IN THE

SUPREME COURT OF FLORIDA

THOMAS C. SUTTON, et al., Petitioners, v. STATE OF FLORIDA, Respondent.	Case No. SC06-1000 District Court Case Nos. 1D05-5922; 1D05-5923; 1D05-5924; 1D05-5925; 1D05-5927; 1D05-5930; 1D05-5931; 1D05-5938; 1D05-5945; 1D05-5947; 1D05-5948

REPLY BRIEF OF PETITIONERS

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A circuit court=s order on a petition for writ of prohibition is reviewable by direct

appeal.[1]

In its Answer Brief, the State requests the Court to distinguish between those petitions for writs of prohibition that Achallenge the jurisdiction of the lower tribunal@ and those petitions for writs of prohibition that challenge the lower tribunal=s Aerroneous exercise of jurisdiction with which that tribunal is lawfully invested.@ Answer Brief at 25. The State suggests that the former is reviewable by direct appeal and the latter is reviewable by certiorari. The State further suggests that a petition for writ of prohibition relating to a trial judge=s refusal to disqualify himself or herself (such as the petitions in the instant case) is a petition that challenges the lower tribunal=s Aerroneous exercise of jurisdiction with which that tribunal is lawfully invested@ and therefore the petition is

[1] In its Answer Brief, the State requests the Court to dismiss this case, arguing that jurisdiction was improvidently granted. *See* Answer Brief at 7-8. The Petitioners continue to assert that it was proper for this Court to grant jurisdiction in the instant case; the Petitioners rely upon the arguments set forth in their Jurisdictional Brief in support of this argument. In particular, the Petitioners submit that it is appropriate at this stage of the case for the Court to accept jurisdiction and resolve the conflict because the issue in dispute (whether the denial of a petition for writ of prohibition is reviewable by appeal or certiorari) was resolved in finality pursuant to the district court=s April 20, 2006, decision. It is likely that any further decision by the district court on the merits of this case will refrain from addressing the appeal/certiorari issue and therefore the Petitioners could be foreclosed from pursuing this issue at a later date. Moreover, the Petitioners submit that this issue regarding the appropriate standard of review must be addressed prior to any ruling on the merits. Once a decision on the merits is reached, the Acat will be out of the bag@ and it will be difficult, if not impossible, for the district court to reassess the case under a different standard. Finally, the Petitioners note that the issue presented in this case is also pending before the Court in *Rivera v. State*, SC06-2236.

reviewable by certiorari.[2]

No appellate court has made the distinction asserted by the State. To adopt the State=s position, the Court would need to disapprove several cases, including the Second District=s holding in *Housing Authority of the City of Tampa v. Burton*, 873 So. 2d 356 (Fla. 2d DCA 2004), and the Fifth District=s holding in *Pinfield v. State*, 710 So. 2d 201 (Fla. 5th DCA 1998).

In fact, to adopt the State=s position, the Court would also need to disapprove the Fourth District=s holding in *State v. Frazee*, 617 So. 2d 350 (Fla. 4th DCA 1993) **B** the case in conflict with *Burton*. *Burton* held that the denial of a petition for writ of prohibition is reviewable by direct appeal, whereas *Frazee* held that the denial of a petition for writ of prohibition is reviewable by certiorari. But the State argues that *both cases* were wrongly decided. *See* Answer Brief at 26 (A[T]he Fourth District=s conclusion

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[2] As support for its argument, the State relies upon the following language from *English v. McCrary*, 348 So. 2d 293, 296 (Fla. 1977):

> Prohibition may only be granted when it is shown that a lower court is without jurisdiction or attempting to act in excess of jurisdiction.

The Petitioners note that at least one district court has held that a writ of prohibition directed towards a judge=s refusal to recuse himself or herself is a challenge to a court=s attempt to act in Aexcess of jurisdiction.@ *See Bay Bank & Trust Co. v. Lewis*, 634 So. 2d 672, 678 (Fla. 1st DCA 1994) (AAlthough a petition for writ of prohibition is an original proceeding in the purest sense, its purpose in the case before us is to determine, not whether the judicial or quasi-judicial officer involved should be disqualified for bias or other reasons, but whether such an officer has *exceeded the jurisdiction* of the office by denying a clearly valid motion for disqualification.@) (emphasis added).

in *Frazee* that proceedings in that case should be addressed by certiorari[] is itself incorrect.@). The State argues that *Burton* involved a petition for writ of prohibition that challenged the lower tribunal=s erroneous exercise of jurisdiction with which that tribunal was lawfully invested (a motion to disqualify a judge) and therefore the petition was not a Atrue common law writ@ and should be reviewed by certiorari. *See* Answer Brief at 16-17. The State then argues that *Frazee* involved a petition challenging the jurisdiction of the lower tribunal (speedy trial violation) and therefore the petition was a Atrue common law writ@ and should be reviewed by appeal. *See* Answer Brief at 26.[3] Hence, in order for the State=s argument to prevail, the Court would need to disapprove both *Burton* and *Frazee* (as well as the Fifth District=s decision in *Pinfield*).

In essence, the State is arguing that prohibition is not a proper vehicle to challenge a judge=s denial of a motion to disqualify B the State claims that Athis type of prohibition is not >true= common law prohibition.@ Answer Brief at 12.[4] The State=s position is contrary

[3] The State questions the amount of time that the Petitioners spent in the Initial Brief responding to Judge Farmer=s dissent in *Frazee*. *See* Answer Brief at 27 n.3. The Petitioners note that although Judge Farmer dissented in *Frazee*, he concurred with the majority=s decision to treat the review of the petition for writ of prohibition by certiorari and his opinion was the only written explanation provided as to why the court=s review was by certiorari.

[4] Despite this assertion, the State recognizes in several other parts of its brief that prohibition is the appropriate remedy for the erroneous denial of a motion to disqualify a judge. *See* Answer Brief at 10 (AThis Court has held that once a basis for disqualification has been established, prohibition is both an appropriate and necessary remedy.@) (citing *Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978)); Answer Brief at 12 (AAt first glance,

to decades of case law from this Court and every other Florida appellate court. *See Dep't of Pub. Safety v. Koonce*, 3 So. 2d 331, 334 (Fla. 1941) ("It is settled law in this state that prohibition may be an appropriate remedy to prevent judicial action, *when the judge is disqualified*, as well as when the judge is without jurisdiction to act in the cause.") (emphasis added); *Mobil v. Trask*, 463 So. 2d 389, 390 (Fla. 1st DCA 1985) ("A petition for writ of prohibition is an appropriate vehicle to prevent judicial action when a judge or deputy commissioner has improperly denied a motion to disqualify."); *St. Pierre v. State*, 32 Fla. L. Weekly D879, D879 (Fla. 2d DCA April 4, 2007) ("Prohibition is the appropriate remedy for the erroneous denial of a motion to disqualify a judge."); *Hill v. Feder*, 564 So. 2d 609, 609 (Fla. 3d DCA 1990) ("Once a basis for disqualification has been established, prohibition is both an appropriate and necessary remedy."); *State v. Schack*, 617 So. 2d 832, 833 (Fla. 4th DCA 1993) ("We note first that prohibition is the proper avenue for relief in judicial disqualification cases."); *Mangina v. Cornelius*, 562 So. 2d 602, 602 (Fla. 5th DCA 1985) ("Where the trial judge refuses to disqualify himself, prohibition is the proper remedy . . . ."). The State has not cited to a single case

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use of the extraordinary writ of prohibition for its true common law purpose may appear to be an appropriate remedy in this circumstance where a party needs to 'prevent' the current presiding judge from continuing in a case."); Answer Brief at 13 ("While the Petitioners' assertion that because prohibition is an 'extraordinary writ,' then all petitions 'seeking to prevent a county court from taking further action in a case involves the circuit court's original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3)', is technically correct . . . .").

that has held that prohibition relating to the erroneous denial of a disqualification motion is not Atrue common law prohibition.@ To adopt the State=s position, the Court would need to recede from, overrule, and/or disapprove all of the cases cited above.

Contrary to the State=s contention, the Petitioners continue to assert that prohibition relating to the erroneous denial of a disqualification motion invokes a court=s original jurisdiction. In *Gieseke v. Grossman*, 418 So. 2d 1055, 1056 (Fla. 4th DCA 1982), the Fourth District stated that a petition for writ of prohibition relating to a trial judge=s denial of a motion for disqualification is a petition filed pursuant to the court=s Aoriginal jurisdiction@:

> Petitioner seeks a writ of prohibition directing respondent to disqualify himself as judge. Respondent denied petitioner=s motion for disqualification concluding that petitioner=s motion was legally insufficient. *This Court has jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(b)(3).*

(Emphasis added.)[5] Similarly, when a party files a petition for writ of prohibition in the circuit court seeking to prevent a county court from taking further action in a case, the petition invokes the circuit court=s original jurisdiction pursuant to Florida Rule of Appellate Procedure 9.030(c)(3). *See State ex rel. Rheinauer v. Malone*, 23 So. 575, 576 (Fla. 1898) (A[I]t is said, in speaking of writs of prohibition, that it is an original remedial writ.@). It follows that review of an order entered by the circuit court acting pursuant to its original jurisdiction is by direct appeal. *See Amendments to the Florida*

[5] Florida Rule of Appellate Procedure 9.030(b)(3) is entitled AOriginal Jurisdiction.@

Rules of Appellate Procedure, 685 So. 2d 773, 774 (Fla. 1996) (recognizing state constitutional right to appeal to the district courts final orders in circuit court proceedings).

The State argues that prohibition relating to the erroneous denial of a disqualification motion is a vehicle to Aobtain appellate review.@ Answer Brief at 20. The State then attempts to distinguish those cases which have clearly recognized that writs of prohibition are not appeals. *See* Answer Brief at 21-25. Despite the State=s argument, the Petitioners continue to assert that prohibition relating to the erroneous denial of a disqualification motion is not a Afull review@ of a case equivalent to an appeal. For example, in *State ex rel. Allen v. Board of Public Instruction of Broward County*, 214 So. 2d 7 (Fla. 4th DCA 1968), the Fourth District considered the appropriate vehicle to disqualify a board member of an administrative body (i.e., appeal or prohibition). The Fourth District explained that an appeal is not an adequate remedy when the decisionmaker denies a disqualification motion:

> It does not comport with reason and basic fairness, and certainly not with due process of law to permit board members to determine wholly subjectively their fitness to make quasi-judicial determinations. If we accept respondent=s position, a board member could freely admit to the worst possible degree of bias, yet decline to recuse himself, thereby sitting in judgment of relators. Relators= only remedy would be by appeal to the state board and then to seek judicial review. *But the due process guaranteed right to a fair and impartial tribunal is a present right, the denial of which would not be remedied by appeal*. For this reason it has long been recognized as settled law in this state that *prohibition is an appropriate remedy to prevent judicial action when the judge is disqualified* as well as

when the judge is without jurisdiction.

Allen, 214 So. 2d at 10 (emphasis added). As explained in *Allen*, an appeal is not an adequate vehicle to remedy the erroneous denial of a disqualification motion; the only appropriate remedy is prohibition.

The State relies upon this Court=s opinion in *Sheley v. Florida Parole Commission*, 720 So. 2d 216 (Fla. 1998), and argues that prohibition relating to the erroneous denial of a disqualification motion is analogous to mandamus review of a Parole Commission=s order. *See* Answer Brief at 17-21. The Petitioners continue to rely upon the arguments set forth in the Initial Brief as to why *Sheley* is limited to mandamus proceedings that are used to review discretionary decisions of an administrative agency such as the Florida Parole Commission. *See* Initial Brief at 16-21.

Accordingly, for all of the reasons set forth above and contained in the Initial Brief, the Petitioners request the Court to approve the decisions in *Burton* and *Pinfield* and hold that the denials of the petitions for writs of prohibition in this case are reviewable by appeal rather than certiorari. The Petitioners request the Court to reject the State=s novel suggestion that prohibition relating to the erroneous denial of a disqualification motion is Anot true common law prohibition.@ This approach is both unmanageable in practice (i.e., attempting to distinguish between those types of prohibition that are Atrue@ and those that are not) and contrary to existing case law. Rather than upsetting decades worth of law recognizing that prohibition is the proper avenue for relief in judicial disqualification cases,

the Petitioners submit that it is appropriate for this Court to simply address the conflict between the Second and Fifth Districts (*Burton* and *Pinfield*) and the Fourth District (*Frazee*) as to whether a circuit court=s order on a petition for writ of prohibition is reviewable by appeal or certiorari. The approach taken by the Second and Fifth Districts **B** that a circuit court=s order on a petition for writ of prohibition is reviewable by appeal **B** is the majority approach and the Petitioners respectfully request the Court to approve that approach in the instant case.

D. CONCLUSION.

The Petitioners respectfully request that the First District=s order below be quashed and that this case be remanded to the district court with directions that the case proceed as a direct appeal. All appropriate relief is respectfully requested.

E. CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true and correct copy of the foregoing instrument has been furnished to:

Assistant Attorney General Bryan Jordan
PL-01, The Capitol
Tallahassee, Florida 32399-1050

by U.S. mail delivery this 10th day of July, 2007.

Respectfully submitted,

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F. CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies pursuant to Florida Rule of Appellate Procedure 9.210(a)(2) that the Reply Brief complies with the type-font limitation.

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