IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOHN CHRISTOPHER STABILE,

Petitioner,

v. CASE NO.: SC01-2053

STATE OF FLORIDA, District Court case no.: 5D00-2427

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

MERITS BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

The only issue presented by the Petitioner is that since the elected State Attorney had previously represented him then the entire State Attorney's Office should be disqualified from prosecuting him. As explained in the brief, the State disagrees with this position.

POINT OF LAW

WHETHER THE TRIAL COURT ERRED IN FAILING TO DISQUALIFY THE ENTIRE STATE ATTORNEY'S OFFICE FROM PROSECUTING THIS CASE.

The Petitioner in this case submits that the entire Office of the State Attorney of the Seventh Judicial Circuit should have been disqualified from prosecuting him based upon the fact that he had been previously represented by the elected State Attorney John Tanner. The trial court held a hearing, heard of no prejudicial information being provided to the prosecutor, ordered that no conversation should occur between the prosecutor and Mr. Tanner, and denied the defense's motion. It is the State's position that the trial court's decision should be affirmed.

Review of the decision written by the Fifth District Court of Appeal in this case shows a detailed factual and legal analysis of the issue presented by the Petitioner. See Stabile v. State, 790 So. 2d 1235 (Fla. 5th DCA 2001). As to the alleged conflict, the appellate court wrote

> The assistant state attorney asserted (without dispute) at the hearing on this motion that Tanner is not involved in this case, has never shared information about Stabile's prior cases with her, and in fact cannot even remember Stabile. The trial court denied the motion to disqualify but expressly prohibited any conversations between the prosecutor, assistant state attorney, and Tanner directly or indirectly concerning this

case.

We think the trial court correctly resolved this potential problem of conflict of interest. The Florida Supreme Court has recognized that disqualification of the entire state attorney's office is not necessary when the record establishes 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. See Bogle v. State, 655 So. 2d 1103 (Fla.), cert. denied, 516 U.S. 978, 116 S. Ct. 483, 133 L. Ed.2d 410 (1995); Castro v. State, 597 So. 2d 259 (Fla. 1992); State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985); State v. Cote, 538 So. 2d 1356 (Fla. 5th DCA 1989).

In this case, there were no allegations or proof that Tanner provided information or personally assisted in the prosecution of the charges against Stabile. Nor are there any allegations that Tanner or anyone else violated the court's order which shielded Stabile from his former defense counsel. Under these circumstances, disqualification of the entire state attorney's office was not warranted. See Bogle (disqualification of entire state attorney's office was not warranted where prosecutor had a brief conversation with the defendant's former defense counsel; even though conversation should have never taken place, any appearance of impropriety was not so great that disqualification was mandated where no prejudicial information had been exchanged and former defense counsel now with the state attorney's office did not assist the prosecution in any capacity); Reaves v. State, 639 So. 2d 1 (Fla. 1994) (no error in refusing to disqualify entire state attorney's office from prosecuting defendant on retrial;

> defendant was properly shielded from his former prosecutor who had earlier been his defense counsel). Compare Castro v. State, 597 So. 2d 259 (Fla. 1992) (trial court should have disqualified state attorney's office from prosecuting defendant where the prosecuting attorney, knowing that the defendant's former public defender had now been hired by the state attorney's office, discussed motions pending in the defendant's case).

Id. at 1236-1238.

In addition to just a generic conflict argument, the defense also submitted to the trial court that this case was different because of the fact the State was seeking an enhanced sentence of the Petitioner which included use of some of the cases which involved representation by Mr. Tanner. This argument was also addressed by the Fifth District in its opinion:

> Stabile argues, however, that merely screening Tanner from prosecuting this case is insufficient because he is the administrative head of the office and has complete discretion to seek his enhanced sentencing as a prison releasee reoffender. Stabile is correct that the state's notice to classify him as a prison releasee reoffender was made in the name of Tanner. However, notice in this case was actually filed by the assistant state attorney. As Judge Blue noted in his specially concurring opinion in Pitts v. State, 787 So. 2d 195 (Fla. 2d DCA 2001), the decision to seek prison releasee reoffender sentencing is usually made by the assistant state attorney. There is no allegation that Tanner was involved in making this decision.

Id.

What the above quotes show is that the only issue presented to this Court was addressed in detail by the appellate court and rejected as to its merits. Therefore, the first point the State will make is this Court should not accept jurisdiction in this case.[1] In the opinion written by the Fifth District Court of Appeal the following question was certified:

> DOES SECTION 775.082(8)(a)2a, FLORIDA STATUTES (1997), WHICH MANDATES A LIFE SENTENCE FOR PRISON RELEASEE REOFFENDERS WHO COMMIT 'A FELONY PUNISHABLE BY LIFE,' APPLY BOTH TO LIFE FELONIES AND FIRST DEGREE FELONIES PUNISHABLE BY IMPRISONMENT FOR A TERM OF YEARS NOT EXCEEDING LIFE?

Id. at 1239. As recognized by the Fifth District Court of Appeal when it certified the issue, several other district courts had already certified that exact question to this Court including the First District Court of Appeal in the case Knight v. State, 791 So. 2d 490 (Fla. 1st DCA 2000).

This Court has now definitively answered the certified question in its January opinion in Knight v. State, 808 So. 2d 210 (Fla. 2002). The remaining issues discussed in Stabile do not conflict with any other district courts of appeal or with any opinions of this Court and do not warrant review by this

[1]Responses were filed by each party as to whether this Court should accept jurisdiction, and this Court entered an order on April 12, 2002, postponing its decision as to whether to accept jurisdiction.

Court.

In Jenkins v. State, 385 So. 2d 1356, 1357-1358 (Fla. 1980), this Court discussed the creation of the district courts of appeal and quoted from Ansin v. Thurston, 101 So. 2d 808, 810 (Fla. 1958):

> It was never intended that the district courts of appeal should be intermediate courts... To fail to recognize that these are courts primarily of final appellate jurisdiction and to allow such courts to become intermediate courts of appeal would result in a condition far more detrimental to the general welfare and the speedy and efficient administration of justice than that which the system was designed to remedy.

This Court's jurisdiction should not be invoked for the purpose of seeking a second appellate review. The Fifth District Court of Appeal reviewed the issue as to the Petitioner's position that the entire State Attorney's Office should have been disqualified and rejected it. That opinion is not in conflict with any other opinion of this State, and, in fact, the Petitioner acknowledges in its Merits Brief that Florida law (which was known to the trial court and discussed by the Fifth District Court of Appeal) holds that such decisions have to be made on a case-by-case basis. (see page twenty of the Petitioner's Merits Brief). The trial court held a hearing and made a ruling which was affirmed on appeal, and the Petitioner has presented no reason why this Court should accept jurisdiction and re-review the appellate court's opinion.

If this Court does find that it should accept jurisdiction, the

State asserts that the trial court correctly applied Florida law. In the case Reaves v. State, 574 So. 2d 105 (Fla. 1991), cert. denied, 513 U.S. 990 (1994), this Court discussed the issue of when the State Attorney's Office should be disqualified from prosecuting a defendant. The Court wrote "[t]he trial court's ruling on this question will not be overturned on appeal unless unsupported by competent substantial evidence." Id. at 107.[2] The opinion continued its explanation "[t]he entire state attorney's office may be disqualified only if the individual prosecutor is not properly screened from direct or indirect participation in, or discussion of the case." Once the defendant in that case was retried, this Court rejected the defense's argument that the entire office should have been disqualified given that the defendant was properly shielded from his former counsel. See Reaves v. State, 639 So. 2d 1, 5 (Fla.), cert. denied, 513 U.S. 990 (1994). Such proper screening is exactly what occurred in this case. The elected State Attorney John Tanner evidently had previously represented the Petitioner in some unrelated cases. The defense submitted that since the prosecutor was seeking an enhanced sentence based upon the earlier convictions of the Petitioner the entire office of the State

[2]It is the position of the State that the standard of review in this case much like review of a suppression issue is a mixed question of law and fact and that once the correct legal standard is applied the appellate court should defer to the findings of fact made by the trial court. See Connor v. State, 803 So. 2d 598 (Fla. 2001).

Attorney should be disqualified. Such a claim is not supported by any law submitted to the trial court.

In fact, the main case presented to the trial court actually supported the trial court's ruling. Bogle v. State, 655 So. 2d 1103 (Fla. 1995), was a capital murder case in which the defendant was given a sentence of death. Obviously, a heightened review of any conflict issues concerning the prosecution would occur in such a case. However, this Court found no reversible error in a situation where one of the defendant's defense attorneys who represented the defendant during the murder case was hired by the State Attorney's Office and actually had a conversation about the defendant with the assistant state attorney who was prosecuting the case. Id. at 1106. This Court wrote that "Disqualification of an entire state attorney's office is unnecessary when a disqualified attorney such as Roberts [the defendant's attorney who began working for the State Attorney's Office] does not provide prejudicial information and does not personally assist in the prosecution of the charge." This Court next noted that the issue is to be decided on a case-by-case basis. Id.

The trial court in this case heard the facts of how Mr. Tanner was involved with the Petitioner. The trial court heard from the assistant state attorney that when the Petitioner's name was mentioned to Mr. Tanner he had no memory of the Petitioner. The trial court ordered that there be no discussion by the prosecutor with Mr. Tanner

concerning the Petitioner. It is undisputed that this order was followed, and it is undisputed that no information was every provided by Mr. Tanner to the prosecutor in this case. Clearly, there has been no basis given to reverse the trial court's determination that disqualification of the entire State Attorney's Office was unnecessary. Given the argument presented in support of disqualification, the Office of the State Attorney would be barred from ever prosecuting a defendant who was previously represented by Mr. Tanner. Such extreme measures are not required by case law, statute, or ethical rule.

Federal case law also supports the fact that the entire prosecutor's office should not be disqualified. The case of United States v. Goot, 894 F.2d 231 (7th Cir. 1990), cert. denied, 498 U.S. 811 (1990),[3] addressed a factual situation in which the attorney representing the defendant was appointed to be the United States District Attorney, and the issue reviewed was whether the entire office had to be disqualified. See also, In re Grand Jury 91-1, 790 F. Supp. 109 (E.D. Va. 1992) (Fact that two attorneys who formerly represented the target of a grand jury joined the United States District Attorney's Office did not require that entire office had to be disqualified). The Circuit Court wrote

[3]Interestingly, while rejecting the fact that the entire prosecutor's office should be disqualified, the Goot court discussed the case of State v. Tippecanoe County Court, 432 N.E.2d 1377 (Ind. 1982), which was one of the cases relied upon by the defense. Goot, 894 F.2d at 234.

> In deciding questions of disqualification we balance the respective interests of the defendant, the government, and the public. Goot has a fundamental interest in his fifth amendment right not to be deprived of liberty without due process of law and in his sixth amendment right to counsel. The government has an interest in fulfilling its public protection function. To that end, the convenience of utilizing the office situated in the *locus criminis* is not lightly to be discarded. Furthermore, the government has a legitimate interest in attracting qualified lawyers to its service.

Id. at 236. (citations omitted). The Court found no error in the prosecution of Goot. Part of the facts supporting the ruling was the erection of a "Chinese Wall" between the attorney and the defendant. Id. at 235; see also, Grand Jury 91-1, 790 F. Supp. at 110-113.

The facts in this case show that a hearing was held at which it was explained that the elected State Attorney John Tanner while previously representing the defendant had no memory of the defendant. The trial court ordered that no communications occur between the assistant handling the case and Mr. Tanner, and there is no assertion that such order was violated. Simply because the elected State Attorney once represented a defendant should not be sufficient reason to disqualify the entire State Attorney's Office of the Seventh Judicial Circuit.[4]

[4]Review of the website of the State Attorney's Office shows that in the year 1997 alone (the last update evidently) Mr. Tanner's office had over sixty prosecutors.

The Petitioner in this case has shown no conflict of counsel and has failed to show why the ruling by the trial court should be reversed.

CONCLUSION

Based on the arguments and authorities presented above, the State respectfully prays this Honorable Court either not accept jurisdiction in this case or, in the alternative if jurisdiction is accepted, affirm the judgment and sentence of the trial court in all aspects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by delivery to James D. Crock, Esq., 444 Seabreeze Blvd., Ste. 650, Daytona Beach, FL 32118, this _____ day of July 2002.

_____
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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

_____
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