



In an unpublished memorandum opinion, this court affirmed the forty-year sentence imposed following the appellant's conviction of burglary resulting in serious bodily injury, a class A felony, and battery, a class C felony. *See Pickett v. State*, 755 N.E.2d 1153 (Ind. Ct. App. 2008). Pickett petitions for rehearing upon grounds that one member of the panel should have recused from the case based upon that panel member's personal familiarity with Pickett's attorney. We agree on this point, if not all points made by Pickett, and therefore grant the petition for rehearing.

It is the rare case in which an opinion upon rehearing need not address the substance of the opinion in question, but this is such a case. Indeed, the facts pertinent to this petition are entirely unrelated to the facts of Pickett's appeal. Simply put, Pickett was represented on appeal by attorney Kimberly A. Jackson. The significance of this escaped our attention until we considered the instant rehearing petition, which pointed out that Attorney Jackson is the former wife of one of the panel members, Judge Cale Bradford. Upon the basis of this relationship, Pickett contends, Judge Bradford was required to recuse. In support of this contention, Pickett cites Rule 2.11(A)(1)(b) of Canon 2 of the Code of Judicial Conduct, which states, in pertinent part:

A judge shall disqualify himself or herself in any proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to the following circumstances:

(2) The judge knows that the judge, the judge's spouse or domestic partner, or a person within the third degree of relationship to either of them, or the spouse or domestic partner of such a person is ... acting as a lawyer in the proceeding[.]

According to Pickett, the foregoing provision *required* Judge Bradford to recuse. Whether

based upon this provision or a different one, Judge Bradford, in fact, has a standing policy of recusing from cases in which Attorney Jackson participates. In this case, it simply escaped his attention that Attorney Jackson was Pickett's attorney. Thus, based upon his standing policy, Judge Bradford agrees with Pickett that he should not have participated in this decision, and we, the other two panel members, respect that decision. Accordingly, we conclude that the petition for rehearing should be granted on this basis and also acknowledge and respect Judge Bradford's request to immediately withdraw from any further involvement in this case, including the instant petition for rehearing.

Having determined that the petition for rehearing should be granted, we must now decide how to proceed from here. Pickett asks us to take the following steps: (1) Withdraw the original decision and appoint a new panel to decide Pickett's appeal, and (2) require Judge Bradford to "issue a standing order of recusal pursuant to Rule 2.11(A) of Jud. Canon 2 in cases in which Pickett's counsel represents one of the parties." *Petition For Rehearing* at 4.

Beginning with the latter request, we have indicated that Judge Bradford's standing policy is to recuse in cases where one of the parties is represented by Attorney Jackson. Such reflects this court's current practice, pursuant to which the decision whether to recuse is made by each judge on a cases-by-case basis. Each judge has current and past associations and affiliations whose involvement in a case requires, or at least recommends, recusal. If each of those associations or affiliations were made the subject of a "standing order", which strongly suggests to us enforcement by third persons through an administrative process, the

logistics thereof would be daunting, to say the least. For this and other reasons, we are convinced that the decision whether to recuse in a particular case cannot be an administrative decision assigned to someone other than the judge, which would certainly be the case if the decision was governed by a “standing order” such as Jackson advocates. In the final analysis, Judge Bradford’s involvement in the appeal up to this point was the result of inadvertence. The remote possibility of such an oversight occurring again with Judge Bradford, or any other judge for that matter, will not be diminished by the creation of a redundant, and ultimately unwieldy, administrative process designed to do what the individual judge is already doing and will continue to do, i.e., review the case materials to ascertain whether grounds exist for recusal. Moreover, Judge Bradford’s personal policy with respect to Attorney Jackson is surely the functional equivalent of the “standing order” that Jackson urges should be issued, and is not burdened with the administrative costs associated with the creation of a new and cumbersome step in the appellate process. In summary, we decline to sanction the concept of a “standing order” in this circumstance and all that it would entail.

We turn now to Pickett’s request for withdrawal of the opinion and the appointment of a new panel to consider his appeal. We agree that the opinion should be withdrawn, but not that an entirely new panel must be appointed to consider this appeal. In essence, Pickett asks the remaining judges on the panel to recuse, but does not identify the grounds upon which we are compelled to do so. Our relationship, or rather the lack thereof, with Attorney Jackson did not require recusal before, and nothing has changed that. Neither does our participation

up to this point in this case reasonably call our impartiality into question. We note in this regard that our original votes were not influenced one way or the other by Judge Bradford. Moreover, the mere fact that we have considered the matter before does not disqualify us from considering it anew. Were it otherwise, we are hard-pressed to understand why, for instance, the Indiana Rules of Appellate Procedure would sanction the procedural vehicle by which this matter was brought to our attention, i.e., a petition for rehearing, which customarily represents a request for the same panel to consider the same case and reach a different conclusion. *Cf. Liteky v. United States*, 510 U.S. 540, 551 (1994) (“[i]t has long been regarded as normal and proper for a judge to sit in the same case upon its remand, and to sit in successive trials involving the same defendant”).

With these principles in mind, we conclude that the following steps shall be taken: (1) The memorandum decision handed down on January 21, 2009 shall be withdrawn; (2) the Court of Appeals Administrator’s Office shall designate a replacement for Judge Bradford on the panel, and (3) after the replacement judge has been named, consideration of the appeal will proceed as normal by the newly constituted panel.

Petition granted.

MAY, J., concurs.