

0A 12.7.83

IN THE SUPREME COURT OF FLORIDA

FILED

NOV 28 1983

SID J. WHITE
CLERK SUPREME COURT

Chief Deputy Clerk

STATE OF FLORIDA,)

Petitioner,)

vs.)

LARRY FITZPATRICK,)

Respondent.)

Case No. 63,752

INITIAL BRIEF OF RESPONDENT

JUDGE & WARREN, P. A.
Dan R. Warren, Esquire
Attorney for Respondent
P. O. Box 5355
Daytona Beach, Florida 32018
(904) 255-3658

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STATEMENT OF THE CASE AND FACTS

The Respondent, LARRY FITZPATRICK, cannot agree to the Petitioner's Statement of the Case and Facts and denies that the nature of the visit by Mr. Greg Kimball was for the purpose of soliciting business, but was occasioned as a result of a telephone call from Respondent's girlfriend, who was living with Respondent, who had requested Mr. Kimball to consult with Respondent, and was further occasioned due to the fact that Mr. Kimball was married to Mr. Fitzpatrick's ex-wife.

Other than the above conflict in the Statement of the Case, the Respondent accepts the Petitioner's Statement of the Case and Facts.

POINT ON APPEAL

THE CONSTITUTIONAL OFFICE OF STATE ATTORNEY FOR ANY JUDICIAL CIRCUIT IS NOT A LAW FIRM WITHIN THE MEANING OF DR 5-105 (D), CODE OF PROFESSIONAL RESPONSIBILITY, AND EVEN THOUGH ONE ASSISTANT WITHIN THAT OFFICE IS ETHICALLY PROHIBITED FROM PROSECUTING A GIVEN INDIVIDUAL, THE ENTIRE OFFICE IS NOT LIKEWISE DISQUALIFIED.

The Respondent concedes that the Point on Appeal is that as stated by the Petitioner in its Initial Brief.

ARGUMENT

Contrary to the position taken by the Petitioner, the Respondent would urge the court to hold that the constitutional circuit offices of the State Attorney are law firms within the

meaning of Babb vs. Edwards, 412 So.2d 859 (Fla. 1982). The State Attorney nor any of his assistants in the Seventh Judicial Circuit may participate in the prosecution of Respondent due to an ethical conflict under DR 5-105 (D). Respondent further would urge this court to direct the trial judge appoint an "acting state attorney" to handle the prosecution of this case as provided by Chapter 27.14 and Chapter 27.16, Florida Statutes Annotated.

In support of this argument, the Respondent would ask this court to so hold in order to insure public confidence in the integrity of the judicial system as found in the Preamble to the Code of Professional Responsibility, which provides:

The continued existence of a free and democratic society depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government. Law so grounded makes justice possible, for only through such law does the dignity of the individual attain respect and protection. Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible.

Lawyers, as guardians of the law, play a vital role in the preservation of society. The fulfillment of this role requires an understanding by lawyers of their relationship with and function in our legal system. A consequent obligation of lawyers is to

maintain the highest standards of ethical conduct.

In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen, but fundamental ethical principles are always present to guide him. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society.

The Code of Professional Responsibility points the way to the aspiring and provides standards by which to judge the transgressor. Each lawyer must find within his own conscience the touchstone against which to test the extent to which his actions should rise above minimum standards. But in the last analysis it is the desire for the respect and confidence of the members of his profession and of the society which he serves that should provide to a lawyer the incentive for the highest possible degree of ethical conduct. The possible loss of that respect and confidence is the ultimate sanction. So long as its practitioners are guided by these principles, the law will continue to be a noble profession. This is its greatness and its strength, which permit of no compromise.

In this setting, the potential for conflict actually exists.

The trial court found that the Respondent and Kimball had confidential conversations covered by EC 4-1 and DR 4-101 of the Code of Professional Responsibility while Kimball was a private attorney. It further found that Kimball had subsequently accepted employment as an Assistant State Attorney but was not involved in the prosecution of this case, and the record does not reflect nor is there a suggestion that Mr. Kimball in anyway disclosed any conversations held with Respondent to his fellow Assistant State Attorneys who were charged with the responsibility of prosecuting the Respondent.

No matter how the Petitioner attempts to construe Babb vs. Edwards, supra, the fact remains that an attorney, is an attorney, is an attorney. By any other name, DR 5-105 (D) applies.

To argue, as the State does, that Babb vs. Edwards, supra, turns "upon a matter of statutory operation;" and, therefore, the "law firm" issue was never reached by the court, is to merely attempt to rename the "Rose." As the Fifth District Court of Appeal concluded in the instant case, "there is no rational distinction between them in this regard; therefore, each is a single 'firm' for purposes of Canon 5 of the Code." (P-3, Slip Opinion, Fitzpatrick, Petitioner vs. Honorable C. McFerrin Smith, case number 82-1724).

The Roberts case (Roberts, Petitioner vs. State of Florida [3rd, 345 So.2d 836], and Turner vs. State [2nd, 340 So.2d 132]), both discussed in Babb, supra, have held that the Public Defender's Office of a given circuit is a "firm" within the meaning of Canons of the Code of Professional Responsibility.

The argument of the Petitioner that the employment of a defendant's lawyer by a prosecutor can only raise the "conflict" question if he acts directly against his former client or provides information or assistance to those who would prosecute the former client ignores Canon 5 and the Thompson and Bryan decisions.

The test is the "potential for conflict;" and, the absolute absence of the appearance of impropriety which is demanded by Canon 5.

This was not a "drop in" appearance by Mr. Kimball. He was specifically requested to do so by Mr. Fitzpatrick's girlfriend. He did and matters of a confidential nature were discussed.

The integrity of the judicial system, in the eyes of the defendant, is more important than the legal nicety urged upon the court that there was "no showing that Mr. Kimball ever represented Fitzpatrick much less did any in terms of preparation of a defense."

None was needed. Only the potential for conflict need exist.

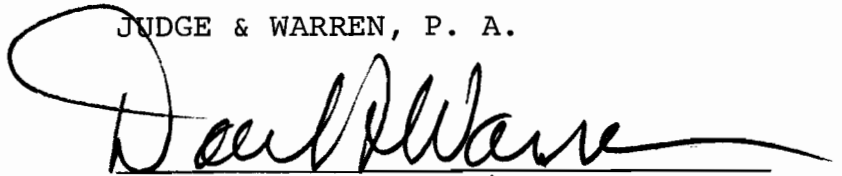
The Petitioner is not without relief for it need only ask the court to appoint an "acting state attorney" to handle the matter in accordance with Chapter 27.14 and Chapter 27.16 of the Florida Statutes.

CONCLUSION

The Respondent urges this court to deny the petition and affirm the decision of the Fifth District Court of Appeal.

RESPECTFULLY submitted this 21st day of November, A. D., 1983.

JUDGE & WARREN, P. A.



Dan R. Warren, Esquire
Attorney for Respondent
P. O. Box 5355
Daytona Beach, Florida 32018
(904) 255-3658

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies hereof have been furnished by mail this 21st day of November, A. D., 1983, to: THE HONORABLE SID J. WHITE, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; and a copy hereof by mail to: RICHARD W. PROSPECT, ESQUIRE, Assistant Attorney General, 125 N. Ridgewood Avenue, Fourth Floor, Daytona Beach, Florida 32014.



Attorney At Law