IN THE DISTRICT COURT OF THE STATE OF FLORIDA

FOURTH DISTRICT

State of Florida, 4D15-1370

Petitioner,

v.

Christopher Hulskamper, et. al.

Respondents.

_____/

RESPONSE TO ORDER TO SHOW CAUSE

The Law Office of the Public Defender, by and through undersigned counsel, hereby files this Response to this Court's order dated June 10, 2015 directing Respondents to show cause why the State's Petition for Writ of Prohibition should not be granted as to those cases "pending for sentencing , as listed in the State's response of May 15, 2015."

Introduction

The State's petition was filed to prohibit Judge John Contini from presiding over the cases listed in the appendix to the State's petition. Said list included **all** cases pending Division FG of the criminal division of the 17th Judicial Circuit at the time the State filed its Motion to Disqualify on March 26, 2015. The list was not limited to defendants who had plead guilty or no contest or had been convicted at trial and were "pending sentencing." The State has **not** filed motions to

disqualify in any cases to assigned to Division FG since the trial court denied the motions to disqualify. The trial court has continued to hear cases, accept pleas, hear and rule on downward departure motions and sentence other defendants without objection from the State.

Standard of Review

The standard of review of the denial of a motion to disqualify is *de novo*. *Santisteban v. State*. 72 So. 3d 187 (Fla. 4th DCA 2011); *Edwards v. State*, 976 So. 2d 1177 (Fla. 4th DCA 2008). The legal sufficiency of a motion to disqualify is a question of law. *Barnhill v. State*, 834 So. 2d 836 (Fla. 2002).

Argument

The State's motion is legally insufficient because it does not comply with Florida Rule of Administrative Procedure 2.330. A motion to disqualify must be sworn to by the party by signing the motion under oath or by a separate affidavit. Rule 2.330 (c) (3) *Fla.R.Jud.Admin.P*. (2015). A motion to disqualify must "show that the party fears that he or she will not receive a fair trial or hearing before the trial court because of specifically described prejudice or bias of the judge." *Id*. The State's motions to disqualify, signed by Assistant State Attorneys Joel Silvershein

and Peter Holden, were not sworn.[1] However, the motions were accompanied by a sworn affidavit from Assistant State Attorney Rayna Karadbil. While the motions allege that the state "has a well-founded fear that it will not receive fair trial or hearing in any matter coming before" the trial court, the affidavit of Attorney Karadbil does not contain any such allegation. "A verified motion for disqualification must contain an actual factual foundation for the *alleged fear of prejudice*." (emphasis added*) Fischer v*. *Knuck*, 497 So. 2d 240, 242 (Fla. 1986) A motion to disqualify must allege both the factual foundation for the fear of prejudice **and** that the movant has such a fear. Because the sworn affidavit does not allege that the state has a well-founded fear that it will not receive fair hearings or trial before the trial court, the motion does not comply with the rule and is not legally sufficient.

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[1] It is important to note that the petition contains several allegations **not** contained in the State's motion to disqualify or the sworn affidavit attached to the motion. Specifically, the petitioner argues that "Judge Contini's prior pre-plea offers of downward departure sentences to criminal defendants, for which there was no legal authority, exhibited a predetermination to grant any/all requests for downward departure sentences as well as a complete distain and disregard for the Criminal Punishment Code." (petition at page 5) The petitioner expands this argument in pages 17-20 of its petition and sets out specific examples of cases in which the state contends downward departure sentences were improperly imposed. These allegations were not contained in the state's motion to disqualify or the sworn affidavit. In addition, neither the motion to disqualify nor the affidavit contains any allegation that the trial court had a sentencing "policy," as argued in the petition. Because they were not contained in the motion or affidavit, they cannot be considered by this Court as grounds to grant prohibition relief.

The determination of whether a motion to disqualify is legally sufficient is two-fold. The court must determine if the motion meets the "literal requirements" of Florida Rule of Judicial Administration 2.330 and the court must determine whether the facts alleged would prompt a reasonable person to fear that he or she would not receive a fair and impartial hearing or trial. See *Hayslip v. Douglas*, 400 So. 2d 553, 555 (Fla. 4th DCA 1981); *Ballard v. Campbell*, 127 So. 3d 693, 695 (Fla. 4th DCA 2013) Thus, the movant must allege that he or she fears that the trial court is prejudiced for some specific reason and the movant's fear of bias must be reasonable.

In *Santisteban v. State*. 72 So. 3d 187 (Fla. 4th DCA 2011), this Court held that "if the technical requirements of the rule are not met, the motion is legally insufficient." *Id*. at 193. This Court affirmed the trial court's denial of the defendant's motion to disqualify because it did not comply with the procedural requirements of rule 2.330. *Id*. In *Barnhill v. State*, 834 So. 2d 836 (Fla. 2002) the Florida Supreme Court affirmed the denial of a motion to disqualify because the defendant did not file an affidavit "stating facts and the reasons for the belief that bias or prejudice exist." *Id*. at 843. The court held that although the trial court's comments may have warranted disqualification, "the technical requirements of the motion were not met and the trial court's decision to deny the motion as legally insufficient was proper." *Id*.

The State's failure to submit a sworn allegation that it has a well-founded fear that it will not receive fair hearings or trials before the trial court completely undercuts its request for disqualification. A sworn allegation that the State fears that the trial court is biased and will not be fair to the State goes to the very heart of disqualification. It is the well-founded fear that makes disqualification necessary. Regardless of any allegedly biased comments or actions by a court, a motion to disqualify is legally insufficient if the movant does not attest that those comments or actions cause the movant to fear that he or she will not receive a fair trial or hearing. Even if the allegations were sufficient to cause a reasonable person to fear that he or she will not receive a fair or impartial hearing or trial, if the movant does not attest to that fear, the motion is not legally sufficient. The State's sworn affidavit does not allege that the State feared it would not receive a fair trial or hearing before the trial court and was therefore legally insufficient. The State's lack of fear is belied by the fact that it has not filed motions to disqualify in any cases assigned to Division FG since it originally filed the motions to disqualify. The motion to disqualify was properly denied as legally insufficient as a matter of law. Accordingly, the requested writ of prohibition should be denied.

Respectfully submitted,
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CERTIFICATE OF TYPEFACE COMPLIANCE AND SERVICE

I HEREBY CERTIFY that (1) this response has been prepared in New Times Roman Font, 14 point, and double spaced and (2) a "pdf" copy of the foregoing was furnished by email to Heidi Bettendorf, Assistant Attorney General, Department of Legal Affairs, crimappwpb@myFloridalegal.com, Melanie L. Casper, Assistant Regional Counsel, Office of Criminal Conflict and Civil Regional Counsel, Fourth District, rc4appellatefilings@rc-4.com and to Jason Blank, Haber Blank, LLP, at eservice@haberblank.com, Marcus Beaton Jr, Esq., Black, Srebnick, Kornspan & Stumpf, P.A., at mbeaton@royblack.com, the Honorable John Patrick Contini at jcontini@17th.flcourts.org, David Donet at donet@dmt-law.com, Lorna Owens at contact@lornaowens.com, Jason Rosnerat Jrosner@jarlaw.com, Richard Merlino at richardmerlinoesq@gmail, Stephen Melnick at typo4664@aol.com, Michael Mirer at Michael@mirerlaw.com, Peter Stamus at pete@stamaslaw.com, Neil Kerch at nkerch@anl-law.com, Linda Osberg-Braun at osberg@visaattorneys.com, Brian Greewald at bfgreenwald@gmail.com, Bernard Fernandez at bsfesq@aol.com, Rainer Richter at wayne@richterlawpa.com, Sean Cocciaat cocciacourtdocs@hotmail.com,Alex Arreaza at alex@alexmylawyer.com, Gu Seligman at guyseligman@gmail.com, George Reres at rereslaw@gmx.com, Eric Kay at ek@ekaylaw.com, Agatino Amoroso at ajamoroso2003@yahoo.com, Jennifer Parrado at

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