IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA Petitioner, v. LARRY E. FITZPATRICK Respondent.	)	Case No.

PETITIONER'S BRIEF ON JURISDICTION

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TOPICAL INDEX

CITATIONS OF AUTHORITY

STATEMENT OF THE CASE AND FACTS

As taken from the opinion made the basis of our request for review, the facts are as follows:

The Respondent was arrested for conspiracy to traffic in cocaine and two other counts of sale of a controlled substance. While incarcerated, he spoke to Greg Kimball who was a private practitioner in Daytona Beach, Florida. During these consultations, confidential communications were disclosed.

Subsequent to meeting with Respondent, Greg Kimball began employment with the state attorney's office in and for the Seventh Judicial Circuit. Because of Mr. Kimball's employment with the state attorney, Respondent moved to disqualify him and the entire state attorney's staff from prosecuting him on the basis of the conferences held when Mr. Kimball was a private practitioner. That motion was denied in the trial court and Respondent sought a Petition for Writ of Prohibition or in the alternative for Writ of Mandamus seeking to remove the entire office of the State Attorney in and for the Seventh Judicial Circuit.

The Fifth District Court of Appeal treated the petition as one in certiorari, granted the writ and quashed the trial court's order denying disqualification.

The Petitioner filed a motion for rehearing and same was denied May 25, 1983. A notice to invoke discretionary jurisdiction of this Court was filed May 26, 1983 and the cause is now here for purposes of determining whether jurisdiction

is present so that this Court may favorably invoke its discretionary review.

QUESTION PRESENTED

WHETHER THE DECISION OF THE FIFTH DISTRICT COURT OF APPEAL DIRECTLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS AND EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF ANOTHER DISTRICT COURT OF APPEAL AND OF THIS COURT ON THE SAME QUESTION OF LAW.

CLASS OF CONSTITUTIONAL OFFICERS BASIS FOR JURISDICTION

In Spradley v. State, 293 So.2d 697 (Fla. 1974), this Court stated the narrow test used to determine whether this constitutional basis for jurisdiction is present. In order for this provision to become operational, a decision must directly and in some way exclusively affect the duties, powers, validity, formation, termination, or regulation of a particular class of constitutional or state officers. 293 So.2d at 701. This test is to be used regardless of whether the class or a member of the class is a party. In Heath v. Becktell, 327 So.2d 3 (Fla. 1976), a writ of mandamus entered by the district court of appeal was on considered to affect the entire class of constitutional officers, i.e., clerks of courts, and jurisdiction was accepted. In State v. Laiser, 322 So.2d 490 (Fla. 1975), the Fourth Amendment issue was held to have affected all sheriffs in the performance of their duties. In In the Interest of J.R.M., 346 So.2d 1033 (Fla. 1977), the state attorney was involved in the litigation as a party and the decision of the district court was considered to affect not only states attorneys but also the

circuit courts and the public defenders in relation to a rule of juvenile procedure.

The holding of the Fifth District Court in this case is that if a lawyer has had consultations with a criminal defendant prior to employment with the state attorney's office, then the entire prosecuting staff is disqualified from prosecuting the criminal defendant. This holding obviously affects all states attorneys who either have hired or will hire attorneys similarily circumstanced and is a matter of extreme public importance.

EXPRESS AND DIRECT CONFLICT OF DECISION BASIS FOR JURISDICTION

The basis of our allegation of conflict in this situation is twofold. We first claim express and direct conflict with decisions of this Court and other district courts of appeal. We also claim that conflict exists because the Fifth District Court of Appeal accepted an earlier decision of this Court as controlling precedent in a situation materially at variance with the case relied on. McBurnette v. Playground Equipment Corporation, 137 So.2d 563 (Fla. 1962).

Insofar as direct conflict is presented, all one need do is examine footnote number four in the decision of State ex rel. Oldham v. Aulls, 408 So.2d 587 (Fla. 5th DCA 1981), a decision of the Fifth District cited in the instant decision. That footnote refers to Thompson v. State, 246 So.2d 760 (Fla. 1971), a case involving a capital rape with three defendants. Two of the three

defendants were represented by attorneys Goodwill and Storey and they were allowed to retain a Mr. Jones as their investigator. Defendant Lewis, represented by Mr. Storey, was tried first and convicted with a recommendation of mercy in October of 1968. In January, 1969, two months before defendant Thompson's trial, Mr. Storey became employed as a regular assistant state attorney. Thompson moved to disqualify the State Attorney contending that he, Mr. Storey, and all other assistants might have the benefit of confidential information related to Mr. Storey by defendant Lewis pertaining to the facts and circumstances surrounding the charge. Much like Mr. Fitzpatrick here, the defendant Thompson did not allege any wrongdoing because of the subsequent employment of attorney Storey but rather that the employment circumstances represented, per se, a violation of due process. In answering this question, this Court acknowledged that attorney Storey was indeed privy to information provided to Thompson's lawyer by the common investigator, Mr. Jones. However, whether the subsequent employment of an attorney who completely participated in the case of one co-defendant was a violation of the second defendant's right to due process was deemed dependent upon utilization of a twofold test. It was held that no such violation occurs provided that the former defender turned prosecutor neither acted directly against his former client in a related matter nor provided information or assistance to those who would act against him.

It must be remembered that attorney Storey shared a

common investigator with attorney Goodwill and had fully investigated and prepared a defense. He actively represented defendant Lewis in a trial which had resulted in a guilty verdict. Placing great trust and professional integrity on and in the attorney, this Court held very clearly that the mere subsequent employment does not necessarily create any conflict of interest so that the second defendant would be deprived of due process of law. Only if, and as is obviously so, the lawyer acted directly against his former client or provided information to his brother prosecutors would a conflict of interest arise.

The above-mentioned test was taken from State v. Bryan, 227 So.2d 221 (Fla. 2d DCA 1969), which developed the test to affirmatively answer the question whether an attorney who defended a client four years earlier could then subsequently prosecute the same client for a criminal charge. Most noteworthy is the fact that the Canons of Ethics were specifically referred to in deciding that case.

Subsequent to Thompson, the Second District again had occasion to consider the question of defender turned prosecutor. In Surrette v. State, 251 So.2d 149 (Fla. 2d DCA 1971), the defendant was originally appointed attorney McPherson, an assistant public defender, and attorney Altman, a private attorney. After a defense was prepared but before trial, McPherson was appointed assistant state attorney. The defendant claimed that this created obvious conflict and that he was deprived of due process. The court rejected that claim and,

relying upon Young v. State, 177 So.2d 345 (Fla. 2d DCA 1965) and Jackson v. State, 234 So.2d 708 (Fla. 3d DCA 1970), reaffirmed that an evidentiary hearing is required to determine the questions of whether a conflict of interest exists so as to result in prejudice.

The above conclusively demonstrates that the instant decision creates express and direct conflict with any or all of the above-cited cases. The legal reader cannot reconcile the decision here with any of those cases, especially this Court's decision in Thompson, supra. The instant decision purports to fashion a new rule to the effect that in circumstances reflected by the facts here, there is created an irrebuttable presumption of conflict such that no prosecutor in the affected judicial circuit may ever discharge the constitutional duties of prosecution. The earlier cited cases clearly demonstrate that such is not necessarily true and at the very least, a hearing should be held to determine the existence of possible prejudice.

The district court misapplied this Court's decision in Babb v. Edwards, 412 So.2d 850 (Fla. 1982), in reaching its decision. There, this Court was confronted with the situation in which the Fifth District Court of Appeal held that despite the assertion of conflict by a Public Defender, two assistant public defenders not geographically associated with

one another could nevertheless act to represent two adverse defendants. In quashing that determination, this Court relied upon a statute, §27.53(3) Fla.Stat., holding that the legislative intention was clear and that once the Public Defender certified conflict, the entire staff of that particular public defender was not legally required to represent two adverse defendants. The court held that the Fifth District Court of Appeal was incorrect in its interpretation of the statute and specifically did not decide the issue of the validity of a conviction had the assistant public defenders so acted insofar as prejudice to the defendant was concerned.

The Fifth District noted that this Court did not base its decision on the proposition that a public defender's office within a judicial circuit is a single "firm". The court however noted two other decisions, mentioned only in passing by this Court, which did hold that a public defender's office is a "firm" within the meaning of the Code of Professional Responsibility. Taking these decisions and at least relying in part on their respective discussions by this Court, the Fifth District equated the analytical concept to a state attorney's office.

It is true that both Roberts v. State, 345 So.2d 837 (Fla. 3d DCA 1977) and Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976), considered a public defender's office as single law firm. Because that premise was not specifically rejected by this Court in Babb, supra, the Fifth District seemed to build upon this to reach its conclusion. It is our contention that

this represented a misapplication of the holding in Babb in a way which was neither indicated nor justified.

CONCLUSION

Based on the above and foregoing it is respectfully submitted that jurisdiction has been properly demonstrated and that the Court should favorably exercise its discretion and grant review.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail to Philip J. Chanfrau, Jr., Esquire, Post Office Box 3156, 701 N. Peninsula Drive, Daytona Beach, Florida 32018, this 2nd day of June, 1983.

Counsel for Petitioner