

IN THE SUPREME COURT OF FLORIDA

CASE NO.

THE STATE OF FLORIDA,

Petitioner

vs.

JERRY BROWN,

Respondent.

**FILED**  
SID J. WHITE  
NOV 13 1984  
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By *m*  
Chief Deputy Clerk

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ON PETITION FOR DISCRETIONARY REVIEW

\* \* \* \* \*

BRIEF OF PETITIONER ON JURISDICTION

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## INTRODUCTION

The Petitioner, the State of Florida, was the Petitioner in the District Court of Appeal of Florida, Third District and the prosecution in the trial court, the Circuit Court of the Eleventh Judicial Circuit. The Respondent, Jerry Brown, was the Respondent in the Third District and the Defendant in the trial court. The parties will be referred to as they stand before this Court. The symbol "A" will be utilized to designate the Appendix to this brief. All emphasis has been supplied unless the contrary is indicated.

## STATEMENT OF THE CASE AND FACTS

The Petitioner filed a Petition for Writ of Certiorari seeking to quash an order of the trial court which disqualified the Office of the State Attorney from further participation in Respondent's prosecution for armed robbery. Respondent successfully contended in the trial court because an Assistant State Attorney was to be a witness for the prosecution, all other members of the State Attorney's Office are disqualified from prosecuting him and a special prosecutor must be appointed. (A.1).

The Third District denied the petition for writ of

certiorari. The grounds therefor were for the reasons set forth in the substantially identical case of Clausell v. State, \_\_\_So.2d\_\_\_ (Fla. 3d DCA 1984)(Case No. 83-252, opinion filed March 13, 1984; opinion rehearing en banc filed September 18, 1984). (A.1).

In Clausell v. State, supra, Clausell sought to quash an order of the trial court which refused to disqualify the Office of the State Attorney from further participation in his prosecution for perjury. Clausell contended that because two Assistant State Attorneys were going to be witnesses for the prosecution, all other members of the State Attorney's Office were disqualified from prosecuting him and a special prosecutor was required to be appointed. (A.2). Clausell argued that it was unnecessary for him to show prejudice and that he was entitled to have the State Attorney's Office disqualified because its further participation in the prosecution constituted a breach of the Florida Bar Code of Professional Responsibility. His thesis was the Office of the State Attorney is a law firm, and every assistant within the office is a lawyer in the firm, so as to require the automatic disqualification of the firm when any of its members are to be witnesses in a case being prosecuted by a law firm. (A.4).

The Panel, on the basis of State v. Murray, 443 So.2d

955 (Fla. 1984), rejected this contention. It held that without a showing that a prosecutor's violation of the Code of Professional Responsibility will or has prejudiced him, a defendant has no right to enforce the Code and is not intended to be an incidental beneficiary of any violation of its provisions. (A.4). Further, the panel found that the State Attorney's Office is not a law firm within the meaning of the Code of Professional Responsibility. (A.6-10). The panel then denied the petition for writ of certiorari. (A.10).

Clausell was heard en banc. (A.11). The En Banc court voted to disapprove of the panel decision and to approve of the Third District's previous decision of Rodriguez v. State, 433 So.2d 1273 (Fla. 3d DCA 1983). In Rodriguez, the Third District had previously held that the impropriety of the prosecuting attorney calling a member of his own office as a witness is per se reversible error without consideration of the amount, if any, of prejudice the defendant suffered. (A.17-20). The En Banc Court certified the following questions:

1. 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?

2. 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.12).

Clausell is now pending before this Court in State v. Clausell, Case No. 65,945.

In the case sub judice, Petitioner, after the denial of the writ of certiorari, moved for rehearing in order to have the questions certified in Clausell, certified in Brown. Petitioner also moved to stay the mandate. The motion for rehearing was denied but the stay was granted. (A.21). Petitioner's subsequent motion for clarification was denied. (A.22).

A notice invoking the discretionary review jurisdiction of this Court was timely filed.

QUESTION PRESENTED

WHETHER THE DECISION OF THE THIRD DISTRICT IN THE INSTANT CASE EXPRESSLY AND DIRECTLY CONFLICTS WITH THIS COURT'S DECISION IN STATE V. MURRAY, 443 SO.2d 955 (FLA. 1984) AND WITH THE FIFTH DISTRICT COURT OF APPEAL'S DECISION IN FITZPATRICK V. SMITH, 432 SO.2D 89 (FLA. 5TH DCA 1983), REV. PENDING?



ARGUMENT

THE DECISION OF THE THIRD DISTRICT  
IN THE INSTANT CASE EXPRESSLY AND  
DIRECTLY CONFLICTS WITH THIS  
COURT'S DECISION IN STATE V.  
MURRAY, 443 SO.2d 955 (FLA. 1984)  
AND WITH THE FIFTH DISTRICT COURT  
OF APPEAL'S DECISION IN FITZPATRICK  
V. SMITH, 432 SO.2D 89 (FLA. 5TH  
DCA 1983), REV. PENDING?

In State v. Murray, 443 So.2d 955 (Fla. 1984), this Court specifically held that prosecutorial misconduct in violation of the Code of Professional Responsibility is the proper subject of bar disciplinary action and will not warrant reversal of a conviction unless the misconduct can be said to have prejudiced the defendant's right to a fair trial. Therefore, in broader application without any showing that a prosecutor's violation of the Code of Professional Responsibility will or has prejudiced him, a defendant has no right to enforce the Code and is not intended to be an incidental beneficiary of any violation of its provisions.<sup>1</sup>

<sup>1</sup>The Model Rules of Profession Conduct now pending before this Court make this clear.

"Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the

In the case sub judice, the Petitioner sought a writ of certiorari from the Third District to quash a trial court order which disqualified the office of the State Attorney from further participation in Respondent's prosecution for armed robbery. Respondent successfully contended below that because an Assistant State Attorney was to be a witness for the prosecution, the entire office was disqualified from prosecuting him and it was unnecessary for him to show prejudice. (A.1).

The Petitioner submits that the District Court's analysis in Brown expressly and directly conflicts with this Court's decision in State v. Murray, supra. In the case sub judice, the Third District has held that a prosecutor's violation of the Code of Profession Responsibility is per se prejudicial to the defendant. This holding is contrary to Murray, which requires a showing of prejudice by the defendant, prior to his benefitting from the prosecutorial misconduct. This holding also directly conflicts with Fitzpatrick v. Smith, 432 So.2d 89 (Fla. 5th DCA 1983),

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Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty."

rev. pending. The Fifth District only disqualified the entire State Attorney's Office from prosecuting the defendant after it found a real danger, based on conflict of interest, to the defense.

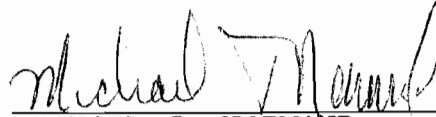
Since the decision in the case sub judice directly and expressly conflicts with Murray and Fitzpatrick, the exercise of discretionary review in this cause is mandated.

CONCLUSION

Based upon the foregoing, Petitioner requests this Court to grant discretionary review in the Cause.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF ON JURISDICTION was furnished by mail to ROBIN GREENE, Attorney for Respondent, 1351 N.W. 12th Street, Miami, Florida 33125, on this 9 day of November, 1984.



MICHAEL J. NEIMAND  
Assistant Attorney General

/vbm