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M. KATHERINE BING  
Interim Clerk

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**C E R T I F I C A T I O N**

I, M. Katherine Bing, Interim Clerk of the Supreme Court of Kentucky, do hereby certify that the attached order, **ORDER REMANDING; NELSON CIRCUIT COURT, DIVISION 1, CASE NO. 23-CR-00309**, is a true and correct copy of the original order as it appears on file in my office.

Done this 25th day of October 2023.

A handwritten signature in blue ink, reading "Katherine Bing", written over a horizontal line.

M. KATHERINE BING, INTERIM CLERK

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# Supreme Court of Kentucky

WHAS

FROM THE 10TH JUDICIAL CIRCUIT  
NELSON CIRCUIT COURT, DIVISION ONE  
CASE NO. 23-CR-00309

IN RE:

COMMONWEALTH OF KENTUCKY

PLAINTIFF

V.

BROOKS HOUCK

DEFENDANT

## ORDER REMANDING

This matter is before the Chief Justice upon the certification of the Clerk of the Nelson Circuit Court of the affidavit of Brian Butler and Michael Denbow, counsel for the defendant, which seeks to disqualify the Honorable Charles C. Simms, Circuit Judge for the 10th Judicial Circuit, Division One, from presiding in the above-styled action.

Under KRS 26A.020,<sup>1</sup> a party may file with the circuit clerk an affidavit “that the judge will not afford him a fair and impartial trial.” This affidavit prompts the Chief Justice “to review the facts and determine whether to designate a regular or retired justice or judge of the Court of Justice as special judge.” About the authority given to the Chief Justice when making such a

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<sup>1</sup> It should be noted that this Court has held KRS 26A.020 to be an unconstitutional “encroachment by the legislature on the power of the judiciary to make rules.” But because it is a “‘statutorily acceptable’ substitute for current judicially mandated procedure” and “out of deference and respect,” the Court has extended comity to the legislature. *Foster v. Overstreet*, 905 S.W.3d 504, 506–07 (Ky. 1995).

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determination, KRS 26A.020 is vague, and a paucity of caselaw exists to guide the Chief Justice's decision.

WHAS

It is important to note that the affiants did not file a motion before Judge Simms asking him to recuse. This is not procedurally required by either rule or statute. But as the Supreme Court recently held in *Abbott, Inc. v. Guirguis*, “when a party moves for a judge's recusal, an affidavit setting forth factual allegations is required. If the judge grants the motion and recuses, a substitute judge is appointed to the case and the matter is at an end. Conversely, if the motion is denied, the judge may include in the record whatever countervailing facts or considerations he or she deems pertinent to permit appellate review.”<sup>2</sup> Based on this language, and out of deference for the judge before whom a case is pending, parties should present the reasons that recusal is requested and give the judge an opportunity to grant or deny that request before filing a KRS 26A.020 affidavit.

In the present case, the Chief Justice finds that Judge Simms should have been afforded an opportunity to grant or deny a motion for recusal before an affidavit was certified to the Chief Justice under KRS 26A.020.

Accordingly, the Chief Justice ORDERS that this matter is remanded to the Nelson Circuit Court with direction to Judge Simms to review the affidavit as a motion to recuse and either grant or deny the request. If the motion is denied, a copy of Judge Simms's order shall be certified by the Nelson Circuit

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<sup>2</sup> 626 S.W.3d 475, 484 (Ky. 2021).

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Court Clerk to the Chief Justice, who will then review the affidavit as a request  
for disqualification under KRS 26A.020.

WHAS

The Clerk of the Nelson Circuit Court shall place a copy of this order in  
the record of this case and shall serve copies on the parties or their counsel.

Entered this 25th day of October 2023.

  
CHIEF JUSTICE

Copies to: Honorable John T. Alexander, Chief Regional Circuit Judge  
Honorable Charles Simms, 10th Judicial Circuit, Division One  
Diane Thompson, Nelson County Circuit Court Clerk

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