

IN THE SUPREME COURT OF FLORIDA

LABRANT D. DENNIS,

Petitioner,

vs.

CASE NO.: SC10-1342

Lower Tribunal No. F96-13558

STATE OF FLORIDA,

Respondent.

_____/

RESPONSE TO PETITION FOR WRIT OF PROHIBITION

COMES NOW, the Respondent, the STATE OF FLORIDA ("State"), by and through undersigned counsel, and pursuant to this Court's Order of July 14, 2010, hereby responds to the Petition for Writ of Prohibition filed by Labrant D. Dennis in the instant case. A writ of prohibition should issue where a trial judge improperly denies a motion for disqualification. On the facts of this case, no basis for disqualification exists, and therefore Dennis's petition must be denied.

Dennis seeks to prohibit Eleventh Circuit Judge Dava Tunis, as well as the entire Eleventh Judicial Circuit, from presiding over the evidentiary hearing awarded by this Court in its Order of June 16, 2010. Dennis claims disqualification is necessary because one of the former prosecutors in this case is now a sitting county court judge. According to the petition, Judge Flora Seff is a "necessary and material witness" at the evidentiary hearing, requiring recusal of the entire circuit (Petition, p. 4, 9, 18).

However, a review of the record demonstrates that Dennis's challenge to the current judicial assignment is both untimely and legally insufficient.

Timeliness

On November 23, 2003, Petitioner Dennis filed a motion for post conviction relief in the circuit court. Included in that motion was a claim that the State had violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose a memorandum from Assistant State Attorney Joshua Weintraub to Dr. Valerie Rao concerning her testimony at the penalty phase of this case. The trial court granted an evidentiary hearing on that motion, and Petitioner made no attempt to call Assistant State Attorney Flora Seff as a witness. After that hearing, the motion was denied.

Petitioner appealed the denial of the motion to this Court, claiming, *inter alia*, that the order denying the motion for post conviction relief was insufficient and that Judge Crespo had erred in denying a motion for disqualification based on the fact that he knew Dr. Rao from his time as a defense attorney. In 2008, while the matter was on appeal, Ms. Seff was appointed as a judge of the Dade County Court.

On December 17, 2008, this Court entered an order reversing the denial of post conviction relief and remanding for a "new postconviction proceeding." *Dennis v. State*, 999 So. 2d 644 (Fla. 2008). On remand, this case was assigned to the Honorable Dava Tunis, and hearings regarding this matter were held on March 13,

2009, April 17, 2009, and May 11, 2009. At those hearings, the State was represented by Assistant State Attorney Gail Levine, as Judge Seff was no longer a prosecutor. At no point during the remand did Petitioner make a motion to disqualify the court based on Judge Seff. On June 12, 2009, the circuit court entered an order summarily denying Petitioner's motion for post conviction relief.

Petitioner again appealed the denial of post conviction relief to this Court. On June 16, 2010, this Court entered an order relinquishing jurisdiction to the circuit court to conduct an evidentiary hearing regarding two claims in the original motion for post conviction relief: Claim IV - counsel was ineffective for failing to investigate and present mitigation and Claim X - the *Brady* claim.

On June 28, 2010, Petitioner filed a motion for disqualification in the circuit court, asserting that recusal was required because Judge Seff was a necessary, material witness to his *Brady* claim. The State filed a response and the motion was subsequently denied on July 7, 2010.

In order for a motion to disqualify to be considered timely, it must be filed within ten days of when the information on which it is based was learned. Fla. R. Jud. Admin. 2.330(e); see also *Willacy v. State*, 696 So. 2d 693 (Fla. 1997). When the grounds for disqualification did not arise until after the matter was no longer before the lower court judge, the motion may be made in a subsequent proceeding before the same lower court judge. See *Asay*

v. State, 769 So. 2d 974 (Fla. 2000). However, the motion must still be timely filed even when it is cognizable in a post conviction proceeding. See *Waterhouse v. State*, 792 So. 2d 1176, 1193-94 (Fla. 2001).

Here, Petitioner clearly knew that Joshua Weintraub had written a memo to Dr. Rao regarding her penalty phase testimony and that Judge Seff had written e-mails to Mr. Weintraub about Dr. Rao's testimony by the time he filed his motion for post conviction relief on November 23, 2003, because Petitioner attached copies of the memo and e-mails to that motion. (PCR. 412-15) Moreover, the fact that this matter was assigned to this Court and that Judge Seff was now a county court judge were known to Petitioner at the time of the remand proceedings in 2009. As such, Petitioner has known of the basis for his motion to disqualify for more than 10 days before June 28, 2010. The motion was untimely and therefore properly denied. Fla. R. Jud. Admin. 2.330(e); *Waterhouse v. State*, 792 So. 2d 1176, 1193-94 (Fla. 2001); *Asay v. State*, 769 So. 2d 974, 980 (Fla. 2000); *Rivera v. State*, 717 So. 2d 477, 481 n.3 (Fla. 1998); *Willacy v. State*, 696 So. 2d 693 (Fla. 1997). Because Petitioner waived any possible conflict long ago, his petition should be denied.

Any reliance Petitioner places on this Court's Order of June 16, 2010, received by counsel on June 22, 2010, as providing a timely impetus for his motion is misplaced. In *Maharaj v. State*, 684 So. 2d 726, 728 (Fla. 1996), this Court held that a judge whose

bias prevented him from presiding at an evidentiary hearing had to be recused from handling any portion of the case, even where the judge summarily denied the motion for post conviction relief. As such, any basis to recuse the Eleventh Circuit has existed for years. The motion was untimely and properly denied, and Dennis's petition should be denied as well.

Legal sufficiency

Even if the motion was timely, the summary denial was proper. This Court has rejected the notion that the fact that a witness in a post conviction proceeding is a sitting judge presents a facially sufficient basis for recusal. *Mungin v. State*, 932 So. 2d 986, 993-94 (Fla. 2006). Mungin claimed that fundamental error occurred when the judge presiding over his postconviction evidentiary hearing did not recuse himself and the entire Fourth Circuit despite the fact that Mungin's trial attorney, Charles Cofer, was a sitting county judge in the Fourth Circuit at the time of the hearing. Judge Cofer testified as a witness at the hearing, accused of having provided Mungin with ineffective assistance of counsel at Mungin's capital trial. In rejecting the claim, this Court refused to adopt a *per se* rule requiring disqualification in such cases, finding such a rule to be unnecessary to preserve judicial impartiality. *Mungin*, 932 So. 2d at 993-94.

Although Dennis now claims that he is not seeking the *per se* rule rejected in *Mungin*, he is certainly seeking a *per se* rule that circuitwide recusal is required *upon the defendant's request*

whenever a judicial colleague will be offering testimony at an evidentiary hearing. As a practical matter, that is the same rule which this Court has determined to be unnecessary. The asserted fear expressed by Dennis in his motion for disqualification is premised on facts which this Court has concluded do not give rise to a legitimate attack on judicial neutrality. Dennis's expressed concern that a sitting will judge ignore a proven constitutional violation simply to avoid making a public finding that a presently-sitting county judge violated *Brady* while previously serving as a prosecutor is speculative and attenuated, and therefore did not compel the granting of his motion for disqualification. *5-H Corp. v. Padovano*, 708 So. 2d 244, 248 (Fla. 1997).

In addition, the weak distinction which Dennis attempts to draw between his case and *Mungin* is plainly a distinction without a difference. The fact that Judge Cofer in *Mungin* was a former defense attorney accused of ethical misconduct and Judge Seff in this case is a former prosecutor accused of misconduct is plainly immaterial to the question of an objective fear that the trial court will not make appropriate credibility determinations.

Dennis devotes a number of pages in his petition to identifying cases where trial judges and even entire circuits have recused themselves under situations similar to the one at bar. The cases he describes provide no basis for a finding that his motion to disqualify was legally sufficient. As this Court has recognized, a trial judge may "voluntarily recuse himself if he

believes it would be in the best interests for the administration of justice" even if the motion requesting disqualification is legally insufficient. *In re Estate of Carlton*, 378 So. 2d 1212, 1220 (Fla. 1979). The fact that one judge has recused himself upon request does not compel a conclusion that the same request requires all similarly situated judges to be disqualified. See *5-H v. Padovano*, 708 So. 2d at 249 (motion to recuse entire First District Court of Appeal was legally insufficient, notwithstanding fact that eleven judges recused themselves in the interests of justice).

This Court has also rejected the assertion that a friendly relationship between a judge and an attorney or litigant is grounds for recusal. *MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 (Fla. 1990). As such, Petitioner's conclusory assertion that the Eleventh Circuit's impartiality is subject to question because of a "professional and/or personal" relationship with Judge Seff does not present a facially sufficient basis for recusal. Dennis attempts to distance himself from this proposition by claiming that the facts of *MacKenzie* involved the judge's relationship with an attorney rather than a witness, but in fact *MacKenzie* considered two cases, one involving an attorney and the other involving a litigant. Of course, particularly in civil cases, litigants are often witnesses, but again the objective fear purportedly created would not turn on the nature of the role played by the person allegedly creating the partiality. Dennis supports his claim of a distinction on this basis by citing *Smith v. Santa*

Rosa Island Authority, 729 So. 2d 944, 946 (Fla. 1st DCA 1998), but the situation in *Smith* involved a trial judge stating on the record that he was uncomfortable making credibility determinations because of his personal relationship with possible witnesses - hardly comparable to the situation at bar.

While Dennis repeatedly characterizes Judge Seff as a material and necessary witness, the specific facts he provides do not support the legal conclusion that her testimony is necessary and material. Judge Seff was not called as a witness when Dennis initially litigated this claim at his first evidentiary hearing, and Dennis has not explained why Judge Seff's participation is needed now when it was not needed then. The memo he claims should have been disclosed was written by ASA Weintraub, and Weintraub was a party to the e-mails with Judge Seff. As such, any testimony that Petitioner might need regarding these documents could be obtained from Mr. Weintraub. Thus, Judge Seff does not even meet the legal definition of a necessary and material witness. *Rodriguez v. State*, 919 So. 2d 1252, 1274-1278 (Fla. 2005) (holding defendant's motion was legally insufficient where premised on evidentiary hearing judge becoming a witness in the proceedings, noting the record established judge's testimony was not material); *Van Fripp v. State*, 412 So. 2d 915 (Fla. 4th DCA 1982); *State ex rel. Slora v. Wessel*, 403 So. 2d 496 (Fla. 4th DCA 1981) (Hurley, concurring); *Wingate v. Mach*, 117 Fla. 104, 175 So. 421 (1934); see also *People Against Tax Revenue Mismanagement Inc. v. Reynolds*, 571

So. 2d 493 (Fla. 1st DCA 1990), *aff'd*, 583 So. 2d 1373 (Fla. 1991).

In describing how these requirements are met in a capital post conviction case, the Florida Supreme Court has held that a defendant must show that the trial judge's testimony is "absolutely necessary to establish factual circumstances not in the record." *State v. Lewis*, 656 So. 2d 1248, 1250 (Fla. 1994). The Court has also cautioned that trial courts should not allow requests for such testimony to be utilized as a method to disqualify a judge. *Id.* at 1250 n.3.

Dennis asserts that these cases are all irrelevant because they do not involve the same facts as the case at hand (Petition, pp. 17, 18). However, Dennis has not cited any cases which are even close to the facts he presents, so presumably all of his cases are also irrelevant. He has not identified any comparable cases holding that the facts he offers are in fact legally sufficient. In addition, his attempt to downplay the significance of what he is asking by suggesting that transferring this case to another circuit "would cause only minor administrative convenience at most" is unpersuasive; the evidentiary hearing which this Court has ordered is scheduled to begin on August 3, 2010 before a judge already familiar with the extensive factual and procedural history of this case regarding a murder committed in 1996. Any transfer to a new circuit will clearly require a lengthy delay and the substantial use of additional judicial resources without cause. The motion for disqualification he filed below was legally insufficient and

properly denied. Accordingly, his petition must also be denied.

CONCLUSION

WHEREFORE, the State respectfully requests that the Petition for Writ of Prohibition be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail to Suzanne Myers Keffer, Assistant CCRC, Office of the Capital Collateral Regional Counsel-South, 101 N.E. Third Avenue, Suite 400, Ft. Lauderdale, Florida 33301, and the Honorable Dava Tunis, Circuit Judge, 1351 Northwest 12th Street, Room 602, Miami, Florida 33125, this _____ day of July, 2010.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this response is 12-point Courier New, in compliance with Fla. R App. P. 9.100(1).

COUNSEL FOR RESPONDENT