

IN THE COURT OF CRIMINAL APPEALS  
FOR THE MIDDLE DISTRICT OF TENNESSEE  
AT NASHVILLE

PAUL DENNIS REID, )  
Petitioner-Appellant, )  
v. )  
STATE OF TENNESSEE, )  
Respondent-Appellee )

M2003-2687-CCA-R10-PD  
CCA No. \_\_\_\_\_  
Davidson County  
DEATH PENALTY CASE

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APPLICATION FOR PERMISSION TO APPEAL PURSUANT TO  
TENNESSEE RULES OF APPELLATE PROCEDURE, RULE 10

Petitioner-Appellant<sup>1</sup>, Paul Dennis Reid, pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure, applies to this Court for review of the order of the court below denying Petitioner-Appellant's motion to recuse Judge Cheryl Blackburn without a hearing in violation of Petitioner-Appellant's rights guaranteed under Article I, sections 8, 9, 16, and 17 of the Tennessee Constitution and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

INTRODUCTION

Petitioner-Appellant is a death sentenced inmate in the midst of his post-conviction proceedings. On September 2, 2003, counsel for Petitioner-Appellant filed a motion seeking recusal of the judge presiding over those proceedings, Judge Cheryl Blackburn, and requested a hearing on the matter. Judge Blackburn subsequently denied the motion to recuse without granting Petitioner-

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<sup>1</sup> Petitioner-Appellant has been declared indigent by the court below and, therefore, moves this Court to tax all costs associated with this appeal to the State of Tennessee.

Appellant a hearing on the matter, a hearing which he was fully entitled to under the law.<sup>2</sup> Further, in denying Petitioner-Appellant's motion to recuse, the court below applied the wrong legal standard.

Petitioner-Appellant now seeks permission to appeal that decision in this Court pursuant to Rule 10 of the Tennessee Rules of Appellate Procedure on the grounds that the court's failure to afford the Petitioner-Appellant an opportunity to be heard and present evidence in support of his motion and applying the wrong legal standard in denying the motion to recuse "so far departed from the accepted and usual course of judicial proceedings as to require immediate review." Tenn. R. App. Proc. 10 (a) (1). Further, the Petitioner-Appellant moves this Court to stay the lower court proceedings while this matter is pending.

#### PROCEDURAL HISTORY

In April 1999, the Petitioner-Appellant was convicted in the Criminal Court for Davidson County of two counts of first-degree murder and one count of especially aggravated robbery. He was sentenced to death for both of the first degree murder convictions. Those convictions and death sentences were upheld by the Court of Criminal Appeals and the Tennessee Supreme Court. State v. Reid, 91 S.W.3d 247 (Tenn. 2002).

Petitioner-Appellant has also been convicted on five other counts of first degree murder and one count of attempted first degree murder. He received death sentences for each of those first degree murder convictions as well. Those cases are currently pending on appeal before this Court.

The Petitioner-Appellant's convictions were spread over three trials, one in Montgomery

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<sup>2</sup> The motion to recuse also requested permission to seek interlocutory appeal if it was denied. The court below did not address the issue of interlocutory appeal in her order denying the motion. Since the motion was "denied," counsel avers that her request for interlocutory appeal was also denied.

County and two in Davidson County. The two trials in Davidson County, the first of which is the subject of the current post-conviction proceedings, were presided over by Judge Cheryl Blackburn.

### STATEMENT OF FACTS

On September 2, 2003, Petitioner-Appellant filed a motion seeking the recusal of Judge Blackburn from his post-conviction proceedings. (See motion to recuse, App. A) Included in that motion was a request for a hearing on the matter. The motion also requested that such hearing be heard by another judge. In an order dated Sept. 8, 2003, Judge Blackburn indicated that she agreed that another judge should be the one to hear the motion and that she would transfer the case if she granted a hearing on the matter. (See order dated Sept. 8, 2003, App. B) That hearing was never granted.<sup>3</sup>

On October 16, 2003, just forty-eight (48) hours after the state filed its' response<sup>4</sup>, the court entered a twenty-six (26) page order denying Petitioner-Appellant's motion to recuse.<sup>5</sup> (See order

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<sup>3</sup> To date, counsel for Petitioner-Appellant has filed ten (10) motions, nine (9) of which sought a hearing. The court has failed to grant a single hearing. The court has allowed "oral argument" on two (2) of the motions and allowed counsel to present testimony at a status conference detailing the Office of the Post-Conviction Defender's (PCDO) procedure in preparing case files, but routinely files orders denying Petitioner-Appellant's motions without allowing counsel an opportunity to be heard— often without requiring or allowing the state to respond.

<sup>4</sup> See state's response to motion to recuse, App. C.

<sup>5</sup> "When a judge goes beyond a mere determination of the legal sufficiency of a motion for disqualification, the court held in Management Corp. of America v Grossman (1981, Fla App D3) 396 So 2d 1169, that the judge should be removed from that case. The judge, in this civil action, responded to the motion for disqualification and the accompanying affidavits by presenting a ten-page order with 22 exhibits consisting of hundreds of pages. This effort by the judge was an attempt to refute the charge that the judge was prejudiced against counsel for a litigant. According to the court, if a judge looks beyond the legal sufficiency of a motion and

dated Oct. 16, 2003, App. D) The next morning, not knowing that the order denying the motion had already been entered, counsel for Petitioner-Appellant filed an addendum to the motion to recuse. Pursuant to an order of the lower court, counsel filed this information under seal. (See Addendum Motion to Recuse, filed under seal, App. E)

The order denying Petitioner-Appellant's recusal motion contained numerous factual findings regarding the allegations contained in Petitioner-Appellant's motion. All of these factual findings were made without giving Petitioner-Appellant a hearing at which his counsel could present evidence in support of his allegations. Instead, the Court below used extrajudicial facts to make factual findings that support the denial of Petitioner-Appellant's motion.

#### REASONS FOR IMMEDIATE APPEAL

Immediate appeal in this case is warranted because Judge Blackburn "so far departed from the accepted and usual course of judicial proceedings as to require immediate review" by refusing to allow the Petitioner-Appellant a hearing on his motion to recuse and applying the wrong legal standard in determining the recusal issue. Tenn. R. App. Proc. 10 (a) (1). This departure from the accepted and usual course of judicial proceedings is exacerbated by Judge Blackburn's factual findings in the order denying the motion in which she relied on extrajudicial facts without allowing Petitioner-Appellant an opportunity to present any evidence at all.

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attempts to refute charges of partiality and bias, the judge has exceeded the proper scope of inquiry. The court, in granting a writ of prohibition to prevent the judge from retaining jurisdiction in the case, stated that if a judge goes beyond the question of legal sufficiency, an intolerable adversary atmosphere is created." *Disqualification of Judge for Bias Against Counsel for Litigant*, 54 A.L.R.5th 575 (1997).

**A. Petitioner-Appellant Is Entitled to a Hearing on His Motion to Recuse**

Due process mandates the “*opportunity* to be heard ‘at a meaningful time in a meaningful manner.’” House v. State, 911 S.W.2d 705, 711 (Tenn. 1995) (citing Burford v. State, 845 S.W.2d 204 (Tenn. 1992)). This case, however, as a death penalty case, entitles Petitioner-Appellant to heightened due process. The qualitative difference between the death penalty and all other terms of punishment requires that a heightened standard of care and review apply where a person’s life is at stake. *See, e.g., Gardner v. Florida*, 430 U.S. 349, 357-358; 97 S.Ct. 1197, 1204; 51 L.Ed.2d 393, 402 (1977)(“Death is a different kind of punishment.”). The court below fundamentally failed to protect Petitioner-Appellant’s rights in this regard.

A party is entitled to a hearing on a motion to recuse if facts alleged in the motion state a ground for recusal. State v. Connors 995 S.W.2d 146, 149 (Tenn. Crim. App. 1998), no perm. app. applied for. The Petitioner-Appellant met or exceeded that standard and was, therefore, entitled to a hearing on the motion. (See Motion to Recuse, App. A)

In Petitioner-Appellant’s motion to recuse Judge Blackburn, he alleged that

she acted improperly and demonstrated bias in arriving at her previous determination of an issue at the center of these post-conviction proceedings; an appearance of impropriety and prosecutorial bias exist as a result of previous employment at the district attorneys’ office and close working relationship with the prosecutor representing the state in these proceedings, and an appearance of impropriety and actual bias has been exhibited against counsel for Petitioner.

(Id.) These allegations, discussed in more detail below, assert sufficient grounds that would warrant Judge Blackburn’s recusal. Thus, Petitioner-Appellant was entitled to a hearing on his motion to recuse.

***1. Inappropriate Conduct And Bias Against Petitioner-Appellant in Determining***

### *Competence*

In his motion to recuse, Petitioner-Appellant alleged that Judge Blackburn acted improperly and demonstrated bias against him in arriving at her determination of Petitioner-Appellant's competence. (Id.) This allegation alone should have warranted Petitioner-Appellant a hearing on his motion.

Despite Petitioner-Appellant's long history of severe mental illness, trial counsel for Petitioner-Appellant did not allege that Petitioner-Appellant was incompetent to stand trial in the proceedings that are at issue in these post-conviction proceedings<sup>6</sup>. In both of Petitioner-Appellant's later cases, trial counsel did allege that Petitioner-Appellant was incompetent to stand trial. Judge Blackburn held a hearing on the issue in Petitioner-Appellant's third trial.<sup>7</sup>

Prior to the beginning of the competency hearing in the third trial, Judge Blackburn appointed Dr. Keith Caruso as an expert for the court to examine Mr. Reid. Dr. Caruso opined that Mr. Reid was not competent to stand trial. (See attached report of Dr. Caruso, App. F) Judge Blackburn apparently was not satisfied with that opinion and sought out another expert to examine Mr. Reid, appointing Middle Tennessee Mental Health Institute (MTMHI) to examine Mr. Reid. MTMHI concluded that Mr. Reid was competent to stand trial. (See MTMHI report, App. G)

Counsel for Petitioner-Appellant alleged that this expert shopping was inappropriate and demonstrated bias against Petitioner-Appellant. (Motion to Recuse, App. A) Counsel alleged that it was not only inappropriate for Judge Blackburn to disregard Dr. Caruso's opinion and seek one

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<sup>6</sup>Counsel for Petitioner-Appellant intends to raise this as an issue of ineffective assistance of counsel in these proceedings.

<sup>7</sup> Davidson County case no. 97-C-1836.

that agreed with her own opinion, but also that this substitution was made more egregious by virtue of the fact that Judge Blackburn was formerly employed as a psychological examiner by MTMHI.<sup>8</sup> (Id.)

The court below made numerous subjective factual findings with regard to these allegations in its order denying Petitioner-Appellant's recusal motion. (See Order, App. D) In making some of those findings, the court employed findings it made in prior orders to dismiss Petitioner's allegations of impropriety and bias. For example, the court included language from its order denying Petitioner's motion for a new trial as follows:

Because of the inconsistencies in the experts' conclusions, the Court believed it would be helpful for the defendant to undergo an additional evaluation.

*Id.*, at page 6. The court further quoted from that same order:

First, although Dr. Caruso is obviously an intelligent man and a well-qualified psychiatrist, the Court had concerns regarding the accuracy of some of his findings.

*Id.*, at page 6-7. The court concluded:

The Court finds that this explanation regarding the post-competency hearing proceedings and the previously-filed order's explanation regarding the competency hearing are more than adequate to dispel any notion that the Court's actions were improper.

*Id.*, at page 10. (footnote omitted.)

Petitioner submits that such subjective findings are wholly inappropriate as Petitioner-Appellant was not able to call any witnesses to testify or present any other evidence to the contrary.

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<sup>8</sup> In her order denying, Petitioner-Appellant's motion, Judge Blackburn denies being employed by MTMHI. She was, however, employed as "a program coordinator for the Forensic Services Section, Tennessee Department of Mental Health and Mental Retardation [now the Department of Mental Health and Developmental Disabilities (DMHDD)]" from 1975-79. (Aff. of Cheryl Blackburn, App. H) MTMHI is one of the regional mental health facilities operated by the DMHDD.

*2. Prosecutorial Bias Resulting From Judge Blackburn's Close Relationship With Tom Thurman and His Participation in Her Campaign.*

Once again, in denying Petitioner-Appellant a hearing on his motion to recuse, Judge Blackburn has denied him the opportunity to present testimony and other evidence in support of his allegations regarding the relationship between Tom Thurman and Cheryl Blackburn. (Motion to Recuse, App. A) In her order denying the motion, Judge Blackburn correctly states the law that the mere fact that she is a former prosecutor is not sufficient grounds to warrant recusal. (Order, App. D) However, counsel for Petitioner-Appellant alleged more than that.

The motion to recuse alleged that Judge Blackburn was biased against the Petitioner-Appellant and in favor of the prosecution because she and Tom Thurman, the prosecutor handling this case, had a close working relationship. (Motion to Recuse, App. A) The issue is not whether Judge Blackburn ever worked as a prosecutor, but the relationship that she built with Mr. Thurman during her seventeen (17) years of working closely with him at the Davidson County District Attorney's Office.

This allegation alone should have been sufficient to warrant a hearing on the issue. *Compare Kinard v. Kinard*, 986 S.W. 2d 220, 229 (Tenn. Ct. App. 1998) ("When a motion for disqualification based on a judge's former association with a party's lawyer is filed, the totality of the circumstances should be examined, including the following factors: (1) the nature and extent of the prior association, (2) the length of time since the association was terminated, (3) the possibility that the judge might continue to benefit from the relationship, and (4) the existence of personal or social relationships springing from the professional relationship.") *with State v. Connors*, 995 S.W.2d 146,



149 (Tenn. Crim. App. 1998)(if the allegations contained in a motion to recuse would give rise to grounds for recusal then party entitled to hearing).

Filed with the State's response is an affidavit from Mr. Thurman in which he provides a little more detail into the working and personal relationship that exists between Judge Blackburn and him. (State's response, App. C) Counsel for Petitioner-Appellant was entitled to an opportunity to explore the factual issues surrounding this claim in more detail through testimony at a hearing on the matter. The fact that a hearing was denied in the face of these allegations is a departure from the accepted and usual course of judicial proceedings.

**THE REMAINDER OF THIS SECTION IS BEING FILED UNDER SEAL PURSUANT TO A N O R D E R OF THE COURT BELOW. (ORDER, APP. B) THE DOCUMENTS FILED UNDER SEAL HAVE BEEN SERVED ON OPPOSING COUNSEL.**

***3. Former Allegations of Misconduct on the Part of Judge Blackburn and Bias Against Counsel for Petitioner-Appellant***

In his motion to recuse, Petitioner-Appellant alleges that

a conflict of interest, or, at the very least, an appearance of impropriety and possible source of bias against the PCDO [Office of the Post-Conviction Defender] exists because the PCDO has previously alleged prosecutorial misconduct against Judge Blackburn as a result of her representing the state in the cases of Byron Black and Charles Wright, both of whom received death sentences.

(Motion to Recuse, App. A) This allegation that Petitioner-Appellant's current counsel<sup>9</sup> previously alleged professional misconduct the judge sitting on this case should have been sufficient to warrant

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<sup>9</sup> Marjorie Bristol and Nicholas Hare who have been assigned by the PCDO to represent Mr. Reid were not employed there at the time that the allegations of prosecutorial misconduct were alleged against Judge Blackburn. However, it is the PCDO that is appointed to represent him, not Ms. Bristol and Mr. Hare individually.

a hearing to allow Petitioner- Appellant to present evidence in regards to it. *See Connors*,995 S.W.2d at149.

The motion to recuse also raised the issue of Judge Blackburn's bias against counsel for Petitioner-Appellant, Ms. Bristol:

Although the post conviction proceedings in this case are scarcely a few months old, Judge Blackburn has inappropriately disparaged and denigrated counsel, both verbally and in written orders. Judge Blackburn has belittled counsel, opining that counsel has a "troubling habit of wasting time addressing insignificant issues." Order, July 24, 2003. Judge Blackburn has, also, written that "[w]ith regard to counsel's repeated assertions that she is unable to meet the Court's deadlines, the Court notes that she could accomplish the assigned tasks more quickly if she would refrain from filing unnecessary and/or repetitious motions." *Id.*

(Motion to Recuse, App. A) (footnotes omitted) These accusations alone raise a genuine issue that would warrant Judge Blackburn's recusal. *See, e.g., Livingston v. State*, 441 So.2d 1083, 1087 (Fla. 1983)(reversing first degree murder conviction and death sentence because Judge failed to recuse himself despite prejudice against defendant's attorney). Thus, Petitioner-Appellant was entitled to a hearing on the motion to recuse. *See Connors*,995 S.W.2d at149.

**B. The Court Below Applied the Wrong Legal Standard In Denying Petitioner-Appellant's Motion to Recuse.**

The appropriate legal standard for deciding whether recusal is warranted is "when a person of ordinary prudence in the judge's position . . . would find a reasonable basis for questioning the judge's impartiality." *Alley v. State*, 882 S.W.2d 810, 820 (Tenn. Crim. App. 1994). Throughout the order denying the Petitioner-Appellant's motion to recuse, the court makes factual assertions, based almost entirely on extrajudicial facts, to support a subjective conclusion that recusal is not

warranted.<sup>10</sup> Nowhere in the order, however, is there an analysis of the appropriate objective standard that applies to recusal determinations. There are a couple of blanket assertions that the Court's impartiality cannot reasonably be questioned and a final paragraph that concludes :

This Court has no doubt whatsoever that it is capable of presiding impartially in this matter. Moreover, a person of ordinary prudence would not find a reasonable basis for questioning the Court's impartiality. Therefore, for all of the previously-discussed reasons, the Court denies counsel's request that the Court recuse itself from this case.

(Order, App. D)

Further, the applicable legal standard in deciding recusal issues mandates that the "person of ordinary prudence" knowing and understanding all of the facts would reasonably question whether bias exists. Alley, 882 S.W.2d at 820. In the order denying Petitioner-Appellant's motion to recuse, the court below addresses each allegation *seriatim* and dismisses them out of hand. (Order, App. N) The court, however, failed to examine the cumulative effect that each of the allegations would have on "a person of ordinary prudence."

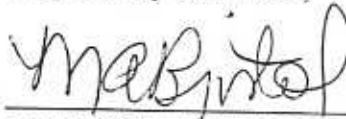
WHEREFORE, for the reasons enumerated above, the Petitioner-Appellant applies to this Court for interlocutory review of the denial of his Motion to Recuse on the grounds that the court below so far departed from the accepted and usual course of judicial proceedings in refusing to allow the Petitioner-Appellant a hearing on and by applying the wrong legal standard in denying the motion. Petitioner-Appellant further requests a stay of the lower court proceedings while this

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<sup>10</sup> Obviously, if Judge Blackburn had any concerns whether she could personally be objective in this case, she should recuse herself whether recusal would be warranted in applying the objective standard or not. See Lackey v. State, 578 S.W.2d 101, 104 (Tenn. Crim. App. 1978)

matter is pending before this Court.

Respectfully Submitted,



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#### CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copies of this Application for Permission to Appeal pursuant to Rule 10 has been mailed, 1<sup>st</sup> class postage pre-paid, to Deputy District Attorney General Tom Thurman, Washington Square, Suite 500, 222 Second Avenue North, Nashville, Tennessee 37201 and to Paul Summers, Attorney General, 425 Fifth Ave., N. 2<sup>nd</sup> Fl., Nashville, TN 37243 on this 7<sup>th</sup> day of November, 2003.



Marjorie A. Bristol