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NORMA FAVELA BARCELEAU
District Clerk
El Paso County
20200D02631

IN THE 409TH DISTRICT COURT
EL PASO COUNTY, TEXAS

THE STATE OF TEXAS V. PATRICK WOOD CRUSIUS	CAUSE NO. 20200D02631

STATE'S MOTION TO RECUSE
THE HONORABLE JUDGE SAM MEDRANO

Comes now, Movant, the State of Texas, by the undersigned Assistant District Attorney for the 34th Judicial District, pursuant to rules 18a and 18b of the Texas Rules of Civil Procedure and files this, the State's motion to recuse the Honorable Sam Medrano, and would show the Honorable Court as follows:

I. APPLICABLE LAW

Rule 18b(b) of the Texas Rules of Civil Procedure provides that a judge must recuse himself in any proceeding in which " . . . the judge's impartiality might reasonably be questioned." *See* TEX. R. CIV. P. 18b(b)(1). In determining whether recusal is required, "the proper inquiry is whether a reasonable member of the public at large, knowing all the facts in the public domain concerning the judge and the case, would have a reasonable doubt that the judge is actually impartial." *See Fuelberg v. State*, 410 S.W.3d 498, 509 (Tex.App.—Austin 2013, no pet.), *quoting Ex Parte Ellis*, 275 S.W.3d 109, 115-17 (Tex.App.—Austin 2008, no pet.);

see also Kniatt v. State, 239 S.W.3d 910, 915 (Tex.App.—Waco 2007, no pet.). The standard is an objective one that focuses not on the judge's subjective state of mind and beliefs about whether he can be fair and impartial, but instead asks whether a reasonable person would doubt that the judge could remain impartial under the circumstances. *See Fuelberg*, 410 S.W.3d at 509-10.

"Because this test requires courts to evaluate a motion to recuse from a disinterested observer's point of view, it seems best suited to achieve the primary purpose of Rule 18b(2)(a) [prior version of Rule 18b(b)(1)]: avoiding the appearance of judicial bias." *See Rogers v. Bradley*, 909 S.W.2d 872, 873 (Tex. 1995) (Enoch, J. responding to Gammage, J.'s "Declaration of Recusal"). As the Austin Court of Appeals has explained, ". . . recusal is concerned not only with actual personal or pecuniary interests, but also the appearance of impartiality when all factors are reviewed as a whole." *See Fuelberg*, 410 S.W.3d at 509, *citing Rogers*, 909 S.W.2d at 873 ("Declaration of Recusal by Gammage, J.) (noting that the issue is one of perception.)

II. BASIS OF KNOWLEDGE

The undersigned Assistant District Attorney is Senior Division Chief for the Office of the District Attorney for the 34th Judicial District of Texas. The undersigned has been tasked with stating what is set out below based on his

personal knowledge and information and belief regarding the events related. Where his understanding of events is based on information and belief, the basis for that belief will be specifically stated parenthetically.

III. BACKGROUND

Defendant Patrick Crusius stands charged by indictment herein with one count of Capital Murder of Multiple Persons and 22 counts of Aggravated Assault with a Deadly Weapon, alleged to have occurred on or about August 3, 2019 in El Paso County, Texas. All told, 23 people are alleged to have been killed in the capital murder count of the indictment. These allegations are commonly referred to as the "Walmart shooting." The defendant was arraigned on these charges on October 10, 2019.

On or about November 7, 2019, before newly-elected District Attorney Yvonne Rosales had taken office, Judge Medrano held a hearing herein (which the undersigned watched via video as it occurred). At that hearing it was presented to the Court that Assistant District Attorney John Briggs would be lead attorney for the State of Texas on this case. Judge Medrano eventually stated that he would begin setting further hearings in this case shortly after the beginning of 2022.

At the beginning of 2021, Yvonne Rosales was sworn in as District Attorney for the 34th Judicial District of Texas. Almost immediately, Judge Medrano

expressed dissatisfaction with Ms. Rosales' personnel assignments to his court. The personnel changes that accompanied the change of administration resulted in the assignment of a completely different set of prosecutors to the 409th District Court than had been assigned under the administration of the previous District Attorney. Judge Medrano was dissatisfied enough with these changes that he eventually requested and received a completely different set of prosecutors than had been assigned at first to his court by District Attorney Rosales. (The undersigned has personal knowledge of this via conversations with Judge Medrano. The tone of these conversations left the undersigned with the perception that Judge Medrano felt disrespected by District Attorney Rosales in regard to the assignment of prosecutors to his court.)

After District Attorney Rosales took office, Assistant District Attorney John Briggs was specifically tasked by the undersigned, via Mr. Briggs' direct supervisor, Division Chief Scott Ferguson, with spending "90% of his time" working on the two death penalty cases to which he was assigned, one of which was this case.

2021 was a pandemic year, and it was believed that work was proceeding apace on this case, particularly as no trials were being scheduled by the courts. (The undersigned's knowledge and belief as to this point is based on discussions

with Division Chief Ferguson related to Chief Ferguson's inquiries regarding the status of this case.)

The beginning of 2022 came and went, with no court settings whatsoever being scheduled herein by Judge Medrano. Assurances continued to be made by ADA Briggs that work was proceeding apace on this case. Given ADA Briggs' level of experience with murder and capital murder cases, it was believed that he was performing in accordance with his proven level of ability. (The undersigned's knowledge and belief is based on discussions with Division Chief Ferguson regarding Chief Ferguson's inquiries about this case.)

In May of 2022, District Attorney Rosales secured a grant from the office of Texas Governor Greg Abbott for $3 million in order that the expense of this case be borne by the State of Texas as a whole, rather than the County of El Paso alone. (The undersigned was involved in presenting this grant for approval by the County Commissioners of the County of El Paso, Texas.)

On or about June 24, 2022, the Honorable Judge David Guadarrama scheduled a trial date of January 8, 2024 in the federal criminal case against the defendant herein. As of that date, there had still been no hearings whatsoever scheduled by Judge Medrano in the state case since November 7, 2019.

On or about June 27, 2022, District Attorney Rosales, in a statement regarding scheduling, as opposed to any facts in the case, stated to certain media outlets that "we hope to have our case proceed to trial by the summer of 2023."

On June 28, 2022, this Court scheduled the first hearing to be held in this case since November 7, 2019. This new hearing was scheduled for July 1, 2022 at 11:00 am, and was styled as a "Status Hearing."

On July 1, 2022, Judge Medrano convened the "Status Hearing" at 11:00 am as scheduled. However, he had already filed an "Order Restraining Parties from Making Extrajudicial Statements (Gag Order)" ten minutes before the hearing commenced, as evidenced by the District Clerk's timestamp on the document. (A copy of this Order is attached hereto.) This early filing of the Order meant that neither the parties to the case, nor the extensive number of other individuals claimed to be subject to the Order, were offered any chance to be heard on any aspect related to it before the Order was entered into the record by the Court.

Another highly irregular deviation from standard practice in the course of this "Status Hearing" was that a large collection of local journalists were positioned, not only inside the courtroom, but actually in the jury box itself. It is a reasonable inference that this occurred with the permission of, if not at the invitation of, the Court, given that the Court controls access to the courtroom.

(The undersigned's basis for information and belief as to this hearing is a combination of a reading of the complete transcript of the hearing; a review of numerous media reports about the hearing, including the media's descriptions and characterizations of the tone and demeanor evidenced by Judge Medrano, as well as the camera angles of photographs taken during the hearing; and interviews conducted with witnesses to the hearing by the undersigned as a result of later directives by Judge Medrano to the undersigned for the collection of certain pieces of information sought by the court. The undersigned will note that, in the approximately 15 years that the undersigned has practiced criminal law in the District Courts of El Paso County. Texas, the undersigned has never once seen any member of the media be allowed to sit in the jury box during any hearing in any court. However, it is known to have happened at this hearing.)

Once the "Status Hearing" was commenced, Judge Medrano immediately began to direct questions at District Attorney Rosales, who was seated at counsel table for the State. These questions included an exploration at some length as to the level of readiness by the State in regard to any eventual trial of the case. All of these questions were directed solely to District Attorney Rosales, even though Judge Medrano had known since November 7, 2019 that ADA John Briggs, who was seated next to DA Rosales at counsel table during the hearing, was assigned as

lead counsel for the State on the case and was therefore tasked with overseeing preparation of the case for trial. Mr. Briggs was apparently asked no questions at all during the course of the hearing, nor did Mr. Briggs either assist in answering the questions, or volunteer any answer himself. As Mr. Briggs had been in discussions with Judge Medrano in chambers within a few days prior to this hearing, along with the defense attorneys on this case, it is a reasonable deduction from the evidence that Judge Medrano could have asked him those questions and gotten an answer directly from the person who was charged with such knowledge. (The undersigned's basis for information and belief as to the questions asked is gleaned from the transcript of the hearing and from representations by John Briggs and others regarding the discussions.)

Additionally, it is of note that while the Court expressly stated, in an accusatory manner, that the State had apparently entered no filings into the record, no such filings were as yet required, given that the Court had failed to issue any scheduling order or filing deadlines whatsoever.

Other questions asked by Judge Medrano of DA Rosales included an exploration of her level of understanding of the amount of time involved in the individualized voir dire that is a factor under Texas law in any death penalty case. These questions were directed solely at her, even though Judge Medrano likely had

an awareness that DA Rosales had never worked on a death penalty case. Judge Medrano could easily have asked these questions of ADA Briggs, who he likely knew had capital murder case experience and who was seated directly next to DA Rosales. It is a reasonable inference from these events that Judge Medrano's intention was not to actually gather information, but was instead to embarrass DA Rosales in front of the members of the media who had been allowed to assemble in the jury box.

Judge Medrano further expressed concerns regarding the extent of media coverage generated by the parties and others exercising their First Amendment rights by communicating with the media regarding this case. These concerns were directed solely at DA Rosales, and were expressed in an emphatic fashion in front of the large collection of members of the media who had been allowed to situate themselves in the jury box. These concerns were expressed even though the Gag Order entered into the record before the hearing included a statement that "pre-trial publicity will interfere with the Defendant's right to a fair trial by an impartial jury." Since these concerns could have been expressed in chambers with the parties present but without the attendance of the media, it is a reasonable inference that the actual purpose of Judge Medrano was to generate media coverage rather than limit it. (The undersigned's basis for information and belief as to the tone and

demeanor of Judge Medrano arises from a review of numerous media reports of the hearing, as well as interviews by the undersigned with witnesses to the hearing itself. The judge's tone and demeanor is described in at least one media report as "clearly angry." Judge Medrano is also described as having "repeatedly criticized" DA Rosales. All of these media reports are a result of the decision by the Court to hold the hearing in front of the media assembled in the jury box. Furthermore, as is evidenced by previous and subsequent events, meetings in chambers between the Court and counsel, off the record and without media presence, have certainly occurred in the course of this case.)

Judge Medrano also queried DA Rosales regarding the grant secured from the Office of the Governor, primarily by making the statement that DA Rosales' decision to "hire out-of-town lawyers that will be prosecuting this case" was "the worst-kept secret in the legal community." This is not so much a request for information as it is a statement made in front of the assembled media. By the terms of its phrasing, it communicates ridicule of DA Rosales' decision-making in regard to personnel matters, combined with an insinuation that lawyers who are not from El Paso are somehow inappropriate for the handling of this case. This statement was directed at DA Rosales despite the fact that lead counsel for the defense, attorney Mark Stephens, is not from El Paso but instead resides in San

Antonio, Texas. (The undersigned's basis for information and belief as to these specific events comes from the transcript of the hearing, as well as a review of numerous media reports.)

DA Rosales was clearly at a disadvantage during this questioning, having had no warning of the subject matter of the "Status Hearing," including the fact that the title of the hearing was apparently designed to be obscure. The defense, on the contrary, apparently read from a carefully-prepared statement when given the chance to present remarks to the Court. (The undersigned's information and belief as to these events is based on a review of the media coverage, including the photos and videos related thereto.)

Judge Medrano then stated, "Never in my 26 years on the bench have I had to resort to the order that I have this morning entered in this case," despite the fact that the only claimed statement to the media was that the State HOPED to be ready for trial by the summer of 2023, which absolutely does not rise to the level of a statement designed to affect jurors in a case.

The hearing concluded with a statement by Judge Medrano that, "The grandstanding ends today." It is a reasonable inference that this statement was intended to be the last word to the media.

It is worthy of note that the previous District Attorney, Jaime Esparza, repeatedly made statements about this case to the media, statements which related various aspects of the facts of the case, without ever drawing the ire of Judge Medrano.

On September 12, 2019, Esparza confirmed to the El Paso Times that a family member was a victim and witness to the incident. He went on to comment on her mental anguish, that he did not believe his relation to his relative was a conflict of interest, and discussed mental health issues of the victims, that there might be a change of venue, and the potential cost to the community. (The undersigned's basis for information and belief is his memory of these statements combined with recent research.)

On October 26, 2019, Jaime Esparza gave an interview to local reporter Angel Kocherga about prosecuting the Walmart case and the impact on the community. (The undersigned's basis for information and belief is his memory of this interview combined with recent research.)

On February 25, 2020, Jaime Esparza gave an interview to the Texas Tribune and other members of the media, including television station KTSM. He stated he was not willing to transfer the case to the federal government, that funding should not be a "barrier," and that he was willing to prosecute the case.

He stated, "If you're going to take 22 lives from us, plus the 26 that you injured and all the people that you've hurt . . . El Paso is up to the task." (The undersigned's basis for information and belief is his memory of these statements combined with recent research.)

Judge Medrano did not find any of these statements to the press worthy of any action whatsoever, much less the issuance of a gag order, even though they are far more extensive than any statement ever made to the press by District Attorney Rosales.

Subsequent to the July 1st "Status Hearing," on August 3, 2022, attorney Amanda Enriquez, who had previously been assigned as a prosecutor on the Walmart shooting case under the administration of the previous District Attorney, gave an interview to the media in which she expressed opinions about the case. The Court thereafter evidenced no concern about this interview in relation to the Gag Order. (The undersigned watched excerpts from this interview on television news.)

On August 4, 2022, multiple local media outlets received an email originating from an email account linked to Rosa Maria Valdez, mother of the biological children of Walmart shooting victim Alexander Hoffmann. This email expressed concerns that Amanda Enriquez, who had been identified by the media

as a potential candidate for District Attorney in the next election cycle, was using the Walmart shooting case for political purposes. The email represented that it had been written by Alexander Hoffmann Valdez, one of Alexander Hoffmann's children. (The undersigned knows of only certain parts of the contents of this email, from reporting by local media.)

On August 12, 2022, the Court scheduled another "Status Hearing." This hearing was scheduled for August 18, 2022. In preparation for that day, the attorneys for the parties, including the undersigned, were summoned to an off-the-record meeting with the Court in the court's chambers. At this meeting, the State was verbally ordered to provide the Court with certain information related to events following the "Status Hearing" on July 1, 2022. This information effectively constituted the beginning of an investigation. Specifically, among other things, the State was ordered to identify who, if anyone, had spoken to the victims and the families of the deceased after the hearing on July 1, 2022, as well as the names of Victims Assistance personnel who had accompanied the victims and families of the deceased at the July 1 hearing. The State was also asked by the Court to contact the Hoffmann family and request their attendance at the hearing scheduled for August 18, 2022. The Court expressed an interest in simply making certain that the Hoffmanns clearly understood the terms of the Gag Order.

The State in fact complied with the order to provide information, at first verbally while in chambers during the off-the-record meeting, and then in writing the following day, following an admonishment via email from the Court for a failure to timely comply with the Court's verbal, unrecorded order to provide the information in writing.

Before the August 18th "Status Hearing" took place, however, the Court again held a meeting with counsel for the parties, off-the-record and in chambers. At this meeting the State informed the Court that it had so far been unsuccessful in making contact with the Hoffman family. The Court then decided that it would instead appoint counsel to represent the Hoffmann family, with a reference being made to the potential danger that one of them might somehow incriminate themselves in regard to the Gag Order. This concern seemed strange to the undersigned in light of the Court's previously expressed intention to simply make certain that the Hoffmanns understood the precise terms of the Gag Order.

The State agreed to file a motion for continuance of the August 18 hearing, on grounds that it had so far been unable to make contact with the Hoffmann family. This motion was filed by the undersigned on August 17, 2022, and was granted on that date by the Court.

On that same day, Justin Underwood, attorney at law, was sua sponte appointed by the Court to represent the Hoffman family "in any future proceeding that may arise in this cause." Justin Underwood is a known critic of Yvonne Rosales, who has made statements hostile to her administration previous to this appointment. The Court neither solicited nor accepted any input as to the choice of attorney from either of the parties, going so far as to state that he would not accept input from the parties. Mr. Underwood's appointment was entirely of the Court's own choosing.

Subsequently, attorney Underwood contacted the undersigned by telephone and requested contact information from the State's files for the Hoffmann family. He stated that his only intention was to "protect" the Hoffmann family to the best of his ability, and that he was confident that the entire episode would turn out to be a "learning experience" for all involved. These statements seemed innocuous enough at that time to the undersigned, who agreed to provide the contact information as a courtesy, despite not having been ordered to do so by the Court.

However, on that same afternoon, before the contact information could be provided, attorney Underwood also contacted Division Chief Scott Ferguson by telephone. The tone of this conversation was decidedly different. Mr. Underwood emphatically indicated to Chief Ferguson (who was his old friend and trial partner

from Underwood's tenure at the District Attorney's Office years before) that he suspected that the email had been written, not by the Hoffmanns, but by one or more other people, and that he intended to investigate that. It is unquestionable that such an investigation would be outside the scope of the appointment according to the order appointing Mr. Underwood. Regardless, the fact that Judge Medrano subsequently scheduled a further hearing, apparently to facilitate such an extrajudicial investigation, demonstrates Judge Medrano's bias in this case. (The undersigned's information and belief for these events is based in conversations with Chief Ferguson.)

Given the emphatic nature of Mr. Underwood's communication with Chief Ferguson, any thought of providing the Hoffmann's contact information as a courtesy was discontinued, since it was unclear in what manner Mr. Underwood might choose to engage the Hoffmanns, and since it was beginning to appear that Mr. Underwood might have different motivations in regard to the Court's appointment beyond simply representing the best interests Hoffmann family. (It should be noted that the Court has to date still never ordered the State to provide any information to Mr. Underwood.)

On August 23, 2022, the Court and the Office of the District Attorney both received an email from Jose Morales, stating that his law firm in Mexico represents

the Hoffmann family, and that they rejected the representation of Mr. Underwood. (A copy of this email is attached to the State's Motion to Quash Mr. Underwood's subsequent subpoenas, and a copy of that Motion is attached hereto.)

Despite the fact that there was now a question regarding the status of Mr. Underwood's representation and his ability to ethically continue to represent clients who had purportedly rejected his representation, the Court took no action.

Subsequently, Mr. Underwood was observed communicating with a local journalist on social media, advocating for the filing of a Petition to remove DA Rosales. He thereafter was heard being interviewed on radio station KLAQ, advocating for an end to Ms. Rosales' tenure in office as District Attorney. It was known to the undersigned that Mr. Underwood was distressed by the fact that a decrease in case filings by the District Attorney's Office had negatively impacted his income by decreasing the number of new clients seeking legal representation. (The basis of the undersigned's information and belief regarding these events is a combination of personal knowledge from previous conversations with Mr. Underwood, along with conversations with witnesses to the events.)

Despite these occurrences, most of which appear to have taken place in public view, the Court took no action until August 30, 2022.

On August 30, 2022, the Court scheduled yet another "Status Hearing." This hearing was scheduled for September 13, 2022. The purpose of the hearing is undiscernible from the title of the hearing.

Subsequently, on September 6, 2022, Mr. Underwood caused to be issued three subpoenas for the hearing on September 13. The persons subpoenaed are District Attorney Yvonne Rosales, Judge Roger Rodriguez, and former ADA John Briggs. Mr. Underwood sought and received issuance of these subpoenas despite lacking any legitimate legal standing or basis to do so in this criminal case, given that he is not the defendant, an attorney for the defendant, or an attorney for the State herein. (The full substance of the State's objections to these subpoenas is memorialized in the State's Motion to Quash, a copy of which is attached hereto.)

Despite the absolute lack of any lawful standing on Mr. Underwood's part to effect the issuance of subpoenas in this case, the subpoenas have in fact been issued, service of those subpoenas is being pursued, and the Court continues to take no action.

The State now files this Motion to Recuse the Honorable Sam Medrano.

IV. ARGUMENT

The sequence of the aforesaid events demonstrates that it is a reasonable inference that Judge Medrano developed a personal animus against DA Rosales at

some point in time prior to the present, perhaps as early as near the beginning of her current term in office. It is also a reasonable inference that he subsequently felt provoked by her innocuous statement (made via the exercise of her First Amendment right to free speech) that she "hoped" this case would go to trial in the summer of 2023. It is furthermore a reasonable inference that Judge Medrano then proceeded to devise methods by which he sought to impugn her in the public's perception.

The Gag Order is a case in point. In entering the gag order ten minutes before the hearing, without taking any input from or allowing any objections by the parties, Judge Medrano blatantly disregarded the law.

Davenport v. Garcia, 843 S.W.2d 4 (Tex. 1992) sets out the current law regarding gag orders. *Davenport* explains that the Texas Constitution gives greater protection for the freedom of speech than does the U.S. Constitution. The Supreme Court went on to explain, setting the standard:

> Since the dimensions of our constitutionally guaranteed liberties are continually evolving, today we build on our prior decisions by affirming that a prior restraint on expression is presumptively unconstitutional. With this concept in mind, we adopt the following test: a gag order in civil judicial proceedings will withstand constitutional scrutiny only where there are specific findings supported by evidence that (1) an imminent and irreparable harm to the judicial process will deprive litigants of a just resolution of their dispute, and (2) the judicial action

represents the least restrictive means to prevent that harm.

Davenport has been held to apply to criminal cases as well as to civil cases. *In Re Graves,* 217 S.W.3d 744 *(Tex.App.–Waco 2007); San Antonio Express–News v. Roman,* 861 S.W.2d 265, 267–68 (Tex.App.-San Antonio 1993).

Under *Davenport,* the judge must make "specific findings supported by evidence." *Davenport,* 834 S.W.2d at 10; *Marketshare Telecom,* 198 S.W.3d at 917; *accord Grigsby v. Coker,* 904 S.W.2d 619, 620 (Tex.1995) (orig.proceeding) (per curiam); *Tex. Mut. Ins. Co.,* 156 S.W.3d at 129; *Brammer,* 114 S.W.3d at 107. In *Davenport*, the court set out the deficiencies which were found in that gag order:

> The orders fail to identify any miscommunication that the trial court may have perceived, does not indicate any specific, imminent harm to the litigation, and offers no explanation of why such harm could not be sufficiently cured by remedial action. For instance, had any miscommunication stemmed from improper statements by Relator, as implied by the court, the proper response may have been to sanction her conduct. By stopping not only the purported miscommunications but *any* communications, the broadly worded injunction certainly fails the second part of our test.

Davenport, 834 S.W.2d at 11.

The Trial court in *Graves* found similar failings in the gag order that the court therein was addressing. "In similar fashion, Respondent failed to make 'specific findings' detailing the nature or extent of the pretrial publicity in Graves's

case or how the pretrial publicity or the record from his prior prosecution will impact the right to a fair and impartial jury." *GravesI,* Supra,, at *762-753, Also, See Grigsby,* 904 S.W.2d at 620; *Davenport,* 834 S.W.2d at 11; *Marketshare Telecom,* 198 S.W.3d at 918; *Markel v. World Flight, Inc.,* 938 S.W.2d 74, 79–80 (Tex.App.-San Antonio 1996, no writ); *Low v. King,* 867 S.W.2d 141, 142 (Tex.App.-Beaumont 1993, orig. proceeding); *San Antonio Express–News,* 861 S.W.2d at 268; *cf. Houston Chronicle Publ'g Co.,* 64 S.W.3d at 108.

In the above-captioned action, Judge Medrano entered the Gag Order ten minutes before the July 1, 2022 hearing even began. No evidence was taken regarding pre-trial publicity prior to the entry of the Gag Order, nor was there any evidence presented at the hearing itself. No finding based on adduced evidence established that there had been any actual miscommunication, nor was there shown any actual harm that occurred. And there was no hearing regarding less restrictive means of addressing any harmful pre-trial publicity.

Instead, Judge Medrano recited in his Gag Order that "The Court takes judicial notice of: 1) the unusually emotional nature of the issues involved in this case; 2) the extensive local and national media coverage this case has already generated; and 3) the various and numerous media interviews with counsel for the parties that have been published and broadcast by local and national media."

A trial court has the discretion to take judicial notice of adjudicative facts *sua sponte. See* TEX.R. EVID. 201(c). However, "[a] party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken." *Id.* 201(e).

A judicially-noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. TEX.R.EVID. 201(b). Judicial notice is an exception to the normal requirement of proof, which must be justified by a "high degree of indisputability." *Garza v. State,* 996 S.W.2d 276, 279–80 (Tex.App.-Dallas 1999, pet. ref'd).

Judicial notice of pretrial publicity may occasionally be appropriate. *In re Houston Chronicle Publ'g Co.,* 64 S.W.3d 103, 105 (Tex.App.-Houston [14th Dist.] 2001). However, that is not the case when the parties are not given the opportunity to be heard or to present evidence to the contrary. *Graves, Supra.*

There was, in this case, of course no opportunity for any party to be heard or any objection to be made prior to Judge Medrano taking such judicial notice, nor prior to his making findings thereon, because the Gag Order had already been

issued before the hearing even began.

Certainly, the "various and numerous media interviews with counsel for the parties that have been published and broadcast by local and national media" are not facts that are not subject to reasonable dispute in that they are either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

Indeed, without a hearing in which evidence could be presented, there was not even a statement or finding regarding whether any of the parties had given interviews, nor how many had been given nor whether any statements of the parties regarding the facts of the case were actually made or reported on.

In *Graves, supra*, at 752-753, the court held, as the basis for its ultimate holding that the gag order in that case was improper, "Respondent failed to make 'specific findings' detailing the nature or extent of the pretrial publicity in Graves's case or how the pretrial publicity or the record from his prior prosecution will impact the right to a fair and impartial jury." Likewise, in this case, Judge Medrano failed to make specific findings detailing the nature or extent of the pretrial publicity, or how pretrial publicity would impact the right to a fair and impartial jury.

Instead, the Court made a finding that "Counsels' willingness to give interviews to the media would only serve to increase the volume of pre-trial publicity." Yet there is no finding that any counsel had given interviews to the media. No evidence was produced that any party had actually given interviews to the media, nor was the State allowed to produce evidence that the one extrajudicial statement which apparently gave rise to this finding by the Court was not an interview, but rather was a simple statement that the Stated hoped the case could begin trial by the summer of 2023.

The next finding by the Court was that "if Counsel for the parties continue to grant interviews to the media, the pre-trial publicity will interfere with the Defendant's right to a fair trial by an impartial jury." Even if those facts of which judicial notice was taken by the Court were properly taken notice of, there was certainly no evidence of how that pre-trial publicity might interfere with the Defendant's right to a fair trial by an impartial jury.

The court further entered a finding that "no less restrictive alternative means exist to treat the specific threat to the judicial process generated by this pre-trial publicity," without taking any evidence regarding less-restrictive alternative means; nor were any of the parties to be bound by said order allowed to present any evidence to the court.

Finally, the Court found that "an Order restricting extra-judicial commentary by Counsel for the parties is necessary to preserve all venue options and a delay in proceedings would not lessen the publicity generated by this case." Once again, there was no evidence regarding the need to preserve all venue options or why this order would actually be necessary to do so. And there was no evidence regarding how a delay in proceedings would not lessen the publicity generated by this case.

There is little question that Judge Medrano is a knowledgeable and erudite jurist, who must have been aware of these points of law. Therefore, the clear deficiencies in the procedure and substance of the Gag Order demonstrate a reasonable inference that its purpose was not as stated, but rather was that it be used as a tool to impugn DA Rosales instead.

Furthermore, Judge Medrano's statements as he was berating DA Rosales demonstrate a reasonable inference that his motivations were to embarrass and demean her, rather than to actually address any pre-trial publicity that may have occurred.

It should further be noted that the only hearings scheduled in this case since November 7, 2019 have all been focused on the Gag Order and possible violations of the Gag Order. The subpoenas unlawfully issued by Mr. Underwood for the

"Status Hearing" currently scheduled for September 13, 2022 demonstrate that this hearing also is intended to have such a focus.

The triggering event for this motion was the unlawful issuance of subpoenas by Mr. Underwood on September 6, 2022, and therefore this motion is timely. (That event itself occurred less than 10 days before the next scheduled hearing in this case, so that limitation should not apply, and this motion is being filed as soon as practicable after the triggering event, given the length of the motion and the time involved in drafting it.) By sua sponte choosing and appointing Mr. Underwood (who, rather than simply representing his appointed clients when and as the need arose, instead proceeded to institute an extrajudicial investigation, and who continued with that investigation even after his representation was apparently rejected by the appointed clients), Judge Medrano himself set in motion that extrajudicial investigation. And since this investigation is being pursued by an attorney who has publicly expressed support for the removal from office of DA Rosales, it creates a reasonable inference that it has no purpose other than facilitating such a design. Therefore, any reasonable person would doubt that Judge Medrano could remain impartial under such circumstances. *See Fuelberg*, 410 S.W.3d at 509-10.

The State is requesting a hearing on its motion pursuant to rule 18a(g)(6).

V. PRAYER

Wherefore, the State prays that the Honorable Judge Sam Medrano recuse himself from this case, or, in the alternative, that the foregoing motion be referred to the Presiding Judge of the Sixth Administrative Judicial Region pursuant to the Texas Rules of Civil Procedure, that the State's motion to recuse the Honorable Judge Sam Medrano from any and all further proceedings in this matter be granted, and that the State receive any and all relief to which it may be entitled.

Respectfully submitted,

/s/ Curtis Cox
CURTIS COX
Assistant District Attorney
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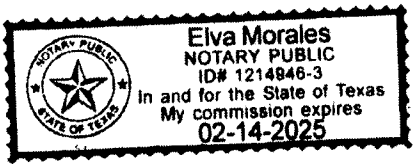
AFFIDAVIT

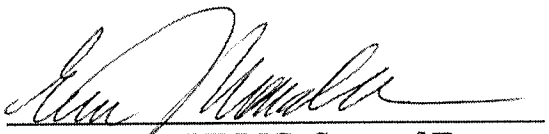
I, Curtis Cox, Assistant District Attorney for the 34th Judicial District, State of Texas, the movant, in the above-styled cause, attest under oath that, based upon my personal knowledge, as well as information and belief, the foregoing allegations in the State's Motion to Recuse the Honorable Judge Sam Medrano are

true and correct.

Curtis Cox

SIGNED under oath before me on September 9, 2022.





NOTARY PUBLIC, State of Texas

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was e-filed and served on Mark Stevens (mark@markstevenslaw.com), Joe Spencer (Joe@joespencerlaw.com), and Felix Valenzuela (felix@valenzuela-law.com), attorneys for Defendant, on September 9, 2022.

/s/ Curtis Cox
CURTIS COX
Assistant District Attorney