

IN THE CIRCUIT COURT OF MOBILE COUNTY, ALABAMA

STATE OF ALABAMA,

v.

STEPHEN D. NODINE,

Defendant.

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CASE NO.

AMENDED ORDER OF RECUSAL, *SUA SPONTE*

This Order Amends and Supplements, the Court's Order entered on May 17, 2010. For the sake of the ease of the reader, the only additions are confined to page 8.

On May 14, 2010, Stephen D. Nodine, one of three members of the Mobile County Commission was impeached by a Grand Jury of Mobile County, and indicted for one or more felonies. As a Circuit Judge of the 13th Judicial Circuit, cases of this type are randomly assigned to one of the eight Circuit Judges which preside over criminal dockets. As of this drafting, Commissioner Nodine's cases have not been assigned to a judge, but the Court anticipates that these cases will be assigned to a particular judge, perhaps the undersigned, or that the cases may be assigned to another judge, who may recuse him/herself and the cases reassigned to the undersigned.

Additionally, as duty judge during the current week (and again in another 7 weeks) this Court is often called upon to rule on emergency matters that arise during the days and weeks leading up to a trial. Such matters as the quashing of subpoenas have already been presented to at least two judges of this Circuit in the last six weeks. In the event that some matter involving Commissioner Nodine requires the emergency attention of one of the judges of this Circuit, the undersigned will not be available to handle any such matter.

This Order will provide notice to the presiding judge of this Circuit as well as the other judges of this Circuit, that this Court has determined that, because of the position held by Stephen D. Nodine, it would be impossible to preside over these cases or any matter related to these case because the appearance of fairness is virtually as important as fairness itself and it would be impossible to avoid the appearance of impropriety.

Often, the judicial branch of government does not do an adequate job of explaining various rulings and the Constitution and statutory basis for them. Rather than simply issue a one-line order of recusal and let the public wonder if perhaps their public servant avoided his duty of making a difficult decision, this Court deems it necessary to state in detail its consideration and legal reasoning that forms the basis of this Order.

At the outset, it has always been the Court's opinion that if one must study, ponder and research a matter of ethics, then one is entirely too close to that ethical line and one should heed one's conscience and not strain the law to find a way to make something wrong appear right.

As a starting point, Canon 3C(1) of the *Alabama Canons of Judicial Ethics* states, “A judge should disqualify himself in a proceeding in which his disqualification is required by law or his impartiality might reasonably be questioned...”

Legal grounds for disqualification include, among other grounds, matters such as being related to a party or his attorney within a certain degree of kinship. See Section 12-11-12, *Code of Alabama* (1975).). This is just one example, but the overriding consideration is for the Court to avoid the appearance of impropriety. As Canon 3C(1) dictates, recusal of a Judge is required where “his impartiality might reasonably be questioned...”

While circuit judges are often referred to as a circuit judge for a particular county, circuit judges in the State of Alabama are State officials, holding offices in particular circuits. See Amendment No. 328, Ala. Const. 1901, Section 12-11-2 *Code of Alabama* (1975). Thus, the undersigned, while often referred to as a “Mobile County Circuit Court Judge” is legally a “Circuit Judge for the 13th Judicial Circuit, State of Alabama”. However, while the circuit judges in this state are state officials, they are certainly not divorced from the counties in which they preside.

The 13th Judicial Circuit, which encompasses Mobile County, is housed in Mobile Government Plaza located at 205 Government Street in Mobile. By law, Mobile County, by and through the Mobile County Commission, must provide space for Circuit Courts to hold court. There are no requirements that govern

how much space must be provided, how it must be maintained, parking and various other accommodations.

The Court has, on occasion, traveled to other circuits to help when judges have had to recuse themselves in cases. It is this Court's opinion that, apart from the avant-garde architecture, Mobile Government Plaza is the finest "county courthouse" in Alabama. This is all due to the past and present members of the Mobile County Commission. When the courtroom sound system is malfunctioning, we call on the employees of the Mobile County Commission to repair it. This is the only county courthouse that the undersigned has held court in that even has an electronic sound system, much less maintains one.

When the undersigned's office has needed a new electrical outlet, a new water filter for the sink or the air conditioner adjusted, Mobile County Commission employees are sent promptly to solve the problem. There is no legal requirement that the Mobile County Commission do these acts, it is because of the excellent working relationship that has existed here, first begun by Judge Braxton Kittrell and which continues through Judge Charles Graddick today.

In addition to the above, the Mobile County Commission completely funds the 13th Judicial Circuit Court Police which provides security for the entire Mobile Government Plaza and is probably finer than any other non-federal facility in Alabama. Once again, the law does not require the Mobile County Commission to provide this. These services can all be terminated by the Commission through their votes and resolutions. If that were to happen, both the Circuit and District

Courts would be scrambling to attempt to maintain some minimum level of security and other services.

The Mobile County Community Corrections Center was founded in 1991 by former Presiding Judge Braxton Kittrell. The backbone of its funding is from the Mobile County Commission. It earns fees from the State of Alabama and from the clients that it serves. Its probation, pre-trial services and drug court programs are absolutely vital to both the Circuit and District Courts. It also lives or dies depending on the whim of the Mobile County Commission.

Thus, the relationship between the Judges of the 13th Judicial Circuit and the Mobile County Commission is more critical than most counties in the state which do not operate corrections centers or court police forces.

In a nutshell, Alabama law concerning recusals not required by operation of law, is best summed up in *Greener v. Killough*, 1 So. 3d 93 (Ala. 2008) wherein the Alabama Court of Civil Appeals held that:

Under Canon 3(C)(1), Alabama Canons of Judicial Ethics, recusal is required when 'facts are shown which make it reasonable for members of the public or a party, or counsel opposed to question the impartiality of the judge.' Specifically, the Canon 3(C) test is: 'Would a person of ordinary prudence in the judge's position knowing all the facts known to the judge find that there is a reasonable basis for questioning the judge's impartiality?' The question is not whether the judge was impartial in fact, but whether another person, knowing all the circumstances, might reasonably question the judge's impartiality-whether there is an appearance of impropriety.

Id. at 99.

Further citing: *City of Dothan Personnel Bd.*, 831 So.2d 1(Ala.2002) [(quoting *Ex parte Duncan*, 638 So.2d 1332, 1334 (Ala.1994)].

The United States Supreme Court, perhaps proving themselves worthy of that esteemed position, recognized in, *In re Murchison*, 349 U.S. 133,(1955) that this standard may require recusal when a judge can act without bias, but deemed that impartiality was worth that risk:

The reasonable person/appearance of impropriety test, as now articulated in Canon 3(C)(1), in the words of the Supreme Court of the United States, may 'sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties.

Id. at 136.

One of America's great jurists, Justice Felix Frankfurter, reflecting upon recusals and avoiding all appearance of impropriety, once said, "Justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, (1954)."

Lest someone cite Alabama Judicial Inquiry Commission Advisory Opinion 03-825, November 21, 2003 which allowed circuit judges to preside over civil cases in which the county was a litigant when that county was paying salaries of a number of state judicial employees during the last budget crisis; that reasoning is sound in that circuit judges are always caught in the middle when their own "employer", the State of Alabama, is a litigant of some sort, either civil or criminal and justice is still served. The cases before the court involving Commissioner Nodine are clearly different than Opinion 03-825, as presiding over Commissioner Nodine's cases would cause the public to question the Court's impartially.

While exiled at Saint Helena, Napoleon Bonaparte is credited with saying, “May my son read and reflect upon history, for it is the only true philosophy”. The history of the 13th Judicial Circuit and its judges, and other criminal cases involving elected officials or high profile public servants offers some guidance regarding the current case.

In the 1990s, former Mobile Bar Association president Tom Bryant was indicted on multiple counts of stealing over \$3,000,000 from his wards’ accounts while serving as General Conservator of Mobile County. The first circuit judge to whom the case was assigned recused himself and then the criminal case was eventually assigned to Circuit Judge Chris Galanos.

The Alabama Supreme Court heard this matter after Judge Galanos refused to recuse himself. The Supreme Court’s opinion stated [citing *Morgan County Commission v. Powell*, 292 Ala. 300 (1974)] that:

Paramount to any system of justice is the total impartiality of the court which sits in judgment of any controversy. The appearance of fairness is virtually as important as is fairness itself. One of the essential ingredients of an effective judiciary is the high level of respect accorded it by the citizenry. Except for the impartiality of those who occupy the role of judge, both in act and [in] appearance, the level of respect necessary to a strong and effective judiciary will fail. It is the essence of the system that any position of interest or bias is sufficient cause for disqualification of a judge, and the right to raise and insist upon the causes of disqualification must be zealously guarded.

Id. at 312.

The Alabama Supreme Court did grant the Writ of Mandamus and ordered the recusal of Judge Galanos. The case was then sent to Judge Charles Price in Montgomery County who presided over it. See *State of Alabama v. Bryant*, CC-96-000017 (Circuit Court for the 15th Judicial Circuit).

In the last decade, former Mobile County Commissioner Freeman

Jockisch was indicted on a multi-count federal indictment which included, among other offenses, an “honest services” violation. Almost forgotten to history is the fact that Mr. Jockisch was also indicted by the State of Alabama for illegal use of campaign funds under the provisions of Section 17-22A-7(a) *Code of Alabama* (1975). All of the judges of the 13th Judicial Circuit, including the undersigned, recused themselves from presiding over Mr. Jockisch’s case. The Chief Justice of the Alabama Supreme Court appointed a circuit judge from outside of the 13th Judicial Circuit to preside over that case. See *State of Alabama v. Jockisch*, CC-04-065, 13th Judicial Circuit.

The Alabama Judicial Inquiry Commission issued an opinion in 1989 which advised a circuit judge to recuse himself from presiding over a civil case in which the county in which he sits is a plaintiff, In that case, the Alabama Legislature authorized a salary supplement to be paid to the circuit judge through the county but it had yet to be a

Often the mere appearance of bias, unaccompanied by any actual bias is actually as bad as actual bias. As stated so brilliantly by Justice Jones in *Morgan County Commission v. Powell*, 292 Ala. 300, 312 (1974), “The appearance of fairness is virtually as important as is fairness itself”. For the undersigned to preside over the impeachment trial of a county commissioner when that trial determines whether that commissioner continues to hold office and thus continues to supply goods and services to this Court which are absolutely essential, would be placing the 13th Judicial Circuit Court in a position where the

appearance of impropriety would be questioned. It would stretch all credulity for the public to be asked to believe that a judge or any judge, who must rely on the county commission for everything in his office from water to drink to maintenance of the bathroom, could expect the members of the public to believe that the court would be absolutely impartial in the trial of said case. Every decision which might favor the defendant commissioner, no matter how credibly based on law or on fact, could be argued by the public to be biased.

It is absolutely essential that the public be assured that “Equal Justice Under Law” is more than an iconic phrase etched on the United States Supreme Court Building. Those words are taken from the 14th Amendment to the United States Constitution but have roots as far back as 5th Century Athens. This decade, the citizens of Mobile County have witnessed a sitting circuit judge seemingly escape criminal punishment for crimes committed while serving in office. There is much public distrust that high officials are not held to the same standards as the man on the street. This also saved the public from enduring lengthy and costly appeals that challenge the Court’s role on this issue. See *State of Alabama v. Jockisch*, CC-04-065 13th Judicial Circuit, thus serving justice more efficiently and effectively.

Therefore, in order to avoid any appearance of impropriety, to preserve public confidence in the judicial system, and to assure the everyone that any trial of this matter will be absolutely fair both to the defendant and to the citizens of Mobile County, the undersigned, as a judge of the 13th Judicial Circuit hereby gives notice of his recusal from presiding over any matters involving either the

impeachment of Stephen D. Nodine or any criminal matters against Stephen D. Nodine.

DONE and **ORDERED** this 17th day of May, 2010.

/s/JOSEPH S. JOHNSTON
CIRCUIT JUDGE
13TH JUDICIAL CIRCUIT