

IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FOURTH DISTRICT

STATE OF FLORIDA
Petitioner,

CASE #: 4D23-0545

v.

L.T. #:16-006714CF10A,
16-006682CF10A,
16-006685CF10A,
16-006716CF10A,
16-006683CF10A

CLAUDE EDWARD WHITE,
LANCELOT JAMES, SHARRIE ANN
THELWELL-JAMES, ADESUMBO
"SANDRA" ADESIOYE, and
JEAN MARIO PIERRE

Respondents.

_____ /

**COLLECTIVE RESPONSE TO PETITIONER'S
PETITION FOR WRIT OF PROHIBITION**

COME NOW Respondents, collectively, by and through undersigned counsel, and respond to Petitioner's Petition for Writ of Prohibition, pursuant to this Honorable Court's Order entered March 7, 2023. Respondents assert that Petitioner's Writ of Prohibition should be DENIED.

Respondents are co-defendants in the Seventeenth Judicial Circuit felony division, case numbers 16-006714CF10A, 16-

006682CF10A, 16-006685CF10A, 16-006716CF10A, and 16-006683CF10A, and will be referred to as "Respondents." Petitioner, the Office of the Statewide Prosecutor, is prosecuting this case and shall be referred to as "Petitioner" or as the "State." Circuit Court Judge Andrew L. Siegel is the trial court presiding over the trial of these cases and shall be referred to as the "trial court." The symbol "PA" in this Response refers to Petitioner's Appendix. "PSA1" shall refer to Petitioner's first supplemental appendix filed on March 3, 2023. "PSA2" shall refer to Petitioner's second supplemental appendix filed on March 6, 2023. "PSA3" shall refer to Petitioner's third supplemental appendix filed on March 7, 2023. The symbol "PSA4" shall refer to the appendix Petitioner was ordered by this Honorable Court to file no later than March 9, 2023.

In support of Respondents' request that the Petitioner's Writ of Prohibition be denied, Respondents offer the following:

BACKGROUND & STATEMENT OF FACTS

Respondents are charged as co-defendants in a 46-page Information accusing them of multiple crimes including Racketeering, Conspiracy to Commit Racketeering, Money Laundering, and Conspiracy to Deliver a Controlled Substance.

(PA4-49) The charge of Racketeering alone includes 49 predicate incidents. (PA5-46) Petitioner's Seventh (7th) Amended Discovery Exhibit lists over 130 witnesses and more than 3,800 pages of documents. (PA121 -146) The State gave notice of its intent to rely on certified business records to admit hearsay evidence. (PA147-151) On January 17, 2023, this document heavy trial began with each of the cases proceeding together before the Honorable Andrew L. Siegel. (PA157) On March 2, 2023, the State filed a Motion to Disqualify the Trial Court from continuing to preside over the trial. (PA152)

In its Motion to Disqualify, the State asserted that the Trial Court departed from its role as a neutral arbiter, that the Trial Court made erroneous and disparate rulings that favored the defense; that the Trial Court prejudged the State's case; and that the Trial Court expressed hostility toward the State and particularly toward the lead counsel for the State, Assistant Statewide Prosecutor, Cynthia Honick. (PA152-195) Of the multiple allegations in the motion to disqualify, only three are dated and therefore capable of being reviewed as timely: that on February 21, 2023 the

trial court found a fatal defect in an affidavit necessary to admitting records under the business records exception (PA159, paragraph v); that on February 22, 2023, the trial court expressed hostility to the State at a sidebar in which the State refused to participate (PA164, paragraph 14a); and that on February 21, 2023, the trial court commented that the State's conduct was "for show" when it wheeled in 17 binders of documents to refresh a witness' recollection with one report (PA 168, paragraph bi).

The State's arguments that the trial court evidenced its bias by excluding TD Bank records via business records exception and disallowing the State to add a new witness through whom to admit the records is now moot. These bank records were admitted into evidence just prior to the filing of the instant response.

The State's motion filed with the trial court did not cite to, or attach, transcripts. The State's Petition for Writ of Prohibition, which is identical to the underlying motion to disqualify, did not cite to transcripts either, but included excerpts of transcripts in the appendix. Despite filing a total of 5 appendices, not one contains a complete transcript showing a complete picture of any of the State's

complaints, dated or undated. Because all of these excerpts begin mid-sentence or mid-argument, it is nearly impossible to decipher or analyze Petitioner's complaints in context, including Petitioner's fourth supplemental appendix which was filed on March 9 per this Court's Order.

As to Petitioner's allegation that the trial court departed from its neutral role

The State's single, dated accusation that the trial court departed from its neutral role is found in the motion to disqualify at paragraph 12(a)(v). (PA159) As previously noted, the State's arguments that the trial court evidenced its bias by excluding TD Bank records via business records exception and disallowing the State to add a new witness through whom to admit the records is now moot. These bank records were admitted into evidence just prior to the filing of the instant response. However, for completeness and context, undersigned offers the following as to this complaint.

The State alleged that on February 21 it was unfairly prevented from introducing bank records, via the certified business records exception, because of a defective affidavit. (PA159-161) The State claimed that the record clearly shows that the judge is "the

only person who argued the defect in the affidavit for the bank business records...” (PA160, paragraph 12(a)(v)(3)). However, the State’s own motion notes that “defense counsel puts {sic} on the record that she had asked to go sidebar to argue all of the issues” including the affidavit. (PA160, paragraph 12(a)(v)(2)). Defense counsel stated, according to the State’s motion, “so I want it clear on the record, when I asked for the sidebar, I was raising the issue.” (PA160, paragraph 12(a)(v)(2)). A reading of the February 21, 2023 transcript excerpt shows that defense counsel stated her objection to the affidavit before the trial court explained its concerns. (PSA1, pp7, lines 19 -25 –pp8, lines 1-8) In response to the trial court asking Ms. Honick to read the affidavit, she said, “I honestly don’t know what Your Honor is asking me...can Your Honor just state the issue?” (PSA1, pp7, lines 19 -25). Before the trial court responded, defense counsel stated:

MS. COOK: Judge, I just want to make it clear that when I asked for the sidebar, the reason why I was asking was for all the issues **before**. The affidavit issue, the corpus delecti issue or however you want to say it, with Mr. Weinstein. The fact that it wasn’t coming in through the proper witnesses and the book coming in. So, I want it clear on the record, when I asked for the sidebar, I was raising the issue.

(PSA1, pp7, lines 19 -25 –pp8, lines 1-8) (emphasis added)

Apparently the admissibility of the records to which the defective affidavit pertained, had been ongoing since the beginning of trial, according to the remainder of this transcript excerpt:

THE COURT: “The affidavit is defective, so [the records are] not coming in that way...As to the rest of it, I don’t know whether its is coming in or not...That’s up to the State to prove their case...I said the affidavit was incorrect...**That is what I said day one.** It wasn’t coming through [that witness]...”

(PSA1, pp11, lines 8-19) (emphasis added)

None of the other transcript excerpts from February 21 pertain to the issue of the defective affidavit, nor do any of the other transcript excerpts from prior dates pertain to the affidavit issue in order to give the trial court’s ruling any context. Petitioner made numerous other, assertions that the trial court made rulings that were not based on defense objections, however, these other assertions are not dated, nor do they cite to any specific transcript. Further, the excerpts of transcripts provided do not provide a complete recitation of any single evidentiary issue.

As to Petitioner’s allegation that the trial court was hostile to counsel & biased against the State

The State also accused the trial court of being hostile to the lead prosecutor and of prejudging the State’s case. (PA164) The

State alleged that the Judge called the parties sidebar to address a defense objection. (PA164, paragraph 14) The State admitted in its motion that it “declined to go sidebar” for the second time during the trial. (PA165, paragraph 14(a)(iii)). Despite the State, “declining” to participate in the sidebar and thereby waiving its ability to place any argument about the objection on the record, it still complained in its motion that the trial court sustained the objection. (PA165, paragraph 14(a)(iii)). Although there are at least 3 attorneys trying this case for the State, **none** of them obeyed the trial court’s instruction to go sidebar. (PA187, paragraph 12; PA191, paragraph 7) The State included the following description of the sidebar in which it refused to participate:

Once at sidebar, without the State, the Court indicated that “She”, referring to Ms. Honick, “keeps doing this.” Defense counsel, Mr. Lewis states: “can we send the jury out and deal with this issue about her not coming up here? I think its something that has to be dealt with.” The Court indicated it was “her” problem and they could proceed. Defense counsel fully articulated his objection onto the record which amounted to an objection for leading. The court went on to say: ‘I don’t care if she doesn’t show up. You can argue whatever you want to argue when she doesn’t show up. That’s her problem and she’s been doing this the whole trial; so, this is the way it is.’”

(PA165 -166)

In its motion, the State quoted the following portions of the discussion on the record after the Jury was taken out:

THE COURT: Ms. Honick, I don't know what to do with your reactions, your actions, your issues, your problems, your being late to trial – all those other kind of things that you choose to do just to delay the trial or create issues with regard to these particular defendants in this particular case. However, if I ask you to come sidebar, your obligation, because I'm in control of this trial, is to walk sidebar. So what's your problem now?

MS. HONICK: Your Honor, Number 1, I'm going to object to the court saying that I have any problem. To be clear, thus far, the Court has listed my issues as being with the Court as all having to do with my current disability, which is a very visible pregnancy. Number 2, I am respectfully declining to enter what the Court says is a sidebar but, for the record, is actually the court's – the clerk's cubicle in which there are nine of us put into a space maybe 3 by 3, 4 by 4. And for the past few days, Your Honor every time has come down, has directed me to stand next to him, even though I purposely attempted not to. Your Honor has stood next to me and berated me with your finger in my face, mere inches from my face, and very visible to the jury.

(PA166 -167)

The transcript excerpt from February 22, included in Petitioner's initial appendix, however, provides a different substance and context to the trial court's comments about the State's refusal to go sidebar:

THE COURT: For the record, everybody is here. I called for sidebar. She doesn't want to show up to a sidebar. I think

that's an issue with regard to her not showing up at sidebar. She's not listening to this. So when the transcript is actually put up, she's not listening to anything we're saying with regard to anything. What was your [defense counsel's] objection?

MS. COOK: Hold on, Judge. The two statewide prosecutors have not come sidebar either.

THE COURT: Are they – that's fine...I'll get to that next. Go ahead.

[whereupon there was discussion of defense counsel Weinstein's objection]

THE COURT: Okay. Thank you.

MR. LEWIS: Can we send the jury out and deal with this issue about her not coming up here. I think it's something that has to be dealt with.

THE COURT: It is noted on the record. I don't care if she doesn't show up. You can argue whatever you want to argue when she doesn't show up. That's her problem. And she's been doing this the whole trial; so this is the way it is..

MR. LEWIS: Okay.

MR. TENZER: Michael Tenzer on behalf of Dr. Pierre. She's doing this continuously, and she gets the question out. It's in the jurors' minds. She doesn't even come here....

THE COURT: We'll deal with it at some point in time.

MS. COOK: --but I'm worried about the impression in front of the jury, Judge.

THE COURT: Of her not paying attention to anything?...Okay. I'll deal with it...

[whereupon the Court addressed the State in open court and in the Jury's hearing]

THE COURT: ...Are you withdrawing the question? Is that why you didn't walk up here, ma'am? Did you withdraw the question?

MS. HONICK: No Judge. I just want the record to reflect that there was a five-minute ex parte discussion in the

clerk's cubicle because the State declined your invitation to go in to that kind of space....

[whereupon the Court asked for the jury and the witness to be taken out of the courtroom]

THE COURT: Ms. Honick, I don't know what to do with your reactions, your actions, your issues, your problems, your being late to trial – all those other kind of things that you choose to do just to delay the trial or create issues with regard to these particular defendants in this particular case. However, if I ask you to come sidebar, your obligation, because I'm in control of this trial, is to walk sidebar.

(PA 233, lines 6-25 – PA 236, lines 1 – 20)

In contrast to Petitioner's assertion that the trial court concluded these comments by asking her, "So what's your problem now?" (PA 166 -167), the trial court's comments actually continued as follows:

THE COURT: If you don't feel like you want to walk sidebar because of whatever issues you have, then one of your individuals who are assisting you should come sidebar. It was not 5 minutes. It was addressing that particular question.

(PA 236, lines 21-25)

The trial court continued:

THE COURT: Mr. Weinstein said he had an objection with regard to the question. I didn't know what his objection specifically was; so I asked to go sidebar, which is **what you wanted Day 1 when you filed your motion with regard to "no talking" instructions.** So that's the deal. And you don't say this in front of the jury and create issues

with regard to this in front of the jury. You are the prosecutor in the case. It's your obligation to prove the case. And it wasn't five minutes. So what's your problem now?

(PA 238, lines 1-12) (emphasis added)

Ms. Honick replied as was included in the motion to disqualify and petition. (PA 237, lines 13-25 – PA 238, lines 1-18)

In response to Ms. Honick telling the trial court that she was uncomfortable in the small space at sidebar, the court replied:

THE COURT: Okay. Where would you like us to do these sidebars? Would you like us to send the jury out every single time a sidebar is called for? Will that make you feel better? Because there's always going to be five lawyers over there with you, myself, the clerk, and the court reporter....Okay. what do you want me to do to protect you?

MS. HONICK: I will be happy if you send the jury out every time.

THE COURT: Okay. I will send the jury out every single time.

(PA 238, lines 19-25 – PA 239, lines 1-15)

Notably, during this discussion, the defense attorneys commented their concerns that the only objections to sidebar were lodged when the defense had an objection, but not when scheduling needed to be discussed; that they had not observed finger pointing; and that they wanted a curative instruction for the jury having seen

Ms. Honick refuse to participate in the discussion of defense objections at sidebar. (PA 239, lines 22-25 –PA 242, lines 1-25) The excerpts included by the State cut off the trial court’s ruling as to defense counsels’ comments and requests for a curative instruction. (PA 242, line 25)

The trial court then stopped conducting sidebars without first asking for the jurors to leave the courtroom in order to alleviate Ms. Honick’s concerns. (PA191, paragraph 8) This concession was discontinued after the State later complained about defense arguments being made outside the presence of the jury during the ensuing “open court sidebars.” (PA191, paragraph 8) Notably, Petitioner’s transcripts do show Ms. Honick participating at sidebar at other times of the trial, such as on February 14 (PA215, line 12); February 21 (PSA2, p18, lines 14 – 22)

As to Petitioner’s remaining points that the trial court prejudged the State’s case, maligned the State, and showed bias by making evidentiary rulings adverse to the State

The State’s arguments that the trial court evidenced its bias by excluding TD Bank records via business records exception and disallowing the State to add a new witness through whom to admit

the records is now moot. These bank records were admitted into evidence just prior to the filing of the instant response.

The State's motion also asserted that the trial court prejudged the State's case and "maligned the State by accusing it of doing things for show" and "telling the jury that the State is bringing documents into the courtroom that it will not be using." (PA 168) The trial court's comments were in response to a defense objection made at sidebar to the State wheeling in "a cart containing [17] binders" of documents into the Jury's view to use only one report to refresh a witness' recollection. (PA168- 169, paragraphs 14(b)(iv) –(14)(b)(vi). Notably, the State acknowledged that the 17 binders of documents had been excluded from being admitted under the business records exception by the trial court. (PA170, paragraph 14(b)(xiv)) In its motion the State complained that the trial court commented, "This is just for show" and "this is ridiculous." (PA 169) However, the trial court allowed the State to roll the cart with its excluded documents in, and only noted the defense objection for the record. (PSA2, pp20, lines 15 – 19) Further, it appears from the excerpts provided by the State, that the judge's comments were not said within the Jury's hearing. (PSA2, pp 18, lines 17 – 25 – pp21, lines 1-18) The trial court did grant

defense request to instruct the jury that the binders on the cart were not evidence. (PSA2, pp21, lines 19 – 25 – pp 22, lines 1-5)

Multiple times throughout the trial however, the transcript excerpts provided by the State show the trial court emphasizing that whether certain records would be admitted would depend on the predicates being laid at the appropriate time. These rulings were applied to both the State and the defense. The trial court's ruling today, admitting the TD Bank records supports the position that the trial court did not prejudge the case and was true to its comments that records would be admitted with the proper witnesses and the proper predicate.

In its motion the State asserted that the trial court prejudged its case “by determining that receiving ...prescriptions without seeing a doctor was not a crime.” (PA170) The State quoted partial statements of the trial court, taken out of context, to support its allegation. (PA171, paragraphs (i- iv)). These accusations in its motion to disqualify are not dated, nor is a transcript cited. In fact the trial court stated several times that it “would not make that conclusion...that [drugs were] received illegally. I don't know. That would be a jury decision...” (PSA 1, pp 6, lines 15 – 17).

The State complained in its motion that the trial court's rulings have been unfair. On the one hand, the State asserts that the rulings against it are not at issue, but that they show bias; the State also takes issue with the trial court calling a trial a "living thing." (PA171)

The Trial Court denied the State's motion as legally insufficient, issuing a separate Order for each of the five (5) co-defendants. (PA196-207) The State's Petition for Writ of Prohibition, identical to the Motion to Disqualify upon which it was based, followed the Trial Court's denial. The instant Collective Response follows.

ARGUMENT

This Honorable Court should deny Petitioner's Writ of Prohibition because the Motion to Disqualify upon which it is predicated is, in fact, legally insufficient. Therefore, the Trial Court's denial was proper.

Petitioner's underlying Motion to Disqualify lacked the specificity required for a motion to disqualify to be considered legally sufficient. The majority of the instances described in Petitioner's motion to disqualify do not reveal *when* the alleged improprieties happened, but instead complain of judicial conduct "on multiple occasions" (PA157; PA171), on "one such occasion"

(PA157), “on another occasion” (PA16; PA170) etcetera. Moreover, the transcripts provided by the State are incomplete excerpts, incapable of providing this Court with a whole and accurate picture of the accusations, and therefore insufficient to support a legally sufficient motion to disqualify. Finally, the judicial conduct, of which Petitioner complains, does not require disqualification.

To be legally sufficient, a motion to disqualify must allege the specific facts and circumstances being relied upon for disqualification, as well as the precise date(s) when those facts and reasons were discovered. *See*, Fla.R.Jud. Admin. 2.330(c) (2022) Additionally, a motion to disqualify must be timely filed within 20 days of the facts constituting the grounds for the motion. Fla.R.Jud. Admin. 2.330(g) (2022) It is impossible to determine if a motion to disqualify is timely filed where the complained of circumstances are undated.

Not only did the State fail to specify most of the dates on which the trial court’s objectionable conduct happened, but it also failed to include complete transcripts or other supporting record for its allegations. Without a complete record, this Court

cannot determine the issue being presented. *See, Applegate v. Barnett Bank of Tallahassee*, 377 So.2d 1150 (Fla. 1979) (appellant who failed to furnish an adequate record to demonstrate reversible error could not prevail). Petitioner bears the burden, as the proponent of the motion, to provide transcripts and record support for its position. *Id.* Here, the transcripts relied upon do not provide a complete, contextual picture of the State's arguments. Further, the lack of context makes the assertions misleading. *See, Barber, v. State*, 306 So.3d 254 (Fla. 3d DCA 2020) (motion to disqualify is properly denied as legally insufficient where it focuses on judge's words that are taken out of context and where there is insufficient record to provide context). Further, a motion to disqualify a trial judge that does not accurately represent what was actually said by the judge cannot comply with the requirement that an affidavit be made in good faith; for the motion to be legally sufficient, the proponent cannot simply pluck one word from a full sentence made by the trial judge and omit the remainder of the statement. *Gregory v. State*, 118 So.3d 770 (Fla. 2013) *Foster v. State*, 778 So.2d 906 (Fla. 2000) (concluding after a

review of all the cited comments and the record as a whole that the judge had not prejudged the case).

Here, the State has failed to meet its burden as the proponent of the motion to disqualify. It asserted undated allegations making its motion legally insufficient. Even where the complaints were dated, they are insufficient to require disqualification. The record provided by the State is incomplete and gives a faulty contextual presentation of the trial court's comments and conduct. As discussed in *Gregory v. State*, where the allegations are not accurately quoted and a complete record provided, the motion to disqualify is legally insufficient and properly denied. *Supra*.

Petitioner complains that the Trial Court has ruled consistently and unfairly in favor of the defense. However, "an adverse ruling does not provide a legally sufficient basis for disqualification." *Downs v. Moore*, 801 So.2d 906, 915 (Fla. 2001) The bulk of Petitioner's allegations in its motion to disqualify take issue with the trial court's evidentiary rulings. Because an adverse ruling against a party does not constitute a legally sufficient basis

for disqualification, the trial court properly denied the motion as being legally insufficient. *Id.* Moreover, it appears that Petitioner is, in effect, asking this Court to determine the correctness of the trial court's evidentiary rulings. Even if such request were appropriate, which it is not, Petitioner has provided incomplete transcript excerpts and has failed to even cite to them appropriately in any way that provides context or a complete picture from which a ruling could be reviewed.

A judge's expression of dissatisfaction or frustration with a party's or counsel's "behavior alone does not give rise to a reasonable belief that the trial judge is biased and the client cannot receive a fair trial." *Ellis v. Henning*, 678 So.2d 825, 827 (Fla. 4th DCA 1996); *see also*, *Oates v. State*, 619 So.2d 23 (Fla. 4th DCA 1993) (motion to disqualify properly denied where judge referred to defendant as an obstinate jerk). Here, Petitioner asserts that the trial court's frustration over her refusal to participate at sidebar is disqualifying. *See also*, *Walls v. State*, 238 So.3d 127 (Fla. 2018) (Court's comment that it hoped the appellate court would appreciate the patience he was showing, was not disqualifying). However, this alone is not sufficient to show the need for

disqualification. *See, Ellis, supra.* Further, a judge is permitted to form mental impressions and opinions during the presentation of evidence. *1440 Plaza, LLC, v. New Gala Building, LLC*, 314 So.3d 555 (Fla. 3d DCA 2020) There is a distinction between commenting, outside the hearing of jurors particularly, that “it is ridiculous” or “for show” to wheel 17 binders of documents that have been excluded from evidence, in front of the jury, and actually prejudging whether the State’s entirety of its evidence. *Id.*

Moreover, an attorney cannot create or invite hostility into its necessary dealings with a trial court and then claim conflict requiring disqualification; an affirmatively created conflict may not be the basis to demand that the judge “step aside.” *Sume v. State*, 773 So.2d 600, 602 (Fla. 1st DCA 2000). When the State refuses to participate at sidebar, it creates conflict. Here, even if one prosecutor did not feel comfortable at sidebar, there are two others who could have participated.

CONCLUSION

WHEREFORE, based on the foregoing, Respondents respectfully request this Honorable Court to DENY the Petition for Writ of Prohibition.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by e-service to Assistant Attorney General Celia Terenzio, Bureau Chief and Assistant Attorney General Jessenia J. Concepcion at the Department of Legal Affairs, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida, 33401 at crimappwpb@myfloridalegal.com, and by eservice to Office of the Statewide Prosecutor, at statewideprosecution.miami@myfloridalegal.com Assistant Statewide Prosecutor (name) at (name.name)@myfloridalegal.com and Assistant Statewide Prosecutor (name) at

(name.name)@myfloridalegal.com and to the Honorable Judge Andrew L. Siegel at Salbert@17th.flcourts.org and div61j@17th.flcourts.org, Broward County Courthouse, 201 SE 6th Street, Fort Lauderdale, FL 33301, this March 13, 2023.

/s/ Lisa S. Lawlor

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the font used in this Petition, Bookman Old Style 14-point, complies with Rule 9.210, Fla. R. App. P.

/s/ Lisa S. Lawlor

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