IN THE SUPREME COURT OF FLORIDA

NO. SC10 - _____

LABRANT DENNIS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF PROHIBITION
IN DEATH PENALTY POSTCONVICTION PROCEEDINGS

SUZANNE MYERS KEFFER
Chief Assistant CCRC-SOUTH
Florida Bar No. 0150177

OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL-
Southern Region
101 NE 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

COUNSEL FOR PETITIONER

PETITION FOR WRIT OF PROHIBITION

Pursuant to Rule 9.100**, PETITIONER, LABRANT DENNIS**, respectfully petitions this Court for a writ of prohibition restraining the Honorable Dava Tunis, Judge of the Circuit Court of the Eleventh Judicial Circuit, or any other circuit court judge in the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, from presiding as a circuit judge in any further post-conviction proceedings in the matter of *State of Florida v. Labrant Dennis*, Case No. F96-13558.

This Petition follows the denial of a timely-filed motion to disqualify (*See* App. 1) in which Mr. Dennis established that he has an objectively reasonable fear that no judge in Miami-Dade County would be willing to publicly make a factual and legal finding that the assistant state attorney who prosecuted him - now a sitting county court judge – failed to disclose material impeachment evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). This Petition is premised on the Florida Rules of Judicial Administration, Florida Statutes, and the Florida Code of Judicial Conduct, all of which require that a judge disqualify himself once the defendant has established a reasonable fear that he will not obtain a fair hearing. *See* Fla. R. Jud. Admin. 2.160; Fla. Stat. §§ 38.02, 38.10; Fla. Code Jud. Conduct, Canon 3-B(7) and E.

I. BASIS FOR INVOKING JURISDICTION

This is an original action under Rule 9.100(a) of the Florida Rules of Appellate Procedure. This Court has original jurisdiction over this capital case pursuant to Fla. R. App. Pro. 9.030(a)(1)(A)(I) and 9.030(a)(3) and art. V, sec. 3(b)(8), Fla. Const. *See Bundy v. Rudd,* 366 So. 2d 440 (Fla. 1978)(granting writ where circuit court erroneously denied motion to recuse judge).

II. STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Mr. Dennis is a death-sentenced inmate seeking postconviction relief pursuant to Fla. R. Crim. P. 3.851 from his convictions and sentence of death based on substantial violations of his rights under the United States and Florida Constitutions.

Mr. Dennis was found guilty, as charged, of two counts of first degree murder, one count of burglary with an assault or battery while armed, and one count of criminal mischief on October 28, 1998. On February 26, 1999, Mr. Dennis was sentenced to death. (T. 5467-5508). On direct appeal, this Court affirmed the convictions and death sentence. *Dennis v. State*, 817 So. 2d 741 (2001), *cert. denied*, 537 U.S. 1051 (2002)**Error! Bookmark not defined.**.

On November 25, 2003, Mr. Dennis filed his initial motion for postconviction relief with request for leave to amend, wherein he alleged eleven

claims for relief, including several grounds under each claim. The circuit court granted an evidentiary hearing on three of Mr. Dennis's Rule 3.851 claims. After an evidentiary hearing, the court issued a written order denying all of Mr. Dennis's postconviction claims. Mr. Dennis timely appealed to this Court. On December 17, 2008, Mr. Dennis's case was remanded to the circuit court for a new postconviction proceeding. Mr. Dennis filed a supplemental motion for postconviction relief on April 13, 2009. On June 12, 2009, the Honorable Dava Tunis issued a written order summarily denying all of Mr. Dennis's postconviction claims. Mr. Dennis timely appealed.

On June 16, 2010, this Court issued its order remanding the case to the circuit court for an evidentiary hearing on Mr. Dennis's claims that (a) counsel was ineffective for failing to investigate and present further mitigation evidence at the penalty phase; and (b) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the assistant state attorney's memorandum to the medical examiner, Dr. Valerie Rao.[1]

On June 28, 2010, counsel for Mr. Dennis filed a Motion to Disqualify the Honorable Judge Dava Tunis and moved for the case to be reassigned outside of

[1] Mr. Dennis did not become aware of this Court's June 16, 2010 order requiring an evidentiary hearing until undersigned counsel received a copy of the order on June 22, 2010, by U.S. Mail.

the Eleventh Judicial Circuit by random selection. The motion was premised, *inter alia*, upon the fact that Assistant State Attorney Flora Seff prosecuted the case against Mr. Dennis. After the trial and the initial postconviction proceedings before Judge Crespo, Ms. Seff was appointed as a county court judge in the Eleventh Judicial Circuit. The Honorable Flora Seff is currently a sitting county court judge in Miami-Dade County. Judge Seff is a necessary and material witness at the evidentiary hearing to be conducted pursuant to this Court's order. The circuit court would be called upon to resolve potential conflicts in testimony and to make a credibility determination with respect to Judge Seff's testimony. As such, the court's professional and/or personal relationship with Judge Seff presents a conflict.

On July 1, 2010, the State filed a Response to Motion to Disqualify arguing that Mr. Dennis's motion was untimely and the facts set forth in the motion were not facially sufficient to require the circuit court's recusal. *See* App. 2

On July 7, 2010, the circuit court entered an Order denying Defendant's Motion to Disqualify Judge, finding the motion legally insufficient as a matter of law. *See* App. 3. On that same date, the circuit court scheduled the evidentiary hearing to begin on August 3, 2010. This Petition follows.

III. NATURE OF RELIEF SOUGHT

Mr. Dennis is an indigent individual presently incarcerated at Union

Correctional Institution under a sentence of death. Pursuant to Rules 9.030(a)(3) and 9.100 of the Florida Rules of Appellate Procedure, Mr. Dennis respectfully moves this Court to enter an order that would require the Respondent to show cause why the requested relief should not be granted and thereafter, enter an order prohibiting any judge in the entire Eleventh Judicial Circuit from presiding over his postconviction proceedings and randomly assign a judge from a different circuit in Florida to hear Mr. Dennis's case.

IV. LEGAL ARGUMENT

A. Standard of Review and General Law

The issue before this Court is the **legal sufficiency** of the motion to disqualify the Eleventh Judicial Circuit. In order to demonstrate legal sufficiency, Mr. Dennis need only show:

> 'a well grounded fear that he will not receive a fair [hearing] at the hands of the judge. **It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling**.' *State ex rel. Brown v. Dewell*, 131 Fla. 566, 573, 179 So. 695, 697- 98 (1938). *See also Hayslip v. Douglas*, 400 So. 2d 553 (Fla. 4th DCA 1981). **The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially**.

State v. Livingston, 441 So. 2d 1083, 1086 (Fla. 1983)(emphasis added). In a capital case like Mr. Dennis's, the courts "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." *Chastine v. Broome*, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). The circumstances of this case are of such a nature that they are "sufficient to warrant fear on [Mr. Dennis's] part that he would not receive a fair hearing by the assigned judge." *Suarez v. Dugger*, 527 So. 2d 191, 192 (Fla. 1988).

Mr. Dennis is entitled to a full and fair post-conviction proceeding, *Holland v. State*, 503 So. 2d 1354 (Fla. 1987); *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994), including a fair determination of the issues by a neutral, detached judge. Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." *Carey v. Piphus*, 435 U.S. 247, 262 (1978). Principles of due process demand that Mr. Dennis's case be heard in another circuit in Florida:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. *See Carey v. Piphus*, 435 U.S. 247, 259-262, 266-267 (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. *See Matthews v. Eldridge*, 424 U.S. 319, 344 (1976). At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done,' *Joint Anti-Fascist*

> *Committee v. McGrath*, 341 U.S. 123, 172, (1951)(Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980).

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify himself in a proceeding "in which the judge's impartiality might reasonably be questioned." The disqualification rules require judges to 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 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 whose 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, 401 (Fla. 3rd DCA 1977).

The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was 'such a likelihood of bias or **an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.**' *Ungar v. Sarafite*, 376 U.S. 575, 588 (1964). 'Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties,' but due process of law requires no less. *In re Murchison*, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974)(emphasis added).

The appearance of impropriety violates state and federal constitutional rights to due process. A fair hearing before an impartial tribunal is a basic requirement of due process. *See In re Murchison*, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." *State ex rel. Mickle v. Rowe*, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal, there can be no full and fair hearing.

The only issue before this Court is the question of legal sufficiency of the motion; there is no deference owed to the lower court. *Smith v. Santa Rosa Island Authority*, 729 So. 2d 944, 946 (Fla. 1st DCA 1998). The test for determining the legal sufficiency of a motion for disqualification is an objective one which asks

whether the facts alleged in the motion would place a reasonably prudent person in fear of not receiving a fair and impartial hearing. *See Livingston v. State*, at 1087. Due to the serious *Brady* violations by Judge Seff and her current position as a colleague of each and every circuit court judge in Miami-Dade County, "a shadow is cast upon judicial neutrality so that disqualification [of the circuit] is required." *Chastine v. Broome*, at 295.

B. Legal Analysis

Mr. Dennis's motion to disqualify was legally sufficient. As Mr. Dennis alleged in the motion, Assistant State Attorney Flora Seff prosecuted the case against Mr. Dennis. After the trial and the initial postconviction proceedings before Judge Crespo, Ms. Seff was appointed as a county court judge in the Eleventh Judicial Circuit. The Honorable Flora Seff is currently a sitting county court judge in Miami-Dade County. Judge Seff is a necessary and material witness at the evidentiary hearing to be conducted pursuant to this Court's order. As such, Judge Seff's credibility will be at issue.

Mr. Dennis anticipates that Judge Seff will testify regarding an e-mail between her and Assistant State Attorney Josh Weintraub regarding the undisclosed memorandum that Mr. Weintraub had written to assistant medical examiner, Dr. Valerie Rao. That correspondence is a necessary component to

proving the *Brady* claim[2] for which this Court has ordered a hearing be conducted. The circuit court would be called upon to make a credibility determination with respect to Judge Seff's testimony regarding the issues before the court. The circuit court's professional and/or personal relationship with Judge Seff presents a conflict because the circuit court will be faced with resolving potential conflicts in testimony and ultimately ruling on the credibility of Judge Seff.

Judge Seff is currently assigned to a county court position and hears criminal cases in the same courthouse where Mr. Dennis's case is pending. Unlike the Eleventh Judicial Circuit, there are several circuits in Florida that cover multiple counties; thus, it is conceivable that two circuit court judges in those particular circuits would not routinely interact with one another. In some examples, disqualification of the circuit might not be warranted. In contrast, the judiciary

---

[2] Prior to Mr. Dennis's penalty phase, the State was in possession of a memorandum sent to Dr. Valerie Rao from Assistant State Attorney, Josh Weintraub detailing the medical testimony required from her at the penalty phase (PC-R. 412-14). The memo went so far as providing Dr. Rao with necessary "terms of art" for the judge and jury to understand (PC-R. 413) and was tantamount to witness coaching. Dr. Rao's testimony at the penalty phase was almost identical to the memorandum. In addition to the memorandum, Mr. Dennis received, through public record disclosure pursuant to Fla. R. Crim. P. 3.852(e)(2), an email confirming Dr. Rao's receipt of the memorandum (PC-R. 415). The memorandum instructing Dr. Rao specifically how to testify at the penalty phase is particularly important given the fact that she was not the pathologist that visited the crime scene, nor did she perform the autopsies in this case. The memorandum and e-mail demonstrate that the State chose not to rely on Dr. Gulino's testimony in favor of presenting the inflammatory testimony of Dr. Rao.

inevitability interacts in Miami-Dade County. Judge Seff is a colleague of each and every circuit court judge in Miami-Dade County in the truest sense of the word, warranting disqualification of the entire circuit.

Mr. Dennis has an objectively reasonable fear that Judge Tunis or any other judge in the Eleventh Judicial Circuit might harbor personal and professional concerns about granting a new penalty phase proceeding in his capital case because a fellow colleague and judge failed to disclose evidence in violation of *Brady* while an assistant state attorney. If this Petition is not granted, the lower court judge will be faced with the possibility of publicly finding that a fellow judge withheld evidence in a capital murder trial. The circuit court will be required to make determinations as to the propriety and lawfulness of Judge Seff's conduct when she was an assistant state attorney. Perhaps more significantly, the court might be faced with resolving potential conflicts in the testimony presented, and ultimately ruling on the credibility of Judge Seff. Mr. Dennis would be urging the circuit court to make findings with potentially adverse consequences to Judge Seff. Mr. Dennis has a concern that, no matter how fair-minded any judge might be, this is a most uncomfortable situation and results in the appearance of impropriety. Consequently, Mr. Dennis is in fear that he cannot receive a fair hearing before any judge in the Eleventh Judicial Circuit. *See* App. 4 (Affidavit of Labrant Dennis).

In the State's response below, it cited to *Mungin v. State*, 932 So. 2d 986

(Fla. 2006) for the proposition that this Court has "rejected the notion that the fact that a witness in a postconviction proceeding is a sitting judge presents a facially sufficient basis for recusal." (*See* App. 2). However, the only issue before this Court in Mr. Dennis's case is the *legal sufficiency* of the motion to disqualify. In contrast, the issues before this Court in *Mungin v. State* were very different. In that case, postconviction counsel never filed a motion for disqualification, even though the former defense attorney had been appointed to the county court bench in the same circuit. Consequently, on appeal, Mungin argued that the judge's failure to recuse himself in that situation was fundamental error. The only issue was whether the lower court's failure to *sua sponte* recuse himself rose to the level of *fundamental error*. This Court reviewed Canon 3E(1)(b) of the Code of Judicial Conduct, which specifically addresses situations in which a judge must recuse himself or herself from a case. In this context, the analysis was straightforward: the particular scenario in Mungin's case is not addressed by Canon 3E(1)(b) and therefore, the judge was not required to *sua sponte* recuse himself. Thus, this Court held that the lower court's failure to recuse himself did not rise to the level of fundamental error in *Mungin. Id*. at 11-13. This Court's rejection of a "per se rule that any time a judge in a circuit represented the defendant in a criminal trial and testifies as a witness in a postconviction proceeding, all the judges of that circuit must *sua sponte* recuse themselves," *id.* at 11, was not a central factor of the

holding.

The holding in *Mungin* is not determinative in this case. Mr. Dennis does not have the burden of establishing the high standard of fundamental error due to the lower court's failure to act on its own. Mr. Dennis timely filed a motion to disqualify. Additionally, Mr. Dennis's reasons for being in fear of not receiving a fair trial are distinguishable. Judge Seff is a material witness to a *Brady* claim, essentially accusing the prosecutors of ethical misconduct. The test for determining the legal sufficiency of a motion for disqualification is an objective one which asks only whether the facts alleged in the motion would place a reasonably prudent person in fear of not receiving a fair and impartial hearing. *See Livingston* at 1087. Mr. Dennis has met this standard.

Even though this Court has not *required* circuit-wide recusal in postconviction cases, the practice is certainly not improper nor is it unprecedented in Florida. For example, in *Victor Farr*, Circuit Court Case No. 91-002CF, Judge E. Vernon Douglas of the Third Judicial Circuit recused himself and the entire circuit where both the trial attorney and trial prosecutor had been elevated to the bench by the time that collateral proceedings had commenced. In that case, the State sought review of the circuit court order but this Court denied relief. (*State v. Victor Farr*, SC05-1389, FSC Order dated Dec. 5, 2006, denying the State's petition and remanding the case to the Chief Judge for reassignment to another

circuit). In *State v. George Hodges*, Case No. 89-2165, in Hillsborough County, Judge J. Rogers Padgett *sua sponte* recused himself when he learned that the trial attorney who represented Mr. Hodges was currently a judge in the Thirteenth Judicial Circuit. Mr. Hodges' case was reassigned to a judge outside of the Thirteenth Judicial Circuit. *See Hodges v. State*, 885 So. 2d 338 (Fla. 2003)(while not the subject of appeal, this Court noted the grounds for disqualification in the opinion). Similarly, in *State v. Dailey*, Case No. 85-7084 CFANO, the postconviction judge *sua sponte* recused himself due to the fact that the defendant's trial counsel sat as a judge in the circuit. Mr. Dailey's case was transferred to a circuit court outside of the Sixth Judicial Circuit.

There are other circuit court judges who have found motions similar to Mr. Dennis's to be legally sufficient. For example, in *State v. Joel Diaz*, Case No. 97-CF-3305, in Lee County, Judge Thomas S. Reese entered an order disqualifying the entire Twentieth Judicial Circuit following the Defendant's Motion to Disqualify based on the court being required to weigh and assess the credibility of the prosecutor and defense attorney who are now sitting judges in that circuit. Mr. Diaz's case was reassigned outside of the Twentieth Judicial Circuit. In *State v. Dean Kilgore*, Case No. CF89-06086A1-XX, and *State v. Juan Melendez*, Case No. CF84-1016A2, Judge Dennis P. Maloney of the Tenth Judicial Circuit recused himself because of circumstances similar to those presented herein: Mr. Kilgore

and Mr. Melendez, the defendants, were represented at trial by Roger A. Alcott. Following Mr. Kilgore and Mr. Melendez's convictions and sentences of death, Roger A. Alcott assumed a position as a Circuit Judge in the Tenth Judicial Circuit. Mr. Kilgore and Mr. Melendez's post-conviction attorneys filed motions to disqualify Judge Maloney and the Tenth Judicial Circuit. Judge Maloney granted those motions. *See also State v. George Brown*, Case No. CF90-3054A1 (Tenth Judicial Circuit) in which the lower court judge granted the defendant's motion for disqualification.

These circuit court decisions - whether the disqualification was on the court's own motion or pursuant to the defendant's motion - demonstrate that there is an objective and reasonable basis for a capital defendant to have a fear that he will not get a fair hearing where a sitting judge must judge both the conduct and credibility of a colleague. The foregoing cases, from circuits throughout Florida, demonstrate that Mr. Dennis's fear is not merely based on the "'factually unsubstantiated perceptions of the cynical and distrustful.'" *See MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 1332 (Fla. 1990)(quotation from the lower court decision in *Breakstone v. MacKenzie*, 561 So. 2d 1164 (Fla. 3rd DCA 1989). Therefore, the result in *Mungin* does not automatically warrant a denial of relief in this matter.

Mr. Dennis is not seeking a *per se* rule of disqualification. In fact,

Mr. Dennis alleged in the motion that he only sought disqualification after this Court's Order remanded the case to the circuit court for an evidentiary hearing on Mr. Dennis's claims that (a) counsel was ineffective for failing to investigate and present further mitigation evidence at the penalty phase; and (b) the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose the assistant state attorney's memorandum to Dr. Rao. Additionally, it is ultimately up to the defendant to decide whether to seek disqualification of a judge in any particular case once the grounds for such a motion have been discovered. It is "elementary that sworn facts set forth in a motion for disqualification must be taken as true." *Lewis v. State*, 530 So. 2d 449, 450 (Fla. 1st DCA 1988) citing *Bundy v. Rudd*, 366 So. 2d 440 (Fla. 1978).

In its response below, the State additionally asserted that Mr. Dennis's motion was not timely because Judge Seff was a county court judge in 2009 at the time of this Court's first remand. However, at that time the lower court summarily denied Mr. Dennis's claims, no evidentiary hearing was set and Mr. Dennis was not required to produce witnesses. It was not until this Court's June 16, 2010 Order remanding the case to the circuit court for an evidentiary hearing on the violation of *Brady v. Maryland*, 373 U.S. 83 (1963), that the conflict and bias requiring recusal arose. Judge Seff was not a witness until such time as an evidentiary hearing was granted and Mr. Dennis would be required to file a witness list. Once

the evidentiary hearing on the Brady claim was granted, the ten day clock started. Similarly, in *State v. Joel Diaz*, Case No. 97-CF-3305, Chief Judge G. Keith Cary of the Twentieth Judicial Circuit found that "…though the motion to disqualify seems to have been filed late during the proceedings, I note that it was filed within ten days of rendition of the order granting an evidentiary hearing…" *See* App. 5.

Furthermore, the State's position below that the motion is not legally sufficient "because a judge's personal and professional relationship with an attorney or litigant is not sufficient to warrant disqualification" must fail. The cases cited by the State in its response (*See* App. 3) deal specifically with the judge's relationship with other *attorneys*, and therefore, are irrelevant to this case. *See MacKenzie v. Super Kids Bargain Store, Inc.*, 565 So. 2d 1332, 1338 (Fla. 1990)(the fact that an *attorney* made a contribution to a judicial campaign was not a legally sufficient ground for disqualification). The case simply illustrates that it is common for judges to have personal relationships with the *attorneys* who might practice before them – the situation is completely different when the *credibility of a witness* is at issue. *See Smith v. Santa Rosa Island Authority, supra.* The lower court in Mr. Dennis's case would be required to rule on the professional conduct and ethics of a sitting circuit court judge as well as her *credibility* as a material witness.

Finally, the State asserted below that Judge Seff is not a material witness in

the hearing. In its Response to the Motion to Disqualify, the State claims Mr. Dennis failed to show that the judge possesses information affecting the merits of the case and that no other witness might similarly testify.[3] Each of the cases cited by the State involved motions to disqualify where the **trial judge** became a witness in the proceedings in which they presided. That is not the situation in the instant case and the cases cited are irrelevant. Mr. Dennis is not moving to disqualify Judge Dava Tunis because she became a witness in the instant proceedings.

In any event, Judge Seff was the lead prosecutor in the instant case. Judge Seff sent an email to a fellow prosecutor regarding the testimony of the medical examiner in Mr. Dennis's case. This email and any other communications with respect to Dr. Rao and the memorandum at issue are necessary components in proving the *Brady* violation this Court has remanded for an evidentiary hearing. Judge Seff is a material witness; no other witness can testify as to Judge Seff's actions and communications. It is necessary for Judge Seff to testify at the evidentiary hearing in Mr. Dennis's case regarding her violation of *Brady*.

The concerns raised by the State pale in the face of the fact that Mr. Dennis

---

[3] The State cited *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); *Wingate v. Mach*, 117 Fla. 104, 175 So. 421 (1935); and *People Against Tax Revenue Management Inc. v. Reynolds*, 571 So. 2d 493 (Fla. 1st DCA 1990), aff'd, 583 So. 2d 1373 (Fla. 1991).

is on death row and seeking relief from his convictions and sentence based on serious constitutional errors that occurred at his trial. Given the unusual circumstances of this case and serious issues at stake, the decision to transfer this case to another circuit at random would cause only minor administrative inconvenience at most.

Mr. Dennis has demonstrated a reasonable fear that he will not get a fair hearing unless his motion is granted. Because this is a capital case, this Court "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake." *Chastine v. Broome, supra*.

CONCLUSION

Contrary to Judge Tunis's Order, the specific facts Mr. Dennis alleged in the motion to disqualify are legally sufficient to warrant disqualification. The test for determining the legal sufficiency of a motion for disqualification is an objective one which asks whether the facts alleged in the motion would place a reasonably prudent person in fear of not receiving a fair and impartial trial. *See Livingston v. State*, 441 So. 2d 1083, 1087 (Fla. 1983). Based on the facts alleged in the motion to disqualify, Mr. Dennis has established that he has an objectively reasonable fear that Judge Tunis or any other judge in the Eleventh Judicial Circuit might harbor personal and professional concerns about granting a new penalty phase in his capital case because a fellow colleague and judge failed to adhere to the law as set

forth in *Brady* while an assistant state attorney. Rule 2.160 of the Florida Rules of Judicial Administration (2004), sections 38.02 and 38.10, Florida Statutes (2002) and the Fourteenth and Eighth Amendments to the United States Constitution mandate that the writ be granted. The facts alleged by Mr. Dennis in the motion to disqualify meet the standard for disqualification articulated in *Livingston*. Because this is a capital case, the importance of detached and neutral tribunal is even more important. In the instant case, Mr. Dennis has a reasonable fear that he will not receive a fair hearing before Judge Tunis or any other judge in the Eleventh Judicial Circuit because of the aforementioned circumstances.

WHEREFORE, Petitioner, LABRANT DENNIS, by and through the undersigned counsel, respectfully urges that the Court enter an order issuing an order to show cause against the Respondent, and thereafter, enter a writ prohibiting Judge Dava Tunis or any other judge in the Eleventh Judicial Circuit from hearing any further proceedings in this case, and randomly reasssign Mr. Dennis's post-conviction motion to another circuit in Florida.

Respectfully submitted,

SUZANNE MYERS KEFFER
Florida Bar No. 0150177
Chief Assistant CCRC-South

Office of the CCRC-South
101 N.E. 3rd Avenue, Suite 400
Fort Lauderdale, FL 33301
(954) 713-1284

Attorney for Mr. Dennis

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. Mail to Gail Levine, Assistant State Attorney, 1350 NW 12th Avenue, Miami, Florida 33125; and Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida 33131, this 9th day of July, 2010.

SUZANNE MYERS KEFFER
Florida Bar No. 0150177
Chief Assistant CCRC-South

Office of the CCRC-South
101 NE 3rd Avenue, Suite 400
Fort Lauderdale, Florida 33301
(954) 713-1284

Attorney for Petitioner