

**STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT**

For Official Use

STATE OF WISCONSIN, Plaintiff - Respondent,

v.

Appeal Number: _____

Kenneth A. Hudson,

Outagamie County Circuit Court

Defendant - Appellant.

Case No. 2000-CF-403

**PETITION AND MEMORANDUM FOR LEAVE TO APPEAL A NONFINAL ORDER
OF THE CIRCUIT COURT FOR OUTAGAMIE COUNTY, HON. JAMES A.
MORRISON PRESIDING**

PETITION FOR STAY OF PROCEEDINGS PENDING APPEAL

Pursuant to Wis. Stat. Secs. 809.50 and 809.51, Mr. Kenneth A. Hudson petitions the Court of Appeals, District III, for leave to appeal from the non-final orders in Outagamie County Case Number 20-CF-403, entered on February 24, 2023, in Marinette County Court, the Honorable James A. Morrison presiding, in which the Court removed Attorney Michael J. Balskus from representing Mr. Hudson and for denying Mr. Hudson's motion for the recusal of the Honorable James A. Morrison. Pursuant to Wis. Stat. Sec. 809.52, Mr. Hudson asks that this Court stay all

proceedings and deadlines pending the disposition of this petition. The Court required Mr. Hudson to file his comprehensive motion by March 31, 2023.

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STATEMENT OF ISSUE

Whether Mr. Hudson was denied his 6th Amendment Right to an Attorney under the United States Constitution and the Wisconsin Constitution, Article 7, when he disqualified his attorney, Michael J. Balskus and required Mr. Hudson to file a comprehensive motion pro se. Second, that

the Honorable James A. Morrison failed to grant a motion that he should recuse himself from the matter based on bias, prejudice, transparency, and disclosure surrounding how the matter was assigned to the Honorable James A. Morrison.

STATEMENT SHOWING NECESSITY FOR REVIEW

Wis. Stat. Sec. 808.03(2) directs an appellate court to grant an appeal from a nonfinal order if the court determines that an appeal will do one of the following:

1. Materially advance the termination of the litigation or materially clarify further proceedings in the litigation;
2. Protect the petitioner from substantial or irreparable injury;
3. Clarify an issue of general importance in the administration of justice.

The Defendant respectfully requests that this Court grant an appeal from the circuit court's non-final order to protect him from the substantial injury caused by being forced to file a comprehensive 976.04 motion without the aid or assistance of an attorney. The Defendant respectfully requests that this Court grant an appeal from the circuit court's non-final order to clarify the issue of transparency and full disclosure in the administration of justice.

Non-final judgements and orders are appealable by permission of this Court. Wis. Stat. sec. 808.03(2). The circuit court recognized that the Defendant had a right for an interlocutory appeal on these issues. The issues presented are crucial to the rights of the Defendant to have a fair hearing.

STATEMENT OF FACTS

On April 3, 2001, the Defendant was sentenced after a jury trial for multiple felonies. The Defendant has alleged from the very beginning of his case that he did not commit the homicide of which he was convicted. The Defendant asserted that he saw the victim in this case and that he tried to assist the victim but fled in his truck when he was attacked by a David Carnot, the son of a retired police officer from the jurisdiction where the offense occurred. The Defendant fled in his truck, and he was run off the road miles later. The officers reported that when he was stopped the Defendant was covered in blood and a knife was found in the cab of the truck. The Defendant indicated that when he was stopped that an officer threw blood or a red substance on him.

The Defendant's story seems outrageous. The State argued that at trial. The Defendant requested DNA testing of all "blood" samples. The State vigorously objected to any further testing. Eventually, testing was conducted, and the results were shocking. The "blood" which was on his chest found no DNA. "Blood" on his left arm contained no DNA. The sample from the right hand which the State indicated had a combination of the Defendant's and the victim's DNA, the Molecular Forensics Laboratory found no DNA. The "blood" on his left leg was analyzed

several years after the trial and the Molecular Forensics Laboratory found that the DNA matched only the Defendant and certain relatives. The “blood” on his left foot was found to have no DNA profile in 2008. In 2017, a “blood” sample was analyzed at the University of California-Davis which found no sequence data or DNA profile generated. The experts indicated that this suggests: “(a) the sample is not mammalian in origin, (b) the sample is not a biological in origin, (c) the DNA that is present is being obscured by inhibition, or (d) the DNA is too degraded for analysis.” Other experts found that fine, iron rich particles and unexplained trace amounts of various compounds could have acted as inhibitors. These compounds should not have been present in the sample unless it was tampered with by others. This presents evidence that the Defendant’s assertions are legitimate to be considered and not an outrageous claim.

The Defendant was taken to a hospital. The officer who took him there had a recording of the time at the hospital. The Defendant insisted that he asked to consult with an attorney. He asked that the recording be provided in discovery. It was not provided. The State, through District Attorney Vincent Biskupic, informed the trial court that the Defendant’s request was ambiguous as to the request for an attorney. The recording was eventually provided to the Defendant after trial, and it showed that the Defendant unequivocally asked for an attorney. The statement by District Attorney Biskupic to the trial court was false. This is one of many instances where the Defendant alleges that the State committed prosecutorial conduct.

The Defendant asked for the dispatch tapes for the incident. He was not provided with the tapes. The State then introduced the tape at trial. The tape went directly to the credibility of the State’s

witnesses. Years later, the Defendant was able to get the dispatch tape from another agency. This should have been the same as the tape that was introduced at trial. But it was not. It is reasonable to assume that the tape played at trial was altered which is supported by an expert's opinion. This evidence directly refutes many of the State's witnesses which affects their credibility. It also goes to claims of prosecutorial misconduct.

The State presented evidence that the Defendant confessed after he left the hospital and was taken to the Kaukauna Police Department. The Defendant denies ever confessing to the crime. The police originally indicated that the confession was not taped but it later was learned that the interview was recorded. The State indicated that the tape was recorded over because it was on a continuous loop. An expert hired by the Defendant examined the recording equipment and indicates that this could not have happened.

The State indicated that the Defendant made inculpatory statements to his girlfriend, Danita Scharenbroch. A tape of that conversation was made by the State. Ms. Scharenbroch always denied that such a conversation ever happened. The tape was in the custody of the District Attorney's Investigator. No copy of the tape was provided to the Defendant. The tape was then lost by the District Attorney's Office. Ms. Scharenbroch was charged with a contempt charge for contacting the Defendant while he was in the jail. The Defendant asserts that this was done by the State to prevent the Defendant from obtaining an attorney violating his 6th Amendment rights under the U.S. Constitution.

Photos became an issue in the case. The Defendant requested all the photos in this case in discovery. The State did not provide all the photos to the Defendant. A major issue deals with the negatives and photos that were taken by the officer at the scene of the stop. The negatives and photos would show the order in which the photos were taken. Judge Gill ordered that the State had to comply with requests dealing with the photos. The State has not fully complied with the courts order.

The trial Judge assigned to this case was the Honorable Harold V. Froehlich. Judge Froelich retired from the bench and the Honorable Gregory B. Gill, Jr. was appointed to Outagamie County Circuit Court Branch IV in September of 2011 and subsequently elected. Judge Gill was a former intern for the Outagamie County District Attorney's Office under District Attorney Biskupic. He later served as an Assistant District Attorney for Outagamie under District Attorney Carrie Schneider, who was the co-prosecutor on the Defendant's case. District Attorney Biskupic became a Judge in 2014 for Outagamie County Branch 6 and District Attorney Schneider became a Judge in 2017.

In June of 2018, the Defendant moved for Judge Gill to remove himself on the case. Judge Gill was transparent and indicated that he was an intern in the Outagamie County District Attorney's Office and later an Assistant District Attorney. Judge Gill had "minimal involvement or awareness even of what had transpired in this case,". (Transcript of the Motion Hearing, June 12, 2018, page 5, lines 19-20.) Judge Gill did not think that the fact that Judge Biskupic and Judge Schneider may have to testify in the matter would require his removal at that time. During that

hearing, Judge Gill made his ruling about the production of the photos which was mentioned above.

Judge Gill was elected to the District III Court of Appeals and started as an Appellate Judge on August 1, 2021. The Honorable Yadira J. Rein was appointed on June 25, 2021, to succeed Judge Gill for Branch IV in Outagamie County. On August 27, 2021, Judge Rein ruled on a motion for withdrawal of counsel on the Defendant's case. On October 21, 2022, an Application for Specific Judicial Assignment was filed. The application states that the Judge assigned to the case is Judge Gregory Gill. The basis for the request was that Judge Gill was recently elected to the Court of Appeals. From all appearances, this Application was filed by Judge Gill, but it wasn't. Judge Gill had been on the Court of Appeals for at least two plus months. The Honorable James A. Morrison was appointed on the case. Judge Morrison was the Chief Judge of the District starting in 2016 until 2022.

On October 20, 2022, Attorney Michael J. Balskus filed a notice of retainer on this case. Attorney Balskus worked in the Outagamie County District Attorney's Office in a variety of positions until January of 2003. On October 24, 2022, the Outagamie County District Attorney Melinda Tempelis filed a Motion To Disqualify Attorney Balskus. (Exhibit 1). District Attorney Tempelis alleged that "As a former government employee Balskus is forbidden from representing a client in connection with a matter in which the lawyer has participated personally and substantially. SCR 20:1.11". The District Attorney then proceeded to cite a Wisconsin Public Radio Program which dealt with misconduct of former District Attorney Biskupic where

Attorney Balskus provided information to the press. However, the District Attorney, after stating that Attorney Balskus participated personally and substantially on this case, conceded that “Attorney Balskus did not appear on this case...” On November 8, 2022, the Defendant filed a motion to transfer the case back to Judge Rein and Outagamie County Branch IV.

On November 9, 2022, a hearing was held before the Honorable James A. Morrison. The Court indicated that the most important issue to be addressed was whether Attorney Balskus would remain on the case. District Attorney Tempelis also raised the issue that Attorney Balskus may be a witness in the case but provided no information or facts to back up that claim. The Court asked District Attorney Tempelis: “So do you assert or do you have any reason to know whether Mr. Balskus was actually involved? And I think in your pleadings you say he certainly made no appearances, but was he actually involved in the investigation, prosecution or appeals of Mr. Hudson?” (Transcript of November 9, 2022, page 8, lines 20-25). District Attorney Tempelis replied: “I don’t believe so in looking at the file.” (Transcript of November 9, 2022, page 9, lines 1-2). The Court indicated that Attorney Balskus was to provide all records “that was the subject of this memo and a copy of the memo and a copy of the affidavit.” (Transcript of November 9, 2022, page 20, lines 8-9). The memo and affidavit refer to an article by reporter Dee Hall which described actions by District Attorney Biskupic.

Attorney Balskus turned over all the records which related to the memo and affidavit. Attorney Balskus did not have a copy of the memo and affidavit. He made attempts to get a copy but was unsuccessful. At the hearing the Court addressed the issue of transferring the case back to

Outagamie County Branch IV, Judge Rein. The Court indicated that “Judge Gill was elected. To the court of appeals, and he filed the standard request for the assignment – for another judge to be assigned.” (Transcript of November 9, 2022, page 25, lines 11-14). The Court acknowledged that he knew that former District Attorney Biskupic was a judge as well as former District Attorney Schneider. He indicated that Judge Rein “had absolutely zero or close to zero criminal law experience at the time. (Transcript of November 9, 2022, page 26, lines 4-5). He indicated that there existed so many potential conflicts with Outagamie County, so he took the case. Judge Morrison stated that “...and as to my recollection, no one in Outagamie County mentioned this case to me at all. Maybe they did. Maybe the judges did because I heard about a lot of things when I was chief....” (Transcript of November 9, 2022, page 27, lines 8-11).

On February 24, 2023, a Status conference was held. Attorney Balskus informed the Court that he had turned over all the documents that were in his possession that he was ordered to turn over. Attorney Balskus indicated that he did not have a copy of the memo and affidavit and that he had tried to obtain it. Attorney Balskus provided even more records than he was required to provide. District Attorney Tempelis complained that she thought that there should be more records. The Court found that as to the disqualification of counsel. “You are disqualified from acting in this case. The Court finds beyond a reasonable doubt, you have a conflict under Supreme Court Rule 20:1.11.” (Transcript, which is attached, of February 24, 2023, page 11, lines 2-4). The Court never took any testimony. Attorney Balskus indicated that statement made in the District Attorney’s Memo was false. Attorney Balskus moved for the Court to remove himself because the Application for Specific Assignment was not submitted properly, and the Court refused.

When questioned as to the basis of the finding of a conflict under Supreme Court Rule 20:1.11, the Court contradicted himself. The Court indicated “No sir. The Court did not rule that. The Court ruled that you have not been candid to the Court. That’s what the Court ruled. I did not rule that you had a conflict of interest. We never got that far, so let’s be very clear.” (Transcript of February 24, 2023, page 14, lines 20-25). Attorney Balskus stated that he provided all the records related to the memo and affidavit except the memo and affidavit because it was not in his possession. The Order to Disqualify Attorney Balskus did not specify the what the basis was of the disqualification but just referred to the transcript of February 24, 2023.

ARGUMENT

Disqualification of Counsel

On February 24, 2023, the Defendant’s case was set for a status hearing. It was not set for a motion hearing to disqualify counsel. It was set to determine whether documents were given to the District Attorney and then a briefing schedule would be set on the issue of disqualification. No notice was given to the Defendant and his Counsel that Judge Morrison was going to change the hearing. No time was given to prepare for this change in the purpose of the hearing. No evidentiary hearing. No opportunity to present evidence on the Defendant’s behalf. The Court blindsided the Defendant and violated his due process rights.

The Court erroneously disqualified counsel in this case. The Defendant first stated that he based his ruling on Supreme Court Rule 20:1.1 which states:

(a) Except as law may otherwise expressly permit, a lawyer who has formerly served as a public officer or employee of the government:

(2) shall not otherwise represent a client in connection with a matter in which the lawyer participated personally and substantially as a public officer or employee, unless the appropriate government agency gives its informed consent, confirmed in writing, to the representation.

No evidence was presented to show that Attorney Balskus handled or appeared in court on this case. While that is what was alleged in the State's motion in paragraph 2, the State acknowledged in the motion that he never appeared on the case and at all the hearings, the State never presented any evidence that Attorney Balskus had been involved in any way. Judge Morrison then indicates that he is disqualifying Attorney Balskus because of lack of candor. The lack of candor was stating that he turned over all the records that were the subject of the Affidavit and the memo. That memo and affidavit was written and signed before January 2003. Attorney Balskus gave the State more records that he was required to do under the order. Judge Morrison had no basis to disqualify Attorney Balskus.

WI Const art Sec. 7:

In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process to compel the attendance of witnesses in his behalf; and in prosecutions by indictment, or information, to a speedy public trial by an impartial jury of the county or district wherein the offense shall have been committed; which county or district shall have been previously ascertained by law.

The Defendant has the Constitutional right to have counsel. Judge Morrison denied the Defendant of this right. He did this by denying the Defendant his right to confront the witnesses against him. No affidavits were filed in this matter. He did not allow an evidentiary hearing. Judge Morrison stated that he found a violation of Supreme Court Rule 20.1.11 beyond a reasonable doubt.

In State v. Jones, 2010 WI 72 at Par. 67, Justice Walsh Bradley in her concurrence noted “...defendants who can afford to retain an attorney need not make such a showing if they were denied representation by their attorney of choice. Rather, those defendants need to show only that the court should not have denied representation by counsel of choice, and a new trial is automatic.” Attorney Balskus has been retained to represent the Defendant as to a 974.06 motion and not for a trial. At the November 9, 2022, hearing, Judge Morrison indicated that Attorney Balskus may be disqualified because he may be a witness. Supreme Court Rule 20:3.7(a)

indicates that this only applies to trials. It appears that Judge Morrison was looking at any basis to disqualify Attorney Balskus.

The United State Supreme Court concluded in Wheat v. United States, 486 U.S. 153, 164, 108 S.Ct. 1692 (1988), that a presumption exists in favor of an accused's counsel of choice. Judge Morrison did not apply that standard in this case. Judge Morrison never explained what the basis was for the conflict of interest that he determines was proven beyond a reasonable doubt.

This puts the Defendant in a very difficult position. Judge Morrison has required him to file a comprehensive Sec. 974.06 motion by himself even though he turned over all his materials to Attorney Balskus. At first, Judge Morrison allowed just over two weeks to file the comprehensive motion. He later extended this until the end of March. This handcuffs the Defendant in presenting his argument in this highly complicated case.

JUDGE MORRISON REFUSAL TO RECUSE HIMSELF

Supreme Court Rule 60.01(7m) states: "Impartiality" means the absence of bias or prejudice in favor of, or against, particular parties, or classes of parties, as well as maintaining an open mind in considering issues that may come before the judge." A Judge must avoid impropriety and appearance of impropriety in all activities. Supreme Court Rule 60.03. During hearings in this case, Judge Morrison has shown a bias and prejudice against the Defendant and has indicated that he has prejudged this case.

One of the major claims of the Defendant is that of prosecutorial misconduct. The Prosecutors in his case were Vincent Biskupic and Carrie Schneider, both who are now Outagamie County Circuit Court Judges. The allegations include that the State failed to provide exculpatory evidence contrary to Brady v. Maryland, 373 U.S. 83 (1963), State v. Harris, 2004 WI 64, and Giglio v. United States, 405 U.S. 150 (1972). The prosecutorial misconduct claims include and not limited to withholding discovery; making false statements to the court; losing discovery; threatening witnesses; knowingly presenting false statements; falsifying evidence; and the list goes on from there.

Judge Gill was open, honest and transparent. He informed the Defendant's counsel that he was a legal intern under District Attorney Biskupic and later an Assistant District Attorney under District Attorney Carrie Schneider. Judge Gill indicated that he could be fair and impartial. He listened to arguments and ordered that key negatives would have to be copied and photos made.

How did Judge Morrison respond to Judge Gills' order? He called it malarkey! Judge Morrison said, "I know what Judge Gill ordered, and it's my case now and I'm responsible, and I'm not ordering the photo – the negatives to be photographed and all this malarkey." (Transcript of Motion Hearing on August 3, 2022, Page 31, lines 13-16) He overruled Judge Gill, who was then on the Court of Appeals, on an issue that goes to the heart of the Defendant's claims. According to Judge Morrison, photos that could bolster the Defendant's case is malarkey.

Judge Morrison showed that he has prejudged this case. On February 24, 2023, Judge Morrison stated, "Many of the issues that Mr. Hudson raised have already been disposed of by the appellate court. I'm well aware of that, and I'm certainly not going to be overruling an appellate court. Let's be clear about that." (Transcript of February 24, 2023, Status Hearing, Page 7, lines

15-19). Judge Morrison has indicated that he has prejudged this matter. He goes on further and states, “You have made a claim that you were framed. The appellate court has already indicated that they thought there is not a scintilla of evidence of that.” (Transcript of February 24, 2023, Status Hearing, Page 21 lines 13-15) That was not the finding of the appellate court. Judge Morrison complains about how long this matter has been pending and he blames the Defendant. It took Steven Avery 14 years to prove that he was falsely convicted on his first case because the State withheld blood testing from the defense that showed that he could not be the perpetrator. DNA tests confirmed that Avery did not commit that sexual assault. Judge Morrison ignores the fact that the State, in this case, did not provide all the discovery in this matter and that the State lied to the court stating that the Defendant ambiguously asked for an attorney at the hospital. When the other DNA samples were tested, it did not support the State’s claim that the Defendant was covered in the victim’s blood. Judge Morrison has made it clear that he believes that there is not a scintilla of evidence that supports the Defendant’s claim before he hears all the evidence.

While Judge Gill was fully open and transparent about his connection with former District Attorneys Biskupic and Schneider, Judge Morrison has not been so open and transparent. Judge Morrison was much more involved in the Application for Specific Judicial Assignment. This was not disclosed until after the Defendant filed a motion on the issue. It has never been clarified why Judge Gill, if he did request a judicial assignment on a case where he was no longer the assigned judge. Judge Morrison said, “I made the determination that this is one that I should take out of Outagamie County because there are so many potential conflicts and take it as far away from Outagamie County as we could in District VII.” (Transcript of Motion Hearing, November 9, 2022, Page 26, lines 16-19) Then why did Judge Morrison not take the case when Judge Gill had

the case? Judge Rein never worked in the Outagamie County District Attorney's Office under District Attorneys Biskupic and Schneider.

Judge Morrison indicated that he has no recollection of any one in Outagamie County mentioning this case to him, but acknowledges that maybe they did. (Transcript of Motion Hearing, November 9, 2022, Page 27, lines 8-10) However, Judge Morrison has a connection to Judge Biskupic that he did not reveal. In 2016, Judge Morrison applied for an appointment to the Wisconsin Supreme Court. Judge Vincent R. Biskupic wrote a letter of recommendation to Governor Scott Walker in support of Judge Morrison. (See Exhibit #2) Judge Biskupic gave a glowing recommendation. Judge Morrison did not disclose this to the Defendant. The Defendant has indicated for some time that he wants an evidentiary hearing as to the claim of prosecutorial misconduct which would require testimony by Judge Biskupic. Judge Morrison would be required to determine the credibility of the individual who gave him that recommendation.

Judge Morrison conduct indicated that he has prejudged this case and create the appearance that he can not be impartial. He has required the Defendant to file a comprehensive 974.06 motion and then handcuffs the Defendant. He disqualifies his counsel and gives the Defendant a less than 40 days to file this motion. He overrules Judge Gill's order to produce potential exculpatory evidence as "malarky". He did not full disclose his involvement in having this case assigned to him. He failed to disclose his connection with potential witnesses in the case. He erroneously states that the appellate court found that there was no scintilla of evidence of the Defendant's claims and that he will not overrule the appellate court. Judge Morrison has demonstrated that he is going to deny the Defendant's motion before it is filed. For all the reasons, Judge Morrison should recuse himself from this matter.

RELIEF REQUESTED

Based on the above stated facts and arguments, the Defendant seeks to appeal the non-final orders. The Defendant also requests a stay of further proceedings while the petition is pending. Only through granting orders as requested will the Defendant's essential due process rights be preserved, and grave injustice avoided.

Dated this 10th day of March 2023, in DePere Wisconsin.

Respectfully Submitted,

ELECTRONICALLY SIGNED

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CERTIFICATION

I certify that this petition for leave to appeal conforms to the rules contained in Wis. Stat. Secs.809.50(1) for a petition for a produced using a proportional serif font; double spaced, and that the length of this petition is 4604 words.

Electronically Signed

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