No.

IN THE

SUPREME COURT OF THE UNITED STATES

KEVIN KOELEMIJ,
Petitioner,
v.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent.

On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL FOR THE PETITIONER

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In the
United States Court of Appeals
For the Eleventh Circuit

No. 24-13381

KEVIN J. KOELEMIJ,

Petitioner-Appellant,

versus

SECRETARY DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Flroida
D.C. Docket No. 4:21-cv-00373-AW-ZCB

ORDER:

[Page 2:]

Kevin Koelemij, a Florida prisoner, filed a

counseled amended 28 U.S.C. § 2254 petition, asserting, as relevant, that the state trial court erred when it denied his motions for a new trial and to disqualify the trial judge, based on comments that the judge made when counsel asked Mr. Koelemij to stand up at trial during the testimony of one witness (Ground One). The district court denied Mr. Koelemij's § 2254 petition, and he appealed and now moves for a certificate of appealability ("COA") on Ground One.

In order to obtain a COA, a petitioner must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). For claims denied on substantive grounds, the petitioner must show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" or that the issues "deserve encouragement to proceed further." *Slack* v. *McDaniel,*

529 U.S. 473, 484 (2000) (quotation marks omitted).

Here, reasonable jurists would not debate the district court's denial of Ground One. *See id.* The district court properly concluded that Mr. Koelemij did not explain how the First District Court of Appeal's ("First DCA") findings were unreasonable or contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(l), (2). As to his argument that his due process rights were violated by the state trial court's comments, the district court properly found that the First DCA reasonably found that the admonishment was brief, and even if the judge seemed stern or impatient, that did not establish a valid ground for recusal, even under

[Page 3:]

state law. *See Birotte* v. *State,* 795 So. 2d 112, 113 (Fla.

Dist. Ct. App. 2001) ("[A] judge's expression of dissatisfaction with counsel's ... behavior does not give rise to a reasonable fear of bias or prejudice").

Further, the First DCA reasonably explained that, because Mr. Koelemij's counsel stated on record at trial that the trial court's comments did not prejudice Mr. Koelemij, and the court gave a curative instruction that it did not prefer one verdict over another, Mr. Koelemij did not suffer any bias or prejudice, such to establish fundamental unfairness at trial to entitle him to federal habeas relief. Thus, the First DCA properly rejected Mr. Koelemij's argument that the state trial court erred when it denied his motions for a new trial and to disqualify the judge.

Accordingly, Mr. Koelemij's motion for a COA is DENIED.

[signature of Judge Jill A. Pryor]
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KEVIN J. KOELEMIJ,

Petitioner,

v. Case No. 4:21-cv-373-AW-ZCB

SECRETARY, DEP'T OF
CORRECTIONS,

Respondent.

_____/

JUDGMENT

The § 2254 petition is denied.

JESSICA J. LYUBLANOVITS
CLERK OF COURT

September 16, 2024
Date

s/ KELLI MALU
Deputy Clerk: Kelli Malu

Excerpt of September 16, 2024,
Order Denying § 2254 Petition
Pages 1 & 6[1]

IN THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KEVIN J. KOELEMIJ,

Petitioner,

v. Case No. 4:21-cv-373-AW-ZCB

SECRETARY, DEP'T OF
CORRECTIONS,

Respondent.

_____/

ORDER DENYING 2254 PETITION

Having carefully considered the matter de novo,

I now adopt the report and recommendation (ECF No.

[1] The remaining pages of the District Court's order address claim 2 of the Petitioner's 2254 petition, which is not relevant to the instance petition.

27) and incorporate it into this order. The objections (ECF No. 34) are overruled. The clerk will enter a judgment that says, "The § 2254 petition is denied." And because there has been no substantial showing of the denial of any constitutional right, a certificate of appealability is denied.

. . . .

The clerk will close the file.

SO ORDERED on September 16, 2024.

s/ *Allen Winsor*
United States District Judge

Excerpt of June 26, 2024, Report and Recommendation,
Pages 12-20

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION

KEVIN J. KOELEMIJ,

Petitioner,

vs. Case No.: 4:21cv373/AW/ZCB

SECRETARY FLORIDA DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

REPORT AND RECOMMENDATION

[Page 12:]

A. Ground 1: The state trial court erred by denying Petitioner Koelemij's motion for new trial and motion to disqualify.

In Ground 1, Petitioner claims the trial court violated his right to a fair trial and sentencing by rebuking Petitioner and his attorney in front

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of the jury and then refusing to recuse from the case. (Doc. 4 at 6-13; Doc. 21 at 3-5). Petitioner raised these arguments before the trial court in a motion for new trial, as well as a motion to disqualify. (Doc. 8-3 at 75, 85). The trial court denied both motions. (Doc. 8-3 at 89, 90).

The basis for those motions was an exchange the trial judge had with Petitioner and his attorney during the testimony of the victim, T.S. When the prosecution asked T.S. to identify the perpetrator of the offense, Petitioner started to rise from his seat without warning or being instructed to do so. Upon seeing Petitioner start to stand, the trial judge ordered him to "sit down." (Doc. 8-4 at 54). Petitioner's counsel then informed the judge that he had told Petitioner to stand up. That led to the following exchange between the

judge and Petitioner's counsel:

> Judge: "Okay. Well, I'm telling—I'm ordering him—
>
> Counsel: "I understand. I just didn't want the Court to—
>
> Judge: "Okay. I don't need to hear anything from you."
>
> Counsel: "Right."

(*Id.*). Later in the trial when the jury was on a break, Petitioner's counsel objected to the judge admonishing him and Petitioner in the presence of

[Page 14:]

the jury. (*Id.* at 92). Petitioner's counsel said the judge "yell[ed]" at him. (*Id.*). Although Petitioner's counsel was unhappy about the admonishment in front of the jury, he admitted that "I don't think it's affected the outcome of this trial." (*Id.* at 93). For her part, the

judge denied yelling. The judge explained that she was surprised to see Petitioner starting to stand during the testimony, so she took action to maintain control of the trial. (*Id.*).

In his appeal to the First DCA, Petitioner argued the trial court should have granted his motion for new trial and motion disqualify based on the admonishment. The First DCA rejected those arguments and affirmed in a written opinion. (Doc. 8-10 at 2-11). According to the First DCA, the trial court's admonishment of Petitioner and his counsel "was in accord with its duty to maintain order in the courtroom." (*Id.* at 6). And the First DCA explained that "the Court's admonishment did not prejudice" Petitioner. (*Id.* at 7). The First DCA further explained that "the trial court properly denied [Petitioner's] motion for disqualification as legally insufficient

because the court's reprimand did not give rise to a reasonable belief that the trial court was biased." (*Id.* at 10).

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In his § 2254 petition, Petitioner takes issue with the rejection of his arguments by the state courts. Because the arguments were adjudicated on the merits, Petitioner cannot obtain habeas relief unless he satisfies the standard in § 2254(d). Thus, he must show the state court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" under § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" under § 2254(d)(2). *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1309 (11th Cir. 2015) (quoting 28

U.S.C. § 2254(d)).

Petitioner has not explained how the state court's factual findings were unreasonable. Thus, he is not entitled to relief under § 2254(d)(2). The Court will now turn to § 2254(d)(1), which requires Petitioner to show that the state courts rendered a decision that was contrary to, or involved an unreasonable application of, clearly established federal law. To meet this standard, Petitioner must show that the state court's application of federal law was "so obviously wrong that its error lies beyond any

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possibility for fairminded disagreement." *Shinn*, 592 U.S. at 118 (cleaned up).

Petitioner claims that the state courts rendered a decision that was contrary to, or involved an unreasonable application of, his clearly established

federal right to a fair trial and sentencing by admonishing him and then failing to recuse upon request. There is no merit to Petitioner's claims.

The Due Process Clause of the Fourteenth Amendment "clearly requires a fair trial in a fair tribunal." *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (cleaned up). Encompassed within that right is the guarantee of a trial conducted by an impartial judge. *Id.* A judge's comments may violate that right if the comments "demonstrate such pervasive bias and unfairness that they prejudice one of the parties in the case." *United States v. Verbitskaya*, 406 F.3d 1324, 1337 (11th Cir. 2005). Put another way, "a clear effect on the jury is required to reverse for comment by the trial judge." *United States v. Morales*, 868 F.2d 1562, 1576 (11th Cir. 1989). A trial judge is "not a mere moderator or observer, but is responsible for the tone

and tempo of the proceedings, [and] may

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comment on the evidence and may exercise his discretion to curtail pursuit of irrelevant matters." *United States v. Butera*, 677 F.2d 1376, 1382 (11th Cir. 1982). "An occasional lapse of patience [by the judge] is insufficient to overturn [a defendant's] convictions." *United States v. Delorme*, 432 F. App'x 886, 889 (11th Cir. 2011).

Here, the First DCA held that the trial judge's admonishment of Petitioner and his counsel "was in accord with its duty to maintain order in the courtroom" and "did not prejudice" Petitioner. (Doc. 8-10). Having reviewed the record, the Court finds that decision was neither contrary to, nor involved an unreasonable application of, clearly established federal law. The trial judge's admonishment was brief, and it

represented a reasonable response to what the judge perceived as a potential disruption to the orderly and efficient presentation of evidence at the trial. This is plainly not a case involving "repeated indications of impatience and displeasure of such nature to indicate that the judge thinks little of counsel's intelligence and what he is doing." *Delorme*, 432 F. App'x at 888 (cleaned up). Moreover, as Petitioner's counsel admitted, the trial judge's admonishment was insufficient to actually prejudice

[Page 18:]

Petitioner. (*See* Doc. 8-4) ("I don't think it's affected the outcome of this trial. . . ."). Because "a clear effect on the jury is required to reverse for comment by the trial judge, *Morales*, 868 F.2d at 1576, the First DCA's rejection of this argument was reasonable. Additionally, the trial court's instruction for the jury to

"please disregard anything I may have said or done that made you think I preferred one verdict over another" (Doc. 8-4 at 133) mitigated any potential prejudice. *See Verbitskaya*, 406 F.3d at 1337) (finding that instruction to the jury reduced possible prejudice from comments made by the judge); *see also Delorme*, 432 F. App'x at 889 (same). Thus, Petitioner is not entitled to habeas relief based on his claim that the trial judge violated his right to a fair trial by admonishing him and his attorney in the presence of the jury.

Similarly, Petitioner is not entitled to habeas relief on the claim that his right to a fair trial and sentencing was violated when the trial judge failed to recuse after issuing the admonishment. It is a violation of due process for a judge who is actually biased to not recuse from a proceeding. *Davis v. Jones*, 506 F.3d

1325, 1336 (11th Cir. 2007). But an appearance of bias—which may require recusal under ethics rules or [Page 19:]

state law—is insufficient to constitute a violation of due process. *Id.* (explaining that recusal statutes "establish[] stricter grounds for disqualification than the Due Process Clause" and recognizing the absence of Supreme Court precedent holding "that the type of appearance [of bias] problem alleged here violates the Due Process Clause").

According to the Supreme Court "judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality challenge." *Liteky v. United States*, 510 U.S. 540, 555-56 (1994). Such remarks may only require disqualification "if they reveal an opinion that derives

from an extrajudicial source," or "if they reveal such a high degree of favoritism or antagonism as to make fair judgment impossible." *Id.* at 555. A trial judge's "ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration" are insufficient to show bias. *Id*. at 556.

Here, the First DCA's rejection of Petitioner's argument that the trial judge should have recused was neither contrary to, nor an

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unreasonable application of, the clearly established precedent discussed above. The First DCA applied the proper standard and its analysis was not "so obviously wrong that its error lies beyond any possibility for fairminded disagreement." *Shinn*, 592 U.S. at 118. There is nothing in the record to show that the trial

judge was actually biased against Petitioner. The trial judge admonished Petitioner and his counsel as part of "ordinary efforts at courtroom administration," and the admonishment did not come close to "reveal[ing] such a high degree of favoritism or antagonism as to make fair judgment impossible." Liteky, 510 U.S. at 556. Accordingly, Petitioner is not entitled to habeas relief on Ground 1.

Excerpts of Transcript of July 3, 2018,
Trial,
Pages 50-52 and 89-91

[Page 1:]

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

CASE NO.: 2015 CF 972

STATE OF FLORIDA,

vs.

KEVIN KOELEMIJ,

Defendant.
_____/

PROCEEDINGS:	JURY TRIAL AND VERDICT
BEFORE:	THE HONORABLE ANGELA C. DEMPSEY
DATE:	JULY 3, 2018
TIME:	Commencing at 8:40 a.m. Concluding at 2:14 p.m.
LOCATION:	Leon County Courthouse Tallahassee, Florida

REPORTED BY: LISA BABOCK, Official Court Reporter
Notary Public in and for the
State of Florida at Large

LISA BABCOCK
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

LISA BABCOCK, OFFICIAL COURT REPORTER

[Page 2:]

APPEARANCES

REPRESENTING THE STATE:

LORENA M. VOLLRATH-BUENO, ESQUIRE
ASSISTANT STATE ATTORNEY
OFFICE OF THE STATE ATTORNEY
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301

REPRESENTING THE DEFENDANT:

DON PUMPHREY, JR., ESQUIRE
553 EAST TENNESSEE STREET, SUITE 3
TALLAHASSEE, FLORIDA 32308

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WITNESSES: PAGE:

T.S.

LISA BABCOCK, OFFICIAL COURT REPORTER

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. . . .

Q And do you see the person who you know to be Kevin

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Koelemij in the courtroom here today?

A Yes, ma'am.

Q Will you please describe something that he's wearing –

THE COURT: Sit down.

MR. PUMPHREY: I asked him to stand up, Judge, for identification.

THE COURT: Okay. Well, I'm telling – I'm ordering him –

MR. PUMPHREY: I understand. I just didn't want the Court to –

THE COURT: Okay. I don't need to hear anything from you.

MR. PUMPHREY: Right.

BY MS. VOLLRATH-BUENO:

Q Mr. [T.S.], if you could identify what he's wearing for the record.

A Yes, ma'am. It's going to be a red tie, light blue shirt and a gray coat.

MS. VOLLRATH-BUENO: We ask the record reflect that the witness has identified the defendant in this case.

I have nothing further at this time, Your Honor.

THE COURT: Okay. Cross?

MR. PUMPHREY: Judge, I need to put some things on the record if I may.

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THE COURT: I don't know what you're talking about. I want you to ask him questions right now.

MR. PUMPHREY: Right. Judge, my prior objection, I just need to put –

THE COURT: Well, you're going to have to do that later. Do you have questions for Mr. T.S.?

MR. PUMPHREY: I do, Judge.

CROSS EXAMINATION

BY MR. PUMPHREY:

Q Mr. [T.S.], good morning. . . .

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. . . .

THE COURT: What would – what did you want to put on the record, Mr. Pumphrey? . . .

MR. PUMPHREY: Okay. I want to make it clear to the Court that I instructed Mr. Koelemij, as I do in every case, the hundreds of cases I've tried, when it comes to identification to make sure there's no question of identification or anything else. And I'm unaware of this Court and the number of trials I've had before it, but I told Mr. Koelemij to stand.

THE COURT: I know. You said that.

MR. PUMPHREY: Okay. But the Court's demeanor in front of the jury was troubling to me. I enjoy practicing before this Court, but when the Court yells directly at my client and then when I respond, the Court's demeanor is less than appropriate, in my – in my professional opinion, I don't think that is biding well

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for the Court, I don't think it's biding well for the jurors, I don't think it is biding well for the defendant.

That having been said, I don't think it's affected the outcome of this trial, in all candor, to put that on the record, but I'd like to know what it is I did to solicit that from the Court in front of the jury. I have no problem with this Court dressing me down, but in front of the jury is what concerns me.

THE COURT: Okay. Well, it's my responsibility to control the flow of the trial, and the only time anyone should be standing is when the

lawyers are addressing the Court or questioning witnesses.

MR. PUMPHREY: I will follow that from this point forward, Your Honor.

THE COURT: Okay. And I never yelled at anybody.

MR. PUMPHREY: Well, I disagree, Your Honor, but that's your opinion. I'll respect it. But I – I don't raise these issues. In fact, I've been practicing for over 20 years; I've never raised this issue with any judge in this jurisdiction. But today I saw a lot of anger, your voice was raised, you yelled at my client.

THE COURT: Okay. I definitely did not yell at him. I just had no – I didn't know you had told him that. I had no idea why he was standing up. He was late

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yesterday and he wore that – some pen yesterday to try to communicate with the jury, and so then when he stood up, I just told him to sit down.

Is there anything else you wanted to put on the record, Mr. Pumphrey?

MR. PUMPHREY: Judge, Mr. Koelemij is not wearing any pens, per the Court –

THE COURT: Today he's not, correct.

MR. PUMPHREY: Right, today.

THE COURT: Was there anything else –

MR. PUMPHREY: He was wearing – he was wearing pens the other day and I told him he needed to not wear them.

THE COURT: Actually, I ordered him to not wear those.

So anything else that you were talking about before that you wanted to put on the record?

MR. PUMPHREY: No, Your Honor.

Excerpt of Transcript of July 2, 2018,
Jury Selection,
Pages 89-90

[Page 1:]

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT, IN
AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

KEVIN KOELEMIJ,

Defendant.
_____/

PROCEEDINGS:	JURY SELECTION
BEFORE:	THE HONORABLE ANGELA C. DEMPSEY
DATE:	JULY 2, 2018
TIME:	Commencing at 8:30 a.m. Concluding at 11:15 a.m.
LOCATION:	Leon County Courthouse Tallahassee, Florida

REPORTED BY: SUE ELLEN MELLO, RPR
Official Court Reporter
State of Florida at Large

SU ELLEN MELLO, RPR
Official Court Reporter
Leon County Courthouse, Room 341
Tallahassee, FL 32301

[Page 2:]

APPEARANCES

REPRESENTING THE STATE:

LORENA M. VOLLRATH-BUENO, ESQUIRE
ASSISTANT STATE ATTORNEY
OFFICE OF THE STATE ATTORNEY
LEON COUNTY COURTHOUSE
TALLAHASSEE, FLORIDA 32301

REPRESENTING THE DEFENDANT:

DON PUMPHREY, JR., ESQUIRE
553 EAST TENNESSEE STREET, SUITE 3
TALLAHASSEE, FLORIDA 32308

[Page 89:]

. . . .

THE COURT: Okay. And, Mr. Koelemij, I don't know what that pin says that you have on your lapel, but you're not going to be wearing that pin or any other pins tomorrow during the trial.

THE DEFENDANT: Okay.

THE COURT: Okay. Or anything else that communicates any type of message to the jury.

THE DEFENDANT: Okay.

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. . . .

THE COURT: 8:30. Okay, see you guys tomorrow.

And make sure you're not late tomorrow, Mr. Koelemij. You were about five minutes late today.

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO: 15-CF-972

v.

SPN: 2732

KEVIN J. KOELEMIJ,
Defendant.

VERIFIED MOTION TO DISQUALIFY

COMES NOW the Defendant, Kevin J. Koelemij, by and through the undersigned counsel, pursuant to Florida Rule of Judicial Administration 2.330, and hereby files this Motion based on the following grounds:

1. Defendant was found guilty at the conclusion of a jury trial conducted by this Honorable Court on July 3, 20 I 8. Sentencing is currently set for July 11.

2. Florida Rule of Judicial Administration 2.330(d) provides that a motion to disqualify the trial court judge may be filed if the party fears that he or

she will not receive a fair trial or hearing because of specifically described prejudice or bias of the judge." Disqualification is required where the facts alleged and established, which must be taken as true, would place a reasonably prudent person in fear of not receiving a fair and impartial proceeding. *Kline v. JRD Management Corp*., 165 So. 3d 812, 814 (Fla. 1st DCA 2015).

3. Defendant fears that he will not receive a fair and impartial sentencing after perceiving bias and prejudice from this Court during the jury trial on July 3, 2018. The facts evidencing this reasonable fear and the governing law are outlined below.

4. No motions to disqualify have been previously filed in this case.

5. It is hereby certified that this motion and the client's statements are made in good faith.

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DISCUSSION

During the identification phase of the State's direct examination of T.S., the alleged victim, defense counsel quietly directed Defendant to stand up so that the record would properly reflect this identification. Defendant silently stood up following this direction. This Court promptly yelled at Defendant to sit down, using an aggressive tone of voice toward Defendant in front of the jury. Defense counsel then attempted to clarify why the Defendant stood up and apologize on behalf of Defendant, explaining that Defendant was simply following his direction. This Court then interrupted defense counsel mid-sentence, explaining that it is her duty to control the courtroom.

After discussing a separate evidentiary matter outside of the presence of the jury, defense counsel

placed on the record that the Court's demeanor toward Defendant in front of the jury was troubling. This Court then repeated that she controls the courtroom, and further referenced the previous day when Defendant was late to jury selection and was wearing lapel pins which she believed to constituted signals to the potential jurors.

This Court will recall that after jury selection, Judge Dempsey ordered Defendant to not be late and to not wear any lapel pins to trial the next day, and the Defendant followed those orders, and only stood during the trial at the direction of defense counsel.

It is uncontested, as defense counsel conceded on the record, that it is well within a judge's province to control the courtroom. The Supreme Court of Florida held in *Braddy* that a judge may sternly, perhaps even angrily, direct a defendant to not interrupt courtroom

proceedings. *Braddy v. State*, 111 So. 3d 810, 834 (Fla. 2012). The Court held that the stern commands toward the defendant in that case were not legally sufficient to evidence a bias or prejudice that requires disqualification. *Id.* Unlike presently, the proceeding at issue in *Braddy* was a pretrial hearing where there was no jury present and the Supreme Court also noted "Braddy continually tried to

[Page 3:]

interrupt while either the judge or the State was speaking, despite the trial judge telling Braddy that he could talk "[i]n a minute," and asking him to "[h]ang on for a second." *Id*.

Defendant in the present case did not persist in any type of similarly disruptive nor exhibit any disrespectful behavior during the trial.

One year after *Braddy* was decided, the court in *Martinez* ruled that a judge's actions in the course of attempting to control the courtroom can be legally sufficient to require disqualification in some circumstances. *Martinez v. Cramer*, 111 So. 3d 206, 207 (Fla. 4th DCA 2013). The court held that the trial court judge's behavior "far exceeded comments or actions necessary to control his courtroom and were sufficient to evidence to a reasonable person bias requiring disqualification, even if the judge may have felt that he had no bias." *Id*. The judge in that non-jury guardianship proceeding ejected the petitioner from the courtroom, struck her testimony, and made some personal comments about her.

Similarly, the tone of voice used in admonishing Defendant and defense counsel during the jury trial on July 3rd far exceeded the comments or actions

necessary to control the courtroom. The response to Defendant's silent, benign act of standing up was wholly out of proportion. Furthermore, when defense counsel respectfully readdressed this issue at a later point, this Court seemingly attempted to justify the reaction by citing to her admonishments of Defendant from the day prior. This served to only add to Defendant's well-founded fear of prejudice and bias. The context of the hearing and history of the case are relevant to understanding whether a movant has a well-founded fear of judicial bias. *Wall v. State*, 238 So. 3d 127, 143 (Fla. 2018).

Defendant's fear of prejudice and bias also stems from the extrajudicial and personal knowledge that this Court possesses about the Defendant. While a motion to disqualify was not filed previously in this case on the singular basis of this Court's personal

knowledge of Defendant,

[Page 4:]

the conduct toward Defendant paired with this historical context bolsters Defendant's fear of judicial bias if a disqualification is not granted for the sentencing hearing. Additionally, pursuant to the Code of Judicial Conduct, Canon 3(E), "a judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where . . . the judge has a personal bias or prejudice concerning a party . . . ." The comments further provide that "a judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no

real basis for disqualification." No such disclosure occurred.

In conclusion, the combination of the following creates a well-founded fear of judicial bias from the perspective of a reasonably prudent defendant: this Court's admonishment of Defendant and counsel in the presence of the jury, the Judge's seemingly unrelated reference to her previous admonishments of Defendant, and the extrajudicial knowledge this Court possesses regarding the Defendant. The notably angry reaction to the commonplace act of having a defendant stand up during an identification stage was beyond what was necessary to control the courtroom and it merely evidenced bias and prejudice against Defendant when considered in the complete context of the trial. The well-founded fear of bias and prejudice possessed by Defendant is further amplified by the broad discretion

that a trial judge is afforded in sentencing hearings. An order granting disqualification would remove the appearance of judicial bias from the reasonable perspective of Defendant.

WHEREFORE, the Defendant moves this Honorable Court to enter an order granting disqualification.

RESPECTFULLY SUBMITTED on this 10th day of July, 2018.

/s/ Don Pumphrey, Jr.
Don Pumphrey, Jr

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA,

CASE NO: 15-CF-972

vs.

SPN: 2732

KEVIN J. KOELEMIJ
Defendant.

MOTION FOR NEW TRIAL

COMES NOW the Defendant, Kevin J. Koelemij, by and through the undersigned attorney, and pursuant to Florida Rule of Criminal Procedure 3.600(b) moves this Honorable Court to grant a new trial in the above-captioned matter, and as grounds states the following:

1. Jury selection for this matter occurred on July 2, 2018. Jury trial commenced and concluded on July 3, 2018, resulting in a verdict of guilty.

2. The nature of this case resulted in a trial that

was largely dependent on the jury's weighing of witness credibility to ultimately determine the issue of consent.

3. The State elicited testimony that constituted both an improper statement on Defendant's constitutional right to not testify and prohibited burden shifting.

4. The State made improper comments in closing that prejudicially injected emotion and fear into the jury's deliberation over the objection of defense counsel.

5. The Court permitted a witness to examine their previous testimony before defense counsel was provided an opportunity to impeach the witness.

6. Evidence that was irrelevant, substantially more prejudicial than probative, and suggestive of prior bad acts was admitted over the objection of

defense counsel.

7. The Honorable Judge Dempsey demonstrated bias and prejudice against Defendant and defense counsel in the presence of the jury.

[Page 2:]

8. The cumulative effect of these errors resulted in the substantial rights of Defendant being prejudiced.

DISCUSSION

Florida Rule of Criminal Procedure 3.600(b) provides that a court shall grant a new trial if any of the following grounds are established: the prosecuting attorney was guilty of misconduct (Fla. R. Crim. P. 3.600(b)(5)), the court erred in the decision of any matter of law arising during the course of the trial (Fla. R. Crim. P. 3 .600(b)(6)), or for any other cause not due to the defendant's own fault, the defendant did

not receive a fair and impartial trial (Fla. R. Crim. P. 3 .600(b)(8)).

As to the ground of prosecutorial misconduct, the first instance occurred when the State asked Officer Caplan if Defendant ever denied that a sex act would occur on his massage table. The witness answered in the negative. Any comment which is fairly susceptible of being interpreted as referring to a defendant's failure to testify is error and is strongly discouraged; the "fairly susceptible" test is a very liberal rule. *Rodriguez v. State*, 753 So. 2d 29, 37 (Fla. 2000). This inquiry also constituted improper burden shifting by creating the appearance that one who is criminally accused has a responsibility to deny or affirm questions such as the one presented.

The second instance of prosecutorial misconduct occurred during the State's closing argument. The

Assistant State Attorney discussed how she should not need to tell a massage therapist at the outset of a massage to not engage in any sex acts during the massage, then proceeded to list examples of sex acts. When comments in closing argument inject elements of emotion and fear into the jury's deliberations, a prosecutor has ventured far outside the scope of proper argument. *Carroll v. State*, 815 So. 2d 601, 622 (Fla. 2002). This commentary violated what is commonly referred to as "The Golden Rule" by placing the jurors in the shoes of the alleged

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victim and it also improperly communicated to the jury what may result from a non-guilty verdict. Defense counsel's objection to this discussion was overruled, and as a result no curative instruction was provided.

Secondly, the Court erred as a matter of law on the following two occasions. Firstly, while defense counsel was cross-examining the alleged victim, the Court ordered that the alleged victim be provided with copies of his prior testimony. This was without the predicate foundation for refreshment or impeachment being established. Ultimately, this resulted in defense counsel being unable to show the jury any possible inconsistencies in the alleged victim's testimony that may have arisen, leaving the jury unable to weigh his credibility as a witness and also devoid of his personal knowledge independent of any memory aids. Defense counsel's objections were overruled. The second occasion of error on the part of the Court occurred when the recordings of Officer Caplan's discussion with Defendant were admitted over the objection of defense counsel.

These recordings were irrelevant, substantially more prejudicial than probative, and in violation of the prohibition of prior bad acts because the recordings reference the Defendant's licensures. The resulting testimony elicited by the State created an appearance of prior bad acts by Defendant that were not the subject of the trial; namely the unlicensed practice of massage.

Lastly, during the identification phase of the State's direct examination of T.S., the alleged victim, defense counsel quietly directed Defendant to stand up so that the record would properly reflect this identification. Defendant silently stood up following this direction. This Court promptly yelled at Defendant to sit down, using an aggressive tone of voice toward Defendant in front of the jury. After discussing a separate evidentiary matter outside of the presence of

the jury, defense counsel placed on the record that the Court's demeanor toward Defendant in front of the jury was troubling. This Court then repeated that the judge controls the courtroom, and further referenced

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the previous day when Defendant was late to jury selection and was wearing lapel pins which she believed to constituted signals to the potential jurors. The tone of voice used in admonishing Defendant and defense counsel during the jury trial on July 3rd far exceeded the comments or actions necessary to control the courtroom. *Martinez v. Cramer*, 111 So. 3d 206, 207 (Fla. 4th DCA 2013). The response to Defendant's silent, benign act of standing up was wholly out of proportion and the fact that it occurred in front of the jury contributed to Defendant not receiving a fair and

impartial trial.

In reviewing these errors, a court should not review them in isolation, but rather examine the totality of errors and the cumulative effect. *See Anderson v. State*, 841 So. 2d 390, 403 (Fla. 2003).

WHEREFORE, the Defendant moves this Honorable Court to enter an Order GRANTING a new trial and permitting Defendant to file an amended copy of this motion with the supporting record.

RESPECTFULLY SUBMITTED on this 13th day of July, 2018.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing has been furnished by electronic filing to the Leon County Clerk of Court; and a true and correct copy has been furnished via electronic filing to the Office of the State Attorney at SAO2 leon@leoncountyfl.gov on this

13th day of July, 2018.

/s/ Don Pumphrey, Jr.
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