IN THE DISTRICT COURT OF APPEAL

STATE OF FLORIDA

FIFTH DISTRICT

CHARLES LARKIN COWART,

Petitioner,

v. CASE NO.

STATE OF FLORIDA,

Respondent.

_____/

**PETITION FOR WRIT OF PROHIBITION**

Comes now the Petitioner, Charles Cowart, pursuant to Rule 9.030(b)(3), Florida Rules of Appellate Procedure, and files this petition for a writ of prohibition to be issued to the Honorable J. David Walsh, Judge of the Circuit Court for the Seventh Judicial Circuit. As grounds for this motion the Petitioner alleges:

**FACTS**

1. The petitioner is one of four defendants charged in pending case no. 2013-881-CFFA, in Flagler County, in a single seven-count Information. (Appendix A to this petition)

2. On March 12, 2014, Petitioner filed a motion to disqualify Judge Walsh from presiding over his trial and sentencing in that case, and over any further pretrial proceedings that affect him in that case. (Appendix B)

3. In a written order issued March 26, Judge Walsh denied the motion as insufficient on its face. (Appendix C)

4. The motion to disqualify set forth the facts which are set out immediately below in paragraphs 5 through 18.

5. The first two counts of the Information filed in case no. 2013-881-CFFA apply to defendant Charles Cowart, and charge him as follows:

> "COUNT I: Charles Larkin Cowart, on or about March 20, 2013, in the County of Flagler, and State of Florida, did unlawfully commit sexual battery by oral, anal, or vaginal penetration of or union with the sexual organ of [B.F.], a person 12 years of age or older, without consent and while [B.F.] was physically helpless to resist, and during the same criminal transaction or episode, more than one person committed an act of sexual battery on [B.F.] in violation of Florida Statute 794.011(4)(a) and Florida Statute 794.023(2). (LIFE FELONY)
>
> COUNT II: Charles Larkin Cowart, on or about March 20, 2013, in the County of Flagler, and State of Florida, without lawful authority did forcibly, secretly or by threat, confine, abduct, or imprison [B.F.], against her will, with the intent to commit or facilitate commission

of a felony, contrary to Florida Statute 787.01(1)(a)2. (1 DEGREE FELONY) (See Appendix A)

6. On Counts IV and VI, co-defendants Daniel Goggans and Kurt Benjamin are charged with a sexual battery, on the same victim, in language identical to that used on Count I. (See Appendix A)

7. On Counts V and VII, co-defendants Daniel Goggans and Kurt Benjamin are charged with the same kidnapping of the same victim, in language identical to that used on Count II. (See Appendix A)

8. On Count III, a third co-defendant, Franklin Goggans, is charged with false imprisonment in similarly general language, to wit:

> COUNT III: Franklin Cole Goggans on or about March 20, 2013, in the County of Flagler and State of Florida, without lawful authority did forcibly, by threat, or secretly confine, abduct, imprison or restrain [B.F.] against her will, contrary to Florida Statute 787.02(2). 3 DEGREE FELONY (See Appendix A)

9. The only difference in the allegations contained in Count III of the Information as it relates to Franklin Goggans, and Count II of the Information as it relates to Cowart is the additional general concluding allegation on Cowart of, "…with the intent to commit or facilitate commission of a felony…", the additional element to convert Cowart's allegation to one of Kidnapping, whereas Franklin Goggans' is False Imprisonment.

10. Each of the four co-defendants is represented by separate counsel. Each of the four co-defendants has requested, and has received, identical

discovery.

11. B.F., the victim named in all seven charges, has stated that she has no memory whatsoever of any of the charged offenses.

12.

Discovery provided by the State alleges that Franklin Goggans, Daniel Goggans, and Kurt Benjamin have all provided statements to police about the charges. Discovery provided by the State further alleges that defendant Charles Cowart has made statements to a person unaffiliated with law enforcement about the charges.

13. On February 25, 2014, counsel for co-defendant Franklin Goggans made a court appearance before Judge Walsh in this case, to argue a Motion for Statement of Particulars as to Count III. (Appendix D)

14.

Counsel for defendant Charles Cowart, Michael H. Lambert, was in the courtroom on an unrelated matter at that time.

15. Counsel for Franklin Goggans argued, in support of his motion, as follows:

> MR. PAPPAS: Your Honor, we're here on a Motion for Statement of Particulars to ask basically where this alleged crime took place, what time it took place, and the place that it happened. …All [Count III of this information] does is just lay out the statute…I think you're supposed to say… "to wit: by, for example, hiding

or stuffing her in a closet" or something. There's nothing in here to tell me where it happened, what time it happened. Also, these events – [it appears] through discovery – happened over a period of 12 to 24 hours…. I don't know where my client allegedly forced her, coerced her, confined her, abducted her against her will. I have no idea where it happened, what time it happened, the circumstances of where it happened, anything.

THE COURT: Okay. Well, Mr. Westbrook, it's over to you. What do you say?

STATE: …the discovery we provided pretty clearly describes the events of that night…there's statements in the reports in which Frank Goggans and others that were involved in this indicated that he was with [B.F.] and was the one who took [B.F.] basically to the truck that ultimately took her out to the west side of the county…. Those are the facts, that he participated in getting this person into a truck and transporting her…. [I]f the court wants us to write that more specifically in a statement of particulars, we'll be glad to do so. It's just not something we normally do until a court orders us to do so.

MR. PAPPAS: As he said, my client gave her a ride. It still doesn't show that he coerced her, forced her. I don't have anywhere in here that tells me how she was forcibly coerced against her will to get into a car for a ride…. Where was she? At a house? Two houses? The car? The bar? Where was she forced by my client to be, against her will?

THE COURT: I've got to say [Count III is] pretty generic, pretty bare-bones.

STATE: It is.

> THE COURT: I think on looking at the rule, it does state "reasonable doubts concerning the construction of the rule shall be resolved in favor of the defendant." I would then grant the motion, ask that the State provide a statement of particulars on the issues asked for… place, date, time, as best the State can respond. (Appendix D, pp. 3-6)

16.

Six days later, on March 3, 2014, defendant Charles Cowart, through his attorney Michael Lambert, called up his Motion for Statement of Particulars and Addendum to that Motion,[1] for hearing before Judge Walsh. The Motion and Addendum are attached as Appendix E to this motion; they seek particulars as to when, where and how the charged offenses are alleged to have taken place.

17. The State filed a Response to Mr. Cowart's Motion and Addendum on March 3. (Appendix F) In the response the State again relied on witness statements it had disclosed in discovery. (Appendix F at pp. 4-7)

18.

At the March 3 hearing, the parties argued their respective positions. (Appendix G at pp. 21-27) Defense counsel further asserted as follows:

> MR. LAMBERT: Judge, I don't know if the Court recalls, but I was here last week when the Court granted a motion for [statement of] particulars in Mr. Frank Goggans' case.

1 The original Motion and the Addendums are attached.

THE COURT: I think the State agreed to it.

STATE: That is correct, and we actually filed one today.

THE COURT: I think that was the basis for that, Mr. Lambert, they agreed to it.

MR. LAMBERT: My recollection is different, but the record will speak for itself. (Appendix G at 27)

19. Judge Walsh ruled as follows on defendant Charles Cowart's motion for particulars:

THE COURT: I have reviewed the State's response. I heard from counsel, reviewed the rule, which is 3.140 dealing with informations. The rule itself, under 3.140(d) "the charge," sub (1), states that each count of an indictment or information on which the defendant is to be tried shall allege the essential facts constituting the offense charged. In sub (3) of that paragraph, "time and place," "each count of an indictment or information on which the defendant is to be tried shall contain allegations stating as definitely as possible the time and place of the commission of the offense charged…." I find that the information itself as it applies to Mr. Cowart is sufficient to comply with the rule. I don't see any basis for a claim of prejudice or otherwise inability [sic] to defend, so I'll deny the motion for requiring the state to provide a statement of particulars as to Mr. Cowart.

(Appendix G pp. 29-30)

20. In granting Goggans' Motion for Statement of Particulars, Judge Walsh found that Count III of the Information was, "pretty generic, pretty bare-bones". A further reason the Court announced for granting

Goggans' Motion for Statement of Particulars was that, "… reasonable doubts concerning the construction of the rule shall be resolved in favor of the defendant." (Appendix A, pp. 6),

21. Six days later when denying Cowart's Motion for Statement of Particulars, Judge Walsh stated, "…the Information itself *as it applies to Mr. Cowart is sufficient* to comply with the rule. I don't see any basis for a claim of prejudice or otherwise inability [sic] to defend, so *I'll deny the motion* for requiring the State to provide a Statement of Particulars *to Mr. Cowart*. (Appendix G – pp. 29-30)

22. Petitioner's Motion to Disqualify (Appendix B) asserted that the foregoing facts are placed in perspective by the following additional facts:

a) In July, 2010, attorney Lambert learned from the Honorable Joseph G. Will, Circuit Judge, that Judge Walsh told Judge Will that he (Judge Walsh) blamed Lambert for adverse media coverage of comments Judge Walsh made regarding reasons for low minority participation in jury service. Judge Walsh added at the time he was talking with Judge Will that he "hates that (expletive deleted) Lambert, both as a lawyer and as a person." Attorney Lambert filed a motion to disqualify Judge Walsh from

a then-pending felony case in Volusia County when he learned those facts from Judge Will. In that motion he omitted the source of the comments. The motion was denied, and this court denied relief on review.[2]

b) In February, 2014, in a Flagler County case unrelated to this one,[3] attorney Lambert appeared before Judge Walsh at a previously-set hearing on a motion which the judge had actually granted before the hearing date. (See Appendix G to this motion at pp. 3-4) Attorney Lambert told Judge Walsh on the record the motion had been resolved, but misunderstanding persisted. Later in that hearing, the court abruptly accused Attorney Lambert of finding the proceedings humorous. (Appendix H at 5; Appendix I at 2:08) Appendix I consists of a CD of the Sbarbaro hearing, attached here because the tone of the proceedings cannot be discerned from the transcript.

23. On March 26, 2014, Judge Walsh denied Petitioner's motion for disqualification, deeming it "legally insufficient" and citing Asay v. State, 769 So. 2d 974 (Fla. 2000); Gilliam v. State, 582 So. 2d 610 (Fla. 1991); and T/F Systems, Inc. v. Malt, 814 So. 2d 511 (Fla. 4th DCA 2002).

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2 Wheeler v. State, Case No. 5D10-2247.

3 Joseph Sbarbaro v. State, no. 2011-CF-230.

## JURISDICTION

This court has jurisdiction to issue writs of prohibition to the Circuit Courts. Article V, Section 4(b)(3), Fla. Const.; Rule 9.030(b)(3), Florida Rules of Appellate Procedure. While prohibition ordinarily lies only when the trial court lacks jurisdiction to proceed, it is also the correct avenue for immediate review of an order denying disqualification. Sutton v. State, 975 So. 2d 1073 (Fla. 2008); Zimmerman v. State, 114 So. 3rd 1011 (Fla. 5th DCA 2012). Once a legally sufficient motion to disqualify a Circuit Judge is filed and denied, prohibition is both an appropriate and necessary remedy. State v. Ramirez, 100 So. 3rd 270 (Fla. 3rd DCA 2012), *citing* Brown v. Rowe, 96 Fla. 289, 118 So. 9 (1928).

## ARGUMENT

A motion for disqualification is legally sufficient where the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial. State v. Ramirez, 100 So. 3rd 270 (Fla. 3rd DCA 2012), *citing* Livingston v. State, 441 So.2d 1083, 1087 (Fla. 1983). A judge may be disqualified

due to prejudice towards an attorney, where the prejudice is of such degree that it adversely affects the client. Livingston, 441 So. 2d at 1087. The Petitioner in this case reasonably fears that Judge Walsh's prejudice toward his attorney is such as to affect the conduct of his felony case. The allegations in his motion to disqualify were, objectively viewed, sufficient to warrant granting the motion, and this court should issue its writ directing the judge to disqualify himself from further action affecting the Petitioner's felony charges.

The question whether a motion to disqualify was timely filed involves a factual determination, and is reviewed for the presence of supporting competent, substantial evidence. Doorbal v. State, 983 So. 2d 464, 475 (Fla. 2008). The Asay and Malt cases cited by the judge stand for the rule that a motion for disqualification will be denied where it is filed more than ten days from the conduct that resulted in filing of the motion. See also Rule 3.220(e), Florida Rules of Judicial Administration. Asay, however, clarifies that "there might be circumstances where a motion to recuse based partially on comments made in a prior proceeding could be timely filed in a subsequent proceeding. For example, a motion to disqualify may be legally sufficient where a defendant learns of [older] facts…that when coupled with the trial judge's statements during the [current proceedings], gives rise to a 'well-grounded fear on the part of the movant that he will not receive a fair hearing.'" Asay v. State, 769 So. 2d 974, 980 (Fla. 2000).

The appendix shows that Petitioner's motion for disqualification was filed March 12, 2014, nine days after the judge's March 3 order denying his motion for statement of particulars, despite its great similarity to a motion previously granted by Judge Walsh in the same case regarding a co-defendant's charges. Receipt of that March 3 order, coupled with Petitioner's knowledge of the remaining allegations set out in the motion, gave rise to Petitioner's well-grounded fear of bias. See Grandview Palace Condominium Ass'n, Inc. v. City of North Bay Village, 974 So. 2d 1170, 1171 (Fla. 3rd DCA 2008) (argument that disqualification motion was untimely failed to take into account the court's recent rulings). Accordingly, the appendix contains competent, substantial evidence showing that the motion was timely filed. Asay; Grandview Palace.

The substantive allegations in a motion to disqualify are reviewed *de novo* in a prohibition proceeding. Zimmerman, supra; Zuchel v. State, 824 So. 2d 1044 (Fla. 4th DCA 2002). Judge Walsh cited Gilliam v. State, 582 So. 2d 610 (Fla. 1991), in denying Petitioner's motion for disqualification; that case stands for the rule that disqualification will be denied where the movant recites that he has "merely receiv[ed] adverse rulings" from the judge in question. Petitioner has not "merely" made such an allegation; his complaint is that he received an adverse ruling *while his co-defendant, six days earlier, obtained the same relief Petitioner sought* on indistinguishable grounds. While adverse rulings against a party *alone*

do not establish prejudice on the part of a judge, a showing that those rulings were motivated by improper considerations may do so. See Paul v. Nichols, 627 So. 2d 122, 123 (Fla. 5th DCA 1993). Where a party alleges that a judge has ruled against him without giving his attorney an opportunity to introduce evidence or argue the law, the allegations are sufficient to support relief. Keating v. State, 110 So. 3rd 538, 540 (Fla. 4th DCA 2013). The same is true where a party alleges that a trial judge has outright refused to allow his attorney to cross-examine a key witness at a bond hearing. Zuchel v. State, supra, 824 So. 2d 1044 (Fla. 4th DCA 2002). The situations in Keating and Zuchel are analogous to the situation at bar, where the court issued disparate rulings on virtually identical motions filed by identically situated litigants six days apart. Here, further, the overtly acrimonious history between counsel and judge amply corroborates the appearance of bias.

Every litigant is entitled to nothing less than the cold neutrality of an impartial judge. State ex rel. Davis v. Parks, 194 So. 613, 615 (Fla. 1939). "It is not enough for a judge to assert that he is free from prejudice. His mien and the reflex from his court room speak louder than he can declaim on this point. If he fails through these avenues to reflect justice and square dealing, his usefulness is destroyed. The attitude of the judge and the atmosphere of the court room should indeed be such that no matter what charge is lodged against a litigant or what cause he is called on to litigate, he can approach the bar with every assurance that he is in

a forum where the judicial ermine is everything that it typifies, purity and justice. The guaranty of a fair and impartial trial can mean nothing less than this." Id.

WHEREFORE Petitioner moves this court to issue its writ of prohibition, precluding Judge Walsh from presiding further in his pending felony case.

Respectfully submitted,

*/s/ Michael H. Lambert*

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COUNSEL FOR PETITIONER

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by **electronic** delivery, to Pamela Jo Bondi, Attorney General, crimappdab@myfloridalegal.com, and hand delivery to Honorable J. David Walsh, Circuit Judge, 1769 East Moody Boulevard, Bunnell, Florida 32110, on this 3rd day of April, A.D., 2014.

*/s/ Michael H. Lambert*

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MICHAEL H. LAMBERT, ESQ.

## CERTIFICATE OF COMPLIANCE

I certify that this brief complies with Rule 9.210(a)(2), Florida Rules of Appellate Procedure, in that it is set in Times New Roman 14-point font.

*/s/ Michael H. Lambert*

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