

IN THE COUNTY COURT OF THE  
17TH JUDICIAL CIRCUIT, IN AND  
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO.: 17-29535-MU10A

vs.

JUDGE: POLE

KAMELIYA ZAHARIEV,  
Defendant.

---

**MOTION FOR DISQUALIFICATION OF JUDGE**

Pursuant to Florida Rule of Judicial Administration 2.330, the Defendant, KAMELIYA ZAHARIEV, by and through the undersigned attorney, requests this Court to enter an order disqualifying itself from all further proceedings in the above-styled cause, and as grounds therefore states the following:

**FACTS**

1. The Defendant is charged with one count of DUI (Injury/Property Damage), one count of DUI (Enhanced), and one count of DUI.
2. On the night of Defendant's alleged crash, a law enforcement officer served upon her, in the hospital whilst being treated, a Notice of State's Intent to Issue a Subpoena Duces Tecum for her medical records. Some time later, the State Attorney subsequently submitted a second Notice of State's Intent to Issue a Subpoena Duces Tecum for her medical records. It is unknown whether this second Notice was served upon Defendant.
3. Defendant filed her Demand for Discovery and on or about December 27, 2017 the State Attorney served upon her its initial discovery submission. Of important note is that this submission failed to include the subpoena duces tecum issued to Broward Memorial

Hospital for Defendant's medical records, or the records obtained therefrom.

4. On January 18, 2018 Defendant filed her Motion Showing Good Cause for Leave of Court to Depose State Witnesses. Defendant attached no exhibits to her motion.
5. The State of Florida did not file a response to Defendant's motion. No hearing was held.
6. On January 25, 2018 Defendant was present in open court for a "calendar call" hearing and inquired about the status of her previously filed motion. The Court advised it had not received a courtesy copy to review, and one was promptly provided to chambers by the undersigned shortly thereafter.
7. Unbeknownst to Defendant, or the undersigned, on January 24, 2018, the Court entered an order denying Defendant's motion and citing to a litany of items it reviewed in coming to its decision. This order was received by the undersigned on or about January 29, 2018.

More specifically, according to the order, the Court reviewed:

- i. The Defendant's [sic]
- ii. The Court file
- iii. The Information
- iv. The Probable Cause Affidavit
- v. The Incident Report
- vi. The Florida Crash Report
- vii. The DUI Supplement Report
- viii. The Notice of State's Intent to Issue a Subpoena Duces Tecum<sup>1</sup>
- ix. The Medical Reports of the Defendant from Memorial Regional Hospital.

---

<sup>1</sup> It is unknown which of the two Notices discussed above the Court reviewed.

x. The State's Discovery Submission, which indicates video by Body Worn Camera.<sup>2</sup>

8. The undersigned was perplexed as to how the Court obtained the documents that it purports to have reviewed, including documents which had not yet been disclosed to Defense in any State's discovery submission, namely Defendant's medical records. The undersigned immediately contacted the assigned State Attorney for this matter and inquired further about how the Court came into possession of these documents.
9. The undersigned was advised that the Court had requested the State's discovery *ex parte*, via telephone.
10. The Court was then party to a second *ex parte* communication when the State complied with the Court's request and provided a slew of documents to the Court. The unsigned is still unaware as to exactly which documents were provided to the Court.
11. According to the Court's order denying defendant's motion, the Court was provided and therefore privy to, medical records of the Defendant, parts of which Defendant believes to be confidential and private.
12. The undersigned was also advised by the assigned State Attorney that it is the Court's normal practice to make these *ex parte* requests to the State when motions for depositions are received by the Court.
13. The undersigned then spoke with the Chief Assistant State Attorney who confirmed the *ex*

---

<sup>2</sup> A cursory review of the Clerk of Courts online system reflects that the State filed its initial discovery submission, consisting of six pages, commonly referred to as the precipe and witness list, but no reports created by law enforcement, on or about December 28, 2017. A supplement discovery submission was filed on January 16, 2018 reflecting the existence and disclosure of the body-worn camera footage discussed in the probable cause affidavit. It is unclear from the Court's January 24, 2018 order which of these were reviewed by the Court, or whether both were.

*parte* communication in this matter had occurred and agreed to address the Court regarding this matter together with the undersigned.

14. The undersigned first brought these facts to the attention of his client on January 31, 2018 and more fully with his client on February 8, 2018. This motion is timely made pursuant to Florida Rule of Judicial Administration 2.330 and Florida Rule of Criminal Procedure 3.040.

15. The undersigned, along with the State, addressed this matter with the Court in person on February 9, 2018, and the Court not only promptly confirmed that the *ex parte* request in the instant matter was made, but that it is the Court's regular practice to request *ex parte* from the State, without any notice to the Defense, all discovery materials provided to the Defense. There is no further investigation or inquiry by the Court to confirm that the documents it receives were in fact provided to the Defense, and the Defense is not provided an opportunity to address, review, object to, or counter the documents provided to the Court.

16. Based on the foregoing, the Defendant has a well-founded fear that this Court, through its *ex parte* communications with the State, is prejudiced against her and is not acting as a neutral arbiter of her case, or has at least put forth the appearance of partiality, and has created a well-founded fear that she will not receive fair hearings, trial, and/or sentencing in this cause before this Court.

#### ARGUMENT

The Fourth District Court of Appeal has repeatedly held that "Florida law prohibits a trial judge from stepping away from the appearance of neutrality to become an advocate for either

party.” Evans v. State, 831 So. 2d 808, 811(Fla. 4th DCA 2002); J.F. v. State, 718 So.2d 251 (Fla. 4th DCA 1998); Chastine v. Bloom, 629 So. 2d 293 (Fla. 4th DCA 1993). In the instant case the trial court at worst showed its bias and prejudice against Defendant, or at best created the appearance of bias and partiality, in having *ex parte* communications with the State.

A trial court presented with a motion to disqualify must limit its review of the motion to making a "bare determination of legal sufficiency." Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978).<sup>3</sup> The purpose of such a limitation is to "ensure public confidence in the integrity of the judicial system . . . ." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); see also Rogers v. State, 630 So. 2d 513 (Fla. 1993). The Florida Supreme Court reiterated in Livingston:

Prejudice of a judge is a delicate question to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge against whom raised, should be prompt to recuse himself [sic]. No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned.

.....  
The judiciary cannot be too circumspect, neither should it be reluctant to retire from a cause under circumstances that would shake the confidence of the litigants in a fair and impartial adjudication of the issues raised.

441 So. 2d at 1085-86 (emphasis supplied) (citation omitted); see also Hayslip v. Douglas, 400 So. 2d 553, 555 (Fla. 4th DCA 1981); Code of Jud. Conduct Canon 3-C.

In the instant case, the Court’s conversation with the State Attorney in requesting

---

<sup>3</sup> Florida Rule of Judicial Administration 2.330(f) explicitly provides the following: The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action. If any motion is legally insufficient, an order denying the motion shall immediately be entered. No other reason for denial shall be stated, and an order of denial shall not take issue with the motion.

documentation from their file, without allowing Defendant an opportunity to be heard neither as to the request, nor as to the documents provided, constitutes an improper *ex parte* communication.

Florida Judicial Canon 3 (B) (7) states,

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, *ex parte* communications for scheduling, administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the *ex parte* communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the *ex parte* communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any *ex parte* communications when expressly authorized by law to do so.

The instant case does not qualify under any of the enumerated exceptions which would allow for the *ex parte* communication between the Court and the State Attorney here. "As Justice Overton has said for this Court:

[C]anon [3 A(4)]<sup>4</sup> implements a fundamental requirement for all judicial proceedings under our form of government. Except under limited circumstances, *no party should be allowed the advantage of presenting matters to or having matters decided by the judge without notice to all other interested parties*. This canon was written with the clear intent of excluding all *ex parte* communications except when they are expressly authorized by statutes or rules.

Rose v. State, 601 So. 2d 1181 (Fla. 1992) (quoting In re Inquiry Concerning a Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987) (emphasis added)).

“Nothing is more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a single litigant. Even the most vigilant and conscientious of judges may be subtly influenced by such contacts.” Rose, 601 So. 2d at 1183. The Court’s communication to the State, in which it requested documents which it may or may not have been entitled to see in its evaluation of Defendant’s motion, even if innocuous in spirit, still creates a toxic situation which both the Judicial Canons and caselaw of this State go to the ends of the earth to avoid.

The impartiality of the Judiciary is paramount to our system of justice, and with it, the clear image of that impartiality must remain. “The appearance of justice is as important as justice itself...The prohibitions contained in the caselaw and judicial canons of this state guard against the evil of *ex parte* communications.” State v. McClain, 572 So. 2d 23, 24 (Fla. 4<sup>th</sup> DCA 1990). “We are not here concerned with whether an *ex parte* communication actually prejudices one party at the expense of the other. The most insidious result of *ex parte* communications *is their effect on the appearance of the impartiality of the tribunal*.” Rose, 601 So. 2d at 1183 (emphasis added; see also Gore v. State, 964 So. 2d 1257 (Fla. 2007)).

Attached to this motion is a sworn affidavit signed by the defendant alleging specifically

---

<sup>4</sup> This is the former numeration of what is now Canon 3 (B).

the facts and reasons relied on to show the grounds for disqualification. The motion is timely filed. Michaud-Berger v. Hurley, 607 So. 2d 441 (Fla. 4th DCA 1992). The motion complies in all respects with the requirements contained in Rule 2.330. Rule 2.330(f), Rules of Judicial Administration, provides that a court shall "determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action." This motion is legally sufficient pursuant to rule 2.330 and demands to be granted.

The inquiry in a motion for disqualification "focuses on the reasonableness of the defendant's belief that he or she will not receive a fair hearing." Rogers v. State, 630 So. 2d 513 (Fla. 1993). The defendant "need only show a well grounded fear" that the court cannot provide a fair hearing or trial. Id. The court's perception of whether it can be fair and impartial is not at issue. "It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (Fla. 1938). Affiant, or Defendant in this case, has a well grounded fear of impartiality based on the Court's actions, regardless of the Court's intentions or belief of correctness in its actions. The motion to disqualify should be granted and the Clerk directed to randomly reassign this case.

#### CONCLUSION

WHEREFORE, based upon the foregoing, the Defendant respectfully requests this Court grant the motion to disqualify, enter an order disqualifying itself, and further directing the Clerk to randomly reassign this matter.



**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of the foregoing has been provided via e-service to the Broward County State Attorneys Office, Judge Pole's Division, at courtdocs@sao17.state.fl.us, this 12<sup>th</sup> day of February, 2018.

**HABER BLANK, LLP**  
Attorneys for Defendant  
888 South Andrews Avenue, Suite 201  
Fort Lauderdale, Florida 33316  
Tel: (954) 767-0300  
Fax: (954) 949-0510  
eservice@haberblank.com



By: \_\_\_\_\_  
JASON B. BLANK, Esq.  
Fla. Bar No. 0028826

**CERTIFICATE OF GOOD FAITH**

I HEREBY CERTIFY that the motion and the Defendant's statements contained in the attached affidavit are made in good faith.




By: \_\_\_\_\_  
JASON B. BLANK, Esq.  
Fla. Bar No. 0028826

**AFFIDAVIT OF DEFENDANT**

The undersigned affiant, KAMELIYA ZAHARIEV, after being duly sworn, deposes and states as follows:

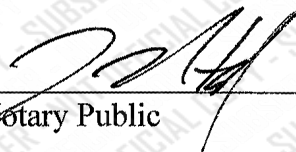
1. I am a defendant in the case of State of Florida v. Kameiliya Zahariev, Broward County case number 17-29535-MU10A.
2. I am presently charged with one count of DUI (Injury/Property Damage), one count of DUI (Enhanced), and one count of DUI.
3. I am represented by Jason B. Blank, Esq. of Haber Blank, LLP.
4. I am aware that my attorney filed, on my behalf, a motion to take depositions.
5. I am aware that the State provided their discovery to my lawyer, but I have not yet received the medical records or subpoena that they speak about in the police reports.
6. I have seen the Court's order denying my motion to take depositions in which the Court says it reviewed documents that I have not even seen yet.
7. My lawyer has told me that he confirmed the Court had communications with the State Attorney about my case, without notifying him, in order to get the documents it says it reviewed.
8. The court stepped out of its role as a neutral magistrate and took on the role of prosecutor in working with the State without the knowledge of my attorney.
7. The Court's actions create in me a reasonable fear that I will not receive a fair and impartial trial and/or sentencing.
8. I have read the Motion for Disqualification of Judge and certify that it is an accurate representation of my understanding of what has occurred in this case.

  
 \_\_\_\_\_  
 KAMELIYA ZAHARIEV

State of Florida            )  
 County of Broward        )

Before me, the undersigned authority, this day personally appeared KAMELIYA ZAHARIEV, who first being duly sworn, says that he is the Defendant in the above styled cause, and that he has read the foregoing, and that all the matters are true and correct.

Sworn and Subscribed before me this 8<sup>th</sup> day of February, 2018.

  
 \_\_\_\_\_  
 Notary Public



**JASON HABER**  
 MY COMMISSION # FF 131988  
 EXPIRES: July 29, 2018  
 Bonded Thru Budget Notary Services

XXX Produced Identification: FLDL