

STATE OF WISCONSIN
IN SUPREME COURT

Appeal No. 2007AP795
(Milwaukee County Case No. 1995CF952095)

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

AARON ANTONIO ALLEN,

Defendant-Appellant-Petitioner.

**SUPPLEMENTAL MOTION FOR RECUSAL OF JUSTICE
MICHAEL GABLEMAN DIRECTED TO
THE COURT AS A WHOLE**

Aaron Antonio Allen, by undersigned counsel, respectfully submits this supplement to his Motion for Recusal of Justice Michael Gableman on Constitutional Grounds filed on April 17, 2009. This Supplemental Motion is necessary for three reasons:

1. On June 8, 2009, the United States Supreme Court issued its decision in *Caperton v. A. T. Massey Co., Inc.*, 129 S.Ct. 2252 (2009), a copy of which is attached as Exhibit 1. For the reasons stated in counsel's letter to the Court dated August 12, 2009, the *Caperton* decision has a substantial impact on the issues presented in Allen's Motions for Recusal.

2. On September 10, 2009, Justice Gableman summarily denied Allen's separately filed Motion for Recusal of Justice Michael Gableman on Statutory And Ethical Grounds. Justice Gableman's entire decision reads as follows:

Having considered the motion of defendant-appellant-petitioner, Aaron

Antonio Allen, individually directed to Justice Michael J. Gableman for his recusal from participation in Case No. 2007AP795, and after careful consideration of the motion for recusal;

IT IS ORDERED that the motion to Justice Michael J. Gableman individually is hereby denied.

A copy of that Order is attached as Exhibit 2.

Pursuant to *State v. Harrell*, 199 Wis.2d 654, 663-64, 546 N.W.2d 115 (1996), and *State v. American TV and Appliance of Madison, Inc.*, 151 Wis.2d 175, 443 N.W.2d 662 (1989), such a decision is subject to review by the entire Court for the limited purpose of “establishing whether the judge made a determination requiring disqualification.” *Harrell*, 199 Wis.2d at 663-64, quoting *American TV*, 155 Wis.2d at 186. That is, the review is to determine whether the judge in question actually made the determination required by Wis. Stat. §757.19(2)(g) of whether “he or she cannot, or . . . it appears that he or she cannot, act impartially in a case.” *Id.* at 663.

Given Justice Gableman’s conclusory denial of Allen’s motion to recuse him on statutory and ethical grounds, it is impossible to determine whether he made the determination required by §757.19(2)(g), *Harrell*, and *American TV*. All we know is that he denied the motion. For all the Order explains, that denial *could* be based on the analysis and decision required by §757.19(2)(g), although that would be highly unlikely given the ample evidence of at least the appearance of bias set forth in Allen’s motion. It is thus also possible that the Order reflects either a misunderstanding of the applicable law or the relevant facts, or even a stubborn refusal to do that which the law clearly requires. In other words, Justice Gableman’s conclusory Order fails to reflect the determination required by §757.19(2)(g) and thus cannot be upheld even under the lenient standards of *Harrell* and *American TV*.

3. On September 16, 2009, the panel presiding over the Wisconsin Judicial Commission’s complaint against Justice Gableman for a campaign advertisement that misrepresented his opponent’s conduct as a state public defender held a hearing on Justice Gableman’s motion for summary judgment. At that hearing, Justice Gableman’s attorney,

James Bopp, argued that the panel should not give the campaign ad at issue its plain meaning in context, which concededly was false. Rather, the panel should construe the ad as merely an attack on then-Justice Butler on the grounds that he had been a public defender willing to present legal arguments on behalf of someone as vile as his client, Reuben Lee Mitchell. Although Bopp conceded that the legal objection Butler raised on behalf of Mitchell was valid, albeit ultimately deemed harmless by this Court, Bopp construed Candidate Gableman's ad as arguing that Butler was unqualified to sit on this Court because he was willing to make such an argument for such a horrible person:

[Louis Butler] is willing to find a loophole for a person so evil that he raped an 11-year-old girl with learning disabilities. And that he's so evil, that once he got out of jail, he went on to molest another child.

So the focus is on Butler's willingness to find loopholes for even people that are as despicable as this person is. And known to be as despicable as he was. Because he raped an 11-year-old girl with a learning disability. . . .

In other words, would you feel safe having somebody on the Supreme Court that is willing to find a loophole for a scumbag like Reuben Lee Mitchell who would rape an 11-year-old girl with learning disabilities and once he got out of jail would rape children again.

He is willing to find a loophole, whatever the result that manifests. It may result in his release, which is of course what Butler was seeking. He was seeking the release of Mitchell, by finding this loophole. And the Court of Appeals granted that.

If Butler had gotten his way, Mitchell would have been released. . . .

This is not about Mitchell, this is about Butler: What he is [sic] willing to do.¹

In other words, in the view of Attorney Bopp and Justice Gableman, it is inappropriate to raise legally valid claims on behalf of an accused child molester. Of course, if it is

¹ This is not an official transcript of the hearing but a "best efforts" transcription from the video recording available at Wisconsin Eye, "09.16.09 | Judicial Commission v. Justice Gableman," http://wisconsineye.com/wisEye_programming/ARCHIVES-courts.html#2582

Because the video recording is copywritten, Allen can only provide the URL for it.

inappropriate even for an attorney to raise such claims, it necessarily follows from their view that a judge such as Justice Gableman likewise can never actually rule in favor of such claims, no matter how valid the claim may be. As such, Justice Gableman's views and defense in his judicial ethics proceeding, as expressed through his attorney, reflect an absolute inability to be impartial in a criminal appeal such as this.

At an impromptu news conference immediately following the hearing, Bopp expanded on Justice Gableman's position. In their view, Butler's actions as a public defender in raising concededly meritorious arguments on behalf of a client not only disqualified him from sitting on this Court, but demonstrates "his willingness to subvert our system of criminal, uh, bringing criminals into account." According to them, an attorney who is performing the ethically and constitutionally mandated role of representing someone accused of a crime necessarily is "subvert[ing] our system of . . . bringing criminals into account."²

Once again, if Justice Gableman views criminal defense attorneys as "subvert[ing] our system of . . . bringing criminals into account" by raising meritorious challenges to a conviction or sentence, how can he possibly be expected to fulfill the constitutionally mandated roll as an impartial arbiter in a criminal case such as this? The answer is clear:

² The complete question and answer from the Wisconsin Eye video recording follow, again in an unofficial, "best efforts" transcription:

Reporter: Let me ask you first of all, [regarding] the contention from [the Wisconsin Judicial Commission], that it really hinges on that final statement, 'Mitchell went on to rape again.' Without the argument that using the word 'loophole' implies that he was set free because of Justice Butler in some way, what does that final statement have to do with Louis Butler?

Jim Bopp: Well, it's the type of person that he was willing to represent, and the type of person that he was willing to find a loophole for. It had everything to do with Justice Butler's, uh, judgment, that he was willing to find a loophole to let such a heinous — or to relieve — such a heinous criminal from responsibility for his crime. Whatever that meant, in terms of finding a loophole.

Justice Butler at the time, as a criminal defense lawyer, was urging that Mitchell get, be released. In fact the Court of Appeals ordered him to be released based upon this loophole. And so it has to do with [Butler's] judgment and his willingness to subvert our system of criminal, uh, bringing criminals into account. That's what it has to do with.

he cannot.

Although the statements at the hearing and subsequent news conference were made by his attorney rather than by Justice Gableman directly, those statements and views necessarily are attributable to Justice Gableman. He has not repudiated his attorney's defense to the ethics complaint and presumably authorized it. The Court of Appeals has recognized that "[t]he attorney-client relationship is one of agent to principal, and as an agent, the attorney must act in conformity with his or her authority and instructions and is responsible to the principal if he or she violates this duty." *State v. Divanovic*, 200 Wis. 2d 210, 224-25, 546 N.W.2d 501 (Ct. App. 1996). We therefore can assume that Attorney Bopp, the agent, utters words approved by and therefore attributable to Justice Gableman, the principal. An attorney is the client's "speaking agent" for comments made within the scope of the representation. *See, e.g., Blinka, Wisconsin Evidence* §801.503 (3d ed. 2008).

CONCLUSION

For these reasons, as well as for those in his Motion for Recusal of Justice Michael Gableman on Constitutional Grounds, Aaron Antonio Allen respectfully asks that the Court order full briefing and argument on this motion and, following such argument, order that Justice Michael Gableman be recused from sitting in judgment in this case.

Dated at Milwaukee, Wisconsin, September 18, 2009.

Respectfully submitted,

AARON A. ALLEN,
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