IN THE CIRCUIT COURT FOR THE SIXTH JUDICIAL CIRCUIT
IN AND FOR PINELLAS COUNTY, FLORIDA

STATE OF FLORIDA	:	Case No. CRC98-20377CFANO-S
	:	
v.	:	
	:	
CHURCH OF SCIENTOLOGY FLAG	:	
SERVICE ORGANIZATION, INC.	:	
SPN: 01980179	:	

Memorandum In Response to Defendant's
Motion to Disqualify Presiding Judge

Comes now, BERNIE McCABE, State Attorney for the Sixth Judicial Circuit of Florida, by and through his undersigned Assistant State Attorney, and hereby files this his Memorandum in Response to Defendant's Motion to Disqualify Presiding Judge, and as grounds therefore would state:

1. The State does not agree that the Rules of Judicial Administration require a trial judge to recuse himself merely because a party alleges a "fear" that they will not receive a fair trial. Rather the moving party must establish that such a fear is reasonable and well grounded based upon facts that are sufficiently alleged in a sworn motion. *Dragovich v. State* 492 So. 2d 350 (Fla. 1986). *Correll v. State* 698 So. 2d 522 (Fla. 1997).

2. While the nature of the allegations of the motion may invite response or correction by the Court, judicial inquiry into the truth or falsity of the Motion's contents or an attempt to defend against its allegations, will in itself invite recusal. The Court should consider and rule upon the legal sufficiency of the Motion without further comment. *e.g. Townshend v. State* 564

So. 2d 594 (Fla. 2d DCA 1990). *State ex rel. Allen v. Testa* 414 So. 2d 38 (Fla. 3d DCA 1982). *Bundy v. Rudd,* 366 So. 2d 440 (Fla. 1978).

3. The State would note that the Rule 2.160 requires that the rule be made within a reasonable time not to exceed 10 days of the facts underlying the motion and it should be *promptly* presented to the court for an *immediate* ruling. The state notes that no issue has previously been raised concerning the reassignment of the case to Judge Downey on February 22, that defense counsel filed and set a Motion for Protective Order before Judge Downey for today's date , that the defense initiated contact with Judge Downey about matters relating to the case,that the defense agreed to an emergency hearing before Judge Downey on its "Notice to Withdraw Notice of Discovery" and having procured a favorable ruling submitted an order to Judge Downey on that issue on Monday, February 28th. However, the defense now objects to the same Judge's reconsideration of that ruling, claiming in an "affidavit" which contains no jurat as required by 117.045(13)(a) that the "information" was learned within the past week. Such a Motion and affidavit are not in compliance with *R. Jud. Admin.* 2.160. Moreover, since the affidavit itself is undated the time within which the facts were learned cannot be fixed.

4. The instant motion is legally insufficient in that the alleged grounds do not justify the requested relief, and do not demonstrate a personal bias on the part of the trial judge. *Dragovich, supra* at 353. Moreover many of the supposed "facts" underlying the alleged fear are either innuendo, speculation, legal conclusions or so vague, unsupported and undocumented as to make the requirement of the oath meaningless. Mere subjective fears are not "reasonably sufficient" to justify a "well-founded fear" of prejudice, *Fisher v. Knuck*, 497 So.2d 240 at 242(Fla. 1986), and mere conclusions that the judge may be biased, unsupported by any factual allegation, do not suffice. *Kennan v. Watson*, 525 So.2d 476 (Fla. 5th DCA 1988).

5.The Court may consider factually supported hearsay such as that in *Barnett v. Barnett* 727 So. 2d 311,312 (Fla. 2d DCA 1999). In that case, the affiant alleged being told by her named attorney of a statement by the trial judge. The attorney had personal knowledge of the making of the statement. *Barnett* does not suggest that unpredicated hearsay must be considered probative when the source is unidentified and the basis of the sources knowledge is undisclosed. To

sanction such a practice would raise unsubstantiated rumor to the equivalent of evidence. Illustrative of such issues is the sworn claim that the affiant has "personal knowledge" of matters concerning a former law partner occurring years before she lived in Clearwater. Similarly, the "affidavit" alleges that Story "understand(s)" from her familiarity with past litigation that in April of 1981 (again a date before the affiant was in Clearwater) Brandt Downey "communicated" with attorney Michael Flynn (who the Church officials apparently do not like). The communication is not sufficiently documented, and the content of the communication is clearly unknown. Similarly, the affiant claims to have "personal knowledge" of facts occurring in the 1970's and 1980's but also swears that she just learned of these facts within the past week.

6. The fact that former law partners represented clients with claims against "Scientology" years after the dissolution of the partnership and sixteen years before the current prosectuion does not establish innappropriate personal bias against the corporation that is charged in the instant criminal action and is clearly irrelevant to establishing bias on the part of this Court.

7. Even if it were sufficiently alleged that Judge Downey supported Mental Health causes it is ludicrous to suggest that because Scientologists disagree with his beliefs he must be recused from sitting on a case in which they are involved. The state would suggest that other than those involved in Scientology most people in the civilized world recognize psychiatry and psychology as legitimate professional disciplines. This includes the legislature who provides for the licensing and regulation of those professions and the Courts who are required to acknowledge them as experts in their appropriate fields. Ms. Story is clearly incompetent to attest to the legal basis or motivation behind the current prosecution. Moreover, her vague and conclusory allegations are unsupported by the few sections of the pleadings that have been quoted. Were Ms. Story required to definitively allege the state's position as contained in a one hundred page pleading (to which the defense does not refer) her accusations could not be substantiated. In order for the oath to be meaningful, the pleading must descend to particulars and the allegations as to the issues in the case must be substantiated by something more objective than the biased characterizations of a lay witness.

Wherefore the State respectfully requests that the defense Motion be denied as legally insufficient.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Morris "Sandy" Weinberg, Esq., Zuckerman Spaeder Taylor & Evans, P.A., 401 E. Jackson Street, Suite 2525, Tampa, FL 33602, by HAND this 3d day of March, 2000.

BERNIE McCABE, State Attorney
Sixth Judicial Circuit of Florida

by: _____
Douglas E. Crow
Executive Assistant State Attorney

by: _____
William H. Burgess, III
Assistant State Attorney