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IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. CASE NO. 81,372

GABRIEL ULL,

Respondent.

_________________________/

ON PETITION FOR DISCRETIONARY REVIEW

AMICUS CURIAE BRIEF OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

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AMICUS CURIAE BRIEF OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION

I PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecutor in the Traffic Division of the County Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent, Gabriel Ull, was the defendant in the trial court. Petitioner will be referred to in this brief as State, and Respondent will be referred to by name or as Defendant.

Undersigned counsel submits this Amicus Curiae Brief on behalf of the Florida Public Defender Association, which will be referred to as FPDA.

Record references will be as denoted in Petitioner's brief.

II STATEMENT OF THE CASE AND FACTS

The FPDA accepts and adopts both Petitioner's and Respondent's Statements of the Case and Facts.

III SUMMARY OF THE ARGUMENT

The trial court erred in discharging the Public Defender from the Defendant's case prior to his trial. No statute or rule authorizes a discharge of the Public Defender once a valid initial appointment is made. In this case, it was only after a six-week period in which the Public Defender competently set about the business of representing the Defendant and requested trial that the State waived a jail sentence and the trial court summarily revoked counsel from the indigent defendant. The State is constitutionally obliged to respect the professional independence of its Public Defenders, and no provision of law allows a trial court to interfere into the attorney-client relationship once it is so firmly established. Furthermore, because any criminal conviction carries the possibility of numerous collateral consequences in addition to incarceration, doubts as to the appointment of counsel should be resolved in favor of the indigent Defendant, particularly where substantial public resources have already been expended on behalf of the Defendant.

Upholding the trial court's discharge of the Public Defender under the circumstances of this case would chill the zealous representation by counsel required by the Sixth Amendment, and accordingly, this Court should remand this case to the trial court with directions to vacate the order discharging the Public Defender and reset the case for trial.

IV ARGUMENT

THE TRIAL COURT'S ACT OF DISCHARGING THE PUBLIC DEFENDER FROM THE INDIGENT DEFENDANT'S CASE AFTER HE REQUESTED A TRIAL WAS NOT ONLY CONTRARY TO STATUTE AND RULE; IT WAS UNACCEPTABLE AS A MATTER OF PUBLIC POLICY (RESTATED).

A. The Trial Court Lawfully Appointed The Public Defender To Represent The Defendant At Every Stage Of The Proceedings.

As noted in Petitioner's and Respondent's Briefs, the County Court of Dade County appointed the Public Defender to represent Mr. Ull at the time of his arraignment on August 14, 1992 (R-22). Part of the trial court's reasoning for subsequently discharging the Public Defender, however, was a statement that the Public Defender had been appointed at a jail arraignment "as a matter of course which is done on all cases for the purpose of that hearing and that hearing only." (R-23-33-34). FPDA submits that this statement is without basis in law or fact.

Certainly, the record contains nothing showing that the initial appointment of the Public Defender was limited in any way. There is no order appointing the Public Defender "for arraignment only" or suggesting that the appointment would not apply to all stages of the proceedings. Moreover, Section 27.51(1) requires the Public Defender to represent any indigent person charged with the offenses specified in 27.51(1)(a), (b), (c), or (d) and does not contain any limitations on that representation. In addition, subsection (2) of Section 27.51

absolutely prohibits the court from appointing the Public Defender to represent any person who is not indigent.

Federal Title 18, Section 3006A (c) is perhaps a bit clearer on the duration of representation contemplated when counsel is appointed for an indigent; it states:

> (c) Duration and substitution of appointments. - A person for whom counsel is appointed shall be represented at every stage of the proceedings from his initial appearance before the United States Magistrate or the court through appeal, including ancillary matters appropriate to the proceeding. If at any time after the appointment of counsel the United States Magistrate or the court finds that the person is financially able to obtain counsel or to make partial payment for the representation, it may terminate the appointment of counsel or authorize payment as provided in subsection (f), as the interests of justice may dictate . . .

Florida Statute provides that if a trial court finds within one year after the determination of indigency that any accused was erroneously or improperly determined to be indigent, the State Attorney may proceed against that person for the reasonable value of the services rendered and costs. Section 27.52(3), Florida Statutes (1991). In addition, Section 27.56 allows the imposition of a public defender lien against any defendant found to be guilty who has received the assistance of the Public Defender's Office. Clearly the whole Florida statutory scheme contemplates that once appointed, the Public Defender will continue to represent an accused defendant through every stage of the proceedings and if it is later

determined that the person was not indigent, efforts will be made to collect reasonable the value of the services rendered.

In Porteous v. State, 582 So. 2d 130 (Fla. 2d DCA 1991), the court held that just as proper procedures must be followed to appoint counsel for an indigent, termination of that appointment must also follow proper procedures. In Porteous, supra, the trial court had apparently considered the initial order of appointment of the Public Defender to be conditioned upon the Defendant's subsequent filing of an order concerning his Canadian assets. The Second District Court of Appeal rejected this conditional appointment, stating:

> However, the order of appointment did not reflect that condition, and the trial court does not appear to have given defendant an opportunity to be heard before terminating the appointment of the Public Defender. Id. at 131.

Similarly here, the initial order of appointment did not reflect any limitations or conditions, and there was no statutory or rule authority for subsequently terminating the appointment of the Public Defender.

B. The Trial Court's Abrupt Termination Of Counsel Came Only After Six Weeks Of Apparently Competent And Zealous Representation, And A Request For A Trial Date.

The record shows clearly in this case that Mr. Ull lost the services of his Public Defender only after the case came up for trial and the Public Defender requested a continued trial date (R-32). The Public Defender on Mr. Ull's behalf had

previously demanded discovery and provided a defense witness list, so it was apparent that the case was indeed headed for a trial. It was only at this point that the trial court began his inquiry as to why the Public Defender was appointed on the case and the prosecutor moved to discharge the Public Defender. Rhetorically, FPDA would ask how likely it is that the trial court would have inquired about the justification for the Public Defender if the Public Defender had merely set the case for a plea. The very sequence of events shown in the record here demonstrates the abuse which is possible if the trial courts are given unlimited discretion to terminate the representation of the Public Defender at any stage prior to and including the eve of trial. Clearly the Public Defender's preparation for and request for trial prompted the questioning which led to his abrupt discharge. Affirming this procedure would have the effect of chilling the zealous representation which is the defendant's right and the lawyer's ethical obligation. No statute, rule or policy argument justifies the interference into an ongoing attorney-client relationship under these facts.

The law is clear that once counsel is appointed to represent an indigent defendant, the parties enter into an attorney-client relationship which is no less inviolable than if counsel had been retained by the defendant. See Change of Appointed Counsel Over Objection, 3 ALR 4th 1227 and cases collected therein. Dismissal of counsel by the trial court after preparation of the case has in some cases been found to

render the assistance of subsequently-appointed counsel constitutionally defective. See e.g. McKinnon v. State, 526 P.2d 18 (Alaska, 1974), overruled on other grounds, 535 P.2d 464 (1975). Trial courts do not have the inherent power to remove retained or appointed counsel over the objection of the accused and counsel. In Welfare of M.R.S., 400 N.W. 2d 147 (Minn. Ct. App. 1987), for example, the court held that the trial court had abused its discretion by summarily dismissing counsel in a juvenile case following counsel's request for removal of the trial judge from the case. The basis of the holding was that since an inviolate attorney-client relationship had been created, the court's arbitrary action could only have a chilling effect on conscientious advocacy. Similarly in Stearnes v. Clinton, 780 S.W. 2d 216 (Texas Ct. of Crim. App. 1989) the court held that removal of appointed counsel was a misuse of judicial power and the power of trial court to appoint counsel for indigent defendants did not carry with it a concomitant power to remove counsel at the court's discretionary whim.

These cases illustrate the well-established precedent prohibiting the summary discharge of counsel once an attorney-client relationship has been established. See also cases cited in M.R.S., supra, and Stearnes, supra.

C. Any doubts as to the indigent defendant's right to representation should be resolved in favor of the defendant since criminal convictions carry significant collateral consequences even beyond the threat of incarceration.

Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) and its progeny amply express the value of

the right to counsel to indigent defendants. As stated in Penson v. Ohio, 488 U.S. 75, 102 L.Ed.2d 300, 109 S.Ct. 346 (1988):

> It bears emphasis that the right to be represented by counsel is among the most fundamental of rights. We have long recognized that "lawyers in criminal courts are necessities, not luxuries." Gideon v. Wainwright, (cite omitted). As a general matter, it is through counsel that all other rights of the accused are protected: "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have. (cites omitted). The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth - as well as fairness - is "best discovered by powerful statements on both sides of the question." (cites omitted). Absent representation, however, it is unlikely that a criminal defendant will be able adequately to test the government's case, for, as Justice Sutherland wrote in Powell v. Alabama, 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527 (1932), "even the intelligent and educated layman has small and sometimes no skill in the science of law." Id. at 69, 77 L.Ed. 158, 53 S.Ct. 55, 84 ALR 527, 488 U.S. at 84.

It is for this reason that doubts should always be resolved in favor of the indigent petitioner when a question of the need for counsel is presented. See e.g. Hooks v. State, 253 So. 2d 424, 426 (Fla. 1971).

A DUI conviction is an increasingly serious sanction. Even if a defendant charged with DUI is not in jeopardy of incarceration for a first time offense, there are mandatory jail sentences for subsequent DUI offenses (see Section

316.193, Florida Statutes (1991)), the possibility of a violation of probation proceedings and sentences, sentencing guideline enhancements, and employment limitations. The possibility of such consequences must be thoroughly discussed with a defendant who is trying to make a decision about whether to plead or go to trial. The sudden and unexpected termination of counsel, however, leaves a bewildered defendant who is most likely to "throw in the towel" and plead guilty or no contest rather than attempting to go to trial without counsel. The likeliness of a plea under these circumstances cannot be far from the mind of a prosecutor who, faced with a zealous public defender who is ready for trial, can request an order of no imprisonment in an effort to "get a plea" out of the case. Such an inequitable event is clearly not contemplated by the statute or the rule, and should not be sanctioned by this Court.

D. The Third District Court Of Appeal's Opinion Reversing The Trial Court's Termination Of The Public Defender Will Not Seriously Hamper The Day To Day Operation Of The County Court Justice System Statewide.

The State in its motion for certification (at page 2) alleged that the Third District Court of Appeal's opinion in this cause will "seriously affect the day to day operation of the county court justice system." The FPDA suggests that a reversal of the Third District Court's opinion would have a far more detrimental and chilling effect on the justice system. As noted, the Second Judicial Circuit has been operating under a

circuit court opinion - Allen v. McClamma, Case No. 87-65(1) (Fla. 2d Cir. Nov. 1, 1988) - which contained a holding identical to that of the Third District Court of Appeal in this case. Since that decision was issued in 1988, the Second Circuit's county court system has not been seriously hampered, and as far as undersigned counsel is aware, no efforts have been made to raise the question again or approach the legislature for a change in the statute.

As indicated previously, the Third District Court of Appeal's opinion only requires that the decision whether to seek incarceration be made at the time of appointment. Ordinarily this is a routine matter of looking over the probable cause affidavit in the case and checking the defendant's prior record, which can easily be done at arraignment. In contrast, allowing the ONI decision to be postponed until well after the attorney-client relationship has been established and resources expended in the representation is a burden which the justice system should not bear. Such a procedure does not save significant taxpayer money but it does cause untoward disruptions in well established legal representation.

Accordingly, FPDA requests this Court to affirm the Third District Court of Appeal's decision in this cause, answer certified question 1 in the negative and answer certified question 2 by stating that under the statute and the rule, an order of no imprisonment must be made at the time of the appointment of counsel.

V CONCLUSION

For the reasons stated, FPDA respectfully requests this Court to remand this case to the trial court with directions to vacate the order discharging the Public Defender and reset the case for a trial at which the Public Defender will represent Mr. Ull.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Angelica D. Zayas, Assistant Attorney General, Department of Legal Affairs, 401 N.W. 2nd Avenue, Suite N921, Post Office Box 013241, Miami, Florida, 33101, and to Elliot H. Scherker, Esquire, Greenberg, Traurig, Hoffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida, 33131, by U.S. Mail, this 2 day of June, 1993.

Nancy A. Daniels
NANCY A. DANIELS