FIRST DISTRICT COURT OF APPEAL
STATE OF FLORIDA

No. 1D20-18

KAREN W. MILLS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

No. 1D20-26

BENJAMIN D. CAMP,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

No. 1D20-33

HEATHER A. NOLAN-WILLIAMS,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

No. 1D20-35

ARLENE O'NEILL WILHELM,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

No. 1D20-36

MARLON MORENO GARCIA,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

Petitions for Writ of Certiorari—Original Jurisdiction.

December 31, 2020

ROWE, J.

Karen W. Mills, Benjamin D. Camp, Heather A. Nolan-Williams, Arlene O'Neill Wilhelm and Marlon Moreno Garcia (Petitioners) seek second-tier certiorari review of a circuit court order denying their petitions for writ of prohibition.[1] Petitioners each sought a writ of prohibition after the county court judge assigned to their DUI cases denied their motions for disqualification. Petitioners argued that the county court judge had to disqualify himself after he communicated ex parte with the State Attorney's Office in another DUI case.

Petitioners argued that the county court judge signaled in an email to prosecutors his policy to not accept certain categories of pleas. Because their cases fell within the scope of the alleged policy, Petitioners argued that the county court judge had prejudged their cases and limited the prosecutors' discretion to negotiate pleas with them. The circuit court disagreed. It found that the county court judge did not establish a policy governing which pleas he would accept in pending or prospective cases. Applying the narrow standard applicable to our review of the circuit court's decision, we deny the petitions because the circuit court afforded due process and violated no clearly established principle of law.

Facts

The State charged each of the Petitioners with driving under the influence. Judge Wesley Poole was assigned to Petitioners' cases. While the cases were pending, the judge emailed the State Attorney's Office, offering his interpretation of a statute governing

[1] This Court initially granted in part Petitioners' motions to consolidate and consolidated their cases for purposes of travel and assignment to a three-judge panel. We now consolidate the cases for all purposes.

pleas in DUI cases. The statute, section 316.656, Florida Statutes (2019) is titled "Mandatory adjudication; prohibition against accepting plea to lesser included offense," and provides:

> (1) Notwithstanding the provisions of s. 948.01 [related to probation], no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of s. 316.193 [related to DUI], for manslaughter resulting from the operation of a motor vehicle, or for vehicular homicide.
>
> (2)(a) No trial judge may accept a plea of guilty to a lesser offense from a person charged under the provisions of this act who has been given a breath or blood test to determine blood or breath alcohol content, the results of which show a blood or breath alcohol content by weight of 0.15 percent or more.
>
> (b) No trial judge may accept a plea of guilty to a lesser offense from a person charged with a violation of s. 316.193(3), manslaughter resulting from the operation of a motor vehicle, or vehicular homicide.

In his email to the State Attorney's Office, Judge Poole shared his view on the limitations the statute places on the court's discretion to accept a plea in a DUI case. He wrote:

> Counselors:
>
> For clarification, given our recent discussions regarding Fla. Stat., Section 316.656, it is my interpretation of the statute, that:
>
> 1. If the State intends to offer a "breakdown" to reckless driving on a DUI, either while impaired or a BAL > .08 and < .15, the DUI citation/Information must be dismissed, and a new citation/Information for reckless driving must be filed. I would expect that in such case, probation would be required with the standard DUI conditions, except the driver's license suspension.

> 2. There can be no breakdown of a DUI with a BAL > .15, or DUI with property damages, or injury.
>
> 3. There can be no breakdown of a DUI on a CDL (ref: Title 49, Section 384.226, CFR).
>
> In addition, you may recall from Judge Grube's article, he recommends that public and law enforcement be informed of the SAO's "unpublished" diversion program, to avoid unequal treatment of DUI defendants, and adverse perceptions of law enforcement and decline in the enforcements and prosecution of DUI cases.

Counsel for Petitioners learned about Judge Poole's email when she was negotiating with an assistant state attorney over a plea for a defendant facing a DUI charge in a different case. The assistant state attorney had told Petitioners' counsel in that other case that there was "no wiggle room" on an adjudication of guilt, as "Judge Poole notified my office that he will not accept reckless pleas without probation . . ." and that "Judge Poole . . . will require the filing of a reckless driving citation an amended information charging reckless driving prior to accepting any negotiated dispo[sition]."

After learning of these communications, Petitioners moved to disqualify Judge Poole. They each alleged that they had a well-founded fear that they would not receive a fair trial because the judge had prejudged all DUI cases and limited the discretion of the State Attorney's Office in plea negotiations. Petitioners asserted that the judge's email created the appearance "that the Court and the State are part of the same 'team' and the Court has an interest in the prosecution of DUI's."

Judge Poole denied the motions to disqualify. He addressed the motions filed by Mills, Nolan-Williams, and Camp (and eight other defendants) in an omnibus order. Judge Poole addressed the motions filed by Garcia and O'Neill Wilhelm in separate orders. In the omnibus order and the order on Garcia's motion, the trial judge cited *Bush v. Schiavo*, 861 So. 2d 506 (Fla. 2d DCA 2003) and found that "[a] trial court's statement of its interpretation of the law is legally insufficient to create . . . a well-founded fear of

prejudice or bias, or of not receiving a fair and impartial trial." As to the motion filed by O'Neill Wilhelm, the trial judge did not make the same finding, but denied the motion with a citation to *Bush v. Schiavo*.

Petitioners then sought writs of prohibition in the circuit court. They argued that the circuit court should quash Judge Poole's order denying disqualification because they alleged a legally sufficient basis to establish an objectively reasonable fear of judicial bias. Petitioners claimed that the email showed that Judge Poole was unwilling to exercise judicial discretion in DUI cases and sought to limit the State Attorney's Office's ability to exercise its prosecutorial discretion.

The circuit court denied the petitions in separate, but nearly identical opinions. First, the court considered whether Petitioners met their burden under Florida Rule of Judicial Administration 2.330(d)(1) to show that disqualification was required. The circuit court examined whether Petitioners had alleged and shown that they had an objectively reasonable fear that they would not receive a fair trial based on specific allegations of prejudice or bias of the trial judge. The circuit court found that Petitioners did not make the required showing.

As for the claim that Judge Poole's email offering his legal interpretation of section 316.656 created an objectively reasonable fear of bias, the circuit court found:

> In formulating that interpretation, Judge Poole did not reference any specific cases pending in his court. Instead, Judge Poole merely offered his general understanding of a particular statute's meaning. Such generic statutory analysis does not demonstrate that Judge Poole has prejudged the facts of all DUI cases or that he has personally adopted a doctrinaire position on DUI charging and sentencing.

And as to Judge Poole's reference to the law review article by Judge Grube, the circuit court similarly concluded that the county court's actions were not sufficient to create an objectively reasonable fear of bias:

> Read literally, Judge Poole's e-mail is simply a synopsis of the article's recommendations. Even if one interprets Judge Poole's e-mail as advocating sub silentio that Nassau County adopt Judge Grube's recommendations, such advocacy is at best aspirational. Judge Poole did not mandate that the State Attorney's Office implement the proposed reforms; rather, Judge Poole at most requested the State Attorney's Office to be cognizant of potential best practices in DUI diversion programs.

Petitioners now seek certiorari review of the circuit court's decision denying their petitions for writs of prohibition.

Analysis

Our supreme court has consistently held that as a case ascends "the judicial ladder, review should become narrower, not broader." *See Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995). And so, when a district court reviews a decision by a circuit court acting in its appellate capacity, it is not at liberty to conduct a de novo review of the county court's decision two tiers below. *See Fla. Parole Comm'n v. Taylor*, 132 So. 3d 780, 783 (Fla. 2014). Rather, the scope of review is narrow; the district court considers only whether the circuit court afforded procedural due process and applied the correct law, or put differently, departed from the essential requirements of law. *See Custer Med. Ctr. v. United Auto. Ins. Co.*, 62 So. 3d 1086, 1092 (Fla. 2010). Thus, a district court should grant certiorari relief only when the circuit court, acting in its appellate capacity, has violated "a clearly established principle of law resulting in a miscarriage of justice." *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983).

Petitioners do not allege that the circuit court failed to afford them due process. Instead, they argue that the circuit court did not apply the correct law. We disagree.

The circuit court began its analysis of the prohibition petitions by considering the standards governing disqualification. The court found that before the county court judge had to disqualify under rule 2.330(d)(1), Petitioners needed to allege facts showing that

they had a well-grounded fear that they would not receive a fair trial. *See Livingston v. Stat*e, 441 So. 2d 1083, 1087 (Fla. 1983). And that fear needed to be objectively reasonable. *See Kline v. JRD Mgmt. Corp.*, 165 So. 3d 812, 813 (Fla. 1st DCA 2015).

Petitioners alleged that the county court judge announced a policy as to which pleas he would accept in DUI cases through his email to the prosecutor. But the circuit court found that the judge announced no such policy and did not seek to direct the prosecutor on the appropriate procedures for reducing a DUI charge to reckless driving.

Rather, the circuit court found that the email simply conveyed the judge's interpretation of section 316.656 and was not sufficient to create a fear of bias or prejudice. In reaching that conclusion, the circuit court relied on the Second District's decision in *Bush v. Schiavo*, 861 So. 2d 506 (Fla. 2d DCA 2003). There, then-Governor Bush moved to disqualify the trial judge based on the judge's comments about the constitutionality of a statute. *See id.* at 507. The circuit court denied the motion, and the Second District upheld the denial, finding that the judge simply announced his interpretation of the statute, which was legally insufficient to create a well-founded fear or prejudice or bias. *See id.* at 507–08.

The circuit court found Judge Poole's email to merely "describe[] the legal standard he believes section 316.656 imposes on DUI cases." And citing *Bush*, the circuit court found that "such comments do not meet the threshold for disqualification" because they were legally insufficient to create an objectively reasonable fear that Petitioners would not receive a fair trial.

But the dissent disagrees with the circuit court's application of *Bush* and argues that it was not the correct law to apply in this case. The dissent explains that "[t]wo distinct lines of disqualification precedents exist: (a) those that apply to judicial rulings in actively litigated cases and (b) those involving policies imposed prospectively by trial judges on a class of pending and future cases." The dissent contends *Bush* falls into the former category, while this case falls into the latter category. And thus the dissent argues that the correct law applicable to the circuit court's

analysis was the line of authority involving judge-made policies with prospective application.

The dissent also asserts that the Third District's decision in *State v. Dixon*, 217 So. 3d 1115, 1117–20 (Fla. 3d DCA 2017), and the Fourth District's decision in *Martin v. State*, 804 So. 2d 360, 364 (Fla. 4th DCA 2001), provide the correct line of authority that the circuit court should have applied. In *Dixon*, the district court held that the motion for disqualification of the judge should have been granted when the judge imposed an obligation on the State to file charges within twenty-one days after a defendant's arrest or face a sua sponte release of the defendant or a reduction of the defendant's bond. *See* 217 So. 3d at 1123. Similarly, in *Martin*, the district court held that Martin's motion for disqualification of the judge should have been granted when the judge announced: "My feeling is, if I'm going to sentence someone to state prison or county jail it should always be followed by probation." *See* 804 So. 2d at 362.

But the cases cited by the dissent do not apply here, and do not provide a clearly established principle of law applicable to these facts. Unlike the cases cited by the dissent, where the judges announced policies with prospective application, the circuit court read Judge Poole's email to **not** convey a policy that would apply in pending and future DUI cases. Rather, the circuit court found that the email merely offered the judge's legal interpretation. The circuit court found that in formulating "that interpretation, Judge Poole did not reference any specific cases pending in his court." The circuit court also found that "such generic statutory analysis does not demonstrate that Judge Poole has prejudged the facts of all DUI cases or that he has personally adopted a doctrinaire position on DUI charging and sentencing."

And so, our disagreement with the dissent boils down to whether the case law addressing judge-made policies with prospective application is the "correct law" that the circuit court should have applied in this case. It depends on how one reads Judge Poole's email. The circuit court read it one way. The dissent reads it differently. But because Judge Poole's memo is subject to

multiple interpretations,[2] we cannot say that the circuit court failed to apply the correct law or violated any clearly established principle of law.

Because we conclude that the circuit court afforded due process and did not violate any clearly established principle of law, Petitioners are not entitled to certiorari relief. The petitions are DENIED.

TANENBAUM, J., concurs with opinion; MAKAR, J., dissents with opinion.

Not final until disposition of any timely and authorized motion under Fla. R. App. P. 9.330 or 9.331.

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[2] Judge Poole interpreted section 316.656 in this way; if the State intended to offer a reduced charge of reckless driving on a DUI, "he would expect that in such a case probation would be required with the standard DUI conditions." Judge Poole's interpretation that there can be no reduction of a DUI with a blood alcohol content of greater than .15, with property damage or injury, or on a CDL appears to track the language of section 316.656, Florida Statutes (2019): "[n]o trial judge may accept a plea of guilty to a lesser offense from a person charged under the provisions of this act who has been given a breath or blood test to determine blood or breath alcohol content, the results of which show a blood or breath alcohol content by weight of 0.15 percent or more." Read this way, Judge Poole's email merely interprets the statute and does not announce a policy that he would apply prospectively. And read this way, the judge was not seeking to direct the actions of the prosecutor. Nor could he. The State Attorney's Office retained its discretion to present to the court any plea it saw fit.

TANENBAUM, J., concurring.

As Judge Rowe explains, there is no basis for certiorari relief in this case. I join her opinion in full, but I write separately to note an essential point about the certiorari review applied in this case.

The petitioners ask that we review the circuit court's denial of their respective petitions for a writ of prohibition. The circuit court has discretion to deny the writ for a variety of reasons that may have nothing to do with the merits of their individual requests. *See Topps v. State*, 865 So. 2d 1253, 1257 (Fla. 2004) ("Since the nature of an extraordinary writ is not of absolute right, the granting of such writ lies within the discretion of the court. Therefore, extraordinary writs may be denied for numerous and a variety of reasons, some of which may not be based upon the merits of the petition."). The petitions that we have similarly ask for a writ that is within our "sound discretion" to grant or deny. *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011). In essence, then, the petitioners ask that we conduct discretionary review of whether the circuit court abused its discretion. *Cf. id.* (explaining that review of a disposition on a discretionary writ petition is for abuse of discretion).

On certiorari review, though, we do not conduct the type of abuse-of-discretion analysis that we would use in a direct appeal. Indeed, we do not grant relief unless, in our discretion, we conclude that there is not just "a violation of a *clearly established* principle of law" but also "a miscarriage of justice" that flows from that error. *Combs v. State*, 436 So. 2d 93, 96 (Fla. 1983) (emphasis supplied). Again, we have "a large degree of discretion" so that we can assess "each case individually" with an eye to "the seriousness of the error" asserted, rather than to "the mere existence of legal error." *Id.* at 95–96. Ultimately, we must carefully exercise this discretion "so as to avert the possibility of common-law certiorari being used as a vehicle to obtain a second appeal." *Id.* at 96; *see also Sutton v. State*, 975 So. 2d 1073, 1081 (Fla. 2008) ("These standards govern the process of a district court of appeal in certiorari review of an order on a petition for writ of prohibition in this context to ensure that such review will neither function like nor actually be a second appeal."). This distinction between certiorari review (along with the tremendous amount of discretion

that comes with it) and appellate review (which is not discretionary but is plenary) is critical to understanding the divergence between the majority and the dissent.

The dissent incorrectly frames the issue as if this is a direct appeal. However, the merits of whether the county court judge should be disqualified is not what we are reviewing. The petitions for certiorari necessarily limit our review to a single set of orders in these cases: the ones rendered by the *circuit court* denying prohibition. These petitions come to us because we have supervisory authority over the *circuit court*. The only question before us, then, is whether the *circuit court* violated some clearly established principle of law when it denied the petitioners a writ of prohibition to the county court; and if so, whether that violation was so serious as to constitute a miscarriage of justice.

In its roughly four-page opinion filed in each of the cases, the circuit court correctly identified the applicable rule and the proper standard, and it analyzed the salient question before it—whether the county court correctly rejected the petitioners' averments that they had objectively reasonable fears of judicial bias. The circuit court, in its discretion, denied them the writ in reliance on the "objectively reasonable" standard reiterated by the supreme court in *Parker v. State*, 3 So. 3d 974 (Fla. 2009). The circuit court looked to decisions out of the Second and Fourth Districts in support of its own analysis.

The dissent does not identify a *clearly established* legal principle that the circuit court missed. Presumably, everyone is in agreement that Florida Rule of Judicial Administration 2.330 was the applicable rule, and that the supreme court was clear as to the standard to be applied in considering a disqualification motion under the rule. The dissent instead purports to separate out-of-district cases into two *soi-disant* "distinct lines of disqualification precedents" and takes the circuit court to task for choosing the wrong operative line. In reality, though, the dissent takes issue

with the circuit court's choice to look to some out-of-district cases, and not others,* as guidance in the exercise of its own discretion.

There is nothing egregiously wrong or unfair about how the circuit court conducted its analysis. A circuit court may decide, in the exercise of its discretion in applying what are clearly established legal principles, to lean on some out-of-district cases as being more analogous—so, more helpful—than others. The circuit court's doing so, within the context of its discretionary consideration of a writ petition, cannot constitute a violation of clearly established legal principles that would support certiorari relief. To have it be otherwise—the dissent would have us grant the petition because the circuit court did not follow certain decisions out of the Third and Fourth Districts—would be to impermissibly subordinate this court to the decisions of other districts.

As the supreme court continues to remind us, certiorari is not to operate as a second appeal. That being the case, we cannot be forced to accept another district's line of "precedent" as establishing a clear legal principle in our district—one that otherwise would be enforceable in certiorari, as the dissent implies—before this court, at a minimum, has an opportunity to pass on the same legal issue *de novo*, something that we cannot do in this second-tier review. Certiorari, moreover, is not the appropriate vehicle by which we should mediate between competing lines of out-of-district decisions and declare one line as prevailing in our district. Our review here is limited to how the circuit court exercised its discretion. After full consideration of the record, I am comfortable stating that there certainly is nothing irregular or manifestly unjust here. The circuit court operated squarely within the confines of legal principles that *are* clearly set out in rule and by the supreme court. We properly deny the writ in all five cases.

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* In any event, we should avoid referring to these opinions as "case law," because under our constitution, Florida's judiciary is not the State's authorized law-giver.

MAKAR, J., dissenting.

At issue is whether a county court judge's written policy, adopted ex parte after consultation with only prosecutors, forms the basis for recusal of the judge in DUI cases directly impacted by his new policy. The answer is yes.

I.

In early fall of 2019, the county judge for Nassau County, Florida, had discussions with members of the Office of the State Attorney, Fourth Circuit, about DUI cases in his court and how they ought to be handled under section 316.656, Florida Statutes, which relates to mandatory adjudication of certain DUI offenses.[1] The core provisions of the statute have been on the books since 1974, *see* Chapter 74-384, §8, Laws of Florida, and modified slightly over the past four and a half decades.[2]

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[1] The statute, entitled "Mandatory adjudication; prohibition against accepting plea to lesser included offense," states:

> (1) Notwithstanding the provisions of s. 948.01 [related to probation], no court may suspend, defer, or withhold adjudication of guilt or imposition of sentence for any violation of s. 316.193 [related to DUI], for manslaughter resulting from the operation of a motor vehicle, or for vehicular homicide.
>
> (2)(a) No trial judge may accept a plea of guilty to a lesser offense from a person charged under the provisions of this act who has been given a breath or blood test to determine blood or breath alcohol content, the results of which show a blood or breath alcohol content by weight of 0.15 percent or more.
>
> (b) No trial judge may accept a plea of guilty to a lesser offense from a person charged with a violation of s. 316.193(3), manslaughter resulting from the operation of a motor vehicle, or vehicular homicide.

[2] The statute was renumbered from section 322.281 to section 316.656 in 1983. *See* § 322.281, Fla. Stat. (2020).

Following those discussions, the county judge on Friday, September 13, 2019, emailed four assistant state attorneys (with subject line "Fla. Stat. 316.656"), setting forth a "clarification" and "interpretation" of that statute and how it would impact the work of those state attorneys in DUI cases in his court. The email in full states:

> Counselors:
>
> For clarification, given our recent discussions regarding Fla. Stat. 316.656, it is my interpretation of the statute, that:
>
> > 1. If the State intends to offer a "breakdown" to reckless driving on a DUI, (either while impaired or a BAL > .08 and < .15, the DUI citation/information must be dismissed, and a new citation/information for reckless driving must be filed. I would expect in such a case, probation would be required with the standard DUI conditions, except the driver's license suspension.
> >
> > 2. There can be no breakdown of a DUI with a BAL > .15, or DUI with property damage, or injury.
> >
> > 3. There can be no breakdown of a DUI on a CDL (ref: Title 49, Section 384.226, CFR).
>
> In addition, you may recall from Judge Grube's article, he recommends that the public and law enforcement be informed of the SAO's "unpublished" diversion program, to avoid unequal treatment of DUI defendants, and adverse perceptions of law enforcement and decline in the enforcement and prosecution of DUI cases.

The email was copied only to the four assistant state attorneys; nothing indicates that the office of the public defender

or any criminal defense counsel was a part of the discussion or made aware of the new policy set forth in the email.

The new policy took root immediately and altered ongoing discussions between assistant state attorneys and defense counsel who were negotiating pleas on their clients' behalf in DUI cases now affected by the policy. As one example, on Monday, September 16, 2019, an assistant state attorney emailed defense counsel about plea negotiations in a pending DUI case. The assistant state attorney, in reliance on the county judge's email from the prior Friday, stated that the county judge had changed how such cases were to be handled. She said:

> I'm okay with license suspension and no BPO [business purposes only] requirement. However, there is no wiggle room on an AG [adjudication of guilt]. Judge Poole notified my office that he will not accept reckless [driving] pleas without probation and all of the standard DUI conditions, except the DL suspension. An AG is a standard condition. Also, Judge Poole informed the SAO that he will require the filing of a reckless driving citation and an amended information charging reckless driving prior to accepting any negotiated disp[osition].

Defense counsel—apparently unaware of the new policy—responded and wanted to know "if the judge sent that [new policy] in an email or just told you guys. If it is in an email or letter, can you give us a copy?" A few days later, the assistant state attorney emailed the county judge, asking "Do I have your permission to forward [the judge's September 13th email] to defense attorneys?" The county judge responded "Yes," and the email was forwarded to the inquiring defense counsel on the morning of September 23, 2019.

Upon learning of the new policy, defense counsel filed a motion to disqualify the county judge, which was one of eleven similar motions in other pending cases. The grounds for the motions were that:

- the email contained "ex parte statements" reflecting the county judge's new policy, amounting to a

"prejudgment of all DUI cases, including the [movant's case]."

- the new policy expressed "how the State can proceed and what the sentence of cases yet presented should be."
- the new policy establishes an expectation that "a certain sentence" will be imposed "regardless of any mitigation or extenuating circumstances."
- the new policy is not merely an "administrative" matter and creates "the appearance that the Court and the State are part of the same 'team' and the Court has an interest in the prosecution of DUI's."

The motion concluded by saying that "[b]y prejudging the Defendant's case in the manner the Court has done, and expressing that position in an ex parte communication to the State, the Court created a well-founded objective fear that the Defendant cannot receive fair consideration from the Court based upon the offense [DUI] with which she is charged."

In an "Omnibus Order Denying Motion to Disqualify," the county judge denied all motions, concluding that no legal basis for disqualification existed because a "trial court's statement of its interpretation of the law is legally insufficient to create in said defendants a well-founded fear of prejudice or bias, or of not receiving a fair and impartial trial," citing *Bush v. Schiavo*, 861 So. 2d 506 (Fla. 2d DCA 2003). The order had no other substantive content.

Next, a circuit judge—sitting as the first tier appellate court—affirmed the omnibus order, ruling that the email to prosecutors had merely expressed the county judge's legal interpretation of section 316.656, Florida Statutes, and that "[s]uch generic statutory analysis does not demonstrate that [the county judge] has prejudged the facts of all DUI cases or that he has personally adopted a doctrinaire position on DUI charging and sentencing." (citing *Bush*). He opined that because adverse or erroneous legal rulings do not warrant disqualification in actively litigated cases, a general statement of statutory interpretation likewise fails because the county judge's new policy "did not reference any specific cases pending in his court." Finally, the appellate judge

downplayed the county judge's reminder to the prosecutors about some of the law review article's policy prescriptions, characterizing them as non-binding and "at best" merely "aspirational" advocacy so that prosecutors would be "cognizant of potential best practices in DUI diversion programs."

II.

A district court of appeal does not engage in plenary review of a circuit court's order on second-tier certiorari review; instead, review at this stage narrows and is "limited to whether the circuit court afforded procedural due process and whether the circuit court applied the correct law." *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995) (explaining that "these two components are merely expressions of ways in which the circuit court decision may have departed from the essential requirements of the law").

It is apparent that the circuit judge did not apply the correct law in resolving the disqualification issue presented by the facts of this case. At issue is a county judge's written policy, arrived at ex parte, that when applied will directly affect (a) a class of active, ongoing DUI cases and (b) the operations of the office of the state attorney and its attorneys' discretion in how they handle such cases in Nassau County (where he is the only county court judge). This is not a case involving an "erroneous legal ruling" in an actively litigated case in which both parties were notified and involved in the trial court's resolution of a disputed matter; nor is it a mundane judicial/division management matter for which ex parte contacts may be appropriate. It is instead a case involving the ex parte imposition of a newly crafted judicial policy as to how DUI cases are to be handled, affecting *all* DUI cases prospectively and changing past practices of the office of the state attorney in the county judge's court.

Two distinct lines of disqualification precedents exist: (a) those that apply to judicial rulings in actively litigated cases and (b) those involving policies imposed prospectively by trial judges on a class of pending and future cases. This case falls in the latter category, not the former. The circuit court erred, however, by applying caselaw that involved *active, ongoing litigation* in which

trial judges made statements about or rulings regarding the law they deemed applicable, with due process afforded to the parties involved. For example, in *Bush*, relied on by both the county and circuit judges, the trial judge made a statement about the legal standard he believed applied to statutes impinging on the right of privacy. 861 So. 2d at 508. Because the standard he announced had been established in a Florida Supreme Court case, his statement was "legally insufficient to create a well-founded fear of prejudice or bias." *Id.* Similarly, *Letterese v. Brody*, 985 So. 2d 597, 599 (Fla. 4th DCA 2008), relied on by the circuit judge here, involved an actively litigated case in which a trial judge's adverse ruling was allegedly grounds for disqualification. The caselaw makes it abundantly clear, as the Fourth District held, that "[n]either the adverse legal ruling, nor the alleged error in the trial court's decision, is a basis for disqualification." *Id.*

Judicial rulings or statements of these types, which are made within the strictures of actual litigation where due process protections apply and the affected parties have a voice in the matter, are far different from the ex parte imposition of a judicial policy affecting an entire class of criminal cases. In *Brody*, for instance, the "judge heard extensive argument on the issues and both parties were permitted more than adequate time to argue their side." *Id.* This type of notice and engagement—by which all affected parties participated—did not occur in the instant case; instead, a one-sided discussion occurred, and a unilateral policy was issued after ex parte meetings and communications with only prosecutors.

The correct law that applies in this case are precedents involving the imposition of judge-made policies on a class of cases generally, such as *State v. Dixon*, 217 So. 3d 1115 (Fla. 3d DCA 2017) and *Martin v. State*, 804 So. 2d 360 (Fla. 4th DCA 2001), decisions that bind trial courts in our District.[3] For example, in *Dixon* the Third District granted relief in a disqualification case

[3] *See Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992) ("Thus, in the absence of interdistrict conflict, district court decisions bind all Florida trial courts."). Although a district court need not adopt another district's precedent, trial courts must follow them, making it non-sensical to argue otherwise.

involving a trial judge's policy that required the State to file a criminal information within twenty-one days of a defendant's arrest, with the failure to do so resulting in the judge's sua sponte release of the defendant or a reduction of the defendant's bond to a minimal amount. The trial judge imposed his unwritten policy because of his perception that the prosecutors were not acting promptly ("bureaucratic laziness") and thereby imperiling the liberty interests of criminal detainees. The Third District concluded that the State's motion to disqualify was legally sufficient because its allegation of facts as to the trial judge's policy, which must be accepted as true, would "place a reasonably prudent person in fear of not receiving a fair and impartial trial." *Dixon*, 217 So. 3d at 1121 (citations omitted).

As the Third District noted in *Dixon*, Florida caselaw reflects that "a judge's announced policy or predisposition to rule in a particular manner is grounds for disqualification." *Id.* at 1123. The

> test of the sufficiency of the affidavit is whether or not its content shows that the party making it has a well-grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind, and the basis for such feeling.

State ex rel. Brown v. Dewell, 179 So. 695, 697–98 (Fla. 1938); *see also Livingston v. State*, 441 So. 2d 1083, 1086 (Fla. 1983) ("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."); *Martin*, 804 So. 2d at 363 (same) (citing *Livingston*).

Applied here, the trial judge met only with prosecutors; announced a policy as to how DUI cases would be handled (which effectively amounted to a predisposition as to how he would rule in cases involving section 316.656); and thereby created a well-founded feeling or perception in the defendants and defense counsel (who were excluded from the judge's meetings with prosecutors) that their DUI cases would not be handled fairly. That the policy's implementation would disfavor DUI defendants who benefited from the existing diversionary program bolsters the

reasonableness of this feeling or perception. Again, the legal standard is not whether a trial judge feels that he has acted and will continue to act impartially, it is how litigants feel and whether their concern has a reasonable basis. *Dixon*, 217 So. 3d at 1121. One need only imagine if the trial judge had met with only public defenders and announced a policy that disfavored prosecutors to understand this point. Moreover, the appearance that a judge is giving legal advice to one side is often sufficient to sustain disqualification. *Id.* at 1126 ("[W]hen a judge provides legal advice, that alone is sufficient to compel disqualification."). Meeting only with prosecutors, before issuing his written policy as to how section 316.656 should operate, could reasonably give the appearance of favor, notwithstanding an intent to the contrary. *Id.* ("The law in Florida is clear—a judge may not enter into the fray by giving 'tips' or legal advice to either side.").

In another judge-made policy case, the Fourth District in *Martin*, granted relief to a criminal defendant seeking to disqualify a trial judge who made a public statement that any sentence he imposes "should always be followed by probation." 804 So. 2d at 362. The criminal defendant alleged he feared the "judge was predisposed to impose probation following any jail or prison sentence awarded in his case, and would not objectively consider evidence that probation following any incarceration was unnecessary." *Id.* (noting that the trial judge's nickname was "Judge Follow-By"). Due to the judge's policy, it was alleged that criminal defendants had a well-founded fear that they would not receive fair and impartial sentencing hearings or individualized sentencing. *Id.*

In granting relief, the Fourth District held that the defendant's motion to disqualify was legally sufficient because the trial judge's "remarks could reasonably be interpreted as announcing a fixed intention to have probation invariably follow any jail or prison sentence that he would impose." *Id.* at 364.

> *At the very least*, as the result of the trial judge's comments, Martin could reasonably fear that any argument that probation following a term of incarceration was unnecessary in his individual case

> *would first have to overcome the judge's presumption to the contrary*.

Id. (emphasis added). The highlighted language underscores that disqualification is justified where comments amounting to a judicial policy require criminal defendants to overcome a hurdle, such as the trial judge's written policy in this case, to achieve a fair or unbiased consideration of their sentences or pleas. This point is particularly important where the policy at issue was arrived at after ex parte communications with only prosecutors.

These cases—relevant to the facts alleged in this case—demonstrate that the trial judge's ex parte actions and written policy, even if well-intentioned, are enough to warrant disqualification because DUI defendants in Nassau County have a reasonable and well-grounded concern for believing their cases and how they must be handled by prosecutors have been pre-judged, at least in part, and will not be adjudged in a fair-minded manner. *See Dewell*, 179 So. at 697–98; *Dixon*, 217 So. 3d at 1121; *Martin*, 804 So. 2d at 362.

It is worth re-emphasizing that the circuit court didn't apply the correct law simply by applying precedents involving Florida disqualification law. That is superficial and incorrect. If this were an antitrust case, the trial court's application of the antitrust laws generally wouldn't be the "correct law" because there are many antitrust laws; the *correct* antitrust law must be applied. If the trial court applied antitrust laws governing horizontal price-fixing, that wouldn't suffice if this were a vertical price-fixing case because the two bodies of law are very different (horizontal price-fixing, for instance, is a per se offense while vertical price-fixing is not). The same analogy would apply in an intellectual property case where a trial court applying copyright law in a trademark case doesn't apply the "correct law" even though he is applying "intellectual property" law. Similarly, the circuit court here relied on factually and legally irrelevant disqualification cases that don't apply to the *facts asserted in the motion for disqualification*; those cases dealt with legal rulings in active cases where all parties are involved and on notice of the rulings. An entirely different situation is presented here—and an entirely separate and distinct body of precedents apply—where trial judges adopt policies

unilaterally (or here, after ex parte discussions) that prejudice a party (or class of litigants).

The circuit judge noted with importance that the county judge's email "did not reference any specific cases pending in his court," which only cements the point that the wrong line of precedents was applied. That's because the cases relied upon by the circuit judge involved rulings in pending cases, ones actively litigated with due process protections such as notice and the opportunity to be heard. On this latter point, i.e., the ability to be heard, the record clearly shows that no public defender or defense counsel was involved in the judge's ex parte discussions about his new policy; and no evidence shows that the new policy was disseminated after-the-fact to anyone other than defense counsel in this case, who by happenstance learned of the new policy and made a request for it. Further, the evidence suggests that the county judge alone was the impetus for the new policy; no motion had been filed or evidence adduced on the matter. *Real State Golden Invs. Inc. v. Ossandon Larrain*, 278 So. 3d 812, 814 (Fla. 3d DCA 2019) (entering a stay "in the absence of any motion or evidence" was "sufficient to leave Petitioners with an objectively reasonable fear they will not receive a fair trial"). Based on the foregoing, the circuit court applied the incorrect law and Mills and other similarly situated defendants are entitled to relief.

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