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IN THE DISTRICT COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT AT PALMER

STATE OF ALASKA,)
)
)
)
)
v.)
)
RALPH K. WINTERROWD,)
Defendant.)
_____)

Case Nos. 3PA-03-3280 CR,
3PA-03-3282 CR, and
3PA-03-3285 CR

I certify that this document and its attachments do not contain (1) the name of a victim of a sexual offense listed in AS 12.61.140 or (2) a residence or business address or telephone number of a victim of or witness to any offense unless it is an address used to identify the place of the crime or it is an address or telephone number in a transcript of a court proceeding and disclosure of the information was ordered by the court.

**MEMORANDUM IN SUPPORT OF MOTION TO QUASH
SUBPOENA OF CHIEF JUSTICE FABE**

Chief Justice Dana Fabe has moved the Court to quash the subpoena directing her to testify at a hearing scheduled on defendant's traffic violations. Chief Justice Fabe seeks relief from the subpoena because: she has no first hand knowledge or involvement in the action; the Court addresses legal principles through its orders, not by the testimony of its members; and for other reasons of public policy.

The Chief Justice was served with the subpoena on June 23, 2003. The subpoena requested by Mr. Winterrowd directs the Chief Justice to appear at the Palmer Courthouse at 3:30 p.m. on Thursday, June 26, 2003. (Ex. 1) The subpoena also directs Chief Justice Fabe to bring:

qualifications for assistance of counsel secured in the sixth amendment as used by the AK Bar Assoc. and the AK

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1
2 Supreme Court and the names of 20 people qualified to
provide assistance of counsel in Alaska. (Id.)

3 The subpoena should be quashed because Chief Justice Fabe has nothing to
4 contribute to the proceeding. The defendant makes no claim that the Chief Justice has any
5 information regarding the facts underlying the offenses with which he is charged. Instead,
6 it appears that the only purpose of the subpoena is for the Chief Justice, as such, to provide
7 testimony interpreting the sixth amendment right to assistance of counsel and the
8 qualifications of attorneys in Alaska to provide such assistance. This is not a proper area for
9 compelled testimony by a judicial officer.
10

11 While judges are not precluded by law from testifying as witnesses (unless the
12 matter is one in which that judge is presiding, Evidence Rule 605), compelling a judge's or
13 justice's testimony about a matter is disfavored, and the reasons for calling the judge or
14 justice as a witness should be carefully scrutinized. United States v. Dowdy, 440 F.Supp.
15 894, 896 (W.D.Va. 1977). The United States Supreme Court has stated that "an examination
16 into the mental processes of a judge would be destructive of judicial responsibility and thus
17 should not be permitted." United States v. Morgan, 303 U.S. 409, 422, 61 S.Ct. 999, 85 L.Ed.
18 1429 (1940). See also State ex rel. Kaufman v. Zakaib, 535 S.E.2d 727, 733-737
19 (W.Va.,2000)(Discussing and supporting the rationale of the many jurisdictions that do not
20 permit the compelled testimony of judges.)
21
22

23 The subpoena of the Chief Justice offends these established principles. Chief
24

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1 Justice Fabe should not be subject to examination over the mental processes or interpretations
2 that guide the Court. As noted in State ex rel. Kaufman v. Zakaib:

3
4 The prohibition against compelling the testimony of a judge is
5 reflected in a long-standing principle of our jurisprudence,
6 namely, that a court speaks only through its orders.

7 535 S.E.2d at 737 (internal citations omitted).

8 Public policy considerations also militate against compelling a judge or justice
9 to testify while acting in the judicial role. Requiring a judge to testify for or against a party
10 in any matter seriously compromises the impartiality of the judicial office. Furthermore,
11 compelling judicial officers to testify seriously disrupts their judicial functions.

12 Courts have allowed such compelled testimony only where there are
13 extraordinary circumstances or where the essential facts of the case are in dispute and no
14 other witness or record is available to establish the facts. Here, there is no obvious need for
15 Chief Justice Fabe to testify at a hearing on three traffic violations.

16 While it is not entirely clear what testimony the defendant would seek to elicit,
17 there is no basis for concluding that the testimony sought is warranted. If the defendant
18 wishes to have the Chief Justice address Supreme Court orders adopting Court rules, that is
19 insufficient justification for her participation. There is no probative value in having a judge
20 testify as to the meaning of an order when the order is available, because the order speaks for
21 itself. Dowdy, 440 F.Supp. at 896. If the defendant seeks Chief Justice Fabe's testimony as
22 to her determination of legal conclusions or principles, that too is not the proper subject of
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2 testimony by a witness, even if the witness is a judge. United States v. Zipkin, 729 F.2d 384,
3 387 (6th cir. 1984).

4 Simply put, defendant has failed to demonstrate the presence of any
5 extraordinary circumstances that warrant causing Chief Justice Fabe to travel to Palmer to
6 participate in a hearing on a simple traffic matter. To do so is unprecedented and totally
7 unwarranted. There are no factual issues related to the offenses charged that can be resolved
8 by the participation of the Chief Justice. Nor should Chief Justice Fabe be called to testify
9 in her capacity as chief justice. The motion to quash should be granted in recognition of the
10 fact that a court speaks through its orders.
11

12 This court should act in conformity with the many jurisdictions that have
13 concluded that judicial officers may not be compelled to testify "concerning their mental
14 processes employed in formulating official judgments or the reasons that motivated them in
15 their official acts." Kaufman, 535 S.E. 2d at 736.
16

17 For the reasons stated above, the motion of Chief Justice Fabe requesting that
18 her subpoena be quashed should be granted.
19

20 DATED this 24th day of June, 2003.

21 GREGG D. RENKES
22 ATTORNEY GENERAL

23 By: 

24 Laura C. Bottger
25 Assistant Attorney General
26 ABA # 9509040

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of Chief Justice Fabe

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