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

APPEAL NO: 19-50AC10A

JANET ROLLE, 18-036511MU10A
IN RE: MICHAEL J. ROCQUE, ESQ. 19-8253CT10A
Appellant.

vs.

STATE OF FLORIDA,
Appellee.
_____/

INITIAL BRIEF OF APPELLANT

[Appeal from the Orders, Judgment and Sentence of Contempt of Court entered by Jill K. Levy, County Court Judge]

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CERTIFICATE OF INTERESTED PERSONS

The following persons have an interest in the outcome of this case:

1. Nicole Bloom, Assistant State Attorney
2. Fred Haddad, Esq., Counsel for Appellant
3. Ashley Kay, Esq.
4. Jill K. Levy, County Court Judge
5. Kristin Nay, Assistant State Attorney
6. Michael J. Rocque, Esq./Appellant
7. Janet Rolle, Defendant
8. Michael Satz, State Attorney

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PRELIMINARY STATEMENT

The Appellant, Michael J. Rocque, will be referred to as the Appellant and Ms. Janet Rolle, if necessary, will be referred to as the Defendant as that was her status below; any other persons will be referred to by their proper names.

The record consists of only one volume and any reference thereof shall be by the letter "R" followed by the page number where the item may be found.

STATEMENT OF THE CASE AND FACTS

The Appellant is a criminal defense attorney who was representing Ms. Janet Rolle in a matter in which she was charged with Driving Under the Influence and related charges, including, importantly, leaving the scene of an accident [R-6-7]. Judge Jill Levy was presiding over the assigned division of County Court.

After the usual discovery, the Appellant, as counsel, filed a ten page Motion to Suppress Physical Evidence and Statements which requested, in essence, all evidence, including the Defendant's statements be suppressed, and in support of the motion alleged numerous grounds, under State and Federal law [R-27-33].

A hearing upon the Motion to Suppress was set for August 1, 2019 and in fact began but was later reset to August 29 at 2:00pm due to the fact that during the August 1, 2019 hearing the Judge held Mr. Rocque in contempt of court, and later disqualified herself.

Post hearing, a written Order of Contempt was entered and is contained in the Record at pages 36 through 44; this Order is dated August 6, 2019 .

The transcript of the hearing on the Motion to Suppress is contained at R-82-144 and the audio of this hearing is available if requested. The undersigned would have normally attached the CD of the audio, however due to the required filing via "the portal" he is unable to upload audio files. As mentioned above, the undersigned

is in possession of the audio CD of the hearing and would provide a copy if requested by this tribunal.

The hearing itself began with some friendly banter, when the prosecutor, while having been provided a lengthy Motion with a Memorandum of Law citing some 32 cases [as opposed to one case the State cited], asked the Judge to have Mr. Rocque frame the issues. The Assistant State's Attorney, despite having the burden, stated, "I've read over the motion and everything, but I would just like him to then frame the issue for us" and the Appellant replied, "I - - I'm attacking everything, Judge. Basis for the stop, the detention, no reasonable articulable suspicious, no probable cause, harassed, Miranda not read properly. That's it. I guess that covers everything" [R-86-87].

The State then called its witness, Kimberly Jacobson, a school teacher, who, on December 29, 2018, alleged she came into contact with the Defendant, Ms. Rolle [R-89].

Ms. Jacobson testified she was stopped at a red light, when she got hit from behind. Her husband was in the car next to her [R-89,90]. They got out of their vehicles, but the Defendant's car allegedly started backing up and took off through the light. Ms. Jacobson never spoke with the person that struck her vehicle [R-90]. Her husband called the police. The following then occurred upon questioning by the

prosecutor [R-91]:

> Q. Okay. And what happened when the police arrived?
>
> A. They asked me if we could identify her and I said, "You know, I knew she was an African female with frizzy hair" and the - - I was able to identify the car and that there was damage to the front end of the car and my husband was able to identify more - - a better description since she went right around him.
>
> Q. And what was the description of the car?
>
> A. It was a blue like minivan, van.
>
> Ms. Nay: One moment to confer, Your Honor.
>
> The Court: Okay.
>
> Q. (By Ms. Nay): And when you said Pines Blvd and I think you said Grand Palm, what city is that in?
>
> A. Pembroke Pines.
>
> Q. And what county?
>
> A. Broward.
>
> Ms. Nay: No further questions, Your Honor.

No evidence to that point had been offered as to how, when or where the Defendant became identified, how any such identification was made, or how much later an arrest was made or the manner of the arrest.

The Motion to Suppress filed by the Appellant however described the actions

of the police, including how the police made contact with the Defendant [R-26-27] and the improper activities allegedly committed by the police, including an illegal detention and a lack of probable cause, all issues Mr. Rocque would, as a defense lawyer, develop through cross examination of the State's witness.

The early cross examination was uneventful. Mr. Rocque then asked questions to which some objections were sustained and he moved on [R-95]. He inquired into the accident and road conditions; Mr. Rocque asked questions about certain things he felt important [R-98-99] when the Judge began to admonish him and continued the hearing [R-99-104], then the Court threatened contempt, alleging the attorney was unprofessional and was challenging the Court's ruling or in essence rephrasing a question.

The Court, in the middle of cross examination, sua sponte directed the witness to step down [R-103-104]. Then the following occurred [R-104-105]:

> Mr. Rocque: I'm not arguing with the Court.
>
> The Court: The next thing I'm going to do is hold you in contempt. You are not going to argue with the Court.
>
> Who's the State's next witness?
>
> Mr. Rocque: Oh. Are you cancelling this witness before I'm done cross-examining?
>
> Ms. Nay: It's going - -

The Court: Who's the State's next witness?

Mr. Rocque: Judge, I'm filing a motion - -

Ms. Nay: It's going to be - -

Mr. Rocque: - - to disqualify.

Ms. Nay: - - Douglas Jacobson.

Mr. Rocque: I'm going to be ordering this transcript and ordering a - - filing a motion - -

The Court: Who's the State's next witness?

Mr. Rocque: - - to disqualify.

Ms. Nay: Douglas Jacobson.

Mr. Rocque: I'm asking to adjourn this - - I'm asking to adjourn the - -

The Court: Your request is - -

Mr. Rocque: - - motion right now - -

The Court: - - denied.

Mr. Rocque: - - so I can file my motion.

The Court: Your request is denied.

Mr. Rocque: I'm requesting time to file my motion.

The Court did not respond after the denial. Further exchanges occurred between the Judge and Mr. Rocque [R-105, 108], including on the issue of identity

and description, and as Mr. Rocque and the Court were having a "back and forth" the following occurred [R-109-110]:

> Mr. Rocque: - - anything from the written motion and in the written motion that clearly says about the driver and whether they were driving the vehicle and the vehicle involved in the case, so ID is an issue in the case and if you read the motion it's very clear - -
>
> The Court: Mr. Rocque - -
>
> Mr. Rocque: - - on the case - - on the clear - -
>
> The Court: Mr. Rocque - -
>
> Mr. Rocque: - - reading of the motion.
>
> The Court: - - you need to be quiet now.
>
> Sir, stand up please.
>
> Mr. Rocque: Judge, when you say I need to be quiet, what does that mean?
>
> The Court: Wayne, could you take Mr. Rocque into custody.
>
> The Deputy: (Complies.)
>
> The Court: I'm going to hold a contempt hearing. Have a seat.
>
> Mr. Rocque: And you're handcuffing me now?
>
> The Court: I am taking you into custody. We're going to have a contempt hearing.

While Mr. Rocque was handcuffed and in custody the Court and Mr. Rocque went back and forth over what was proper, and thereafter attorney Ashley Kay appeared for Mr. Rocque. The Judge was explaining her position, and the Judge and Ms. Kay had discussions about what was to occur [R-114]. Ms. Kay noted Mr. Rocque was in custody by then for 45 minutes in handcuffs [R-125]:

> Ms. Kay: Your Honor, if we're forced to proceed today, we're not going to have a transcript of occurred which would be obviously a record that couldn't be really contested, we would ask that - - we would have to call Your Honor as a witness and for that reason we'd ask the Your Honor recuse so that it can be before another Judge. [Emphasis supplied]
>
> The Court: The Court is not going to do that at this point. We're in the middle of a criminal contempt hearing in which this has been committed in front of this Court.

The Court then stated [R-127]:

> This Court is not doing that [disqualify] and I'm going to rule at this point in time if there's nothing more to be said.

A lot more was said by the Court and by Ms. Kay about what was occurring including, again, Mr. Rocque being detained in handcuffs [R-135]; denial of the Court's accusations were, of course, made and Ms. Kay did state the following [R-136]:

> Mr. Rocque's due process rights were violated today and they've been violated the second the handcuffs were

slapped on him before any finding was - - finding was made at all. So, we deny the allegations and, again, we request an opportunity. There's no harm in doing everything correctly - -

The Court: That - -

Ms. Kay: - - to have the transcript to have an opportunity.

The Court: - - request has been denied.

Ms. Kay: Understood.

The Court: The Court finds that the reason that was given by Mr. Rocque's counsel is not satisfactory. The Court finds Mr. Rocque in direct contempt. Prior to imposing sentence, is there anything that Mr. Rocque would like to say in mitigation?

The Court imposed sentence and then removed the handcuffs [R-137].

This appeal follows:

POINTS INVOLVED ON APPEAL

POINT ONE

WHETHER THE COURT ERRED IN NOT GRANTING THE APPELLANT A RECESS TO PREPARE A WRITTEN MOTION TO DISQUALIFY AS REQUESTED DURING THE HEARING

POINT TWO

WHETHER THE COURT COMMITTED REVERSIBLE ERROR IN PRECEDING OVER A CONTEMPT HEARING AFTER TAKING THE APPELLANT INTO CUSTODY PRIOR TO THE HEARING AND FURTHER DENY THE MOTION THAT SHE DISQUALIFY HERSELF MADE BY COUNSEL

POINT THREE

WHETHER THE COURT ERRED IN HOLDING THE APPELLANT IN DIRECT CRIMINAL CONTEMPT

SUMMARY OF THE ARGUMENT

The Appellant will argue in the first two points that for various reasons the Court committed error in not disqualifying herself, or allowing the filing of such a motion, and proceeding to hold the Appellant in contempt. This is contrary to the established law and compels reversal.

The Appellant will thirdly argue there was no legal or factual basis to hold the Appellant in contempt of court.

ARGUMENT

POINT ONE

THE COURT ERRED IN NOT GRANTING APPELLANT A RECESS TO PREPARE HIS MOTION TO DISQUALIFY THE COURT OR TO PROFFER EVIDENCE

Appellant, as counsel for Ms. Rolle, felt the Defendant was not receiving a fair hearing upon her Motion to Suppress based upon Judge Levy's rulings and actions. Considering that, in his professional opinion, this long time attorney stated he wanted to file a Motion to Disqualify the Court and requested a recess so he could prepare and file a written Motion to Disqualify. The Judge denied that request, as the transcript clearly shows, and the contempt proceedings against Appellant shortly commenced.

This is error that, inter alia, compels reversal of the contempt proceedings that were thereafter indulged against Mr. Rocque. The Judge eventually disqualified herself as the record illustrates [R-45-49, 54; R-62-81], but only after holding Appellant in contempt.

In *Rogers v. State*, 630 So.2d 513 (Fla. 1993) the Supreme Court set forth a bright line rule and the requirements that the Court must adhere to:

> Accordingly, we hold that upon filing of this opinion all motions for disqualification of a trial judge must be in writing and otherwise in conformity with this Court's rules of procedure. The writing requirement cannot be waived and a presiding judge must afford a petitioning party a reasonable opportunity to file its motion. Where a party discovers mid-trial or mid-hearing that a motion for disqualification is required, he or she may request a brief recess — which must be granted — in order to prepare the appropriate documents. [Emphasis supplied]
>
> Based on the foregoing, we reverse the trial court's denial of postconviction relief and remand for a new evidentiary hearing before a different judge appointed by the chief judge of the circuit.

Not only must the Judge allow the attorney a recess to file the motion, the Court must grant a reasonable, not an arbitrary, amount of time to prepare a motion, see ie, *Inquiry Concerning a Judge, No. 06-52, re Cheryl Aleman*, 995 So.2d 395 (2008), and compare *Inquiry Concerning a Judge, No. 18-352, re Dennis Daniel Bailey*, 267 So.3d 992 (Fla. 2019).

In the reprimand of Broward Judge Aleman, certain conduct was detailed by the Supreme Court:

> The charges stem from Judge Aleman's behavior in response to three motions to disqualify her made by Assistant Public Defenders Sandra Perlman and Bruce Raticoff on January 24, 2006, the second day of jury selection in *State v. Braynen,* a first-degree murder case. On the morning of January 24, Perlman sought to disqualify Judge Aleman based on what Perlman perceived

to be Judge Aleman's aggressive and intimidating questioning of prospective jurors during *voir dire* the previous afternoon. Because the motion was oral, Perlman requested a reasonable amount of time to reduce the motion to writing as required by *Rogers v. State,* 630 So.2d 513 (Fla.1993). Judge Aleman denied the request for additional time and immediately denied the motion on its merits.

The second motion to disqualify related to Judge Aleman's allegedly preferential treatment of Assistant State Attorney Peter Holden. Judge Aleman had granted Holden a fifteen-minute delay in the start of the afternoon proceedings while denying a similar request from Perlman. When Perlman requested "at least an hour" to reduce this second oral motion to writing, Judge Aleman responded that the court would be in recess for five minutes. During this time, Judge Aleman conferred with another jurist, who suggested that defense counsel be given a pad of paper and a pen to prepare a written motion. When the proceeding resumed at 2:20 p.m., Judge Aleman did just that; she gave Perlman paper and pen and stated that, if defense counsel subsequently wished to substitute a typed motion, she would allow it. But rather than giving counsel an hour, Judge Aleman gave the defense attorneys fifteen minutes to transcribe the motion, stating that the court would adjourn until 2:35 p.m.

Intending to research and type the motion, Perlman and Raticoff left the courtroom to return to their office. In their haste, they ran past a number of prospective jurors who were sitting and standing in the hallway. At 2:42 p.m., when the proceeding reconvened, neither assistant public defender was in the courtroom. Judge Aleman took a recess until defense counsel returned.

By 2:48 p.m., Raticoff had returned, but Perlman had not. At that point, Judge Aleman mentioned the prospect of

holding both public defenders in contempt:

> The Court: The Court's go[ing] to issue a rule to show cause, and we'll hold this in abeyance until conclusion of the trial. The Court had [given] counsel 15 additional minutes to handwrite a motion, provided a paper and pen for counsel to do so, and when the Court returned back neither Defense Counsel was here, and now it's 2:49 and we're still missing one of defense counsel.
>
> Again, good grounds for the rule to show cause is failure to abide by the Court's order with respect, and we'll hold that in abeyance until the concluding of the proceeding.
>
> Mr. Raticoff: Judge, just so the record —
>
> The Court: Directly to both Counsel, Mr. Raticoff and Ms. Perlman. And we'll be in recess until Ms. Perlman arrives.

Upon returning to the courtroom at 2:57 p.m., Perlman inquired into the status of the contempt charge. There was some confusion as to whether Judge Aleman actually issued the order to show cause. At first, Judge Aleman suggested that she did not. Upon further inquiry by defense counsel, however, Judge Aleman indicated that she had, in fact, issued the order.

Raticoff then moved to withdraw from the case, citing the conflict between defending his client on one hand and defending himself on the other. In addition, Raticoff expressed his concern that he would not be able to represent Braynen effectively. Judge Aleman denied the motion, finding no reason to believe that the defendant had

> not received effective assistance of counsel. Judge Aleman eventually denied the second motion to disqualify, finding it legally insufficient.
>
> Judge Aleman's order to show cause triggered defense counsel's third motion to disqualify. Again, Perlman requested a reasonable time to reduce the motion to writing, and again Judge Aleman granted fifteen minutes. When Perlman objected, reminding Judge Aleman that fifteen minutes was previously insufficient, Judge Aleman instead granted twelve minutes. Once again, Perlman objected, and Judge Aleman eventually gave defense counsel twenty-two minutes to prepare the written motion.

Again, Mr. Rocque was denied any ability to prepare his motion by Judge Levy, which of course is reversible error and taints the entire proceedings that followed.

In Judge Bailey's matter, Judge Bailey's reprimand resulted from admitted improper conduct:

> On April 17, 2018, Judge Bailey was presiding over Genesis Espejo's felony criminal trial in Broward County. During the trial, a legal issue came up that required a sidebar conversation. Ms. Espejo's two attorneys left the defense table and came to the bench for the sidebar. As found by the commission,
>
> > [w]hen one of the attorneys tried to help his colleague articulate a point during the sidebar, Judge Bailey repeatedly attempted to quiet him by saying, "One lawyer at a time," "Only one lawyer argues," followed shortly thereafter by, "You have a hard time

> understanding me? Two lawyers can't argue one argument."
>
> There was no standing order that only one attorney per side was allowed to argue a point, and this was the first time Judge Bailey communicated such an order to counsel.
>
> As the attorney who was trying to help his colleague started to say, "Judge I mean no disrespect," Judge Bailey raised his voice over the "white noise" that he turned on during the sidebar conversation and ordered his courtroom deputy to approach the bench and "return this attorney to his table." "The attorney immediately retreated away from the sidebar and back to counsel table as soon as he saw the deputy approaching." Had the attorney not retreated to counsel table, Judge Bailey "would have allowed the deputy to use physical force, `if necessary.'" All of this was "in full view and hearing of the jury."
>
> Ms. Espejo's non-removed attorney then moved for time to file a disqualification motion. Judge Bailey allowed a forty-five-minute break to draft and file the motion to disqualify, and then denied it as legally insufficient. Judge Bailey improperly denied the motion because he believed it was a "trial tactic" and he could be fair to the parties. He "did not consider the motion from the defendant's perspective when considering whether or not to grant it." [Emphasis supplied]

At bench, the trial judge would not even allow Mr. Rocque a minute to file a Motion, but denied it outright without time to prepare.

The Appellant submits all actions of the trial judge after the denial of the request for time to disqualify are void by operation of law, and hence the later

entertained and entered contempt judgment must be reversed.

Moreover during the suppression hearing and further evidencing the Judge's bias, and prior to being taken into custody, Mr. Rocque stated he desired to excuse the State's witness momentarily so he could proffer answers to the questions he was propounding so he could have a complete record for appeal [R-106-110]; this the Court did not allow and again the trial judge improperly denied the request. Indeed in an adversarial setting it is improper and reversible error for a Judge to not allow a Defendant to make a proffer of evidence to preserve the record, particularly where, as here, such is necessary were there to be a reviewing court upon an adverse ruling on the Motion to Suppress [see, ie, Fla.Stat. 90.104(1)(b), and see *Fehringer v. State*, 976 So.2d 1218 (Fla. 4th DCA 2006); *Wood v. State*, 654 So.2d 218 (Fla. 1st DCA 1995); *Rozier v. State*, 636 So.2d 1386 (Fla. 4th DCA 1994), and see particularly *Radler v. State*, 45 FLW D336 (Fla. 4th DCA 2020), decided February 12, 2020]. This, it is submitted, illustrates further the prejudice of the Judge towards the Appellant and a further basis for why the Judge should not and could not have conducted a valid contempt hearing which is more particularly detailed below.

ARGUMENT

POINT TWO

THE COURT ERRED IN NOT DISQUALIFYING ITSELF IN THIS MATTER EITHER SUA SPONTE OR UPON THE MOTION OF COUNSEL

The Appellant, briefly in the factual presentation, quotes the transcript where the Judge, prior to any contempt order or hearing, had the deputy take Mr. Rocque into custody, where he was held for some forty five plus minutes, at the least, until the conclusion of a contempt hearing. While the hearing, it is submitted, failed to comply with Florida Rule of Criminal Procedure 3.830, other actions of the trial court preclude the necessity of reaching those issues in detail.

In *McNamee v. State*, 915 So.2d 276 (Fla. 4th DCA 2005) the Appeals Court reversed Judge Marc Gold after he took Broward Public Defender Owen McNamee into custody before indulging a contempt hearing concerning "in-court" conduct in some respects similar to what occurred below. The Court described the following as what occurred:

> Owen McNamee, an attorney, appeals an adjudication of direct criminal contempt. Although McNamee raises several issues, we reverse as to only the effect of the trial court's ordering that McNamee be immediately taken into "custody" before he was afforded

the opportunity to show cause as to why he should not be held in contempt.

McNamee represented a defendant in a criminal case. The underlying event took place during a calendar call at which the trial court concluded that McNamee's statements, conduct, tone of voice, and attitude constituted contempt of court, at which time the following transpired:

> THE COURT: If I hear that tone one more time I'm putting you in jail for the evening. Do we understand each other?
>
> MCNAMEE: Yes, Your Honor, I understand you.
>
> THE COURT: I've never — take this man into custody. Never have I had a lawyer address me in that manner before and I want to make sure I do this by the book so we're going to take a five minute recess so I can put everything on the record that's required to hold you in contempt.

After the recess, the trial court opened: "Release this man, please," and proceeded to recite the acts that had occurred and then offered McNamee the opportunity to show cause why he should not be held in contempt.

We recognize that the court did not, as such, comment on McNamee's guilt in conclusory terms before he was afforded the opportunity to show cause. It is also obvious that in any direct contempt, the trial court will have determined, prior to offering an opportunity to show cause, that the underlying conduct in question is contemptuous. Nevertheless, a trial court should avoid comments or conduct indicating a bias or predisposition to

> hold the alleged contemnor in contempt. Here, the court displayed such predisposition by ordering that McNamee be taken into custody prior to offering the opportunity to show cause. [Emphasis supplied]
>
> It is clear that the custody order was not a simple "misspeak" by the court, as in its final order, the court acknowledged that it "had Mr. McNamee taken into custody." [On page 6 of her order, page 41 of the Record, Judge Levy notes in paragraph 20, "[a]t this time the court had the Bailiff take Mr. Rocque into custody for purposes of a direct criminal contempt hearing. . .] There is nothing in the record indicating why the court felt the need to issue the custody order. We conclude that taking McNamee into custody under these circumstances, without apparent cause, gives a reasonable person the impression that the court has pre-determined the outcome without first listening to any mitigation or showing of cause as to why the contemnor should not be held in contempt.

Based on this, the Court held:

> We, therefore, reverse and remand for a new show cause hearing before another judge, who is to be appointed by the chief judge.

Obviously holding someone in custody for forty five minutes before a contempt hearing exceeds a "five minute" recess to begin a hearing in *McNamee* but bespeaks of the same prejudice and conclusion of guilt.

The above actions by Judge Gold in *McNamee* and Judge Levy in the instant case are reminiscent of the early contempt case that occurred in a 1978 murder trial before Judge James M. Reasbeck [recently deceased Broward County Judge], and

ended in the United States Court of Appeals in 1984 [*Sandstrom v. Butterworth*, 738 F.2d 1200 (11th Cir. 1984), reversing an opinion of the Fourth District Court of Appeals, *Sandstrom v. State*, 402 So.2d 461 (Fla. 4th DCA 1981)], wherein Judge Reasbeck took the undersigned's law partner in custody before a contempt hearing.

To get some of the flavor, the undersigned would quote an excerpt highlighted by the Eleventh Circuit Court of Appeals:

> The Court: I am telling you what I want you to do, and you are going to do it.
>
> Mr. Sandstrom: I don't care about being asked what you want me to do.
>
> The Court: Mr. Bailiff, take that gentleman and put him in the jail now.
>
> Mr. Sandstrom: No. I am entitled to be treated differently.
>
> The Court: You are going to jail, sir.
>
> Mr. Sandstrom: I am entitled to be treated differently.
>
> The Court: Call in a couple more bailiffs and take this man and put him in the jail.
>
> Mr. Sandstrom: I have my rights, and one of those rights is to have an appropriate citation and a right to appeal it to a court that is impartial, and not in the manner in which this Court has exhibited its prejudice towards me.

Judge Reasbeck, while not exactly as at bench, but in similar import and paying

homage to Judge Roy Bean [“”We will give him a fair trial and then we will hang him”] stated to Sandstrom: “Just a minute. He is right. I will go get the rule, and we will ask the question properly, and then we will put him in jail”.

Judge Levy, in a fashion similar to the method of resolution uttered by the Queen during the trial of the Knave of Hearts in *Alice in Wonderland* “. . . sentence first verdict afterwards”, took Mr. Rocque into custody, then announced the hearing would be held, but the Judge held him in custody for some forty five minutes including through the hearing. Quite obviously, Mr. Rocque was denied an impartial and detached arbiter as the Due Process Clause requires, see *Offutt v. United States*, 348 U.S. 11, 75 S.Ct. 11 (1954), *Mayberry v. Pennsylvania*, 400 U.S. 455, 91 S.Ct. 499 (1971), see also *Bloom v. Illinois*, 391 U.S. 194, 88 S.Ct. 1477 (1968), and hence the judgment of contempt must be reversed.

While the State Courts upheld the Sandstrom contempt, the United States District Court quashed the decision on habeas corpus and the Eleventh Circuit affirmed the decision to reverse the contempt due to the lack of disqualification in words of guidance for this Court, citing from numerous cases that made clear that there must be a neutral judge, nor one engaged with the contemnor.

What makes this case more compelling than *McNamee, supra* is that Appellant’s attorney Ms. Kay actually moved that the Judge disqualify herself from

considering the contempt matter based on all that had occurred, which the Judge refused to do; this was error both on the cited cases in this Point, and the cases cited in Point One, *Rogers, et al*.

The instant case is also similar to that decided by the Court in *Levine v. State*, 650 So.2d 666 (Fla. 4th DCA 1995), wherein Broward Circuit Judge Goldstein refused to disqualify himself upon written motion and found attorney Alan Levine guilty of contempt. While the contempt was set aside on the merits, the Court authored the following:

> In reviewing the contempt order, we must necessarily consider the motion to disqualify which had challenged Judge Goldstein's impartiality to conduct the contempt hearing. To determine the legal sufficiency of a motion for judicial disqualification based on prejudice, the test is whether the motion demonstrates a well-founded fear on the part of the party that he will not receive a fair trial at the hands of the trial judge. *Lewis v. State,* 530 So.2d 449, 450 (Fla. 1st DCA 1988). Further, the facts and reasons given must tend to show personal bias or prejudice. *Id.* Thus, we determine the legal sufficiency of a motion for disqualification based on whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. *See MacKenzie v. Super Kids Bargain Store, Inc.,* 565 So.2d 1332, 1335 (Fla. 1990); *Livingston v. State,* 441 So.2d 1083, 1087 (Fla. 1983).
>
> In *Feuerman v. Overby,* 638 So.2d 179, 180 (Fla. 3d DCA 1994), our sister court reviewed a motion to disqualify and found the allegations in the motion to be legally sufficient. The trial judge in *Feuerman* had written a letter to the

> Florida Bar grievance committee to institute proceedings against "the attorneys" in another case. In the other case, Feuerman's counsel had represented an attorney who had offended the trial judge by filing pleadings the trial judge considered premature. The trial judge's request prompted the Bar to commence grievance proceedings against counsel [the undersigned, Mr. Rocque's present counsel], whose sole role had been as counsel for the offending attorney. The matter was subsequently dismissed, but in the meantime, counsel had written the Florida Bar requesting referral of the matter to the JQC in order to institute proceedings against the trial judge. Feuerman relied on this sequence of events to seek disqualification. In holding that disqualification was warranted, the *Feuerman* court found that the circumstances were such that petitioner's fears that he would not receive a fair trial were reasonable. *Id.*
>
> In the instant case, it is clear that the motion to disqualify is legally sufficient. The allegations show a well-founded fear of prejudice. Not only did Levine's law firm file a complaint with the JQC, Judge Goldstein attempted to persuade Levine to forego his special public defender's fee in exchange for which the judge would withhold issuing the order to show cause. These allegations support Levine's contention that there is an adversarial relationship between him and the judge, and that he has a well-founded fear that he cannot receive a fair and impartial trial before this trial judge.

Clearly, based upon the above authorities, the Order of Contempt must be reversed, and if not outrightly discharged [see Point Three] at least be remanded for a full hearing before a neutral Judge, for the failure of Judge Levy to sua sponte disqualify herself and/or for denying the Appellant's Motion to Disqualify. Mr.

Rocque ought have been able, as had Mr. Levine, to set out his basis for disqualification, but Appellant submits the violations of due process were so basic as to compel reversal without a motion; the Court should find the trial court denied Appellant due process of law by taking him into custody, holding him for 45 minutes in custody and only releasing him from custody after the contempt hearing, *McNamee, supra*. The Appellant was denied a fair hearing and the basic tenants of due process of law.

The Order of Contempt must be reversed and, at the least, set for a new hearing before a different Judge, as was Mr. McNamee and Mr. Sandstrom.

ARGUMENT

POINT THREE

THE COURT ERRED IN HOLDING APPELLANT IN DIRECT CRIMINAL CONTEMPT

The Court, pursuant to Florida Rule of Criminal Procedure 3.830, issued a written order that purports to state what occurred during the hearing upon the Motion to Suppress, however the order itself is open to question as to the propriety of what is necessary for a Motion to Suppress, as well as the propriety of what need be established during the hearing on the Motion to Suppress, yet alone the error of a Judge that ought have been disqualified even authoring such an order.

As relates to the Motion to Suppress, quite clearly identity was an issue, as the Defendant, it was testified, left the scene. Thus, all issues regarding the identity of the Defendant and her vehicle were open to question, as was the ability of the witness to see and observe. Hence, it was the Court that was in error, *Robbie v. Robbie*, 726 So.2d 817 (Fla. 4th DCA 1999) and *Rubin v. State*, 490 So.2d 1001 (Fla. 3rd DCA 1986), quoted by the trial court notwithstanding.

While there is a cold record before the Court, it was made from an audio recording of the proceedings and will be provided if requested.

Certainly it cannot be stated beyond a reasonable doubt that Appellant

intentionally and willfully disregarded any specific court orders or rulings in defending his client. While he did suggest the reasons for his questions, there certainly was no clear directive or specific order from Judge Levy that was disregarded. Nor was there any indication of disrespect for the Court and certainly none that existed and was proven beyond a reasonable doubt, the standard of proof necessary to sustain a contempt nor upon review could the conduct meet the standard of proof beyond a reasonable doubt. The basic niceties of due process were never afforded Mr. Rocque.

The Appellant would cite to the opinion of the Fourth District Court of Appeals in *Braisted v. State*, 614 So.2d 639 (Fla. 4th DCA 1993), wherein Judge Futch held Broward Assistant Public Defender Brian Braisted in contempt of court. The Fourth District Court of Appeals reversed holding:

> We hold that the trial court's admonition to appellant not to be "dramatic" lacked an injunction sufficiently specific to apprise appellant of the behavior being enjoined. "A trial court may not hold an individual in contempt of court for violating an order which does not clearly and definitely make the person aware of its command and direction." *Barnes v. State,* 588 So.2d 1076, 1077 (Fla. 4th DCA 1991); *American Pioneer Cas. Ins. Co. v. Henrion,* 523 So.2d 776, 777 (Fla. 4th DCA 1988). Had a proper warning been given, this court has nevertheless recognized that the standard for criminal contempt proceedings is higher than the standard of proof that is required in civil contempt proceedings. In the latter, a preponderance of the evidence will suffice,

> while in the former, the conduct must be provable beyond a reasonable doubt. *Mrha v. Circuit Court,* 537 So.2d 182, 184 (Fla. 4th DCA 1989). From this record we cannot conclude that appellant intentionally and willfully disregarded any specific court rulings, much less so beyond a reasonable doubt. We reverse the trial court's adjudication of direct criminal contempt. Consequently, we need not address appellant's remaining points on appeal. [Emphasis supplied]

Certainly the Judge should not have to sit as a "Sphinx on the Nile" when arguments may be occurring that "involve" the Judge, [see *Nassetta v. Kaplan*, 557 So.2d 919 (Fla. 4th DCA 1990)], but the Judge in this case denied the Appellant the opportunity to present a written motion, and hence, as the *Rogers, supra* Court stated:

> A judge may well be drawn into the fray inadvertently long before he or she is put on notice that a motion for disqualification will be filed. Where the motion itself is oral, rather than written, and live testimony replaces factual allegations contained in affidavits, as was also the case here, the risk of impermissible judicial involvement is heightened dramatically.

As the Court stated in *Hunnefeld v. Futch*, 557 So.2d 916 (Fla. 4th DCA 1990) the following:

> A trial court may not hold an individual in contempt of court for violating an order which does not clearly and definitely make the person aware of its command and direction.

Appellant submits that no clear and definitive order was given to Mr. Rocque,

but rather objections were sustained to questions and rephrased questions as opposed to direct orders. Thus, as the Court continued in *Hunnefeld*, *supra*:

> But, a trial court should use its power to punish criminal contempt cautiously and sparingly, to punish assaults or aspersions upon the authority and dignity of the court or judge and not to avenge personal affronts.

Mr. Rocque did, early on, what was appropriate in what he felt was erroneous rulings interfering with his ability to argue or examine the witness on his Motion to Suppress, in which the State bore the burden, he moved to disqualify the Judge and for a recess to prepare the same. Despite the clear dictates of the law, Judge Levy refused and was obviously "irritated" by Mr. Rocque. This does not justify a contempt proceeding and certainly does not allow for an order affirming the same.

Mr. Rocque committed no direct criminal contempt and were it that the Judge thought so and it involved her so directly she was compelled to disqualify herself [*Levine, supra*] but, as in *Braisted, supra* this Court should find no contempt was proven to the degree necessary and reverse the matter with directions to dismiss the matter and discharge Mr. Rocque.

CONCLUSION

For this and for all the foregoing the Appellant would request that the Order of Contempt be reversed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished by E-Service to Nicole Bloom, Esq., Office of the State Attorney, courtdocs@sao17.state.fl.us, and to Court Administration, appeals@17th.flcourts.org, via the portal, this 4th day of March, 2020.

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