RULE 4-1.6 CONFIDENTIALITY OF INFORMATION

1. **(a) Consent Required to Reveal Information.** A lawyer shall not reveal information relating to representation of a client except as stated in subdivisions (b), (c), and (d), unless the client consents after disclosure to the client.

(b) When Lawyer Must Reveal Information. A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary:

(1) to prevent a client from committing a crime; or

(2) to prevent a death or substantial bodily harm to another.

(c) When Lawyer May Reveal Information. A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

(1) to serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) to comply with the Rules of Professional Conduct.

(d) Exhaustion of Appellate Remedies. When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

(e) Limitation on Amount of Disclosure. When disclosure is mandated or permitted, the lawyer shall disclose no more information than is required to meet the requirements or accomplish the purposes of this rule.

Comment

The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct.

The common law recognizes that the client's confidences must be protected from disclosure. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.

A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

The principle of confidentiality is given effect in 2 related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or by law. However, none of the foregoing limits the requirement of disclosure in subdivision (b). This disclosure is required to prevent a lawyer from becoming an unwitting accomplice in the fraudulent acts of a client. See also Scope.

The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance.

Authorized disclosure

A lawyer is impliedly authorized to make disclosures about a client when appropriate in carrying out the representation, except to the extent that the client's instructions or special circumstances limit that authority. In litigation, for example, a lawyer may disclose information by admitting a fact that cannot properly be disputed or in negotiation by making a disclosure that facilitates a satisfactory conclusion.

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Disclosure adverse to client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts that would enable the lawyer to counsel against a wrongful course of action. While the public may be protected if full and open communication by the client is encouraged, several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See rule 4-1.2(d). Similarly, a lawyer has a duty under rule 4-3.3(a)(4) not to use false evidence. This duty is essentially a special instance of the duty prescribed in rule 4-1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent. In such a situation the lawyer has not violated rule 4-1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer shall reveal information in order to prevent such consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

Subdivision (b)(2) contemplates past acts on the part of a client that may result in present or future consequences that may be avoided by disclosure of otherwise confidential communications. Rule 4-1.6(b)(2) would now require the attorney to disclose information reasonably necessary to prevent the future death or substantial bodily harm to another, even though the act of the client has been completed.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction, and factors that may extenuate the conduct in question. Where practical the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose.

Withdrawal

If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.16(a)(1).

After withdrawal the lawyer is required to refrain from making disclosure of the client's confidences, except as otherwise provided in rule 4-1.6. Neither this rule nor rule 4-1.8(b) nor rule 4-1.16(d) prevents the lawyer from giving notice of the fact of withdrawal, and the lawyer may also withdraw or disaffirm any opinion, document, affirmation, or the like.

Where the client is an organization, the lawyer may be in doubt whether contemplated conduct will actually be carried out by the organization. Where necessary to guide conduct in connection with the rule, the lawyer may make inquiry within the organization as indicated in rule 4-1.13(b).

Dispute concerning lawyer's conduct

Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish

a defense. The same is true with respect to a claim involving the conduct or representation of a former client. The lawyer's right to respond arises when an assertion of such complicity has been made. Subdivision (c) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately. In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

If the lawyer is charged with wrongdoing in which the client's conduct is implicated, the rule of confidentiality should not prevent the lawyer from defending against the charge. Such a charge can arise in a civil, criminal, or professional disciplinary proceeding and can be based on a wrong allegedly committed by the lawyer against the client or on a wrong alleged by a third person; for example, a person claiming to have been defrauded by the lawyer and client acting together. A lawyer entitled to a fee is permitted by subdivision (c) to prove the services rendered in an action to collect it. This aspect of the rule expresses the principle that the beneficiary of a fiduciary relationship may not exploit it to the detriment of the fiduciary. As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

Disclosures otherwise required or authorized

The attorney-client privilege is differently defined in various jurisdictions. If a lawyer is called as a witness to give testimony concerning a client, absent waiver by the client, rule 4-1.6(a) requires the lawyer to invoke the privilege when it is applicable. The lawyer must comply with the final orders of a court or other tribunal of competent jurisdiction requiring the lawyer to give information about the client.

The Rules of Professional Conduct in various circumstances permit or require a lawyer to disclose information relating to the representation. See rules 4-2.2, 4-2.3, 4-3.3, and 4-4.1. In addition to these provisions, a lawyer may be obligated or permitted by other provisions of law to give information about a client. Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against such a supersession.

Former client

The duty of confidentiality continues after the client-lawyer relationship has terminated.

RULE 4-4.2 COMMUNICATION WITH PERSON REPRESENTED BY COUNSEL

1. In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer. Notwithstanding the foregoing, an attorney may, without such prior consent, communicate with another's client in order to meet the requirements of any statute or contract requiring notice or service of process directly on an adverse party, in which event the communication shall be strictly restricted to that required by statute or contract, and a copy shall be provided to the adverse party's attorney.

Comment

This rule does not prohibit communication with a party, or an employee or agent of a party, concerning matters outside the representation. For example, the existence of a controversy between a government agency and a private party, or between 2 organizations, does not prohibit a lawyer for either from communicating with nonlawyer representatives of the other regarding a separate matter. Also, parties to a matter may communicate directly with each other and a lawyer having independent justification for communicating with the other party is permitted to do so. Communications authorized by law include, for example, the right of a party to a controversy with a government agency to speak with government officials about the matter.

In the case of an organization, this rule prohibits communications by a lawyer for 1 party concerning the matter in representation with persons having a managerial responsibility on behalf of the organization and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization. If an agent or employee of the organization is represented in the matter by the agent's or employee's own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule. Compare rule 4-3.4(f). This rule also covers any person, whether or not a party to a formal proceeding, who is represented by counsel concerning the matter in question.

CANON 3

1. A Judge Shall Perform the Duties of Judicial Office Impartially and Diligently

A. Judicial Duties in General.

The judicial duties of a judge take precedence over all the judge's other activities. The judge's judicial duties include all the duties of the judge's office prescribed by law. In the performance of these duties, the specific standards set forth in the following sections apply.

B. Adjudicative Responsibilities.

(1) A judge shall hear and decide matters assigned to the judge except those in which disqualification is required.

(2) A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism.

(3) A judge shall require order and decorum in proceedings before the judge.

(4) A judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom the judge deals in an official capacity, and shall require similar conduct of lawyers, and of staff, court officials, and others subject to the judge's direction and control.

(5) A judge shall perform judicial duties without bias or prejudice. A judge shall not, in the performance of judicial duties, by words or conduct manifest bias or prejudice, including but not limited to bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, and shall not permit staff, court officials, and others subject to the judge's direction and control to do so. This section does not preclude the consideration of race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors when they are issues in the proceeding.

(6) A judge shall require lawyers in proceedings before the judge to refrain from manifesting, by words, gestures, or other conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation, or socioeconomic status, against parties, witnesses, counsel, or others. This Section 3B(6) does not preclude legitimate advocacy when race, sex, religion, national origin, disability, age, sexual orientation, socioeconomic status, or other similar factors are issues in the proceeding.

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling,

administrative purposes, or emergencies that do not deal with substantive matters or issues on the merits are authorized, provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond.

(c) A judge may consult with other judges or with court personnel whose function is to aid the judge in carrying out the judge's adjudicative responsibilities.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law to do so.

(8) A judge shall dispose of all judicial matters promptly, efficiently, and fairly.

(9) A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness or make any nonpublic comment that might substantially interfere with a fair trial or hearing. The judge shall require similar abstention on the part of court personnel subject to the judge's direction and control. This Section does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court. This Section does not apply to proceedings in which the judge is a litigant in a personal capacity.

(10) A judge shall not commend or criticize jurors for their verdict other than in a court order or opinion in a proceeding, but may express appreciation to jurors for their service to the judicial system and the community.

(11) A judge shall not disclose or use, for any purpose unrelated to judicial duties, nonpublic information acquired in a judicial capacity.

C. Administrative Responsibilities.

(1) A judge shall diligently discharge the judge's administrative responsibilities without bias or prejudice and maintain professional competence in judicial administration, and should cooperate with other judges and court officials in the administration of court business.

(2) A judge shall require staff, court officials, and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge and

to refrain from manifesting bias or prejudice in the performance of their official duties.

(3) A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.

(4) A judge shall not make unnecessary appointments. A judge shall exercise the power of appointment impartially and on the basis of merit. A judge shall avoid nepotism and favoritism. A judge shall not approve compensation of appointees beyond the fair value of services rendered.

D. Disciplinary Responsibilities.

(1) A judge who receives information or has actual knowledge that substantial likelihood exists that another judge has committed a violation of this Code shall take appropriate action.

(2) A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

(3) Acts of a judge, in the discharge of disciplinary responsibilities, required or permitted by Sections 3D(1) and 3D(2) are part of a judge's judicial duties and shall be absolutely privileged, and no civil action predicated thereon may be instituted against the judge.

E. Disqualification.

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) the judge served as a lawyer or was the lower court judge in the matter in controversy, or a lawyer with whom the judge previously practiced law served during such association as a lawyer concerning the matter, or the judge has been a material witness concerning it;

(c) the judge knows that he or she individually or as a fiduciary, or the judge's spouse, parent, or child wherever residing, or any other member of the judge's family residing in the judge's household has an economic interest in the subject matter in controversy or in a party to the proceeding or has any other more than de minimis interest that could be substantially affected by the proceeding;

(d) the judge or the judge's spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

(iii) is known by the judge to have a more than de minimus interest that could be substantially affected by the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding.

(2) A judge should keep informed about the judge's personal and fiduciary economic interests, and make a reasonable effort to keep informed about the economic interests of the judge's spouse and minor children residing in the judge's household.

F. Remittal of Disqualification.

A judge disqualified by the terms of Section 3E may disclose on the record the basis of the judge's disqualification and may ask the parties and their lawyers to consider, out of the presence of the judge, whether to waive disqualification. If following disclosure of any basis for disqualification other than personal bias or prejudice concerning a party, the parties and lawyers, without participation by the judge, all agree the judge should not be disqualified, and the judge is then willing to participate, the judge may participate in the proceeding. The agreement shall be incorporated in the record of the proceeding.

COMMENTARY

Canon 3B(4). The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Judges can be efficient and business-like while being patient and deliberate.

Canon 3B(5). A judge must refrain from speech, gestures or other conduct that could reasonably be perceived as sexual harassment and must require the same standard of conduct of others subject to the judge's direction and control.

A judge must perform judicial duties impartially and fairly. A judge who manifests bias on any basis in a proceeding impairs the fairness of the proceeding and brings the judiciary into disrepute. Facial expression and body language, in addition to oral communication, can give to parties or lawyers in the proceeding, jurors, the media and others an appearance of judicial bias. A judge must be alert to avoid behavior that may be perceived as prejudicial.

Canon 3B(7). The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented, the party who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief as amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

Canon 3B(8). In disposing of matters promptly, efficiently, and fairly, a judge must demonstrate due regard for the rights of the parties to be heard and to have issues resolved without unnecessary cost or delay. Containing costs while preserving fundamental rights of parties also protects the interests of witnesses and the general public. A judge should monitor and supervise cases so as to reduce or eliminate dilatory practices, avoidable delays, and unnecessary costs. A judge should encourage and seek to facilitate settlement, but parties should not feel coerced into surrendering the right to have their controversy resolved by the courts.

Prompt disposition of the court's business requires a judge to devote adequate time to judicial duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants, and their lawyers cooperate with the judge to that end.

Canon 3B(9). The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition. This Section does not prohibit a judge from commenting on proceedings in which the judge is a litigant in a personal capacity, but in cases such as a writ of mandamus where the judge is a litigant in an official capacity, the judge must not comment publicly. The conduct of lawyers relating to trial publicity is governed by Rule 4-3.6 of the Rules Regulating The Florida Bar.

Canon 3B(10). Commending or criticizing jurors for their verdict may imply a judicial

expectation in future cases and may impair a juror's ability to be fair and impartial in a subsequent case.

Canon 3C(4). Appointees of a judge include assigned counsel, officials such as referees, commissioners, special masters, receivers, mediators, arbitrators, and guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by Section 3C(4). See also Fla.Stat. § 112.3135 (1991).

Canon 3D. Appropriate action may include direct communication with the judge or lawyer who has committed the violation, other direct action if available, or reporting the violation to the appropriate authority or other agency. If the conduct is minor, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge having knowledge, however, that another judge has committed a violation of this Code that raises a substantial question as to that other judge's fitness for office or has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is required under this Canon to inform the appropriate authority. While worded differently, this Code provision has the identical purpose as the related Model Code provisions.

Canon 3E(1). Under this rule, a judge is disqualified whenever the judge's impartiality might reasonably be questioned, regardless of whether any of the specific rules in Section 3E(1) apply. For example, if a judge were in the process of negotiating for employment with a law firm, the judge would be disqualified from any matters in which that law firm appeared, unless the disqualification was waived by the parties after disclosure by the judge.

A judge should disclose on the record information that the judge believes the parties or their lawyers might consider relevant to the question of disqualification, even if the judge believes there is no real basis for disqualification. The fact that the judge conveys this information does not automatically require the judge to be disqualified upon a request by either party, but the issue should be resolved on a case-by-case basis. Similarly, if a lawyer or party has previously filed a complaint against the judge with the Judicial Qualifications Commission, that the fact does not automatically require disqualification of the judge. Such disqualification should be on a case-by-case basis.

By decisional law, the rule of necessity may override the rule of disqualification. For example, a judge might be required to participate in judicial review of a judicial salary statute, or might be the only judge available in a matter requiring immediate judicial action, such as a hearing on probable cause or a temporary restraining order. In the latter case, the judge must disclose on the record the basis for possible disqualification and use reasonable efforts to transfer the matter to another judge as soon as practicable.

Canon 3E(1)(b). A lawyer in a government agency does not ordinarily have an association with other lawyers employed by that agency within the meaning of Section 3E(1)(b); a judge formerly employed by a government agency, however, should

disqualify himself or herself in a proceeding if the judge's impartiality might reasonably be questioned because of such association.

Canon 3E(1)(d). The fact that a lawyer in a proceeding is affiliated with a law firm with which a relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "the judge's impartiality might reasonably be questioned" under Section 3E(1), or that the relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Section 3E(1)(d)(iii) may require the judge's disqualification.

Canon 3F. A remittal procedure provides the parties an opportunity to proceed without delay if they wish to waive the disqualification. To assure that consideration of the question of remittal is made independently of the judge, a judge must not solicit, seek, or hear comment on possible remittal or waiver of the disqualification unless the lawyers jointly propose remittal after consultation as provided in the rule. A party may act through counsel if counsel represents on the record that the party has been consulted and consents. As a practical matter, a judge may wish to have all parties and their lawyers sign the remittal agreement.

Commentary amended June 15, 1995, effective Nov. 9, 1995 (656 So.2d 926); Aug. 24, 1995 (659 So.2d 692).

THE FLORIDA BAR, Complainant, v. ROY BEACH, Respondent.

No. 85,005

SUPREME COURT OF FLORIDA

675 So. 2d 106; 1996 Fla. LEXIS 729; 21 Fla. L. Weekly S 188

April 25, 1996, Decided

PRIOR HISTORY: [**1] Original Proceeding - The Florida Bar.

COUNSEL: John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, Tallahassee, Florida; and John B. Root, Jr., Bar Counsel, Jan K. Wichrowski, Co-Bar Counsel and Rose Ann Degangi, Co-Bar Counsel, Orlando, Florida, for Complainant.

Roy L. Beach, pro se, Orlando, Florida, for Respondent.

JUDGES: GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

OPINION

[*107] PER CURIAM.

We have for review the complaint of The Florida Bar and the referee's report regarding alleged ethical breaches by Roy Beach. [1] We have jurisdiction. *Art. V, § 15, Fla. Const.*

1 Beach was admitted to the Bar on October 31, 1980, and has one prior disciplinary conviction which resulted in a 28-day suspension on March 31, 1994. *Florida Bar v. Beach, 637 So. 2d 237 (Fla. 1994).*

FACTS

The alleged violations in this case concern Beach's legal practices during 1993 when he provided services as an independent contractor to King and King Paralegals (King and King). [**2] King and King was owned and operated by Kenneth and Cathy King. As the Kings' supervising attorney, Beach discussed their clients' legal issues, reviewed pleadings and other documents prepared by them, and offered thirty-minute consultations to Kings' customers. King and King paid Beach a $ 75 flat rate for his services rendered in each case.

On June 29, 1993, Margery Rose contracted with King and King to prepare legal documents, which would be reviewed by Beach. The contract also provided that Beach would have a thirty-minute consultation with Ms. Rose, but would not represent her unless she entered into a separate agreement with him. Pursuant to the contract, Ms. Rose paid King and King $ 675 as a nonrefundable retainer to prepare the paperwork, conduct research and additional interviews, and for attorney time. During her relationship with King and King, Ms. Rose received advice and guidance from Kenneth King regarding the various legal actions she considered pursuing. The guidance provided by King was the direct product of legal advice King had received from Beach.

Approximately two weeks after hiring the Kings, Ms. Rose requested they cease working on her case and provide her [**3] with the documents they had prepared up to that point. She also requested but was denied a [*108] refund. Ms. Rose then filed a pro se action seeking a refund and delivery of her file documents to determine whether the legal services she initially requested had been performed. The Kings defended that action pro se. After mediating the disagreement, the parties entered into a stipulation which provided the Kings would deliver the documents within seventy-two hours and pay Ms. Rose $ 47 on or before October 21, 1993. Subsequently, a dispute arose as to whether the Kings had exhibited good faith in attempting delivery of the documents within the required time period, and final judgment was entered awarding Ms. Rose $ 675 because of the Kings' breach of the stipulation.

Ms. Rose filed a grievance with The Florida Bar wherein she complained that Roy Beach had failed to meet with her or contact her pursuant to the King and King contract. Ms. Rose also stated in her complaint that the Kings had tried twice to deliver her documents to her former husband prior to actually delivering them to him at his place of business. Based upon his belief that Ms. Rose's statement was contradictory to her prior [**4] position that the Kings had violated the mediation agreement, Beach filed a motion on behalf of the Kings to vacate the final judgment. [2] The court granted this motion and set the matter for a new final hearing but, prior to that date, Ms. Rose dismissed her action.

> 2 As the Kings' supervising attorney, Beach had also received Ms. Rose's paperwork which was the subject matter of her initial civil suit against King and King.

BAR PROCEEDINGS

The Florida Bar filed a complaint against Roy Beach alleging violation of *Rules Regulating The Florida Bar 4-5.4* (sharing legal fees with a nonlawyer), *4-5.5* (assisting a person who is not a member of the Bar to perform activities that constitute the practice of law), *4-1.7* (representing a client when the representation would be directly adverse to the interests of another client), *4-1.8* (using information relating to the representation of a client to the disadvantage of the client), and *4-1.9* (representing another person in the same or substantially related matter [**5] in which that person's interests are materially adverse to the interests of a former client).

REFEREE'S FINDINGS AND RECOMMENDATIONS

After a hearing, the referee recommended that Beach be found guilty of violating *rules 4-5.4* and *4-5.5* and that he be suspended from the practice of law for three months with automatic reinstatement at the end of the suspension period and all costs of the proceedings be charged to the defendant. The referee found for Beach on the other charges. In his recommendation for discipline, the referee considered that Beach had a prior disciplinary suspension for twenty-eight days. Beach challenges the referee's findings and recommendations, contending that they are not supported by the record. Conversely, The Florida Bar challenges the referee's recommendations as to those issues found adversely to it and contends that a suspension requiring proof of rehabilitation is more appropriate given Beach's disciplinary history and the circumstances of the ethical violations at issue here.

OUR REVIEW

In Bar proceedings, a referee's findings of fact are presumed correct and this Court will not reweigh the evidence and substitute its judgment for that of [**6] the referee as long as the findings are not clearly erroneous or lacking in evidentiary support. *Florida Bar v. Seldin, 526 So. 2d 41, 43-44 (Fla. 1988)*; *Florida Bar v. McKenzie, 442 So. 2d 934, 934 (Fla. 1984)*. The party seeking to challenge the referee's findings of fact bears the burden of showing that the referee's findings are clearly erroneous or unsupported by the record. *Florida Bar v. Neu, 597 So. 2d 266, 268 (Fla. 1992)*; *Florida Bar v. McClure, 575 So. 2d 176, 177 (Fla. 1991)*. However, a referee's legal conclusions are subject to broader review by this Court than are findings of fact. *Florida Bar re Inglis, 471 So. 2d 38, 41 (Fla. 1985)*.

In this case, the referee's finding that Beach assisted Mr. King in the unlicensed practice of law is supported by the record. Beach never met with or consulted [*109] Ms. Rose. Rather, he met with Mr. King who passed on Beach's advice to Ms. Rose concerning what legal action she should pursue. While Beach did discuss Ms. Rose's case with Mr. King, he never monitored or participated in the subsequent discussions that Mr. King had with Ms. Rose concerning her legal problems. At the discipline hearing, Beach inadvertently explained [**7] the ethical problem with his conduct here:

> [W]hat I would do is, Mr. King would come in to me and say, Roy, this lady, she wants a change of custody. This is what she told me concerning the facts of it. What do we need to do? And I said okay; you need to prepare this; ask her some more information about this to maybe beef up the petition . . . . And then he would go back to Ms. Rose. And he would say, okay, Ms. Rose, you need this document, this document, this document. So he did not give any independent advice of his own, but he was a conduit of me saying what was needed.

Beach improperly allowed Mr. King to act as his conduit for giving legal advice by obtaining and relaying, without supervision, case-specific information to persons whom Beach never actually met or consulted. *Cf. Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (Fla. 1978)* (holding that non-lawyer proprietor of "secretarial service" overstepped bounds and engaged in unauthorized practice of law by advising clients of various legal remedies available to them, recommending appropriate legal forms to file and assisting in preparation and filing of forms). Consequently, we find the referee's conclusions, [**8] that Beach (1) assisted Mr. King in the

unauthorized practice of law in violation of *rule 4-5.5* and (2) shared a legal fee with a nonlawyer in violation of *rule 4-5.4*, to be supported by the record in this case.

The Bar contends the referee's legal conclusion that Beach triggered no conflict of interest by funneling legal advice to Ms. Rose through King and King, and his subsequent representation of King and King in the civil action against Ms. Rose, was erroneous. The Bar argues that Ms. Rose became Beach's client, whether he was employed by her or not, when she disclosed confidential information to King who passed it on to Beach while seeking legal advice on Ms. Rose's behalf.

In *Bartholomew v. Bartholomew, 611 So. 2d 85 (Fla. 2d DCA 1992)*, the Second District noted the test for determining the existence of an attorney-client relationship:

> "[T]he test for determining the existence of this fiduciary relationship is a subjective one and 'hinges upon the client's belief that he is consulting a lawyer in that capacity and his manifested intention is to seek professional legal advice.'" *Green v. Montgomery County, Ala., 784 F. Supp. 841, 845-6 (M.D. Ala. 1992)* (citation [**9] omitted). However, "this subjective belief must . . . be a reasonable one." *Id.*

611 So. 2d at 86. In this case, Ms. Rose specifically sought out assistance from a paralegal instead of an attorney. She entered into a contract with King and King and not with Beach. Although the contract stated that Beach would review her paperwork and give her a thirty-minute consultation, it also stated that she would not be represented by him. [3] Ms. Rose dealt exclusively with Mr. King and she never even met with Beach. In view of these facts, we find the record supports the referee's conclusion that Beach did not establish an attorney-client relationship with Ms. Rose and consequently, was not guilty of representing clients with conflicting interests in violation of *rules 4-1.7 - 4-1.9*. Despite our conclusion, however, we acknowledge that a close question is presented and caution lawyers that they should be very careful in placing themselves in such difficult positions.

> 3 The referee further notes in his report that "although Ms. Rose testified she considered Beach to be her attorney because of King telling her Beach was reviewing her case, she also knew she had never entered into a separate agreement with Beach for representation as called for in the contract with King and King."

[**10] Finally, we address the Bar's contention that a ninety-one-day suspension requiring proof of rehabilitation is a more appropriate sanction, even if we do not find there was a conflict of interest, because any lesser sanction will not deter Beach from altering his [*110] relationship with King and King in the future. On the other hand, Beach argues that the recommended sanction is too severe and the referee failed to find several mitigating circumstances in this case. Beach maintains that (1) he has a small practice with no associates, (2) several of his clients who are indigent would be unable to afford an attorney to handle their case if he were suspended for ninety days, and (3) he and Mr. King "undertook the program complained of by the Bar for the purposes of enhancing public access to the court system for those who could not afford to hire an attorney."

The sanction resulting from a Bar disciplinary action must serve three purposes: The sanction must be fair to society; the sanction must be fair [**11] to the attorney; and the sanction must be severe enough to deter other attorneys from similar misconduct. *Florida Bar v. Neu, 597 So. 2d 266, 269 (Fla. 1992)*. This Court's review of a referee's recommendations as to disciplinary measures is broader than that afforded to factual findings because the ultimate responsibility to order an appropriate sanction rests with us. *Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994)*.

We find the referee's recommendation of a ninety-day suspension with automatic reinstatement and imposition of costs adequately fulfills the three purposes of disciplinary sanction set out in *Neu*. We believe the Bar's assumption that Beach, despite being sanctioned, will continue to violate the ethical rules through his relationship with King and King as a "supervising attorney" is unfounded. There is no evidence in the record that his violation of the rules was willful or deliberate; nor is there any evidence that he intends to disregard the authority of this Court. On the other hand, the mitigating factors cited by Beach, while appropriate for consideration, do not warrant a lesser sanction than that recommended by the referee. Thus, we approve the [**12] referee's findings of fact, determinations of guilt, and recommended discipline.

CONCLUSION

Accordingly, Beach is hereby suspended from the practice of law for ninety days with automatic reinstatement at the end of the suspension period. The suspension shall be effective thirty days from the filing of this opi-

nion so that Beach can close out his practice and protect the interests of existing clients. If Beach notifies this Court in writing that he is no longer practicing and does not need the thirty days to protect existing clients, this Court will enter an order making the suspension effective immediately. Beach shall accept no new business from the date this opinion is published until the suspension is completed. Judgment for costs in the amount of $ 1,745.63 is entered in favor of The Florida Bar and against Roy Beach, for which sum let execution issue.

It is so ordered.

GRIMES, C.J., and OVERTON, SHAW, KOGAN, HARDING, WELLS and ANSTEAD, JJ., concur.

THE FILING OF A MOTION FOR REHEARING SHALL NOT ALTER THE EFFECTIVE DATE OF THIS SUSPENSION.

DERRICK MO'MEY MANNING, Appellant, v. STATE OF FLORIDA, Appellee

Nos. 51098, 52782

Supreme Court of Florida

378 So. 2d 274; 1979 Fla. LEXIS 4867; 5 Media L. Rep. 2428

November 21, 1979

SUBSEQUENT HISTORY: [**1] Rehearing Denied January 28, 1980.

COUNSEL: Robert G. Murrell of the Law Offices of Sam E. Murrell & Sons, Orlando, for appellant.

Jim Smith, Atty. Gen., and Richard W. Prospect, Asst. Atty. Gen., Tallahassee, for appellee.

JUDGES: ENGLAND, C.J., OVERTON, SUNDBERG and McDONALD, JJ., Concur ENGLAND, C.J., Concurs with an opinion ALDERMAN, J., Dissents with an opinion, with which ADKINS and BOYD, J., Concur

OPINION BY: PER CURIAM

OPINION

[*274] PER CURIAM

Appellant, Manning, was convicted of the premeditated murder of two Columbia County sheriff's deputies and sentenced to death. We have jurisdiction to review this case under *article V, section 3(b)(1), Florida Constitution.* We determine that the trial court abused its discretion in denying appellant's motion for change of venue.

In the early morning of July 6, 1976, two sheriff's deputies were killed while investigating an alleged attempted sexual battery. Shortly after the officers were shot, appellant Derrick Manning, a twenty-three-year-old black male from another county, was stopped, arrested, and charged with the two murders. The deputies found a .22 caliber automatic rifle similar to that used in the killings in Manning's vehicle at [**2] the time of his arrest. Manning made incriminating statements to the police concerning his involvement in the crime. He alleges that these statements were the result of police coercion, beatings, and threats against his life. Upon the advice of the local state attorney, the Governor of Florida requested a transfer of appellant to a county jail outside Columbia County in order to ensure the appellant's safety while awaiting trial. The trial court ordered the transfer. These tragic deaths became the "main topic of conversation" in this small rural community. [*275] Coverage of this crime by local news media was intense.

The sheriff's department and state attorney's office released to the press their versions of the facts and circumstances in the shooting incident. In addition, the prosecutor released to the press the names of the primary witnesses to the crime. The prosecutor told the local newspaper the substance of the initial testimony given to the state attorney's office by these alleged eyewitnesses. Similarly, the sheriff discussed evidence gathered during the investigation, including in his statements conclusions implying a total lack of justification on behalf of [**3] the appellant in the shootings. The versions of the incident related by the sheriff and prosecutor to the local newspaper were in conflict with the version of the events given by the appellant in a statement to law enforcement officials shortly after his arrest.

Appellant was represented in these trial proceedings by an Orlando law firm. The local public defender's office was granted a request to be dismissed from handling the defense apparently because of friendships with the slain police officers. Appellant's attorney filed a motion for change of venue, alleging that a fair and impartial trial could not be conducted in Columbia County; that there had been wide publicity given to the case through the newspapers published or circulated in Columbia County; that by reason of the inordinate publicity by these newspaper accounts concerning the offense, there was pronounced prejudice and hostility towards the accused which would make the securing of an impartial

jury practically and psychologically impossible; that the general state of mind of the inhabitants of Columbia County was affected by knowledge of the incident, which was accompanied by such prejudice, bias, and preconceived [**4] opinions that it would not be possible to obtain a fair and impartial jury; that the defendant would not receive a fair and impartial trial in Columbia County because of undue prejudice and sympathy for the alleged victims; that the alleged victims and their families were residents of Columbia County whereas the defendant was not a resident; that the alleged victims were law enforcement officers employed by the county sheriff's office, and there had been widespread discussion and comment among the citizens of Columbia County to the prejudice of the defendant; and, that by reason of the crime charged, it was necessary for the safety of the defendant that he be transferred to a jail outside Columbia County upon the advice of the state attorney and the Governor of Florida. The defense attached various newspaper articles to the motion, as well as affidavits of fifteen persons, including the defendant, stating that because of bad feelings and prejudice against the defendant and because of the adverse publicity concerning the case, the affiants were convinced by reason of personal observations and knowledge of the conduct and statements by various persons in Columbia County that the defendant [**5] could not receive a fair and impartial trial in that county. In addition, the defendant alleged that local police officers made various threats against his life, physically and verbally abused him, and harassed his mother when she came to visit him in jail. The state attorney filed a traverse in opposition to the defendant's motion for change of venue, alleging that the transaction out of which the charges arose had not been given undue publicity in the area to such extent that a change of venue was required, and that the only way to determine whether an impartial jury could be successfully chosen was to attempt to impanel one. The prosecutor attached affidavits of residents of that area alleging that the defendant could receive a fair trial in the community. The trial court denied the motion for change of venue conditioned upon the ability to select a fair and impartial jury. The voir dire inquiry established that every member of the jury panel had prior knowledge of the alleged crimes through news media accounts and community discussion. The jury ultimately selected found the appellant guilty and recommended the imposition of the death penalty.

Recently, in *Hoy v. State, 353 So.2d 826 (Fla. 1977)*, [**6] this Court rejected an assertion [*276] that the trial court erred in denying a motion for change of venue because of extensive pretrial publicity. During the voir dire in that case, the prospective jurors were questioned extensively as to their prior knowledge of the case. That record disclosed that a great many of the prospective jurors had heard nothing about the case. The allegedly inflammatory articles were contained in the local Clearwater paper, whereas most of the prospective jurors who had prior knowledge of the case had read brief accounts of it in the St. Petersburg paper. This Court determined from the record that there was a lack of evidence showing a significant inflammatory atmosphere in the community. The jurors who were chosen were completely impartial and were not prejudiced by pretrial publicity. None of the jurors had read any of the alleged inflammatory articles.

Similarly, claims of prejudice for failing to change venue were rejected in *McCaskill v. State, 344 So.2d 1276 (Fla. 1977)*; *Dobbert v. State, 328 So.2d 433 (Fla. 1976)*; *Aff'd Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290, 53 L. Ed. 2d 344 (1977)*; *Murphy v. Florida, 421* [**7] *U.S. 794, 95 S. Ct. 2031, 44 L. Ed. 2d 589 (1975)*; *Thomas v. State, 374 So.2d 508 (Fla. 1979)*.

In *McCaskill v. State*, this Court adopted the test set forth in *Murphy v. Florida and in Kelley v. State, 212 So.2d 27 (Fla. 2d DCA 1968)*, for determining whether or not to grant a change of venue. According to that test, a determination must be made as to whether the general state of mind of the inhabitants of a community is so infected by knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely on the evidence presented in the courtroom.

An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of coming forward and showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the [**8] natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, *See Rideau v. Louisiana, 373 U.S. 723, 83 S. Ct. 1417, 10 L. Ed. 2d 663 (1963)*, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause. *Murphy v. Florida*.

The motion for change of venue in this case was amply supported by evidence which established that the community was so pervasively exposed to the circumstances of this incident that the defendant could not secure a fair and impartial trial in Columbia County. Every member of this prospective jury had knowledge of ex-parte statements of the evidence against the accused. The record further reflects that hostility existed in the

community against the accused to the extent that it would be difficult for any individual to take an independent stand adverse to this strong community sentiment. The fact that the victims were well-liked caucasian deputies of the local sheriff's department and the accused was a young black male from outside the community clearly magnified the problems involved in securing a fair trial in Columbia [**9] County. The facts in this case are clearly distinguishable from the factual circumstances existing in *McCaskill v. State*, *Hoy v. State*, *Thomas v. State*, *Kelley v. State*, *Murphy v. Florida*, and *Dobbert v. Florida*. These were different facts under different circumstances, not the least of which was the fact that this incident occurred in a rural community where it is apparent that the incident had received substantially more attention than if the same incident had occurred in a metropolitan area. Each case must be judged on its own merits as to whether, under the circumstances, the inhabitants of the community are so infected by knowledge of the incident and accompanying [*277] prejudice that jurors from the community could not possibly try the case solely on the evidence presented in the courtroom. We have determined from the record in the instant case that the general atmosphere in this rural community was sufficiently inflammatory to require the trial court to grant a change of venue, and his failure to do so constituted an abuse of discretion.

Our state and federal constitutions guarantee to criminal defendants a right to a fair trial by an impartial jury. As this Court [**10] noted in *Singer v. State, 109 So.2d 7, 14* (Fla .1959):

> Every reasonable precaution should be taken to preserve to a defendant trial by such a jury and to this end if there is reasonable basis shown for a change of venue a motion therefor properly made should be granted.
>
> A change of venue may sometimes inconvenience the State, yet we can see no way in which it can cause any real damage to it. On the other hand, granting a change of venue in a questionable case is certain to eliminate a possible error and to eliminate a costly retrial if it be determined that the venue should have been changed. More important is the fact that real impairment of the right of a defendant to trial by a fair and impartial jury can result from the failure to grant change of venue.

This Court further discussed in *Singer* the difficult and frequently encountered conflict between the rights of a defendant to a fair trial by an impartial jury and the constitutional freedom of the press to disseminate news to the public. There, this Court said

> :Irrespective of whether the press determines to limit the scope of its pre-trial publication of such events there are other avenues through which the problem [**11] must be attacked.
>
> Prosecuting officials, being lawyers, are strictly prohibited . . . from making for publication statements which pertain to pending or anticipated litigation for the reason that such statements may interfere with a fair trial. All prosecutors must observe this canon and the courts must enforce its observation.
>
> Law enforcement officials likewise must be required to abstain from making pre-trial statements regarding the details of crimes under investigation by them, which statements tend to establish the guilt or innocence of one accused of the crime. There is nothing to prevent announcement of the commission of a crime or of an arrest of one suspected of committing it, but they should not publish matters relating to evidence which they have acquired, statements attributed to witnesses, or statements or confessions attributed to an accused. Publication of such statements, evidence or confession forms the basis for trial by newspaper. Further, such statements, evidence or confession either may not be submitted at the trial, or if offered may not be admitted, yet if those who sit on the jury have read the press version of them it is most difficult, if not impossible, [**12] for the human mind not to fill in from its extrajudicial knowledge that which is not offered at the trial or to determine the veracity of a witness by comparing the newspaper version of the facts with the testimony given at the trial. It is a tribute to the press that most believe as true what is written or spoken by the press media, yet it must be admitted that press reports are not always accurate and are seldom complete. Further, the accused has no means to answer them, nor is there any appeal from conviction on trial by newspaper. *Id. at 16, 17.*

Recently, in *Nebraska Press Association v. Stewart, 427 U.S. 539, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976)*, the United States Supreme Court discussed at length this historical conflict between freedom of the press and the right of a defendant to an impartial jury. The court noted that prior restraints as to what the news media may publish about a pending criminal trial are held in disfavor. Such restraints on the press were disapproved, not be-

cause such first amendment rights are held to preempt sixth amendment rights of criminal defendants [*278] but rather because states have at their disposal alternative methods [**13] of protecting accused persons from the prejudicial effect of such pretrial publicity without imposing such great burdens on the news media's constitutional rights. Citing its prior decision in *Sheppard v. Maxwell, 384 U.S. 333, 86 S. Ct. 1507, 16 L. Ed. 2d 600 (1968)*, the court stated that a trial court has a duty to protect a defendant's constitutional right to a fair trial by using various alternatives to prior restraint of publication, including change of venue to a place less affected by such pretrial publicity. The court recognized that all pretrial publicity does not inevitably lead to an unfair trial. Rather, the capacity of the jury eventually impaneled to decide the case fairly is influenced by the tone and extent of the publicity which is in part, and often in large part, shaped by what attorneys, police, and other officials do to precipitate news coverage. However, citing *Irvin v. Dowd, 366 U.S. 717, 728, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961)*, the court emphasized that when a defendant's life is at stake, it is not requiring too much that the accused be tried in an atmosphere undisturbed by so huge a wave of public passion.

Although the evidence against the defendant [**14] in the present case is quite strong, it is possible that another jury uninfluenced by the passion existing in Columbia County at the time of this trial might have reached a different verdict. Because this record reflects a strong community sentiment, intensified by pervasive pretrial publicity which may have improperly influenced this jury's verdict and the recommendation of death, we determine it necessary to remand this case for a new trial in a location other than Columbia County.

Our disposition of the case on the change of venue issue makes discussion unnecessary at this time of other serious issues involving the lawfulness of the arrest and searches.

It is so ordered.

ENGLAND, C. J., and OVERTON, SUNDBERG and McDONALD, JJ., concur.

ENGLAND, C. J., concurs with an opinion.

ALDERMAN, J., dissents with an opinion, with which ADKINS and BOYD, JJ., concur.

CONCUR BY: ENGLAND

CONCUR

ENGLAND, Chief Justice, concurring.

The majority has not commented on the introduction of several allegedly gruesome photographs which Manning claims were introduced solely to influence the jury, inasmuch as any discussion of that subject is unnecessary to the opinion. I would hope that [**15] on retrial, however, the prosecution will consider the views on cumulative photographic evidence with only marginal relevance which I expressed in *Funchess v. State, 341 So.2d 762, 763 (Fla. 1976)*.

DISSENT BY: ALDERMAN

DISSENT

ALDERMAN, Justice, dissenting.

I agree with the general principles of law expressed in the majority opinion. In order to be entitled to a change of venue, the defendant must carry the burden of coming forward and showing that the trial of this case in Columbia County would be inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. I also agree that a trial judge is bound to grant a change of venue only when the evidence presented reflects that the community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. I likewise agree that the trial judge may make his determination based upon the evidence presented prior to the commencement of the jury selection process, or he may withhold that determination pending an attempt to obtain impartial jurors to try the cause.

In support of his motion for change of venue, the defendant presented [**16] evidence from which the trial judge might have concluded that it would not be possible to obtain a fair and impartial jury in Columbia County. At that point, the trial judge, in the exercise of his discretion, might have granted the defendant's motion for change of venue. Instead, as was his right, he [*279] elected not to make that decision until after an attempt was made to obtain an impartial jury. At that point in time, no one knew for sure whether it was possible to obtain an impartial jury. The conclusory allegations in defendant's motion for change of venue were, of necessity, based upon speculation. Although there probably were some people in Columbia County who, because of their knowledge and preconceived opinions of this incident, could not have served as fair and impartial jurors, it was likewise probable that there were a sufficient number who were qualified to serve. The fact that a prospective juror has read or heard something about the crime charged does not necessarily mean that he is prejudiced, biased, or has a preconceived opinion. A person need not be unaware of what is going on in his community in order to serve on a jury. If such were the case, a [**17] jury would have to be composed of the most illiterate, ignorant, and unconcerned members of the community. We would have to eliminate all pros-

pective jurors who read newspapers, who listen or watch news reports on radio and television, or who otherwise are aware of and are concerned with what is going on in the world around them.

Fortunately, the privilege and the duty of jury service are not reserved exclusively for the illiterate, the ignorant, and the uncaring; otherwise, the jury system could not long survive. The fact that a prospective juror has read or heard something about the defendant or the facts of the alleged crime does not disqualify that person from jury service. To be qualified, it is only necessary that the prospective juror be impartial and be able to base his verdict solely upon the evidence properly before the jury.

In some cases, it is not advisable for the trial judge to rule on a motion for change of venue until after the jury selection process actually begins. This is the "acid test" to determine if it is possible to obtain a fair and impartial jury. During the jury selection process, the trial judge is in the best position to make the final decision [**18] as to whether a fair and impartial jury can be obtained. He has the opportunity to observe firsthand the prospective jurors during the voir dire examination, to weigh the credibility of their answers, and to judge the state of their minds as well as the general atmosphere in the courtroom and the community.

Judging of this type is an art, not a science. It is not possible to reduce all of the elements considered by a trial judge in such a situation to a computer card and obtain a mechanistic answer. In deciding a motion for change of venue, more is involved than the sterile application of legal principles. The trial judge must also function as the finder of facts.

Turning now to the present case, the majority has determined that the general atmosphere in this rural community was sufficiently inflammatory to require a change of venue and that the trial judge's failure to do so was an abuse of discretion. In doing so, the majority has substituted its judgment for that of the trial judge. I prefer to accept the evaluation of the trial judge who was actually in the courtroom when the jury was selected. A review of the transcript of the voir dire examination reveals that there [**19] was no real difficulty in finding twelve jurors acceptable to the defendant. The voir dire was no different than those which trial judges are accustomed to hearing on a day-to-day basis in the courtrooms across the state. The defendant did not exhaust his preemptory challenges and accepted the jury without renewing his motion for change of venue. In fact, defense counsel, Robert Murrell, prior to accepting the jury, stated, "[I]t would appear to us that we have a fair and impartial jury here."

The fact that the defendant was convicted does not mean that his jury was not fair and impartial. The majority concedes that the evidence against the defendant is quite strong. Even the defendant does not argue that he did not kill the law enforcement officers. It is pure speculation that another jury in another county might possibly have reached a different verdict, and even if another jury might have reached a different verdict, that would not entitle the defendant [*280] to a new trial. The same could be said for any defendant who has been found guilty by a jury. It is always possible that another jury at another time and at another place might reach a different verdict.

I would [**20] hold that the trial judge did not abuse his discretion when he failed to grant defendant's request for change of venue.

ADKINS and BOYD, JJ., concur.

LEXSEE 380 U.S. 24

SINGER v. UNITED STATES

No. 42

SUPREME COURT OF THE UNITED STATES

380 U.S. 24; 85 S. Ct. 783; 13 L. Ed. 2d 630; 1965 U.S. LEXIS 1730

November 18, 1964, Argued
March 1, 1965, Decided

PRIOR HISTORY: CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

DISPOSITION: *326 F.2d 132*, affirmed.

SUMMARY:

On the opening day of defendant's trial, in the United States District Court for the Southern District of California, on charges of violations of the mail fraud statute, defendant offered in writing to waive a trial by jury for the purpose of shortening the trial. The trial court was willing to approve the waiver, but the government refused to give its consent under *Federal Criminal Procedure Rule 23(a)*, which conditions a defendant's waiver of a jury trial upon both the court's approval and the government's consent. Defendant was subsequently convicted by a jury and the Court of Appeals for the Ninth Circuit affirmed. (*326 F2d 132.*)

On certiorari, the United States Supreme Court affirmed. In an opinion by Warren, Ch. J., expressing the unanimous view of the Court, it was held that the Federal Constitution neither confers nor recognizes the right of criminal defendants to have their cases tried before a judge alone, and that consequently *Rule 23(a)* is valid.

LAWYERS' EDITION HEADNOTES:

[***LEdHN1]

JURY §19

waiver of jury trial -- conditions --

Headnote:[1A][1B]

Federal Procedure *Rule 23(a)*, conditioning a defendant's waiver of a jury trial upon the court's approval and the government's consent, violates no provision of the Federal Constitution and sets forth a reasonable procedure governing attempted waivers of jury trials; the Federal Constitution neither confers nor recognizes a right of criminal defendants to have their cases tried before a judge alone.

[***LEdHN2]

CONSTITUTIONAL LAW §8

ability to waive constitutional right -- implications --

Headnote:[2]

The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite of that right.

[***LEdHN3]

CRIMINAL LAW §47.5

public trial --

Headnote:[3]

Although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial.

[***LEdHN4]

COURTS §479

venue -- waiver --

Headnote:[4]

Although an accused in a federal court can waive his right to be tried in the state and district where the crime was committed, he cannot in all cases compel transfer of the case to another district.

[***LEdHN5]

CRIMINAL LAW §50

confrontation with witnesses -- trial by stipulation --

Headnote:[5]

Although an accused in a federal court can waive his right to be confronted by the witnesses against him, he cannot thereby compel the government to try the case by stipulation.

[***LEdHN6]

CONSTITUTIONAL LAW §1

waiver of constitutional rights -- procedural regulations --

Headnote:[6]

The waiver of constitutional rights can be subjected to reasonable procedural regulations.

[***LEdHN7]

JURY §1.5

trial by jury -- criminal case --

Headnote:[7A][7B]

Trial by jury has been established by the Federal Constitution as the normal and preferable mode of disposing of issues of fact in a criminal case; a defendant's only constitutional right concerning the method of trial is to an impartial trial by jury.

[***LEdHN8]

JURY §1.5

rights of government --

Headnote:[8]

The Federal Constitution recognizing an adversary system as the proper method of determining guilt, the government, as a litigant, has a legitimate interest in seeing that cases in which it believes that a conviction is warranted are tried before the tribunal--jury or judge--which the Constitution regards as most likely to produce a fair result.

[***LEdHN9]

COURTS §538.1

Federal Criminal Procedure Rules -- adoption by Congress --

Headnote:[9]

In view of *18 USC 3771*, empowering the United States Supreme Court to prescribe rules of practice and procedure with respect to criminal proceedings, Congress can be deemed to have adopted the Federal Rules of Criminal Procedure, including *Rule 23(a)*, conditioning a defendant's waiver of a jury trial upon the court's approval and the government's consent.

[***LEdHN10]

DISTRICT AND PROSECUTING ATTORNEYS §1

status of government attorney --

Headnote:[10]

The government attorney in a criminal prosecution is not an ordinary party to a controversy, but a servant of the law with a twofold aim that guilt shall not escape or innocence suffer.

[***LEdHN11]

JURY §19

waiver of jury trial -- consent of government --

Headnote:[11]

Federal Criminal Procedure Rule 23(a), conditioning a defendant's waiver of a jury trial upon the government's consent, does not require that the government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver.

[***LEdHN12]

APPEAL §1289

inferences -- government's motives in demanding jury trial --

Headnote:[12]

The United States Supreme Court will not assume that federal prosecutors would for an ignoble purpose refuse to consent to an accused's waiver of a jury trial.

[***LEdHN13]

JURY §19

waiver of jury trial -- government's consent --

Headnote:[13]

While under some circumstances a defendant's reasons for wanting to be tried by a judge alone may be so compelling that the government's insistence on trial by jury would result in the denial to a defendant of an impartial trial, no such a case is presented where the ac-

cused gave no reason for wanting to forego jury trial other than to save time.

[***LEdHN14]

APPEAL §1161

instructions -- necessity of objection --

Headnote:[14]

In the absence of plain error, a federal appellate court does not review the adequacy of instructions to the jury, where no timely objection was made as required by *Federal Criminal Procedure Rule 30.*

[***LEdHN15]

APPEAL §1446.5

TRIAL §30

misconduct of prosecuting attorney -- cured by instruction --

Headnote:[15]

An accused's specifications of misconduct by the prosecuting attorney during the trial are without merit where the record reveals that the misconduct, if any, was neither purposeful nor flagrant, and that the trial court's admonitions to the jury were well designed to cure whatever prejudicial impact some of the prosecutor's remarks may have had.

SYLLABUS

Petitioner, a defendant in a federal criminal mail fraud case, claims that he had an absolute right to be tried by a judge alone if he considered such a trial to be to his advantage. *Held: Federal Rule of Criminal Procedure 23 (a)* sets forth a reasonable procedure governing proffered waivers of jury trials. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. Although he may waive his right to trial by jury, *Patton v. United States, 281 U.S. 276*, there is no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is that the defendant is subject to an impartial trial by jury -- the very thing that the Constitution guarantees him. Pp. 24-38.

COUNSEL: Sidney Dorfman argued the cause and filed a brief for petitioner.

Beatrice Rosenberg argued the cause for the United States. With her on the brief were Solicitor General Cox, Assistant Attorney General Miller and Sidney M. Glazer.

Briefs of amici curiae were filed by Victor Rabinowitz and Leonard Boudin for Joni Rabinowitz, and by Justin A. Stanley for Nicholas Jacop Uselding.

JUDGES: Warren, Black, Douglas, Clark, Harlan, Brennan, Stewart, White, Goldberg

OPINION BY: WARREN

OPINION

[*24] [***632] [**784] MR. CHIEF JUSTICE WARREN delivered the opinion of the Court.

Rule 23 (a) of the Federal Rules of Criminal Procedure provides:

"Cases required to be tried by jury shall be so tried unless the defendant waives a jury trial in writing with the approval of the court and the consent of the government."

[*25] Petitioner challenges the permissibility of this rule, arguing that the Constitution gives a defendant in a federal criminal [**785] case the right to waive a jury trial whenever he believes such action to be in his best interest, regardless of whether the prosecution and the court are willing to acquiesce in the waiver.

Petitioner was charged in a federal district court with 30 infractions of the mail fraud statute, *18 U. S. C. § 1341 (1958 ed.)*. The gist of the indictment was that he used the mails to dupe amateur songwriters into sending him money for the marketing of their songs. On the opening day of trial petitioner offered in writing to waive a trial by jury "for the purpose of shortening the trial." [1] The trial court was willing to approve the waiver, but the Government refused to give its consent. Petitioner was subsequently convicted by a jury on 29 of the 30 counts and the Court of Appeals for the Ninth Circuit affirmed. We granted certiorari, *377 U.S. 903*.

1 R. 17.

Petitioner's argument is that a defendant in a federal criminal case has not only an unconditional constitutional right, guaranteed by Art. III, § 2, and the *Sixth Amendment*, [2] to a trial by jury, but also a correlative [***633] right to [*26] have his case decided by a judge alone if he considers such a trial to be to his advantage. He claims that at common law the right to refuse a jury trial preceded the right to demand one, and that both before and at the time our Constitution was adopted criminal defendants in this country had the right to waive a jury trial. Although the Constitution does not in terms give defendants an option between different modes of trial, petitioner argues that the provisions re-

lating to jury trial are for the protection of the accused. Petitioner further urges that since a defendant can waive other constitutional rights without the consent of the Government, he must necessarily have a similar right to waive a jury trial and that the Constitution's guarantee of a fair trial gives defendants the right to safeguard themselves against possible jury prejudice by insisting on a trial before a judge alone. Turning his attention to *Rule 23 (a)*, petitioner claims that the *Fifth*, *Sixth*, *Ninth*, and *Tenth Amendments* are violated by placing conditions on the ability to waive trial by jury.

2 Art. III, § 2, of the United States Constitution provides:

"The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed."

The *Sixth Amendment* provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[***LEdHR1A] [1A]

We have examined petitioner's arguments and find them to be without merit. We can find no evidence that the common law recognized that defendants had the right to choose between court and jury trial. Although instances of waiver of jury trial can be found in certain of the colonies prior to the adoption of the Constitution, they were isolated instances occurring pursuant to colonial "constitutions" or statutes and were clear departures from the common law. There is no indication that the colonists considered the ability to waive a jury trial to be of equal importance to the right to demand one. Having found that the Constitution neither confers nor recognizes a right of criminal defendants to have their cases tried before a judge alone, we also conclude that *Rule 23 (a)* [**786] sets forth a reasonable procedure governing attempted waivers of jury trials.

[*27] I.

English Common Law. The origin of trial by jury in England is not altogether clear. At its inception it was an alternative to one of the older methods of proof -- trial by compurgation, ordeal or battle. I Holdsworth, A History of English Law 326 (7th ed. 1956). Soon after the thirteenth century trial by jury had become the principal institution for criminal cases, Jenks, A Short History of English Law 52 (5th ed. 1938); yet, even after the older procedures of compurgation, ordeal and battle had passed into disuse, the defendant technically retained the right to be tried by one of them. Before a defendant could be subjected to jury trial his "consent" was required, but the Englishmen of the period had a concept of "consent" somewhat different from our own. The Statute of Westminster I, 1275, 3 Eds. 1, c. 12, which described defendants who refused to submit to jury trial as "refus[ing] to stand to the Common Law of the Land," marks the beginning of the horrendous practice known as *peine forte et dure* by which recalcitrant defendants were tortured until death or until they "consented" to a jury trial.

It is significant that defendants who refused to submit to a jury were not entitled to an alternative method of trial, [3] and it was only in [***634] 1772 that *peine forte et dure* was officially abolished in England. By a statute enacted in that year, 12 Geo. 3, c. 20, a defendant who stood mute when charged with a felony was deemed to have pleaded guilty. Not until 1827, long after the adoption of our Constitution, did England provide by statute, 7 & 8 Geo. 4, c. 28, [*28] for the trial of those who stood mute. Even this statute did not give the defendant the right to plead his case before a judge alone, but merely provided that he would be subject to jury trial without his formal consent.

3 It appears that many hardy defendants were willing to be tortured to death rather than submit to a jury trial, not because of any inherent distrust of the jury system but because of their desire to avoid a conviction and thereby prevent forfeiture of their lands and the resultant hardships for their descendants. Cf. I Holdsworth, *supra*, at 326.

Thus, as late as 1827 the English common law gave criminal defendants no option as to the mode of trial. The closest the common law came to such a procedure was that of the "implied confession," described briefly in 2 Hawkins, Pleas of the Crown, c. 31 (6th ed. 1787), by which defendants accused of minor offenses did not explicitly admit their guilt but threw themselves on the King's mercy and expressed their willingness to submit to a small fine. Despite the "implied confession," the court heard evidence and could discharge the defendant if it found the evidence wanting. Griswold, The Historical Development of Waiver of Jury Trial in Criminal

Cases, 20 Va. L. Rev. 655, 660 (1934). It cannot seriously be argued that this obscure and insignificant procedure, having no applicability to serious offenses, establishes the proposition that at common law defendants had the right to choose the method of trial in all criminal cases. On the contrary, "by its intrinsic fairness as contrasted with older modes, and by the favor of the crown and the judges, [trial by jury] grew fast to be regarded as the one regular common-law mode of trial, always to be had when no other was fixed." Thayer, A Preliminary Treatise on Evidence at the Common Law 60 (1898).

The Colonial Experience. The colonies which most freely permitted waiver of jury trial as a matter of course were Massachusetts and Maryland. The "first constitution" of Massachusetts -- The [**787] Body of Liberties of 1641 -- contained as Liberty XXIX the following:

"In all actions at law, it shall be the liberty of the plaintiff and defendant, by mutual consent, to choose [*29] whether they will be tried by the Bench or by a Jury, unless it be where the law upon just reason has otherwise determined. The like liberty shall be granted to all persons in Criminal cases."

It should be noted that Liberty XXIX's language explicitly provided that the right to choose trial by judge alone was subject to change "where the law upon just reason has otherwise determined." Moreover, those drafting and administering the Liberty recognized that it was a departure from the English common law. Grinnell, To What Extent is the Right to Jury Trial Optional in Criminal Cases in Massachusetts? 8 Mass. L. Q. No. 5, 7, 23-25 (1923). Several cases can be cited, at least up until 1692, in which defendants in Massachusetts waived jury trial and were tried by the bench. See Grinnell, *supra*, at 27-29; Griswold, *supra*, at 661-664. However, from 1692 on, in light of increasing hostility to the Crown, the colonists of Massachusetts stressed their right to trial by jury, not their right to [***635] choose between alternate methods of trial. Instead of being a settled part of the jurisprudence of Massachusetts at the time of the Constitutional Convention, the ability to choose between judge and jury had become a forgotten option in Massachusetts:

"With the state of mind then existing among the colonists, presumably nobody bothered about this question of any one's wanting to waive a jury. The General Court was then concerned with the question of a man's right to a jury *when he asked for it*, which they thought in danger. The 'Body of Liberties' never having been printed and the nineteen original official manuscript copies having doubtless been lost or forgotten, the 'bar' (which did not begin to develop until the beginning of the 18th century) and [*30] the 18th century people, probably grew up without any general knowledge of the expressly optional character of the right to a jury established as a 'fundamental' by the common law of Massachusetts in the colonial period." [4]

4 Grinnell, *supra*, at 33.

It appears that from the early days of Maryland's colonization minor cases were tried by judges sitting alone. Bond, The Maryland Practice of Trying Criminal Cases by Judges Alone, Without Juries, 11 A. B. A. J. 699, 700 (1925). But the defendant who submitted his case to the judge was not considered on a par with the defendant who chose to have a jury hear his case, as is evidenced by a Maryland statute of 1793 which provided that submission to a judge would be considered an admission of crime (analogous to the "implied confession" of minor offenses under English common law) at least insofar as to render the person submitting his case to a judge liable for the costs of prosecution. In 1809, Maryland declared by statute that waiver of jury trial was to be encouraged and the willing defendant was to suffer no increased liability for so doing. It was not until 1823, however, that major cases began also to be submitted to judges alone, and the first major case so submitted caused some surprise and sharp comment in Maryland legal circles. See Bond, *supra*, at 701.

Other possible examples of optional jury trial procedures can be cited in colonial New Hampshire, Vermont, Connecticut, New Jersey and Pennsylvania. [5] [**788] See Griswold, [*31] *supra*, at 664-667. The most that can be said for these examples is that they are evidence that the colonists believed it was possible to try criminal defendants without a jury. They in no way show that there was any general recognition of a defendant's right to be tried by the court instead of by a jury. Indeed, if there had been recognition of such a right, it would be difficult to understand why Article III and the *Sixth Amendment* were not drafted in terms which recognized an option.

5 The Pennsylvania case of *Proprietor* v. *Wilkins*, Pennypacker's Pennsylvania Colonial Cases 88 (1892), decided in 1685-1686, is of interest in that the court tried a fornication case without a jury over the objection of the prosecution. The punishment involved in the case was a 10-pound fine. The case is, therefore, little authority for the proposition that defendants had the right to waive jury trials in all cases.

The Constitution and Its Judicial Interpretation. The proceedings at the Constitutional Convention give little insight into what was meant by the direction in Art. III, § 2, that the "Trial of all Crimes . . . shall be by jury." The clause was clearly [***636] intended to protect the accused from oppression by the Government, see III

Farrand, Records of the Federal Convention 101 (James Wilson), 221-222 (Luther Martin) (1911); but, since the practice of permitting defendants a choice as to the mode of trial was not widespread, it is not surprising that some of the framers apparently believed that the Constitution designated trial by jury as the exclusive method of determining guilt, see The Federalist, No. 83 (Alexander Hamilton) (Cooke ed. 1961); IV Elliot's Debates 145, 171 (James Iredell) (2d ed. 1876); III Elliot's Debates 521 (Edmund Pendleton) (2d ed. 1876).

In no known federal criminal case in the period immediately following the adoption of the Constitution did a defendant claim that he had the right to insist upon a trial without a jury. Indeed, in *United States v. Gibert, 25 Fed. Cas. 1287* (No. 15204) (C. C. D. Mass. 1834), Mr. Justice Story, while sitting on circuit, indicated his view that the Constitution made trial by jury the only permissible method of trial. Similar views were expressed by other federal judges. See *Ex parte McClusky, 40 F. 71, 74-75 (C. C. D. Ark. 1889)* (by implication); *United* [*32] *States v. Taylor, 11 F. 470, 471 (C. C. D. Kan. 1882)* (dictum). [6]

6 In construing their own constitutions, which generally had clauses designed to preserve the common-law right to trial by jury, the state courts took a similarly limited view of the ability of a defendant to waive jury trial. Some state courts ruled that in the absence of a statute there could be no waiver of jury trial. See, *e. g., Wilson* v. *State*, 16 Ark. 601 (1855); *State v. Maine, 27 Conn. 281 (1858)*; *People v. Smith, 9 Mich. 193 (1861)*. Several other courts determined that the State could by statute prohibit waiver of jury trials. See, *e. g., Arnold v. Nebraska, 38 Neb. 752, 57 N. W. 378 (1894)*; *In re McQuown, 19 Okla. 347, 91 P. 689 (1907)*; *State v. Battey, 32 R. I. 475, 80 A. 10 (1911)*; *State v. Hirsch, 91 Vt. 330, 100 A. 877 (1917)*; *Mays v. Commonwealth, 82 Va. 550 (1886)*. Some state courts interpreted their constitutions to say that under no circumstances could waiver be allowed. See, *e. g., State v. Holt, 90 N. C. 749 (1884)*; *Williams v. State, 12 Ohio St. 622 (1861)*. Several courts, of course, held that waiver of a jury was permissible, even in the absence of enabling legislation. See, *e. g., State ex rel. Warner v. Baer, 103 Ohio St. 585, 134 N. E. 786 (1921)* (overruling *Williams v. State, supra*); *Ex parte King, 42 Okla. Cr. 46, 274 P. 682 (Okla. Crim. App. 1929)*. In *Hallinger v. Davis, 146 U.S. 314*, this Court held that a state statute permitting waiver of jury trial in criminal cases did not violate the *Due Process Clause of the Fourteenth Amendment*.

Although not necessary to the holding in the case, in *Thompson v. Utah, 170 U.S. 343*, this Court also expressed a view that the Constitution made jury trial the exclusive method of determining guilt in all federal criminal cases. However, in *Schick v. United States, 195 U.S. 65*, the [**789] Court decided there was no constitutional requirement that petty offenses be tried by jury. These two decisions were construed by the lower federal courts as establishing a rule that in all but petty offenses jury trial was a constitutional imperative. See *Coates v. United States, 290 F. 134 (C. A. 4th Cir. 1923)*; *Blair v. United States, 241 F. 217, 230 (C. A. 9th Cir. 1917)*; *Frank v. United States, 192 F. 864, 867-868 (C. A. 6th Cir. 1911)* [*33] (dictum); *Low v. United States, 169 F. 86 (C. A. 6th Cir. 1909)*; *Dickinson v. United States, 159 F. 801 (C. A. 1st Cir. 1908)*, cert. denied, *213 U.S. 92*.

The issue whether a defendant could waive a jury trial in federal criminal cases was finally presented to this Court in *Patton v. United States,* [***637] *281 U.S. 276*. The *Patton* case came before the Court on a certified question from the Eighth Circuit. The wording of the question, *id., at 287*, is significant:

"After the commencement of a trial in a Federal Court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the Government through its official representative in charge of the case consent to the trial proceeding to a finality with eleven jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of twelve men?"

The question explicitly stated that the Government had agreed with the defendant that his trial should proceed with 11 jurors. The case did not involve trial before a judge alone, but the Court believed that trial before 11 jurors was as foreign to the common law as was trial before a judge alone, and therefore both forms of waiver "in substance amount[ed] to the same thing." *Id., at 290*. The Court examined Art. III, § 2, and the *Sixth Amendment* and concluded that a jury trial was a right which the accused might "forego at his election." *Id., at 298*. The Court also spoke of jury trial as a "privilege," not an "imperative requirement," *ibid.*, and remarked that jury trial was principally for the benefit of the accused, *id., at 312*. Nevertheless, the Court was conscious of the precise question that was presented by the Eighth Circuit, and concluded its opinion, *id., at 312-313,* [*34] with carefully chosen language that dispelled any notion that the defendant had an absolute right to demand trial before a judge sitting alone:

"Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

In *Adams v. United States ex rel. McCann, 317 U.S. 269, 277-278*, this Court reaffirmed the position taken in *Patton* that "one charged with a serious federal crime may dispense with his Constitutional right to jury trial, where this action is taken with his express, intelligent consent, where the Government also consents, and where such action is approved [**790] by the responsible judgment of the trial court."

II.

Thus, there is no federally recognized right to a criminal trial before a judge sitting alone, but a defendant can, as was held in *Patton*, in [***638] some instances waive his right to a trial by jury. The question remains whether the effectiveness of this waiver can be conditioned upon the consent of the prosecuting attorney and the trial judge.

[***LEdHR2] [2] [***LEdHR3] [3] [***LEdHR4] [4] [***LEdHR5] [5] [***LEdHR6] [6]The ability to waive a constitutional right does not ordinarily carry with it the right to insist upon the opposite [*35] of that right. For example, although a defendant can, under some circumstances, waive his constitutional right to a public trial, he has no absolute right to compel a private trial, see *United States v. Kobli, 172 F.2d 919, 924 (C. A. 3d Cir. 1949)* (by implication); although he can waive his right to be tried in the State and district where the crime was committed, he cannot in all cases compel transfer of the case to another district, see *Platt v. Minnesota Mining & Mfg. Co., 376 U.S. 240, 245*; *Kersten v. United States, 161 F.2d 337, 339 (C. A. 10th Cir. 1947)*, cert. denied, *331 U.S. 851*; and although he can waive his right to be confronted by the witnesses against him, it has never been seriously suggested that he can thereby compel the Government to try the case by stipulation. Moreover, it has long been accepted that the waiver of constitutional rights can be subjected to reasonable procedural regulations: *Rule 7 (b) of the Federal Rules of Criminal Procedure* sets forth the procedure to be followed for waiver of the right to be prosecuted by indictment; Rule 20 describes the procedure for waiver of the right to be tried in the district in which an indictment or information is pending against a defendant; and Rule 44 deals with the waiver of the right to counsel.

[***LEdHR7A] [7A]

Trial by jury has been established by the Constitution as the "normal and . . . preferable mode of disposing of issues of fact in criminal cases." *Patton v. United States, 281 U.S. 276, 312*. As with any mode that might be devised to determine guilt, trial by jury has its weaknesses and the potential for misuse. However, the mode itself has been surrounded with safeguards to make it as fair as possible -- for example, venue can be changed when there is a well-grounded fear of jury prejudice, *Rule 21 (a) of the Federal Rules of Criminal Procedure*, and prospective jurors are subject to *voir dire* examination, to challenge for cause, and to peremptory challenge, Rule 24 (a) and (b).

[*36] [***LEdHR1B] [1B] [***LEdHR7B] [7B] [***LEdHR8] [8]In light of the Constitution's emphasis on jury trial, we find it difficult to understand how the petitioner can submit the bald proposition that to compel a defendant in a criminal case to undergo a jury trial against his will is contrary to his right to a fair trial or to due process. A defendant's only constitutional right concerning the method of trial is to an impartial trial by jury. We find no constitutional impediment to conditioning a waiver of this right on the consent of the prosecuting attorney and the trial judge when, if either refuses to consent, the result is simply that the defendant is subject to an impartial trial by jury -- the very thing that the Constitution guarantees him. The Constitution recognizes an adversary system as the proper method of determining guilt, and the Government, as a litigant, has a legitimate interest in seeing that cases in which it believes a conviction is warranted are tried before the tribunal which the Constitution regards as most likely to produce a fair result. This recognition of the [***639] Government's interest as a litigant has an analogy in Rule 24 (b) of the federal rules, which permits the Government to challenge jurors peremptorily.

[**791] [***LEdHR9] [9]We are aware that the States have adopted a variety of procedures relating to the waiver of jury trials in state criminal cases. Some have made waiver contingent on approval by the prosecutor, *e. g.*, California (*Cal. Const. Art. I, § 7*), Indiana (Ind. Ann. Stat. § 9-1803 (1956 Repl. vol.), *Alldredge v. Indiana, 239 Ind. 256, 156 N. E. 2d 888 (1959))*, and Virginia (Va. Const. § 8, Va. Code Ann. § 19.1-192 (1950 Repl. vol.), *Boaze v. Commonwealth, 165 Va.*

786, 183 S. E. 263 (1936)). Others, while not giving the prosecutor a voice, have made court approval a prerequisite for waiver, *e. g.*, Georgia (Ga. Code Ann. § 102-106 (1955), *Palmer v. State, 195 Ga. 661, 25 S. E. 2d 295 (1943))*, and Washington (Wash. Rev. Code § 10.01.060 (1963 Supp.)). Still others have provided [*37] that the question of waiver is a matter solely for the defendant's informed decision, *e. g.*, Connecticut (Conn. Gen. Stat. Rev. § 54-82 (1958)), and Illinois (Ill. Ann. Stat. c. 38, § 103-6 (Smith-Hurd ed. 1964), *Illinois v. Spegal, 5 Ill. 2d 211, 125 N. E. 2d 468 (1955))*. However, the framers of the federal rules were aware of possible alternatives when they recommended the present rule to this Court, see Orfield, Trial by Jury in Federal Criminal Procedure, 1962 Duke L. J. 29, 69-72; this Court promulgated the rule as recommended; and Congress can be deemed to have adopted it, *18 U. S. C. § 3771 (1958 ed.)*.

[***LEdHR10] [10] [***LEdHR11] [11] [***LEdHR12] [12] [***LEdHR13] [13]In upholding the validity of *Rule 23 (a)*, we reiterate the sentiment expressed in *Berger v. United States, 295 U.S. 78, 88*, that the government attorney in a criminal prosecution is not an ordinary party to a controversy, but a "servant of the law" with a "twofold aim . . . that guilt shall not escape or innocence suffer." It was in light of this concept of the role of prosecutor that *Rule 23 (a)* was framed, and we are confident that it is in this light that it will continue to be invoked by government attorneys. Because of this confidence in the integrity of the federal prosecutor, *Rule 23 (a)* does not require that the Government articulate its reasons for demanding a jury trial at the time it refuses to consent to a defendant's proffered waiver. Nor should we assume that federal prosecutors would demand a jury trial for an ignoble purpose. We need not determine in this case whether there might be some circumstances where a defendant's reasons for wanting to be tried by a judge alone are so compelling that the Government's insistence on trial by jury would result in the denial to a defendant of an impartial trial. Petitioner argues that there might arise situations where "passion, prejudice . . . public feeling" [7] or some other [*38] factor may render impossible or unlikely an impartial trial by jury. However, since petitioner gave no reason for wanting to forgo jury trial other than to save time, this is not such a case, and petitioner does not claim that it is.

7 Petitioner's Brief, p. 24.

[***LEdHR14] [14] [***LEdHR15] [15]Petitioner has also raised questions involving the instructions to the jury and alleged misconduct by the prosecuting attorney. We have examined the record and find that the jury was adequately instructed. In any event, no timely objection was made as required by *Rule 30 of the Federal Rules of Criminal Procedure* and, in the absence of plain error, the Court of Appeals correctly affirmed the judgment [***640] of the trial court. Similarly without merit are petitioner's specifications of misconduct by the prosecuting attorney during the trial, since the record reveals that the misconduct, if any, was neither purposeful nor flagrant, and the trial court's admonitions to the jury seem to have been well designed to cure whatever prejudicial impact some of the prosecutor's remarks may have had in this case.

The judgment of the Court of Appeals is

Affirmed.

REFERENCES

Validity and construction of *Federal Criminal Procedure Rule 23*, dealing with trial by jury or by the court

Annotation References:

Right of accused to insist, over objection of prosecution or court, upon trial by court without a jury. *51 ALR2d 1346.*

Right to waive trial by jury in criminal cases, and effect of waiver upon jurisdiction of court to proceed without a jury. 48 ALR 767, 58 ALR 1031.

Right to consent to trial of criminal case before less than 12 jurors, and effect of consent upon jurisdiction of court to proceed with less than 12. 70 ALR 279, 105 ALR 1114.

Right to public trial in criminal case. 4 L ed 2d 2128.