IN THE SUPREME COURT OF FLORIDA

JOHN CHRISTOPHER STABILE

Petitioner,

CASE NO.: SC01-2053
Lower Tribunal No.: 5D00-2427

vs.

STATE OF FLORIDA,

Respondent.

_____/

ON APPEAL FROM THE DISTRICT COURT OF APPEAL
OF THE STATE OF FLORIDA
FIFTH DISTRICT

AMENDED BRIEF OF PETITIONER

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_____/

INITIAL BRIEF OF PETITIONER'S
PRELIMINARY STATEMENT

Petitioner was the Defendant and Respondent was the Prosecution in the Criminal Division of the Circuit Court, Seventh Judicial Circuit, in and for Volusia County, Florida. In this brief, the Respondent will be referred to as "the State", "the Prosecution" or as "Respondent", and Petitioner will be referred to as he appears before this Honorable Court of Appeal, or by name or as Defendant.

In this brief, the following symbols will be used:

"R" - Record on appeal, followed by the appropriate page number(s).

STATEMENT OF THE CASE AND FACTS

The instant offense occurred on or about November 16, 1998 in Volusia County, Florida. (R 523-524) A charging information was filed on or about December 29, 1998, and an amended information filed April 9,1999.(R 527, 541) A "Motion to Disqualify State Attorney" was filed on April 7, 1999, heard on May 3,1999 and denied May 4, 1999. (R 539-540,545) Volume 10, R. 754, 756-772) A jury trial was begun on or about February 14, 1999, and completed February 18, 2000. (Volumes 3,6,7,8) A verdict was reached on or about February 18,2000.(R 615) The State's Notice of Intention to Classify Defendant as a Prison Release Re-Offender was filed on or about February 18, 2000 (R 598) A motion for new trial was filed on or about February 18,1999.(R 616-617) An amended Motion for New Trial was filed on or about June 12,2000.(R 660-661) It was denied on or about July 27,2000.(Vol.4, R 435-522,481) Notice of State's intent to classify Defendant as Habitual Felony Offender was filed on April 27,2000.(R 651) The Defendant filed a motion to declare statute 775.082(8) unconstitutional on April 28,2000.(R 659) Judgement and Sentence was entered on or about July 27,2000.(R 730-735) A hearing was held as to the amended motion for new trial and sentencing on or about July 27,2000.(R 435-522) Said motion was denied. Sentence was imposed. At the sentencing the State of Florida asked for Prison Releasee Reoffender

sanctions. The State announced that they alone had jurisdiction to decide when or if they would seek such sanctions, and that they did so in the instant cause on the basis of the Defendant's prior record.(Volume 4 , R 511-512) The trial court acknowledged that the State had sole discretion in seeking said sanction, and that imposition was mandatory upon the Court. (Volume 4, R 515-517) A notice of appeal was filed on or about August 22,2000. Directions to the Clerk, Designation to the Court Reporter, and Statement of Judicial Acts to be Reviewed were filed on or about August 22,2000. (R 743-752) The Fifth District Court of Appeal rendered an opinion on or about August 10, 2001 and certified a question of great public importance to this Honorable Court. A notice to invoke discretionary jurisdiction was filed September 13, 2001. An acknowledgement of new case was entered October 8, 2001. An order staying proceedings until Disposition of Knight v. State, Case No. SC00-1987 was entered October 17, 2001. An order to show cause was entered February 27, 2002. A response to the order to show cause was filed March 13, 2002. The State's response was filed on or about March 26,2002. An order postponing decision on jurisdiction and briefing schedule was entered on April 12, 2002. A Motion to Toll Time, and A Motion for extension of time to file petitioner's brief on the merits were filed on or about May 3, 2002. An order extending time was entered on/or about May 3, 2002.

SUMMARIES OF ARGUMENTS

POINT ONE: The trial court erred in denying the Defendant's Motion to Disqualify the State Attorney's Office. The standard of review is De Novo, and the Supreme Court can review this issue as a matter of law. The elected state attorney previously represented the Defendant in several felony cases. The State exercised its discretion and sought to enhance the Defendant's sentence by having him declared a prison releasee reoffender. The State used the cases in which the elected State Attorney previously represented the accused in order to enhance the sentence to life imprisonment. The trial judge acknowledged that he had no discretion but to impose a sentence of life imprisonment.

When the State seeks to use such previous cases to enhance a sentence in the current cause, it places the previous representation directly at issue, and increases the potential or the perception that confidential communications might be used against the Defendant's interests, in deciding to use its discretion to enhance a sentence. The appearance of impropriety is so great in such a case as to virtually undermine the confidence of the public in the integrity of the judicial system itself. In addition, when an elected state attorney previously represented the Defendant, it is insufficient to simply screen said party from the assistant prosecuting the case. The State Attorney's status as administrative head of the

office makes a simple screening insufficient to overcome the public's perception of the potential denial of due process of law, and violation of his right to counsel.

ARGUMENT

POINT ONE ON APPEAL - POINT ONE
THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S MOTION TO DISQUALIFY THE STATE ATTORNEY'S OFFICE

The Petitioner sought pre-trial disqualification of the Seventh Judicial Circuit's Office of State Attorney. (Volume 4, R 539-540, Volume 10, R 756-772) The trial judge erred in denying the motion. (Volume 10, R 770) In doing so the Defendant was deprived of his United States and Florida Constitutional rights to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution, and Article I, Section 9 of the Florida Constitution, effective assistance of counsel under the United States Constitution's Sixth Amendment, and the Florida Constitution, and a fair trial. As a result the Defendant is entitled to a new trial, and appointment of a special prosecutor. The standard of review is De Novo.

The State of Florida, through elected State Attorney John Tanner, exercised it's sole discretion to seek a mandatory sentence of life imprisonment pursuant to enhancement provisions authorized under the Prison Releasee Reoffender statute FS 775.082.

The State sought sentence enhancement exclusively based upon two prior convictions in which the Petitioner had been represented by the current elected State

Attorney, John Tanner.

The authority to initiate enhancement proceedings, or to wield any other prosecutorial power on behalf of the State of Florida, is given only to the elected State Attorney. (Article 5. Section 17, Florida Constitution, and FS 27.181). Any assistant state attorney receives his/her entire authority to act solely from, and solely in the name of, the elected State Attorney.

The Assistant State Attorney in the instant cause acknowledged that she sought an enhanced sentence on the basis of the aforementioned prior record. (Vol. 4, R 511-512, LL 20-21).

The trial judge acknowledged his dismay in having to impose a life sentence, and the State Attorney's sole discretion in seeking, and effectively imposing said term. Nonetheless, a term of life imprisonment was imposed.(Volume 4, R 515, 517, Volume 5, R 730-735)

The appearance of impropriety is manifest. The elected State Attorney, John Tanner, formerly represented Petitioner in two cases that led to convictions. Those same two cases were then used to both fulfill the statutory criteria, and to persuade the exercise of discretion to pursue said statutory sanctions, in seeking an enhanced penalty of life imprisonment by the Office of elected State Attorney John Tanner.

At least four other State Supreme Court's have ordered the disqualification of

the entire prosecution office in similar cases, and are at odds with the reasoning of the lower trial court and the Fifth District Court of Appeals. (See State of West Virginia ex rel. Charles Garland Keenan v. Hatcher, 557 S.E. 2d 361 (West Virginia 2001, State ex rel. Meyers v. Tippecanoe County Court, 432 N.E. 2nd 1237 (Ind. 1982), In Re Ockrassa, 165 Ariz. 576, 799 P.2d 1350 (Ariz. 1990), State v. Stenger, 760 P.2d 357 (Wash. 1988), and see State v. Hursey, 861 P.2d 615, (Ariz. 1993), also see New Mexico v. Barnett, 965 P.2d 323 (New Mexico Court of Appeals 1998)

In Tippecanoe, Keenan, and Stenger the conflict of interest involved the elected state attorney, and administrative head of the office, as in the instant cause.

In Tippecanoe the Indiana Supreme Court emphasized that when a deputy prosecutor has a conflict of interest, individual rather than vicarious disqualification may be the appropriate action. However, in Tippecanoe when the prosecutor who had administrative control over the entire staff was the one who had formerly represented the particular defendant involved, the trial court properly disqualified the entire staff of deputies.(see Tippecanoe at 1380)

In Stenger the Washington Supreme Court noted that:

> "Where the prosecuting attorney (as distinguished from a deputy prosecuting attorney) has previously represented the accused in the same case or in a matter so closely interwoven therewith as to be in

> effect a part thereof, the entire office of which the prosecuting attorney is administrative head should ordinarily also be disqualified from prosecuting the case and a special deputy prosecuting attorney appointed. This is not to say, however, that anytime a prosecuting attorney is disqualified in a case for any reason that the entire prosecuting attorney's office is also disqualified. Where the previous case is not the same case (or one closely interwoven therewith) that is being prosecuted, and where, for some other ethical reason the prosecuting attorney may be totally disqualified from the case, if that prosecuting attorney separates himself or herself from all connection with the case and delegates full authority and control over the case to a deputy prosecuting attorney...."(at 363-364 Stenger) that type of screening should be sufficient.

In all five state supreme court cases cited above, the prosecuting attorney previously represented the Defendant in criminal proceedings leading to convictions, and the presumed inherent conveying of confidences. Further, in said cases, as in the instant cause, the prosecution used these earlier convictions to obtain enhanced sentences. Said direct use of these earlier cases, utilizing defense representation by the now prosecuting attorney, to gain enhanced sentences violated the ethical

standard required under the Rules of Professional Conduct. All of the aforementioned courts used a similiar, if not in some cases identically worded, standard mandated by the Rules Regulating the Florida Bar as detailed in Rule 4-1.9:

> "A lawyer who has formerly represented a client in a matter shall not thereafter:
>
> a) represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation."(emphasis added)

All the aforementioned cases ruled that when the earlier representations were utilized to obtain enhanced sentences the standard for a conflict of interest of involving a "substantially related matter" was met.

In Keenan the court noted that:

> "This Court agrees that in cases such as these it is
>
> impossible to completely discount the possibility that confidential information derived from a lawyer's previous representation on the predicate convictions could not be used against a former client during recidivist proceedings. This is particularly true with respect to the decision to file a recidivist information in the first instance. While we

> do not go so far as to say a prosecutor is forever precluded from bringing charges against a former client because of the possibility that confidential information may inform the prosecutor's charging decision, the circumstance we face here, where the prosecutor represented the defendant in connection with the predicate convictions, simply raises too great a danger that a client's confidences may be betrayed. The Court therefore holds that a prosecutor is disqualified from representing the State in a recidivist proceeding ....where such lawyer acted as defense counsel in connection with the prior felony convictions that are the basis for such proceeding."(Keenan at 370)

The Keenan court also emphasized that when the discretion to seek enhancement rests entirely within the hands of the prosecutor there is an even greater risk that said decision was substantially influenced by the ethical violation. In the instant cause, the discretion to pursue enhanced penalties under the prison releasee reoffender law rested entirely in the hands of the prosecution. The trial court had no discretion to not impose such penalties upon a routine showing of identity, release date, and prior convictions.

It is interesting to note that the lower appellate court noted Acting Chief Judge

Blue in Pitts v. State, 787 So.2d 195, 196 (Fla. 2d DCA 2001) for the proposition that the decision to seek prison releasee reoffender sentencing is usually made by the assistant state attorney. However, the lower court did not note Judge Blue when he stated that:

> "The State objected to the guidelines sentence and requested prison releasee re offender sentencing. The prison releasee reoffender sentence would have been a mandatory fifteen years.
>
> That sentence, if imposed, would result not from the discretion of the the trial judge but from the judgement of an assistant state attorney. I am troubled by the unreviewable nature of a prosecutor's exercise of discretion."(Pitts at 196)
>
> Additionally, in Barnett the court noted that:
>
> "Given the tremedous discretion possessed by a prosecutor in the plea bargaining process, a defendant could be seriously prejudiced by the prosecutor's knowledge regarding the defendant's character and conduct acquired in prior representation... Such prior knowledge of a former client's credibility or personality also may be used to his or her disadvantage in the prosecuting attorney's assessment of whether or under what terms the former client should be released

from detention."(Barnett at 333)

In Pitts, Acting Chief Judge Blue was understandably troubled by the unreviewable excercise of discretion in seeking enhanced sentencing sanctions in routine circumstances.

In the instant offense there exists the vastly more troubling circumstance of 1) an unreviewable exercise of discretion, 2) under circumstances in which the elected State Attorney, by whose individual statutory authority, and in whose name, the Assistant State Attorney acts, previously represented the Defendant, and 3) whose previous cases were then utilized to enhance the Defendant's sentence to one of life imprisonment.

In the aforementioned state supreme court cases, it was pointed out that a fundamental policy basis for disqualification of the prosecutor's entire office was the risk of undermining public confidence in the criminal justice system. Here the public is told that John Tanner represented John Stabile in cases leading to conviction, and then the Office of John Tanner, now wearing a prosecutorial hat, uses those same cases to seek an enhanced sentence of life imprisonment in a matter entirely within their discretion and unreviewable by either the trial or appellate courts. The public is asked to believe that no earlier client confidences or observations were used behind closed doors to place the Defendant behind bars for the rest of his life. The

appearance of impropriety is manifest and rises to the level contemplated in Reaves v. State 574 So.2d 105 (Fla. 1991), Castro v. State, 597 So.2d 259 (Fla. 1992) and reaffirmed in dicta in Rogers v. State, 783 So.2d 980 (Fla. 2001). The appearance of impropriety created by the instant circumstances are sufficiently egregious to demand disqualification.

In Hursey the Arizona Supreme Court noted that a defendant should not be forced to attempt to prove that there was an actual indiscretion or impropriety. Evidence of such conduct, being under the control of the prosecution would be well-nigh impossible for a defendant to bring forth. In addition, if a Defendant were required to show prejudice he might be forced to disclose a confidential communication be made to his former lawyer.

Furthermore, as noted in Barnett:

> "Employing a presumption that confidential information was disclosed in cases that are substantially related serves several important purposes. In particular, employing this presumption will "spare former clients from the self-defeating necessity of having to reveal what confidential information they imparted to their lawyer as a means of making sure (through a disqualification motion) that the lawyer would not use this information to their disadvantage in the representation of another

client...By avoiding the necessity of actually disclosing confidential information in order to disqualify an attorney, the presumption increases the assurance of confidentiality that clients need to to confide more completely in their attorneys...such assurances of confidentiality...are necessary to maintain public trust in the integrity of the judicial process."(Barnett at 332)

This Court stated in Castro v. State, 597 So.2d 259, 260 (Fla. 1992) that:

"In (State v.) **Fitzpatrick**,(464 So.2d 1185 (1985), the disqualified attorney had had no conversations or contact with other state-attorney personnel regarding the defendant's case. Under such circumstances, we held that the entire state attorney's office need not be disqualified. However, we cannot say the same should follow where the defendant or the public at large is given reason to believe the judicial process has been compromised. Our judicial system is only effective when its integrity is above suspicion. Our system must not only refuse to tolerate impropriety, but even the appearance of impropriety as well. "(emphasis added) "An imagined advantage on one side or the other in a criminal proceeding can be as destructive of the integrity of the process as can a real advantage.: Mackey v. State, 548 So.2d 904, (Fla. 1st DCA 1989)"

Similar circumstances to the instant cause existed in all of the aforementioned state supreme court cases. The prosecution in all cases involved the seeking of enhanced penalties utilizing prior convictions in which the now prosecuting attorney had then represented the Defendant. All courts found that the Professional Rules of Conduct were violated and that a conflict of interest existed involving a substantially related matter due to the direct use of the previous causes to enhance the sentence in the instant cause, even though no actual prejudice was shown. Said conflict of interest raised a significant risk, and a great appearance of impropriety, of the betrayal of the attorney client privilege through improper use of the client's confidential communications, and thus prejudice was presumed (see Hursey), or a showing of actual prejudice not required. Furthermore, in at least three of the State Supreme Court's the alleged conflict involved the elected state attorney, as in the instant cause, and a higher standard requiring not just an individual disqualification but the vicarious recusal of the entire state attorney's office imposed.

The aforementioned Florida cases, and others, do not deal with similiar circumstances to the instant cause. They do not involve the extraordinary circumstances of utilizing prior convictions involving representation of the Defendant by the current elected State Attorney to enhance a sentence to life imprisonment.

The cases cited by the Appellate Court in its opinion in the instant cause rely

in part upon Meggs v. McClure, 538 So.2d 518 (Fla. 1st DCA 1989) and State v. Cote, 538 So.2d 1356 (Fla. 5th DCA 1989). Both cases predate the decisions of Reaves, Castro, and Rogers, and their finding the appearance of impropriety to be a sufficient standard in certain cases. Further, neither case involves circumstances even remotely related to the instant cause or the aforementioned state supreme court decisions. Also, the Appellate Court opinion simply made passing reference to the "appearance of impropriety" standard, and stated that the instant circumstances "were not so great that disqualification was mandated," without explanation. In contrast, the aforementioned five state supreme courts, in closely similiar circumstances, reasoned at length that such facts were great and did mandate disqualification. Said reasoning is consistent with this Honorable Court's fundamental standards as employed in Reaves and Castro, albeit in massively different circumstances. Nonetheless, it does not appear that a decision has been rendered in Florida on point to the instant circumstances or those similar ones considered in the aforementioned sister state supreme courts.

In Keenan, the West Virginia Supreme Court held that since the prosecutor's office should have been disqualified then they lacked the jurisdiction to file an enhancement pleading, in that case a recidivist information. If the same sound reasoning were used in the instant cause both the Motion for sentence enhancement

under the Prison releasee reoffender statute, and the original information should be set aside. As in Hursey not only would the instant sentence enhancement be set aside but a new trial ordered.

This Court has ruled in Reaves, Castro, Rogers, and in Bogle v. State, 655 So.2d 1103 (Fla. 1995) that the appearance of impropriety may require the disqualification of a state attorney's office, but such situations must be reviewed on a case by case basis. Circumstances like those in the instant cause have not previously been considered by this or any other appellate court in Florida. Nonetheless, they are as particular as they are egregious, and can be narrowly addressed. A concern of the trial prosecutor was that the disqualification of her office would be required in quite a few cases if the standard were simply whether John Tanner had previously represented an individual. (Volume 10, R 766, LL 17-22) Here, the crucial circumstance becomes the State's discretionary pursuit of a sentencing enhancement, and it's utilization of convictions to gain that enhancement in which Mr. Tanner represented the defendant. Four factors that include not only discretion, but unfettered, unreviewable discretion, in seeking an enhancement and doing so by utilizing the previous convictions involving Mr.Tanner's representation

distinguish this cause from other situations. The conflict of interest and violation of standards in the code of professional responsibility, the danger of undermining the

sacred right to confidential communication between lawyer and client, that it is not overstatement to say, forms a major portion of the criminal justice system's foundation, and the concurrent threat of undermining public confidence, makes this a particular case that does create an appearance of impropriety that demands disqualification. Yet, such a disqualification could be narrowly tailored to facts like the unusual circumstances found in the instant cause, as the aforementioned sister state supreme courts ordered. As a result, disqualification should have been ordered, and the instant Petitioner's sentence set aside and a new trial ordered.

CONCLUSION

Petitioner urges this Honorable Court, under the argument advanced in point one on appeal, to vacate the entry of judgment and sentence against Petitioner and remand for a new trial and order the disqualification of the State Attorney's Office for the Seventh Judicial Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies and a diskette has been furnished by federal express to the Supreme Court of Florida, Office of the Clerk, 500 South Duval Street, Tallahassee, Florida 32399-1927 and a copy hereto has been furnished by U.S. Mail to Wesley Heidt, Esquire, Assistant Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118, this _

___ day of June, 2002 and to John Stabile, DC# 894926, Dorm A, South Bay

Correctional Facility, P.O. Box 7171, South Bay, FL 33493.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 14 point Times New Roman.

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APPENDIX

APPENDIX INDEX

1. Conformed copy of District Court of Appeals
Fifth District - Case No. 5D00-2427 -Opinion filed August 10, 2001