IN THE SUPREME COURT OF FLORIDA

CASE NO. 66,171

THE STATE OF FLORIDA,

Petitioner,

-vs-

JERRY BROWN,

Respondent.

ON APPLICATION FOR DISCRETIONARY REVIEW

RESPONDENT'S BRIEF ON THE MERITS

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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 the Merits except for the following.

Respondent again disagrees with the state's characterization of his contentions below (Petitioner's Brief on the Merits at 5) as too simplistic; it was and is respondent's contention that the Office of the State Attorney must be disqualified in this case because a member of that office was to be called as a witness for the sole purpose of buttressing the highly impeachable identification testimony of the victim and key prosecution witness, Julian Angelini. (Ex. H at 12-18, 20-21).[1]

The state omitted the following pertinent facts from its recitation of proceedings in the trial court. The record reflects that victim Angelini told the jury at respondent's first trial that he had identified respondent Brown as standing in the number two position at the live line-up. (Ex. B at 7; H at 7-8). Prior to the declaration of mistrial resulting from the jury deadlock, the testimony of Mr. Angelini and the other prosecution witness was read to the jury during its deliberations. (Ex. B at 1-2).

At the pretrial line-up, Mr. Angelini vacillated in his identification of the perpetrator, settling on number two as

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[1] In this brief, the symbol "Ex." refers to the exhibits comprising the petitioner's appendix, and the symbol "A."refers to the appendix attached to this brief of respondent.

"more like the favorite one." (Ex. G at 3-7).

Respondent disagrees that Dennis Nowak, the prosecutor-witness at issue in this case, was a mere observer at the line-up and did not participate as an assistant state attorney. (Petitioner's Brief on the Merits at 3). The transcript of the line-up proceeding reflects the presence of Mr. Nowak in his official capacity, his acceptance of the procedure, and his declination to ask any questions. (Ex. 6 at 2-3, 7).

In the course of proceedings on respondent's motion to disqualify, which were heard by judges other than the one who had presided at trial, the state offered several reasons for insisting upon the testimony of the non-prosecuting assistant state attorney at the pending retrial of this case. These reasons included, "Mr. Nowak would come in purely as a witness to say that Mr. Angelini, the victim, made a positive identification at that line-up" (Ex. H at 5); "there is no independent witness available . . . to corroborate the victim's testimony (Ex. H at 10); "the words [of the transcribed lineup] don't always clearly depict what happened at that point[;] (t)he words may say one thing and something else may actually have happened, especially how positive the victim may have been in making the identification" (Ex. H at 17); "buttressing an identification" (Ex. H at 20); and, the prosecuting assistant state attorney "has been instructed by superiors" to call his fellow non-prosecuting assistant as a witness. (A. 3-4).

SUMMARY OF ARGUMENT

The circumstances which gave rise to the order disqualifying the office of the state attorney from further prosecution of respondent show the necessity for applying D.R. 5-102(A), Florida Bar Code of Professional Responsibility, to multi-assistant state attorney offices.

This Court's recent decision holding the imputed disqualification rule inapplicable to government lawyers rests on policy considerations not pertinent to the circumstances of this case. To permit, on retrial of the respondent, the prosecuting assistant state attorney to bolster the demonstrably weak identification testimony of the key prosecution witness by eliciting the opinion testimony of a fellow prosecutor in his office as to the positiveness of that identification would subvert the special duty imposed on prosecutors by Canon 7 to ensure the fairness of trial and the integrity of the fact-finding process.

The office of the state attorney was properly disqualified in this case.

ARGUMENT

THE OFFICE OF THE STATE ATTORNEY WAS PROPERLY DISQUALIFIED FROM PARTICIPATING IN THE RETRIAL OF THIS CASE WHERE THE PROSECUTING ASSISTANT STATE ATTORNEY, IN OBEDIENCE TO THE ORDERS OF HIS SUPERIORS, INSISTED ON CALLING AS HIS WITNESS A PROSECUTOR IN HIS OFFICE FOR THE SOLE PURPOSE OF BUTTRESSING THE HIGHLY IMPEACHABLE IDENTIFICATION TESTIMONY OF THE KEY PROSECUTION WITNESS.

The trial court's order of disqualification and the district court's decision to uphold that order were based on the Third District's opinion in Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983). In Rodriguez, the court held that under D.R. 5-102(A), Florida Bar Code of Professional Responsibility, it was improper 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. Id. at 1275. In a subsequent opinion, that court announced a different rule of law, that "the State Attorney's office is not a law firm, and an Assistant State Attorney is not a lawyer in the firm for the purposes of D.R. 5-101(B) and D.R. 5-102(A)." Clausell v. State, 455 So.2d 1050 (Fla. 3d DCA 1984), disapproved on motion for rehearing en banc, No. 83-252 (Fla. 3d DCA September 18, 1984).[2] An issue related to the questions certified in Clausell, supra, was recently addressed by this Court.

In State v. Fitzpatrick, 10 F.L.W. 141 (Fla. February 28,

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2 The decisions cited above are contained in the appendix to the petitioner's brief on jurisdiction in this case.

1985), an assistant state attorney was disqualified from the prosecution of a defendant with whom he had shared confidential communications while in private practice. This Court held that the imputed disqualification of the entire state attorney's office under Disciplinary Rule 5-105(D) is unnecessary "when the record establishes that the disqualified attorney has neither provided prejudicial information relating to the pending criminal charge nor has personally assisted, in any capacity, in the prosecution of the charge." 10 F.L.W. 141 at 143. Although this Court expressed its adherence to the view that prosecutors must abide by the same high standards imposed by the Code of Professional Responsibility on private practitioners, it approved the construction of the imputed disqualification rule contained in the American Bar Association's Formal Opinion 342. State v. Fitzpatrick, supra.

Formal Opinion 342 concerns the impact of the imputed disqualification rule on the representation a lawyer may undertake after terminating past employment and its deterrent effect on the government's recruitment of competent attorneys. 62 A.B.A.J. 517 (1975). It is the policy against such unreasonable impairment of the government's ability to function which underlies the Opinion's conclusion that D.R. 5-105(D) is inapplicable to other government lawyers associated with a government lawyer who is himself disqualified. 62 A.B.A.J. 517, 522 (1975). The Opinion approved by this Court considered the government lawyer's lack of financial interest in the outcome of litigation in forming its conclusion. Id.; State v. Fitzpatrick, supra.

Respondent submits that the policy of encouraging government service by limiting the vicarious disqualification of a government agency is not pertinent to the enforcement of the Disciplinary Rules involved in this case, D.R. 5-101(B), 5-102(A), and that a restrictive construction of the term "law firm" would permit the prosecution, under the circumstances of this case, to violate its mandate to seek just results in advocating on behalf of the state. The record in this case reveals the impropriety of the intended conduct of the office of the state attorney and the consequent prejudice to respondent Brown.

The prosecution's first attempt to secure respondent's conviction failed when a mistrial was declared because of jury deadlock. (Ex. B at 1-2). The issue was identification; victim Angelini told the jury that he had identified respondent Brown as standing in the number two position at the pretrial line-up, and his testimony was reheard by the jury during its deliberations. (Ex. B at 1-2, 7; H. at 7-8).

The transcript of the live line-up reveals the uncertainty of Mr. Angelini's identification of respondent. (Ex. G). Present at the line-up in their official capacity as assistant state attorneys were the prosecuting assistant and the non-prosecuting assistant whom the state insists on calling as its witness. (Ex. G. at 2-3, 7). The prosecutor's purpose in calling a member of his office as a witness in the pending retrial of this case is solely to buttress Mr. Angelini's highly impeachable identification testimony. (Ex. H. at 5, 10, 17, 20). Despite the uncertainty of Mr. Angelini's identification of respondent, as

evidenced by the transcript of the line-up proceeding, and the inability of the jury to reach a verdict after twice hearing his testimony, the prosecutor insisted on eliciting the opinion of his fellow prosecutor as to the positiveness of Mr. Angelini's identification in the second attempt to secure respondent's conviction. (Ex. H. at 17; A. 4).[3]

It was clearly improper for the prosecutor to insist on such use of a member of his office when the trancript reflects the uncertainty of identification, and when the issue of respondent's identification as the perpetrator was decided adversely to the state at respondent's first trial. By seeking the opportunity to argue the credibility of his fellow prosecutor in order to buttress unreliable identification testimony, the prosecutor is seeking to enhance in the eyes of the fact-finder his own credibility and that of the office which employs them both and which made the decision to prosecute this case. To allow the prosecutor to bolster an obviously weak case by eliciting his associate's opinion as to a positive identification when there was none would subvert the special duty imposed on prosecutors by Canon 7 to ensure the fairness or appearance of fairness of a criminal prosecution and to preserve the integrity of the fact-finding process. It is precisely because of the likelihood of

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3 The prosecutor then proposed to limit his associate's testimony to "solely the fact that the person that the victim identified, number two, was in fact the [respondent]" (Ex. H at 20), but he receded from this proposal and refused to stipulate to the uncontested fact that the respondent was number two in the line-up. (Ex. H. at 21; A.).

prosecutorial misconduct, as intended in this case, that the Disciplinary Rules should be applied to the office of the state attorney and to assistants in that office. The fundamental difference in the duties of a prosecutor 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. 3d DCA 1982).

Moreover, the record in this case discloses the very interest which the Disciplinary Rules of Canon 5 were designed to prevent; the prosecuting assistant state attorney in this case stated that he was ordered by his superiors to insist on calling a fellow prosecutor as his witness. (A. 3-4). Regardless of the motives of his superiors, the prosecutor's obedience to their instructions vitiates the axiom that a lawyer should exercise independent professional judgment on behalf of a client.

In United States v. Alu, 246 F.2d 29 (6th Cir. 1957), the court explained why the Disciplinary Rules involved in this case must be deemed to apply to prosecuting attorneys:

> . . . It is obvious that the opportunity for tailoring a witness's testimony to the needs of the Government's case is maximized if recourse is permitted to the testimony of an experienced trial attorney who is interested in the successful presentation of that case. Especially in criminal litigation, where so much is at stake for the defendant, must be Bench and Bar demand adherence to a principle that is designed to ensure objectivity in the presentation of evidence.

Id. at 34.

The record in this case discloses interests, other than financial, to explain the prosecutor's intended conduct. It

reveals the insidious disadvantage to the respondent if the prosecutor's self-serving procedure was to be countenanced. The circumstances under which the office of the state attorney is seeking to buttress the highly challengeable identification testimony of its key prosecution witness by calling on the opinion of one of its members requires this Court to uphold the decision disqualifying that office from further participation in this case.

CONCLUSION

Based on the cases and authorities cited herein, the respondent requests this Court affirm the judgment of the lower court.

Respectfully submitted,

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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, MICHAEL J. NEIMAND, Assistant, Suite 820, 401 N.W. 2nd Avenue, Miami, Florida 33128, this 22 day of March, 1985.

Robin H Greene

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