

ORIGINAL



IN THE COURT OF CRIMINAL APPEALS OF THE STATE OF OKLAHOMA

STATE OF OKLAHOMA,

Petitioner,

-vs.-

**The Honorable KENNETH ADAIR,
Judge of the District Court of
Okmulgee County,**

Respondent.

**FILED
IN COURT OF CRIMINAL APPEALS
STATE OF OKLAHOMA**

DEC -6 2017

No. MA-2017-1059

**ORDER DENYING PETITION FOR WRIT OF MANDAMUS AS CONCERNS
RESPONDENT'S DISQUALIFICATION IN CRIMINAL MATTERS**

AND

**TRANSFERRING TO SUPREME COURT REQUEST
FOR MANDAMUS RELIEF ON POTENTIAL CIVIL MATTERS**

On October 16, 2017, Petitioner, the State of Oklahoma, through counsel, O.R. Barris III, District Attorney, filed with the Clerk of this Court an "Application to Assume Original Jurisdiction and Petition for Writ of Mandamus" and a supporting brief. The State's Petition requests that this Court issue a writ of mandamus requiring Respondent, the Honorable Kenneth Adair, District Judge, to certify his disqualification from "all criminal cases and civil forfeiture cases being prosecuted by the Okmulgee County District Attorney's Office, or transfer these proceedings to another judge." (Pet. at 1.) Petitioner's matter originates from trial court proceedings initiated under Okmulgee County District Court Case No. CV-2017-70.

After exhausting the remedies afforded in the district courts as set out in Rule 15, *Rules of the District Court*, Okla. Stat. tit. 12, ch. 2 app., that rule permits an original action in mandamus from an unfavorable ruling on a motion for the disqualification of a judge or the transfer of the case to another

judge. That mandamus procedure in this Court is recognized at Rule 1.2(D)(3), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch. 18, App. (2017). Under Rule 15, before a person may file a motion to disqualify a judge, he must make an in camera request to the affected judge to disqualify or to transfer the cause. If such request is not satisfactorily resolved, the party may then file a motion to disqualify or transfer. Should the judge refuse to grant that written motion, then within five (5) days, an interested party aggrieved by that decision may file a written request for rehearing, whereupon he will re-present his motion to the Chief Judge of the county or to the Presiding Judge of the Administrative District, if it is the disqualification of the Chief Judge that is sought. Should the order on rehearing be adverse to the moving party, “he shall be granted not more than five (5) days to institute a proceeding in the Supreme Court or the Court of Criminal Appeals for a writ of mandamus.” Rule 15(b), *Rules for District Courts*, 12 O.S.Supp.2006, ch. 2 app. This same rule provides, “An order favorable to the moving party may not be reviewed by appeal or other method.” *Id.*

We assume original jurisdiction and take up Petitioner’s matter to the extent the Petition requests relief concerning criminal cases, but as required under Rule 15(c),¹ we transfer to the Supreme Court any remaining request by Petitioner that potentially concerns civil matters before the district courts.

I. Procedural History

A. Proceedings Before Judge Adair on Motion to Disqualify

In Petitioner’s case, the record shows that District Attorney Barris appeared in camera before Judge Adair to request that Judge Adair recuse in

¹ Rule 15(c) states, in pertinent part, “If mandamus is not brought in the appellate court designated as proper by this rule, the case will be transferred to the proper court either on motion or sua sponte.” Rule 15(c), *Rules for District Courts*, 12 O.S.2011, ch. 2 app.

all criminal matters in Okmulgee County. Judge Adair denied that in camera request on August 4, 2017, in part on grounds that he believed Rule 15 contemplated a case-by-case request to recuse as opposed to a blanket motion covering an entire category of cases. (8/4 Tr. 17; 8/28 Tr. 3-4.) On August 7, 2017, the District Attorney then filed a written motion with the District Court Clerk using the case name “In the Matter of Motion to Disqualify Judge Ken Adair from Hearing All Cases Prosecuted by the Okmulgee County District Attorney’s Office.” The District Attorney titled his Motion as described in the given case name and used that Motion to initiate District Court Case No. CV-2017-70.

The District Attorney’s Motion alleged that subsequent to Judge Adair’s August 4th decision, the State presented “a list of all criminal and civil forfeiture cases currently pending before the Court, again asking the Court to recuse and/or transfer those cases to another judge.” (8/7 Mot. at 1.) The District Attorney alleged that once his request to recuse was denied, he filed this written August 7th Motion. Attached to his Motion as Exhibit “A” was the case list that he presented to Judge Adair that had named “all criminal and forfeiture cases currently set for hearing before the Judge from August 7, 2017 to December 31, 2017.” (*Id.*) The Motion argued, “[T]he language of Rule 15 does not prohibit the Movant from making the request to the Judge to disqualify pertaining to all cases the State is prosecuting before the Judge,” and asserted that the Exhibit “A” list was being provided so as to notify those persons who might be affected by the relief requested. (*Id.*) The Motion then presented three grounds for why the District Attorney believed Respondent should certify his disqualification. On August 28, 2017, following a hearing on this written Motion, Judge Adair ultimately denied relief on a procedural

ground. Although not entirely clear from his order as pronounced from the bench,² that ground was apparently that Rule 15 did not permit a blanket motion to disqualify. (8/28 Tr. 25-26.)

On August 29, 2017, the District Attorney filed a new written motion in CV-2017-70. The District Attorney gave this second motion the same title as that of the August 7th Motion and again asked that Judge Adair be disqualified “from hearing all cases prosecuted by the Okmulgee County District Attorney’s Office.” (8/29/17 Mot. at 1.) This second motion, however, differed from the District Attorney’s previous Motion in that he added a fourth ground for disqualification and provided a revised Exhibit “A” “list of all criminal and forfeiture cases currently set for hearing before the Judge from August 7, 2017 to December 31, 2017.” (8/29/17 Mot. at 1.)

B. Proceedings on Re-Presented Motion to Disqualify

The Honorable Douglas W. Golden, Presiding Judge over the administrative district that encompasses Okmulgee County, recused from hearing Petitioner’s matter on August 31, 2017. The Oklahoma Supreme Court then assigned the Honorable Mark Campbell, District Judge, “to hear and decide all matters related to Okmulgee County Case No. CV-2017-70.” *In Re Assignment to Judicial Service*, No SCAD-2017-66 (Okla. Sept. 5, 2017) (unpublished). On September 28, 2017, Judge Campbell heard the request seeking Judge Adair’s disqualification, but he limited the issues to be considered to those listed in the State’s Motion of August 7th. (10/11 Order at 4.) Judge Adair appeared at the hearing and questioned the witnesses presented by the District Attorney, as did Carol Seacat who was appearing on behalf of five of the defendants named

² If Judge Adair prepared a written order of his decision, it has not been included within those records that Petitioner has presented to this Court.

within various cases listed in the Exhibit “A” of the August 7th Motion. After receiving evidence, Judge Campbell took the matter under advisement, and on October 11, 2017, he filed his written order.

In that order, Judge Campbell found the District Attorney could properly petition for the disqualification of Judge Adair on all of the cases, and that his “global request does not render the State’s motion procedurally invalid.” (10/11 Order at 9.) Proceeding to the merits of the State’s request, Judge Campbell reviewed the various code provisions and authorities he believed applicable to Petitioner’s case as well as the evidence presented. Judge Campbell concluded:

[T]he State has not established that Judge Adair is patently biased against the District Attorney’s Office, or law enforcement in general, so as to warrant his absolute disqualification from handling their cases. Accordingly, the State’s request to completely disqualify Judge Adair from handling any case filed by the State is **DENIED**.

(10/11 Order at 10.)

Judge Campbell did find, however, that Judge Adair’s investigation of the scene in *State v. Michaelle Johnson*, No. CF-2016-18—it being an independent investigation by Judge Adair that occurred without notice to the parties—did provide grounds for his disqualification for further involvement in that matter. Judge Campbell therefore permanently transferred that case number to the Honorable Cynthia Pickering, Associate District Judge. (10/11 Order at 10.)

Lastly, Judge Campbell made the following rulings:

[T]he judicial system must be mindful of the appearance of impropriety. Accordingly, the undersigned hereby transfers all of the cases referenced in “State’s Exhibit A”³ in the Motion to Dis-

³ As Judge Campbell limited the issues to those presented in the State’s Motion of August 7th,

qualify to the Honorable Cynthia Pickering, Associate District Judge. It is critical to note that this Court is not disqualifying Judge Adair, but rather transferring said cases to another judge

Nothing in this Order shall apply to any cases filed after the State's Motion to Disqualify was filed, as the undersigned has no authority nor any intention to disqualify Judge Adair from handling any newly-filed cases of the State (or transfer any newly-filed cases from him).

The transfer of the cases referenced herein is not a slight to the integrity or obvious exceptional Constitutional knowledge of Judge Adair. Simply put, based on the statements made by Judge Adair that were the subject of the State's Motion to Disqualify as to the cases referenced herein, the appearance of impropriety must be avoided by transferring said cases to an alternate judge. The Defendants who are the subject of said cases will not be prejudiced in any way, as they will have no less a competent judge to handle their case in Judge Pickering.

(10/11 Order at 10-11.)

II. Analysis of Petitioner's Rule 15 Request for Mandamus as Concerns Petitioner's Pending and Future Criminal Case Filings

As previously noted, Rule 15 provides, "An order favorable to the moving party may not be reviewed by appeal or other method." Rule 15(b), *Rules for District Courts*, 12 O.S.Supp.2006, ch. 2 app. Consequently, we find that Rule 15 prevents Petitioner, as well as those defendants whose cases have been transferred to Judge Pickering, from now complaining of Judge Campbell's decision to the extent that it was favorable to Petitioner as the moving party. Petitioner's complaint is therefore limited to the question of whether it should be granted a writ that would mandate Judge Adair either to disqualify or to transfer to another judge all pending cases not encompassed in the Exhibit "A"

we construe this "State's Exhibit 'A'" reference to the Exhibit "A" attached to the District Attorney's August 7th Motion. The revised Exhibit "A" list attached to Petitioner's August 29th motion appears to add some cases and delete others.

document attached to Petitioner's August 7th Motion and all future criminal cases prosecuted by the Okmulgee County District Attorney's Office.

The Code of Judicial Conduct states, "A judge shall uphold and apply the law, and shall perform all duties of judicial office fairly and impartially." 5 O.S. 2011, ch. 1, app. 4, Canon 2, R. 2.2. That Code further requires that a judge "disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned." *Id.*, R. 2.11(A). In construing the latter-quoted phrase, both this Court and the Oklahoma Supreme Court have found:

A trial judge may have a duty to disqualify despite a personal belief that he is free of bias:

Where there are circumstances of such nature as to cause doubts as to a Judge's partiality, bias or prejudice, it is his duty to disqualify, notwithstanding the fact that he personally believes himself to be unprejudiced, unbiased and impartial.

Heard v. Sullivan, 280 P.2d 708 (Okla. 1955) (Syl. 1).

Willett v. State, 1984 OK CR 16, ¶ 2, 674 P.2d 573, 575.

Relying on these principles, the State throughout its brief argues that the issue is whether it has proven circumstances exist under which Respondent's impartiality might reasonably be questioned. Petitioner therefore takes issue with that portion of Judge Campbell's order that seems to conclude that the State was required to "establishe[] that Judge Adair is patently biased against the District Attorney's Office, or law enforcement in general" in order to warrant his disqualification. (10/11 Order at 10.) We agree that the proper measure is whether the judge's impartiality might reasonably be questioned. We note, however, that it is an objective standard of reasonableness that must be applied, and not whether the District Attorney might personally question Respondent's impartiality. *See Judicial Ethics Op. 1999-3*, 1999 OK JUD ETH

3, ¶ 6, 86 P.3d 663, 664 (“We must also emphasize that a Judge should disqualify, as set out clearly in the Canons, where there may be the *appearance* of impartiality as viewed by a reasonable person.”). In other words, the issue is whether “a reasonable person, knowing all the relevant facts, would harbor doubts about the judge’s impartiality.” *Switzer v. Berry*, 198 F.3d 1255, 1257 (10th Cir. 2000).⁴

We further note that in construing Rule 15, our state Supreme Court has held, “The burden is on the party seeking disqualification to substantiate a claim that the appearance of a fair trial is not present, or that the judge’s impartiality might reasonably be questioned.” *Casey v. Casey*, 2011 OK 46, ¶ 11, 270 P.3d 109, 112. Consistent with that allocation of the burden of proof, this Court has observed, “There is a general presumption of impartiality on the part of judges as to matters before them.” *Carter v. State*, 1994 OK CR 49, ¶ 13, 879 P.2d 1234, 1242.

Having reviewed the record presented by Petitioner, we do not find the State’s evidence would cause a reasonable person to question Respondent’s impartiality on the pending cases not identified in the August 7th Motion on which Judge Campbell denied relief or on those unnamed future proceedings filed by the Okmulgee County District Attorney.

We begin by noting that almost all of the incidents cited by Petitioner as grounds for questioning Respondent’s impartiality arose in previously filed

⁴ Construing the federal equivalent of that portion of Oklahoma’s *Code of Judicial Conduct*, 5 O.S.2011, ch. 1, app. 4, Canon 2, R. 2.11(A), that reads, “A judge should disqualify himself or herself in any proceeding in which the judge’s impartiality might reasonably be questioned” See also *Cheney v. United States Dist. Ct.*, 541 U.S. 913, 924, 124 S. Ct. 1391, 1400, 158 L.Ed. 2d 225 (2004) (Scalia, J., mem. den. mot. to recuse) (“Such a blast of largely inaccurate and uninformed opinion cannot determine the recusal question. It is well established that the recusal inquiry must be ‘made from the perspective of a reasonable observer who is *informed of all the surrounding facts and circumstances.*’”).

matters that have either been concluded or transferred as a result of Judge Campbell's order. Whether Respondent's impartiality in those prior or pending proceedings could be reasonably questioned is not at issue before us. The only issue here is whether Respondent's previous acts will provide cause to question his impartiality in new and future criminal case filings by the District Attorney.

The allegations of bias and lack of impartiality cited by Petitioner are:

1. The Judge, through conduct and statements on the record, has established circumstances in which his impartiality might reasonably be questioned;
2. The Judge has, through rulings in on-going cases and statements made extrajudicially to members of court staff, district attorney personnel and/or law enforcement personnel, established circumstances in which the judge's impartiality might reasonably be questioned;
3. The Judge, in his violation of canon of judicial ethics rule 2.9, has created further circumstances in which the judge's impartiality might reasonably be questioned.

(Pet. for Mandamus at 2.)

The majority of the instances relied upon in support of these allegations for disqualification arise from four cases in particular. In those cases, Respondent found portions of the testimony of various law enforcement officers to be untruthful, embellished, or exaggerated. In addition to comments Respondent made when hearing those cases, Petitioner also complains that Respondent made remarks to a fellow jurist and to a long-time practicing attorney about his assessment of the law enforcement testimony he observed in one or more of those cases. Because the State does not believe the evidence or circumstances presented in those cases can justify Respondent's findings or support those extrajudicial remarks he has made about the law enforcement

testimony, Petitioner asks that we now mandate Respondent's disqualification from all new and future criminal cases filed by the District Attorney.

Judge Adair's rulings in the four cited cases will not support the disqualification that Petitioner seeks. The cases of *State v. Mario Alexander* and *State v. Michaelle Johnson* are the primary focus of Petitioner's complaints. The State appealed Respondent's decision in the *Alexander* case, and this Court upheld Respondent's rulings. *State v. Alexander*, No. S-2012-723 (Okl.Cr. Sept. 8, 2016) (not for publication). As for the *Johnson* case, we have reviewed the behaviors Petitioner lists from that matter, but we do not find that they demonstrate a personal interest or bias that could reasonably be considered to extend beyond the confines of that particular case—a case that Judge Campbell has addressed by permanently transferring it to Judge Pickering.

The Comment to Canon 2's Rule 2.2 observes, "When applying and interpreting the law, a judge sometimes may make good-faith errors of fact or law. Errors of this kind do not violate this Rule." 5 O.S.2011, ch. 1, app. 4, Canon 2, R. 2.2, cmt. (3). Consequently, Petitioner must do more than merely show Respondent may have erred in his assessment or disposition of a particular case. Similarly, proof that a judge has previously entered rulings adverse to a petitioner will rarely, standing alone, serve as a basis for establishing bias. *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 1157, 127 L.Ed. 2d (1994) ("judicial rulings alone almost never constitute a valid basis for a bias or partiality motion").

We have also reviewed the extrajudicial remarks Respondent is alleged to have shared with a fellow judge and with an attorney concerning law enforcement testimony. Although Petitioner wishes to construe these remarks as exhibiting an ongoing bias or prejudice against particular officers or law

enforcement testimony in general, the evidence presented does not reasonably support that conclusion. Judge Ramirez denied that Respondent ever said he could not believe any law enforcement officers' testimony, could not believe the future testimony of the officer involved in one of the cited cases, or could not believe any testimony presented by an Assistant District Attorney who had sponsored a particular officer's prior testimony. (9/28 Tr. 30-31.) The attorney who the Petitioner named as a witness to Respondent's remarks about the testimony of law enforcement officers had practiced before the Okmulgee County District Courts for more than fifty years and had appeared before Respondent on numerous criminal cases. He testified before Judge Campbell that he could not "single out one time" when Respondent "tilted in [his] favor against the law enforcement and Mr. Barris and his office." (9/28 Tr. 58-59.)

Most of the extrajudicial remarks about which Petitioner complains flow from the four Okmulgee County cases to which Petitioner has cited. Such remarks cannot serve as grounds for questioning Respondent's impartiality. "Also not subject to deprecatory characterization as 'bias' or 'prejudice' are opinions held by judges as a result of what they learned in earlier proceedings." *Liteky*, 510 U.S. at 551, 114 S.Ct. at 1155. Additionally, it is not grounds for a judge's disqualification merely because he previously presided over one or more cases that involved the same individual. *See generally Carter v. State*, 1977 OK CR 57, 560 P.2d 994, 997 (trial judge was not disqualified by statute because, "when in private practice, [he] had represented the defendant in an unrelated matter," or because he "had presided over two of the defendant's prior trials"). "Thus, judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases,

ordinarily do not support a bias or partiality challenge.” *Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157.

Lastly, Petitioner’s request for disqualification relies on a statement Respondent made that is apparently unconnected with the four prior cases. An investigator for the sheriff’s office testified that when he was in the chambers of Judge Ramirez on a search warrant matter, Respondent came in and stated to Judge Ramirez that law enforcement officers do not come to him regarding search warrants because they don’t trust him. (9/28 Tr. 61-62.) This same investigator, however, also testified that Respondent never denied a warrant request that the investigator had made of Respondent and testified that he had no reason to dispute that Respondent had never denied a search warrant request. (9/28 Tr. 65.)

Although our decision to deny the requested writ should not be interpreted as necessarily approving of Respondent’s comments, before remarks such as those Petitioner describes will require a judge’s disqualification, they must “reveal such a high degree of favoritism or antagonism as to make fair judgment impossible.” *Liteky*, 510 U.S. at 555, 114 S.Ct. at 1157. In other words, it must appear that the judge “harbors an aversion, hostility or disposition of a kind that a fair-minded person could not set aside when judging the dispute.” *Id.*, 510 U.S. at 558, 114 S.Ct. at 1158 (Kennedy, J., concurring). Additionally, we must construe the judge’s comments in the context of all the facts and circumstances and determine if a reasonable person would construe them as indicating partiality on the merits of those pending new or future criminal cases filed by the District Attorney. Because we do not find the cited incidents rise to these levels, Petitioner’s request for a writ of mandamus from this Court should be denied as set forth below.

III. Defense Counsel's Request to File Response

On October 19, 2017, Carol Seacat, as counsel on behalf of the defendants named in affected Cases Nos. CF-2014-42, CF-2017-156, CF-2017-123, CF-2015-380, and CF-2014-423, filed an "Application for Permission to File Response." This Application asserts these defendants are interested parties whose rights have been affected by Judge Campbell's order. The Application further asserts that the issue of disqualifying a judge in all criminal cases is of particular concern to the defense bar as a whole. The Application therefore asks to be heard by allowing the filing of a response.

As we have determined Rule 15 prevents review of an order that is favorable to the moving party, a response objecting to the relief granted by Judge Campbell would be of no benefit to the Court, as we are foreclosed by Rule 15 from reviewing that aspect of his decision. Moreover, as we find Petitioner has not shown itself entitled to further relief by writ of mandamus from this Court, we find a response in opposition to that writ is not necessary. Counsel's Application is therefore **DENIED**.

IT IS THEREFORE THE ORDER OF THIS COURT that the Petition for Writ of Mandamus, filed herein on October 16, 2017, is **DENIED** to the extent it seeks a writ requiring the disqualification of Respondent in all criminal cases prosecuted by the Okmulgee County District Attorney or seeks a writ for the transfer of such criminal cases to another judge.


IT IS THE FURTHER ORDER OF THIS COURT that, to the extent that the Petition for Writ of Mandamus seeks in any civil matter the disqualification of Respondent or the transfer of any civil case to another judge, his Petition, pursuant to the provisions of Rule 15(c) of the *Rules for District Courts*, 12

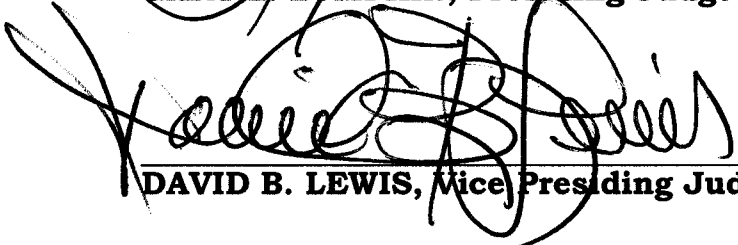
O.S.Supp.2006, ch. 2 app., is hereby transferred to the Oklahoma Supreme Court for such orders as the Supreme Court deems appropriate.

The Clerk of this Court is directed to forward a copy of this Order to Chief Justice Douglas Combs; to the Honorable Mark Campbell, District Judge; the Honorable Kenneth Adair, District Judge; the Honorable Cynthia Pickering, Associate District Judge; the Okmulgee County District Court Clerk; O.R. Barris III, District Attorney; for Rogers County; and to Carol Seacat, Attorney at Law.

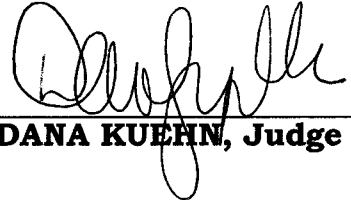
IT IS SO ORDERED.

WITNESS OUR HANDS AND THE SEAL OF THIS COURT this 16th day of December, 2017.

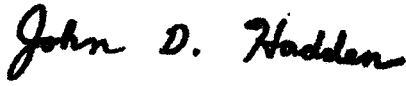

GARY L. LUMPKIN, Presiding Judge


DAVID B. LEWIS, Vice Presiding Judge


ROBERT L. HUDSON, Judge, *Special Concur*
(see writing)


DANA KUEHN, Judge *concur in part / dissent in part*

ATTEST:


Clerk

OA

HUDSON, J., SPECIALLY CONCURS

This case presents an extraordinary situation in which the State seeks disqualification of a district judge from hearing an entire category of cases. The pattern of comments and conduct by Respondent makes this, in my view, a close case. I nonetheless concur in today's decision denying mandamus in light of Judge Campbell's orders in this case as well as the remedies which remain available to address any future issues with this Judge.

Despite today's ruling, the State retains the ability to seek disqualification of Judge Adair in future cases when appropriate under the governing law and procedures discussed in this Order. In extreme cases, an appropriate remedy (depending, of course, upon the particular facts of the case) may be the categorical disqualification of a trial judge from hearing cases involving certain issues, witnesses or parties. The Oklahoma Constitution guarantees that "[t]he courts of justice of the State shall be open to every person . . . and right and justice shall be administered without sale, denial, delay, or prejudice." Okla. Const. art. 2, § 6. And "[d]ue process guarantees 'an absence of actual bias' on the part of the judge." *Williams v. Pennsylvania*, __U.S.__, 136 S. Ct. 1899, 1905, 195 L. Ed. 2d 132 (2016) (quoting *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 2d 942 (1955)). Rule 15, *Rules for District Courts* in my view authorizes the drastic remedy of disqualification of a biased judge from an entire category of present and future cases—without resort to administrative transfer remedies—to vindicate these constitutional commands.

The State too always has the option of pursuing interlocutory state appeals of adverse rulings in a variety of contexts pursuant to 22 O.S.2011, § 1053. *See, e.g., State v. Gilchrist*, 2017 OK CR 25, __P.3d__ (reversing district court's order granting motion to quash based on purported double jeopardy violation); *State v. Feeken*, 2016 OK CR 6, 371 P.3d 1124 (reversing district court's order sustaining defense motion to suppress narcotics evidence based on alleged Fourth Amendment violation); *State v. Franks*, 2006 OK CR 31, 140 P.3d 557 (affirming district court's order that State amend general felony charge down to the more specific misdemeanor offense supported by the facts).

Justice Cardozo writing for the Court in *Snyder v. Massachusetts*, 291 U.S. 97, 54 S. Ct. 330, 78 L. Ed. 2d 674 (1934), said:

The law, as we have seen, is sedulous in maintaining for a defendant charged with crime whatever forms of procedure are of the essence of an opportunity to defend. Privileges so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men will be kept inviolate and inviolable, however crushing may be the pressure of incriminating proof. *But justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true.*

Id., 291 U.S. at 122, 54 S. Ct. at 338 (emphasis added).

Today, more than ever, we must “hold the balance true.” *See* 5 O.S.2011, ch.1, app. 4, Canon 1, Rule 1.2, *Code of Judicial Conduct* (“A judge shall act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and avoid impropriety and the appearance of impropriety.”); *id.*, Canon 2, Rule 2.2 (“A judge shall

uphold and apply the law, and shall perform all duties of judicial office fairly and impartially.”); *id.*, Canon 2, Rule 2.3 (a judge shall perform his or her duties without bias or prejudice). I believe the procedures discussed above allow us to accomplish that goal.

KUEHN, JUDGE: CONCURRING IN PART/DISSENTING IN PART

The State's request for extraordinary relief is complex and poses multiple issues. The first set of issues is whether the decisions were proper to disqualify Judge Adair from a specific case and to administratively transfer a list of cases ("Exhibit A") off Judge Adair's docket. Also at issue is whether the decision was proper in denying the State's request under Rule 15, *Rules for District Courts*, 12 O.S.Supp.2017, Ch. 2 App, to recuse Judge Adair in all future criminal matters filed. Lastly, at issue is whether an administrative decision was proper in refusing to transfer all future criminal matters away from Judge Adair.

As the majority discusses at length, the affirmation to recuse Judge Adair in *State v. Michaelle Johnson*, No. CF-2016-18 and Judge Campbell's administrative decision to transfer to another judge the bulk of the cases listed in "Exhibit A" of the August 7, 2017 motion, are rulings favorable to the moving party. Therefore, no appealable issues exist under Rule 15. *Id.* I would dismiss that portion of the application.

Next, Judge Campbell denied the State's request to recuse Judge Adair in all future criminal and forfeiture matters. We have jurisdiction to review Rule 15 recusal requests in all criminal matters, but Rule 15 is for a *single* case. *Id.* Each recusal request is fact and party specific and must be individually addressed when a request is made. Under Rule 15 the State may, as it did here, ask for Respondent's disqualification in any particular case it believes

appropriate. *Id.* Should the State be unsuccessful, it may appeal each ruling under Rule 15(b). Judge Campbell's decision that Rule 15 applies to recusal from a single case and cannot be applied to a string of unfilled future cases was an appropriate exercise of his authority. *Hopkins v. LaFortune*, 2016 OK CR 25, ¶ 17, 394 P.3d 1283, 1287-88; Rule 10.6(B), *Rules of the Oklahoma Court of Criminal Appeals*, Title 22, Ch.18, App. (2017). I agree that this portion of the application for writ of mandamus should be denied.

Finally, this Court does not have jurisdiction with regard to cases not filed at the time the State filed its request. As well, we cannot review an administrative decision denying a *carte blanche* request to transfer a judge from all future cases of a specific type, even criminal cases. Only the Presiding Judge of the District Court and/or the Chief Justice of the Supreme Court can make administrative docket decisions on the district court level. *See Rules on Administration of Courts*, Rules 1, 3(A), 3(C), 3(D) and 7, 20 O.S.2011, Ch. 1, App. 2. A solution¹, which Judge Campbell utilized appropriately, is to transfer only specific cases from Judge Adair to a different judge due to an appearance of impropriety for docket management control. The State wishes this Court to review that administrative decision and order the presiding judge to transfer *all* future criminal cases off of Judge Adair's docket. The majority implies that we have jurisdiction to entertain a request to administer a full docket transfer under the guise of a Rule 15 recusal appeal, authority which we do not have. It is neither the law, nor is it our job.

¹ The State may also refer the matter to the appropriate judicial authorities, including the Oklahoma Court on the Judiciary. Okla. Const. Art. VII-A §1 et. seq.

Therefore, I would dismiss the application as it relates to the disqualification on CF-2016-18 and the administrative decision to transfer specific cases. I concur in the transfer of the civil forfeiture matters to the Supreme Court. However, I would also transfer to the Supreme Court the request for extraordinary prospective relief on whether an administrative decision was proper in refusing to transfer all future criminal matters away from Judge Adair for his apparent improper behavior.