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TIMOTHY YOUNG
State Public Defender

November 10, 2014

Office of the Clerk
Supreme Court of Ohio
65 South Front Street, 8th Floor
Columbus, Ohio 43215-3431

Re: Request for Recusal, Case No. 2010-1373

Dear Clerk:

Counsel for Ashford Thompson respectfully request that Justices Judith French and Sharon Kennedy recuse themselves from deciding the matter *State v. Ashford Thompson*, Case No. 2010-1373, which is currently pending in front of the Supreme Court of Ohio. This letter is being filed in accordance with S. Ct. Prac. R. 14.6(B)(1), and the supporting affidavit is enclosed.

Respectfully Submitted,

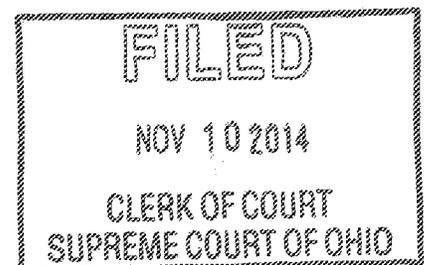
A handwritten signature in black ink, appearing to read "Rachel Troutman".

Rachel Troutman

Supervising Attorney, Death Penalty Division

Enclosure

cc: Richard Kasay, Assistant Summit County Prosecutor (with enclosure)



IN THE SUPREME COURT OF OHIO

STATE OF OHIO, :
Appellee, : Case No. 2010-1373
v. : Appeal taken from the Summit County
Court of Common Pleas
ASHFORD THOMPSON, : Case No. CR 2008-07-2390
Appellant. : **This Is A Capital Case.**

Affidavit of Rachel Troutman

STATE OF OHIO)
) ss:
COUNTY OF FRANKLIN)

I, Rachel Troutman, after being duly sworn, hereby state as follows:

1. I am an attorney in Ohio, licensed and in good standing since November 2003.
2. I am lead counsel for Ashford Thompson in his death penalty direct appeal case. Together with my co-counsel, I filed Mr. Thompson's Merit Brief in this Court on July 26, 2011. The assigned case number is 2010-1373. Mr. Thompson is filing with this Court a Motion for Rehearing and Reconsideration.
3. On October 29, 2014, this Court issued its decision in Mr. Thompson's direct appeal case, denying him relief. Justice Judith French authored the opinion for the majority. The issue on which the Justices diverged was whether the circumstances surrounding the crime, as well as the characteristics of Mr. Thompson himself, warranted a sentence of life over death. Four of the justices voted after their independent review to uphold the death sentence. Three justices concluded that Mr. Thompson is deserving of a life sentence.
4. Our justice system is based upon foundational principles of fairness, objectivity, and maintaining confidence that the decisions rendered by the courts are above any appearance of impropriety. Because of these foundational principles, it is an accepted standard that where an inappropriate influence exists, even if it did not impact the decision, it still raises the appearance of impropriety and the appearance of undue interference with the decision making process, resulting in the view that a potential bias was involved with the outcome of a case.

5. The election process is largely anathema to the impartiality of our justice system. Elections are difficult, time consuming, and all-encompassing for candidates. They can be filled with partisan rhetoric, debates, and perhaps worst of all, political ads. The nature of our political environment today makes the campaign process even more difficult. That political world necessarily then interferes with the need for justice and decisions that have no such influence. As Justice O'Connor explained in her concurrence in *Republican Party v. White*, 536 U.S. 765, 788-89 (2002) (O'Connor, J., concurring), "Elected judges cannot help being aware that if the public is not satisfied with the outcome of a particular case, it could hurt their reelection prospects."
6. Justices French and Kennedy are human, and they were facing reelection at the time they rendered the deciding votes in a controversial case. Even if they had the ability "to suppress their awareness of the potential electoral consequences of their decisions and refrain from acting on it," it is still the case that public confidence in their impartiality is undermined by timing of the Thompson opinion against the backdrop of repeated studies demonstrating that elections affect judges' impartiality. See Gregory A. Huber & Sanford C. Gordon, *Accountability and Coercion: Is Justice Blind When It Runs for Office?*, 48 AM. J. POL. SCI. 247, 251-58 (2004); John Paul Stevens, Assoc. Justice, U.S. Supreme Court, Opening Assembly Address, American Bar Association Annual Meeting, Orlando, Florida (Aug. 3, 1996), in 12 St. John's J. Legal Comment. 21, 30-31 (1996) (discussing need to improve quality of judges and espousing belief that judges should not be elected). See also Joanna Cohn Weiss, Note, *Tough on Crime: How Campaigns for State Judiciary Violate Criminal Defendants' Due Process Rights*, 81 N.Y.U. L. REV. 1101, 1107-09 (2006); Article: Antiterrorism and Effective Death Penalty Act: Why Habeas Review of State Court Convictions Is More Important than Ever, 24 Fed. Sent. R. 292 (2012).
7. The decision denying Thompson relief was released six days before Election Day. This fact, coupled with the political advertisements supporting Justice French for re-election and the controversial nature of Thompson's case, could affect the public perception of the most well-meaning of Justices. One commercial on behalf of Justice French stated that Justice French "protects us," and it briefly described the facts of death penalty cases in which she has voted for death. *Buying Time 2014 - Ohio*, Brennan Center for Justice (Oct. 8, 2014, updated Nov. 3, 2014).¹ Thompson recognizes that this particular commercial was paid for by American Freedom Builders and not by the French campaign. But because of the nature of campaigning and elections, it put Justice French in an arduous spot. It would seem that a vote against death in a controversial case, at a time when she was being praised for upholding death sentences, would be difficult. Even if it did not enter Justice French's thoughts, it could appear to the public that this would be the case.
8. In addition, both Justices French and Kennedy had campaign commercials that included references to support for and by law enforcement. One commercial refers to Justice

¹http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_OH_AFB_WORKING_HARD.mov.

French as a “tough on crime judge,” while showing video of her talking to law enforcement and showing her endorsement by the Fraternal Order of Police.² Another commercial notes her Fraternal Order of Police endorsement, emphasizing it both on the screen and in the voice-over. The Fraternal Order of Police endorsement said that “French and Kennedy were found to have strong records and to be supportive of our issues.”³ Justice Kennedy’s commercials also highlighted the support for police and being tough on crime. Justice Kennedy referred to herself as “Law Enforcement’s Choice.” In one campaign commercial, it is highlighted that Justice Kennedy “began her career as a police officer working undercover operations”, and said that is “why law enforcement from around Ohio supports Sharon Kennedy.”⁴

9. The commercials for both campaigns demonstrated a strategy that would be undermined by granting relief to a man who had killed a police officer. Because a campaign is at its height right before the election, and because Mr. Thompson’s direct appeal decision was released right before the election, it is too much of a risk that the situation “offer[ed] a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.” *Aetna Life Ins. Co*, 475 U.S.at 822 (internal citations omitted). Thus, Thompson respectfully requests that Justice Kennedy and Justice French recuse themselves from his appeal and that this Court undertake a rehearing, so as not to violate Mr. Thompson’s rights to an impartial decision-maker.
10. Justice John Paul Stevens has stated that a campaign promise “to be tough on crime,” or to “enforce the death penalty” is evidence of bias that should disqualify a candidate from sitting in criminal cases. Address to the Opening Assembly, American Bar Association Annual Meeting, August 3, 1996, at 12. Unfortunately, at the least, there is a legitimate appearance of impropriety in making these types of statements and at the exact same time be deciding a case that involves these exact issues, only days before a contested election. Thus, in the alternative, the campaign promises “to be tough on crime,” or to “enforce the death penalty” are evidence of actual bias.
11. Although the election is now over, simply reconsidering Thompson’s case with Justices French and/or Kennedy participating would not resolve the problem. Both Justices would be in a difficult spot: if either changed her opinion rendered on October 29, 2014, it would reinforce the perception that she operated under a bias when giving her initial vote. They can, however, step aside to remove the *appearance* of impropriety, and Thompson can have his case decided anew without their participation. “[A] recusal remedy is the best way to balance the need for free, open campaigns with the dangers that

² *October 23 – Start Her Career*, Buying Time 2014 – Ohio, Brennan Center for Justice, http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_OH_FRENCH_START_HER_CAREER%20%2830%20Sec%29.pdf (5th frame) (last visited Nov. 10, 2014).

³<http://www.fopohio.org/docs/Ohio%20FOP%20State%20%26%20Local%20Lodge%20Endorsements.pdf> (visited Nov. 5, 2014).

⁴http://www.brennancenter.org/sites/default/files/analysis/Buying_Time/STSUPCT_OH_KENNEDY_LAW_ENFORCEMENT%27S_CHOICE_15.mov.

arise when judges win votes by declaring their intent to be tough on crime and then hear alleged criminals' cases." Cohn Weiss, *supra*, at 1127.

Further affiant sayeth naught.



Rachel Troutman

Sworn and subscribed in front of me on this the 10th day of November, 2014.



Notary Public



TERI SLACK
NOTARY PUBLIC, STATE OF OHIO
MY COMMISSION EXPIRES April 9, 2017