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SID J. WHITE
FEB 8 1990
CLERK, SUPREME COURT
By Deputy Clerk

IN THE SUPREME COURT OF THE STATE OF FLORIDA

IN RE: ORDER ON PROSECUTION OF CRIMINAL APPEALS BY THE TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER

PINELLAS COUNTY	CASE NO. 74,574
MANATEE COUNTY	CASE NO. 74,580
CHARLOTTE COUNTY	CASE NO. 74,629
HILLSBOROUGH COUNTY	CASE NO. 74,630
LEE COUNTY	CASE NO. 74,631

AMICUS CURIAE FLORIDA ASSOCIATION OF COUNTIES, INC. INITIAL BRIEF

On Appeal from the Second District Court of Appeal

Will J. Richardson
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of Counties, Inc.
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STATMENT OF THE CASE

Amicus **Curiae adopts Petitioner Pinellas County's Statement of the Case**

SUMMARY OF ARGUMENT

When the Legislature expressly assumed the obligation to both consolidate and separately fund indigent appeals in designated Public Defenders, it did not intend that Counties be forced by the Courts to assume **a** part of the financial burden of these appeals except in capital or conflict cases. The Statutes governing the structure and funding of designated appellate Public Defenders therefore may not be construed to authorize the Courts to place the financial burden on the Counties by implication.

The Legislature has chosen to both structure and fund indigent appeals differently from trial or capital cases. This Court while it may increase the financial burden on the State or Countiesmay not shift the burden contrary to the expressed intent of the Legislature.

ARGUMENT

I.
WHEN THE LEGISLATURE EXPRESSLY ASSUMED THE OBLIGATION TO FUND APPEALS BY THE PUBLIC DEFENDER FOR THE TENTH JUDICIAL CIRCUIT IT DID NOT INTEND THAT BURDEN BE SHARED BY THE SEVERAL COUNTIES OF THE DISTRICT.

The Order of the Court below relies in large part on a construction of Section 27.53 (2) and Section 925.036 Florida Statutes authorizing courts to appoint either the Public Defender or a Special Assistant Public Defender to represent indigent defendants. However, the language of those statutes reveals no intention to authorize the courts to appoint Special Assistant Public Defenders, at the expense of the Counties, to prosecute appeals assigned by the Legislature to the Public Defender for the Tenth Judicial Circuit.

The Legislature consolidated the appellate burden of the several Public Defenders within the Second District Court Of Appeal into the office of the Public Defender for the Tenth Judicial Circuit. **S.** 27.51 (4), Fla.Stat. (1987). **As** a part of that consolidation, the Legislature expressly assumed responsibility for funding that appellate burden by a separate appropriation to the Public Defender for appellate work. **S.** 27.51 (6), Fla. Stat. (1987). Admittedly the Legislature has failed to appropriate sufficient funds for that purpose. However, the fact that the Legislature expressly assumed that obligation should persuade this Court that the Legislature did not intend that Section 27.53 (2), Florida Statutes be construed as authorizing the courts to shift this Legislative obligation to the Counties.

Where, as here, the legislature has specifically designated the Public Defender for the Tenth Judicial Circuit to prosecute all felony appeals for the Second District, and

expressly assumed the obligation to appropriate funds for such appeals, the general grant of authority in Section 27.053 (2) cannot be construed to obligate the counties to pay Special Assistant Public Defenders to prosecute such appeals. This Court's decision in Escambia County v. Behr, 384 So.2d 147 (Fla. 1980) does not require a different construction. In Behr this Court held that Section 27.53 (2), Florida Statutes (1977) authorized courts to appoint either the Public Defender or Special Assistant Public Defenders, paid by the counties, to represent indigent clients. However, there are differences here which limit the applicability of Behr.

The year after this Court's decision in Behr, the Legislature amended Section 27.53 (2), Florida Statutes by deleting language stating:

> Such fee and costs and expenses shall be fixed by the trial judge and shall be paid in the same manner as counsel fees are paid in capital cases or as otherwise required by law.

Ch. 81-273, s. 2, Laws of Fla. (Emphasis added). Section 925.035 (6), Florida Statutes requires counties to pay the fees, costs and expenses of Special Assistant Public Defenders in capital cases. From the language quoted above, this Court correctly concluded that counties were responsible for paying all Special Assistant Public Defenders as if they were appointed to capital cases. Behr, at 148, n. 1. As noted by Judge Schoonover's dissenting opinion in the court below, the present statute does not require counties to pay for Special Assistant Public Defenders except in capital cases. After the 1980 amendment to Section 27.53 (2), deleting the language quoted above, no statute exists requiring counties to pay for the services of Special Assistant Public Defenders in non-capital cases. Section 27.53 (2), no longer incorporates the language of Section 925.035 (6), Florida Statutes requiring counties to pay the fees and costs and

expenses of Special Assistant Public Defenders.

Section **925.037,** Florida Statutes, enacted in **1989,** may imply that the Legislature intends counties to pay the fees, costs and expenses of Special Assistant Public Defenders. Although the statute does not expressly state, or even mention, that counties are required to pay Special Assistant Public Defenders appointed under Section **27.53 (2),** Florida Statutes, it does require that counties report their expenditures for counsel appointed because of a "stated lack of resources" on the part of the Public Defender. **S. 925.037 (5),** Fla.Stat. **(1989).** The statute also provides for appropriations to reimburse counties for expenditures on appointed counsel, However, absent specific authority for the payment of Special Assistant Public Defenders appointed under Section **27.53 (2),** Florida Statutes, this Court should not construe this reporting and reimbursement statute as authority for the imposition of the fees, costs and expenses of appellate Special Assistant Public Defenders when the Legislature has clearly taken that obligation on itself. **S. 27.51 (6),** Fla.Stat. **(1987).**

II.
THE STATUTES DEFINING THE RESPONSIBILITIES OF THE PUBLIC DEFENDER CREATE DISTINCT OBLIGATIONS AND METHODS OF FUNDING AT THE TRIAL AND APPELLATE LEVELS AND THEREFORE RELIEVE THE COUNTIES FROM RESPONSIBILITY FOR FUNDING INDIGENT APPEALS THROUGH APPOINTMENT OF SPECIAL ASSISTANT PUBLIC DEFENDERS.

The Legislature deals with the Public Defender's responsibilities at the trial and appellate level differently. Section **27.51 (4),** Florida Statutes **(1987)** states that:

> The public defender for a judicial circuit enumerated in this subsection shall, after the record on appeal is transmitted to the appellate court by the

> office of the public defender which handled the trial and if requested by any public defender within the indicated appellate district, handle all felony appeals to the state and federal courts required of the official making such request.

S. 27.51 (4), Fla.Stat. (1987). In contrast, Public Defenders for the several circuits within each appellate district not designated by Section 27.51 (4) handle only non-felony appeals and each Public Defender handles his own trial cases. S. 27.51, Fla.Stat. (1987).

The Legislature also makes separate appropriations for each of the Public Defenders responsible for felony appeals. S. 27.51 (6), Fla.Stat. (1987). That section states:

> A sum shall be appropriated to the public defender of each judicial circuit enumerated in subsection (4) for the employment of assistant public defenders and clerical employees and the payment of expenses incurred in cases on appeal.

S. 27.51 (6), Fla.Stat. (1987). All other appropriations for the several Public Defenders are made under Section 27.53 (4), Fla.Stat. (1987) for practical reasons apparent from the separate administration and treatment of appeals under Section 27.5 1 (4), Florida Statutes. Under this statutory scheme, the Legislature has clearly taken the financial burden of providing appellate counsel for indigent defendants upon its shoulders. Absent specific statutory authority this Court can not reallocate the burden from the Legislature to the counties without infringing on Legislative prerogatives.

This is not a situation like that presented in Rose v. Palm Beach County, 361 So.2d 135 (Fla. 1978), where this Court ruled that courts had inherent power to award higher witness fees in order to protect a defendant's right to compulsory attendance of

witnesses, or a situation such as that in Makemson v. Martin County, **491** So.2d **1109** (Fla. **1986); cert. denied**, **479 U.S. 1043, 107** S.Ct. **908, 93** L.Ed.2d **857 (1987),** where this Court ruled that courts had inherent power to exceed statutory caps on attorney's fees in capital cases when necessary to protect a defendant's right to counsel. Here the Second District Court has determined not the amount the state or a county must pay for Special Assistant Public Defenders, but who must pay it. It is true that this Court must resolve any conflict between fundamental constitutional rights and the treasury in favor of fundamental constitutional rights, Makemson, at **1113,** but here the Second District has picked the wrong treasury with which to protect those rights.

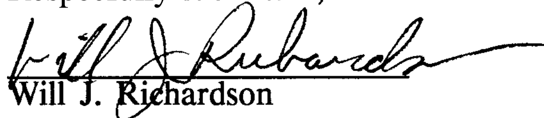
CONCLUSION

The Legislature defined the respective responsibilities of Public Defenders, Counties and the State to provide representation to indigent criminal defendants. The State expressly assumed responsibility for funding and consolidating appeals in one Public Defender for each appellate district. Having expressly assumed this obligation, the State may not by implication, be relieved of this financial burden by placing it on the Counties.

The Law governing the conduct of indigent criminal appeals differs markedly from that governing trial court and capital cases. The Legislature has decided to fund indigent appeals through a separate appropriation for each designated Public Defender. While this Court undoubtedly has the inherent power to force the Legislature and the Counties to exceed statutory caps on witness and attorney's fees when it is clear who is obligated to pay such fees. However, this Court should not use its inherent power to shift the burden of appellate fees from the State to the Counties without express authority in the Statutes governing the relationship between the Public Defender, Counties and the State.

This Court may protect the rights of indigent appellants in ways less intrusive of the perogatives of the Legislature than the remedy fashioned by the Second District Court **of** Appeal. At the least this Court should not place a burden on the Counties of the State of Florida with which they are ill equipped to deal. If the rights of individual indigent appellants suffer this Court may fashion a remedy appropriate to each as his individual right appears.

Respecfully submitted,



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CERTIFICATE OF SERVICE

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