

Russell M Adams
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF GLYNN COUNTY
STATE OF GEORGIA

STATE OF GEORGIA,)
)
)
v.) Criminal Action No. CR2000433
)
WILLIAM RODERICK BRYAN,)
Defendant.)

**FIRST MOTION TO DISQUALIFY PROSECUTOR
AND FOR OTHER RELIEF**

COMES NOW Defendant William Roderick “Roddie” Bryan, by and through undersigned counsel, pursuant to the Fifth and Fourteenth Amendments to the United States Constitution, Article I, Section I, Paragraph I and Article VI, Section VIII, Paragraph I of the Constitution, O.C.G.A. § 15-18-5, Georgia common law, and the inherent supervisory powers of this Court, and files this his First Motion to Disqualify Prosecutor. In support thereof, Defendant shows as follows:

1. The Due Process Clause of the United States Constitution, and Constitution of the State of Georgia¹, guarantee Mr. Bryan the right to be prosecuted by a “disinterested” prosecutor.

Between the private life of the citizen and the public glare of criminal accusation stands the prosecutor. That state official has the power to employ the full machinery of the state in scrutinizing any given individual. Even if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life. For this reason, we must have assurance that those who wield this power will be guided solely by their sense of public responsibility.

Young v. United States ex rel. Vuitton et fils S.A., 481 U.S. 787, 814 (1987) (plurality opinion).

See Bordenkircher v. Hayes, 434 U.S. 357 (1978); Berger v. United States, 295 U.S. 78 (1935).

¹Georgia cases appear to apply the same analysis to due process claims under state law.

2. In Vuitton, a plurality of the Court concluded that a prosecutor's lack of "disinterestedness" may constitute a *per se* violation of due process, a systemic error which is not subject to harmless error analysis. 481 U.S. at 809-10. This reasoning is consistent with a long line of decisions dating back more than fifty years. See, e.g., Marshall v. Jerrico, Inc., 446 U.S. 238 (1978); Clearwater-Thompson v. Grossmueck, Inc., 160 F.3d 1236 (9th Cir. 1998); Brotherhood of Locomotive Firemen & Enginemen v. United States, 411 F.2d 312, 319 (5th Cir. 1969); and Granger v. Peyton, 379 F.2d 709 (4th Cir. 1967).

3. Several Georgia cases, citing these and other authorities, have reached the same conclusion:

A conflict of interest . . . has been held to arise where the prosecutor has acquired a personal interest or stake in the defendant's conviction." Williams, 258 Ga. at 314. If the assigned prosecutor has acquired a personal interest or stake in the conviction, the trial court abuses its discretion in denying a motion to disqualify him, and the defendant is entitled to a new trial, even without a showing of prejudice. See Whitworth v. State, 275 Ga. App. 790, 796 (2005) (physical precedent only).

Amusement Sales, Inc. v. State of Georgia, 316 Ga. App. 727, 735 (2012).

4. It has been said that a prosecutor's determination of an interest in the prosecution of a case, whether a personal interest or that of his office, may not be second guessed by the Court.

State v. Mantooth, 337 Ga. App. 698, 701 (2016).² This is because "counsel is in the best position professionally and ethically to determine when a conflict of interest exists." Id.

²This position is deeply flawed in several respects, as the responsibility of a public prosecutor differs from that of the usual advocate. First and foremost, his duty is to seek justice and not merely to convict. Second, the district attorney is a constitutional officer duty bound by oath to prosecute the cases within his jurisdiction. The prosecutor does not have the luxury of choosing the cases within his jurisdiction. Third, in a criminal prosecution constitutional concerns are typically implicated in a more profound matter than in civil cases. Fourth, this is an unconstitutional delegation of judicial power to the prosecutor. But in this instance the rule, if correct, benefits the accused.

5. When first announced, the appointment of then-Cobb County District Attorney Joyette Holmes was widely questioned in academia, the bar, and the mainstream media given the ties between her office and that of then-Glynn County District Attorney Jackie Johnson and the District Attorney's Office for the Brunswick Judicial Circuit. The most obvious conflict arose from the fact that the Chief Investigator in Brunswick, Greg McMichael, had worked with the Cobb County District Attorney's office on several high profile cases. Each office had provided litigation support for the other in these cases. The posture of the Cobb County District Attorney's Office has likewise struck many observers as odd because the prosecution has gone to great lengths to punish and discredit Mr. Bryan who remains the primary witness in this case against the McMichael defendants. Mr. Bryan, as the Court will surely recall, made the video and is the only eye witness to the shooting. Ms. Holmes played down such concerns in several media reports, attached hereto as composite exhibit one.

6. Undersigned counsel filed a motion pursuant to Brady in June, 2020, within a few weeks of the arrest of Mr. Bryan, seeking relevant exculpatory information. The Cobb County District Attorney's Office has stonewalled multiple requests pursuant to Brady for information with respect to whether her office should be disqualified from handling this case, filing a written response on January 29, 2021 that essentially provided no relevant information. The prosecution has never disclosed the exact nature, breadth, depth, frequency or importance of the work of Greg McMichael for their office nor any documentation with respect to the frequency of communications between Greg McMichael and various members of their office or the relationship, if any, between them.

7. Flynn Broady, Jr., defeated Joyette Holmes to become the new Cobb County District Attorney. He took office in January, 2021. His election was by all accounts an upset.

8. Broady filed his appointment as District Attorney Pro Tempore on February 5, 2021.

9. A preliminary investigation into statements made by Mr. Broady during his campaign has revealed that he made the Arbery case part of his campaign in the race for district attorney. This investigation is continuing. Many of these statements are embedded in videos, tweets, facebook posts and in other places not readily accessible through the usual internet searches. It would appear that various campaign messages were targeted to specific individuals or groups rather than all potential voters (a practice known as micro-targeting)– further complicating and delaying discovery by the defense.

10. A motion to strike the illegal appointment of Flynn Broady was filed on February 23, 2021, and remains pending before the Court. Although arguably premature, as Mr. Broady has yet to be validly appointed to handle this case, Mr. Broady has commenced signing pleadings in this matter and made public statements to the media confirming that he is, in fact, acting as the District Attorney Pro Tempore in this case.

11. Due to an outbreak of COVID-19 at the Glynn County Detention Center, undersigned counsel has been unable to meet with Mr. Bryan for nearly a month with respect to his case. Mr. Bryan authorized the filing of this motion this evening.

12. Without waiving any other grounds for disqualification as they may appear, and without waiving any other pending motions, Defendant Bryan moves for disqualification of Mr. Flynn Broady, Jr., and the Cobb County District Attorney’s Office, based upon the following statement posted below a picture of Joyette Holmes on Mr. Broady’s campaign website:

FAME AND PARTY

Joyette Holmes claims there “has been no continuing relationship” with Greg McMichael, the former cop who killed Ahmaud Arbery, but they worked together on a highly publicized hot-car death case. Joyette couldn’t say no to the national spotlight! She put fame over ethics.”

<https://www.electbroady.com/thestakes> (emphasis in original).

13. Having campaigned on the proposition that the Cobb County District Attorney's Office had a conflict, and that it was unethical for that office to handle the Arbery case, Flynn Broady, Jr., is now estopped from denying the existence of the conflict. Pursuant to Mantooth, supra, this Court is compelled to disqualify the Cobb County District Attorney's Office.

14. Defendant further notes related "forensic" misconduct in that the internet was "scrubbed" sometime between Mr. Broady's election and the filing of this motion so as to remove all trace of the web page known as "Stakes." This deliberate concealment, indeed destruction of evidence, betrays any doubt that Mr. Broady and his office well understand the gravity of his words. Moreover, at this juncture any attempt to "walk back" these words would utterly lack credibility. This spoliation activity, especially when coupled with the Brady violations of the Cobb County District Attorney's Office both with respect to the details concerning ties between that office and Greg McMichael, Jackie Johnson and the District Attorney's Office for the Brunswick Judicial Circuit and specifically with respect to Mr. Broady's public comments about the case constitutes a further, independent ground for disqualification.

15. Mr. Broady has also publicly suggested that his office, as was allegedly the case with Tom Durden and the Atlantic Judicial Circuit, lacks the resources to handle the Arbery case without prejudice to the rights of other defendants and victims served by his office. In a "Town Hall Forum" sponsored by the Cobb County Democratic Party, and available online at: <https://www.youtube.com/watch?v=XvYgvdliykM>, at 7:00 to 7:30, Flynn Broady called out the Cobb County District Attorney's Office over the fact that they rushed down to indict the Arbery case while they were not indicting anyone in Cobb County. Broady flatly said we need to "take care of home, especially, if we're gonna take care of somewhere else, first."

16. Undersigned counsel, parenthetically, notes that the issue was even more outrageous than Mr. Broady realized. In response to judicial inquiry, during a Cobb County bond hearing in another major felony murder case with multiple defendants, ADA Jesse Evans stated as follows:

After consulting with the prosecuting attorney of Georgia, who also was in consulting with the Supreme Court of Georgia, we got word that we believe that this case could qualify for the exceptional circumstance; namely, **considering the national climate and considering the fact that there were riots and a stream of violence here in our country – there's a lot of noise in the background . . . we thought it advisable to sort of tamp down the level of violence that was going on around the country by taking a step forward in this exceptional case, and that's what we elected to do.**

Magistrate Court Transcript (attached hereto as Exhibit Two) at p. 24. Mr. Evans acknowledgment that his office put this matter ahead of other cases due to politics only raises additional questions as to the motivations behind the decisions of the prosecutors in this case.

17. As Mr. Broady has himself noted, as to Ms. Holmes, in some cases the political aspects of a case combined with the political ambition of the office holder may constitute a conflict of interest. Indeed, that appears to be the case here. Aside from attempting to retain control over a case in which Mr. Broady has already acknowledged the office had a conflict, Mr. Broady has thrust himself and his handling of this case into the national spotlight. Mr. Broady's campaign not only prominently featured the Arbery case but also included unseemly courting of BLM, the NAACP, the Democratic Party and democrat candidates up and down the ballot. Indeed, it would be difficult to identify a more partisan political campaign for district attorney in the United States. Various media and social media posts are attached hereto as composite exhibit three. Indeed, Broady appears to have done exactly what he criticized Joyette Holmes for having done, to wit: trade ethics for fame and for the furtherance of his political party.

18. To the extent that he and his office are somehow not disqualified due to the McMichael connection then Mr. Broady's shameless use of the Arbery case as a campaign tool – and specifically the disqualification issue – would independently dictate disqualification. In short, he and his office must be disqualified either way.

19. Investigation of conflict issues raised herein is ongoing; this motion will be amended as additional information relevant to said motion comes to light. Investigation of potential forensic misconduct is also continuing.

WHEREFORE, Defendant prays that:

(1) This Court compel the District Attorney and District Attorney's Office to disclose to the defense instanter any potentially favorable evidence with respect to whether Mr. Broady or the Cobb County District Attorney Office should be disqualified from further involvement in the above-styled case;

(2) In the alternative, Mr. Broady and the Cobb County District Attorney Office should turn over, *instanter*, any evidence potentially relevant to the disqualification issue for the presiding judge to inspect and examine *in camera* (with a copy of said information filed under seal to preserve the record for appellate review);

(3) This Court promptly schedule an evidentiary hearing with evidence and testimony presented via video rather than a hearing "in person" pursuant to the election of Mr. Bryan filed contemporaneously with this Court (**including entry of an order facilitating testimony by Flynn Broady, Joyette Holmes, Jesse Evans and Greg McMichael (with respect to the disqualification issue only)**);

(4) That District Attorney and District Attorney Pro Tempore Flynn Broady, Jr., and the Cobb County District Attorney's Office be disqualified from any further involvement in the above-styled case;

(5) That any resulting delay of jury trial herein be charged to the State of Georgia; and

(6) For such other and further relief as the Court deems proper.

So moved, this 1st day of March, 2021.

/s/ Kevin Gough
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CERTIFICATE OF SERVICE

COMES NOW Kevin Gough, attorney for the defendant, and hereby certifies that a copy of the foregoing document(s) have been served upon the District Attorney by email delivery this date.

This 1st day of March, 2021.

/s/ Kevin Gough
Kevin Gough