

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA  
THIRD JUDICIAL DISTRICT AT ANCHORAGE

DAVID HAEG, )  
 )  
 Applicant, )  
 )  
 v. )  
 )  
 STATE OF ALASKA, )  
 )  
 Respondent. )

POST-CONVICTION RELIEF  
Case No. 3HO-10-00064CI

\_\_\_\_\_  
(Trial Case No. 4MC-04-00024CR)

**ORDER GRANTING REQUEST FOR DISQUALIFICATION**

This court was assigned the task of reviewing Judge Murphy's order denying Applicant David Haeg's request that she be disqualified from presiding over Haeg's post-conviction relief application.<sup>1</sup> On July 28, 2010, this court issued an order narrowing the issue of whether Judge Murphy should recuse herself to the question of whether her contacts with prosecution witness Trooper Gibbens during the trial and sentencing proceedings warranted recusal based on the appearance of impropriety.<sup>2</sup> After further consideration, David Haeg's request for the disqualification of Judge Murphy is GRANTED for the following reasons.<sup>3</sup>

<sup>1</sup> See Order (April 30, 2010).

<sup>2</sup> See Order Narrowing Scope of Review of Judge Murphy's Order Denying Motion to Disqualify Judge Murphy for Cause (July 28, 2010) (denying Applicant's request to disqualify Judge Murphy on all other grounds but the appearance of impropriety).

<sup>3</sup> See also the confidential order supplementing this decision not yet issued by the court.

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Haeg alleges that during his trial in the remote community of McGrath, Judge Murphy openly accepted rides from Trooper Gibbens. In support of this argument, Haeg (1) submitted numerous affidavits<sup>4</sup> over the course of this court's consideration of the issues related to disqualification and (2) referenced materials from the trial and sentencing transcript.

A review of the transcript and log notes of the hearing Haeg references reveals the cited conversation took place in court at 6:48 p.m. September 29, 2005, just prior to a 21-minute break, at Haeg's sentencing hearing.<sup>5</sup> As the transcript reflects, Judge

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<sup>4</sup> Cf. 7-25-10 Mot. to Supplement (July 28, 2010) Ex. 6 (affidavits of Jackie Haeg, Tony Zellers, Tom Stepnosky, and Drew Hilterbrand); Affidavit of Wendell Jones (former Alaska State Trooper) (August 2, 2010). For example, Tony Zellers, a retired Air Force Captain, asserts that on July 28, 2005, a day during which he was a state's witness during the trial, and on September 29, 2005, the day of the sentencing hearing, "I personally observed Judge Margaret Murphy being shuttled in a white Trooper pickup truck driven by Trooper Brett Gibbens; leave and return with Trooper Gibbens in the same truck during breaks, lunch, and dinner; and leave with Trooper Gibbens when court was finished for the day." Jackie Haeg, Haeg's wife, asserted the same as to the trial days and other days in her own affidavit. Jackie Haeg Aff. Four affiants state that on September 29, 2005, the day of the sentencing hearing, the affiant "personally observed" Judge Margaret Murphy taking rides from Trooper Gibbens throughout the day. 7-25-10 Mot. to Supplement Ex. 6 (affidavits of Zellers, Stepnosky, Hilterbrand); Jones Aff.

<sup>5</sup> The conversation was as follows:

MR. ROBINSON [Haeg's counsel. Substitution of Counsel (Dec. 15, 2004) (case no. 4MC-04-024CR).]: Before we get going again I think we're going to need about a 10 minute break

THE COURT: At least. I have to get to the store because I need to get some . . .

MR. ROBINSON: So why don't we take long enough to go to the store and . . .

THE COURT: Get some diet Coke. And I'm going to commandeer Trooper Gibbens and his vehicle to take me because I don't have any transportation.

Murphy informed the parties that she was going to “commandeer” Trooper Gibbens to take her to the store. It appears that Prosecutor Leaders, sensing some possible appearance issue, began to address this concern. Haeg’s trial counsel then stated he did not object to Judge Murphy obtaining a ride from the trooper.

Canon 2(A) of the Code of Judicial Conduct provides that a judge “shall” avoid both impropriety and also “the appearance of impropriety.” In addition, Canon 3 requires a judge to weigh the possibility that an appearance of impartiality is likely to flow from his or her participation in any case, in light of the circumstances, even if the judge finds him or herself fully capable of subjective fairness in the

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MR. ROBINSON: All right.

THE COURT: All right, Trooper Gibbens?

TROOPER GIBBENS: Well, yeah.

MR. ROBINSON: You’ve been commandeered.

MR. LEADERS [State Prosecution]: As long as there’s no issue of . . .

MR. ROBINSON: Oh, no, no, I don’t have any problem . . .

THE COURT: Yeah, I’m just telling you that I – I can tell you I’m not going to talk about the case.

MR. ROBINSON: You’ve been commandeered.

THE COURT: He’s just going to drive me over there to get some diet Coke and we’ll be back.

MR. ROBINSON: All right.

THE COURT: Why don’t we start back up at like 10 after

MR. ROBINSON: Okay.

THE COURT: Okay?

(Whispered conversation)

THE COURT: Off record

(Off record)

THE COURT: Okay. We’re back on record. Who did you want to call, Mr. Leaders? Or Mr. Robinson, I’m sorry. . . .

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matter.<sup>6</sup> The purpose of this rule is to further the important goal of “promoting ‘public confidence in the integrity and impartiality of the judiciary.’”<sup>7</sup>

At this juncture, this court does not seek to resolve whether (1) Judge Murphy’s contacts with Trooper Gibbens were inappropriate and/or occurred during the trial as well as the sentencing and (2) any of Haeg’s concerns about what occurred at the Judicial Conduct Commission.<sup>8</sup> These issues are best left for review within the PCR proceedings when claimed legal errors and alleged improprieties before the trial court are addressed.

This court has not conducted an evidentiary hearing to conclude that there was any wrong-doing on Judge Murphy’s part with regard to Haeg’s alleged submission of his explanatory letter.<sup>9</sup> In addition, Judge Murphy’s request for a ride from Trooper Gibbens toward the end of the sentencing hearing, which was coupled with an explanation that she would not discuss the case with him and was acknowledged as appropriate by Haeg’s counsel,<sup>10</sup> does not in and of itself raise an appearance issue. Nevertheless, the affidavits raising questions over the extent of her contact with prosecution witness Gibbens during the trial raise a sufficient appearance of impropriety that will negatively affect the confidence of the public, and Haeg himself, in the impartiality of the judiciary.

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<sup>6</sup> *Perotti v. State*, 806 P.2d 325, 327-28 (Alaska 1991).

<sup>7</sup> *Amidon v. State*, 604 P.2d 575, 578 (Alaska 1979) (quoting Canon 2(A)).

<sup>8</sup> For a more detailed discussion of Haeg’s concerns, see this court’s confidential order supplementing this order, to be issued hereafter.

<sup>9</sup> See July 28, 2010 Order Narrowing Scope of Review.

CONCLUSION

The sentencing hearing transcript indicates that Judge Murphy discussed the propriety of her ride with Trooper Gibbens with counsel for both sides and that Haeg's counsel "d[id]n't have any problem" with her requesting the ride. Nevertheless, it is premature to rule conclusively that earlier rides and meals did not occur, since such a ruling would require an evidentiary hearing that is best held in the post-conviction relief proceeding itself. Haeg's motion to disqualify Judge Murphy is GRANTED due to concerns over the appearance of impropriety.

DONE this 25<sup>th</sup> day of August 2010 at Anchorage, Alaska.

What about Judge Murphy lying during the repeal investigation into this?

STEPHANIE E. JOANNIDES  
Superior Court Judge

I certify that on 8.25.10 a copy of the above was mailed ~~to~~ ~~and~~ ~~forwarded~~ to each of the following at their address of record  
S. Mori  
Judicial Assistant

Haeg  
Madden  
Peterson  
AK Judicial Council

<sup>10</sup> Cf. transcript of proceedings, quoted *supra* at n. 5.