

NO. 366-81639-2011

STATE OF TEXAS

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IN THE DISTRICT COURT
OF COLLIN COUNTY, TEXAS
366TH DISTRICT COURT

v.

HON. SUZANNE H. WOOTEN

DISTRICT ATTORNEY'S MOTION FOR THE APPOINTMENT OF A NEW, IMPARTIAL AND DISINTERESTED ATTORNEY *PRO TEM*

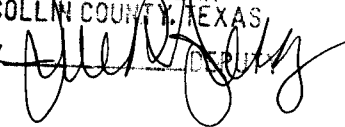
TO THE HONORABLE JUDGE OF SAID COURT:

Now comes Greg Willis, Criminal District Attorney of Collin County ("District Attorney"), and brings this Motion for the Appointment of a New, Impartial and Disinterested Attorney *Pro Tem*, and in support thereof will show the Court as follows:

I. PRELIMINARY STATEMENT

1. This matter has been mired in politics, speculation, and allegations of conflicts of interest since its inception. Regardless of the existence of actual conflicts of interest, this prosecution is cloaked in the appearance of impropriety and should not continue on its present course. The citizens of Collin County must trust in the integrity those who investigate and prosecute allegations of public corruption and have faith in the integrity of countywide elections. The proximity of the Texas Attorney General's Office and the former Collin County Criminal District Attorney to the investigation and prosecution of this matter, and the related federal investigations into the same, have placed that trust in jeopardy. Accordingly, for the reasons set forth below, the Texas Attorney General's appointment as attorney *pro tem* must be terminated, and a new, impartial, and disinterested attorney *pro tem* should be appointed.

2. The Texas Court of Criminal Appeals has noted that a newly elected district attorney may seek the termination of an attorney *pro tem* appointed at the request of a

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predecessor. Indeed, certain justices on the Court of Criminal Appeals have questioned the ability of a district court to refuse such a request. In this matter, the undersigned District Attorney is requesting the termination of the current attorney *pro tem* appointed at the request of his predecessor. He is doing so to avoid the appearance of impropriety and to preserve the public's confidence in the fairness of this prosecution.

3. The interests of the citizens of Collin County must take precedence in this matter. A new indictment alleging additional counts (and additional methods of proving the allegations set forth in the original indictment) was filed on July 14, 2011. There is no prejudice to the State or the Defendant in allowing a new, disinterested attorney *pro tem* to move forward with this case. The citizens of Collin County deserve to have an impartial and disinterested attorney appointed by this Court to assess and determine how this prosecution should move forward. To that end, the undersigned District Attorney, also requests permission to recuse himself and requests that this Court appoint an impartial and disinterested attorney *pro tem* to move forward with this case in the interests of justice and the citizens of Collin County.

II. **BACKGROUND FACTS**

4. In 2008, Defendant Suzanne H. Wooten was elected Judge of the 380th State District Court in Collin County, unseating incumbent, Charles Sandoval. According to Defendant Wooten's pleading, in December 2008, former Collin County Criminal District Attorney, John R. Roach ("Roach"), initiated an investigation into the election of Judge Wooten and appointed Assistant Attorneys General to work at his direction on the investigation.

5. Pursuant to Roach's appointment, Assistant Attorneys General Harry White and Brian Chandler ("White" and "Chandler") began investigating Defendant Wooten in December 2008 as "special prosecutors" serving under the direction of Roach.

6. On July 22, 2010, Roach filed a Request for Permission to Recuse and Appointment of an Attorney Pro Tem in the court of Judge Mark Rusch. Roach sought the appointment of the Texas Attorney General's Office as attorney pro tem, making it possible for White and Chandler, who had previously served as "special prosecutors," to remain involved in the investigation. On July 22, 2010, Judge Mark Rusch signed the order appointing the Office of the Attorney General as attorney *pro tem* in Defendant Wooten's case. Under this appointment, the Office of the Attorney General designated White and Chandler to act as attorneys *pro tem* on its behalf.

7. On October 14, 2010, with White and Chandler now acting as attorneys *pro tem*, Defendant Wooten was indicted on one count of conspiracy to commit bribery and six counts of bribery (the "Original Indictment").

8. Shortly after the Original Indictment of Defendant Wooten, Greg Willis was elected the new Criminal District Attorney of Collin County.

9. Nine months after the Original Indictment and thirty days prior to the date of trial, on July 14, 2011, White and Chandler reindicted Defendant Wooten adding two additional counts: money laundering and tampering with government records. On July 22, 2011, White and Chandler filed Notice of State's Intent to Introduce Extraneous Offenses, Unadjudicated Offenses, Bad Acts and Punishment Evidence, that, among other things, claims that Defendant Wooten prompted the FBI's investigation into her prosecution, and did so with the intent to impede and frustrate the grand jury's investigation. In other words, White and Chandler appear to accuse Defendant Wooten of prompting an FBI investigation into their conduct (and the conduct of Roach). White and Chandler are not disinterested parties given these facts and their own allegations.

10. According to Defendant Wooten's pleadings, on July 28, 2011, the Attorney General's Office provided Defendant Wooten's counsel with an FBI report,¹ which revealed that the FBI had been investigating the circumstances surrounding her prosecution since as early as July 14, 2010—before Roach's voluntary recusal and request that the Attorney General's Office be appointed as attorney *pro tem*. Again, according to Defendant Wooten's pleadings, parts of the report referred to Defendant Wooten as "the victim," named members of the Collin County District Attorney's Office as targets and subjects, and confirmed that the FBI questioned White and Chandler regarding their involvement in the investigation and prosecution of Defendant Wooten. The undersigned District Attorney does not know the status of the FBI investigation.

11. Defendant Wooten filed her Motion to Disqualify Texas Attorney General's Office as "District Attorney *Pro tem*" on August 22, 2011 based upon facts purported to be contained in the FBI report and other independent allegations of misconduct.

12. The Undersigned District Attorney takes no position on Defendant Wooten's Motion. The District Attorney's independent review of this proceeding compels him to request that an impartial and disinterested attorney *pro tem* be appointed in this matter.

III. **ARGUMENT**

A. A New, Impartial and Disinterested Attorney *Pro Tem* Must Be Appointed.

13. When an outgoing district attorney has recused himself, an incoming district attorney may object to the continued appointment of the attorney *pro tem* in that case. *Coleman v. State*, 246 S.W.3d 76, 85 (Tex. Crim. App. 2008). Texas law mandates that a district attorney "represent the state in all criminal cases in the district courts of his district" except where an actual conflict exists. Tex. Crim. Proc. Code art. 2.01 (Vernon 2010). An actual conflict exists

¹The facts attributed to the FBI report by Defendant Wooten, if true, further bolster the need for the appointment of an impartial and disinterested attorney *pro tem*.

only where the district attorney's prosecution of a case would violate a defendant's due-process rights. *Landers v. State*, 256 S.W.3d 295, 310 (Tex. Crim. App. 2008) ("A district attorney may be disqualified only for a violation of the defendant's due-process rights, not for violations of the disciplinary rules of professional conduct alone."). Absent an actual conflict, a "district attorney's power cannot be abridged or taken away" because his office is constitutionally created and protected. *Id.* at 304 (citing *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 4 (Tex. Crim. App. 1990)). Thus, imposing an outgoing district attorney's recusal and appointment of an attorney *pro tem* onto an incoming district attorney would unconstitutionally abridge his power and prevent him from fulfilling his mandate to prosecute *all* criminal cases in his district. See Tex. Crim. Proc. Code art. 2.01; *Coleman*, 246 S.W.3d at 85; *Ashlock v. State*, No. 06-10-00205-CR, 2011 WL 1770893, at *4 n.6 (Tex. App.—Texarkana May 10, 2011, no pet. h.) (mem. op., not designated for publication).

14. Accordingly, a trial court should restore the duties of the office to a newly elected district attorney, unless an actual conflict exists or the incoming district attorney does not object to the continued appointment of an attorney *pro tem*. In *Coleman*, while the incoming district attorney did not object to the attorney *pro tem*, the Court noted that had the district attorney "wanted to do so, [he] could have requested the trial court to terminate the appointment of the attorneys *pro tem* because he was the duly elected district attorney and was not disqualified from acting." 246 S.W.3d at 85. Concurring justices even questioned whether trial courts have discretion to deny such a request from a duly elected district attorney. *Id.* at 86 (Keller, J., concurring) ("Saying that the trial court has 'discretion' suggests that the trial court may have the power in this type of situation to act contrary to the wishes of the district attorney—a proposition that is at least questionable.").

15. And when an incoming district attorney did object, the Texarkana Court of Appeals upheld the trial court's decision to withdraw the order granting an outgoing attorney's recusal and appointment of an attorney *pro tem*. *Ashlock*, 2011 WL 1770893, at *3-4. Specifically, the court held that the incoming district attorney "had a right to request that the recusal [of the outgoing prosecutor] be rescinded" because the incoming district attorney "was not disqualified from acting" and "the reasons for the original recusal of his predecessor" no longer pertained. *Id.* at *3.

16. Here, the District Attorney's request to terminate the Texas Attorney General's appointment as attorney *pro tem* is identical: (1) the District Attorney is the new, duly elected Criminal District Attorney of Collin County and the Texas Attorney General's appointment as attorney *pro tem* was based on the voluntary recusal of his predecessor; (2) no legal basis requiring disqualification of the District Attorney exists in this case; and (3) the District Attorney objects to the continued appointment of the Texas Attorney General as attorney *pro tem*.

17. As the duly elected Criminal District Attorney of Collin County, the Texas Constitution vests the undersigned District Attorney with the exclusive power to represent the state in all Collin County criminal cases where no actual conflict exists. Tex. Crim. Proc. Code art. 2.01 (Vernon 2010); *Landers*, 256 S.W.3d at 303-04. Even if the District Attorney's request to terminate the appointment of the attorney *pro tem* wasn't, by itself, sufficient to justify a termination of the Texas Attorney General's appointment, the facts surrounding this case more than support such an outcome.

18. A prosecutor should be independent, unbiased, without conflicts of interest, and not witnesses to any of the concerns presented to the grand jury. *In re Guerra*, 235 S.W.3d 392, 423, 429 (Tex. App.—Corpus Christi 2007, orig. proceeding). The absence of an impartial and

disinterested prosecutor has been held to violate a criminal defendant's due-process right to a fundamentally fair trial. *Id.* at 429 (citing *Ganger v. Peyton*, 379 F.2d 709, 714 (4th Cir. 1967)).

19. Because there is no bright-line rule for determining whether a conflict rises to the level of a due-process violation, each case must be analyzed on its particular facts. *Id.* Generally, any interest that is inconsistent with the prosecutor's duty to see that justice is done is a conflict that could potentially violate a defendant's right to fundamental fairness. *In re Guerra*, 235 S.W.3d at 430. A prosecutor should not be subject to influences that undermine confidence that the prosecution can be conducted in a disinterested fashion. *Id.* at 431.

20. The existence of a federal investigation is clearly known to attorneys *pro tem* White and Chandler— who, according to Defendant Wooten's pleading, were themselves questioned by the FBI as part of the investigation. (Def.'s Second Mot. to Disqualify Attorney *Pro Tem* ¶¶ 14-16). The Assistant Attorneys General serving as attorneys *pro tem* are perceived to have a personal stake in the outcome of this prosecution, including justifying their investigation and clearing their own names in the federal investigation. Accordingly, in the judgment of the undersigned District Attorney, these prosecutors are subject to influences that undermine confidence that Defendant Wooten's prosecution can be conducted in a disinterested fashion. These concerns compel the District Attorney to seek the appointment of an impartial and disinterested attorney *pro tem*.

21. Thus, the District Attorney further requests permission to voluntarily recuse himself from this matter to avoid even the appearance of impropriety. Under Texas law, "the responsibility for making the decision to recuse" rests on the district attorney alone and cannot be required by the trial court. *Coleman*, 246 S.W.3d at 81. But given the highly politicized nature of this case, the District Attorney opts to err on the side of caution and voluntarily recuse himself from representing the State in the criminal prosecution of this case.

22. In view of his decision to voluntarily recuse himself, the District Attorney further moves the court to appoint an impartial and disinterested attorney *pro tem* pursuant Texas Code of Criminal Procedure article 2.07. Upon granting the recusal, the trial court may appoint “any competent attorney” to perform the duties of the district attorney. Tex. Crim. Proc. Code art. 2.07(a) (Vernon 2010). In this matter, good cause exists. The citizens of Collin County must trust in the integrity of countywide elections, and also in the integrity of those who investigate and prosecute allegations of public corruption in the same. The proximity of the Texas Attorney General’s Office and the former Collin County Criminal District Attorney to the allegations at the heart of the indictment, and to the related federal investigations into the same, have placed that trust in jeopardy. Further, because these matters involve the election of public officials and the justice system in Collin County, it is in the best interest of justice that the District Attorney voluntarily recuses himself and that this Court appoint an impartial and disinterested attorney *pro tem* with experience interacting with state, federal, and local law enforcement to prosecute this case. Accordingly, District Attorney Willis asks the court to grant his recusal and to appoint a new and disinterested attorney *pro tem*.

WHEREFORE, PREMISES CONSIDERED, District Attorney Willis respectfully prays that the Court grant his Motion for the Appointment of a New, Impartial and Disinterested Attorney *Pro Tem* in all respects, and enter an Order providing for:

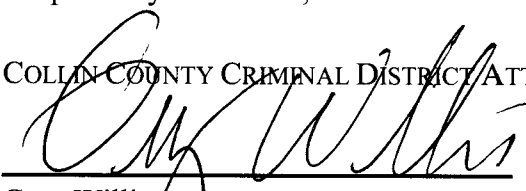
- A) the termination of the Texas Attorney General as attorney *pro tem*;
- B) accepting the voluntary recusal of the undersigned District Attorney;
- C) the appointment of an impartial and disinterested attorney *pro tem*; and

D) any and all further relief to which the District Attorney Willis has shown the citizens of Collin County to be justly entitled.

DATED: August 26, 2011.

Respectfully Submitted,

COLLIN COUNTY CRIMINAL DISTRICT ATTORNEY



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Certificate of Service

This is to certify that on this the 29th day of August, 2011, a true and correct copy of this motion was mailed to Peter A. Schulte, 4131 N. Central Expressway, Suite 680, Dallas, Texas, 75204, and Harry E. White, Assistant Attorney General, Office of the Attorney General, P.O. Box 12548, Austin, Texas 78711.



Greg Willis
Collin County Criminal District Attorney