

IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,171

**FILED**

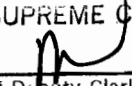
SID J. WHITE

DEC 3 1984

THE STATE OF FLORIDA,

Petitioner,

CLERK, SUPREME COURT

By  Chief Deputy Clerk

-vs-

JERRY BROWN,

Respondent.

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ON APPLICATION FOR DISCRETIONARY REVIEW

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RESPONDENT'S BRIEF ON JURISDICTION

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STATEMENT OF THE CASE AND FACTS

Respondent Jerry Brown accepts the statement of the case and facts set forth in petitioner's Brief on Jurisdiction except for the following:

The state's characterization of respondent's successful contention in the trial court (Brief of Petitioner at 1) is overly simplistic; it was respondent's contention that the Office of the State Attorney must be disqualified because a member of that office was to be called as a witness for the sole purpose of buttressing the credibility of the victim's highly impeachable identification testimony. (App. 2-3).<sup>1</sup>

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In this brief, the symbol "A." refers to the petitioner's appendix, and the symbol "App." refers to respondent Brown's appendix. The parties are referred to as they stand before this Court.

ARGUMENT

THE PETITIONER HAS FAILED TO DEMONSTRATE  
AN EXPRESS AND DIRECT CONFLICT OF  
DECISIONS TO WARRANT THE INVOCATION OF  
THIS COURT'S DISCRETIONARY JURISDICTION.

The Third District Court of Appeal affirmed the trial court's order disqualifying the Office of the State Attorney from prosecuting respondent Brown "(f)or the reasons set forth in the substantially identical case of Clausell v. State, \_\_\_ So.2d \_\_\_ (Fla. 3d DCA 1984) (Case No. 83-2522, Opinion filed March 13, 1984, Opinion rehearing en banc filed [September 18, 1984])." (A. 1). In Clausell, supra, a majority of the panel sitting en banc decided to approve that court's previous decision in Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983) and to submit the issue for resolution by this Court. (A. 11-12).

Rodriguez involved the same question of law that is central to this case. The court held:

. . . It is clearly improper under the Code of Professional Responsibility for the office of the state attorney to call a member of its legal staff as an expert witness for the purpose of buttressing the credibility of one of its witnesses. Fla.Bar Code Prof.Resp. D.R. 5-102. Thus, the state's presentation of the testimony of a member of its office to give an expert opinion as to whether the alibi witness could be prosecuted constituted error.

(A. 19).

The petitioner seeks to invoke this Court's discretionary jurisdiction by asserting that the district court's "analysis" in this case expressly and directly conflicts with this Court's

decision in State v. Murray, 443 So.2d 955 (Fla. 1984). (Brief of Petitioner at 7). There is no conflict.

In State v. Murray, this Court decided the standard of review for errors concerning prosecutorial misconduct which do not require the automatic reversal of a conviction. In closing argument, the prosecutor violated D.R. 7-106(c)(4), Florida Code of Professional Responsibility by attacking the credibility of the defendant, but this Court held that the error was harmless in light of the overwhelming evidence of guilt. Id. at 956.

Although both cases involve the Code of Professional Responsibility, the decision below did not announce a rule of law which conflicts with the standard of appellate review announced in State v. Murray, supra. This is so because there are provisions in the Code, such as the one at issue here, which govern situations in which a violation is presumed to be actually or potentially prejudicial, irrespective of the manner in which the violation occurred or the evidence adduced at trial. These include the representation of multiple defendants with possible conflicting interests, see, Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978); Fla. Bar Code Prof. Resp., D.R. 5-105; the prosecution of a defendant who had confidential communications with an attorney who later became a prosecutor in the same circuit, Fitzpatrick v. Smith, 432 So.2d 89 (Fla. 5th DCA 1983), rev. granted, State v. Fitzpatrick, \_\_\_\_\_ So.2d \_\_\_\_\_ (Fla. 1983) (Case No. 63, 752, Juris. Accepted October 17, 1983); Fla. Bar Code Prof. Resp. D.R. 4-101; and the utilization by a prosecutor of the testimony of a fellow prosecutor for the sole

purpose of buttressing the credibility of one of his witnesses, Rodriguez v. State, supra; Fla. Bar Code Prof. Resp. 5-102(A).

The provision at issue here, D.R. 5-102(A), is designed to avoid the appearance of impropriety and the potential for prejudice which inheres in the calling of a fellow prosecutor for the sole purpose of buttressing the credibility of another prosecution witness. It is clear that the decision in this case did not announce a rule of law which would be out of harmony with this Court's decision in State v. Murray, 443 So.2d 955 (Fla. 1984); thus, there is no justification for invoking this Court's discretionary review jurisdiction. Nielson v. City of Sarasota, 117 So.2d 731 (Fla. 1960); Kyle v. Kyle, 139 So.2d 885 (Fla. 1962).

For the same reasons, the petitioner has failed to demonstrate that the decision of the district court in this case expressly and directly conflicts with the decision in Fitzpatrick v. Smith, supra, which is presently under review by this Court.

In Fitzpatrick, the defendant consulted with an attorney who was subsequently hired by the same office which was prosecuting him. The Fifth District rejected the state's argument that the defendant was required to demonstrate prejudice, holding that the defendant's allegations that there were confidential communications which related to the trial were sufficient to establish the potential for prejudice. 432 So.2d at 90. The court further held that the Office of the State Attorney is a "law firm" within the dictates of the Code. Id. at 91. Because the decision in Fitzpatrick v. Smith, is totally consistent with

the decision below, petitioner has failed to demonstrate the requisite conflict. Review should therefore be denied.



CONCLUSION

Based on the foregoing, the respondent respectfully urges this Court to decline to review the decision of the district court of appeal in this case.

Respectfully submitted,

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BY: Robin H. Greene  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail to the Office of the Attorney General, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 29 day of November, 1984.

  
ROBIN H. GREENE  
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