CAUSE NO. 24923

THE STATE OF TEXAS	§	IN THE 6th DISTRICT COURT
	§	
V.	§	OF
	§	
STANLEY WAYNE MAGGARD	§	LAMAR COUNTY, TEXAS

MOTION FOR RECUSAL OF TRIAL JUDGE AND NOTICE OF PRESENTMENT

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW the Defendant in the above-styled and numbered cause by and through his attorney of record, and moves for the recusal of the Honorable Trial Judge in this case; and in support thereof would show as follows:

I.

Tex.R.Civ.P. 18b.[2] states the situations in which a trial judge should be recused from presiding over a particular case.

II.

In this case the trial judge, the Hon. ERIC CLIFFORD ["Clifford"], should be recused from presiding over this case because: the trial judge's impartiality is reasonably in doubt, and the trial judge has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. Specifically, the trial judge has conducted *ex parte* communications with at least four [4] witnesses herein, and the trial judge has expressed an opinion about the merits and disposition of the case and sentencing in open court.

FACTUAL BASIS FOR THIS MOTION

The *ex parte* Communications with Witnesses

On March 1, 2013, an evidentiary hearing was conducted herein on the Defendant's *MOTION FOR HEARING ON COMPLIANCE W/ORDER ON COUNSELING RECORDS PRODUCTION*. This motion was urged because the various providers of counseling services to the alleged child victim herein and her sister were not producing therapy notes as ordered by the trial court. The children were engaged in this therapy after the August 2013 alleged anal rape of the younger sister by the Defendant, so the notes were likely to memorialize relevant statements of fact by the patients [and - after their eventual production - it is clear that they do].

After unsuccessful efforts to elicit cooperation from these vendors for their compliance with the order for therapy note production, however, counsel issued and served subpoena *duces tecums* to the three private vendors of

such services – Roni Kaye Rusac, Beth Gilmore and Kim Jones – as well as a representative of the local CPS office, Cindy Whatley [the "Witnesses"] to appear with the their therapy notes at the March 1, 2013 hearing to compel [the "Hearing"].

The four witnesses appeared at the Hearing. Prior to the Hearing, as the Court called various other matters, Ms. Rusac ascended the bench while Clifford conducted the docket. Rusac stood next to the bench as Clifford conducted the docket from the bench for approximately ten minutes and quietly conversed with him. As this was occurring, Rusac pointed in the general direction of the two other counselors subpoenaed to the hearing, Gilmore and Jones. Eventually, the Hearing was called and testimony taken from all four witnesses. The Witnesses generally testified about the therapy of the two children and the notes they maintained of this therapy. [See transcript of the Hearing]. The notes were produced at the Hearing by the therapists.

Remarkably, Clifford also granted the request of the three counselors – Rusac, Gilmore and Jones – that they be paid an hourly fee for their preparation and attendance at this hearing. The Defendant did not file a *Ake* motion requesting their testimony as experts or, because he is indigent, that the Court fund their testimony as experts. The Defendant did not attempt to qualify the witnesses as experts at the Hearing. The Defendant did not attempt to elicit expert opinion testimony at the Hearing. Nonetheless, the Court paid their requested fees and taxed the fees as costs to the case, which of course would normally result in the Defendant paying the fees should he be convicted. The Defendant filed a written objection to this order. [See attached Exhibit "A"].

After the Hearing, it came to the attention of the undersigned that the Witnesses were headed in the direction of Clifford's chambers as he left the bench. After confirming the Witnesses were indeed going into chambers with Clifford, Defendant's counsel ["Haslam"] advised the prosecutor, Jill Drake, ["Drake"] of these events and that he requested her to accompany him to inquire about the nature of what appeared to be an *ex parte* conference with the Witnesses.

As Haslam and Drake neared chambers, they encountered Clifford standing at the threshold of his chambers. The Witnesses were clearly visible in chambers behind Clifford. Drake orally inquired of Clifford if this conference was something counsel needed to attend. Clifford replied that he would not receive counsel in the conference or otherwise permit the attendance of counsel during his conference with these witnesses, advised that he was going to hear from the Witnesses about their allegations of the misconduct of the court-appointed investigator herein, Ray Ball, assured Haslam his conduct was not the subject of any such allegations, turned, and closed the

door to chambers. It is unknown how long the Witnesses were in chambers, but is clear from Clifford's own explanation at the threshold of his chambers that the topic was the instant case. This clearly indicates that Clifford emerged from this *ex parte* communication with three trial witnesses with a personal knowledge of disputed evidentiary facts relating to this proceeding. Indeed, in light of Clifford's expressions of unadulterated conviction about Defendant's guilt herein [see below], one reasonably questions if this ex parte communication with these counselors formed the basis for this conviction.

Defendant filed his *MOTION FOR HEARING ON EX PARTE COMMUNICATIONS BY THE COURT AND OBJECTION TO FURTHER EX PARTE COMMUNICATIONS* on April 4, 2013. He filed his *FIRST AMENDED MOTION FOR EVIDENTIARY HEARING ON EX PARTE COMMUNICATIONS BY THE COURT AND OBJECTION TO FURTHER EX PARTE COMMUNICATIONS* on April 8, 2013. [See attached Exhibit "B"] The motion has not been heard.

The Expression of Impartiality, Bias and Opinion on the Merits, Disposition and Sentencing of the Case

On June 6, 2013, Clifford presided over an evidentiary hearing in *ITIO E. A. M. and W. R. M., Children* [82433][Lamar] [the "CPS Hearing"]. The CPS Hearing was conducted pursuant to Section 262.205 TFC, and characterized in the pleadings as a "full adversary hearing". In this matter, CPS arranged a placement of E. A. M. and W. R. M., the biological children of the Defendant and Mary Maggard [the "Children"], with relatives based on the Childrens' allegations of sexually inappropriate behavior of Mary Maggard. Mary Maggard confessed the allegations and voluntarily relinquished the Children to relatives. [See attached *Amended Temporary Order Following Adversary Hearing* at Exhibit "C"]. The Defendant appeared with counsel, however, and attempted to cross-examine the first witness, a CPS investigator, about the credibility of the allegations.[1] After three questions, Clifford halted the cross-examination, inquired of Mary Maggard's counsel if she were indeed confessing the motion, terminated the CPS Hearing, and pronounced that the cross-examination was a "fishing-expedition" for discovery in this [criminal] matter. Clifford explained that the mother's confession of the allegations and her agreement to the out-of-home placement of the Children were all he needed to hear to close the CPS Hearing.

[1] A transcript of the CPS Hearing was requested of the court reporter on June 7, 2013.

Immediately after the CPS Hearing, Clifford conducted an unrelated domestic relations matter. Neither Drake nor Haslam appeared in this matter. On information and belief, before, during[2] and after that matter was concluded Clifford remained on the bench and uttered to the courtroom several wholly unsolicited remarks relating to the CPS Hearing and Defendant. Various persons were in the courtroom, including counsel for one party in the unrelated hearing.

The remarks uttered by Clifford generally indicated Clifford's opinion that the Defendant's effort to be heard in the CPS Hearing was "unbelievable" in light of his pending criminal charges, that since he is charged with "multiple" counts of sexually assaulting his children[3] "he is going away for long time", and that he has no standing to express an opinion about the placement of his children. Clifford's words expressly denoted his expectation that the Defendant will be found guilty of the instant charge.[4] Clifford uttered these words a number of times, each wholly unsolicited, to the general courtroom at large and, in at least one instance, directly to an attendee.

Clifford's History of *ex parte* Communications

The undersigned has grappled with Clifford's inclination to *ex parte* communications before. In *State v. Jason Baker* [23067][Lamar], the undersigned moved for the recusal of Clifford for conducting an *ex parte* communication with a witness in a probation hearing and advising the witness that he would insure that Mr. Baker would be revoked. [See attached Exhibit "D"]. Clifford refused to recuse himself and the presiding judge set the matter for evidentiary hearing. Counsel successfully subpoenaed several witnesses to the hearing, including Clifford. On the day of the hearing, however, Clifford failed to appear, and advised he was taken ill. The evidentiary hearing was continued but in the meanwhile, Clifford was permitted to withdraw from that matter and recusal was mooted.

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[2] According to one witness, the unrelated hearing vacillated on- and off-the-record.
[3] Defendant is charged with one count of aggravated sexual assault of one child.
[4] Clifford was well aware that the DPS-conducted testing for DNA evidence was returned negative for any DNA of Defendant weeks before the June 6, 2013 CPS Hearing. In point of fact, the undersigned reminded Clifford of this in his brief opportunity to be heard at the CPS Hearing. *Clifford was further aware* that the Defendant affirmatively requested DPS to conduct more complete DNA testing for epithelial and trace evidence, and that DPS agreed to cause such further testing to be done. This testing is expected to be completed in late August 2013, according to DPS staff. Remarkably, Clifford's on-the-record response to this reminder at the CPS Hearing was that, rather than afford Mr. Maggard the opportunity to be heard therein, he [Clifford] would advance the September 10, 2013 trial date so Mr. Maggard could first disabuse himself of the criminal charge.

It is fair and accurate to represent in this motion that Clifford has earned a reputation for *ex parte* communications among the members of the Lamar County Bar. It is unfortunate even if perhaps understandable that there exists among the Lamar County Bar members reservation about challenging this situation. To the personal knowledge of the undersigned, the only attorney that has affirmatively expressed concern to either Clifford or an authority is the District Attorney, Gary Young, and even this concern was articulated only in the confines of the off-the-record argument of counsel in the *Baker* matter. During this argument, Presiding Judge John Ovard heard directly from Mr. Young about his frustration with Clifford's routine *ex parte* communications with opposing counsel.

THE LAW RELATING TO THIS MOTION

In pertinent part, the law relating to recusal of judges is:

> …. (2) Recusal
>
> A judge **shall recuse himself in any proceeding in which:**
>
> **(a) his impartiality might reasonably be questioned;**
>
> **(b) he has a personal bias or prejudice concerning the subject matter or a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;**
>
> (c) he or a lawyer with whom he previously practiced law has been a material witness concerning it;
>
> (d) he participated as counsel, adviser or material witness in the matter in controversy, or expressed an opinion concerning the merits of it, while acting as an attorney in government service;
>
> (e) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (f) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iii) is to the judge's knowledge likely to be a material witness in the proceeding.
>
> (g) he or his spouse, or a person within the first degree of relationship to either of them, or the spouse of such person, is acting as a lawyer in the proceeding**.**

Tex. R. Civ. Pro. 18b. Grounds for Disqualification and Recusal of Judges [**emphasis added**].

Rule 18b(2) of the Texas Rules of Civil Procedure sets out the law concerning recusal and includes instances in which a judge must step down from hearing a case for reasons other than the disqualifying grounds listed in the constitution. Rule 18b(2) states, in relevant part, that "A judge shall 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[.]" *Gaal v. State*, 332 S.W.3d 448 (Tex.Cr.App. 2011).

Once a sufficient motion to recuse has been filed, before proceeding further in the case, the judge must either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear the motion under *Tex. Gov't Code* §74.059(c)(3). *Sanchez v. State*, 926 S.W.2d 391 (Tex.App.—El Paso 1996, *pet. ref'd*).

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APPLICATION

Application of the law of recusal of trial judges to the facts of this motion must result in recusal. The Defendant is facing a first degree felony in a matter in which the trial judge must be expected to marshal the likelihood that prospective jurors and jurors selected will experience visceral prejudice against the Defendant by virtue of the mere fact he is so charged. Every single potential juror must be honestly, thoroughly vois dired for evidence of bias and prejudice in any aspect of the law, whether substantive, procedural or sentencing. There will be evidentiary decisions that can make or break the defense of this charge.

Entrusted as he is with these obligations, we consider that Clifford has evidenced an undeniable indifference to the prohibitions against *ex parte* communications with witnesses herein. Such indifference creates a reasonable question about Clifford's willingness to hew the line of the law in his duties as trial judge: if he will not impose on himself the very simple discipline to refuse *ex parte* communications with witnesses, how can he be expected to impose on himself the discipline to hew the line of the law in less apparent, perhaps, but no less significant trial rulings? Consider that when presented with the opportunity to invite counsel for each party herein to the *ex parte* conference with trial witnesses that he convened after the March 1, 2013 Hearing, he refused, and

closed the door in the face of two attorneys who have a duty to report such conduct. He conducted an *ex parte* communication with a witness, at the bench, *in open court*, for ten minutes, and subsequently paid her for her appearance with court funds. This conduct is remarkable not only for its clear impropriety and suggestion of impartiality, *it is singular for its audacity.* It is chilling in its indifference to observation, and this very indifference must create a reasonable concern about subsequent inappropriate conduct, impartiality, bias and prejudice. In the language of the relevant statute, his communications with these witnesses indicate a likelihood of "…personal knowledge of disputed evidentiary facts concerning the proceeding;…." so real that at *the very least* the appearance of significant impropriety renders him unfit to serve as trial judge herein, and more importantly, raise concern about his willingness to hew the line of less apparent but meaningful law relating to the countless issues that arise during vois dir, trial and sentencing.

Concern about Clifford's indifference to the law is further evidenced by his *open court*, unsolicited remarks after the June 6, 2013 CPS Hearing on the guilt and sentencing of the Defendant herein. *From the bench*, *in open court*, Clifford expressed his observation that the Defendant is guilty as charged herein and will spend a "long, long time in prison" in an apparent effort to explain to observers of the CPS Hearing his refusal to afford the Defendant a hearing about the placement of his children by CPS. These remarks in particular evidence a reasonable question – if not an unfettered conclusion – about Clifford's impartiality, and indicate a "…personal bias and prejudice concerning the subject matter or party…." of this case so structural and thoroughgoing as to render him plainly, simply, flatly incapable of serving as trial judge herein. There really is nothing a trial judge could conceivably utter more indicative of impartiality, bias or prejudice than the words uttered by Clifford at the June 6, 2013 CPS Hearing.

This situation is not novel. The undersigned has confronted this issue with Clifford in another matter. That experience was insufficient to modify Clifford's conduct with respect to *ex parte* communications, and the failure of that experience is informative. That failure disabuses us of the idea that Clifford is simply unaware of the prohibitions against such *ex parte* communications, and leaves us with the indisputable conclusion that he is simply indifferent to the prohibition and, more meaningfully, to the consequences for the administration of justice. This history – and it is important to bear in mind here Mr. Young's observations to Judge Ovard about the routine nature of such *ex parte* communications - is evidence of an indifference to the law that cannot be ignored. Indeed, by this point, an established indifference to this fairly routine rule against *ex parte* communications begs the question of

Clifford's willingness to hew the line of the law in less apparent, but perhaps more meaningful trial decisions. He must be recused from this case.

III.

This Motion to Recuse is not brought for the purpose of delay. Sufficient cause has been shown for the recusal of the Honorable Trial Judge. The Motion sets forth such facts as would be admissible in evidence. Movant does not wish to waive any ground for recusal stated in the instant Motion. The case is set for jury selection August 21, 2013, and jury trial September 10, 2013. Many motions are pending. The Defendant has been in custody since September 2012. Time is of the essence.

WHEREFORE, PREMISES CONSIDERED, the Defendant requests that the Honorable Trial Judge voluntarily recuse himself from any further proceedings in this case and that another trial judge be assigned to hear the case; or in the alternative, that the Honorable Trial Judge refer this matter to the presiding judge of the applicable administrative judicial region for a hearing on the allegations in said Motion as soon as is practicable.

Respectfully submitted,

By:

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State of Texas

County of Lamar

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared George D. Haslam, Jr., who being by me duly sworn, upon oath deposes and says:

"I am the attorney for the Defendant in this cause, I have read the above MOTION FOR RECUSAL OF TRIAL JUDGE AND NOTICE OF PRESENTMENT and it is all true and correct to the best of my knowledge."

_____

AFFIANT, George D. Haslam, Jr.

SUBSCRIBED AND SWORN BEFORE ME on this _____ day of _____, 2013, to certify which witness my hand and seal of office.

_____

Notary Public, State of Texas

My commission expires: _____

NOTICE OF PRESENTMENT

Defendant expects this motion to be presented to the trial judge three [3] days after the filing of this motion unless otherwise ordered by the trial judge.

FIAT

IT IS HEREBY ORDERED that the above Motion be heard on the _____ day of _____, 201_____ at _____: _____:0 o'clock _____.m.

CERTIFICATE OF SERVICE

The undersigned certifies that on June _____, 2013 a true and exact copy of the foregoing was delivered to the office of the Lamar County District Attorney.

_____

G. Donald Haslam, Jr.

ORDER

On this _____ day of _____, 2013, came to be heard the foregoing Motion and it appears to the Court that the same should be GRANTED / DENIED.

If GRANTED, it is ORDERED that the trial judge recuses himself and requests the presiding judge of the administrative judicial district to assign another judge to sit herein. IT IS FURTHER ORDERED that the recusing trial judge shall make no further orders and shall take no further action in this case except for good cause stated in this order.

If DENIED, it is ORDERED that, in either original form or certified copy, an order of referral, the motion, and all opposing and concurring statements be forwarded to the presiding judge of the administrative judicial district. IT IS FURTHER ORDERED that the recusing trial judge shall make no further orders and shall take no further action in this case after the filing of the instant motion and prior to a hearing on the motion except for good cause stated in this order.

SIGNED on this the ___ day of _____, 2013.

_____
JUDGE PRESIDING

EXHIBIT A

EXHIBIT B

EXHIBIT C

EXHIBIT D