Cause No. DICI10100069

IN RE:	§	
	§	
CAMERON TODD WILLINGHAM	§	IN THE 299TH DISTRICT COURT
	§	
	§	IN AND FOR
	§	
	§	TRAVIS COUNTY, TEXAS
	§	

PETITIONERS' RESPONSE
TO NAVARRO COUNTY'S MOTION FOR JUDGE
TO DISQUALIFY OR RECUSE THE HONORABLE CHARLIE BAIRD

Petitioners, Eugenia Willingham and Patricia Willingham Cox, surviving relatives of Cameron Todd Willingham, by and through counsel, submit this response to the Motion for Judge to Disqualify or Recuse the Honorable Charlie Baird submitted by the Navarro County District Attorney on behalf of the State ("Navarro County"), filed on October [4/5], 2010.

On Friday, September 24, 2010, Petitioners filed a petition with the court asking that it find probable cause that an offense against the laws of this State has occurred and take the steps provided in Article 52 of the Texas Code of Criminal Procedure to request that the presiding judge of the administrative district convene a Court of Inquiry, and that the court declare that Mr. Willingham was wrongfully convicted (the "Petition"), thereby restoring his reputation.

Before a Court of Inquiry may be commenced, a district judge must enter an affidavit stating the facts supporting his probable cause determination and request the presiding judge of the administrative judicial district to convene a Court of Inquiry to investigate the matter. Tex. Code Crim. Proc. art. 52.01 (b)(1) (2010). On Monday, September 27, 2010, Your

Honor announced that Your Honor would hold a two-day hearing on the allegations in the Petition (the "Hearing") on October 6 and 7, 2010.

ARGUMENT

"All judges have the duty to sit and decide matters brought before them unless there is a basis for disqualification or recusal." *Rogers v. Bradley*, 909 S.W.2d 872, 879 (1995) (Enoch, J.); *see also Kirby v. Chapman*, 917 S.W.2d 902, 909 (Tex. App. 1996) (judges have an obligation not to recuse themselves from a proceeding unless there is reason to do so). No basis for requiring Your Honor to step down has been raised here.

As a threshold matter, Navarro County, acting on behalf of the State, does not have standing to move for recusal because neither Navarro County nor the State are parties to this proceeding. Even if there were standing to so move, no valid grounds for recusal have been presented. Your Honor's status as a government employee is not grounds for recusal, none of the facts offered by movant objectively establish bias, and there is no basis to conclude that this Court has misapprehended the procedures set out in Article 52 of the Texas Code of Criminal Procedure for determining whether to convene a Court of Inquiry.

I. Navarro County Has No Standing To Bring A Recusal Motion.

The "judge against whom the [recusal] motion is directed may properly make an initial decision of whether the motion conforms with Rule 18(a)." *See Barron v. Attorney General*, 108 S.W. 3d 379 (Tex. App. 2003). Rule 18(a) plainly requires that one seeking recusal must be a party to the proceeding. *See* Tex. R. Civ. P. 18a(a). If a motion to recuse is filed by a nonparty, the court does not need to entertain it. *Whately v. Warden*, 302 S.W.3d 314, 328 (Tex. App. 2009); *Bell v. State*, No. 01-05-1180-CR, 2006 Tex. App. LEXIS 10675, 2006 WL 3628916, at *6 (Tex. App. Dec. 14, 2006). Accordingly, faced with a nonparty's recusal

motion, a judge may properly continue the case without recusing himself or referring the motion to the administrative judge. *See Whately*, 302 S.W.3d at 328; *Bell*, 2006 WL 3628916, at *6.

The proceeding to determine whether there is probable cause to convene a Court of Inquiry is conducted *ex parte*. By definition, Navarro County is not a party to the proceeding. The fact that the Navarro County District Attorney and others were invited by Your Honor to attend does not make them parties, and they were not — nor could they be — joined as such. *See* Letters of Invitation from Judge Baird dated September 27, 2010. Indeed, in correspondence declining to attend these proceedings, the Governor's Counsel and the State Prosecuting Attorney expressly noted that they are not parties. *See* Letter From Governor's Counsel dated October 6, 2010 ("I am not a party."); State Prosecuting Attorney's Notice of Non-Appearance and Non-Participation dated October 5, 2010 ("the agency is not a party").

As the Navarro County District Attorney itself has noted, this is not a proceeding to determine whether a violation of law has been committed, but rather only one to assess whether there is probable cause to believe that this is the case. If probable cause is found, another judge will make the determination of whether an actual violation of law was committed. Given that Your Honor is presiding over an *ex parte*, non-adversarial, preliminary probable cause proceeding to which Navarro County is not a party, Navarro County has no standing to move for recusal. As such, Your Honor need not address the Navarro County's motion.

II. There Are No Grounds for Recusal Here.

Even if Navarro County had standing to seek recusal, which it does not, it has advanced no basis for recusal in this case.

A. Your Honor's Status As A Government Employee Cannot Be Grounds For Recusal.

Navarro County argues that Your Honor should recuse himself under Texas Rule of Civil Procedure 18b(2)(d). That section provides for recusal in the event that a judge "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." Texas R. Civ. P. 18b(2)(d). Section 18b(2)(d) is entirely inapposite here.

Navarro County maintains that Section 18b(2)(d) is implicated because, as a sitting judge, Your Honor is an employee of the government who sat in judgment of Mr. Willingham's appeals between 1992 and 2004. According to the motion, Your Honor "act[ed] as an attorney on the Court of Criminal Appeals," was "employed by the government," and, in upholding Mr. Willingham's conviction, "issued an opinion concerning the merits of the case." Motion for Judge to Disqualify or Recuse the Honorable Charlie Baird at 2-3.

None of this provides a basis to invoke Section 18b(2)(d). To be sure, judges receive their paychecks from the State government, and judges are attorneys, *see* Tex. Const. art. 5, §§ 2(b), 6. However, neither of those facts makes a judge an attorney within the meaning of Section 18b(2)(d). The State's argument confuses the position of attorneys who are acting on behalf of the State, such as prosecutors, with that of judges who are neutral arbiters of fact and law. To view judges otherwise would vitiate our entire notion of separation of powers. Indeed, a logical conclusion of Navarro County's recusal argument would be that no judge should sit on any case involving the government because he receives his paycheck from the same "employer" as the prosecutor.

Even if Your Honor had been acting as an attorney within the meaning of Section 18b(d)(2), which is not the case, that Section also would be inapplicable for the independent

reason that the matter in controversy that was presented to the Criminal Court of Appeals is different from the one presented here. There the issue was whether the standards for granting a habeas petition had been met, *see* Order, *Ex parte Cameron Todd Willingham*, No. 35,162-02 at 2 (Tex. Crim. App. Feb. 17, 2004), which is manifestly not a question raised by the instant petition. Even if the issues were the same, and they are not, it would not be unusual for a judge who has previously ruled in a matter to issue further rulings in connection therewith.

It is particularly surprising that Navarro County seeks to invoke Section 18b(2)(d) today. When Your Honor was asked to issue a probable cause affidavit to request the convening of a Court of Inquiry in the case of Timothy Cole in 2009, no recusal motion was made, notwithstanding the fact that Your Honor had heard and ruled on one of Mr. Cole's prior appeals. There is no more basis for recusal in this instance than there was in the Cole case.

B. Your Honor's Impartiality Cannot Reasonably Be Questioned In This Matter.

There is also no basis to move under Texas Rule of Civil Procedure 18b(2)(a), which provides for recusal when a judge's "impartiality might reasonably be questioned."

The standard for determining if a judge should be recused because of his partiality is objective, not subjective. *See Rogers*, 909 S.W.2d at 873 (Gammage, J.). The inquiry is "whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge's conduct, would have a reasonable doubt that the judge is actually impartial." *Id.* at 881 (Enoch, J.). A determination is made, not in a "knee-jerk reaction" to facts in isolation, but "based on a studied analysis of all the circumstances involved." *Ex parte Ellis*, 275 S.W.3d 109, 116 (Tex. App. 2008). Recusal is warranted only where there is a basis to conclude that a judge's attitude or state of mind is "so resistant to fair and dispassionate inquiry" that the objectivity of his rulings could reasonably be questioned. *See Liteky v. U.S.*, 510 U.S.

540, 557-58 (1994) (Kennedy, J., concurring). The motion for recusal does not come close to demonstrating that this standard has been met.

In support of its claim of bias, Navarro County cites three or four anonymous blog postings questioning Your Honor's impartiality following an Austin newspaper's report that Your Honor was convening this Hearing. To state the obvious, that cannot possibly constitute an objective basis for recusal. Every experienced judge has sat in judgment of hundreds or thousands of cases, creating myriad losing litigants and unhappy observers who may well believe that the judge acted unfairly. In olden days they grumbled; today they blog or Twitter. Neither is a basis for recusal. Were it otherwise, the court system quite literally would come to halt. No judge could withstand such scrutiny and no case of public import would ever be able to be heard. For the court system to function, recusal must remain the extraordinary remedy it was intended to be.

Navarro County also has not made any showing, nor could it, that Your Honor's purported views on the death penalty would affect this proceeding. Judges' privately-held political views are not a grounds for recusal, inasmuch as judges enjoy a "presumption of impartiality." *Ex parte Ellis*, 275 S.W.3d at 117. It is well-accepted that conscientious judges will make themselves aware of potential biases and counteract them, because judges understand "their duty to render cases upon a proper record and to disregard" other matters. *Liteky*, 510 U.S. at 562 (Kennedy, J., concurring); *Ex parte Ellis*, 275 S.W.3d at 117. In fact, the notion that Your Honor's alleged views on the death penalty will affect Your Honor's partiality is belied by the movant's own implicit recognition that Your Honor has let stand death sentences while Your Honor was on the appellate bench.

Nor is there any ground to find bias based on Navarro County's claim that Your Honor has misconstrued the nature of the Court of Inquiry procedure. As a threshold matter, even if Your Honor had been incorrect about the procedure, that in no way would establish bias. If it did, every judge who reached an erroneous conclusion would be deemed biased. In any event, there is no basis to conclude that Your Honor in fact has misunderstood the Court of Inquiry procedure.

In support of its claim, Navarro County argues that it is improper for the Court to hold an evidentiary proceeding because its function at this stage of the Court of Inquiry process is merely to determine whether a finding of probable cause is appropriate. Similarly, and for the same reason, Navarro County asserts that there was no basis for Your Honor to have issued a bench warrant. Both arguments are incorrect. As Navarro County acknowledges, in order to make a finding of probable cause, a district judge must enter a sworn affidavit "stating the substantial facts establishing probable cause that a specific offense has been committed against the laws of the state." Tex. Code Crim. Proc. art. 52.01(b)(1). Given that, it is perfectly appropriate for Your Honor to conduct an evidentiary hearing and to issue process in support thereof.

Moreover, contrary to Navarro County's suggestion, the fact that Article 52 authorizes the Court of Inquiry itself to issue process in no way means that the judge tasked with determining whether there is probable cause for the inquiry is prohibited from issuing process. A judge who is required to make a probable cause determination is not likely to have personal knowledge of the relevant underlying facts. Accordingly, issuance of process and the conduct of a hearing are perfectly appropriate tools for a judge to use in that circumstance. For the same reason, a magistrate conducting an examining trial to determine probable cause to bind an

individual over to a grand jury conducts hearings, and a grand jury itself conducts hearings. In neither of those instances is a final determination as to guilt being made, but that in no way means that a hearing is inappropriate. The same is true in this case.

Indeed, rather than bespeaking bias, the Court's intention to hold a hearing indicates the seriousness with which the Court is treating its responsibility to determine whether there is probable cause. Conscientiousness is not a basis for recusal.

CONCLUSION

For all of the foregoing reasons, Petitioners respectfully urge that there is no basis for recusal in this case.

Respectfully submitted,

Dated: San Antonio, Texas
October 14, 2010

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above Petitioners' Response to Navarro County's Motion for Judge to Disqualify or Recuse the Honorable Charlie Baird has been faxed to the following persons/and or persons in the care of their office on the 14th day of October, 2010.

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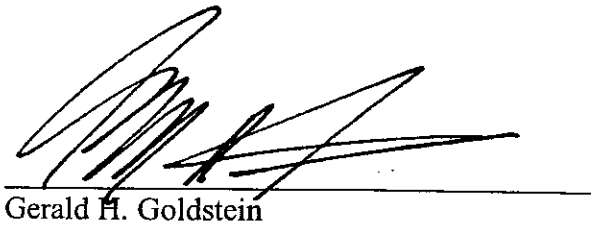

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