

DISTRICT COURT OF APPEAL OF  
FIRST DISTRICT, STATE OF FLORIDA

GEORGE W. BUSH;  
RICHARD CHENEY; and  
THE REPUBLICAN PARTY  
OF FLORIDA,

Petitioners,

DCA Case No.: 1D00-4717  
Lower Court Case No. 00-2816

v.

HARRY N. JACOBS and  
JOHN AND JANE DOES 1-NNN,

Respondents.

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**EMERGENCY PETITION FOR WRIT OF PROHIBITION**

Petitioners, George W. Bush, Richard Cheney, and The Republican Party of Florida, pursuant to Rule 9.100(e), Florida Rules of Appellate procedure, file this Emergency Petition for Writ of Prohibition, respectfully requesting that this Court prohibit the Honorable Nikki Ann Clark, Judge of the Second Judicial Circuit, from further participation in the case below. In support of their petition, Petitioners state as follows:

**INTRODUCTION**

Prohibition is necessary because Judge Clark erred in refusing to disqualify herself from this case. This unique and most extraordinary situation involving the closeness of the election of the President of the United States demands strict adherence to the Rules of Judicial Conduct. Where a judge's impartiality might reasonably be questioned, disqualification is required, regardless of the judge's actual conduct. Canon 3 E. The critical consideration is not whether the lawyers would question the judge's impartiality, or whether this Court would question the judge's impartiality, but instead, whether an ordinary litigant

would reasonably question the judge's impartiality. "A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial." Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983). If ever there were a situation which required the Appellate Courts to strictly adhere to the standards long enunciated in the opinions of the Courts of this state, that situation has arrived.

Petitioners reasonably fear that Judge Clark will not be impartial in the case below. The well-founded fear that Petitioners would not receive a fair trial is underscored by the extraordinary issues in this case which involve no less than the offices of the Presidency and Vice Presidency of the United States. Judge Clark's disqualification is necessary in order to avoid even the appearance of impropriety. The public must have the utmost confidence in the judicial process. That is why this Court should grant the Writ of Prohibition.

#### **STATEMENT OF THE FACTS AND OF THE CASE**

On November 29, 2000, Petitioners (Defendants below) filed a Suggestion of Disqualification of Trial Judge, a copy of which is attached hereto as Appendix A.

On the same day, November 29, 2000, Judge Clark entered an Order Denying Motion to Disqualify. A copy of the Order is attached hereto as Appendix B.

The Suggestion of Disqualification contained the required certificate of counsel, and attached an affidavit of Petitioners' representative Mr. Al Cardenas, Chairman of the Republican Party of Florida. The affidavit contained the facts and reasons for the affiant's belief that Petitioners would not receive a fair trial in the Court where the suit is pending on account of the bias of the Judge. This affidavit precisely met the requirements of Section 38.10, Florida Statutes (2000).

The Suggestion of Disqualification was timely filed. The case below was filed in Leon County Circuit Court on November 27, 2000, Petitioners' affidavit was executed on November 28, 2000, and the Suggestion of Disqualification was filed on November 29, 2000.

It is Petitioners' position that prohibition is necessary because Judge Clark erred in refusing to disqualify herself from the case below.

The facts supporting disqualification are specifically detailed in the affidavit attached to the Suggestion of Disqualification. Most specifically, the affiant has unequivocally stated under oath that it is his firm belief that Judge Clark will not provide a fair trial to Petitioners' Republican Party and its nominees for President and Vice President of the United States.

The affiant has further stated that the case below is a case of significant prominence and notoriety involving the election of the President and Vice President of the United States.

The basis of the suggestion of affiant's well-founded fear that Petitioners will not receive a fair trial before Judge Clark derives from the undisputed fact that Judge Clark within the past 90 days sought appointment to this Honorable Court from Petitioner George W. Bush's brother, Florida Governor Jeb Bush, and that the Florida Governor did not select Judge Clark for the position, a decision announced as recently as November 17, 2000. A complete recounting of all the facts is not necessary here as they are all contained in the affidavit in Appendix A.

## **ARGUMENT**

### **A. STANDARD OF REVIEW.**

Prohibition is the appropriate and necessary remedy for an order denying judicial disqualification. See Bundy v. Rudd, 366 So.2d 440 (Fla. 1978) (granting a writ of prohibition and ordering the judge to

disqualify himself). This Court requires prompt review of such cases. See Sybers v. State, 709 So.2d 128, 129 (Fla. 1st DCA 1998) (“Disqualification issues should be timely brought to the attention of the appellate Court.”).

The only issue for this Court’s determination is whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair or impartial trial. See Rogers v. State, 630 So.2d 513, 515-16 (Fla. 1993); Smith v. Santa Rosa Island Auth., 729 So.2d 944, 946 (Fla. 1st DCA 1998). In other words, if Petitioners demonstrate they have a well-grounded fear that judicial bias exists, this Court should grant this writ and disqualify Judge Clark. See Rogers, 630 So.2d at 515; Smith, 729 So.2d at 946. This Court should take the facts as true and view them from the Petitioners’ perspective. See Rogers, 630 So.2d at 515; Smith, 729 So.2d at 946-47 (“It is not a question of how the judge feels; it is a question of what feeling resides in the movant’s mind, and the basis of such a feeling.”).

In the recent case of Wal-Mart Stores, Inc. v. Carter, 25 Fla. L. Weekly D1778 (Fla. 1st DCA July 26, 2000), this Court noted that the traditional remedy for interlocutory review of an order denying judicial disqualification is prohibition.

**B. CANON 3 OF FLORIDA’S CODE OF JUDICIAL CONDUCT REQUIRES DISQUALIFICATION UNDER THESE CIRCUMSTANCES.**

Canon 3E(1) of the Code of Judicial Conduct states that

A judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned.

The Commentary to Canon 3E(1) sets out an example of circumstances under which disqualification would be required:

Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any manner in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

This provision compels disqualification here. If a party to a case has a reasonable belief that he or she cannot receive a fair trial on account of the bias of the judge, Section 38.10, Florida Statutes, compels the judge to proceed no further. The statute does not require the belief to be premised upon facts that are proven at trial. Instead, the judge must consider whether a party has stated a fear based on the facts alleged, not their truth or falsity. See Rogers v. State, 630 So.2d 513, 515 (Fla. 1993).

Judge Clark within the past 90 days sought and was denied appointment to this Honorable Court from Petitioner George W. Bush's brother, Florida Governor Jeb Bush. In such circumstances, Judge Clark's impartiality might reasonably be questioned.

As noted above, Canon 3 in Florida's Code of Judicial Conduct mandates that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might be questioned. . . ." Furthermore, because Defendants have a well-grounded fear that justice in this case may be overshadowed by the appearance of impropriety, Judge Clark's disqualification is necessary. Caleffe v. Vitale, 488 So.2d 627 (Fla. 4th DCA 1986).

Judge Clark need not agree with the facts on which Defendants' fear is based, because it is the reasonableness of affiant's belief, and not the judge's own perception of his or her ability to act fairly, that matters. Id. at 628. See also, Superkids Bargain Store, Inc. v. Breakstone, 565 So.2d 1332, 1335, 1342 (Fla. 1990). Again the proper consideration is not whether the lawyer would question a judge's

impartiality, it is whether an ordinary litigant would reasonably question the judge's impartiality. Id. at 1342.

The Order Denying Motion to Disqualify (Appendix B) was entered within forty (40) minutes of filing without a hearing or any further presentation by any of the parties. The only grounds stated for denial of the motion are "that the Motion to Disqualify is legally insufficient." The Suggestion of Disqualification fully complied with every single statutory and procedural requirement. There was no legal insufficiency. The lower Court's summary denial is without any foundation in the record below.

The Supreme Court adopted Canon 3E to avoid an appearance of bias in litigation. Because these circumstances will cast a shadow over Judge Clark's decision-making throughout this litigation, disqualification is required. See Canon 3E & Commentary, Fla. Code of Judicial Conduct; Op. 84/23, Fla. Sp. Ct. Comm. On Stds. Of Conduct Governing Judges (1984). See also In Re Murchison, 349 U.S. 133, 136, (1955) (holding that "justice must satisfy the appearance of justice"); Op. 97-14, Fla. Sp. Ct. Comm. On Stds. Of Conduct Governing Judges (1997); The Tower Group, Inc. v. Doral Enter. Joint Ventures, 760 So.2d 256 (Fla. 3d DCA 2000).

The only possible area where a judge might review a Suggestion of Disqualification is the reasonableness of the belief stated in the supporting affidavit. As noted above, a reviewing judge may not pass on the truthfulness of the facts upon which the belief is based. As provided in the Florida Rule of Judicial Administration 2.160(f), the order denying the motion states no other reason for denial other than "legal sufficiency" without any explanation. One must turn to case law to ascertain what "legal sufficiency" is.

The Florida Supreme Court has stated that:

The facts alleged in the motion need only show a well-grounded fear that the movant will not receive a fair trial at the hands of the judge. “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.” Livingston v. State, 441 So.2d 1083, 1086 (Fla. 1983). In order to decide whether the motion is legally sufficient, “[a] determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.” Id. at 1087. The legal sufficiency of the motion is purely a question of law. (Emphasis supplied).

Petitioners respectfully suggest that the reasonableness of affiant’s fear that Petitioners will not receive a fair trial in the case below is underscored by the extraordinary nature and national importance of the case below. The fraternal relationship of Petitioner candidate for the Presidency of the United States to the Governor of the State of Florida, who denied the judge below appointment to a judicial office she sought, underscores the well-founded fear of the affiant.

Plaintiffs here seek no less than an order which would purport to determine who will be the next President of the United States. Everyone concerned in this historic dispute, including the Court, the parties, and the public at large must have the utmost confidence that there is not even the appearance of perceived bias. Accordingly, Judge Clark’s disqualification is necessary.

### **C. DUE PROCESS REQUIRES DISQUALIFICATION**

Due process under the federal Constitution requires that Judge Clark be disqualified from deciding this case. “A fair trial in a fair tribunal is a basic requirement of due process.” In re Murchinson, 349 U.S. 133 (1955); see also Aetna Life Insur. Co. v. Lavoie, 475 U.S. 813, 831 (1986) (impartial tribunal is “fundamental” component of due process); Weiss v. United States, 510 U.S. 163, 178 (1994) (fair tribunal is “basic requirement” of due process); Bracy v. Gramley, 520 U.S. 899 (1997) (Fair tribunal is “floor”

established by Due Process Clause) (quoting Withrow v. Larkin, 421 U.S. 35, 46 (1975)). Moreover, a basic component of a fair tribunal is an impartial judge. See Weiss, 510 U.S. at 178. The constitutional requirement of impartiality prohibits not only actual bias, “event he probability of unfairness.” See Murchison, 349 U.S. at 136. Thus, “every procedure which would offer a possible temptation to the average man as a judge. . . . not to hold the balance nice, clear and true . . . denies . . . due process of law.” Id. (quoting Tumey v. Ohio, 273 U.S. 510, 532) (1927).

The Supreme Court has noted that, in assessing the fairness and impartiality of a tribunal, the Court must consider “circumstances and relationships.” It is clear that Judge Clark’s perceived adverse relationship with Governor Jeb Bush - the highest elected official of the Republican Party in Florida and the brother of Petitioner Bush, creates at least the strong appearance and possibility of unfairness, if not actual bias. Therefore, to avoid the appearance of impropriety, to preserve the integrity fo the judicial process, and to safeguard Defendants’ right to constitutional due process, Judge Clark must be recused from this case.

**D. DISQUALIFICATION WILL NOT DELAY THE EFFICIENT RESOLUTION OF THIS CASE.**

Requiring Judge Clark’s disqualification will not cause undue delay or unfairly prejudice any parties to this case.

To the contrary, Judge Clark has not made any substantive rulings on the merits. The parties have not even briefed any of the substantive issues currently pending before Judge Clark. There has been no sworn testimony. Therefore, any subsequent judge may assume responsibility for this case without undue delay. Petitioners have further certified that they will continue to scrupulously adhere to the discovery

schedule ordered by Judge Clark on November 28, 2000, and as the Court may further order (Appendix A at page 5 of the Suggestion of Disqualification).

**CONCLUSION**

For the foregoing reasons, Petitioners respectfully request that this Court grant the writ of prohibition, disqualify Judge Clark from presiding over the proceedings below, and direct that a new judge be assigned to this case.

Respectfully submitted,

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& COLE, P.A.

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished **Via Facsimile and United States Mail** this 30th day of November 2000, to all counsel of record listed below, as well as a copy to the Honorable Judge Nikki Ann Clark, 2nd Judicial Circuit, Leon County Courthouse, Tallahassee, Florida 32301.

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