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IN THE SUPREME COURT OF FLORIDA
CASE NO. 74,574

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

PETITIONER PINELLAS COUNTY'S REPLY BRIEF

ON APPEAL FROM THE
SECOND DISTRICT COURT OF APPEAL

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STATEMENT OF THE CASE AND FACTS

Petitioner, PINELLAS COUNTY, a political subdivision of the State of Florida, adheres to the Statement of the Case and Facts contained in Petitioner's Initial Brief.

PINELLAS COUNTY, a political subdivision of the State of Florida, continues to be referred to as PINELLAS COUNTY. Respondent, J. MARION MOORMAN, the Public Defender of the Tenth Judicial Circuit, is referred to as PUBLIC DEFENDER. Amicus curiae, the Florida Public Defender Association, Inc., is referred to as FPDA.

In this appeal, PINELLAS COUNTY challenges the substance of and procedure utilized in issuing the Second District Court of Appeal's May 12, 1989 Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender. All parties have presented the issues on appeal differently. PINELLAS COUNTY again restates those issues to more directly respond to the PUBLIC DEFENDER'S arguments.

SUMMARY OF ARGUMENT

(1) Applicable statutes and the Florida Constitution set up a state-controlled and state-financed system for the appellate public defenders. Shifting that burden to the counties for an undetermined period of time is an artifice which is unlawful and unconstitutional.

(2) Denying the counties due process was in error. This Court has held that trial court evidentiary hearings must be held in situations such as these.

(3) PINELLAS COUNTY already contributes significantly to

the criminal court system. Shifting new burdens onto PINELLAS COUNTY is fundamentally unfair to the taxpayers of this county. This Court must consider alternative courses of action.

ARGUMENT

I. THE SUBSTANCE OF THE SECOND DISTRICT COURT OF APPEAL'S ORDER IS IN ERROR AND EXCEEDS THAT COURT'S AUTHORITY.

The effect of the Order is to shift the responsibility for funding all indigent criminal appeals for an undetermined period of time from the state to the counties. This is unauthorized and unprecedented.

One thing the parties herein, and other persons and organizations, all agree on is that the state is obligated to properly fund the appellate public defenders. See, eg., Brief for PUBLIC DEFENDER at **16**; Brief for FPDA at **27-28**; Report of the Judicial Counsel Special Committee on Criminal Appeal Structure Relating to Indigent Defendants (attached as Appendix Exhibit "E", Section 6 to PUBLIC DEFENDER'S Brief). The diverse entities, including public defenders, counties, chief judges, state attorneys, and the attorney general's office, previously filing responses to withdrawal motions before the Second District Court of Appeal also recognized this. **See** Appendix Exhibit "B", Sections 3 and 4, to PUBLIC DEFENDER'S Brief. That is not surprising because the statutes explicitly **so** provide. Section **27.51(6),** Florida Statutes **(1987)** states regarding the appellate public defenders:

> 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.

The appellate public defenders are part of a state-controlled and state-financed system. Dade County v. Baker, 362 So.2d 151, 159 (Fla. 3d DCA 1978) (Hubbart, J., dissenting), rev'd sub nom. Escambia County v. Behr, 384 So.2d 147 (Fla. 1980).

Article V of the current Florida Constitution, as adopted in 1972, was the foundation for this system. For instance, it eliminated self-funding local courts such as municipal courts. One of the promises of Article V was that new financial burdens would not be imposed on the counties and municipalities.

The PUBLIC DEFENDER ignores this statutory and constitutional scheme. The PUBLIC DEFENDER cites this Court's decision in Escambia County v. Behr, 384 So.2d 147 (Fla. 1980), and decisions from the First and Fourth District Courts of Appeal, for the proposition that county-paid private counsel can be appointed to represent indigent criminal appellants. The PUBLIC DEFENDER does acknowledge the more limited scale of those cases. Brief for PUBLIC DEFENDER at 8.

In Escambia this Court permitted public defender withdrawal from six non-capital felony cases at the trial level in one case and withdrawal from one appeal in another case. 384 So.2d at 147-150. In Kiernan v. State, 485 So.2d 460 (Fla. 1st DCA 1986). the first reported case after Escambia, the First District Court of Appeal approved withdrawal from eight appellate cases. Subsequently, in Crow v. State, 500 So.2d 171 (Fla. 1st DCA 1986), that court denied withdrawal from one appeal. The court held future motions to withdraw would be considered on a

case-by-case basis. Id. at 172. The Fourth District Court of Appeal, in Schwarz v. Cianca, 495 So.2d 1208 (Fla. 4th DCA 1986), allowed a trial public defender to withdraw from certain juvenile cases pending in circuit court. The court noted that at a hearing Martin County did not challenge the workload evidence presented by the public defender. In 1988 the First District Court of Appeal authorized the Second Circuit Public Defender to withdraw from up to 100 appeals. Grube v. State, 529 So.2d 789 (Fla. 1st DCA 1988). As before, motions were to be considered on a case-by-case basis. Id. at 790. Similarly, in 1989 the district court authorized withdrawal in up to 150 cases by the same public defender. Terry v. State, 547 So.2d 712 (Fla. 1st DCA 1989). These cases are not controlling here.

First, the statute relied on in Escambia was immediately changed by the Florida Legislature in 1981. See Ch. 81-273, Section 2, Laws of Fla. Section 27.53(2), Florida Statutes (1987) no longer references representation by private attorneys in non-capital cases. The applicable statutes now reflect the Florida Legislature's intention all along--that counties only pay for indigent representation in limited circumstances, conflict cases at the trial level and capital conflict cases on appeal. Section 27.53(3), Florida Statutes (1987); Section 925.035(2), Florida Statutes (1987). The PUBLIC DEFENDER does not respond to this argument. FPDA notes the statutory change but argues it has no effect. However, FPDA does not say why. Brief for FPDA at 27. Judges Schoonover and Parker discussed the statute change in their dissents and considered the issue unresolved. Furthermore,

this argument was not raised or ruled upon in Kiernan, Schwarz, Grube or Terry, supra.

Secondly, in all the above cited cases duly filed motions to withdraw were submitted. Here, the court sua sponte entered this extraordinary Order.

Thirdly, the scope of the Order is unprecedented. The PUBLIC DEFENDER points to Terry. The PUBLIC DEFENDER does not state the court only authorized the appellate public defender to seek to withdraw in up to **150** cases. Motions had to be considered on **a** case-by-case basis. That was not done here. The 150 cases in Terry, while certainly a large number, are at least finite. The **150** cases were also proportionately spread out over six circuits. See Grube, **529** So.2d at **790,** note 2. In the instant case, the number of cases is potentially infinite. Presumably the Order will be lifted when and if the PUBLIC DEFENDER catches up. When that will be is anybody's guess. Here the PUBLIC DEFENDER is relieved from all appeals filed after May **22, 1989.** Since the issuance of that Order, the Sixth Circuit Public Defender has sought to withdraw from some eighty appeals in Pinellas County alone. The number in the eleven-county area affected must be much higher. This Court in Escambia did not contemplate such an unlimited withdrawal from statutory duties. Judge Hubbart's dissenting opinion in Dade County, supra, adopted by this Court in Escambia, specifically held that an en masse withdrawal by an appellate public defender would present an entirely different question. 362 So.2d at 159. The PUBLIC DEFENDER also does not respond to this argument. The PUBLIC DEFENDER, however, does acknowledge that the withdrawal ordered herein is precisely that--massive. Brief for PUBLIC DEFENDER at **18.**

FPDA presents some other arguments. PINELLAS COUNTY agrees with FPDA that Section 27.53(3), Florida Statutes (1987) does not apply to appeals. Brief for FPDA at 7. The statute on its face refers to trial court representation and cannot be used to justify attorney appointment for appeals.

FPDA then argues that the appellate court, as it utilized Section 27.53(3)(b), unconstitutionally expanded the duties of the trial public defenders. Brief for FPDA at 4-11. Interestingly, FPDA does not consider expansion of the counties' funding duties pursuant to Section 27.53(3)(a) as unconstitutional. This position is hypocritical. Expansion as to both is unconstitutional. By statute neither have the appellate duties imposed by the Second District Court of Appeal.

Section 43.28, Florida Statutes (1987)[1] and In Interest of D.B., 385 So.2d 83 (Fla. 1980), are inapplicable. Surely the public defenders do not suggest this statute and case apply to the various district courts of appeal. Must PINELLAS COUNTY now provide courtrooms, typewriters, and bailiffs, as well as attorneys, to the Second District Court of Appeal in Lakeland?

FPDA also points to newly-enacted Section 925.037, Florida Statutes (1989) as "implied" evidence of legislative intent. However, with respect to private attorneys appointed because of inadequate public defender resources, the statute only appears to impose a reporting requirement. Sections 925.037(5)(a)-(b), Florida Statutes (1989). It is entirely unclear, and the statute

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[1] Section 43.28 provides: Court facilities-The counties shall provide appropriate courtrooms, facilities, equipment. and, unless provided by the state, personnel necessary to operate the circuit and county courts.

is silent, as to whether counties could even partially be reimbursed for those fees and costs. Rather, the intent appears to inform the Justice Administrative Commission about county expenditures in existing programs where certain counties have voluntarily decided to help public defenders.[2] See Brief for FPDA at 36 (describing arrangements in Dade and Hillsborough Counties); Brief for PUBLIC DEFENDER at 8 (describing Baker Program in Dade County). This is buttressed by the fact that in 1989 the Florida Legislature did not increase the money for county reimbursement. Two million dollars, the same amount provided for fiscal years 1986-87, 1987-88, and 1988-89, was provided. This alleged evidence of legislative intent is an illusion.

Finally, FPDA cites three prior orders of this Court as precedent. They are In re: Directive to the Public Defender of the Seventh Judicial Circuit, 6 FLW 324 (Fla. April 28, 1981); In re: Directive to the Public Defender ofthe Eleventh Judicial Circuit, 6 FLW 328 (Fla. April 28, 1981); and In re: Directive

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2 Sections 925.037(5)(a)-(b) first state that conflict attorney fees and costs shall be reimbursed on the basis of required expenditure statements. Subsequently, both sections state that separate reporting should be made on the same forms for fees and costs incurred as a result of stated lack of public defender resources. Normal statutory construction would indicate the latter are not reimbursable.

Even though Section 925.037 did not exist, the Florida Legislature allocated money for conflict attorney fees in the General Appropriations Act for those prior years. For fiscal year 1989-90, the amount allocated to the Sixth Judicial Circuit (Pinellas and Pasco Counties) was $172,200.00. Conference Committee Report on Senate Bill 1500, Conference Committee on Appropriations, June 2, 1989. For specific amounts received by PINELLAS COUNTY from 1986 through 1989 see Appendix.

to the Public Defender of the Fifteenth Judicial Circuit, 6 FLW 327 (Fla. April 28, 1981). This Court ordered three appellate public defenders to comply with briefing schedules in certain cases, withdraw as counsel in other cases, and not accept new capital appeals until they could assure timely compliance with applicable rules. Where withdrawal was mandated, jurisdiction was relinquished to the trial courts for appointment of private counsel.

Some distinguishing factors must be mentioned at the outset. All cases involved death penalty appeals. There is at least statutory authority for private county-paid attorneys to handle such appeals. Section 925.035(2), Florida Statutes (1987). Here there is no statutory authority. The appellate public defenders had to file motions to withdraw. Here no motions were filed and opportunity to be heard or object was specifically denied. The scope of the three directives was also more limited. All three appellate public defenders were directed to withdraw in only five cases. Withdrawal was denied in sixteen cases. PINELLAS COUNTY does not know how many future death penalty appeals were handled by private attorneys. However, by their very nature, death penalty appeals are limited in number.

More importantly are this Court's subsequent orders. FPDA mentions the rescission of the directive to the Fifteenth Circuit Public Defender but does not discuss this Court's rationale. In 1987 this Court vacated its previous directive and ordered the Fifteenth Circuit Public Defender to accept new capital appeals. In re: Directive to the Public Defender of the Fifteenth Judicial

Circuit No. 60,515 (Fla. April 28, 1987). The public defender asked this court to reconsider its ruling. That motion was denied. In re: Directive to the Public Defender of the Fifteenth Judicial Circuit No. 60,515 (Fla. Nov. 19, 1987). Because of the importance and relevance of the last order to this appeal, a copy is included in the Appendix to this brief. This Court stated that its original directive was entered as a temporary emergency measure. This Court recognized the difficulties facing the public defender but also held that relieving him of his appellate duties was contrary to statute. This Court stated:

> When a public defender is replaced by a privately appointed attorney, the effect is an additional tax on the counties and, in effect, indirectly forces the counties to contribute monies to the public defender's office. This is contrary to the legislature's intent of the state's funding indigent legal costs in all but conflict cases. It is the responsibility of the state to adequately fund the various public defenders and it is the responsibility of the public defenders to fulfill their statutory responsibilities.

Id. Justice Barkett dissented but also agreed counties should not bear the cost of additional special public defenders. Id.

Forcing the counties to fund indigent criminal appeals is an artifice. This Court squarely recognized that fact in the above order. Not only is such a stratagem contrary to statute and legislative intent, it is expressly prohibited by law. Section 27.54(2), Florida Statutes (1987). Perhaps under prior statutes and case law some limited intervention by the courts was justifiable. What the Second District Court of Appeal has done, however, is not limited. The Order in question massively

restructures indigent criminal appeals. The counties are expected to bear the cost of that restructuring. While it may be convenient to shift appellate responsibilities to the counties, this unwarranted intrusion is unlawful and unconstitutional.

11. THE PROCEDURE UTILIZED BY THE SECOND DISTRICT COURT OF APPEAL IS IN ERROR AND VIOLATES THE COUNTIES' RIGHT TO DUE PROCESS.

The public defenders affirm the counties are not entitled to due process. Brief for PUBLIC DEFENDER at 4; Brief for FPDA at 26. This is strange coming from a group that fights for the constitutional rights of all persons.

The PUBLIC DEFENDER cites Escambia and Terry, supra. This Court, however, appears to have receded from the majority opinion in Escambia and adopted the concurring opinion of Justice England. Justice England argued the counties are the only real parties in interest and should be able to challenge withdrawal motions in trial court proceedings. 384 So.2d at 150. Subsequently, in In re: Directive to the Public Defender of the Fifteenth Judicial Circuit No. 60,515 (Fla. Nov. 19, 1987). this Court held that alleged inability of public defenders to perform their work may be a factor for a trial judge's consideration in determining whether or not to permit withdrawal. Trial judges, on a case-by-case basis, would decide whether the inability was because of lack of funding, improper allocation of resources, or otherwise. Presumably the counties would be entitled to be heard at such evidentiary hearings. This Court also held it should not be involved by way of a blanket order. Id.

In addition, Escambia, if relied on alone, only applies in more limited circumstances and not the large-scale withdrawal contemplated here. Other decisions have also recognized the counties right to a hearing. Haggins V. State, 498 So.2d 953 (Fla. 2d DCA 1986); Schwarz, supra.

Secondly, the PUBLIC DEFENDER states due process was accorded as the counties were heard on two prior occasions. This is meaningless. Would a criminal defendant be denied a trial because he had previously been arrested and then proclaimed his innocence?

Thirdly, the PUBLIC DEFENDER argues the counties can participate in the trial court appointment of alternative appellate counsel. This too is meaningless. Such a hearing would only determine whether a trial public defender or private attorney would handle an appeal. The withdrawal in the first place of the appellate public defender would be moot.

The procedure utilized here is further contradicted by this Court's decision in Chief Judge of the Eighth Judicial Circuit V. Bradford County, 401 So. 2d 1330 (Fla. 1981). There the Bradford County Board of County Commissioners adopted a resolution to reassign courthouse space. The circuit's chief judge enjoined that action. The appellate court remanded for an evidentiary hearing. This Court held that conflicting governmental branches should attempt to resolve their differences in an amicable fashion. One branch should not act unilaterally. If that fails an evidentiary hearing must be held. Id. at 1332. Burdens of proof were also allocated between the branches of government. As

the county acted to acquire space, it had the burden to show necessity. If the court had initiated the dispute, it would have had the burden of proof. In any event, the holding is that an evidentiary hearing must be held before a court exercises its power of inherent authority. Id. This comports with Justice England's view in Escambia.

The PUBLIC DEFENDER'S explanation as to why motions to withdraw were not brought pursuant to Haggins, supra, is unconvincing. Brief for PUBLIC DEFENDER at 13-14. The PUBLIC DEFENDER suggests trial court hearings are impractical and overly burdensome. First, this Court has mandated such a procedure. In re: Directive to the Public Defender of the Fifteenth Judicial Circuit No. 60,515 (Fla. Nov. 19, 1987); Chief Judge, supra. Secondly, hearings do not have to be burdensome. While motions to withdraw would be filed in each case, only one consolidated hearing need be held. Circuit judges would probably insist on this. By stipulation, hearings in one county could even be dispositive in another county. While some inconsistency could result, that is why there are appellate courts. PINELLAS COUNTY does not want to harass the PUBLIC DEFENDER in hundreds of hearings. PINELLAS COUNTY wants to know the facts. How many appeals are late? What briefs are given priority by the PUBLIC DEFENDER'S office? Is the PUBLIC DEFENDER'S office mismanaged? Are proportionately more resources allocated to the PUBLIC DEFENDER'S trial work than other appellate public defenders? FPDA states there are no factual disputes here. Brief of FPDA at 27. That is not true. These are questions PINELLAS COUNTY wants to ask and has been denied the opportunity so far.

The Second District Court of Appeal has a novel solution for court overload. That is to eliminate trial courts and have appellate courts choose and take judicial notice of facts to be considered, weigh the credibility of this evidence, and render an opinion. This is not due process. Nor is it justice. The counties are entitled to a trial court evidentiary hearing. This is the minimum to be expected if the counties are forced to fund an appellate responsibility that is not theirs in the first place.

111. THIS COURT SHOULD CONSIDER ALTERNATIVE COURSES OF ACTION.

All parties and this Court agree the state is required to fund criminal indigent appeals. Everybody also knows this Order will impose that burden on the counties. No one is fooled by the option given trial courts to appoint trial public defenders or private attorneys. This apparently is done to promote the artifice that Section 27.53(3), Florida Statutes **(1987)** applies to appeals. Trial public defenders have never been appointed to do appellate work to PINELLAS COUNTY'S knowledge. If the Order is allowed to stand, PINELLAS COUNTY'S current expenditures on private attorneys in criminal cases will probably double.

The Order ignores the significant contribution already made by PINELLAS COUNTY for conflict attorney fees and costs at the trial level. The projected figure for the next fiscal year, 1990-91, exceeds one million dollars. Possible appellate costs as a result of this Order are not included. Reimbursement from the state has been small, never exceeding **$176,163.00.** See Appendix.

The overall contribution by PINELLAS COUNTY to the trial

court system as a whole is enormous. PINELLAS COUNTY will spend in excess of twenty million dollars this fiscal year. Much of this by necessity comes from ad valorem taxes. PINELLAS COUNTY is also building a new criminal courthouse at a projected cost of fifty million dollars.

The Order also ignores that criminal indigent appeals from this county were basically current up to the time of the Order. The PUBLIC DEFENDER has two appellate lawyers stationed in Pinellas County. Although the two lawyers are employees of the PUBLIC DEFENDER, they work out of the Sixth Circuit Public Defender's offices and handle all appeals out of Pinellas County. These two appellate lawyers were current up until the May 19, 1989 Order. Now apparently they must handle appeals from other counties as well. Some accommodation must be made for this fact as well.

The above all illustrates the Order's unfairness to the taxpayers of Pinellas County. Forcing the counties to fund criminal indigent appeals rests on a doctrine of impossibility. There is no legal basis. The courts have simply found no other way to resolve the problem. Other solutions must be found. PINELLAS COUNTY cannot provide a detailed or all-inclusive list but simply offers some possibilities for this Court's consideration.

First, and most appropriately, the state must be forced to honor its obligations. The state allowed the situation to deteriorate to where it is now and must remedy the problem. This Court has broad powers pursuant to its extraordinary writs and contempt powers.

Secondly, this Court could dismiss criminal cases, dismiss cases pending retrial, or release certain prisoners pending completion of their appeals. This would force the state to take notice. See Brief for PUBLIC DEFENDER at 16-17. The PUBLIC DEFENDER calls these options drastic. PINELLAS COUNTY responds that forcing the counties to pay additional millions of dollars is drastic.

Thirdly, is to develop a voluntary pro bono program. See Brief for State of Florida at 9-11.

Fourthly, failing this, is a mandatory pro bono program. There must be thousands of former state attorneys and public defenders now in successful private practice. Many of these owe their current success to their previous experience. If these and other qualified lawyers took just one appeal the backlog could be quickly eliminated. The Florida Bar could conduct training seminars for other attorneys.

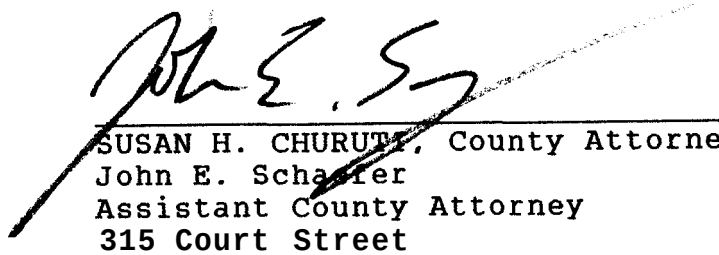
Finally, an appropriate legislative response must be forthcoming. Either the existing appellate public defenders must be appropriately funded or, as suggested by the State of Florida, an overload public defender could be created. See Brief for State of Florida at 8.

Probably the least cost-effective course of action is that dictated by the Second District Court of Appeal. That waste must not be imposed on the taxpayers of Pinellas County.

CONCLUSION

The May 12, 1989 Order of the Second District Court of Appeal must be quashed. Alternatively, this matter should be remanded to the trial courts for evidentiary hearings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to J. MARION MOORMAN, Public Defender, Tenth Judicial Circuit, Polk County Courthouse, P.O. Box 9000, Drawer PD, Bartow, FL 33830; H. HAMILTON RICE, JR., County Attorney, Manatee County, P.O. Box 1000, Bradenton, FL 34206; CHARLES H. WEBB, Assistant County Attorney, Charlotte County, 18500 Murdock Circle, Port Charlotte, FL 33948-1094; FREDERICK B. KARL, County Attorney, Hillsborough County, P.O. Box 1110, Tampa, FL 33601; JAMES G. YAEGER, County Attorney, Lee County, P.O. Box 398, Fort Myers, FL 33902; KENNETH B. CUYLER, County Attorney, Collier County, 3301 East Tamiami Trail, Naples, FL 33962; BENNETT H. BRUMMER, ESQ., Florida Public Defender Association, Inc., 800 Metro Justice Building, 1351 N.W. 12th Street, Miami, FL 33125; WILL J. RICHARDSON, ESQ., Florida Association of Counties, Inc., 217 S. Adams Street, Tallahassee, FL 32301; and RICHARD E. DORAN, ESQ., Director, Criminal Appeals, Department of Legal Affairs, The Capitol, Tallahassee, FL 32399-1050, this 23rd day of March, 1990.

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