IN THE SUPREME COURT OF FLORIDA

HONORABLE MICHAEL E. ALLEN, PUBLIC DEFENDER, SECOND JUDICIAL CIRCUIT, and WILLIE REYNOLDS,

Petitioners,

v.

CASE NO. 68633

HONORABLE HAL S. McCLAMMA, COUNTY JUDGE, IN AND FOR LEON COUNTY,

Respondent.

PETITION FOR WRIT OF MANDAMUS, OR, IN THE ALTERNATIVE, PETITION FOR WRIT OF PROHIBITION

COME NOW the petitioners, by and through the undersigned, and move this Honorable Court to grant its writ of mandamus or writ of prohibition, pursuant to Florida Rules of Appellate Procedure 9.030(a)(3) and 9.100(a).

JURISDICTION OF THE COURT

This Court has jurisdiction, pursuant to Article V, Section 3(b)(8), Florida Constitution, to issue a writ of mandamus to the respondent county judge, who is a constitutional and state officer pursuant to Article V, Section 6, Florida Constitution and Section 34.021, Florida Statutes. This Court has jurisdiction to issue a writ of mandamus to aid petitioner Allen, who is a constitutional and state officer, Article V, Section 18, Florida Constitution, and Section 27.50, Florida Statutes, in the performance of his duties. State ex rel. Norris v. Chancey, 129 Fla. 194, 212-13, 176 So. 78 (1937):

> [T]hey [the Civil Service Board of the City of Tampa] have the right to act as relators in bringing this mandamus proceeding, it appearing prima facie from the allegations that they came within the operation of the principle enunciated in Holland v. State, [23 Fla. 123, 1 So. 521 (1887)], to the effect that where a power or duty is imposed by law upon a

> board of officers, and to execute such power or perform such duty, it becomes necessary to obtain a writ of mandamus, they may apply for same. They are also, under such allegations, "officially directly interested" within the meaning of those words as used in the [State ex rel. White v.] MacGibbon [79 Fla. 132, 84 So. 91 (1920)] case, supra.

This Court has jurisdiction to issue its writ of mandamus to compel a judge to observe court procedure. State ex rel. Dillman v. Tedder, 123 Fla. 188, 166 So. 590 (1936). This Court has jurisdiction to issue its writ of mandamus to compel a judge to perform a ministerial act. Wincor v. Turner, 215 So.2d 3 (Fla. 1968). This Court has jurisdiction to issue its writ of mandamus to enforce a constitutional right. State ex rel. Brown v. Dewell, 123 Fla. 785, 167 So. 687 (1936); Dickey v. Circuit Court, 200 So.2d 521 (Fla. 1967). Petitioners have no other adequate remedy at law. Costello v. Carlisle, 413 So.2d 834 (Fla. 1st DCA 1982).

In the alternative, this Court has jurisdiction to issue its writ of prohibition against the respondent county judge, who was acting in excess of his jurisdiction. English v. McCrary, 348 So.2d 293 (Fla. 1977). This Court has jurisdiction to issue its writ of prohibition to enforce a constitutional right. Sherrod v. Franza, 427 So.2d 161 (Fla. 1983); Westlake v. Miner, 460 So.2d 430 (Fla. 1st DCA 1984), approved, 478 So.2d 1066 (Fla. 1985). Petitioner Reynolds has no other adequate remedy at law and will suffer impending present injury. Gordon v. Savage, 383 So.2d 646 (Fla. 5th DCA 1980).

Finally, this Court has the sole jurisdiction to regulate the conduct of attorneys, Article V, Section 15, Florida Constitution, as well as the practice and procedure in the courts, Article V, Section 2(a), Florida Constitution.

## STATEMENT OF THE FACTS

Petitioner Reynolds was arrested on November 23, 1985, and charged with gambling, in the parking lot of a convenience

store, in violation of Section 849.08, Florida Statutes (Appendix A). At arraignment on December 4, 1985, petitioner Allen's office was appointed to represent him (Appendix B). On January 2, 1986, an information was filed (Appendix C). Discovery was conducted (Appendix D). Depositions were taken (Appendix E). Trial was set before a jury for March 3, 1986 (Appendix F),but rescheduled for March 18, 1986 (Appendix G).

On March 14, 1986, petitioner Allen's office filed a motion to suppress on behalf of petitioner Reynolds (Appendix H). This was heard by County Judge John Crusoe on March 18, 1986, and the jury trial was continued (Appendix I). On March 19, 1986, a written order was entered denying the motion (Appendix J). Jury trial was reset for April 3, 1986 (Appendix K), but continued upon petitioners' motion (Appendix L). Jury trial was reset for Monday, April 14, 1986 (Appendix M).

On Friday, April 11, 1986, petitioner Allen received respondent's sua sponte Order of No Imprisonment [hereinafter referred to as ONI] and Discharging Public Defender (Appendix N). On Monday, April 14, 1986, the jury trial date, petitioner Allen filed a motion to modify the ONI to allow petitioner Allen to continue to represent petitioner Reynolds (Appendix O). This motion was presented to respondent at 9:00 a.m. and was orally denied. Respondent advised petitioner Reynolds that he had removed the Public Defender, and that he would risk going to jail if the Public Defender were re-appointed, but petitioner Reynolds declined the invitation. Respondent ordered petitioner Reynolds to appear for non jury trial on Monday, April 28, 1986 (Appendix P). Representatives from petitioner Allen's office were present but not permitted to speak (Appendix Q).

## NATURE OF RELIEF SOUGHT

Petitioner Allen seeks the aid of this Court in granting its writ of prohibition or mandamus to require respondent to allow petitioner Allen to appear at a jury trial to defend petitioner Reynolds on the gambling charge. Without the aid of this Court, petitioner Reynolds will be required to represent himself on the charge at a non-jury trial and petitioner Allen will be precluded from tendering any advice or counsel to petitioner Reynolds.

## ARGUMENT IN SUPPORT OF THE WRIT

It is clear that respondent acted in accordance with established law when he appointed petitioner Allen to represent petitioner Reynolds on the charge, because an indigent defendant has the constitutional right to appointed counsel when a jail sentence is contemplated or imposed upon conviction. Argersinger v. Hamlin, 407 U.S. 25 (1972); Scott v. Illinois, 440 U.S. 367 (1979). It is likewise clear that respondent acted contrary to law when he removed petitioner Allen on the eve of the jury trial, which coincidentally was the same day this Court issued its Order to Show cause in Allen & Gayoso v. McClamma, #68,564.

Respondent has ignored this Court's decision in State ex rel. Smith v. Brummer, 426 So.2d 532 (Fla. 1982), which petitioners submit is controlling authority in this matter. This case, submitted to respondent in petitioner Allen's motion for clarification (Appendix F in #68,564), further defines the role of the public defender and his authority to represent an indigent defendant in a matter to which he was not directly appointed. In Smith, the Miami public defender was appointed to represent a juvenile in a Baker Act proceeding. After that matter was concluded, the public defender filed a class action lawsuit in federal court on behalf of the juvenile and others, pursuant to 42 USC §1983. The attorney general challenged the public defender's authority

to represent the members of the class in federal court. This Court agreed with the attorney general and held that the public defender could not represent the class. However, this Court also held that the public defender could represent, in federal court, the juvenile whom he had been appointed to represent in state court, as a matter of professional responsibility:

> The state is constitutionally obliged to respect the professional independence of the public defenders whom he engages. The decision in Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), established the right of state criminal defendants to the "[g]uiding hand of counsel at every step of the proceedings against [them]." Id. at 345, 83 S.Ct. at 797 (quoting from Powell v. Alabama, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64, 77 L.Ed. 158 (1932).
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> The United States Supreme Court opinion in Polk County v. Dodson, 454 U.S. 312, 102 S.Ct. 445, 70 L.Ed.2d 509 (1981), concisely summarizes this Court's view concerning the primary purpose of the public defender. Quoting from Ferri v. Ackerman, 444 U.S. 193, 204, 100 S.Ct. 402, 409, 62 L.Ed.2d 355 (1979), the Court agreed that
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> > His [the public defender's] principal responsibility is to serve the undivided interests of his client. Indeed, an indispensable element of the effective performance of his responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.
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> 102 S.Ct. at 450 n. 8 (emphasis supplied).

Id. at 533.

In Smith, this Court founded its holding upon its prior decision in Graham v. State, 372 So.2d 1363 (Fla. 1979), in which this Court held that counsel, having been appointed in state court, had authority to represent a client in federal court on post conviction proceedings, even though he could not be expressly appointed by a state judge for that purpose. Again, this Court made reference to counsel's professional responsibility in representing

his client, in any forum, where necessary to protect his client's rights.

In the instant case, this same professional responsibility has motivated petitioner Allen to seek to represent petitioner Reynolds in the trial.

This limited autonomy on the part of the public defender to decide to represent clients is recognized in other state cases, in addition to State ex rel. Smith v. Brummer. For example, in Villery v. Florida Parole and Probation Commission, 396 So.2d 1107 (Fla. 1981), the public defender represented the petitioner before this Court in a mandamus action seeking the right to parole. In Florida Parole and Probation Commission v. Alby, 400 So.2d 864 (Fla. 4th DCA 1981), the court specifically held that the public defender had authority to file a habeas corpus petition. In Roberson v. Florida Parole and Probation Commission, 407 So.2d 1044 (Fla. 3d DCA 1981), quashed on other grounds, 444 So.2d 917 (Fla. 1983), the public defender represented the prisoner in an administrative appeal. The public defender has also represented clients in proceedings such as prohibition, Sherrod v. Franza, supra, and common law certiorari, Roberts v. State, 345 So.2d 837 (Fla. 3d DCA 1977) and Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976). Finally, the First District in Graham v. Vann, 394 So.2d 176 (Fla. 1st DCA 1981) rejected the view that the public defender's responsibilities are limited solely by statute, and in two companion cases, implicitly allowed the public defender to institute a complaint for declaratory relief, a petition for injunctive relief, and a petition for writ of mandamus. Graham v. Vann, 394 So.2d 178 (Fla. 1st DCA 1981) and Graham v. Vann, 394 So.2d 180 (Fla. 1st DCA 1981).

In addition to this Court's opinion in State ex rel. Smith v. Brummer, supra, the right of the public defender to take clients into federal court in order to protect their rights has been equally recognized by the federal courts.

See e.g., Pugh v. Rainwater, 355 F.Supp. 1286 (S.D. Fla. 1973), affirmed in part sub nom. Gerstein v. Pugh, 420 U.S. 103 (1975) [suit for declaratory and injunctive relief leading to major decision on standards for pretrial detention]; and Ackis v. Purdy, 322 F.Supp. 38 (S.D. Fla. 1970) [suit for declaratory and injunctive relief regarding use of master bond schedule for pretrial release].

The common theme of these cases -- in addition to the realization that if the public defender does not undertake the case, nobody else will - is that once the public defender is appointed to represent someone he is required to represent, his discretion in choosing the means by which this representation is to be carried out should not be judicially limited. These cases also rest upon the assumption, present in the instant case, that the public defender is acting in good faith and in accordance with recognized ethical principles. See, e.g., Babb v. Edwards, 412 So.2d 859 (Fla. 1982) and Section 27.53(3), Florida Statutes [once public defender has certified a conflict of interest, the court has no alternative but to appoint substitute counsel]; Code of Professional Responsibility, Canon 5 [a lawyer should exercise independent professional judgment on behalf of a client], Canon 6 [a lawyer should represent a client competently], and Canon 7 [a lawyer should represent a client zealously within the bounds of the law]. It is axiomatic that the establishment of the duty to represent a client necessarily carries with it the inherent power to initiate and engage in all representation necessary to the complete exercise of this duty, which is not in conflict with any other law or public policy.

In the instant case, petitioner Allen has represented petitioner Reynolds for over four months. Extensive discovery, motion practice, and trial preparation has occurred. It defies common sense to remove the only defense attorney who has been counsel of record on the eve of trial.

It defies judicial sense as well to expect petitioner Reynolds to be able to proceed pro se to a non-jury trial at which arguably, there is a right to a jury [Reed v. State, 470 So.2d 1382 (Fla. 1985], witnesses must be subpoenaed, motions must be renewed, and objections must be made, especially where respondent made no inquiry into petitioner Reynolds' competence to represent himself. See Miller v. State, 11 FLW 738 (Fla. 5th DCA March 27, 1986), in which the court held that where a solvent defendant, whose request for counsel had been denied, appeared at trial without counsel, the trial court reversibly erred in requiring the defendant to proceed to trial without conducting an inquiry into his competence to represent himself pursuant to Faretta v. California, 422 U.S. 806 (1975).

It is likewise unconscionable for respondent to remove petitioner Reynolds' right to a jury trial. This Court has held that the right to jury trial remains in Florida for a second degree misdemeanor, if the act was a crime at common law. Reed v. State, 470 So.2d 1382 (Fla. 1985); Whirley v. State, 450 So.2d 836 (Fla. 1984). Gambling per se was not a crime at common law, but it could be prosecuted as a public nuisance. 3 Wharton's Criminal Law and Procedure, § 902 at 4-5; Lee v. City of Miami, 121 Fla. 93, 99-103, 163 So. 486 (1935). A single act of gambling in a hotel room has been held to constitute the common law crime of nuisance. Drake v. State, 91 Okla Crim. 142, 217 P.2d 191, rehearing denied, 92 Okla. Crim. 253, 222 P.2d 770 (1950).

In Florida, we have adopted the common law. Sections 2.01 and 775.01, Florida Statutes. The elements of the crime in the gambling statute have never been altered. Compare Section 849.08, Florida Statutes with Rev.Stat. 1892, § 2651. Florida has expressly outlawed a nuisance, Section 823.05, Florida Statutes, and made it a second degree

misdemeanor. Section 823.01, Florida Statutes.

Thus, when the citizens of Florida adopted Article I, Sections 16 and 22, Florida Constitution, providing the right to jury trial, they granted the same right to those crimes which recognized it at common law. Reed and Whirley, supra. Since gambling was a nuisance at common law, and a crime, the right to jury trial has attached.

Notwithstanding the logic of the preceding argument, query whether petitioner Reynolds will be able to convince respondent of its merit while proceeding in pro se. Again, it was unconscionable for respondent to remove petitioner Reynolds' jury as well as his lawyer.

Compare respondent's actions with those of another county judge:

> The Commission concluded that respondent intended to discourage the defendant from seeking an attorney's services by threatening the defendant with a substantial period of incarceration, in violation of Canons 2(A) and 3(A) of the Code of Judicial Conduct.
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> We find the record contains substantial evidence supporting the Commission's factual findings that Judge Damron... improperly used the authority of his office to discourage defendants from exercising constitutional rights... .

Inquiry Concerning A Judge, Judge Leonard A. Damron, #67,151 (Fla. April 10, 1986) (slip opinion at 3-4,11).

In summary, then, petitioners have demonstrated that respondent's actions are contrary to law and to accepted notions of the public defender's professional responsibility. This Court should grant its writ to allow petitioner Allen to exercise his professional judgment on behalf of petitioner Reynolds.

Respectfully submitted,

MICHAEL E. ALLEN
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

P. Douglas Brinkmeyer

P. DOUGLAS BRINKMEYER
Assistant Public Defender

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Respondent Hal S. McClamma, County Judge, Leon County Courthouse, Tallahassee, Florida; Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida; and to Honorable William N. Meggs, State Attorney, First Florida Bank Building, Tallahassee, Florida, this 18 day of April, 1986.

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