

**IN THE SUPREME COURT OF FLORIDA**

**Case No. SC09-833**

**WILLIAM LEE THOMPSON,**  
Petitioner,

v.

**STATE OF FLORIDA**  
Respondent

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**REPLY TO STATE'S RESPONSE TO PETITION  
FOR WRIT OF PROHIBITION**

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## **STATEMENT OF CASE AND FACTS**

The State/Judge's Response consists of six (6) pages of argument on the issues and thirty-nine (39) pages of a procedural history, personal recollections and comment. These musings are improper and not related to any official transcripts of the instant hearing which has not yet been transcribed or provided to counsel or this Court. Mr. Thompson suggests that the official transcripts and prior facts of this case as set out in this Court's opinions are a more accurate reflection of the factual and procedural history of this case than the State's defense of Judge Hogan Scola here.

As a result, the comments and argument and the Statement of the Case and Facts in the State/Judge's Response should be stricken until such time as they can be corrected by the availability of the official transcripts which will be provided by Appendix when they are available.

## ARGUMENT IN REPLY

### **A. Writ of Prohibition is the Proper Vehicle to Raise the Issue of Disqualification**

Under Florida law, the legal sufficiency of a disqualification motion depends on “whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.” *Livingston v. State*, 441 So. 2d 1083, 1067 (Fla. 1083). The legal sufficiency of the motion is purely a question of law. *MacKenzie v. Super Kids Bargain Store*, 565 So.2d 1332, 1335 (Fla. 1990). When a trial court fails to act in accord with the law governing motions to disqualify, the appellate court will vacate a trial court judgment that flows from the error. *Fuster-Escalona v. Wisotsky*, 741 So. 2d 1063, 1065 (Fla. 2000). Since no notice of appeal has been filed as of this date, jurisdiction over the case still remains in the circuit court.

The State, on Judge Hogan-Scola’s behalf, argues that this Writ is now moot because on May 21, 2009, the day before this Court issued its show cause order, and ten days after Mr. Thompson filed a stay motion in the circuit court and his Writ of Prohibition to this Court, the circuit court issued a ruling on the case. (State’s Response at pg. 40). The context of that ruling is important. On May 11, 2009, Mr Thompson filed a motion to stay further proceedings in the circuit court

simultaneous with the filing of this Writ of Prohibition. The stay motion asked Judge Hogan Scola to stop any further rulings in the case until this Court could address the merits of Mr. Thompson's petition. He could not file a stay motion with this Court until the circuit court had ruled on the motion.

The judge, however, refused to rule on the stay motion and rushed to complete her written order before this Court could issue a show cause order. The judge's refusal to rule on the stay motion foreclosed Mr. Thompson from requesting a stay of further proceedings by this Court.<sup>1</sup> This conduct is another demonstration of the pattern of bias shown by Judge Hogan Scola.

As of this date, the judge has still not ruled on Mr. Thompson's motion for stay. Since the time for filing notice of appeal in circuit court has not yet expired, Mr. Thompson's Writ and his request to stay further proceedings in circuit court pending the disposition of this Writ is still properly before this court because jurisdiction remains with the circuit court.

If this Court stays further proceedings in circuit court and, after consideration of the Writ, finds that Mr. Thompson was denied due process because Judge Hogan-Scola should have recused herself, jurisdiction will remain

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<sup>1</sup>Prior orders from Judge Hogan Scola during these proceedings have been ruled on very quickly. The May 7, 2009 motion to disqualify was denied hours after it was filed. The motion for rehearing in the previous *Atkins* proceeding was denied within an hour of filing. *Atkins v. Virginia*, 536 U.S. 304 (2002).

with the lower court to remedy the errors without an additional remand by this Court. Should the Court deny the Writ as moot, then Mr. Thompson will request a consolidation of this appeal with the notice of appeal that was due to be filed on June 21, 2009 before the issuance of this Court's show cause order.

## **B. The Writ of Prohibition has Merit Under Florida Law**

The judge's refusal to rule on Mr. Thompson's stay motion is symptomatic of the pattern of bias against him. The State/Judge never addressed whether Mr. Thompson could have had a reasonable fear that Judge Hogan Scola could not fairly hear or rule on his claims. See *Konior v. State*, 884 So. 2d 334, 335 (Fla. 2d DCA 2004)[disqualification required where judge predetermined appropriate sentence]. Instead, the State/Judge attempts to re-write the issues.

**1. Timeliness**--The State/Judge argues that the Writ should be denied as meritless because portions of the recusal motion are untimely (Response at pg. 41). It states that this Court already determined in 2003 that Judge Hogan Scola's behavior did not warrant disqualification (Response at pg. 41, ftn 12); that *ex parte* communication was never proved in 2007 (Response at pg. 41, ftn. 13) or that it was never proved that Judge Hogan Scola was an assistant state attorney at the time of Mr. Thompson's 1989 resentencing (which is a matter of public record). This is not the proper standard of review for motions to disqualify. The pertinent

inquiry is not whether the judge perceives herself as able to act fairly and impartially, but whether a party may reasonably question the judge's partiality. *Livingston v. State*, 441 So. 2d at 1086. Here, there were sufficient incidents pled in both disqualification motions to "reasonably question" the judge's partiality. In the May 7, 2009 disqualification motion, he pled facts concerning the judge's comment that she did not believe Mr. Thompson should have had an evidentiary hearing. The remark was made before the judge ruled on whether to allow Dr. Greenspan to testify and indicated her prejudgment of the issue. He also pled the judge's prior pattern of misconduct in her *ex parte* hearings, employment as an assistant state attorney during Mr. Thompson's 1989 resentencing, and her derogatory remarks toward defense counsel.

The State/Judge also argued that because historical facts of previous misconduct were cited in Mr. Thompson's current motions to disqualify, they can serve as no basis for relief because they did not occur within 10 days of the current triggering events (Response at pg. 42). Yet, it cites to no case law or statute that says Mr. Thompson cannot establish current bias by showing a pattern of conduct **in addition to** current occasions of Judge Hogan Scola's bias.

The triggering event for the March 8, 2009 disqualification motion was the judge's order dated March 1, 2009, which was within seven days of Judge Hogan

Scola's conduct. The comments made by Judge Hogan Scola at the April 27, 2009 evidentiary hearing triggered the next disqualification motion, which was filed on May 7, 2009, within 10 days of Judge Hogan Scola's conduct. Thus, both motions were timely filed. The State can show no authority that states a pattern of prior bias in conjunction with evidence of current bias is not proper as a basis for a motion to disqualify.

Moreover, Mr. Thompson need only show that he has a reasonable fear that the judge will be unable to be fair and impartial. *Kersaint v. State*, -----So. 2d -----, 34 Fla. L Weekly D1001 (Fla. 3d DCA May 20, 2009). The prejudgment by the judge and prior conduct against defense counsel both support Mr. Thompson's reasonable fear. See, *Livingston, supra*. It also shows actual prejudice against the defense.

## **2. Bases for Disqualification are Valid.**

The State/Judge attempts to reduce the Writ to a mere disagreement with the judge's evidentiary rulings and its order (which had not been written at the time of the filing of the Writ). (Response at pg.43 ). It attempts to paint the picture that Judge Hogan Scola's rulings and behavior in the past and at the 2009 evidentiary hearing were misinterpreted by Mr. Thompson. (Response at pg. 42-43).<sup>2</sup>

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<sup>2</sup>The State cites to this Court's opinion in *Thompson v. State*, 759 So. 2d 650, 659-60 (Fla. 2000) for the proposition that the trial judge's question to the State asking

It is clear in the judge's initial March 1, 2009 order, which was the subject of the March 8, 2009 disqualification argument, that the State had no deadlines. It was not given any deadline until Mr. Thompson complained and filed his motion to disqualify. Even after his complaint, the State had nearly six weeks to obtain an expert and have Mr. Thompson evaluated. The defense had no such luxury even though it had the burden of proof.

The State/Judge blames this Court for Mr. Thompson's truncated hearing time (Response at pg. 42). But it was not this Court that cut Mr. Thompson's deadline. The State claims it was perfectly reasonable for Judge Hogan Scola to give Mr. Thompson less than half the time allotted by this Court since the judge had to write an order by the end of May. Yet, the Court's order was filed a week before the deadline and even then the court's order is substantially similar to the State's post-hearing memorandum. Thus, the argument that Judge Hogan-Scola needed to truncate Mr. Thompson's hearing because she needed time to write an order is belied by the record.

Noticeably absent from the State/Judge's Response is any discussion about the judge's prejudgment or her frustration that Mr. Thompson had been granted a

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how she could deny relief before she actually did so was not facially sufficient for disqualification. But that case did not deal with Judge Hogan-Scola, but Judge Robbie Barr.

hearing by this Court when she did not feel it was warranted. The State is silent on this issue because the implication is clear. The judge had no intention of giving Mr. Thompson a full and fair hearing because she had prejudged that Mr. Thompson deserved no chance to prove his claims even after this Court ordered it.

Judge Hogan Scola's rulings and orders reflected that prejudgment. It was not that Mr. Thompson disagreed with adverse ruling, as the State argues. The rulings, exclusion of witnesses, rulings to exclude hearsay testimony from Dr. Sultan (when the judge acknowledged the evidence was admissible,) that supports Mr. Thompson's reasonable fear of bias and shows the actual prejudice that he suffered as a consequence.

The State has no plausible rebuttal to explain how the judge acknowledged that an expert could rely on hearsay evidence and then excluded the expert's testimony. The State/Judge has no explanation for why the defense experts could not testify about the Florida definition of mental retardation but the prosecution expert could. Mr. Thompson could have no complaint if he had received an adverse ruling after a full and fair presentation of the evidence based on a consistent application of the law, but he did not have that opportunity despite this Court's order. Instead, Mr. Thompson received arbitrary rulings bent on foreclosing his presentation of evidence.

The State was not so restricted. Its expert was even qualified as a “legal” expert when he was only qualified as a psychologist, with no foundation presented to show he was a legal expert. This is not a full and fair presentation of evidence, but evidence of judicial bias that any reasonably prudent person would have. The judge’s past pattern of conduct only supports Mr. Thompson’s fears of prejudice on her current misconduct.

In *Ballard v. State*, 956 So.2d 470 (Fla. 2d DCA 2007), the court addressed a State motion to disqualify a judge based on her prejudgment of the issue of the propriety of seeking the death penalty when defense counsel asked for more time to prepare a penalty phase case. The judge told the State it may be a “waste of the State’s resources” to seek the death penalty and asked the State to revisit its decision in light of the defendant’s advanced age. The Second District Court of Appeals admitted that there could have been two interpretations of what the judge said—first in the context of scheduling problems of the State seeking death and the second being that the judge was inviting the State to imagine what she was thinking. The court granted the Writ stating:

We cannot say that the State could not reasonably conclude that Judge Roberts’ remarks reflected a prejudgment on the issue of whether it would be appropriate to impose the death penalty in Mr. Ballard’s

case. The State's fear that Judge Roberts prejudged the question of the appropriateness of the death penalty was thus a reasonable fear, and that fear was a legally sufficient reason for the judge's disqualification. See *Konior v. State*, 884 So. 2d 334, 335 (Fla. 2d DCA 2004); *Pierce v. State*, 873 So. 2d 618, 620 (Fla. 2d DCA 2004). Accordingly Judge Roberts should have entered an order disqualifying herself in Mr. Ballard's case.

*Ballard v. State*, 956 So. 2d 470, 473 (Fla. 2d DCA 2007).

Thus, even if two interpretations of the judge's comments can be gleaned, the critical factor is whether the comment creates a reasonable fear that the judge cannot be impartial. In *Ballard*, the court looked at all the circumstances surrounding the judge's comments. Mr. Thompson asks this Court to consider all of instances of Judge Hogan Scola's conduct and the context in which her comments were made.

The State/Judge takes exception with *Chastine v. Broome*, 629 So. 2d 293 (Fla. 4<sup>th</sup> DCA 1993), but the case is directly on point. In *Chastine*, the judge passed a note to the prosecution advising them on how to argue their case. Here, the judge did not bother to pass a note, she made the State's whole argument and became a second prosecutor.

The State/Judge insists that the judge's interference in Mr. Thompson's case was somehow beneficial to him. (Response at 46, ftn 14). But, the judge's "assistance" consisted of incorrect advice on how to have Dr. Sultan not testify to hearsay evidence that should have been admissible. The judge's assistance to defense counsel was a thinly veiled attempt to keep anecdotal hearsay evidence of adaptive behavior deficits from being admitted. This "assistance" helps the prosecution, not Mr. Thompson.

The State/Judge also blames the judge's bias and conduct on Mr. Thompson for what it perceives as a lack of preparation in not having enough time to retain experts and have evaluations completed within the judge's abbreviated timeline. Yet, Mr. Thompson's investigation was plainly evident in the post-conviction motions and the facts were sufficient to cause this Court to remand for an evidentiary hearing.

The State/Judge complains that Mr. Thompson should have given an IQ test before this Court granted an evidentiary hearing. But, Florida Rules of Criminal Procedure require a current evaluation of the defendant. See, Fla. R. Crim. P. 3.203(c)(3). In the years since 1958, Mr. Thompson has been IQ tested a dozen times, and he still was required to be re-evaluated for the evidentiary hearing under Rule 3.203(c)(3).

Moreover, the State argued that most of Mr. Thompson's prior IQ tests were invalid for various reasons. By definition, current testing cannot be done prior to the Court's ordering the evidentiary hearing. Mr. Thompson was able to obtain experts to present his evidence. The judge just would not let them testify. It was Judge Hogan Scola's arbitrary abbreviation of the evidence that was the basis for Mr. Thompson's reasonable fear of bias, not any lack of preparation on his part.

The truncated time constraints on the defense were not because Judge Hogan Scola had to hurry to complete an order in ninety (90) days since she obviously took less than a month to do so. The judge made it crystal clear in the very first hearing after remand before hearing a shred of evidence that she was not **under any circumstances** going to ask this Court for more time to complete the evidentiary hearing, even though defense counsel had not asked her to do so. It was that she had prejudged that Mr. Thompson should not have been granted a hearing despite this Court's order. She then limited Mr. Thompson's presentation of the experts by setting hearing so quickly that Mr. Thompson was forced to obtain them in any way he could (i.e. one expert had to do the IQ and adaptive behavior testing while the other would testify about the methodologies and data supporting the expert's conclusion).

As stated in the Writ, the State/Judge successfully prevented any rebuttal of

the State's expert by refusing to hear the testimony of Dr. Greenspan. The judge's rejection was based on the relevance of Dr. Greenspan's testimony because he had not personally tested Mr. Thompson.

Dr. Sultan could not rebut the State's expert because she did not have the raw data from the State's expert at the only time she could testify on April 13<sup>th</sup>. The only other hearing date the judge was willing to allow was April 27<sup>th</sup> when Dr. Sultan was not available because she was testifying in another case. Judge Hogan Scola refused to allow more time for the hearing when requested by the defense on the first day of the hearing. This is proved in the hearing transcripts, which are currently being prepared and will be filed with this Court as an appendix when they become available.

Thus, the State's argument that Mr. Thompson did not ask to recall Dr. Sultan to rebut the State's expert is disingenuous. The judge had said she was not allowing any other days for the hearing and Dr. Sultan was not available on April 27<sup>th</sup>. There were no other options for Mr. Thompson. He had no opportunity to rebut the State's expert's conflicting IQ score because Judge Hogan Scola excluded Dr. Greenspan, Mr. Thompson's only available rebuttal expert. This exclusion of evidence due to the judge's prejudgment of the issues is the actual prejudice to Mr. Thompson. The truncated time limitations were merely the

vehicle by which Judge Hogan Scola demonstrated her bias.

### **C. Conclusion**

Judicial comments revealing a determination to rule a particular way prior to hearing all the evidence have been found to be sufficient grounds for disqualification. *Benson v. Tharpe*, 685 So. 2d 1363, 1364 (Fla. 2d DCA 1996); cf. *Melvin Thompson v. State*, 990 So. 2d 482, 490 (Fla. 2008)[ineffective for defense counsel to fail to timely file motion to disqualify judge when she comments reflected prejudgment of issues], citing *Gonzalez v. Goldstein*, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994)[paradigm of judicial bias and prejudice is judge's prejudgment of evidence and sentence]. The facts pled by Mr. Thompson in his motions to disqualify were legally sufficient under Florida law to justify a legitimate and reasonable fear that he would not get a full and fair determination of his mental retardation claims.

**WHEREFORE**, for the foregoing reasons, Mr. Thompson prays that this Court grants the petition for writ of prohibition and that a substitute judge will be assigned to preside over any further proceedings in this matter.

### **CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing Reply to

State's Response to Petition for Writ of Prohibition has been furnished by United States Mail, postage prepaid to Clerk of Court, Florida Supreme Court, 500 Duval Street, Tallahassee, FL 32399 ; Honorable Jacqueline Hogan Scola, Circuit Judge, 1351 NW 12 St., Miami, FL 33125 ;Ms. Abbe Rifkin and Mr. Joel Rosenblatt, Assistant State Attorney, 1350 NW 12th Ave., Miami, FL 33136 ; Ms. Sandra Jaggard, Assistant Attorney General, 444 Brickell Avenue, Suite 950, Miami, FL 33131 on June 8, 2009.

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