OA 4250

IN THE SUPREME COURT OF FLORIDA

IN RE: ORDER ON PROSECUTION OF CRIMINAL APPEALS BY THE TENTH JUDICIAL CIRCUIT PUBLIC DEFENDER (PINELLAS) CASE NO. 74,574

(MANATEE) CASE NO. 74,580

(HILLSBOROUGH) CASE NO. 74,629

(CHARLOTTE) CASE NO. 74,630

(LEE) CASE NO. 74,631

(COLLIER) CASE NO. 74,679.i

On Discretionary Review From the Florida District Court of Appeal, Second District

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ANSWER BRIEF OF THE STATE OF FLORIDA

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PRELIMINARY STATEMENT

Petitioners are the various county governments impacted by the order of the Second District Court of Appeal related to the prosecution of criminal appeals within the district issued May 12, 1989. ("Order"). In this brief they shall be referred to as Petitioners.

Respondents are the Public Defender for the Tenth Judicial Circuit of Florida, the Honorable James Marion Moorman, and the State of Florida. In this brief, those parties shall be referred to as Respondents or by proper name.

An amicus brief has been filed by the Florida Public Defenders Association ("Amicus").

As this case arose from an original proceeding at the District Court level, there is no record on appeal per se. Reference to material contained within the appendix to this brief shall be by the use of the symbol "A" followed by an appropriate page number in parentheses.

STATEMENT OF THE CASE AND FACTS

The Order On Prosecution Of Criminal Appeals By The Tenth Judicial Circuit Public Defender entered by the Second District Court of Appeal on May 12, 1989, accurately summarizes the history of this case and provides the Court with most of the facts needed to resolve the issues presented. Additional factual material may be found within the voluminous appendix filed by the Public Defender for the Tenth Judicial Circuit.

SUMMARY OF *THE* ARGUMENT

These consolidated cases arise out of a conflict over the question of funding for attorneys representing indigent convicted felons in the Second District Court of Appeal. While the elected Public Defender, his amicus, and the various counties, have briefed the specific issues related to the Order of the Second District Court of Appeal, it is the view of the Attorney General, as chief legal officer of this State and representative of the State's interest, that this Court's attention should be focused on solutions to the overall problem and not on the legal narrow issues arising from the lower court's opinion.

For that reason, we have eschewed a traditional argument on these three issues in favor of a brief which will hopefully answer some of the questions raised by the various Justices of this Court at the earlier oral argument in the related case of *Hatten* v. *State*, Florida Supreme Court case number 74,694.

The Court is well aware of pending federal litigation which could seriously impact upon this Court's ability to administer the state court system. This office is proposing a number of possible remedies and solutions which we urge the Court to consider in whole or in part. We realize that the suggestions may not be favorably viewed by either, or both, of the other parties but, they are viable options offered in lieu of any request that this Court simply ask for more money from the Legislature. It is obvious that particular tactic has failed time and time again.

ARGUMENT

It is readily apparent that none of the parties nor the learned judges of the District Court of Appeal are satisfied with the ultimate resolution of this matter. Once the underbrush of legal argument is cleared away, the bottom line is that the court system needs more money to insure that the constitutional rights of convicted felons within the Second District Court of Appeal are not thwarted by State inaction, i.e. lack of funding.

Assuming, *arguendo,* that Public Defender Moorman is accurate in his assessment that there may be 1700 cases backlogged in the Second District Court of Appeal (Initial Brief of Respondent Moorman, p. 5 n. 1), the appellate system in that district teeters on the brink of collapse. The Attorney General of Florida, as this state's chief legal officer, believes that this Court can not delay in finding a solution to this problem. What is required from this Honorable Court is a firm, clear, message to those within the executive and legislative branches of government that there must be immediate funding this term to relieve the backlog of appellate cases within the District Court of Appeal system. Furthermore, this Court should motivate the private bar of this state to recognize its ethical obligation to assist with ***pro bono*** service and devise a program for voluntary lawyer assistance to meet the current critical backlog of cases within the Second District Court of Appeal. Finally, this Court needs to review current procedures for monitoring case overload at the district court level and promulgate appropriate rules and

regulations to insure notice to affected county governments that they will be pressed into funding additional attorneys for purposes of insuring effective assistance of counsel in direct appeal cases.

The Court should deliver a message to all parties that it will act in its constitutionally designated role as protector of the state court system to take whatever steps are necessary to insure the integrity of that system. The warning that former Chief Justice England issued in his concurring opinion in *Escambia County v. Behr*, 384 So.2d 147, 150 (Fla. 1980), has become reality:

> My agreement on that approach, however, highlights the need to examine another alternative to the representation problem which these cases have identified. The free substitution of private attorneys for public defenders who seek to withdraw from a case in which they have been appointed counsel, on the ground of excessive case load, potentially poses dramatic financial implications for the counties and variant levels of performance or responsibility among the public defenders of Florida's twenty judicial circuits.

Id. at 150. The counties come to this court with legitimate concern about the potential fiscal impact of the District Court of Appeal's order. Likewise, Public Defender Moorman takes special effort to explain to this Court that the Second District's order will skewer the calculations for the funding formula nominally used by the executive and legislative branches to appropriate funds for his appellate office. This Court does not have the ability to encroach upon the legislative or

executive branches of government and "superlegislate" a solution to this problem. However, this Court plainly has a wide array of tools at its disposal to move this conflict towards resolution. The time is here to use those tools.

First, the Attorney General suggests that this Court adopt, as its own view, the recommendation of the Crime Prevention and Law Enforcement Study Commission, a blue ribbon committee whose members included the Attorney General, members of the Legislature, judges, prosecutors, defense attorneys, and law enforcement officers, regarding funding for the Public Defender system. Pertinent portions of that report are contained within the Appendix to this brief. *Master Planning for Florida's Criminal Justice System, Crime Prevention and Law Enforcement Study Commission,* January 1, 1990. (Appendix). That report recommends "the Governor and Legislature recognize that Public Defender Offices are underfunded" and that "a substantial funding enhancement should be provided so that Florida will not find itself in violation of federal court mandates.'' Within his proposed budget, Governor Martinez has provided for funding for approximately 32 new appellate public defender positions and an expenditure of approximately $608,000. Additionally, the Governor has recommended an expenditure of nearly two million dollars and a creation of 55 Public Defender positions. The Attorney General urges the Court to review this budgetary analysis against the documentation provided by Public Defender Moorman and to adopt a

similar recommendation, based on its own perception of need, prior to this legislative session.[1]

Likewise, the Court should call upon the Governor and the Legislature to increase funding for the pilot program to reimburse county government for compensation of court appointed attorneys. See Chapter 89-253(1), Laws of Florida. (Appendix C). In 1989 the Legislature provided approximately two million dollars to this fund for the specific purpose of reimbursing the counties for monies paid to court appointed attorneys handling cases which would otherwise have been handled by the public defender offices. The Court should call for increased funding of this program based upon information compiled by the various counties, with specific emphasis on the existing backlog of cases.

In conjunction with this legislative request, this Court should consider, if requested by particular counties, promulgation of emergency rules of judicial administration that would allow the counties to pool resources for purposes of handling these appeals, regardless of any statutory language to the contrary. Such action could be appropriate given the grave circumstances which impact directly upon this Court's ability to assist and supervise the Second District Court of Appeal in the administration of its constitutional duties. See, e.g., *In the*

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[1] Part of this review process should focus on recommendation of funding for "OPS" positions strictly for use by Mr. Moorman over the next year. For example, 10 positions at $30,000 each = $300,000.

Interest of: D.B., 385 So.2d 83 (Fla. 1980); *Makemson* v. *Martin County,* 491 So.2d 1109 (Fla. 1986); *White* v. *Board of County Commissioners of Pinellas County,* 537 So.2d 1376, 1378-79 (Fla. 1989); *Rose* v. *Palm Beach County,* 361 So.2d 135 (Fla. 1978); and *Chief Judge of The Eighth Judicial Circuit v. Board of County Commissioners,* 401 So. 2d 1330 (Fla. 1981). See also, ***AGO*** 73-329 (clear intent of §27.51(4)(e) is to fund indigent appeals with state funds).

While such a decision would be extreme, it may be necessary. A limited ruling predicated upon strict accountability would be appropriate when, as here, no other alternative is available to the court to insure that this huge backlog of cases, and incoming cases, is disposed of consistent with the Court's obligation to insure redress of grievance by appeal.

As an alternative, or supplement to, the reimbursement program outlined in Chapter 89-253, this Court should call upon the Legislature to consider the creation of an auxiliary defender staff with the specific duty to handle overflow and conflict cases.[2] This office could be modeled similar to the Office of Capital Collateral Representative, created pursuant to 627.702, Fla. Stat. (1987). This conflict office should be limited to handling appointments for direct appeal cases involving felonies in which the appointed public defender is unable to handle the appeal due to conflict of interest or certified case overload.

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[2] See note 1, *infra*.

In addition to these specific proposals for the funding of additional public defender positions or for the more efficient use of existing monies, this Court should also call for mobilization of the members of the Florida Bar to explore a *pro bono* program with the specific goal of providing immediate appellate representation to all incarcerated inmates whose appeals have yet to be processed in the Second District Court of Appeal. This type of program has precedent in the volunteer lawyer program established by the Florida Bar for death sentenced inmates prior to the creation of CCR. Specifically, the program could be targeted at those civic-minded and public-spirited attorneys of the various counties impacted by the current crisis in the Second District.

These recommendations are made only because of the desperateness of the current situation in the Second District. A backlog of 1,7000 is far from alarming; it verges on an almost complete breakdown of the appellate system. A massive public service project on the Bar's behalf would go far to promote with the public the notion of the Bar as a professional organization with a commitment to Florida's least advantaged citizen. It is the public's lack of understanding (or perhaps lack of appreciation of) that professionalism which has, in the view of one judge of the Second District, led to part of the fiscal crisis now faced by the various counties in these criminal cases. In his dissenting opinion to *White* v. *Board of County Commissioners,* 524 So.2d 428 (Fla. 2d DCA 1988), Judge Lehan noted:

> There has long been a professional obligation of attorneys to make themselves available for court appointments as counsel to indigent defendants in capital cases. This kind of professionalism in the legal profession is, unfortunately, little understood outside the profession. (To a substantial extent that may be the result of the profession's lack of adequate public information and education in the past which, in turn, may serve to explain at least partially the lack of legislative response to the problem of the statutory maximum involved here.) (Citation omitted) It would be a travesty of justice to penalize those attorneys who fulfill that obligation and who thereby, as a result of the 1963 U.S. Supreme Court decision in *Gideon v. Wainwright,* "bear a burden which is properly the state's. . . ." 491 So.2d at 1114. It is only natural that the continuation of the unfair system reflected by the trial court's order in this case would inevitably reduce the numbers of competent counsel who make themselves available for such appointments, regardless of their sense of professional responsibility. A court should not be faced with *compelling* attorneys to accept such appointments and financial losses and thereby being required to themselves pay what is now under *Gideon* the obligation of the state to pay. (Emphasis in orignial).

Id. at 434-35. Judge Lehan continued, "after *Gideon* established that obligation of the state, [provision for representation by counsel] the ethical obligation of attorneys did not disappear. There came into existence dual obligations - the constitutional obligation of the state and the ethical obligation of the attorney." *Id.* at 435.

Vigorous prosecution of this type of specific and focused *pro bono* program would go far towards convincing the common

citizenry, i.e. the taxpayer, that further revenues are indeed necessary for preservation of the court system. If such a program were accepted by the membership of the Bar, particularly those lawyers who are home owners and taxpayers within the impacted counties, there is no doubt that a significant portion of the short term crisis in the Second District Court of Appeal could be remedied on a fairly cost effective basis. Obviously, such a program would not call upon lawyers with little or no criminal law experience to handle complex drug conspiracy cases or first degree murder cases. However, this Court is well aware that the District Court dockets are crowded with simple guideline matters, violation of probation cases, cases involving matters of restitution or issues of search and seizure. Many of these cases are based upon stipulated facts contained in short records and can be disposed of with discussion of one or perhaps two issues. Training and supervision for such a program could easily be provided by the elected Public Defenders of the various circuits who obviously would have a vested interest in seeing themselves removed from the obligation of these overflow cases.

Finally, this Court should take upon itself a review of the current methods for monitoring appellate level case loads in the District Courts of Appeal. All those involved in this process should learn from the history of this particular litigation. By not swiftly addressing itself to the problem of overflow, the Second District Court of Appeal has found itself mired in the current situation. Partially as a result of the history of this litigation, the current Attorney General has altered the policy

course set by his predecessor of opposing discharge of the appellate Public Defender from further responsibility when case overloads appear. Compare *Hagens* v. *State*, 498 So.2d 953 (Fla. 2d DCA 1986)(Attorney General objects to plan to release Public Defender Moorman from overload cases) with *Grube* v. *State*, 529 So.2d 789 (Fla. 1st DCA 1988), and *Terry* v. *State*, 547 So.2d 712 (Fla. 1st DCA 1989)(Attorney General agrees to allow appellate Public Defender to withdraw from 100 and 150 future cases respectively in the face of obvious Public Defender overload).

A problem faced by the counties is their inability to predict what their costs will be under the Second District's Order. This situation sharply contrasts with the method currently utilized in the First District Court of Appeal which has allowed for limited specific withdrawals of fairly small numbers of cases on almost regularly yearly intervals. Strict regulation and release would also allow for a better review on a case-by-case basis at the trial court level.

Efforts should be made to promulgate rules that would require the various District Courts of Appeal to monitor their criminal case loads and hold periodic status conferences with the elected Public Defender responsible for those cases, the Attorney General, and representatives of the various counties. Specific study should be made of ways to ensure that any cases which are removed from the appellate Public Defender's case load are those cases which, when possible, would the least expensive to the counties. For example, if the appellate Public Defender sought

removal from 10 cases out of an existing new case load of 20, efforts should be made to allow withdrawal of the least serious, least complex cases.

In conclusion, the Attorney General urges this Court to act quickly and decisively to insure that indigent convicted felons receive effective assistance of counsel in the most cost effective way possible. Under the shadow of a pending federal lawsuit, it is time for this Court to take a multifaceted approach to resolution of the immediate, short term problem of representation in the Second District Court of Appeal; the continuing and lingering problem of underfunding of both the appellate Public Defender Offices and the local county program for compensation of court appointed attorneys; and the lack of workable rules and procedures for monitoring case loads in the appellate system. Furthermore, it would be of benefit to the Bar, the impacted counties, and the taxpayers of this State, if this Court were able to mobilize the private Bar in a specific *pro bono* program targeted at briefing cases for all incarcerated inmates backlogged in the Second District Court of Appeal.

The Attorney General of Florida is committed to working with the Court, Florida county government, and the elected Public Defenders, in bringing a clear message to the Legislature and the Governor that the time is now to provide adequate funding of these Art. V. costs.

CONCLUSION

The State of Florida urges this Court to enact the proposals outlined in its brief as soon as possible.

Respectfully submitted,

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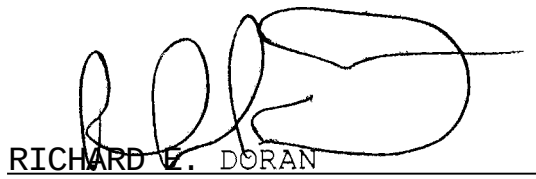
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to the following persons, on this 12th day of March, 1990.



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