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IN THE SUPREME COURT OF FLORIDA

CASE NO: 65,945

THE STATE OF FLORIDA

Petitioner,

vs.

JOSE CLAUSELL,

Respondent.

****

BRIEF OF RESPONDENT

****

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ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE CASE AND FACTS

Respondent, JOSE CLAUSELL, accepts Petitioner's Statement Of The Case And Facts with the following corrections and additions:

1. The information in case no. 83-18020 alleges that on November 23, 1982, JOSE CLAUSELL made false statements to an assistant state attorney during a pre-filing conference.

2. There are two assistant state attorneys listed as witnesses on the state's witness list; one is the assistant state attorney who was present at the pre-filing conference; the other assistant state attorney is the one to whom JOSE CLAUSELL allegedly corrected his prior testimony in a phone conversation.

3. The trial court did not deny the motion for disqualification at the conclusion of the October 14, 1983, hearing; the motion was denied on October 24, 1983.

4. In his petition for common law certiorari, Respondent JOSE CLAUSELL argued that the trial court departed from the essential requirements of the law in denying his motion to disqualify the state attorney's office pursuant to disciplinary rules 5-101 (B), 5-102 (A), and the case of Rodriguez v. State, 433 So 2d 1273

(Fla. 3rd DCA 1983)[1]. CLAUSELL's argument was not only that the two non-prosecuting assistant state attorneys were witnesses for the State, but that they were material witnesses, since without their testimony, the State would have no case.

5. While the petition for certiorari was denied by the three-judge panel in Clausell v. State,[2] it was granted upon a full hearing by the Court. Of the eight active sitting members of the Court, four voted to disapprove the panel decision and approve Rodriguez; one voted to disapprove the panel decision on the basis of stare decisis; and three (two of whom sat in the original panel), voted to approve the panel decision and reject Rodriguez.

The court certified the following questions to the Supreme Court:

QUESTION I

> IS IT A BREACH OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR FOR A STATE ATTORNEY OR ANY ASSISTANT STATE ATTORNEY IN THE OFFICE TO CONTINUE TO ACT AS THE PROSECUTOR IN A CRIMINAL CASE WHEN IT IS HIS OR HER INTENTION TO CALL ANOTHER ASSISTANT STATE ATTORNEY IN THE SAME OFFICE TO TESTIFY AT THE TRIAL OF THE CASE AS TO A MATERIAL MATTER?

QUESTION II

> IF IT IS A BREACH OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR FOR A STATE ATTORNEY OR ANY ASSISTANT STATE ATTORNEY IN THE OFFICE TO CONTINUE TO ACT AS THE PROSECUTOR IN A CRIMINAL CASE WHEN IT IS HIS OR HER INTENTION TO CALL ANOTHER ASSISTANT STATE ATTORNEY IN THE SAME OFFICE TO TESTIFY AT THE TRIAL OF THE CASE AS TO A MATERIAL MATTER, IS DISQUALIFICATION OF THE STATE ATTORNEY AND ANY ASSISTANT STATE ATTORNEY IN THE SAME OFFICE FROM PROSECUTING THE CASE REQUIRED WHETHER OR NOT PREJUDICE TO THE DEFENDANT CAN BE DEMONSTRATED?

A special concurrence was written by Judge Ferguson and joined in by Judge Baskin. In his Opinion, Judge Ferguson argued that only one question should have been certified to the Florida Supreme Court, and that is whether disqualification of the Office of the State Attorney for the District is required when the State Attorney or one of his assistants is obligated to call another assistant in the same office to testify at trial as to a material matter. Judge Ferguson argued that a criminal defendant should not be required to show actual prejudice; that the fact that an assistant state attorney is the key witness in the effort of the State Attorney to obtain a conviction is potentially prejudicial to the accused.

The Third District, sitting en banc, quashed the decision of the Eleventh Judicial Circuit and directed the disqualification of the Office of the State Attorney of

the Eleventh Judicial Circuit from further prosecution of Respondent CLAUSELL in this cause.

QUESTION I

> IS IT A BREACH OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR FOR A STATE ATTORNEY OR ANY ASSISTANT STATE ATTORNEY IN THE OFFICE TO CONTINUE TO ACT AS THE PROSECUTOR IN A CRIMINAL CASE WHEN IT IS HIS OR HER INTENTION TO CALL ANOTHER ASSISTANT STATE ATTORNEY IN THE SAME OFFICE TO TESTIFY AT THE TRIAL OF THE CASE AS TO A MATERIAL MATTER?

ARGUMENT I

The provisions of the Code of Professional Responsibility are applicable to all persons licensed to practice law in Florida. Fla. Bar Integr. Rule, Art. II, Rule I; Art. X; Jackson v. State, 421 So 2d 15, 17 (Fla. 3d DCA 1982). Every member of the Florida Bar is within the jurisdiction of the Supreme Court of Florida and is held to know the provisions of the Code, a violation of which is cause for discipline. Fla. Bar Integr. Rule, Art. XI, Rules 11.01, 11.02.

In its Preliminary Statement to the Code, the Court expressed its intention that, "(w)ithin the framework of fair trial, the Disciplinary Rules should be uniformly applied to all lawyers, regardless of the nature of their professional activities." And, as explained in the Preamble to the Model Rules of Professional Conduct,

"every lawyer is responsible for observance of the Rules of Professional Conduct[3].

Respondent, therefore, agrees with the Third District's ruling which disqualified the State Attorney from further prosecution of Respondent for perjury. The Court, sitting en banc, relied upon the opinion previously rendered in Rodriguez v. State, 433 So 2d 1273 (Fla. 3rd DCA 1983), where the Court, in applying the disciplinary rules to a state attorney's office, held that it is clearly impermissible under the Code for the office of the state attorney to call a member of its legal staff as a witness during a trial. Upon rehearing en banc on Clausell, five members of the Court rejected the earlier decision in Clausell v. State, ___ So 2d ___ (Fla. 3rd DCA 1984) (Case No. 83-2522, opinion filed March 13, 1984), which held that a state attorney's office was not a law firm, and that an assistant state attorney was not a lawyer in the firm for the purposes of Disciplinary Rules 5-101 (B) and 5-102 (A).

As further authority for its position that a state attorney's office is a law firm within the meaning of the Disciplinary Rules, Respondent cites Fitzpatrick v. Smith, 432 So 2d 89 (Fla. 5th DCA 1983) rev. granted; State v. Fitzpatrick, ___ So 2d ___ (Fla. 1983) (Case No. 63,752,

jurisdiction accepted October 17, 1983). After noting that at least two cases, Roberts v. State, 345 So 2d 837 (Fla. 3rd DCA 1977) and Turner v. State, 340 So 2d 132 (Fla. 2nd DCA 1976), have held that a public defender's officer in a given circuit is a "firm" within the meaning of Canon 5, and finding that "the same potential for conflict exists in both the office of the state attorney and the public defender and that there is no rational distinction between them in this regard," the Fifth District held that each office is a single firm for the purposes of Canon 5 of the Code[4].

Further, this Court has held that when an assistant public defender is subpoenaed to testify as a witness, his office may no longer continue to represent the accused. Adams v. State, 380 So 2d 421 (Fla. 1980). Since there is "no rational distinction" between the office of the state attorney and the public defender, when an assistant state attorney is subpoenaed to testify as a witness, his office may no longer continue in prosecution of the accused. See, Fitzpatrick at 91[5].

Despite the clear statement of judicial will promulgated in the Preliminary Statement to the Code, the one rule of the Code which relates solely to prosecuting attorneys, DR 7-103, and the cases of Rodriguez, supra,

and Fitzpatrick, supra, the panel in Clausell held that the Code of Professional Responsibility was not meant to apply to a state attorney's office. The Court reasoned that the expressions "law firm" and "lawyer in his firm" were intended to refer to law firms and lawyers in such firms undertaking employment for remuneration.

It is a cardinal rule of statutory construction that the entire statute in question must be considered in determining legislative intent, and effect must be given to every part of the statute and every part of the statute as a whole. State v. Gale Distributors, Inc., 349 So 2d 150 (Fla. 1977). Instead of viewing the entire code in pari materia, the panel in Clausell cited isolated sections of the Disciplinary Rules to support its theory of remuneration. Clausell at 5-6.

Yet, DR 7-103 and DR 7-107[6] are specifically directed to a prosecuting attorney. And in Richman v. State, 387 So 2d 493 (Fla. 5th DCA 1980), the Fifth District held that the prosecutor's conduct violated DR 7-106 (C) (4), which prohibits a lawyer from, among other things, asserting his personal opinion as to justice of a cause or the credibility of a witness.

It is precisely because of the likelihood of prosecutorial misconduct that the Disciplinary Rules are

intended to be applied to a state attorney's office. It is the "fundamental and decisive difference" inherent in the duties of a prosecutor which makes it all the more compelling that the standards governing propriety of conduct be applied in the context of a criminal prosecution. See, e.g. Jackson v. State, 421 So 2d 15 (Fla. 3rd DCA 1982).

It would be impossible for a prosecutor to fulfill his obligations to serve justice and insure a fair trial, see, Frazier v. State, 291 So 2d 691 (Fla. 1st DCA 1974), Jackson v. State, supra, and it would be impossible for the public to have confidence in the integrity of the justice system if lesser standards are deemed to control the conduct and appearance of propriety in the representation by a public prosecutor, vested with the enormous discretionary powers, in a criminal proceeding.

The function of preserving public trust in the integrity of the judicial system is all the more important when the lawyer in question represents the prosecuting arm of the government. It is the prosecutor who determines who, what and how to prosecute. Any act not in accordance with the standards of conduct, because it impairs the confidence of the people in the integrity of the exercise of the State's sovereign power to indict and prosecute,

tends to destroy the people's faith in the fair and equal administration of justice. Sinclair v. State, 340 A 2d 359, 373 (Md App 1975).

As stated by Justice Frankfurter in Offutt v. United States, 348 U.S. 11,14 (1954):

> Important as it was that people should get justice, it was even more important that they should be made to feel and see that they were getting it.

To hold a large body of lawyers above the canons of ethics for the mere convenience of government would serve neither the defendant nor the public.

Continuation of the American concept that we are to be governed by the rules of law requires that those laws apply to all attorneys. Accordingly, a state attorney's office must be deemed a law firm within the meaning of the Code of Professional Responsibility, and, when it is the intention of an assistant state attorney to call another assistant state attorney in the same office to testify at trial as to a material matter, that state attorney's office may no longer continue to act as the prosecutor in the case.

QUESTION II

> IF IT IS A BREACH OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR FOR A STATE ATTORNEY OR ANY ASSISTANT STATE ATTORNEY IN THE OFFICE TO CONTINUE TO ACT AS THE PROSECUTOR IN A CRIMINAL CASE WHEN IT IS HIS OR

HER INTENTION TO CALL ANOTHER ASSISTANT STATE ATTORNEY IN THE SAME OFFICE TO TESTIFY AT THE TRIAL OF THE CASE AS TO A MATERIAL MATTER, IS DISQUALIFICATION OF THE STATE ATTORNEY AND ANY ASSISTANT STATE ATTORNEY IN THE SAME OFFICE FROM PROSECUTING THE CASE REQUIRED WHETHER OR NOT PREJUDICE TO THE DEFENDANT CAN BE DEMOSTRATED?

ARGUMENT II

Respondent agrees with Judge Ferguson in his concurring opinion in which he states that the fact that an assistant state attorney is the key witness in the effort of the state attorney to obtain a conviction is potentially prejudicial to the accused. Respondent does not contend that calling a member of the prosecutor's office who was not prosecuting the case to testify as a prosecution witness is unethical conduct in and of itself. The prejudice to the defendant attaches when the prosecutor is a lawyer in the same office as the sole witnesses against the defendant giving added weight, credibility, and prestige to their testimony. In his opening argument to the jury as well as in his closing statement, the prosecutor is arguing the credibility of his witnesses, and, in turn, the credibility of himself and his office.

It is not the status of the witness as an assistant state attorney that prejudices Respondent, but rather, it is the presence of a prosecuting attorney from the same

office as the witnesses that serves to buttress and bolster the witness' credibility. Not only may a jury give evidence from these witnesses greater weight than that of an ordinary witness because they are from the same office as the prosecutor, the jury may accord testimonial credit to the prosecutor's closing arguments. See, United States v. Birdman, 602 F 2d 547 (3rd Cir. 1979). The added weight given to the testimony of a state attorney as a witness, by the presence of a prosecutor from the same office, is sufficient to establish a real danger of prejudice to the defense, as well as a substantial threat to the fairness of the trial. See, United States v. Alu, 246 F 2d 29 (6th Cir. 1957), where, in a perjury case, the Sixth Circuit held that the prohibition against a lawyer calling a member of his firm to testify during trial was applicable to the United States government and its attorneys as well as to private litigants and their attorneys.

WHEREFORE, Respondent prays this Honorable Court affirm the Order of the Third District sitting en banc, which granted the writ of common law certiorari and directed disqualification of the office of the state attorney of the Eleventh Judicial Circuit from further prosecution in this cause.

Respectfully submitted,

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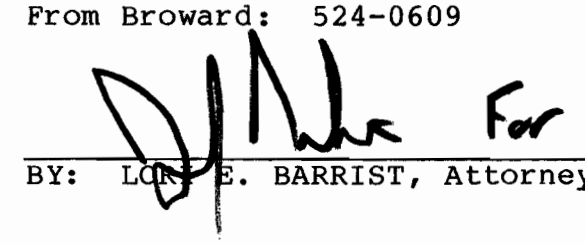

BY: LORE E. BARRIST, Attorney at Law

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1 In Rodriguez v. State a three-judge panel held that a state attorney's office is a law firm within the meeting of the disciplinary rules and that it was improper for the office of the state attorney to call a member of its legal staff as a witness to testify on behalf of the State.

2 Judge Pearson, writing for the court in Clausell v. State, distinguished Rodriguez, supra, holding that the testimony presented in Rodriguez was inadmissible regardless of whether it was offered by a member of the state attorney's office or someone appointed in place of the state attorney. Judge Pearson disregarded that portion of Rodriguez that he termed "dicta" - the application of the disciplinary rules to a state attorney's office.

3 The Model Rules have been adopted by the American Bar Association and are being considered for adoption by this Court. However, unless and until this Court adopts the Model Rules as binding on all members of the Bar, lawyers are guided solely by the Code of Professional Responsibility.

4 The applicable provisions of Canon 5 are:

a. DR 5-101 (B): A lawyer shall not accept employment in contemplated or pending litigation if he knows or it is obvious that he or a lawyer in his firm ought to be called as a witness, except that he may undertake the employment and he or a lawyer in his firm may testify:

1. If the testimony will relate solely to an uncontested matter.

2. If the testimony will relate solely to a matter of formality and there is no reason to believe that substantial evidence will be offered in opposition to the testimony.

3. If the testimony will relate solely to the nature and value of legal services rendered in the case by the lawyer of his firm to the client.

4. As to any matter, if refusal would work a substantial hardship on the client because of the distinctive value of the lawyer or his firm as counsel in the particular case.

b. DR 5-102 (A): If, after undertaking employment in contemplated or pending litigation, a lawyer learns it is obvious that he or a lawyer in his firm ought to be called as a witness on behalf of his client, he shall withdraw from the conduct of the trial and his firm, if any, shall not continue representation in the trial, except that he may continue the representation and he or a lawyer in his firm may testify in the circumstances enumerated in DR 5-101 (B) (1) through (4).

c. DR 5-105 (D): If a lawyer is required to decline employment or to withdraw from employment under DR 5-105, no partner or associate of his or his firm may accept or continue such employment.

5 In Informal Opinion 1405, 65 A.B.A.J. 970 (1979), the American Bar Association Standing Committee on Ethics and Professional Responsibility applied the Disciplinary Rules to an attorney general's office. The committee found that it was not unethical for an assistant attorney general to represent state agencies at an administrative appeal hearing where another assistant attorney general may be called as a witness provided that the reason for the witness' testimony relates solely to the formal procedural steps required in the proceeding. For the assistant attorney general to testify to something more than a purely procedural matter, then, would be unethical. Here, the two assistant state attorneys will be testifying to all of the elements of the crime of perjury, not to just procedural or formal matters.

6 DR 7-103 provides:

(A) A public prosecutor or other government lawyer shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cuase.

(B) A public prosecutor or the government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

DR 7-107 provides:

(B) A lawyer or law firm associated with the prosecution or defense of a criminal matter shall not, from the time of the filing of a complaint, information, or indictment, the issuance of an arrest warrant, or arrest until the commencement of the trial or disposition without trial, make or participate in making an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication and that relates to:...

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that a true and correct copy of the foregoing was mailed this 31st day of October, 1984, to: MICHAEL J. NEIMAND, ESQUIRE, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite 820, Miami FL 33128.

BY: JORI E. BARRIST, Attorney at Law