APPEALS COURT GRANTS ZIMMERMAN JUDGE DISQUALIFICATION MOTION

I have long maintained the George Zimmerman criminal case ongoing in Florida, and the nature of Florida law and procedure, is far different than most in the media and blogosphere understand. The initial investigation was not particularly “botched” at all, the actual known facts and statements do not indicate particular racial animus on Zimmerman’s part, the known facts and statements relating to the actual physical “confrontation” are far different than generally painted and arguably do indicate Martin was the aggressor, and Florida law is rather, shall we say, unique in many regards.

One of the areas I have delved into, although not here, is the disqualification motion made by Zimmerman defense attorney Mark O’Mara. The motion was aimed at Judge Lester and, go figure, was denied by him. But O’Mara appealed via a Writ of Prohibition and, what do you know, the Florida Court of Appeals For The Fifth District just granted the writ and ordered Judge Lester to recuse himself:

> George Zimmerman petitions for issuance of a writ of prohibition. This is the proper mechanism for challenging the denial of a motion to disqualify a trial judge. See, e.g., Lusskin v. State, 717 So. 2d 1076, 1077 (Fla. 4th DCA 1998). Reviewing the matter de novo, see R.M.C. v. D.C., 77 So. 3d 234, 236 (Fla. 1st DCA 2012), we grant the petition.
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> Florida Rule of Judicial Administration 2.330 requires a trial judge to grant a motion to disqualify without determining

> the accuracy of the allegations in the motion, so long as the motion is "legally sufficient." R.M.C., 77 So. 3d at 236. "A motion is legally sufficient if it alleges facts that would create in a reasonably prudent person a well-founded fear of not receiving a fair and impartial trial." Id. (citing MacKenzie v. Super Kids Bargain Store, Inc., 565 So. 2d 1332 (Fla. 1990)). Although many of the allegations in Zimmerman's motion, standing alone, do not meet the legal sufficiency test,1 and while this is admittedly a close call, upon careful review we find that the allegations, taken together, meet the threshold test of legal sufficiency. Accordingly, we direct the trial judge to enter an order of disqualification which requests the chief circuit judge to appoint a successor judge.

It was not unanimous, but was, rather, a 2-1 decision. The State of Florida, now operating for appellate purposes, through AG Pam Biondi's office, may well file a petition for review with the Florida Supreme Court, we shall see.

Here is what I said in another forum on July 16th, just after the original motion to disqualify was lodged:

> It is a Florida case and, yes, their law is a bit different. But what Lester has done would be outrageous in any jurisdiction. Denial of a defendant's due process right to be present for a non-emergency bond revocation is a denial of due process anywhere, even in New York I would hope.
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> That said, in most jurisdictions, including here [where I practice], I think this motion to disqualify would not stand a great chance of success, although I certainly would file it for tactical purposes and to make a record

> of objection to the court's conduct.
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> In Florida, however, there is a very good chance the motion is granted. Indeed, there is an argument it MUST be granted.
> Fla. R. Jud. Admin. 2.330 (2012):
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> > (f) Determination—Initial Motion. —The judge against whom aninitial motion to disqualify under subdivision (d)(1) is directed shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting disqualification and proceed no further in the action.
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> That is exactly the subsection O'Mara filed under and, although there was a previous disqualification of a judge in this case, it was under a different subsection. The burden in FL, believe it or not, is whether or not the defendant — Zimmerman himself — believes the judge will not be fair and impartial. That sure as hell is not the standard here [where I practice], but it is there, and it is very easily made in Zimmerman's case due to the gratuitous editorializing done by Judge Lester. If Lester is so impertinent as to refuse the motion, I think it would be appealed and reversed.

I have delved rather deeply into the Zimmerman fact set and, as I said above, it really is quite a bit different than commonly portrayed and understood. I have had access to all of the discovery, whether police reports, witness statements, recordings or copies of physical

evidence in the case. There is a LOT of evidence and, frankly, I think very few people have really looked at most of it as opposed to reading ill informed news and blog accounts. I have had the privilege of doing this thanks to my friend, and Marcy's, Jeralyn Merritt. I have only engaged with Jeralyn personally on issues for the last few years, but I have known of her, and seen her at NACDL meetings, for at least 20 years; she is a very good criminal lawyer. Jeralyn has spent the hard cash to acquire every bit of the disclosure in this case, and it is not cheap, and she has done some incredible analysis on the case from the outset.

Here is what Jeralyn had to say on August 24th, just after the state filed it's appellate response brief, about the recusal motion and appeal:

> As I wrote here:
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> > Judge Lester impugned George Zimmerman's character, saying he "flouted the system." He said he exhibited disrespect for the judicial process. He said he was a manipulator. He doesn't think Zimmerman is credible. He has suggested there is probable cause for the state to charge him with a crime for misrepresentations in his bail application. He is holding the threat of contempt over Zimmerman's head. The state presented no evidence other than a flimsy affidavit that failed to include information it had contradicting its theory of guilt, and he found the evidence against Zimmerman "strong." In setting bail at a million dollars, he didn't even acknowledge the strength of the defense evidence presented and admitted at the hearing. He even

> > gratuitously threw in he thought Zimmerman might be preparing to flee.
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> > The question is whether a reasonable person in Zimmerman's situation – a defendant in his court – would fear the judge is biased as a result of his comments and rulings.
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> I also don't think much of the state's argument that this is O'Mara's second motion to recuse a judge based on impartiality. The motion O'Mara filed in April was based on section (d)(2) of the rule (affinity of judge to an interested person) not the impartiality section (d)(1). (The rule is here.) Although O'Mara mentions impartiality in the first motion, he cites a case law for his statement, not the rule, and it seems obvious to me the first motion is filed only under section (d)(2).

That is good work, and precisely what I would have said had I written a full on blog post on this topic on that date.

Now, again, maybe there will be a petition for review and the Florida Supreme Court reverses the Court of Appeals. But, either way, let it stop being said, by people that are not up to speed, that the disqualification motion was idiotic or ill taken. Win, lose or draw, it was a necessary and tactically smart move by Mark O'Mara to remove either Judge Lester completely or, at a minimum, some of his out of control hubris.

UPDATE: There will be no appeal (technically a petition for review) per Pam Biondi's Florida Attorney General's Office according to the Orlando Sentinel. Case looks to likely be assigned to Judge Debra Nelson, who has a reputation for being tough. So, Zimmerman may

not have any net gain in getting a judge change; still, tactically, it was the right play.