mayor Melton has been hospitalized for heart problems. It is uncertain exactly when he will be released or when the Hinds

County Sheriff will arrest Mayor Melton. The Petitioner believes the facts and circumstances present a valid, imposing reason for immediate, emergency relief amounting to a stay of the arrest warrant and in the rucusal.

RESPECTFULLY SUBMITTED



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