

THE CIRCUIT COURT OF THE 17TH
JUDICIAL CIRCUIT, IN AND FOR
BROWARD COUNTY, FLORIDA

CASE NO.: 04-15633CF10A

STATE OF FLORIDA,

Plaintiff,

VS.

OMAR LOUREIRO,

Defendant,

JUDGE: MARTIN J. BIDWILL

ORDER

THIS CAUSE has come before the Court upon the defendant's Second Amended Initial Verified Motion To Disqualify Judge and All Judges of the Seventeenth Judicial Circuit. The State filed a Response.¹

The defendant is charged with First Degree Murder. After a jury convicted the defendant in a prior trial, the Court sentenced the defendant to death. While on appeal, the defendant filed a motion in the Florida Supreme Court asking that Court to relinquish jurisdiction to the trial court to allow for an evidentiary hearing on the defendant's allegation that improper, ex parte communications occurred between the presiding judge and the Assistant State Attorney during the trial proceedings. The Florida Supreme Court granted the motion in an order dated March 31, 2009, and relinquished jurisdiction to allow for

¹ The State correctly argued that the first amended motion was not under oath. The defendant has cured this defect with the second amended motion which contained a proper oath.

consideration of the defendant's claim. In its order, the Supreme Court directed that, "[i]n **light of the allegations of the motion**," a trial judge from a different circuit should preside over the evidentiary hearing. Supreme Court Relinquishment Order of March 31, 2009, at 1 (emphasis added).

After conducting discovery on the issue, the State filed an agreed motion to amend the relinquishment order to allow for the consideration of an agreed motion to vacate the defendant's conviction and sentence and for a new trial. In the motion, the State announced its intention to move to vacate the judgment "based on the appearance of impropriety arising from undisclosed and ongoing conversations between the trial judge and prosecutor during the trial proceedings," State's Agreed Motion To Amend Relinquishment Order, at 2. On May 19, 2009, the Florida Supreme Court granted this motion to amend and relinquished jurisdiction to this Court. On May 22, 2009, Chief Judge Victor Tobin granted the agreed motion to vacate the defendant's conviction and sentence. As the case was previously assigned to felony division FW, Chief Judge Tobin then assigned the case to the undersigned for further proceedings.

The defendant has now filed the above-referenced motion seeking to disqualify the undersigned, as well as all judges of this Circuit. In his motion, the defendant advises that he intends to file a motion to dismiss for prosecutorial misconduct, as well as a motion to recuse the State Attorney's Office for the Seventeenth Circuit. He states that each motion will be premised on the alleged improprieties relating to the undisclosed, ex parte communications between the former trial judge, Circuit Judge Ana Gardiner, and the former Assistant State Attorney. He has attached copies of the transcripts of the

depositions taken upon relinquishment, as well as an affidavit of attorney Sheila Alu. The defendant goes on to state that he will seek an evidentiary hearing on these motions, and that the testimony of Judge Gardiner will be required at such a hearing. As Judge Gardiner is a judge of the Seventeenth Judicial Circuit, the defendant alleges that he "has a reasonable fear that a judge in this Circuit will not be able to make the necessary objective findings as relates to witness credibility of a fellow judge in any motions to be filed and heard" Defendant's Second Amended Initial Verified Motion To Disqualify, at 3. Consequently, he seeks disqualification of the undersigned, and all other judges of the Seventeenth Judicial Circuit.

Rule 2.330 of the Florida Rules of Judicial Administration requires disqualification of the presiding judge where the facts alleged in an initial motion for disqualification are reasonably sufficient to create a well grounded fear in the mind of the moving party that he will not receive a fair trial or hearing. Fla. R. Jud. Admin. 2.330; Doorbal v. State, 983 So. 2d 464, 476 (Fla. 2008). Significantly, the evaluation of an initial motion for disqualification must focus on those matters from which a litigant may reasonably question a judge's impartiality, rather than the judge's own subjective perception of his or her ability to act fairly and impartially. Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). It is the movant's well grounded and objectively reasonable fear, not the presiding judge's subjective belief, which dictates the outcome of an initial motion seeking to disqualify the presiding judge.

Although the undersigned subjectively believes he can be completely fair in this matter, the defendant's initial motion to disqualify the undersigned is legally sufficient when evaluated according to the standard for disqualification. See Wickham v. State, 998 So.

2d 593 (Fla. 2008) (finding disqualification was required because murder defendant's fear was well grounded that a Second Circuit judge hearing post-conviction proceeding testimony from the defendant's former attorney—a former Second Circuit judge and current judge on the District Court of Appeal—would be biased in favor of the judge and against the defendant). In fact, in its relinquishment order of March 31, 2009, the Florida Supreme Court itself had ordered the appointment of a judge from another Circuit to hear those issues underlying the request for relinquishment, which are essentially the same issues the defendant will raise in his pre-trial motions.

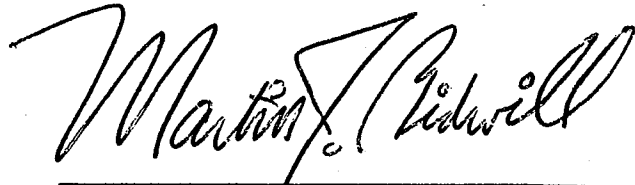
In its Response opposing the motion, the State relies on Mungin v. State, 932 So. 2d 986 (Fla. 2006), and argues that Mungin stands for the proposition that the fact that a fellow judge will be a witness in a proceeding is not a legally sufficient basis to seek disqualification. However, the State reads too much into Mungin. Unlike the defendant here, Mungin never even moved to disqualify the trial court, and the Florida Supreme Court found that Mungin was therefore procedurally barred from raising the unpreserved issue on appeal. That being so, the Supreme Court in Mungin at most merely ruled that there is no per se requirement that a trial judge must recuse—even in the absence of a disqualification motion--when a fellow judge in the Circuit will be a witness. The Mungin decision did not announce a blanket rule precluding judicial disqualification upon proper motion where, as here, the circumstances of the case will require one judge to determine the credibility of a fellow judge. Under the facts and circumstances of this case, the defendant's motion is legally sufficient. The Court is not persuaded that Mungin requires a different result.

Although the Court will grant the defendant's initial motion to disqualify the

undersigned Circuit Judge, the undersigned cannot unilaterally disqualify all judges of this Circuit. Therefore, the defendant's request to disqualify all judges of the Seventeenth Judicial Circuit is referred to Chief Judge Victor Tobin for his consideration of that aspect of the motion.

Accordingly, having reviewed the motion and the record, and being otherwise duly advised in the premises, it is hereby ORDERED AND ADJUDGED that the defendant's Second Amended Initial Verified Motion To Disqualify Judge and All Judges of the Seventeenth Judicial Circuit is GRANTED in part as legally sufficient with regard to the undersigned Circuit Judge only. The defendant's request to disqualify all judges of this Circuit is hereby referred to Chief Judge Victor Tobin for further consideration.

DONE and ORDERED this 1ST day of July, 2009, in chambers at Fort Lauderdale, Florida.



MARTIN J. BIDWILL
CIRCUIT JUDGE

cc: Hon. Victor Tobin, Chief Judge
Michael Tenzer, Esq.
Brian Cavanagh, SAO
J. Scott Raft, SAO