STATE OF NORTH CAROLINA COUNTY OF FORSYTH	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
	FILE NO: 97 CRS 6593-94
STATE OF NORTH CAROLINA))) v.))) KALVIN MICHAEL SMITH)	MOTION TO DISQUALIFY COUNSEL AND REASSIGN CASE

NOW COMES DEFENDANT KALVIN MICHAEL SMITH, by and through his undersigned attorney, and moves the Court for an order disqualifying present counsel for the State of North Carolina from further participation in this case. The ground for this Motion is that these lawyers have tacitly admitted that they have material knowledge about the alleged misconduct involving use of a false affidavit by agents of the State in connection with the MAR proceedings in this case.[1] Transcript of *in camera* Meeting at 75, *State v. Kalvin Michael Smith* (Nov. 7, 2014) (97 CRS 6593-94) (hereinafter "Meeting Tr."). As a consequence of that admission, these attorneys likely are barred from any further representation of the State in this matter by N.C. State Bar Rules, Rule 8.4(a), (c), (d), and (g). The Court thus has an ethical and legal obligation to determine if such disqualification is required. Defendant also requests the Court to reassign this case to the Honorable Richard Doughton, who presided over the January 2009 evidentiary hearing that is the subject of the Motion to Vacate, or to another judge outside of Forsyth County. In support of this Motion, Defendant states as follows:

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[1] The fact that present counsel for the State knew about the affidavit does not mean they knew in 2008-09 that it was false; likely they did not. That, however, makes the use of the affidavit in these proceedings even more egregious. Those using the false affidavit misled not only the witnesses and others to whom they disclosed it, they also may have misled the lawyers entrusted to represent the State in this matter. That fact makes the State's attempt to shield those responsible from exposure even more perplexing.

1. Special Deputy Attorney General Danielle Marquis-Elder's admission that she and her co-counsel may have to "get out of the case" if the Court holds an evidentiary hearing on Defendant's Motion to Vacate may disqualify these lawyers from any further participation in this matter. Meeting Tr. at 75. The Court also must determine if their disqualification would extend to the Attorney General's Office generally.[2]

2. The Attorney General's Office took responsibility for this case after former Assistant District Attorney David Hall, now a Superior Court Judge in Forsyth County, declared that his Office had a possible conflict of interest arising from claims Defendant made in his 2d MAR that disqualified the Office from further participation in the proceedings. *See* Defendant's Motion to Vacate, App. 3. However, despite the recusal of his Office and with the knowledge of the Attorney General's Office, Mr. Hall continued to participate actively in the 2009 evidentiary hearing and likely participated in drafting Judge Doughton's opinion dismissing the 2d MAR.

3. The State does not dispute that the Arnita Miles Affidavit is false or that the State used the false Affidavit in connection with the January 2009 2d MAR proceedings.[3] Rather, the State argues only that it did not introduce the Affidavit into evidence and that none of its

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[2] *See, e.g.*, *State v. Kinkennon*, 275 Neb. 570, 576, 747 N.W.2d 437, 443 (2008) ("The prosecuting office need not be disqualified from prosecuting the defendant if the attorney who had a prior relationship with the defendant is effectively isolated from any participation or discussion of matters concerning which the attorney is disqualified. If impropriety is found, however, the court will require recusal of the entire office.") (internal citations omitted).

[3] Arnita Miles is a former Winston-Salem police officer. She was one of the first responders when Jill Marker was assaulted on the night of December 9, 1995. In March 2008, then Assistant District Attorney David Hall procured a sworn affidavit from Ms. Miles in which she claimed Ms. Marker told her on December 9, 1995, that her assailant was a black man. That claim is false; Ms. Miles retracted it in an interview with the Duke Wrongful Convictions Clinic. Defendant did not learn that Ms. Miles had executed the false affidavit until July 2012, when District Attorney Jim O'Neill used it in an attempt to discredit Defendant's counsel and disparage his claim of innocence. The Miles affidavit is the subject of Defendant's Motions to Vacate and for Discovery. Defendant is trying to determine if he was denied a fair hearing in January 2009 as a result of the State's use of the false affidavit.

witnesses referred to the Affidavit in testimony. Counsel for the State, however, has repeatedly refused to say whether they knew if the Miles Affidavit was used in connection with the 2d MAR proceedings. Although counsel for Defendant has asked the State's attorneys several times whether they used the Affidavit, the State has failed to answer and the Court has not directly sought to determine the answer. Meeting Tr. at 54, 56.

4. However, at the end of the *in camera* meeting on November 7, 2014, however, counsel for the State advised the Court that if it held an evidentiary hearing, as it intended to do, "[d]epending on which witnesses the [Defendant is] going to call, we may need to get out of the case." *Id.* at 75. This disclosure confirmed what Defendant has been arguing in support of his request for discovery: "[the State] may . . . have relevant information." *Id.* Defendant is not alleging that the Attorney General's Office knew that the Miles Affidavit was false at the time it was used in 2008-09; they were as much victims of the deception as others to whom the Affidavit was secretly disclosed.

5. Mr. Hall's misconduct extends beyond use of the Miles Affidavit. He also continued to participate in the MAR proceedings after his Office voluntarily recused itself because of a potential conflict of interest. He did so with the knowledge of the Attorney General's Office. At the *in camera* meeting, the State sought to minimize Mr. Hall's involvement in the proceedings. At the meeting, the Court noted that the "evidentiary hearing was conducted by the State Attorney General's Office," and asked if "Mr. O'Neill or Mr. Hall participate[d] in the hearing." Meeting Tr. at 72-73. Ms. Elder responded, "They were there for purposes of observing the hearing." *Id.* at 73. This greatly misstates Mr. Hall's actual role in the proceedings. In a December 3, 2012, hearing relating to the false Affidavit, Judge Doughton, who presided over the 2009 evidentiary hearing, observed: "As I recall, we had the previous

hearing, even though the Attorney General's Office was handling it, David Hall was actively involved in the case during the entire hearing." Transcript of Hearing on Motion to Remove Arnita Miles Affidavit from the Record at 9 (December 3, 2013).[4]

6. At the end of the November 7 *in camera* meeting, the Attorney General's Office first admitted that it may have known about use of the Miles Affidavit in 2008-09 at the end of the November 7, 2014, *in camera* meeting. Prior to this admission, the Court had announced that it would hold an evidentiary hearing before ruling on the Motion to Vacate. Meeting Tr. at 75. In response, Ms. Elder suggested she and her co-counsel may need to "get out of the case." *Id.* Following are the exchanges leading to the Court's abrupt decision not to hold an evidentiary hearing and instead to summarily deny the Motion to Vacate:

> MS. ELDER: Are you ruling on the motion to vacate Judge Doughton's order?
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> THE COURT: We probably ought to have a hearing on that sometime in the near future.
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> MS. ELDER: An evidentiary hearing?
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> THE COURT: If they want to try to produce evidence.
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> MR. COLEMAN: We would. And we'll simply subpoena the witnesses and bring them in and we'll ask them under oath at that hearing.
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> MS. ELDER: Depending upon which witnesses they are going to call, we may need to get out of the case.
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> THE COURT: Well, of course. Who would get in it then?
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> MS. ELDER: I have no idea.
>
> THE COURT: I think you're stuck.

[4] Defendant believes Mr. Hall also improperly participated in drafting the written opinion that Judge Doughton adopted nearly verbatim, which is the subject of the Motion to Vacate. Thus, the Attorney General's Office facilitated Mr. Hall's inappropriate and unethical conduct, which enabled him to use the false affidavit in the 2d MAR proceedings.

> MR. COLEMAN: Well, they may have to get out because they may have relevant information.
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> THE COURT: Might be. I'm trying to figure out when we could schedule it. That's going to be the hardest problem because I have to get done in a very short period of time. And I'm really trying to think how there is anything that could come in on that. Like I said, you have not asked even Mr. Speaks about it.
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> MR. COLEMAN: We'll have an opportunity to do that.
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> THE COURT: You've had a year and a half to do it.
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> MR. COLEMAN: Your Honor, really the question was whether the State tried to use the affidavit. That's really the question. That would be the misconduct --
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> THE COURT: How would that be material to the evidentiary hearing?
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> MR. COLEMAN: Because it was an attempt to undermine the hearing. They were tampering with witnesses using a false affidavit.
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> THE COURT: I think I have to deny the whole petition, dismiss it. So put that in [the proposed order] too.
>
> MS. ELDER: Can we draft you an order, Your Honor?
>
> THE COURT: Draft a long order, submit it to the other side.

Meeting Tr. at 74–76.

7. The Court cannot shield the State's counsel from the consequences of their tacit admission. Judges have an "overarching obligation to uphold the integrity and independence of the judiciary." *See*, e.g., Judith A. McMorrow, Jackie Gardina, & Salvatore Ricciardone, *Judicial Attitudes Toward Confronting Attorney Misconduct: A View From the Reported Decision*s, 32 HOFSTRA L. REV 1425, 1430 (2004). Thus, before allowing the Attorney General's Office to "[d]raft a long order," the Court has an independent obligation to determine if doing so would violate the attorneys' ethical obligations and undermine the integrity of this proceeding. Allowing the Attorney General's office to continue participating in this matter, despite their admission of a potential conflict of interest, flies directly in the face of this Court's obligation to ensure the fair administration of justice.

8. Counsel's tacit admission at the conclusion of the *in camera* meeting on November 7, 2014, implicates Rule 8.4 of the North Carolina State Bar Rules:

> "It is professional misconduct for a lawyer to:
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> (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
>
> . . .
>
> (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
>
> (d) engage in conduct that is prejudicial to the administration of justice; [or,]
>
> . . .
>
> (g) intentionally prejudice or damage his or her client during the course of the professional relationship, except as may be required by Rule 3.3."

9. The State's present Counsel's possible violation of Rule 8.4 is relevant to the disposition of this motion because "[t]he [ABA] Model Rules [of Professional Conduct] now provide the key component in the substantive law of disqualification: whether there has been an ethical violation that may warrant disqualification."[5] Mark J. Fucile, *Disqualification Motions*

[5] North Carolina initially adopted the American Bar Association (ABA) Model Rules of Professional Conduct in 1985. American Bar Association Center for Professional Responsibility, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Nov. 14, 2014). The ABA Model Rules of Professional Conduct invoked in this petition are consonant with the following rules of the North Carolina (N.C.) Rules of Professional Conduct: Rule 8.3 of the ABA Model Rules of Professional Conduct ("Reporting Professional Misconduct") is consonant with Rule 8.3 of the North Carolina Rules of Professional Conduct ("Reporting Professional Misconduct"); Rule 8.4 of the ABA Model Rules of Professional Conduct ("Misconduct") is consonant with Rule 8.4 of the N.C. Rules of Professional Conduct ("Misconduct"); and Rule 3.3(b) of the ABA Model Rules of Professional Conduct ("Candor Toward the Tribunal) is consonant with Rule 3.3(b) of the N.C. Rules of Professional Conduct ("Misconduct"). *See Superseded N.C. Rules of Professional Conduct, revised Rules of Professional Conduct, and Superseded Code of Professional Responsibility*, North Carolina State Bar (Nov. 13, 2014 9:43PM), http://www.ncbar.com/rules/corr_table_2.asp. And North Carolina courts have consistently applied the N.C. Rules of Professional Conduct where disqualification of counsel is a key issue. *See State v. Philip Warnew Smith*, 749 S.E.2d 507 (N.C. Ct. App. 2013); *State v. Taylor*, 155 N.C. App 251, 574 S.E.2d 58 (N.C. Ct. App. 2002); *Smith v. Beaufort County Hosp. Assoc'n, Inc.*, 141 N.C. App. 203, 540 S.E.2d 775 (N.C. Ct. App. 2000).

and the Rpc's: Recent Decisions Using Ethics Rules As the Basis for Disqualification, PROF. LAW., 1999 at 9; *see also In re Epic Holdings, Inc.*, 985 S.W.2d 41, 48 (Tex. 1998) (stating that "'[t]he Texas Disciplinary Rules of Professional Conduct do not determine whether counsel is disqualified in litigation, *but they do provide guidelines and suggest the relevant considerations*") (emphasis added); Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 76 (2014) ("Courts will eject lawyers from cases for many reasons. The common and predictable reasons, however, are certain classes of ethical violations (or at least the appearance of such violations)."); *The Rude Question of Standing in Attorney Disqualification Disputes*, 25 AM. J. TRIAL ADVOC. 17, 22–23 (2001) ("Whether an attorney should be disqualified in any particular case is a decision committed to the trial court's sound discretion. In their exercise of such discretion, courts generally are guided by applicable ethics rules, and a lawyer who commits an ethical violation central to the controversy is far more likely to be disqualified than one who does not."). Thus, Rule 8.4 is the yardstick the Court must now use to determine if the State's present Counsel should be disqualified. At a minimum, it requires those lawyers to disclose the specific reason that they might have to "get out of the case," if there had been an evidentiary hearing.[6]

10. The Court's abrupt decision to deny the Motion to Vacate without a hearing is inconsistent with the Supreme Court's decision in *State v. McHone*, 348 N.C. 254 (1998). *See* Defendant's Motion to Reconsider the Decision to Deny Discovery and the Motion to Vacate, filed herewith. For that reason, the Court's precipitous turnaround may have been based on the

[6] "But, increasingly, the court's resort to the Model Rules in the disqualification context extends well beyond conflict-based issues to those addressing discovery and other pretrial activities as well." Mark J. Fucile, Disqualification Motions and the Rpc's: Recent Decisions Using Ethics Rules As the Basis for Disqualification, Prof. Law., 1999, at 9, 11.

mistaken belief that it would insulate the State's counsel from disqualification. However, independently of the Court, those attorneys may have an ethical obligation to withdraw from this case. That obligation cannot be satisfied by simply refusing to discuss what they know about the State's use of the Miles Affidavit. Their duty of candor to the Court requires them to disclose what they know about ant misconduct that occurred, including whether they knew or suspected that the Affidavit was false. This obligation is reflected in Rule 8.3(a) of the North Carolina Rules of Professional Conduct:

> A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the North Carolina State Bar or the court having jurisdiction over the matter.[7]

11. The actions of present counsel are further called into question by Rule 3.3(b) of the North Carolina Rules of Professional Conduct, which reads in relevant part:

> A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

This rule has been held to require mandatory recusal in circumstances where an attorney knows that a person involved in the proceedings plans to or has already perpetrated "a fraud on the

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[7] A violation of the duty reflected in Rule 8.3 could warrant suspension from the Bar. *Cf. In Re Himmel*, 125 Ill. 2d 531 (Ill. 1998)). As has "[a] refusal to answer questions regarding [an attorney's] knowledge of other persons' misconduct." *Id.* at 541 (*citing In re Anglin*, 122 Ill. 2d 531 (Ill. 1988)). The disciplinary proceedings in *Himmel* were based on Rule 1-103(a) of the Illinois Code of Professional Responsibility, which reads: "(a) A lawyer possessing unprivileged knowledge of a violation of Rule 1 -- 102(a)(3) or (4) shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation." 107 Ill. 2d R. 1 -- 103(a)." 107 Ill. 2d R. 1 -- 103(a). This language is similar to Rule 8.3 of the North Carolina Code of Professional Responsibility, and is similarly modeled on the American Bar Association Model Code of Professional Responsibility.

court," which includes "the creation or presentation of false evidence." *See In re Palmer*, 296 N.C. 638, 651 (1979).[8]

13. Counsel's failure to inform the Court of the full extent of their knowledge of the use of the Miles Affidavit during the 2d MAR proceedings appears to be in direct violation of the foregoing ethical rules. At a minimum, the Court has an obligation to determine if that is true.

14. Finally, Defendant requests that the Court reassign this matter to the Honorable Richard Doughton. Following the *in camera* meeting, counsel for the State informed Defendant that the Court asked them to include in their proposed order, as one of the grounds for the Court's decision, that judge Wood may not have the authority to review Judge Doughton's May 21, 2009, decision. Although Defendant does not believe the rule that the Court apparently has in mind applies in the circumstances of the Motion to Vacate, that issue can be avoided altogether simply by reassigning this matter to Judge Doughton, who issued the decision that is being challenged. That is particularly appropriate because Judge Doughton invited Defendant to file the Motion to Vacate:

> If you have specific information about a specific individual that did something specifically wrong, either the Court will handle it in its own disciplinary proceeding or would order it. But I don't have that information.

[8] "Where an attorney learns, prior to trial, that his client intends to commit perjury or participate in the perpetration of a fraud upon the court he must withdraw from representation of the client, seeking leave of the court, if necessary. The right of a client to effective counsel in any case (civil or criminal) does not include the right to compel counsel knowingly to assist or participate in the commission of perjury or the creation or presentation of false evidence." *Palmer* , 296 N.C. at 651.

Although in this case the person involved in the proceeding was a client, Rule 3.3 does not specify that it only applies to attorney-client relationships, or that it could not also apply to attorney-attorney relationships.

Dec. 3, 2012, Hearing at 18. That specific information is now before the Court and Judge Doughton should be allowed to take the action Defendant requested almost two years ago.

WHEREFORE, Defendant respectfully prays that the Court order the following:

1. That this matter be transferred to the honorable Richard Doughton for further proceedings;

2. That as soon as practicable, the Court hold a hearing to determine why the Attorney general's Office may have to "get out of the case" if there were a hearing on Defendant's Motion to vacate and whether that reason requires the immediate disqualification of the Office from any further proceedings in this case; and,

3. Such other relief as the Court deems just and proper.

Respectfully submitted this the 14th day of November, 2014.

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