

FILED
IN SUPREME COURT
OF TEXAS NO. _____

OCT 10 2008

BLAKE HAWTHORNE, Clerk

BY _____ Deputy

IN THE SUPREME COURT OF TEXAS
AUSTIN, TEXAS

IN RE THE HONORABLE JAN P. PATTERSON, JUSTICE,
THIRD DISTRICT COURT OF APPEALS,
IN HER OFFICIAL CAPACITY

PETITION FOR WRIT OF MANDAMUS

Original Proceeding from the Third District Court of Appeals
Travis County, Texas, the Honorable Ken Law, Chief Justice

JAN P. PATTERSON
State Bar No. 15596500

Third Court of Appeals
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RELATOR

IDENTITY OF PARTIES AND COUNSEL

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TO THE HONORABLE SUPREME COURT:

Relator, The Honorable Jan P. Patterson, Justice, Third District Court of Appeals (Third Court of Appeals), in her official capacity, submits this petition for writ of mandamus and would respectfully show the Court as follows:

STATEMENT OF THE CASE

Nature of the underlying proceedings:

In the underlying proceedings, *Ex Parte James W. Ellis*, Nos. 03-05-00585-CR, 03-05-00586-CR; *Ex Parte John Dominick Colyandro*, Nos. 03-05-00589-CR to 03-05-00603-CR, James W. Ellis and John Dominick Colyandro appealed from the trial court's orders denying habeas corpus relief. Ellis and Colyandro sought the dismissal of indictments accusing them of accepting unlawful campaign contributions and money laundering. The Third Court of Appeals issued its opinion authored by Justice Alan Waldrop on August 22, 2008.

Motion to recuse:

The State thereafter filed a motion for rehearing, a motion for reconsideration en banc, and a motion to recuse Justice Waldrop from participating in the motion for rehearing and the motion for en banc reconsideration. The Third Court of Appeals, sitting en banc, overruled the motion for recusal on October 8, 2008, by letter¹ and the chief justice of the court has instructed the court clerk not to file Relator's dissent to the overruling of this

¹ See Appendix 2 (copy of letter overruling motion to recuse).

motion.

Respondent:

The respondent is the Honorable Ken Law, Chief Justice, Third Court of Appeals, in Travis County.

Relief sought:

Relator seeks a writ of mandamus directing the respondent, the Honorable Ken Law, Chief Justice, Third Court of Appeals, to instruct the court clerk, the Honorable Jeff Kyle, to file Relator's dissent from the court's denial of the motion to recuse Justice Waldrop.

STATEMENT OF JURISDICTION

This Court has jurisdiction under article V, section 3 of the Texas Constitution and section 22.002 of the government code. *See* Tex. Const. art. V, § 3; Tex. Gov't Code Ann. § 22.002 (West 2004).

ISSUE PRESENTED ON MANDAMUS

Whether a court of appeals has a duty to allow a justice to file a dissent from the court's denial of a motion to recuse.

STATEMENT OF FACTS

On August 22, 2008, the Third Court of Appeals issued its opinion in *Ex Parte James*

*W. Ellis; Ex Parte John Dominick Colyandro.*² The opinion was authored by Justice Alan Waldrop. *Id.*

On September 22, 2008, the State filed with the Third Court of Appeals a motion for rehearing, a motion for reconsideration en banc, and a motion to recuse Justice Waldrop from participating in the motion for en banc reconsideration and motion for rehearing. *See* Appendix 1. Without requesting a response, the Third Court of Appeals overruled the motion to recuse in a letter dated October 8, 2008. *See* Appendix 2. In the letter, the clerk states, "The State's motion to recuse Justice Alan Waldrop was considered *en banc* and was overruled by this Court on the date noted above." Appendix 2.

On September 25, 2008, Justice Waldrop notified Relator and the other justices of the court that he declined to recuse himself. On September 30 and October 2, 2008, Relator requested the court clerk to obtain a response to the motion from the appellants and informed those justices on the court who were allowed to participate in deciding the motion of her request. The chief justice refused Relator's request to obtain a response, and he instructed the court clerk not to obtain a response. On October 6, Relator advised those justices on the court who were allowed to participate in the deliberations that she intended to file a dissent from the overruling of the motion to recuse. The chief justice instructed the court clerk to

² *Ex Parte Ellis*, Nos. 03-05-00585-CR, 03-05-00586-CR; *Ex Parte Colyandro*, Nos. 03-05-00589-CR, 03-05-00590-CR, 03-05-00591-CR, 03-05-00592-CR, 03-05-00593-CR, 03-05-00594-CR, 03-05-00595-CR, 03-05-00596-CR, 03-05-00597-CR, 03-05-00598-CR, 03-05-00599-CR, 03-05-00600-CR, 03-05-00601-CR, 03-05-00602-CR, 03-05-00603-CR, 2008 Tex. App. LEXIS 6472 (Tex. App. Austin Aug. 22, 2008).

advise the parties of the court's "en banc" ruling on October 8, 2008. *See* Appendix 2. Upon presentation of a dissenting opinion on October 10, 2008, the clerk of the Third Court of Appeals refused to file her dissent. As explained to me by the court clerk, he refused to accept and file my dissenting opinion based upon the instructions of the chief justice.

ARGUMENT

The Texas Supreme Court has a constitutional obligation to supervise and administer the judicial branch. Tex. Const. art. V., §§ 3, 31; *In re Castillo*, 201 S.W.3d 682, 684 (Tex. 2006). Pursuant to this obligation, the supreme court "has supervisory and administrative control over the judicial branch and is responsible for the orderly and efficient administration of justice," Tex. Gov't Code Ann. § 74.021 (West 2005), and has the "inherent power to protect and preserve the proper administration of the judicial system." *In re Castillo*, 201 S.W.3d at 684. In this role, the supreme court "may issue writs to compel courts of appeals to perform non-discretionary acts when the law so requires." *Id.*; *O'Connor v. First Court of Appeals*, 837 S.W.2d 94, 95 (Tex. 1992).

In *O'Connor*, the supreme court conditionally granted the writ of mandamus to allow a non-panel justice to file a dissent from the denial of a motion to hear an appeal en banc. 837 S.W.2d at 95. The court relied in part on the common practice in federal circuit courts of appeals to allow dissents from the denial of en banc review and the general purpose behind dissents. *Id.* at 96-97. The applicable federal rule "does not expressly address the right to

dissent,” but dissents from motions for en banc review are common. *Id.* (citing examples of dissents from the denial of en banc review in federal circuit courts, including the United States Court of Appeals for the Fifth Circuit).

The supreme court also noted that a non-panel dissent from the denial of en banc review serves the same “salutary purposes served by any other dissenting opinion: chiefly, promoting the uniformity and correctness of the court’s decision” and quoted Chief Justice Hughes:

“an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly convert the error into which the dissenting judge believes the court to have been betrayed.”

Id. at 96 (citing Charles Evan Hughes, *The Supreme Court of the United States*, 68 (1937)).

A dissent from the denial of a motion to recuse serves the same purpose as any other dissent from a decision by a court’s majority. Just as a decision not to hear an appeal en banc involves the entire court, a motion to recuse involves the entire court. Pursuant to rule 16.3 of the rules of appellate procedure, the challenged justice must either remove himself or herself from all participation in the case or certify the matter to the entire court. Tex. R. App. P. 16.3. In the latter event, the matter is decided by a “majority of the remaining judges sitting en banc.” *Id.*

PRAYER

Relator respectfully requests that this Court grant this petition for writ of mandamus and direct the respondent, the Honorable Ken Law, Chief Justice, Third Court of Appeals, to instruct the court clerk, the Honorable Jeff Kyle, to file the dissent at issue. Relator also requests any other relief to which she may be justly entitled.

Respectfully submitted,



Jan P. Patterson
State Bar No. 15596500

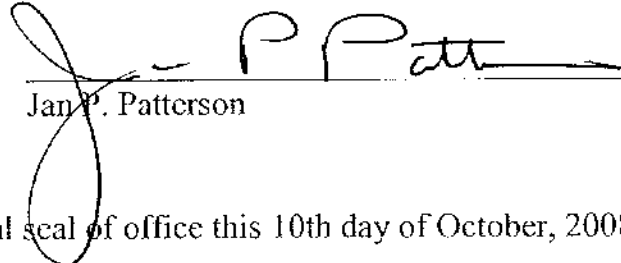
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RELATOR

VERIFICATION

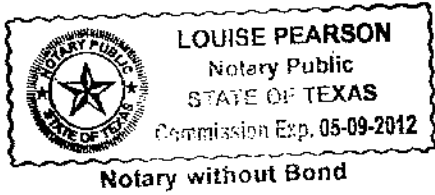
STATE OF TEXAS §
 §
COUNTY OF TRAVIS §

Before me, the undersigned authority, on this day personally appeared Jan P. Patterson, the person whose name is subscribed below and who, on her oath and based on personal knowledge stated that (i) she is the Relator in this original proceeding; (ii) the facts stated in this petition are true and correct; and (iii) the items contained in the Appendix/Record are true and correct copies of the original documents.



Jan P. Patterson

Given under my hand and official seal of office this 10th day of October, 2008.





Notary Public, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by overnight Lone Star or hand delivery upon the following counsel of record and Respondent on this 10th day of October, 2008.

Real Parties in Interest

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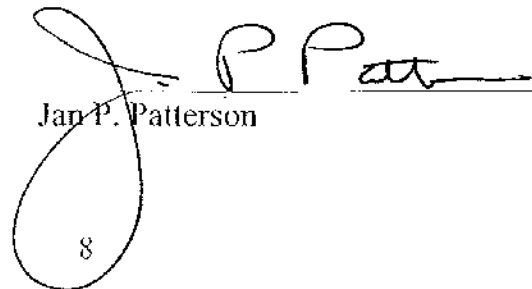
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