No. 2015-2260-C1

THE STATE OF TEXAS,	)	**19TH DISTRICT COURT**
	)	
Plaintiff,	)	**McLENNAN COUNTY,**
	)	**TEXAS**
v.	)	
	)	
XXXX XXXX BERGMAN,	)	
	)	
Defendant.	)	
	)	

MOTION TO RECUSE JUDGE RALPH STROTHER

Generally speaking a judge should recuse himself in any proceeding in which: (a) his impartiality might reasonably be questioned; or (b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Tex. R. Civ. P. 18b.

I. BACKGROUND

A. Judge Strother Continues to Make Comments to the Media about Issues that Have the Potential to Be Litigated Before Him.

There have been at least two instances in which Judge Strother has made comments to the *Waco Tribune Herald* regarding legal issues potentially related to the Twin Peaks' cases which had the potential to come before him for

determination. Such public comments were highly inappropriate.

First, many believed that the Twin Peaks' cases would be decided by the first non-"pick-a-pal" grand jury. Judge Strother chose Waco Police Detective James Heard as the foreman of that grand jury. Knowing that the selection of a Waco Police detective as the grand jury foreman that might pass on the Twin Peaks case could be problematic, the *Waco Tribune Herald* questioned Judge Strother about the choice. Judge Strother responded by stating that the selection was totally proper. He is quoted as saying, "Who is better qualified in criminal law than somebody who practices it all the time?"[1] Judge Strother made these public comments despite the fact that he knew or should have known that the issue of Detective Head serving as the grand jury foreman would likely result in motions to quash being filed under the "implied bias" doctrine.[2] Had such motions been filed, Judge Strother would have had to rule on such motions.[3]

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[1]"Waco Police Detective Named Foreman of Grand Jury that may Hear Twin Peaks cases," *Waco Tribune Herald* (July 8, 2015) (Attachment A hereto). This quote was also repeated in an Associated Press article and reported in papers throughout the nation.

[2]*See, e.g., See, e.g., Smith v. Phillips*, 455 U.S. 209, 222 (1982) (Discussing "implicit bias" in jury selection); *Brooks v. Dretke*, 444 F.3d 328 (5th Cir. 2006) (same)

.

[3]As an aside, Detective Head allegedly stated that he was "not really' involved in the Twin Peaks investigation. *See* Attachment A. That statement was demonstrably false. In fact, Detective Head assisted in questioning those arrested on May 17, 2015 and directed other members of the Waco Police Department to assist in the questioning. He likewise ran "records checks" of many of those arrested and actively participated in the search of the motorcycles found at Twin Peaks. *See* Attachment B hereto.

Second, Judge Strother was well aware that several Twin Peaks' defendants were demanding speedy trials. Still, after District Attorney Abelino Reyna filed his "Disclosure of the Existence of Federal Evidence, Not in Its Possession or Control," Judge Strother proceeded to give an interview to the *Waco Tribune Herald* in which he is quoted as saying, "'I don't think we can move forward in any of our cases until some kind of resolution or understanding is reached regarding the situation with the federal indictment in San Antonio.'"[4] Judge Strother made such comments despite the fact that Mr. Bergman and others were demanding speedy trials and, most importantly, he made such comments when he knew or should have known it was likely that those defendants would oppose any delays and that he would be required to rule on such oppositions.

B. Judge Strother Lends His Office to the District Attorney's Office

The indictment against Mr. Bergman has been pending since November 2015. Nevertheless, despite rushing the case to the grand jury, the State was not ready to try Mr. Bergman nor any of the other Twin Peaks' defendants. While defendants were forced to wait until the District Attorney's Office decided it was ready to try the cases it rushed to indict, the cases were set for regular

[4]Attorney Seeks Speedy Trials for Two Twin Peaks Bikers," *Waco Tribune Herald* (April 21, 2017) (Attachment C hereto).

"announcements" and the Twin Peaks' defendants were *not* required to be present for those "announcements."

Nevertheless, on or about January 6, 2017, the District Attorney's Office apparently secured DNA warrants for many of the defendants. Rather than have a peace officer serve the warrants on the defendants, the District Attorney's Office apparently convinced Judge Strother to simply order all of the defendants to appear in court. Thus, on February 13, 2017, the District Attorney's Office (*not* the court) sent counsel an email informing them of Judge Strother's *ex parte* order and ordering the defendants to appear in court for the first time in over a year on only three days notice:

> **Judge Strother is ordering that you and your client appear for the Status Docket on Thursday February 16th, 2017. The client must appear and the Announcement Form must be signed and turned into the Court by 1pm.**

Attachment D hereto (emphasis in original).[5] Two days later, counsel received an email from Judge Strother's court staff on this issue:

> **To clear up confusion, Judge Strother had and is ordering Attorneys and their clients to appear at the status dockets this month. Reset notices have gone out and cases are set at 1:30 pm.**

[5]When the Court was informed that Mr. Bergman was out of town on February 16, Undersigned Counsel was directed to coordinate with the District Attorney's Office. It was agreed between counsel and the District Attorney's Office that Mr. Bergman could appear on February 17.

> **Please come to the 19th District Court Coordinators Office, Room 302; you will be instructed on where to report in the event we are still in trial.**

Attachment E hereto (emphasis in original). Apparently, when most of the defendants arrived on February 16, 2017 they were directed to the District Attorney's Office. When Mr. Bergman arrived on February 17, 2017 he was directed to a conference/jury room where his DNA was taken.

Since that time, through an Open Records Act request by Susan Criss, counsel for Rolando Reyes, a more complete picture of what occurred behind the scenes was developed and it is clear that Judge Strother simply lent his office to the District Attorney's Office for the purpose of executing the DNA warrants. Indeed, on January 6, 2017, the day the DNA warrants were secured from another judge, there is an email from Judge Strother's court staff to an Assistant District Attorney requesting an *ex parte* meeting between the Judge and the District Attorney's Office. *See* Attachment F hereto ("Judge wants you to come talk to him about the TP order?") Moreover, at least one defense attorney was apparently told by Judge Strother's court staff that **"this docket has nothing to do with Judge Strother and the DA is requiring some defendants to appear."** *See* Attachment G (emphasis added).

Simply put, there was absolutely no reason for this "DNA docket" order from the Court other than to assist the State in executing the DNA warrants.

C. Judge Strother Continues to Play Musical Chairs with the Trial Schedule So the District Attorney's Office Case Can Lead with the One it "Want[s] to Go on First."

Mr. Bergman filed his first Speedy Trial Demand on or about November 12, 2015. He filed his second Speedy Trial Demand on or about February 23, 2016. He filed his third Speedy Trial Demand on or about April 27, 2017. The reason Mr. Bergman has been adamant about his asserting his Speedy Trial Acts is that it is clear from his examining trial that the government will be unable to prove the charges asserted against him. Indeed, the government's witness at the examining trial essentially asserted that, contrary to law, Mr. Bergman's mere presence at Twin Peaks made him guilty:

> Q. [By counsel for Mr. Bergman] What acts did he take in pursuance of participating in the violence that day?
>
> A. [By DPS Trooper Steven Schwartz] By arriving with the Bandidos, showing support colors in his official attire, his cut, which is an official support group for the Bandidos, *his mere presence*, in my opinion, was show of support for the Bandidos under the increased tensions that were showing that day.

Examining Trial Tr. at 66 (emphasis added).

Nevertheless it is clear that the State was adamant about trying Jacob

Carrizal first and, as a result, Judge Strother has engaged in a game of musical chairs to accommodate the State's objectives.

> MR. REYNA: Let me reiterate, Judge, that we do want to try Jake Carrizal first.[6]
>
> * * * *
>
> THE COURT: Mr. Reyna, you-all are saying, of all the Twin Peaks cases, this is the one you-all want to go on first?
>
> MR. REYNA: Yes, Sir.
>
> THE COURT: All right....

See Attachment H hereto. Indeed, in order to accommodate the District Attorney's preference, Judge Strother has "bumped" at least two trials (Cody Ledbetter and Thomas Landers) that had trial dates prior to the current Carrizal setting. Moreover, he has now moved at least one of those trial settings (Landers) so that it now conflicts with Mr. Bergman's trial setting despite Mr. Bergman's repeated speedy trial demands.

In attempting to accommodate the District Attorney's Office, Judge Strother has acted in complete disregard of the speedy trial rights of those defendants who have asserted those rights and of the trial schedule of defense counsel. Moreover,

[6]There is no indication of this desire ever being iterated in the first place except, perhaps, in an *ex parte* proceeding.

the Court has acted with complete disregard to the schedules of other state and federal courts because counsel has previously had to inform those courts that they were not available for the dates the Twin Peaks' trials had been set for their clients.

II. DISCUSSION

The United States Supreme Court has held that a violation of the right to an impartial judge is structural error that defies harm analysis. *Arizona v. Fulminate*, 499 U.S. 279, 309 (1991). As one Texas judge observed, "the impartial standard has been adopted in order that the public, *i.e.*, the person on the street, might have confidence in the judiciary and to protect judges from unjustified complaints about their being partial in their decision." *Aguilar v. Anderson*, 855 S.W.2d 799, 804, 805 (Tex. App.–El Paso 1993) (Osborn, J., concurring).

Consequently, when deciding recusal, courts use a reasonable person test, evaluating the motion from a disinterested person observer's standpoint. *See Ex Parte Ellis*, 275 S.W.3d 109, 116 (Tex. App.–Austin 2008). Indeed, "'the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial.'" *Kniatt v. State*, 239 S.W.3d 910, 915 (Tex. App.–Waco 2007), *quoting, Burkett v. State*, 196 S.W.3d 892, 896

(Tex. App.–Texarkana 2006).

A. Judge Strother Continues to Make Comments to the Media about Issues that Have the Potential to Be Litigated Before Him.

Texas Judicial Cannon 3(B)(10) provides:

> A judge shall abstain from public comments about a pending or impending proceeding which *may* come before the judge's court in a manner which suggests to a reasonable person the judge's probable decision on any particular case. (emphasis added)

The comments by a United States Court of Appeals when disqualifying a judge based upon her public comments to the media are particularly instructive:

> This appearance of partiality by Judge Scheindlin at the *Daniels* hearing was exacerbated as a result of interviews she gave to the news media during the course of the *Floyd* litigation. Cases involving public comment by a presiding judge, other than statements in open court, are infrequent. As the First Circuit has remarked, "[j]udges are generally loath to discuss pending proceedings with the media." Of course, not every media comment made by a judge is necessarily grounds for recusal. We note that Judge Scheindlin did not specifically mention the *Floyd* or *Ligon* cases in her media interviews. However, a judge's statements to the media may nevertheless undermine the judge's appearance of impartiality with respect to a pending proceeding, even if the judge refrains from specifically identifying that proceeding in his remarks to the media. Because context is always critical, the relevant question at all times remains whether, under the circumstances taken as a whole, a judge's impartiality may reasonably be called into question. Because there is no scienter requirement in section 455,21 the test is not how a judge intended his remarks to be understood, but whether, as a result of the interviews or other extra-judicial statements, the appearance of

impartiality might reasonably be questioned.

* * * *

> While nothing prohibits a judge from giving an interview to the media, and while one who gives an interview cannot predict with certainty what the writer will say, judges who affiliate themselves with news stories by participating in interviews run the risk that the resulting stories may contribute to the appearance of partiality.

Ligon v. City of New York, 736 F.3d 118*,* 126 (2d Cir. 2013). Meanwhile in Texas a trial judge was recently recused mid-trial for placing posts on her Facebook page describing the case over which she was presiding. *In re Slaughter*, 480 S.W.3d 842, 847 (Special Ct. of Rev. Appointed by Tex. S. Ct. 2015).

Here, Judge Strother had blatantly violated the Texas Judicial Cannons and, while doing so, created a situation where his impartiality could certainly be open to question by a "a reasonable member of the public at large." Indeed, on at least two occasions he voluntarily made statements to the *Waco Tribune Herald* on matters which *could* have come before in a manner which would have suggested his probable decision on the issues.

First, as noted above, it was widely anticipated that Waco Police Detective Head might sit as the foreperson of the grand jury considering the Twin Peaks' cases. Nevertheless, despite the fact that any judge should have been able anticipate that defendants might seek to challenge such an arrangement (an

arrangement of Judge Strother's own making), Judge Strother opined to the newspaper that, in his view, this was not only legally proper but a good thing! In other words, he made public comments indicating that, if he was asked to decide the issue about Detective Head being foreman of the grand jury, he would decide that issue against the defendants.

Second, despite knowing that several defendants, including Mr. Bergman, had made speedy trial demands, Judge Strother felt the need to make public comments regarding the alleged ability of his court to comply with those demands in light of a pleading filed by the State. In other words, Judge Strother made public comments, without any hearing, that he believed the State's "Notice" trumped Mr. Bergman's continually asserted speedy trial rights.

B. Judge Strother Lends His Office to the District Attorney's Office

As noted above, not only did Judge Strother use his judicial authority to assist the State in executing its DNA warrants, but he appears to have engaged or attempted to engage in *ex parte* communications in order to do so.

First, it would appear obvious that a judge who assists the State in executing its warrants does not manifest that neutrality and detachment demanded of a judicial officer. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 326 (1979). Indeed,

"[w]hatever else neutrality and detachment might entail, it is clear that they require severance and disengagement from activities of law enforcement." *Shadwick v. City of Tampa*, 407 U.S. 345, 350 (1972).

Second, it would likewise appear obvious that a judge should not engage in *ex parte* communications. *See, e.g., Barnes v. Whittington*, 751 S.W.2d 493, 495, n. 1 (Tex. 1988). *"Ex parte* communications are prohibited because they are inconsistent with the right of every litigant to be heard and with maintaining an impartial judiciary. When a judge takes the side of one party, whether expressly or implicitly, the court creates an additional opponent in the courtroom for the other litigant." *Abdygapparova v. State*, 243 S.W.3d 191, 208 (Tex. App.–San Antonio 2007).

The bottom line is that judges are obligated to act with impartiality. *See Ex Parte Ellis*, 275 S.W.3d at 116. A judge fails to do this when he engages in *ex parte* communications with one party to a contested case and exhibits bias related to those communications. *See e.g. Abdygapparova* 243 S.W.3d at 208-10 (*Ex parte* communications became strong evidence of bias and partiality). It is for this reason that Texas Judicial Cannon 3(B)(10) provides:

> A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte

> communications or other communications made to the judge outside the presence of the parties between the judge and a party, an attorney, a guardian or attorney ad litem, an alternative dispute resolution neutral, or any other court appointee concerning the merits of a pending or impending judicial proceeding. A judge shall require compliance with this subsection by court personnel subject to the judge's direction and control.

"Here, [Judge Strother] knew or *should have known* that" his conduct in communicating or attempting to communicate with the State *ex parte* and lending his office to assist in executing search warrants secured by the State from another judge was improper. *Abdygapparova* 243 S.W.3d at 209.

C. Judge Strother Continues to Play Musical Chairs with the Trial Schedule So the District Attorney's Office Case Can Lead with the One it "Want[s] to Go on First."

Generally courts takes steps to prohibit parties from manipulating trial schedules. *See, e.g., United States v. Pollani*, 146 F.3d 269, 272 (5th Cir. 1998). In this case, however, Judge Strother's has continued to assist the State in manipulating the trial schedule of the Twin Peaks' defendants. This is so, even despite the fact that Judge Strother has had to "bump" defendants who have filed speedy trial demands and has displayed absolutely no concern with what this does to the trial schedules of other state and federal judges.

The only reason for Judge Strother's machinations seems to be the State's expressed desire to try Jake Carrizal first. Apparently this was iterated to Judge

Strother at one point in time, possibly *ex parte*, and then "reiterated" to him at a hearing. The State, as a matter of strategy, has made clear that "of all the Twin Peaks cases, [Carrizal is the one it] want[s] to go on first." *See* Attachment H Consequently, Judge Strother has taken unusual steps to make this happen and, at the same time, had "bumped" other defendants who the State apparently loath to try first. In doing so, Judge Strother has certainly added to the appearance of impropriety which might cause "a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, [to] have a reasonable doubt that the judge is actually impartial." *Kniatt*, 239 S.W.3d at 915.

In order to see the public perception regarding this game of musical chairs, one need look no further to the reporting on this issue earlier this week:

> McLennan County District Attorney Abel Reyna and his first assistant, Michael Jarrett, have made it clear that they want Carrizal, a Bandido from Dallas, to be the first in a long line of 155 bikers indicted after the May 2015 shootout to stand trial, even while passing over other bikers who were clamoring for quicker trial settings.[7]

Despite this understandable perception of what is occurring, Judge Strother has done everything in his power to accommodate the State's wishes and turn them into

[7]Twin Peaks Biker Named in Three-Count Superseding Indictment, *Waco Tribune Herald* (July 28, 2017).

realities.

III. CONCLUSION

In an ideal world, it would go without saying that the United States Constitution guarantees any defendant the right to an impartial judge. *Gagon v. Scarpelli*, 411U.S. 778, 786 (1973). Mr. Bergman deserves nothing less. Therefore, and for the foregoing reasons, individually and collectively, Judge Strother should be recused for presiding in the above-referenced case.

Respectfully submitted,

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VERIFICATION

F. Clinton Broden, being duly sworn, under oath says: "I am the retained attorney in the above entitled and numbered cause. I have read and prepared the foregoing Defendant's Motion To Recuse and swear that all of the allegations of fact contained therein are within my personal knowledge and true and correct."

_____
F. Clinton Broden

STATE OF TEXAS
COUNTY OF DALLAS

SUBSCRIBED AND SWORN TO BEFORE ME on this ___ day of _____ 2017.

_____
Notary Public

CERTIFICATE OF SERVICE

I, F. Clinton Broden, do hereby certify that, on this 29th day of July, 2017, I caused a copy of the foregoing document to be served on McLennan County District Attorney's Office, 219 N. 6th St., Waco, TX 76701 by overnight mail, postage prepaid.

F. Clinton Broden