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09-23-2020  
Clerk of Circuit Court  
Outagamie County  
2000CF000403

STATE OF WISCONSIN

CIRCUIT COURT

COUNTY OF OUTAGAMIE

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STATE OF WISCONSIN,

Plaintiff,

v.

Court Case No. 2000-CF-403

KENNETH HUDSON,

Hon. Gregory B. Gill, Jr.

Defendant.

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**MEMORANDUM OF LAW**

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Defendant Kenneth Hudson (hereinafter “Hudson”), by his counsel Walter W. Stern III, provides this *Memorandum of Law in Support of Motion to Recuse* pursuant to §757.19(2)(g) Wis. Stats.

**INTRODUCTION**

Hudson asserts his right under the due process clause of the 14<sup>th</sup> Amendment to the United States Constitution to request recusal of Hon. Gregory Gill, the Circuit Court Judge assigned to the above case, as he believes Judge Gill is unable to preside over a matter which will be calling as witnesses individuals who worked with Judge Gill in his prior position in the Outagamie County District Attorney’s Office. Hudson believes his rights of due process could be muddled by Judge Gill presiding over any future proceedings.

The specifics surrounding these assertions are more specifically set forth in the Motion for Judicial Recusal filed simultaneously herewith.

### **ARGUMENT**

Every defendant has a right to due process under the Wisconsin and United States Constitutions. This is inherent to a fair trial and a trier of fact that is unbiased and non-prejudicial. A judge must be impartial and free from any presumption of bias. A judge is presumed to have acted without prejudice. However, a defendant may rebut that presumption by a showing of an appearance of bias, which could lead to actual bias. *Caperton v. A.T. Massey Coal Co.*, 556 US 868, 885, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009); *State v. Goodson*, 2009 WI App 107, 320 Wis.2d 166, 771 NW2d 385; *State v. Gudgeon*, 2006 WI App 143, 295 Wis.2d 189, 720 NW2d 114. A showing of a presumption of bias constitutes a due process violation and defendant has a right to a new judge to be appointed.

Section 757.19(2)(g) of the Wisconsin Statutes states that a recusal is appropriate “when a judge determines that, for any reason, he or she cannot, or it appears he or she cannot, act in an impartial manner.” In the instant case, Judge Gill has many ties to the former prosecutor (now judge) in the original trial, Judge Vincent Biskupic, and Judge Carrie Schneider, with whom Judge Gill was a colleague while all three worked in the Outagamie County District Attorney’s Office. Judge Biskupic and Judge Schneider are integral to Hudson’s § 974.06 motion in several aspects, including their own misconduct during Hudson’s trial, including failure to disclose exculpatory evidence. Judge Gill’s former working relationship and presumed personal relationship with both Judges could most certainly be construed to be an appearance of impartiality.

“It is axiomatic that ‘[a] fair trial in a fair tribunal is a basic requirement of due process.’” *Caperton v. A.T. Massey Coal Co.*, 556 US 868, 885, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009); *Guthrie v. WERC*, 111 Wis.2d 447, 454, 331 NW2d 331 (1983), wherein the court states “[i]t is, of course, undisputable that a minimal rudiment of due process is a fair and impartial decisionmaker.” A biased trier of fact is “constitutionally unacceptable.” *Withrow v. Larkin*, 421 US 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Due process, and by inference, a fair trial with an impartial judge is fundamental to our given rights under the United States Constitution.

“Justice must satisfy the appearance of justice.” *Offutt v. United States*, 348 US 11, 14, 75 S.Ct. 11, 99 L.Ed 11 (1954). In the instant case, the appearance of potential bias, consciously or subconsciously, should preclude Judge Gill from continuing on a case which alleges misconduct against two peers – first at the District Attorney’s Office, and then as fellow Judges. “The appearance of bias offends constitutional due process principles whenever a reasonable person – taking into consideration human psychological tendencies and weaknesses – concludes that the average judge could not be trusted to ‘hold the balance nice, clear and true’ under all the circumstances.” *State v. Gudgeon*, 2006 WI App 143, 295 Wis.2d 189, 720 NW2d 114. The appearance of bias violates due process when there is “a great risk of actual bias.” *Id.*

While Hudson is not questioning Judge Gill’s honesty or integrity, he remains steadfast in his belief that there is an absolute appearance of potential bias. Hudson is not obligated to show proof of bias, only a reasonable presumption that bias could occur. Hudson has a right to impartiality under the due process clause of the 14<sup>th</sup> Amendment to the United States Constitution. As such, Judge Gill should be obligated to recuse himself under § 757.19(2)(g) as

there is, at a minimum, the potential for an appearance of impropriety.

Dated at Kenosha, Wisconsin this 22<sup>nd</sup> day of September, 2020

Electronically signed by Walter W. Stern III

Walter W. Stern III

State Bar No.: 1014060

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