



FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

DEC 13 2021

RICK WARREN  
COURT CLERK

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THE STATE OF OKLAHOMA,	)	
	)	
Plaintiff/Appellee,	)	District Court
	)	Case No. CF-2017-1448
vs.	)	
	)	Court of Criminal Appeals
ROBERT LEON, HASHAGEN, III,	)	Case No. F-2021-203
	)	
Defendant/Appellant.	)	

**DEFENDANT’S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Pursuant to the order of this Court, Defendant Robert Leon Hashagen, III, by and through his appellate counsel, James H. Lockard, hereby submits the following as proposed findings of fact and conclusions of law:

**EVIDENTIARY HEARING**

**Findings of Fact and Conclusions of Law**

On the 15<sup>th</sup> day of November 2021, an evidentiary hearing was held pursuant to an order of the Oklahoma Court of Criminal Appeals. *See Order Remanding for Evidentiary Hearing and Holding Further Briefing in Abeyance* (filed October 11, 2021) (hereinafter “*Remand Order*”). The purpose of the hearing was to allow for factfinding relevant to Mr. Hashagen’s allegation of a previously undisclosed sexual relationship between former judge Timothy R. Henderson, who presided over Mr. Hashagen’s trial in January and February 2021, and Assistant District Attorney Kelly Collins, who prosecuted the case along with Assistant District Attorneys Jimmy Harmon and Lori McConnell. *Id.* at 3. Mr. Hashagen had claimed that he could “establish that within the last five years, including at least part of the pendency of this case in the court below, the judge who presided over his trial engaged in a sexual relationship with at least one of the prosecutors in his case.” *Appellant’s Motion for New Trial, Request for Evidentiary Hearing, and Motion to Hold*

*Briefing in Abeyance* (filed September 10, 2021) (hereinafter “*Motion*”).

As the Court above noted, these allegations “strike at the heart of an accused’s constitutional due process right to a fair trial before a fair tribunal.” *Remand Order* at 4. Due to the gravity of the allegations and the fundamental nature of the right at stake, the Court remanded this case to the District Court of Oklahoma County<sup>1</sup> for factfinding. *Remand Order* at 6. This Court was directed to hold an evidentiary hearing and to make written findings of fact and conclusions of law concerning Mr. Hashagen’s claims. *Id.* at 6-7.

### **Statement of the Case**

The defendant was tried and convicted by an Oklahoma County jury of First Degree (Felony) Murder. The defendant was represented at trial by Clayburn T. Curtis and Benjamin Munda. The case was prosecuted by Assistant District Attorneys Jimmy Harmon, Lori McConnell, and Kelly Collins. Former judge Tim Henderson presided over the case. Judgment and Sentence was formally imposed on March 4, 2021.

#### **A. FACTS PRESENTED AT THE EVIDENTIARY HEARING**

The testimony of Tim Henderson and Kelly Collins was submitted to this Court in two written stipulations of proposed testimony. *See* Court’s Exhibits 1 and 2. Additionally, five witnesses testified in person: Clayburn Curtis and Benjamin Munda, for the defendant; and Lori McConnell, Jimmy Harmon, and Kristen Taylor for the State.

Ms. Collins and Mr. Henderson agree that there was a sexual relationship between them in the time period from April 2016 to July or August 2018. (Ct. Exh. 1, ¶ 4; Ct. Exh. 2, ¶¶ 6-7) Each witness asserts that the other continued to harbor feelings for the other well after this relationship

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<sup>1</sup> Due to the recusal of all Oklahoma County judges assigned to criminal dockets, this case was administratively re-assigned to the undersigned, the Honorable Paul Hesse, District Judge for Canadian County. *See Administrative Order* (filed October 13, 2021).

ended. (Ct. Exh. 1, ¶ 9; Ct. Exh. 2, ¶ 4) Charges were filed against Mr. Hashagen on March 8, 2017. (O.R. 7-18) Jury trial was held from January 25 to February 2, 2021.

It is undisputed that neither Ms. Collins nor Mr. Henderson disclosed their sexual relationship to counsel for the defendant. Ms. Collins did not “disclose to anyone that former Judge Henderson sexually abused” her until March 2021. (Ct. Exh. 2, ¶ 10) Clay Curtis and Ben Munda both testified that they had no knowledge of an affair between Ms. Collins and Mr. Henderson prior to the start of trial in January 2021. (Evid. Hr. Tr. 6, 63) Assistant District Attorney Lori McConnell, a co-worker and close personal friend of Ms. Collins, testified that she had no knowledge of the abuse/affair until after the trial. (Evid. Hr. Tr. 92-93, 106-07) First Assistant District Attorney Jimmy Harmon similarly testified that he had no knowledge of any sexual relationship between Ms. Collins and Mr. Henderson. (Evid. Hr. Tr. 114-15)

## **B. CONCLUSIONS OF LAW**

A criminal defendant has a right to have a fair and impartial judge presiding over his trial. *See Mitchell v. State*, 2006 OK CR 20, ¶ 87, 136 P.3d 671, 707 (citing *Fitzgerald v. State*, 1998 OK CR 68, 972 P.2d 1157; *Bryan v. State*, 1997 OK CR 15, ¶ 27, 935 P.2d 338, 354-55; OKLA. CONST. Art. 2, § 6). The right to a fair trial in a fair tribunal is a basic requirement of due process. *See Bracy v. Gramley*, 520 U.S. 899, 904 (1997); *In re Murchison*, 349 U.S. 133, 136 (1955). A showing of actual subjective bias is not required to establish a due process violation. *Williams v. Pennsylvania*, 579 U.S. 1, 136 S.Ct. 1899, 1905 (2016); *Rippo v. Baker*, 137 S.Ct. 905, 907 (2017). Rather, the question is whether “the probability of actual bias on the part of the judge . . . is too high to be constitutionally tolerable.” *Rippo*, 137 S.Ct. at 907 (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)). The standard for recusal under Oklahoma law is whether the facts and circumstances are such that would “preclude reasonable people from feeling that a fair and impartial trial could be had

before” the trial judge. *Casey v. Casey*, 2011 OK 46, ¶ 8, 270 P.3d 109, 111. A judge must “disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned.” Rule 2.11, *Code of Judicial Conduct*, Title 5, Ch. 1, App. 4 (2011); *see also* OKLA.STAT. tit. 20, § 1401 (2011); OKLA. CONST. Art. 2, § 6. The question is not whether the trial judge sincerely believes that he could or did conduct a fair and impartial trial, but how his objectivity would be perceived by others. *Casey, supra* at ¶ 6, 270 P.3d at 111 (citing *Hearn v. Miller*, 1934 OK CR 341, 33 P.2d 506, 507).

There is no question that Mr. Henderson should not have presided over this trial. Assistant District Attorney McConnell testified that if she had known about the sexual relationship between Ms. Collins and Mr. Henderson she (McConnell) would have told someone and Ms. Collins would not likely have been on the case anymore. (Evid. Hrg. Tr. 109) First Assistant District Attorney Harmon emphatically stated that Ms. Collins would not have been allowed to participate in the trial if he had known of her involvement with Mr. Henderson. (Evid. Hrg. Tr. 143) Former judge Henderson’s own court reporter and personal friend, Kristen Taylor, agreed that it was unlikely for a defendant to get a fair trial in a case where Mr. Henderson was the judge and Ms. Collins was a prosecutor. (Evid. Hrg. Tr. 152, 155-56)

Clearly, reasonable people would question Mr. Henderson’s ability to be fair and impartial under these circumstances. Indeed, his exercise of judgment in carrying on illicit sexual affairs with attorneys appearing before him in criminal cases<sup>2</sup> is as questionable as it is alarming. It is particularly disturbing that neither Ms. Collins nor Mr. Henderson advised opposing counsel of a

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<sup>2</sup> While Collins and Henderson agree that a sexual relationship existed, they disagree about the nature of that relationship. Ms. Collins alleges that Mr. Henderson sexually abused her. (Ct. Exh. 2, ¶¶ 6-9) Mr. Henderson counters that the relationship was consensual. (Ct. Exh. 1, ¶ 4) This Court finds that it is immaterial, for purposes of the claims presented here, whether the relationship was consensual or nonconsensual. In either case, Mr. Henderson’s impartiality may reasonably be questioned. The possibility that he may have abused the power of his office in furtherance of this and other relationships casts an additional specter over this case.

possible conflict of interest or otherwise took any steps to protect the integrity of these judicial proceedings. Mr. Henderson insists that he did not “exercise any bias” for or against either party in this case and that he “maintained [his] role as a neutral and detached judicial officer.” (Ct. Exh. 1, ¶¶ 14-15) However, “[b]ias is easy to attribute to others and difficult to discern in oneself.” *Williams*, 136 S.Ct. at 1905.

This Court finds that there was an unconstitutionally high risk that Mr. Henderson could not be the neutral and detached tribunal to which Mr. Hashagen was entitled. This Court further finds that Mr. Henderson’s presiding over this trial infected the entirety of the proceedings. A defendant not required to show actual subjective bias to establish a due process violation, nor is such a claim amenable to harmless error analysis. *Williams*, 136 S.Ct. at 1909. Such error is structural; its effects cannot be quantifiably assessed. *See, e.g., Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993). Other courts have similarly found structural due process error when the basis for disqualifying the trial judge is not disclosed to the parties and the judge presides over the case. *See, e.g., State v. Wakefield*, 751 S.E.2d 199, 201 (Ga. Ct. App. 2013) (in multi-defendant case, judge was having an affair with one of the defense lawyers); *Ex Parte Young*, 2021 WL 4302528 at \* 5 (Tex. Ct. Crim. app. Sept. 22, 2021) (prosecutor who assisted in prosecution of capital defendant was simultaneously working for the trial judge, in unrelated cases, part time as a judicial clerk).

### **C. CONCLUSION**

Ordinarily, reviewing courts apply a presumption of the correctness of the proceedings, but such a presumption is vitiated where, as here, a trial judge who should have been disqualified from the case nevertheless continued to preside over the case and ultimately imposed judgment and sentence. It is beyond the scope of this hearing for this Court to review former judge Henderson’s legal rulings, especially those related to the bad character evidence admitted at trial, for an abuse of

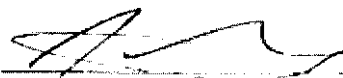
discretion. Indeed, even if reasonable legal minds could differ on the correctness of his legal rulings, there is no way for this Court, or another court, to know whether his rulings were the product of sound legal judgment or bias. Outside observers cannot look at this case and be satisfied that justice was done under these circumstances. Mr. Henderson's actions have done grave harm both to Mr. Hashagen's constitutional rights and to the very integrity of the judicial system in Oklahoma. It is therefore this Court's finding that Mr. Hashagen is entitled to relief and that his conviction should be reversed and remanded for a new trial.

WHEREFORE, the foregoing proposed findings of fact and conclusions of law are respectfully submitted by the appellant, Robert Leon Hashagen, III.

Respectfully submitted,

ROBERT LEON HASHAGEN, III

By:



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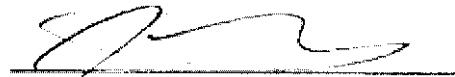
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ATTORNEYS FOR APPELLANT

## CERTIFICATE OF SERVICE

I certify that on the date of filing the above and foregoing instrument, a true and correct copy of the same was mailed to:

Travis White, OBA #19721  
First Assistant District Attorney  
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