IN THE SUPREME COURT OF FLORIDA

EDWARD CASTRO,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

CASE NUMBER 77,102

APPEAL FROM THE CIRCUIT COURT
IN AND FOR MARION COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

JAMES B. GIBSON
PUBLIC DEFENDER
SEVENTH JUDICIAL CIRCUIT

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REPLY BRIEF OF APPELLANT

POINT I

THE TRIAL COURT ERRED IN REFUSING TO DISQUALIFY THE OFFICE OF THE STATE ATTORNEY OF THE FIFTH JUDICIAL CIRCUIT WHERE, AFTER DEFENDING CASTRO ON THESE CHARGES, CASTRO'S DEFENSE COUNSEL LEFT THE PUBLIC DEFENDER'S OFFICE, BECAME A PROSECUTOR EMPLOYED BY THE FIFTH CIRCUIT STATE ATTORNEY'S OFFICE, AND PERSONALLY PARTICIPATED IN CASTRO'S RESENTENCING.

The state argues that prosecutors of the Fifth Circuit State Attorney's Office can, with impunity, disregard well-established ethical considerations which serve as objective benchmarks that insure not only the actual integrity of the legal profession, but also the public's perception of the integrity of the legal profession. The state's position is simple: no error occurred here because Castro cannot demonstrate "prejudice", that is, he cannot reveal the actual content of communications to which he was not privy.

In plain terms, the state asks Castro and this Court to rely on the honor of a prosecutor who knowingly called Castro's former defense attorney to discuss Castro's case, and the honor of Castro's former defense attorney who did not feel compelled to tell the prosecutor that he ethically could not discuss anything concerning Castro's prosecution. The state asks too much in light of what has transpired. Where the conduct of prosecutors employed by a state attorney's office is this unethical, it is proper upon timely motion of the defendant to disqualify that entire office from further prosecution of the matter.

The state argues, and Castro readily agrees, that "there was no question that [Tatti] was disqualified." Answer Brief ("AB") at 21. **It is because** it is so clear that Tatti could not be involved in the resentencing of Castro due to his status as Castro's former defense attorney that Castro's prosecutor must be presumed to have known that he and his staff must carefully avoid having any contact with Tatti while the resentencing of Castro was pending. Instead, the prosecutor called Tatti and discussed pleadings filed in Castro's case. That it was seriously improper for the prosecutor who was litigating the resentencing proceeding to telephone Castro's former defense attorney to discuss matters pending in the resentencing, and for Castro's former defense attorney to discuss the matter with the prosecutor, seems, at least to the undersigned, beyond real question.

Yet, the state does not even acknowledge that an impropriety occurred. Instead, the state adamantly claims that State v. Fitzpatrick, 464 So.2d 1185 (Fla. 1985) **condones** what occurred here: "Although Castro cites Fitzpatrick for the proposition that a former defense attorney cannot be involved in any capacity, this language referred to the attorney involved in that case and was not establishing a rule of law." AB at 18. Castro respectfully disagrees with the state. Fitzpatrick clearly did **not** authorize a former defense attorney to discuss with a prosecutor what responses the state could make **in the same case** against that lawyer's former client.

This Court in Fitzpatrick looked to Formal Opinion 342 of the American Bar Association to determine when an entire prosecutorial office is subject to disqualification:

> Although vicarious disqualification of a government department is not necessary or wise, the individual lawyer should be screened from any direct or indirect participation in the matter, **and discussion with his colleagues concerning relevant transactions or set of transactions is prohibited by [ethical rules]**.

Fitzpatrick, 464 So.2d 1185, 1187 (Fla. 1985)(emphasis added).

It is a basic tenet that, when a law firm hires an attorney who previously represented an adverse party on a particular matter, a procedure must be used to screen that lawyer from other members of the firm who are litigating the same matter of that lawyer's prior representation. For the adverse party's former attorney to actually discuss that matter is taboo. This

premise is well understood to uniformly apply to all attorneys, government and private alike. Yet, the Fifth Circuit State Attorney's Office made **no effort whatsoever** to screen Castro's former defense attorney from Castro's prosecutors. Assuming that the failure to have an appropriate screening procedure, without more, can never justify automatic disqualification of a state attorney's office, disqualification is warranted upon timely motion of a defendant when it is shown, as here, that actual discussions concerning the defendant's case occurred between his former lawyer and the present prosecutor.

The pertinent facts are that Castro moved to disqualify the state attorney's office because Castro's previous attorney, who received confidential communications from Castro on the very same first-degree murder presently being prosecuted, was employed by and actively assisting that state attorney's office in the prosecution of that first-degree murder. The impropriety of the prosecutor calling Castro's prior defense attorney and the defense attorney discussing the matter with the prosecutor are not even mentioned by the state. Instead, the state asserts:

> To disqualify the state attorney's office . . . for sharing information that is public record . . . would be ridiculous. As Mr. Tatti stated, the only information he gave Mr. Moore was research he had done on unrelated cases (Keebler or McGuire or Hall) since he had been at the State Attorney's Office. He specifically stated he gave no information as a result of his perspective as a defense attorney in Castro's case. Castro has not only failed to establish Mr. Tatti revealed confidential information but he has neither alleged nor

> proven prejudice. In fact, he has not even shown Mr. Moore used the case cited (sic) he obtained from Mr. Tatti.

(Answer Brief "AB" at 21). The state's perspective of what occurred is, by far, too simplistic and myopic. Castro respectfully asserts that the reason the office must be disqualified is not for "sharing public record information" but instead for the conduct of the prosecutors which violated basic ethical considerations designed to instill confidence in the fairness and integrity of the legal profession.

The state contends that this Court's recent decision of Reaves v. State, 574 So.2d 105 (Fla. 1991) "should be considered prospectively only." AB at 20. Castro disagrees and respectfully suggests that, because this Court in Reaves discussed **existing** precedent in order to formulate a rule that serves to enhance the public's perception of the integrity of the legal profession, the law discussed in Reaves is relevant and properly considered here. Specifically, Reaves addressed the necessity for a screening procedure that serves as an objective basis upon which the public can, with confidence, conclude that confidential communications remain inviolate when a former defense attorney becomes employed by a state attorney's office. This Court noted:

> **We also caution our state attorneys that any prosecutor who is disqualified under this rule must be properly screened from other state-attorney personnel.** Failure to do so may require the trial court, upon a proper motion and factual predicate, to disqualify the entire state attorney's office. See Fitzpatrick, 464 So.2d at 1187 (majority opinion) & 1188-89 (Ehrlich, J. dissenting).

Reaves v. State, 574 So.2d at 107. It is readily apparent from the above-emphasized passage that, at the time of Castro's resentencing, Fitzpatrick required that former defense attorneys be screened from other prosecutors who are prosecuting the former client of the ex-defense attorney turned prosecutor, especially so where the subject matter of the prosecution is identical to that for which the defendant was previously represented by the former defense attorney who is now a prosecutor.

Also noteworthy is the fact that Reaves requires disqualification of a prosecutor "who has previously defended the defendant in **ANY** criminal matter that involved or likely involved confidential communications with the same client." Reaves, 574 So.2d at 107 (emphasis added). If such an expansive rule is necessary to "prevent the perception or actuality of a breach of confidentiality" where even a stale or tangentially-relevant communication is concerned, of how much more magnitude is the concern for confidential communications directly concerning the **SAME** matter actively being prosecuted by the state attorney's office?

Here, upon timely motion by Castro, after it was shown without contradiction that confidential communications were made between Castro and Tatti while Tatti was representing Castro on the same matter presently being prosecuted, shown that the former defense attorney was presently a member of the Fifth Circuit State Attorney's Office, shown that NO screening procedure whatsoever was being used, and shown that Castro's prosecutor and

former defense attorney had actively discussed Castro's case in violation of ethical mandates, the trial court should have disqualified the entire state attorney's office on the authority of Fitzpatrick. The death sentence in this case must be reversed and the matter remanded for a new penalty phase prosecuted by a state attorney's office other than that of the Fifth Circuit.

POINT II

THIS DEATH SENTENCE IS UNCONSTITUTIONAL UNDER THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS AND THE STATE CONSTITUTIONAL COUNTERPARTS BECAUSE IT IS BASED ON A JURY RECOMMENDATION TAINTED BY DUPLICITOUS CONSIDERATION OF "DOUBLED" STATUTORY AGGRAVATING FACTORS OVER TIMELY AND SPECIFIC DEFENSE OBJECTION.

The state argues, "The trial judge followed the law and Castro propounds no compelling reason for this court to change prior case law." AB at 22. In reply, Castro respectfully submits that at least one compelling reason exists to change the holding of Suarez v. State, 481 So.2d 1201 (Fla. 1985); it's flat-out wrong because it stands as authority from the Supreme Court of Florida which the state used to compel this judge to incorrectly instruct the jury in a manner that unfairly tipped the scales in favor of a recommendation, and ultimately a sentence, of death.

POINT III

THE TRIAL COURT ERRED BY PREVENTING CASTRO FROM PRESENTING ANY TESTIMONY THAT WAS INCONSISTENT WITH THE SCENARIO OF THE MURDER CONTAINED IN CASTRO'S STATEMENTS TO POLICE.

In distinguishing the cases cited in Castro's Initial Brief, the state asserts, "The testimony [in Colina v. State, 570 So.2d 929 (Fla. 1990)] showed the co-defendant may have been the dominant actor in the murder. In the present case there is no question Castro was the sole perpetrator." (AB at 29). The state evidently does not appreciate that the **reason** "there is no question in this case that Castro was the sole perpetrator" was **because** the trial judge expressly ruled that Castro could not contest what was said in the previous statements given to the police investigator, and that is the ruling about which Castro complains. Specifically, the judge ruled as follows:

> THE COURT: **We are not going to say that McNight had anything to do with this murder in this trial, because there is - we aren't going to do it; this is a penalty phase mit -- this is mitigation, and that's all, and we're not going to say that McNight stabbed him and killed him because that's already settled.**
>
> DEFENSE COUNSEL: Judge, is the court saying that disparate treatment of co-defendants is not recognized?
>
> THE COURT: No, I didn't say that: you can ask him about that.
>
> DEFENSE COUNSEL: Well, then, his participation in the murder needs to be established for the jury to decide --

> THE COURT: **No. You're not going to get into the guilt -- you're not going to get into the guilt, and we're not going to do it; and you're not going to get into it through the back door, the side door, or anywhere else; because he didn't have anything to do with it, and Castro says so in his confession.**

(R861-62).

The ruling of the trial judge was clear and unequivocal and, as the trial court explained to the prosecutor, the reason that the testimony was excluded was that "They (Castro's defense attorneys) wanted to go into basically -- get back -- it was my opinion they wanted to get back into the guilt phase." (R864) The exclusion of evidence which was probative to establish that McNight was at least as culpable as Castro violated due process, the right to a fair trial and to present evidence, which in turn rendered the death sentence in this case unreliable under the Fifth, Sixth, Eighth and Fourteenth Amendments and Article 1, Sections 9, 16, 17 and 22 of the Florida Constitution.

POINT IV

THE EVIDENCE IS LEGALLY INSUFFICIENT TO SHOW THAT THE MURDER WAS COMMITTED IN A COLD, CALCULATED AND PREMEDITATED MANNER, WITHOUT ANY PRETENSE OF MORAL OR LEGAL JUSTIFICATION.

In arguing that the evidence supports this statutory aggravating factor, the state, as did the trial judge, relies solely on the statements made by Castro to the police following his arrest. (AB at 33-35) Castro respectfully maintains that those statements were unlawfully obtained, in that they were not voluntarily given as set forth in Point VI, infra.

POINT V

THE EVIDENCE IS LEGALLY INSUFFICIENT TO PROVE THAT SCOTT'S MURDER WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.

In arguing that the evidence supports this statutory aggravating factor, the state, as did the trial judge, relies primarily on the statements made by Castro to the police following his arrest. In arguing that the statements were voluntarily given, the state asserts, "The best evidence is listening to the tapes." (AB at 39) In reply, Castro agrees that the tapes are the best evidence as to whether the statements were voluntarily given and that the Justices of this Court should each listen to the tapes to determine whether a person in such an intoxicated state as the tapes evince can knowingly and intelligently waive a constitutional right to remain silent and/or to an attorney under the Fifth, Sixth and Fourteenth Amendments to the United State Constitution and Article I, Sections 9, 16 and 22 of the Florida Constitution.

POINT VI

THE TRIAL COURT ERRED IN REFUSING TO SUPPRESS THE STATEMENTS CASTRO MADE WHILE INTOXICATED BECAUSE ANY WAIVER GIVEN BY CASTRO WHILE INTOXICATED WAS NOT KNOWING, INTELLIGENT OR VOLUNTARY.

The state asserts that the trial court could not reconsider its own determination of the admissibility of Castro's statements because his prior ruling is now the law of the case. (AB at 42) Castro respectfully disagrees. The doctrine of "law of the case" is not absolute. "[W]hatever is once established between the same parties in the same case continues to be the law of the case as long as the facts on which such decision was predicated continue to be the facts in the case." Lincoln Fire Ins. Co. of New York v. Lilleback, 130 Fla. 635, 178 So. 393, 397 (1938); See McGregor v. Provident Trust Co., 19 Fla. 718, 162 So. 323, 327 (1935).

Here, the facts are no longer the same as when the trial judge first ruled that the statements given by Castro were admissible. Expert testimony has now been introduced which clearly establishes that it was impossible for a knowing and/or intelligent waiver to have been given by Castro after he drank the amount of beer and liquor that was consumed in the short amount of time between the murder and his apprehension. Because these inadmissible statements were used to support the findings of statutory aggravating factors, the death sentence must be reversed and the matter remanded for a new penalty phase.

Castro relies on the argument and authority set forth in the Initial Brief of Appellant in reference to the following points on appeal:

POINT VII

CASTRO WAS DENIED A FAIR TRIAL BY THE UNNECESSARY PRESENTATION OF GRUESOME PHOTOGRAPHS MADE DURING THE AUTOPSY OF THE VICTIM.

POINT VIII

THE STATUTORY AGGRAVATING FACTOR OF AN ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL MURDER IS UNCONSTITUTIONALLY VAGUE UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTIONS 9,16 AND 17 OF THE FLORIDA CONSTITUTION.

POINT IX

SECTION 921.141, FLORIDA STATUTES (1987) IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED.

POINT X

UNDER FLORIDA LAW, THE DEATH PENALTY IS DISPROPORTIONATE TO THE FACTS OF THIS CASE.

POINT XI

THE TRIAL COURT ERRED IN REFUSING TO PROVIDE THE JURY WITH A WRITTEN DEFINITION OF THE COLD, CALCULATED AND PREMEDITATED MURDER STATUTORY AGGRAVATING FACTOR.

CONCLUSION

Based on the argument and authority previously set forth, this Court is respectfully asked to provide the following relief:

POINTS I - IX : To reverse the death sentence and to remand for a new penalty proceeding before a new jury.

POINT X: To vacate the death sentence and remand for imposition of a life sentence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered by hand to the Honorable Robert A. Butterworth, Attorney General, 210 N. Palmetto Avenue, Suite 447, Daytona Beach, Fl., 32114 in his basket at the Fifth District Court of Appeal and mailed to Edward Castro, #110488, P.O. Box 747, Starke, Fl., 32091, on this 8th day of July, 1991.

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ASSISTANT PUBLIC DEFENDER