

IN THE SUPREME COURT OF FLORIDA

NO. SC02-667

KEVIN DON FOSTER

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

PETITION FOR EXTRAORDINARY
RELIEF, FOR A WRIT OF PROHIBITION,
AND FOR A WRIT OF MANDAMUS

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Petitioner, KEVIN DON FOSTER, through undersigned counsel, petitions this Court for a writ of prohibition prohibiting the Honorable Issac Anderson Jr., Judge of the Circuit Court of the Twentieth Judicial Circuit, in and for Lee County, Florida, from hearing any further post-conviction proceedings in the matter of State of Florida v. Kevin Don Foster, Case No. 96-1362 CFB-IA.

INTRODUCTION

In 1998, Kevin Foster was tried and convicted of first degree murder. The jury recommended a death sentence and the judge sentenced Mr. Foster to death. Both the trial and sentencing were conducted before Judge Issac Anderson in the Twentieth Judicial Circuit. While Mr. Foster's direct appeal was pending, law enforcement developed information that Kevin Foster and his mother, Ruby Foster, were allegedly plotting to kill several witnesses involved in Mr. Foster's trial. On July 20, 2000, both Kevin Foster and Ruby Foster were charged with conspiracy to commit murder. At the time of his arrest for this charge, Mr. Foster's capital case had not been affirmed on direct appeal and Mr. Foster was not being represented by CCRC-S. The charges allege that the Fosters asked journalist James Greenhill to eliminate certain individuals on a "hit list." Aside from several witnesses from Mr. Foster's trial that were on this "hit list," other information was disclosed including

allegations that Mr. Foster intended or threatened to kill various individuals including Judge Issac Anderson. The fact that Judge Anderson was named as someone Mr. Foster intended to kill was well publicized in the Fort Myers area in the local media. After discovering this information, undersigned counsel filed a timely motion to disqualify Judge Anderson and the entire Twentieth Judicial Circuit due to Mr. Foster's reasonable fear that Judge Anderson may be called as a material witness against him in his trial on the conspiracy to commit murder charge, as well as a well founded fear that Judge Anderson harbors a bias against him due to the serious allegations charged. Mr. Foster's motion to disqualify was denied by Judge Anderson.

JURISDICTION

This is an original action under Rule 9.100(a) of the Florida Rules of Appellate Procedure. This Court has original jurisdiction pursuant to 9.030(a)(3) thereof and art V, sec. 3(b)(8), Fla. Const. Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978) (writ granted where circuit court erroneously denied motion to recuse judge.)

STATUS OF PETITIONER

Mr. Foster is presently litigating post-conviction public records issues and is investigating the validity of his conviction and death

sentence. A status conference to deal with public records issues is set to take place before Judge Anderson within the next 90 days.

REASONS FOR GRANTING PETITION

Mr. Foster is entitled to full and fair Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1354 (Fla. 1987), including the fair determination of the issues by a judge who will be fair and impartial in judging Mr. Foster's claims.

Prohibition at this stage is appropriate and vital for the interests of justice. As discussed below, proceedings before Judge Anderson would violate the principles of due process and equal protection and would be fundamentally unfair.

THE FACTUAL BASIS OF THE MOTION TO DISQUALIFY

While Mr. Foster's direct appeal was pending, law enforcement developed information that Kevin Foster and his mother, Ruby Foster, were allegedly plotting to kill several witnesses involved in Mr. Foster's trial. On July 20, 2000, both Kevin Foster and Ruby Foster were charged with conspiracy to commit murder. At the time of his arrest for this charge, Mr. Foster's capital case had not been affirmed on direct appeal and Mr. Foster was not being represented by CCRC-S. Recent public records disclosures have made undersigned counsel aware

that the conspiracy to commit murder charges are still pending against Mr. Foster. The charges allege that the Fosters asked journalist James Greenhill to eliminate certain individuals on a "hit list." Among those individuals named by the Fosters was Judge Issac Anderson. News of this alleged "hit list" was subject to great scrutiny by the media in Ft. Myers.¹ Other individuals named on the list included prosecutors and their investigators from the Office of the State Attorney for the Twentieth Judicial Circuit and attorneys from the Public Defender's Office for the Twentieth Judicial Circuit, law enforcement, jurors, and media personnel. Several of these persons have already been named in the State's preliminary discovery as witnesses against Mr. Foster such as Investigator Dickman, Investigator J.S. Purdy, Kevin Smith, Brian Kelley and Dr. Huser. As a result, Mr. Foster believes the entire circuit, circuit court judges in the Twentieth Judicial Circuit, and government attorneys, may become material witnesses against him at his conspiracy trial. Even if these people are not called, they are biased against him because of these accusations. Therefore, the entire circuit should be disqualified. The allegation that Judge Anderson was on a "hit list" is a potent and serious allegation that alone warrants disqualification. Mr. Foster has a clear and understandable

¹None of Mr. Foster's post-conviction attorneys are from Ft. Myers. Ms. Backhus is a private attorney in Tampa, Florida and the remainder of the litigation team resides in Ft. Lauderdale. Therefore, none of Mr. Foster's team were aware of this information until disclosed in public records.

fear that Judge Anderson may be called as a material witness in the upcoming trial and may hold a bias against him. Due to the seriousness of these charges, the potential bias and use of hit list members as material witnesses at Mr. Foster's conspiracy trial, and the intense publicity generated by Mr. Foster's capital trial and ultimate death sentence, it would be prudent to re-assign this case to a different circuit. Mr. Foster has a well-founded fear that Judge Anderson and his colleagues in the Twentieth Judicial Circuit harbor a bias against him². Under Florida law, the lower court should be disqualified as well as the entire Twentieth Circuit.

LEGAL BASIS FOR DISQUALIFICATION

The purpose of the disqualification rules direct that a judge must avoid even the appearance of impropriety:

It is the established law of this State that every litigant, including the State in criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his

² On March 15, 2002, nearly three weeks after Judge Anderson denied Petitioner's Motion to Disqualify, a television program on *NBC Dateline* aired a 2 hour special about Kevin Foster's case. The program detailed the conspiracy to commit murder charges pending against Kevin Foster and stated that Kevin Foster intended to kill the lower court judge. Juxtaposed with this information, the program showed a picture of Judge Anderson sitting at his bench with his judicial robe. *NBC Dateline* aired this prime-time show nation wide.

qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).

* * * *

The prejudice of a judge is a delicate question for a litigant 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 in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

Mr. Foster is entitled to full and fair hearings in post-conviction proceedings, Holland v. State, 503 So. 2d 1250 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994); including the fair determination of the issues by a neutral, detached judge. The facts of this case are of such a nature that they are "sufficient to warrant fear on [Mr. Foster's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and

impartially." Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983); Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Livingston, 441 So. 2d at 1086. Canon 3E of the Florida Code of Judicial Conduct and Rule 2.160 of the Florida Rules of Judicial Administration mandate that a judge disqualify him or herself in any proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal bias or prejudice concerning a party or a party's lawyer, personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b)(emphasis added), Fla. R. Jud. Admin. Rule 2.160(d)(1) & (2). The situation in this case mandates recusal.

In its order denying Mr. Foster's motion to disqualify, the lower court found that the motion to be untimely, insufficient as a matter of law, and stated that "[a] court may not be provoked into disqualification." Mr. Foster, through undersigned counsel respectfully disagrees with the lower court's finding of untimeliness. In fact, after supplemental records were disclosed, undersigned counsel investigated the allegations charged in the conspiracy case and filed

the motion to disqualify within ten days. Therefore the motion was timely under Fla. R. Jud. Admin. Rule 2.160(e). With respect to the sufficiency of the motion, as demonstrated by the factual basis above, Mr. Foster has a real and actual fear that Judge Anderson holds a bias against him for the obviously serious allegations in the conspiracy to commit murder case pending against him. Furthermore, the pending case is before a Circuit Court judge in the same Twentieth Judicial Circuit where it has been alleged that assistant state attorneys, the elected Public Defender, and other investigators for the state of Florida were named in the alleged "hit list." Petitioner, through undersigned counsel, respectfully disagrees with the lower court's finding that his fear of not receiving a fair post-conviction proceeding constitutes insufficient subjective fear.

In denying the motion to disqualify, the lower court asserts that "a court cannot be provoked into disqualification." The lower court cites State ex rel. Fuente v. Himes, 36 So.2d 433 (Fla. 1948). In Fuente, a lawyer intentionally spoke to the trial judge in a manner that would provoke the judge for the purpose of seeking a disqualification. The present case is clearly distinguishable. In fact, it has never been alleged that the purpose of Kevin Foster's threats was to deliberately create a circumstance where disqualification of a judge was the goal. There is no factual basis to support the position that Mr. Foster attempted to provoke the lower

court into disqualification. While Petitioner appreciates that it was not the actions of Judge Anderson that formed the basis for the motion to disqualify which was denied by the lower court, the serious nature of the allegations charged against Mr. Foster as well as the fact that charges for conspiracy to commit murder are pending against Mr. Foster³ constitute a unique situation where Petitioner has a real fear that Judge Anderson and the entire Twentieth Judicial Circuit harbor a bias against him.

For these reasons, counsel would urge this Court to stay further proceedings in this case, and request that Mr. Foster's case be randomly assigned outside of the Twentieth Judicial Circuit.

WHEREFORE, Petitioner, Kevin Don Foster, by and through the undersigned counsel, respectfully urges that the Court enter a writ prohibiting the Honorable Judge Issac Anderson from hearing any further proceedings in this case, and directing that the case be assigned to another judge outside of the Twentieth Judicial Circuit.

³ Judge Anderson was not one of the individuals named as an individual on the "hit list" which formed the basis of the conspiracy to commit murder charges.

I HEREBY CERTIFY that a true copy of the foregoing Petition for Extraordinary Relief, for a Writ of Prohibition, and for a Writ of Mandamus has been furnished by United States Mail, first class postage prepaid, to Hon. Issac Anderson, Lee County Justice Center Complex, 1700 Monroe Street, 3rd Floor, Fort Myers, FL 33901; The Office of the Attorney General, Department of Legal Affairs, Westwood Building, 7th Floor, Tampa, FL 33607; Robert A. Lee Office of the State Attorney, P.O. Box 399 Fort Myers, FL 33902 on March __, 2002.

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