

1 right, court will be in recess.
2 (WHEREUPON, the proceedings in the above-styled cause were
3 concluded April 3, 2009 until August 18, 2009.)

4 **AUGUST 10, 2009**

5 THE COURT: All right, I can't remember where we
6 left off. Who was our last witness?

7 MR. ROSENZWEIG: Good morning, Judge.

8 THE COURT: Good morning.

9 MR. ROSENZWEIG: Your Honor, the last time we were
10 here, was to finish the Stidham cross-examination.

11 THE COURT: Did we finish that?

12 MR. ROSENZWEIG: I believe so.

13 MR. HOLT: Almost, but for purposes of that false
14 confession issues and his connection to the
15 professionals.

16 MR. ROSENZWEIG: Yes. The last time we were here,
17 Your Honor, uh, Mr. Baldwin was not here at all. We
18 did two days with Mr. Stidham, but the Baldwin team
19 was not here at all.

20 Before we start, Your Honor, I think it's
21 appropriate at the beginning of these proceedings. A
22 year ago, we had moved for Your Honor's recusal on
23 several grounds, and of course, were denied it.

24 We need to, uh, I think it would be appropriate
25 to renew that, and largely because of the, well, at

1 least from the reports in the newspaper that Your
2 Honor is running for the Arkansas state senate next
3 year.

4 And so I would renew that motion. I assume the
5 reports are accurate, that you are running? And if
6 they are accurate, it would be our position...

7 THE COURT: ...well, what would be the reason for
8 recusal? You're talking about something that will
9 happen in the future.

10 MR. ROSENZWEIG: Yes, sir.

11 THE COURT: I'm still a judge.

12 MR. ROSENZWEIG: That's correct, Your Honor. It
13 is not, as I read the rules in the Canons of Judicial
14 Conduct, because you're sitting as a special judge, it
15 would not be, it's not a violation of the Code of
16 Judicial Conduct; however, that doesn't resolve the
17 problem, because as we perceive it that Your Honor is
18 a candidate for a partisan political office and it
19 would be our position that it would violate the
20 spirit, if not the letter, of Amendment 80.

21 You have every right to run for office, there's
22 no question about that, uh, as a retired judge, as
23 would be the right of any citizen, including
24 yourself.

25 But the issue is whether or not it is appropriate

1 under the violation of due process of the federal and
2 state constitution.

3 THE COURT: How would it violate due process?

4 MR. ROSENZWEIG: Because, uh, you would be sitting
5 concurrently as a judge, but also as a candidate for a
6 partisan political office; not a nonpartisan office
7 such as the Supreme Court or circuit court, or
8 something like that.

9 And that's the basis for it, because it is a
10 partisan political office and it is our position that
11 those two roles are inconsistent.

12 Amendment 80 basically holds that, uh, Amendment
13 80 which says that if a person files, which you can't
14 do until...

15 THE COURT: ...you can't do it until next year.

16 MR. ROSENZWEIG: That's right.

17 THE COURT: If I do.

18 MR. ROSENZWEIG: But at least the newspaper is
19 indicating you have announced for that position.

20 THE COURT: I announced that I am looking at it
21 and intend to, yes. I have done that.

22 MR. ROSENZWEIG: And so although it's not a
23 violation, technically, of Amendment 80, it would be,
24 our submission is it would be a violation of the
25 spirit of the Amendment, under the circumstances.

1 THE COURT: Well, I don't follow it. What's the
2 state's position on that?

3 MR. RAUPP: Well, Your Honor, our position is the
4 same as briefed in the Arkansas Supreme Court. The
5 parties, uh, have briefed this in the Arkansas Supreme
6 Court, uh, you may know that there is a pending motion
7 to have this case remanded for fact-finding on whether
8 or not you should recuse, uh, the bottom line is, we
9 chose recusal to rest on the conscious of the Court.

10 THE COURT: Well, I'm having a hard time finding
11 where it would - - I mean, I guess you've got a legal
12 argument, but I certainly don't feel any compulsion to
13 recuse the case.

14 I mean, frankly, I'd love to drop it in some-
15 body's lap, but I feel like it's my burden to bear.
16 I'm the one that tried the case originally; I'm the
17 one that has the familiarity with a case that's been
18 going on for fifteen or sixteen years, and I think
19 it's appropriate that I finish it.

20 MR. RAUPP: Certainly, case authority is that the
21 trial judge can sit in a Rule 37, ordinarily, the
22 Court rules they can. A matter of bias or recusal in
23 case of discretion can be reviewed on direct appeal.

24 THE COURT: I think if I were a filed candidate
25 for office, your motion probably would be well-taken.

1 I am not, and there are several months before that
2 occurs, if it does occur. So I'm going to deny the
3 motion.

4 MR. ROSENZWEIG: Well, we've made our record, and
5 for the record, it would be our position that this
6 would violate the spirit of Amendment 80, and federal
7 and state constitutional rights of due process.

8 THE COURT: How does it violate due process?

9 MR. ROSENZWEIG: *Tooney vs. Ohio; Ward vs. Eddie*
10 *Monroe*, and there are a number of other cases like
11 that, that specifically talk about the circumstances
12 in which a, uh, that bias, uh, that bias, either
13 explicit, or even implied bias, uh, could...

14 THE COURT: ...well, where would bias be implied?

15 MR. ROSENZWEIG: Because, Your Honor, is a candi-
16 date for a partisan political office.

17 THE COURT: And what would that have to do with
18 it?

19 MR. ROSENZWEIG: Because, because, uh, you are, as
20 any candidate would be who is wanting to appeal to the
21 votes of at least the majority of his electorate,
22 which is a totally different motivation from
23 attempting to apply the law.

24 And that's why certain matters are regarded as
25 implied or structural bias, and do not need to look

1 into the head or the character of the particular, uh,
2 of the particular judge, just as in the same way you
3 can't sit on your first cousin's case, uh, because
4 even though you may not have talked to your first
5 cousin for a hundred years, you can't do it because
6 the law says there are certain structures.

7 And it's our position this would be one of those
8 structures.

9 THE COURT: Well, I don't have any biases, and
10 your motion is denied. I'm going to hear it through
11 to the end.

12 MR. PHILLIPSBORN: Your Honor, on behalf of Mr.
13 Baldwin, we have made a similar argument, uh, before
14 the Supreme Court.

15 We've joined in the Misskelley motion before and
16 we respectfully ask the Court to show us as having
17 joined in the motion.

18 THE COURT: Sure. No problem.

19 MR. PHILLIPSBORN: Thank you.

20 MR. RAUPP: Your Honor, if I could make a brief
21 point to the due process argument. The state's
22 position is pleaded both in this court and the
23 Arkansas Supreme Court, but it would be, uh, among
24 other reasons that the due process claim, I think, is
25 founded on a concern that a party have a fact-finder

1 who is not interested in the outcome.

2 And the parties are the financial interests or
3 personal lives in the outcome, and the suggestion that
4 a candidate for office at this stage of the game,
5 whether it's a judicial candidate or a house or senate
6 candidate, has an interest in the outcome to sway
7 voters, and I think it's speculative, at best.
8 Certainly, that's the state's position, and it
9 certainly wouldn't - - it would certainly undermine
10 the notion that elected circuit judges at all could
11 sit in cases because they're going to come up for
12 election.

13 And at least taken to the extreme, a due-process
14 argument suggests that all judicial candidates have an
15 interest in the outcome of the case.

16 MR. ROSENZWEIG: If I can respond briefly to that,
17 uh, there is a difference between a nonpartisan
18 election as circuit judgeships are, and a partisan
19 election.

20 And a judge for a judicial candidate has certain
21 restrictions, uh, some of which may or may not be
22 constitutional, but has certain strictures on what
23 they can and cannot say and do in a way that a
24 candidate for a partisan political office does not.

25 THE COURT: Is that it?

1 MR. ROSENZWEIG: Yes, sir.

2 THE COURT: All right. Call your next witness.

3 MR. PHILLIPSBORN: Your Honor, if it please the
4 Court, we're going to recall Dr. Werner Spitz, who was
5 on the stand November of last year. Dr. Spitz, would
6 you stand up and re-take the stand?

7 THE COURT: Doctor, do you understand you're still
8 under oath?

9 THE WITNESS: Yes, sir.

10 THE COURT: Just have a seat there, please.

11 THEREUPON,

12 DR. WERNER SPITZ, Forensic Pathologist

13 was recalled as a witness by and on behalf of the Defendant/
14 Petitioner and having been duly sworn, was examined and
15 testified as follows, to-wit:

16 DIRECT-EXAMINATION

17 BY MR. PHILLIPSBORN:

18 Q] Dr. Spitz, when we were last here I had asked you a number
19 of questions about the process in becoming a forensic path-
20 ologist and the board certification process. One thing that I
21 had not clarified is the following: A person who is a board
22 certified forensic pathologist, does that person have to pass
23 any other boards prior to actually sitting for the forensic
24 pathology specialty board?

25 A] Yes. A forensic pathologist who wishes to be board certi-