IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

FRANK SCHAUB,

Respondent.

_____/

Case No. 79,759
TFB No. 91-10,737(12B)

INITIAL BRIEF

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STATEMENT OF THE FACTS AND OF THE CASE

The Respondent, as State Attorney for the Twelfth Judicial Circuit, prosecuted the case, State v. Nowitzke, before a jury in Circuit Court, Manatee County, on October 26 - November 12, 1987. Nowitzke was prosecuted for: (1) first degree premeditated murder for killing his mother; (2) first degree premeditated murder for killing his stepbrother; and (3) attempted first degree murder for shooting his stepfather. Nowitzke's defense was insanity. Nowitzke was found guilty on all three (3) counts and sentenced to death. Nowitzke v. State, 572 So. 2d 1346 (Fla.1990); RRRA, 2-6.

On appeal, The Supreme Court of Florida reversed the convictions, vacated the death sentence, and remanded the case for a new trial. The reversal was based, inter alia, upon the defendant being denied a fair trial for prosecutorial misconduct, which permeated the case and led to the admission of irrelevant and deliberately misleading evidence. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

During the trial, the defense called Dr. Emanuel Tanay to testify that Nowitzke was legally insane when the shootings occurred. During cross-examination, the Respondent elicited testimony from Dr. Tanay that a Dr. Szasz, a non-testifying expert had characterized Dr. Tanay as a "hired gun". (Nowitzke v. State, R. 2319; Bar Exhibit 1, p. 107-113). The Respondent then argued in his closing statement to the jury that "we [then] heard from I think someone Dr. Szasz called the 'hired gun,' Dr. Emanual Tanay of Detroit." (Nowitzke v. State, R. 3175; Bar Exhibit 1, p.116).

The Respondent next attempted to impugn the integrity of Dr. Tanay by accusing him of charging $600.00 an hour for a deposition after Dr. Tanay testified that he charged $150.00 an hour. The Respondent had Dr. Tanay's bill of itemized expenses for $1800.00 before him. The bill indicated a charge for twelve (12) hours of time, not merely three (3) hours for a deposition which the Respondent attempted to persuade to the jury. (Nowitzke v. State, R. 2392-2397; Bar Exhibit 1, p. 117-129).

At various points throughout the cross-examination of Dr. Tanay, the Respondent stated his personal opinions on psychiatry, misstated Dr. Tanay's answers, insulted the witness generally, and ignored the trial court's rulings by persisting in irrelevant lines of questioning after defense objections had been sustained. Nowitzke v. State, 572 So. 2d 1346, 1353, 1354, (Fla. 1990); Nowitzke v. State, R. 2182-2195 and 2242 -2422).

The defense also called Dr. Rufus Vaughn to testify that Nowitzke's disorder was classical paranoid schizophrenia and that Nowitzke was not sane at the time of the shootings. The Respondent attempted to mislead the jury during Dr. Vaughn's cross-examination when the Respondent asked Dr. Vaughn to confirm that it is not uncommon for a stay in a hospital for the criminally insane to be about six to eight months. (Bar Exhibit 1, pgs. 143-146; Nowitzke v. State R. 2595-2599). Respondent admitted that this line of questioning was improper. (TR. p.32, L.5; p.39-40).

The Respondent presented the rebuttal testimony of Dr. Padar, a neurosurgeon, who testified that the defendant did not suffer

from organic brain damage, despite the fact that the defense experts never claimed that Nowitzke suffered organic brain damage. Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990). (Respondent's Response to Request for Admissions #18, and #19; Bar Exhibit 1, p. 156-161; Nowitzke v. State, R. 2895-2912). Although Dr. Pader was unfamiliar with the definition of insanity under Florida law, the Respondent asked Dr. Padar whether Nowitzke was insane at the time of the shootings. Dr. Padar responded that he found no indication that the defendant was insane at the time of the commission of the crimes. The Respondent then argued in his summation to the jury that the only "genuine scientist" that testified in the trial found the defendant sane.

The Respondent improperly questioned Detective Roy Hackle concerning the propensity of drug addicts to steal from their families to support their drug habits and to commit homicides in connection with narcotics deals.

The Respondent's strategy throughout the trial was to discredit the whole notion of psychiatry in general and the insanity defense specifically. The Respondent's approach improperly placed the issue of insanity, as a complete defense to a crime, before the jury in the form of repeated criticism of the defense in general. Nowitzke v. State, R. 2252 -2262 and 2329 - 2331; Bar Exhibit 1, p. 124-140).

The Florida Bar initiated a complaint against Respondent after a review of the opinion in Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). A Final Hearing was held in this disciplinary matter on

September 14, 1992. The Report of Referee was entered on October 19, 1992. The Report of Referee was reviewed by the Board of Governors at its meeting which ended November 20, 1992. The Board voted to seek review of the Referee's recommendation of a public reprimand, and seek a thirty (30) day suspension. A Petition for Review was filed on or about December 4, 1992.

SUMMARY OF THE ARGUMENT

The overall effect of Respondent's improper prosecution of Nowitzke was so overwhelming that it deprived Nowitzke of a fair trial and required the reversal of a conviction and vacation of a death sentence.

Respondent's conduct included the admission of prejudicial, irrelevant and deliberately misleading evidence elicited by Respondent over repeated defense objections.

Respondent's cross-examination of Dr. Tanay, a psychiatrist, regarding whether a non-testifying expert had referred to Dr. Tanay as a "hired gun", with respect to civil commitments was improper and misleading.

Respondent further accused Dr. Tanay of charging $600.00 an hour for a deposition after Dr. Tanay had testified that he charged $150.00 an hour, where it was obvious from the billing statement that Respondent was aware of the services covered in the bill. Respondent insisted before the jury that Dr. Tanay charged the higher amount.

Respondent questioned Dr. Vaughn, a psychiatrist, in a manner so as to lead the jury to believe that a capital murder defendant would be released from the state prison for the criminally insane within a few months.

Respondent introduced the testimony of Dr. Padar, a neurosurgeon, to establish that Nowitzke did not suffer from organic brain damage, where the defense had never claimed that Nowitzke suffered from organic brain damage. Further, Dr. Padar

was unfamiliar with the definition of insanity under Florida law. Respondent then used Dr. Padar's answer that there was no indication of Nowitzke's insanity in his closing argument to persuade the jury that Dr. Padar, the only genuine scientist that testified, found Nowitzke sane.

Respondent's conduct throughout the trial was to discredit psychiatry in general and the insanity defense in particular.

Respondent presented the irrelevant and prejudicial testimony of Detective Roy Hackle about the criminal behavior of drug addicts. Respondent sought to establish that drug addicts commit homicides in connection with their drug habits.

Respondent's introduction of testimony of past crimes that did not involve Nowitzke could not be introduced to demonstrate that Nowitzke committed the crimes at issue.

Respondent's prosecutorial misconduct in a capital murder case warrants a thirty (30) day suspension.

ARGUMENT

ISSUE: WHETHER THE REFEREE ERRED IN RECOMMENDING A PUBLIC REPRIMAND RATHER THAN A THIRTY (30) DAY SUSPENSION WHERE THE RESPONDENT ENGAGED IN PROSECUTORIAL MISCONDUCT THAT RESULTED IN THE ADMISSION OF IRRELEVANT AND DELIBERATELY MISLEADING EVIDENCE.

During the prosecution of Nowitzke, Respondent, as State Attorney for the Twelfth Judicial Circuit, engaged in conduct that led to the admission of irrelevant and deliberately misleading evidence. Respondent's prosecutorial misconduct denied Nowitzke of a fair trial and resulted in a reversal of the conviction, vacation of the sentence, and remand for a new trial. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

During the trial, the defense called Dr. Emanuel Tanay to testify that Nowitzke was legally insane when the shootings occurred. During cross-examination, the Respondent elicited testimony from Dr. Tanay that a Dr. Szasz, a non-testifying expert had characterized Dr.Tanay as a "hired gun". (Nowitzke v. State, R. 2319; Bar Exhibit 1, p. 107-113). The Respondent then argued in his closing statement to the jury that "we [then] heard from I think someone Dr. Szasz called the 'hired gun,' Dr. Emanual Tanay of Detroit." (Nowitzke v. State, R. 3175; Bar Exhibit 1, p. 116).

It was improper for Respondent to impeach Dr. Tanay by eliciting from another witness what he thinks of that expert. As this Court noted in the Nowitzke opinion, "had Dr. Szasz appeared in person, he would have been precluded from testifying that Dr. Tanay was a "hired gun". Nowitzke v. State, 572 So. 2d 1346, 1352 (Fla. 1990). The personal opinion of one expert witness is

immaterial as to the reputation of another expert witness.

The Respondent next attempted to impugn the integrity of Dr. Tanay by accusing him of charging $600.00 an hour for a deposition after Dr. Tanay testified that he charged $150.00 an hour. The Respondent had Dr. Tanay's bill of itemized expenses for $1800.00 before him. The bill indicated a charge for twelve (12) hours of time, not merely three (3) hours for a deposition which the Respondent attempted to persuade to the jury. (Nowitzke v. State, R. 2392-2397; Bar Exhibit 1, p. 117-129).

At various points throughout the cross-examination of Dr. Tanay, the Respondent stated his personal opinions on psychiatry, misstated Dr. Tanay's answers, insulted the witness generally, and ignored the trial court's rulings by persisting in irrelevant lines of questioning after defense objections had been sustained. Nowitzke v. State, 572 So. 2d 1346, 1353, 1354 (Fla. 1990); Nowitzke v. State, R. 2182-2195 and 2242-2422).

The defense called Dr. Rufus Vaughn to testify that Nowitzke's disorder was classical paranoid schizophrenia and that Nowitzke was not sane at the time of the shootings. The Respondent attempted to mislead the jury during Dr. Vaughn's cross-examination when the Respondent asked Dr. Vaughn to confirm that it is not uncommon for a stay in a hospital for the criminally insane to be about six to eight months. (Bar Exhibit 1, pgs. 143-146; Nowitzke v. State R. 2595-2599). Respondent admitted that this line of questioning was improper. (TR. p.32, L.5; p.39-40).

It was improper for Respondent to "suggest to a jury that an

acquittal would result in the defendant's release from an asylum in just a few months because the disposition of an insane defendant is neither the concern nor the responsibility of the jury. Nowitzke v. State, 572 So. 2d 1346, 1354 (Fla. 1990).

The Respondent presented the testimony of Dr. Padar, a neurosurgeon, who testified that the defendant did not suffer from organic brain damage, despite the fact that the defense experts never claimed that Nowitzke suffered organic brain damage. Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990). (Respondent's Response to Request for Admissions #18, and #19; Bar Exhibit 1, p. 156-161, Nowitzke v. State, R. 2895-2912). Although Dr. Pader was unfamiliar with the definition of insanity under Florida law, the Respondent asked Dr. Padar wither Nowitzke was insane at the time of the shootings. Dr. Padar responded that he found no indication that the defendant was insane at the time of the commission for the crimes. The Respondent then argued in his summation to the jury that the only "genuine scientist" that testified in the trial found the defendant sane.

The Respondent's strategy throughout the trial was to discredit the whole notion of psychiatry in general and the insanity defense specifically. The Respondent's approach improperly placed the issue of insanity, as a defense to a crime, before the jury in the form of repeated criticism of the defense in general. Nowitzke v. State, R. 2252-2262 and 2329-2331; Bar Exhibit 1, p.124-140).

This Court held that "once the legislature had made the policy

decision to accept insanity as a complete defense to a crime, it is not the responsibility of the prosecutor to place that issue before the jury in the form of repeated criticism of the defense in general. Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990).

Finally, the Respondent improperly questioned Detective Roy Hackle concerning the propensity of drug addicts to steal from their families to support their drug habits and to commit homicides in connection with narcotic deals. It was improper for Respondent to elicit testimony concerning past crimes that did not involve the defendant to demonstrate that the defendant committed the crimes at issue. Nowitzke v. State, 572 So. 2d 1346, 1355 (Fla. 1990).

The Referee found Respondent guilty of several violations of the Rules Regulating The Florida Bar and recommended a public reprimand. However, a thirty (30) day suspension is an appropriate discipline based upon the findings of the Referee as well as the Florida Standards for Imposing Lawyer Sanctions. No applicable case law was found. The Referee found Respondent guilty of Rule 4-3.4(e), and specifically set forth the basis in support of the finding as follows:

> Rule 4-3.4(e): (a lawyer shall not in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, or the guilt or innocence of an accused) in that Respondent illicited testimony about the opinion of a non-testifying expert as to the credibility of a defense witness, knowingly illicited irrelevant and improper testimony concerning average length of stays in hospitalization of persons acquitted by reason of insanity, presented expert testimony directed to disprove a fact in issue (lack of organic brain damage), offered

> irrelevant testimony concerning the propensity of drug addicts to commit larceny and homicide and repeatedly make personal observation about the credibility of Dr. Tanay, the validity of the insanity defense and the guilt of the Defendant.
> (RR, p.3).
>
> The Referee found Respondent guilty of
>
> Rule 4-3.1: (a lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law) in that Respondent sought to persuade a jury to disregard a fact (organic brain damage) never placed in issue.
> (RR, p.2).
>
> Respondent was found guilty of
>
> Rule 4-4.4: (in representing a client a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third party..) in that Respondent used his cross-examination of Dr. Tanay to personally insult the witness and his profession.
> (RR, p.3).

Likewise, Standard 5.22, Florida Standard for Imposing Lawyer Sanctions states that "suspension is appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedure or rules, and causes injury or potential injury to a party or to the integrity of the legal process."

In a related Standard, 6.22, Florida Standards for Imposing Lawyer Sanctions, "suspension is appropriate when a lawyer knows that he or she is violating a court order or rule, and cause injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding."

Further, Standard 7.2, Florida Standards for Imposing Lawyer Sanctions states that a "suspension is appropriate when a lawyer knowingly engages in conduct as a professional and causes injury or

potential injury to a client, the public, or the legal system."

The Referee also found that the Respondent engaged in certain fraudulent or deceptive acts. The Referee found the Respondent guilty of the following rules:

> Rule 4-3.3(a)(1): (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal) in that Respondent made a material misstatement as to the fees charged by a defense expert, presented testimony of his own expert as to the Defendant's sanity knowing that his witness was totally unfamiliar with the definition of insanity under Florida law and represented to the jury that his expert was the "only genuine scientist" to testify on the issue of the Defendant's sanity.
>
> Rule 4-3.3(a)(4): (if a lawyer has offered material evidence and thereafter comes to know of its falsity, the lawyer shall take reasonable remedial measures) in that Respondent made no effort to correct his misrepresentation that the defense expert had charged $600 per hour, even though he had in his possession an itemized statement controverting this suggestion.
>
> Rule 4-8.4(c): (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) in that the Respondent knowingly misrepresented the fees charged by a defense expert and offered rebuttal testimony of an expert witness as to the issue of Defendant's sanity fully knowing the witness was unfamiliar with the M'Naughton rule.
> (RR, p.3).

The Referee also found the Respondent had violated the Oath of Attorney, in that Respondent argued matters "not fairly debatable under the law of the land" and sought to "mislead the judge and jury by artifice of law and fact." (RR, p.3).

The Standard related to these disciplinary rules is Standard 6.12, Florida Standards for Imposing Lawyer Sanctions, which states that "suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that

material information is improperly being withheld, and takes no remedial action."

The Referee found Respondent not guilty of Rule 4-3.3(a)(2) (a lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client).

The aggravating factors set forth in the Florida Standards for Imposing Lawyer Sanctions are as follows:

Standard 9.22(g) - refusal to acknowledge the wrongful nature of the conduct. Respondent testified at the Final Hearing herein that "the bottom line position is that I prosecuted a good case and did a good job of prosecution and did nothing wrong." (Tr. p.11, L.23-25, p.12, L.1).

Respondent repeated his position again at the Final Hearing, "...that case, I felt, was well tried and that I did the best I could with what I had and had a strong case apparently, the jury bought it...". (Tr. p.35, L.14-17).

Also, when asked in The Bar's Request for Admissions to admit that the Nowitzke conviction was reversed based upon the "defendant being denied a fair trial by prosecutorial misconduct, which permeated the case and led to the admission of irrelevant and deliberately misleading evidence," Respondent denied the Request. Instead, Respondent answered, that "Respondent denies ... maintaining the reversal in the case was based on the opposition of certain members of The Florida Supreme Court to the imposition of the death penalty as provided by statute and their failure to

recuse themselves in such cases". (RRRA, #7).

In fact, Respondent in an argument as to whether the Referee should take judicial notice of Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), characterized the opinion as "only the opinion written by some reseach assistant." (Tr. p.4, L.11-20).

Respondent refuses to acknowledge the wrongful nature of his conduct.

An additional aggravating factor is Standard 9.22(i), substantial experience in the practice of law, Florida Standards for Imposing Lawyer Sanctions. Respondent was admitted to practice law in the State of Florida in 1949. Respondent served twelve (12) years as a Circuit Court Judge and eighteen (18) years as State Attorney for the Twelfth Judicial Circuit. (Tr. p.44, L.23-25, p.45, L.1-6; RR, p.4).

As to mitigation, Respondent had an absence of a prior disciplinary record, as set forth in Standard 9.32(a), Florida Standards for Imposing Lawyer Sanctions.

The Referee found that

> "while the standards would clearly support a suspension, as requested by The Florida Bar, it is my considered opinion that it would be of a little significance to impose a 30 day suspension upon a lawyer who has retired from practice, already been suspended for non-payment of Bar dues for 3-4 years and is likely suspended for failure to comply with C.L.E. requirements". (RR, p.3-4).

However, the mitigation cited by the Referee, is not set forth within the enumerated mitigating factors of the Florida Standards for Imposing Lawyer Sanctions. The appropriate recognized aggravating factors outweigh the mitigating factors for misconduct

that already begins with suspension.

Respondent should not benefit from a lesser sanction because he retired and stopped paying bar dues. Further, there must be a deterrent to others who might engage in prosecutorial misconduct.

CONCLUSION

Respondent engaged in conduct that led to the admission of irrelevant and misleading evidence in the prosecution a capital murder case. As stated by this court in Nowitzke v. State, 572 So. 2d 1346, 1356 (Fla. 1990), "it ill becomes those who represent the state in the application of its lawful penalties to themselves ignore the precepts of their profession and their office". Bertolotti v. State 476, So. 2d 130 (Fla.1985).

Accordingly, the Respondent should be suspended from the practice of law in the State of Florida for thirty (30) days.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by Certified Mail, Return Receipt Requested P 750 391 674 to Frank Schaub, Esq., Route 2, Box 4C, Highlands, NC 28741 and by Certified Mail, Return Receipt Requested P. 750 391 675 to 5090 Oak Run Drive, Sarasota, FL 34243; and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 22nd day of Dec., 1992.

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