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IN THE SUPREME COURT OF FLORIDA
CASE NUMBER 74,574

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

PETITIONER COLLIER COUNTY, JOINING PINELLAS COUNTY --
BRIEF ON JURISDICTION

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Petitioner, COLLIER COUNTY, a political subdivision of the State of Florida, seeks to have reviewed an Order of the Second District Court of Appeal, dated May 12, 1989. A Motion for Rehearing, in which a number of affected counties joined, was denied on July 20, 1989. Respondent, J. MARION MOORMAN, is the Public Defender of the Tenth Judicial Circuit (hereinafter PUBLIC DEFENDER). Said PUBLIC DEFENDER is charged by statute with the representation of indigent defendants on appeal within the fourteen-county jurisdiction of the Second District Court of Appeal. Section 27.51, Florida Statutes.

The factual background of this case is unusual in that the Second District Court of Appeal acted as a court of original jurisdiction, making both factual findings and rulings of law. The court's May 12, 1989 Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender seeks to relieve the PUBLIC DEFENDER from accepting appeal assignments in all cases outside the Tenth Judicial Circuit in which the notice of appeal is filed after May 22, 1989. No time limit is put on the PUBLIC DEFENDER'S relief from his statutory duties. The appellate court further ordered that the trial courts in the various circuits appoint either the local public defenders or county-paid private attorneys to handle the appeals from which the PUBLIC DEFENDER has been relieved. As Judges Schoonover and Parker recognize in their respective dissents to the May 12, 1989 Order, the financial burden of this order will be directly on the pocketbooks of the counties.

The Second District Court of Appeal has previously noted that the local public defenders do not have the funding or staffing to pursue appeals. In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 523 So.2d 1149 (Fla. 2d DCA 1987).

The apparent justification for the Order, as stated in the majority's opinion was the large backlog of appeal cases assigned to the PUBLIC DEFENDER. As further background, this cited backlog is part of a problem that goes back a number of years. In 1986 the PUBLIC DEFENDER filed motions to withdraw as counsel in 247 criminal appeals. At that time the Second District Court of Appeal sought the responses of all parties affected. Subsequently, in Haggins v. State, 498 So.2d 953 (Fla. 2d DCA 1986), the Second District Court of Appeal denied the motions to withdraw ruling that withdrawal would be counter-productive. The court further ruled that the PUBLIC DEFENDER should file appropriate motions at the trial court level to seek to withdraw in the future. The court reasoned the trial courts were in the best position to hear the motions on a case-by-case basis. Id. at 954. In 1987, the court established a briefing schedule for the PUBLIC DEFENDER in In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 504 So.2d 1349 (Fla. 2d DCA 1987). The appellate court also ordered all affected parties, including the counties, to show cause why the PUBLIC DEFENDER should not be discharged from the 150 oldest appeals. Id. at

1352-1353. Thereafter, in In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 523 So.2d 1149 (Fla. 2d DCA 1987), the court again denied withdrawal by the PUBLIC DEFENDER holding that withdrawal would result in further delay and that the solution lay elsewhere. Id. The court increased the briefing schedule of the PUBLIC DEFENDER. Id. at 1149-1150.

Two years have elapsed. On May 12, 1989, the Second District Court of Appeal entered the instant Order. This order was entered without any due process for the counties, and without even a motion having been filed by the PUBLIC DEFENDER. See Judge Schoonover's dissent. In fact, the PUBLIC DEFENDER did not even seek the relief entered. The PUBLIC DEFENDER, in his own Motion for Reconsideration or Clarification, raised serious reservations about the Order and pointed out that as a result his funding could even be reduced by the Florida Legislature. The PUBLIC DEFENDER further set forth in his Motion for Reconsideration or Clarification that it would take approximately two years to dispose of the backlog.

SUMMARY OF ARGUMENT

A. The Order of the Second District Court of Appeal expressly affects a class of constitutional officers. The appellate court seeks to have county government fund indigent criminal appeals for an indefinite period of time. This indefinite funding committment, shifts what is by statute a state responsibility to the counties and will impose a considerable financial burden upon the counties.

B. The Order of the Second District Court of Appeal expressly and directly conflicts with decisions of this Court and other district courts of appeal. Neither this Court nor any other court has permitted such a large scale withdrawal by a public defender. In fact, withdrawal of such a magnititude has been expressly denied. In addition, all courts which have considered this issue have directed that motions to withdraw must be considered at the trial court level.

C. The affected counties were denied due process at the Second District Court of Appeal. This appeal is COLLIER COUNTY'S only opportunity to be heard.

ARGUMENT

A. THE ORDER OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

The Order of the Second District Court of Appeal potentially affects all counties, and their duly constituted board of county commissioners, in the State of Florida. Of course, the eleven counties within the purview of the Order are most directly affected from an immediate financial standpoint. Previously, this Court has accepted jurisdiction in this type of matter on the basis that a class of constitutional officers was affected. Escambia County v. Behr, **384** So.2d **147** (Fla. **1980).** In Escambia Countv, this Court recognized that ultimately the counties would bear the expense of appointed private counsel. Id. at **148.** See also Ludlow v. Brinker, **403** So.2d **969** (Fla. **1981);** Pinellas County v. Nelson, **362** So.2d **279** (Fla. **1978).**

The decision of the Second District Court of Appeal does not simply add to a general body of case law. Rather, the breadth and scope of the Order is unprecedented. The Order greatly increases the fiscal duties counties have with respect to funding for criminal appeals of indigents. Presently the counties exclusively pay for the private attorneys that are appointed in these criminal cases pursuant to Sections 925.035 and 925.036, Florida Statutes. Compare Spradley v. State, 293 So.2d 697 (Fla. 1974).

The facts in the two cases consolidated for appeal in Escambia County were far narrower. In the case arising from the First District Court of Appeal, the issue was whether or not the local public defender could withdraw from six non-capital felony cases due to excessive case load. State ex rel. Escambia County v. Behr, 354 So.2d 974 (Fla. 1st DCA 1978), aff'd sub nom. Escambia County v. Behr, 384 So.2d 147 (Fla. 1980). In the case arising from the Third District Court of Appeal, the issue was whether or not the local appellate public defender could withdraw from representation in one criminal indigent appeal. Dade County v. Baker, 362 So.2d 151 (Fla. 3d DCA 1978), rev'd sub nom. Escambia County v. Behr, 384 So.2d 147 (Fla. 1980). This Court ultimately held that the trial courts in those cases had the discretion to appoint private counsel. Escambia County, 384 So.2d at 150.

The impact of this order is far greater. The PUBLIC DEFENDER has been ordered not to take any future appeals from all counties

comprising the Sixth, Twelfth, Thirteenth and Twentieth Judicial Circuits for an indefinite period of time. The PUBLIC DEFENDER estimates in his Motion for Reconsideration or Clarification that it will take nearly two years to dispose of his backlog of cases. Assuming the statutory maximum for attorneys fees on appeal set forth in Section 925.036(2)(e), Florida Statutes, the financial impact on COLLIER COUNTY could be considerable. Moreover, pursuant to White v. Board of County Commissioner of Pinellas County, 537 So.2d 1376 (Fla. 1989) and 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), there really is no statutory cap. Accordingly, the financial burden on COLLIER COUNTY alone could conceivably amount to millions of dollars.

Cumulatively, the financial burden on Pasco, Pinellas, Manatee, Sarasota, DeSoto, Hillsborough, Charlotte, Collier, Glades, Hendry and Lee counties will most certainly be in the tens of millions of dollars. It is undisputed these funds are not budgeted for by the counties. See In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 523 So.2d 1149 (Fla. 2d DCA 1987). Furthermore, it would be difficult to budget the funds given the rulings in White and Makemson. The counties have no control over this situation. The counties cannot influence the briefing capabilities and case load of the PUBLIC DEFENDER, do not know when this Order will be lifted, cannot influence the amount of attorneys fees that will be assessed against them, and in many counties simply do not have the money.

Most significantly, the Order shifts the statutory duty and

responsibility of state government to the counties on a long-term basis. The impact on a class of constitutional officers is clear. This impact could quickly become state-wide if other public defenders seek to withdraw from trial and appellate responsibilities on the same basis.

B. THE ORDER OF THE SECOND DISTRICT COURT OF APPEAL EXPRESSLY AND DIRECTLY CONFLICTS WITH A DECISION OF ANOTHER DISTRICT COURT OF APPEAL OR OF THE SUPREME COURT ON THE SAME QUESTION OF LAW.

(1) The Second District Court of Appeal's Order for En Masse Withdrawal by the Public Defender is Unprecedented and Unauthorized.

As previously indicated, this Court held in Escambia County that the trial courts in the two cases considered had the discretion to appoint private counsel when the public defenders sought to withdraw from six non-capital felony cases and one appeal. 384 So.2d at 150. In so ruling, this Court adopted the opinion and rationale of the dissenting opinion of Judge Hubbart in Dade County v. Baker, 362 So.2d 151 (Fla. 3d DCA 1978), rev'd sub nom. Escambia County v. Behr, 384 So.2d 147 (Fla. 1980). 384 So.2d at 150. Judge Hubbart, while recognizing the statutory duty of the public defenders to represent insolvent defendants on appeal, argued that the counties also are required to fund part of the delivery of legal services to the poor in criminal cases. Dade County, supra at 159-160. However, Judge Hubbart markedly qualified his opinion as follows:

> The order under review permits the public defender to withdraw as counsel, and appoints a special assistant public defender to represent a particular insolvent defendant on appeal in a single felony case. It does not allow the public defender to withdraw en masse

> from all his insolvent criminal appeals arising out of Dade County and appoint private counsel to take over such cases. Nor is there any showing on this record that this has been accomplished in whole or in part in prior cases. If it did, an entirely different question would be presented. To cast this case in such dramatic terms is to ignore the plain lansuage of the order under review.

Id. at 159 (emphasis added). In adopting the opinion of Judge Hubbart, this Court recognized this important distinction and qualification.

An en masse withdrawal by the PUBLIC DEFENDER, however, is precisely what the Second District Court of Appeal proposes to do in the instant case. Such action contradicts the holding, rationale and intent of this Court's decision in Escambia County.

In addition, there is direct conflict with opinions of other district courts of appeal. The action taken here is unprecedented. In all other cases considering the issue, withdrawal by a public defender was only permitted under more limited circumstances. Compare In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 523 So.2d 1149 (Fla. 2d DCA 1987) (denying withdrawal from 150 appeals); Haggins V. State, 498 So.2d 953 (Fla. 2d DCA 1986) (denying withdrawal from 247 appeals); Schwarz V. Cianca, 495 So.2d 1208 (Fla. 4th DCA 1986) (permitting withdrawal from juvenile cases in circuit court); Kiernan V. State, 485 So.2d 460 (Fla. 1st DCA 1986) (permitting withdrawal from 8 appeals, denying blanket authority to withdraw from 100 cases); Dade County, supra, (withdrawal from 1 appeal); Behr, supra, (withdrawal from 6 felony cases). While the Second District Court of Appeal appears to have

reversed itself, conflict remains with the First, Third and Fourth District Courts of Appeal.

COLLIER COUNTY can cast this Order in dramatic terms. As Judge Hubbart stated, an entirely different question is presented here. The Order is in contravention of statute and contradicts the prior case law of this Court and other district courts of appeal.

(2) The Trial Courts Must Rule on Withdrawal of Public Defenders.

This is a unique case in that the Second District Court of Appeal asserted original jurisdiction in the matter. In all the previous district court of appeal opinions cited, motions to withdraw were heard at the trial court level. Schwarz, supra; Kiernan, supra; Dade County, supra; Behr, supra. In fact, the Second District Court of Appeal has previously and specifically ruled that motions to withdraw should be filed with the various circuit courts as they were better suited to rule on a case-by-case basis. Haggins, supra at **954.** The court cited the concurring opinion of Justice England in Escambia County, noting its applicability to trial and appellate representation. Id.

This Court further agreed with that procedure when it ruled in Escambia County, supra that the trial courts have the discretion to appoint private counsel. Such a procedure would also grant the counties due process as set forth in the concurring opinion of Justice England. **384** So.2d at **150-151.** Due process has been denied COLLIER COUNTY in the instant case so far. Once again, the Order herein is in express and direct conflict with the decisions of this Court and other district courts of appeal.

C. THIS IS PETITIONER'S ONLY OPPORTUNITY FOR APPEAL AS THE SECOND DISTRICT COURT OF APPEAL ACTED AS A COURT OF ORIGINAL JURISDICTION.

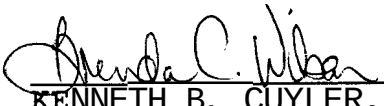
The Florida Rules of Appellate Procedure are generally structured to ensure all party litigants one appeal. In the instant case, the Second District Court of Appeal acted as a court of original jurisdiction in which COLLIER COUNTY was not accorded any due process. Should this Court deny jurisdiction, COLLIER COUNTY will be deprived the right of even one appeal.

This is a decision that significantly affects the duties of the Board of County Commissioners of COLLIER COUNTY as well as this county's taxpayers. COLLIER COUNTY must now be heard on appeal.

CONCLUSION

The Order of the Second District Court of Appeal materially affects COLLIER COUNTY and all the counties within the jurisdiction of the Second District Court of Appeal. This is a very important issue to all said counties. COLLIER COUNTY respectfully prays that this Court accept jurisdiction and hear this matter on the merits.

Respectfully submitted,



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