IN THE SUPREME COURT OF FLORIDA

ANTHONY MUNGIN.,
Appellant,

vs. **Case Number SC17-815**

STATE OF FLORIDA,
Appellee.
_____/

APPEAL FROM THE CIRCUIT COURT
IN AND FOR THE FOURTH JUDICIAL CIRCUIT,
DUVAL COUNTY, STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

I. MR. MUNGIN'S RIGHTS TO DUE PROCESS AND NOTICE REQUIRED JUDGE MCCALLUM TO DISCLOSE THAT SHE HAD BEEN DESIGNATED TO TEMPORARILY PRESIDE OVER MR. MUNGIN'S CASE, THUS DEPRIVING HIM OF A REASONABLE OPPORTUNITY TO OBJECT TO HER APPOINTMENT, SEEK HER DISQUALIFICATION, OR OTHERWISE ESTABLISH HER BIAS AND PREJUDICE. JUDGE MCCALLUM ERRED IN DENYING MR. MUNGIN'S MOTION FOR REHEARING.

A. Appointment of Judge Linda McCallum to Mr. Mungin's Case.

The State does not dispute Mr. Mungin's assertion that he had never been made aware of the fact that there had been a judicial reassignment of his case much less that Judge McCallum had been surreptitiously[1] appointed by someone to handle his case. Rather, the State seeks to blame Mr. Mungin for this situation. But blame-shifting only detracts from, and does not resolve, the problem.

First, the State complains that Mr. Mungin "failed to follow the proper procedure" for seeking Judge McCallum's removal, namely that he did not file a motion to disqualify Judge McCallum within ten days of discovering her

[1]There was no order entered by any court disclosing the reassignment to Judge McCallum.

assignment to his case (AB at 5).[2] At the outset, Mr. Mungin submits that the State failed to raise this below in responding to his motion for rehearing and, as such, the State is barred from raising this ground on appeal. Procedural bars apply equally to the State as to the defense. See *Cannady v. State*, 620 So.2d 165, 170 (Fla. 1993) ("Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State"). Moreover, the lower court did not determine that Mr. Mungin should have–but failed to–file a motion to disqualify; rather, it rejected Mr. Mungin's due process argument on its merits:

> Finally, Defendant avers his due process rights were violated when the instant proceedings were reassigned to a judge who was a former prosecutor at the time Defendant was tried and convicted. Defendant makes speculative, cursory allegations of bias, but fails to allege any specific instances of prejudice or bias of this Court. Moreover, Defendant has not shown an objectively reasonable fear he did not receive a fair ruling. Thus, this claim is legally insufficient.

(4PCR-101). Indeed, the State ultimately concedes that the lower court's ruling addressed only the legal sufficiency of Mr. Mungin's allegations rather than the putative "untimeliness" of a non-existent motion to disqualify (AB at 12) ("the trial court ruled the motion was legally insufficient").

The State overlooks the fundamental problem associated with what happened here: Mr. Mungin's counsel was blindsided by the judicial appointment

[2]References to the Answer Brief shall be designated as "AB" followed by the pertinent page number.

and was put in a position where, due to the lack of notice, he was deprived of a reasonable opportunity to file a written motion to disqualify. Counsel received the order on Friday, March 3, 2017. In order to meet the ten day requirement, a motion to disqualify would have to have been filed by Monday, March 13, 2017. Two weekends fell during this time period leaving only 5 business days for Mr. Mungin's counsel to drop all his other work, investigate Judge McCallum's background, and, at his client's expense, secure last minute (*i.e.* expensive) travel to north Florida in order to visit with Mr. Mungin (assuming a legal visit could be arranged on short notice), and obtain a written oath or affidavit to accompany a motion to disqualify. All in a matter of days in order to comply with the rules. *See* Fla. R. Jud. Admin. (c)(1), (3). This situation put Mr. Mungin and his counsel in an untenable, impossible, and unreasonable position; thus, Mr. Mungin raised the issue of the impropriety of Judge McCallum's appointment at the earliest time he reasonably could—in his motion for rehearing. If the State chooses to maintain that Mr. Mungin somehow is to blame for not filing a motion to disqualify, then the State agrees that Mr. Mungin has been prejudiced by Judge McCallum's failure to notify him of the judicial reassignment.[3]

[3] The State's reliance on *Willacy v. State*, 696 So.2d 693 (Fla. 1997), is misplaced and factually inapposite to the circumstances presented in Mr. Mungin's case (AB at 6). In *Willacy*, the defendant moved to disqualify the judge assigned to preside over his capital resentencing proceeding. The judicial assignment to Willacy's case was made some three months prior to the filing of the disqualification motion.

While Mr. Mungin understands that the applicable rules of judicial administration set out a time frame within which to file a written motion to disqualify a judge, he submits that there must be some reasonable allowance for unique circumstances, such as those presented here. Generally speaking, grounds for judicial bias will arise during a court proceeding or as a result of something occurring during court proceedings, the existence of which the parties are properly notified (or are even present at). Under these circumstances, the triggering event is clear and the time within which to file a written motion to disqualify is evident. Here, Mr. Mungin was not informed of the judicial reassignment to Judge McCallum until after she denied his Rule 3.851 motion; and, to make matters worse, Mr. Mungin was not afforded the opportunity to be heard pursuant to Fla. R. Crim. P. 3.851 (f)(5)(B). Had a case management hearing been scheduled—as mandated by the rule—Mr. Mungin would, at the time of the hearing, have been on notice that Judge McCallum was presiding over his case and, at that time, could (and would) have followed the appropriate rule regarding the filing of a motion to disqualify. Had he not, the State's position would be more understandable. But this is not what happened here.

This Court upheld the lower court's determination that the motion was untimely, noting that the grounds for disqualification "were in existence since the first trial" and long known to Willacy and his counsel. *Id*. at 695. This is hardly the situation in Mr. Mungin's case, where he only found out about the judicial assignment when the new judge denied his Rule 3.851 motion.

Circumstances warranting the filing of a motion to disqualify a judge can arise in a myriad of settings, with the vast majority of situations easily guided by Fla. R. Jud. Admin. 2.330. But this Court has addressed cases presenting unique circumstances making it impossible for a party to technically comply with the requirements of a filing a written motion to disqualify, and it has made reasonable accommodations to satisfy basic notions of fairness. For example, in *Rogers v. State,* 630 So.2d 513 (Fla. 1993), this Court addressed a situation where the circumstances giving rise to judicial bias arose during an evidentiary hearing in a capital case, and the judge failed to give the defense an opportunity to file a written motion, instead ruling on an oral motion made during the heat of a contested argument about the judge's alleged bias. *Id*. at 514-15. This Court ordered a new proceeding to be conducted before a different judge, holding that a judge must give a party an opportunity to file a written motion to disqualify if grounds for such arise during a court proceeding. The Court held that the requirement that the motion be in writing could not be waived and, if need be, a court must cease the proceedings and give the party seeking disqualification a reasonable opportunity to prepare the appropriate written documents. *Id*. at 516.

In addressing the judicial disqualification issue in the instant case, Mr. Mungin respectfully submits that this Court should modify any precedent holding

that the ten day time period within which to seek judicial disqualification cannot be waived or forgiven under certain case-specific circumstances. At least in capital cases, where the stakes could not be higher, and the need for judicial impartiality more evident, slavish adherence to the ten day rule does not serve any purpose other than to potentially deny a capital defendant his or her right to seek judicial disqualification under circumstances that were outside of his or her control. Given that the right to an impartial tribunal is of such fundamental importance in the justice system, *see Marshall v. Jerrico, Inc*., 446 U.S. 238, 242 (1980); *Porter v. Singletary*, 49 F.3d 1483, 1487-88 (11th Cir. 1995), an accommodation must be made for cases where, as here, unique circumstances are present that call for forgiveness of the strict application of the ten day rule under Fla. R. Jud. Admin. 2.330.

Next, the State discusses what it perceives to be the legal insufficiency of "the motion to disqualify" filed by Mr. Mungin (AB at 7-8). But the State, in the previous pages of its brief, complained that Mr. Mungin did not file a motion to disqualify. The State's muddled position aside, it contends that Mr. Mungin did not allege that he had a well-founded fear that Judge McCallum could not be impartial or provide him with a fair hearing (AB at 7). This is false. His rehearing motion was grounded on his allegation that due process was violated. *See* 4PCR-

91 ("Mr. Mungin seeks rehearing of Judge McCallum's Order because her assignment, without notice to Mr. Mungin, violated due process"); 4PCR-93 ("A ruling in Mr. Mungin's case would impact the death sentences that Judge McCallum successfully sought and which have yet to be carried out"); 4PCR-95 ("[] what is at issue here is more than merely the appearance of impropriety. It is a violation of due process . . . ").

The State's unduly cramped reading of *Williams v. Pennsylvania*, 136 S.Ct. 1899 (2016), does not assist its position, nor does its misreading of the unpublished federal appeals court opinion in *Matiru v. Sessions*, 705 Fed. Appx. 476 (8th Cir. 2017). (AB at 9-10). The State's contention that *Williams* is limited to situations only where a judge had been personally involved in prosecuting the defendant before her is not borne out by the plain language of the decision; on its face, Williams's reach includes situations where a judge "would be influenced by an improper, if inadvertent, motive to validate and preserve the result obtained through the adversary process." *Williams*, 136 S.Ct. at 1907. This "motive to validate" can certainly arise due to the effect of a ruling on another defendant, as alleged in Mr. Mungin's case. What matters is the *potential* for a judge to be influenced by an improper motivation to validate her earlier work as a prosecutor. And simply because *Williams*'s holding was not deemed to require disqualification

of an immigration judge under the federal rules for judicial disqualification in *Matiru* does not mean that it does not encompass the situation presented in Mr. Mungin's case.[4]

B. The State's Attempt to Urge Overturning of *Huff v. State*.

In an inordinately lengthy footnote (using a compressed font) containing extensive legal argument,[5] the State's misunderstanding of–and contempt for–due process is on full display. For example, it argues that the only reason for a case management hearing is only "to determine which issues need additional factual development at an evidentiary hearing" and implies that oral advocacy by defense counsel in these cases (in either the circuit court or even in an appellate court) is largely irrelevant if not an outright waste of time (AB at 12-13 n.4). Nonsense. Indeed, the actual matter at issue in *Huff v. State*, 622 So.2d 982 (Fla. 1993), was

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[4]The State's reliance on *Duest v. Goldstein*, 654 So.2d 1004 (Fla. 4th DCA 1995), is mystifying. Mr. Mungin did not rely on *Duest*, nor is it remotely relevant. At issue in *Duest* was the disqualification of a judge who, as a prosecutor, personally was involved in the defendant's capital trial by "delivering documents" to the prosecutor and was a "supervisor of the division that prosecuted" Duest (AB at 12). The State sets up a strawman only to knock it down by arguing that Mr. Mungin did not allege that Judge McCallum "handled any documents" in this case. This attempt to imply that judicial disqualification is only warranted under such circumstances is contrary to *Williams* itself.

[5]Mr. Mungin makes this point to note the irony that the State evidently inserted extensive legal argument into a footnote using a compressed font to have its brief fit within the page limit set by the Court while at the same time complaining that Mr. Mungin's 3.851 motion was an abuse of process due to its length.

whether a defendant had a due process right to be heard on a Rule 3.850 motion before the court signed an order denying relief that had been submitted to the court by the State. *Huff*, 622 So.2d at 983. This Court held that due process did so demand, holding that a hearing on a Rule 3.850 motion was mandated to "allow the attorneys the opportunity to appear before the court" and to "hear legal argument relating to the motion." *Id*. While it is true that the *Huff* decision addressed an initial Rule 3.850 motion in a capital case, the rules of criminal procedure mandate a case management hearing *even on successive motions*. See Fla. R. Crim. P. 3.851 (f)(5)(B). "When a procedural error reaches the level of a due process violation, it becomes a matter of substance." *Huff*, 622 So.2d at 984.

The State is essentially asking the Court to overturn *Huff* simply because it disdains oral advocacy. It even marshals a law review article to support the notion that federal appeals courts conduct few oral arguments than before (AB at 13 n.4). It is unclear what this has to do with Mr. Mungin's appeal. But it is simply untrue that this Court sees no benefit in oral argument even in appeals of successive Rule 3.851 appeals or in warrant cases. In any event, the rules of appellate procedure do not mandate oral arguments, unlike the rules of criminal procedure, which *do* mandate case management hearings even in successor Rule 3.851 motions. And the availability of an oral presentation is not dependent on whether the party has

been allowed to submit a written motion or brief; nor is due process defined by the fact that a motion was filed regardless of the number of pages it contains (AB at 13). Indeed, the depth of the misunderstanding of due process is epitomized by its reference to "opposing counsel's" due process rights (AB at 13). It is not "opposing counsel" who has a due process right, it is his client.

III MR. MUNGIN'S DEATH SENTENCE IS RIDDLED WITH UNRELIABILITY AND STANDS IN VIOLATION OF THE EIGHTH AMENDMENT DEMAND FOR HEIGTENED RELIABILITY IN WHICH A DEATH SENTENCE IS IMPOSED.

The State contends that Mr. Mungin's reliance on *Johnson v. Mississippi*, 486 U.S. 578 (1988), is misplaced because it involved the vacation of a prior conviction that served as an aggravating circumstance (AB at 15). The State's myopic view of *Johnson* cannot overcome the explicit Eighth Amendment holding of *Johnson*. Id. at 584-85 ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a 'special need for reliability in the determination that death is the appropriate punishment in any capital case'") (citation omitted).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing pleading was filed on this Court's electronic filing portal, which will serve all counsel of record in this matter, on this 28th day of May, 2018.

/s/ Todd G. Scher
TODD G. SCHER

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Fla. R. App. P. 9.210 (a)(2).

/s/ Todd G. Scher
TODD G. SCHER