IN THE SUPREME COURT OF FLORIDA

Case No. 81,372

THE STATE OF FLORIDA,

Petitioner,

vs.

GABRIEL ULL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF RESPONDENT

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Introduction

The certified questions in this case ask, in essence, whether a trial court may deprive an indigent citizen charged with a misdemeanor of duly-appointed defense counsel when the prosecution chooses, well into the proceedings, to announce its lack of desire to seek a term of imprisonment upon conviction. Gabriel Ull, the defendant in a county court misdemeanor prosecution, secured a ruling from the Third District Court of Appeal that the county judge was not empowered to remove the Public Defender as his counsel after approximately six weeks of unchallenged representation upon the prosecutor's statement that he would not seek a jail sentence if Ull were to be convicted. None of the countervailing considerations put forth by the state outweigh the fundamental interest in providing indigents with the same expecta-

tion of sanctity and trust in their relationship with appointed counsel as is guaranteed to those with the wherewithal to retain private counsel.

Statement of the Case and Facts

Ull accepts the statement of the case and facts set forth in petitioner's brief as an accurate recitation of the history of the case, with the following additions:

(1) The County Court appointed the Dade County Public Defender to represent Ull at the time of his arraignment on August 14, 1992 (R. 22). A plea of not guilty was entered and trial was set for September 23, 1992 (R. 22). The Public Defender, on Ull's behalf, demanded discovery under Rule 3.220 of the Florida Rules of Criminal Procedure and the state provided discovery on September 18, 1992 (R. 22, 23-26). A defense witness list was filed on September 22, 1992 (R. 28).[1/]

(2) When defense counsel requested a continuance of the trial, the court responded by asking whether there was "[a]ny reason why the public defender is appointed on this [case]" (R. 32), and the following exchange ensued:

> Mr. Silva [assistant state attorney]: I don't see why, Your Honor.
>
> As a matter of fact, [the] State would move to discharge the public defender's office since the State is not seeking jail in this case. It is [the] first time up [for trial].
>
> Mr. Lenamon [defense counsel]: On that basis, Judge, I would like to stay on. It is a low breath reading and my client informed me of some exceptional circumstances leading to the arrest.
>
> Mr. Silva: I would like to know . . . what exceptional circumstances would require the services of the public defen-

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[1/] The defense witness list set forth the names of five potential witnesses; included among them are at least three apparent experts (R. 28).

der's office in a first DUI where the State is not seeking jail?

We have a .109, .111 reading with a video in this particular case.

Mr. Lenamon: That's correct, Judge, and it is confidential information at this point, client privileged information.

I ask to stay in the case, Judge.

(R. 32).

(3) The court ordered that the Public Defender would be discharged, upon a ruling that the county judge who had entered the initial appointment "had no authority to appoint you." (R. 33). Defense counsel sought and was granted an opportunity to question Ull on the record, and Ull voiced his desire to have the public defender remain as his counsel, as well as re-affirming his indigent status (R. 34).[2/] Counsel then renewed his request to remain as Ull's counsel, and the court responded by asking the prosecutor whether the state was "seeking jail" (R. 34). The prosecutor stated that he was not and urged the court to discharge the Public Defender:

2/ The colloquy was as follows:

Mr. Lenamon: Mr. Ull, have I talked to you about your case?

The Defendant: Yes.

Mr. Lenamon: Do you request that I stay on your case as your attorney?

The Defendant: Yes.

Mr. Lenamon: Can you afford an attorney?

The Defendant: No, sir.

(R. 34).

> [T]he services of the public defender are not available in this case. The people of the State of Florida should not have to pay for this attorney's services where the State is not seeking jail and it is not authorized by case law or statutory authority.

(R. 34).

(4) The Third District found that the county court had "purported to discharge or 'dis-appoint' the public defender, and, although the office had conducted discovery and was otherwise fully prepared and desired to continue the representation, precluded it from doing so." *Ull v. State*, 613 So. 2d 928, 929 (Fla. 3d DCA 1983). Granting the petition for writ of certiorari, the court held as follows:

> After the public defender had undertaken to represent the defendant under an appropriate order, the trial court lacked authority -- certainly at that stage of the proceedings -- to revoke the appointment and leave the defendant without counsel to defend him. The fact than an *initial* appointment of the public defender may not have been permissible under the facts as they only later developed makes no difference.

Id. at 929 (citations omitted).

Question Presented

The two certified questions present one fundamental issue for this Court's review: whether the Public Defender, having been appointed to represent an indigent charged with a misdemeanor, may be discharged as counsel prior to trial upon a certification by the prosecution or trial judge that imprisonment will not be imposed as a sanction upon conviction.

Summary of Argument

The Dade County Public Defender had been serving as Ull's counsel pursuant to an appointment by the County Court in a prosecution for driving under the influence. Upon the

case having been called for trial for the first time, the County Judge summarily discharged the Public Defender as counsel, leaving the indigent defendant to proceed *pro se* over his and counsel's objections, once the prosecutor declared that the state would not seek a jail sentence upon conviction and sought the Public Defender's dismissal.

Rule 3.111 of the Florida Rules of Criminal Procedure and Section 27.51, Florida Statutes (1991), do not provide for the "de-appointment" of the public defender. Those provisions plainly contemplate that the courts will make a determination whether an accused misdemeanant is entitled to counsel at the time that the decision whether to provide counsel is made, and that, once an accused is afforded representation by the public defender, that appointment continues throughout the course of the prosecution. Strong constitutional and policy concerns also mandate this interpretation of the statute: the violence to the attorney-client relationship and the prospect for abuse preponderate in favor of preventing interference with the public defender's representation of an indigent charged with a misdemeanor.

Argument

The public defender may not be discharged as counsel for an indigent charged with a misdemeanor prior to trial upon a certification by the prosecution or trial judge that a jail sentence will not be imposed upon conviction.

The state's position is that "the power to appoint counsel to represent indigent defendants pursuant to Rule 3.111 of the Florida Rules of Criminal Procedure and Section 27.51 of the Florida Statutes inherently carries with it the power to review a defendant's entitlement to counsel at taxpayer's expense" upon a certification that jail time will not be imposed. Brief of Petitioner at 14. Although recognizing the fundamental canons of statutory construction which require in the first instance that statutes and rules be construed in light of the language

used therein, *ibid*, the state nonetheless sees in the pertinent statutes and rules a "de-appointment power." That view cannot be sustained.

Section 27.51, Florida Statutes (1991), provides that "[t]he public defender shall represent . . . any person who is determined by the court to be indigent . . . and who is * * * [u]nder arrest for, or is charged with, a misdemeanor . . . unless the court, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned if he is convicted . . . ." § 27.51(1)(b), Fla. Stat. (1991). Rule 3.111 of the Florida Rules of Criminal Procedure provides:

> Counsel shall be provided to indigent persons in all prosecutions for offenses punishable by imprisonment . . . . Counsel does not have to be provided to an indigent person in a prosecution for a misdemeanor . . . if the judge, prior to trial, files in the cause a statement in writing that the defendant will not be imprisoned in the event he is convicted.

Fla. R. Crim. P. 3.111(b)(1).

Rule 3.111 and Section 27.53(1) serve to implement *Argersinger v. Hamlin*, 407 U.S. 25 (1972), in Florida by codifying a procedure which embodies the "predictive evaluation" process, *Argersinger*, 407 U.S. at 42 (Burger, C.J., concurring), contemplated by the Supreme Court:

> Under the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though the local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense and therefore know when to name a lawyer to represent the accused before the trial starts.

Id. at 40. What is tacit in this scenario, *i.e.*, that the predictive evaluation should *precede* the decision whether counsel is to be appointed, is made express in the Florida *Argersinger* scheme.

Rule 3.111(a) of the Florida Rules of Criminal Procedure, entitled "When Counsel Provided," promulgates the mandatory procedure for providing counsel:

> A person entitled to appointment of counsel as provided herein shall have counsel appointed when he is formally charged with an offense, or as soon as feasible after custodial restraint or upon his first appearance before a committing magistrate, whichever occurs earliest.

Ibid. When the foregoing is read together with Rule 3.111(b), the intention of this Court in promulgating the rule is plain: the decision whether the case merits a jail sentence upon conviction is to be made at the time that the court is required to appoint counsel.[3/] Here, for example, that decision presumptively was made at the time of arraignment, when counsel was appointed, in compliance with Rule 3.111(a).[4/]

[3/] *See, e.g., Taylor v. Carlisle*, 566 So. 2d 576, 576-77 (Fla. 4th DCA 1990) (public defender properly represented accused misdemeanant not sentenced to jail upon conviction where trial judge did not file pretrial order precluding incarceration; upon public defender's withdrawal on appeal from conviction, defendant entitled to appointment of private counsel); *Miller v. State*, 25 Fla.Supp.2d 113, 114 (Fla. 2d Cir. 1987) (defendant properly not afforded counsel where, "[a]t his arraignment, the trial court . . . entered an 'Order of No Imprisonment'" and did not impose imprisonment upon conviction).

[4/] The trial judge's cynical view that the appointment was a *pro forma* ruling, made in every case at jail arraignment proceedings (R. 33), runs directly counter to the governing statutory provision: "[t]he court *may not appoint the public defender to represent, even on a temporary basis, any person who is not indigent.*" § 27.53(2), Fla. Stat. (1991) (emphasis supplied). Unless it is assumed that the Dade County courts routinely are violating this clear statutory command, it must be inferred from the fact that the Public Defender was appointed to represent Ull that the commands of Rule 3.111(b)(1) and Section 27.51(1)(b) were followed at the time that the decision was made to provide Ull with appointed counsel. *Cf.,, Porteous v. State*, 582 So. 2d 130, 131 (Fla. 2d DCA 1991) (trial judge declared defendant "partially insolvent" because "defendant's assets were frozen in Canada in connection with a pending divorce suit" and appointed public defender; subsequent discharge of counsel in belief that appointment had been conditioned upon filing of order showing state of defendant's assets, without inquiry into indigence, held improper because court failed to give defendant "an opportunity to be heard before terminating the appointment"). (continued...)

Conspicuously absent from Rule 3.111 and Section 27.51 is any provision authorizing a trial judge to revisit the determination that counsel should be appointed to represent an indigent defendant in a misdemeanor prosecution, *i.e.*, there is no mention in either statute or rule of a procedure for "de-appointing" the public defender. This omission is dispositive in a proper construction of the statute and rule.

It is a rudimentary precept of statutory interpretation that, where "the language of a statute is clear and unambiguous the language should be given effect without resort to extrinsic guides to construction." *Lamont v. State*, 610 So. 2d 435, 437 (Fla. 1992).[5] As this Court emphatically has stated,

> Even where a court is convinced that the Legislature really meant and intended something not expressed in the phraseology of the act, it will not deem itself authorized to depart from the plain meaning of the language which is free from ambiguity.

Forsythe v. Longboat Key Beach Erosion, 604 F.2d 452, 454 (Fla. 1992) (quoting *Van Pelt v. Hilliard*, 75 Fla. 792, 78 So. 693, 694 (1918)). A court's power of statutory construction may not be invoked "where . . . there is no statutory language to support judicial restructuring." *Brown v. State*, 358 So. 2d 16, 19 (Fla. 1978).

On the face of the enactments, the intent of the legislature and the Court is plain: to require the courts to make a determination whether an accused misdemeanant is entitled

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[4](...continued)

Thus, the state's belatedly-made argument in the appellate proceedings that Ull might perhaps not be indigent (because, apparently, the state believes that an accused's protestations of indigency are inherently incredible), Brief of Petitioner at 11, must be rejected out of hand.

[5] The rules which govern the construction of legislative enactments are fully applicable to the interpretation of court rules. *See Flowers v. State*, 586 So. 2d 1058, 1059 (Fla. 1991).

to counsel at the time that the decision whether to provide counsel is made, and, once an accused is afforded representation by the public defender, that appointment continues throughout the course of the prosecution.[6/] Had the intention been to allow a post-appointment determination that the provision of counsel was inappropriate, Rule 3.111 would have been written very differently, and Section 27.51 would include a "de-appointment" procedure. The courts have "no authority to change the plain meaning of a statute where the legislature has unambiguously expressed its intent." *State v. Barnes*, 595 So. 2d 22, 24 (Fla. 1992) (citations omitted).

These rudimentary canons of statutory construction convinced the Circuit Court of the Second Judicial Circuit to quash a similar "de-appointment" order in *Allen v. McClamma*,

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[6/] Of course, extrinsic factors, *i.e.*, considerations other than those taken into account in the decision whether to appoint counsel, may warrant the appointment of new counsel during the course of a criminal prosecution. *E.g., Bowden v. State*, 588 So. 2d 225, 229 (Fla. 1991) (court must make inquiry into circumstances when defendant seeks to discharge appointed counsel); *Babb v. Edwards*, 412 So. 2d 859, 860 (Fla. 1982) (public defender's post-appointment determination that interests of jointly-represented codefendants are adverse requires appointment of other counsel); *Johnson v. State*, 600 So. 2d 32, 33 (Fla. 3d DCA 1992) (same); *Freeman v. State*, 503 So. 2d 997, 998 (Fla. 3d DCA 1987) (state may secure disqualification of defense counsel for conflict of interest unless defendant waives conflict); *Perez v. State*, 474 So. 2d 398, 400 (Fla. 3d DCA 1985) (defense counsel may be compelled to withdraw when properly called as a prosecution witness). A trial court's inherent power to protect the defendant's Sixth Amendment rights and the integrity of the judicial system when confronted with such situations is beyond question. The narrow issue presented here is whether a court may revoke its initial determination that a defendant is entitled to the assistance of appointed counsel based *solely* upon a reconsideration of the *same* factors which were taken into account at the time that counsel was appointed.

No. 87-651 (Fla. 2d Cir. Nov. 1, 1988), one of the decisions relied upon by the Third District.[7] In one of the two cases consolidated for review in *Allen*, the defendant Reynolds was charged with gambling, a second-degree misdemeanor, and the public defender was appointed to represent him at the time of arraignment. *Allen v. McClamma* at 2. The public defender took discovery in the case and prepared a pretrial motion. *Ibid.* Three days before trial, the county court judge entered an order certifying that no imprisonment would be imposed upon conviction and discharging the public defender. *Ibid.* The public defender's request at the time of trial to be re-appointed as Reynold's counsel was denied. *Ibid.* Quashing this order, the Circuit Court held as follows:

> [T]he issue in *State v. Reynolds* is whether the court improperly discharged a lawfully appointed public defender on the eve of trial through issuing an ONI. Sec. 27.51 addresses only the appointment of a public defender. It does not give the appointing court authority to remove a public defender once lawfully appointed. Therefore, it appears that the County Court acted without authority when it removed the Public Defender under the facts of this case . . . .

Id. at 5-6.

The second decision relied upon by the Third District is *Roswall v. Municipal Court of Northern Solano District*, 89 Cal.App.3d 467, 152 Cal.Rptr. 337 (1979). In *Roswall*, the two defendants were appointed the public defender at the time of their arraignment on DUI

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[7] The Circuit Court's decision in *Allen v. McClamma* was rendered on remand from this Court. *Allen v. McClamma*, 500 So. 2d 146 (Fla. 1987). The public defender originally had sought review of the discharge order in *Allen* by a petition for mandamus in the Supreme Court; that court remanded, ruling that certiorari in the circuit court is proper remedy to redress a discharge of the public defender in a misdemeanor prosecution. *Id.* at 147. The Circuit Court's *Allen v. McClamma* decision is not published in Florida Supplement; a copy of the decision was included in the appendix supplied to the district court (R. 36-42).

charges. 152 Cal.Rptr. at 338. At a subsequent pretrial hearing, the court inquired whether they had secured employment since the time that counsel was appointed, and, upon learning that they were each then earning $450 per month, discharged the public defender. *Id.* at 338-39. In California, as in Florida, the determination of indigence is ultimately the responsibility of the appointing court. *Id.* at 339 (citing statute). Thus, the question before the court was whether a trial judge, "having once made a determination of eligibility and sanctioned the formation of the attorney-client relationship, may reopen the inquiry at a later proceeding and relieve the public defender should it find that the defendant is in fact able to employ private counsel." *Id.* at 339-40.

The court recognized the inherent power of trial judges to remove counsel in appropriate situations, *id.* at 340, see n.6, *supra*, but also that discharging an indigent's appointed counsel stands on a different footing:

> "[O]nce 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. To hold otherwise would be to subject that relationship to an unwarranted and invidious discrimination arising merely from the poverty of the accused."
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> * * *
>
> The dangers inherent in permitting the trial court to make such a redetermination are numerous: (a) It allows for arbitrary judicial interference with the attorney-client relationship on grounds unrelated to a genuine concern with the defendant's financial eligibility. (b) The threat of such removal power could be used to penalize a defendant's rights to counsel, to speedy trial and to trial by jury . . . . (c) It will subvert the atmosphere of trust and confidence which is absolutely vital to the relationship between an indigent client and the public defender. It is essential that once the attorney-client relationship is established, a defendant represented by appointed counsel should feel free to

> disclose information in confidence and be assured that his attorney will represent his interests to the best of his ability. The threat that counsel could, at any time during the proceedings, be dismissed on the basis of an inquiry into his client's finances, would seriously undermine the entire foundation of that relationship.
>
> We therefore conclude that once the court has made its determination that a defendant is financially eligible for legal assistance at public expense and has appointed counsel to represent him, it may not thereafter, without the defendant's consent, remove that attorney on the grounds of financial ineligibility . . . .

Id. at 340-42 (citations omitted).

All of the considerations which were found to preponderate against allowing trial judges to discharge a public defender in *Roswall* are fully applicable here. And whatever countervailing factors may exist when discharge is sought because the defendant is found to be solvent do not pertain to a discharge upon a post-appointment certification of no incarceration upon conviction. For a solvent defendant simply *is not entitled* to appointed counsel in any criminal case, while trial courts in Florida have discretionary power to appoint counsel to represent an indigent defendant in *any* proceeding arising from a criminal charge. Fla. R. Crim. P. 3.111(b)(2).[8/] Thus, if the sanctity of the attorney-client relationship is sufficient to

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> Counsel *may* be provided to indigent persons in *all* proceedings arising from the initiation of a criminal action against a defendant . . . regardless of the court in which they occur or the classification of the proceedings as civil or criminal.

Ibid (emphasis supplied). Under this rule, a misdemeanor defendant may be provided with appointed counsel, even when the State has waived incarceration as a possible sanction, where "irreparable harm" would result from forcing the (continued...)

outweigh the state's patently-legitimate interest in ensuring that appointed counsel does not represent those citizens who financially are able to retain their own lawyers, in violation of state law, the need to protect that relationship from unwarranted intrusion is *ipso facto* sufficiently compelling to justify allowing counsel *lawfully* to continue representing a defendant whom the state and court do not wish to incarcerate upon conviction.

And where, as here, appointed counsel has taken discovery, investigated the case, and secured the assistance of expert witnesses to assist in the presentation of the defense (R. 28, 32), it defies common sense to construe Section 27.51 and Rule 3.111(b) (1) otherwise. To appoint the public defender, to have the case prepared over a period of time and an attorney-client relationship established, and then abruptly to discharge counsel, leaving the accused standing alone and self-evidently unable to pursue the case in the manner contemplated by counsel, is a lamentable waste of public resources.[9/] Even if the statute and rule could be

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[8/](...continued)
defendant to proceed without counsel. *Taylor v. Carlisle*, 566 So. 2d at 576-77. The existence of the discretionary authority granted by this subsection of the rule obliterates the position taken by the state before the trial court, *i.e.*, that the appointment of counsel "where the State is not seeking jail time . . . is not authorized by case law or statutory authority." (R. 34).

[9/] Indeed, the Supreme Court's final word on this subject, in *Scott v. Illinois*, 440 U.S. 367 (1979), seems to have been based largely upon cost-benefit analysis:

> In *Argersinger* the Court rejected arguments that social cost or a lack of available lawyers militated against its holding, in some part because it thought these arguments were factually incorrect. But they were rejected in much larger part because of the Court's conclusion that incarceration was so severe a sanction that it should not be imposed as a result of a criminal trial unless an indigent defendant had been offered appointed counsel to assist in his defense, regardless of the cost to the States implicit in such a rule. . . . .

(continued...)

given a sufficiently-strained reading so as to support the notion that a trial judge may act as did the county judge in this case, "[t]he courts will not ascribe to the Legislature an intent to create absurd or harsh consequences." *City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950) (citation omitted). Should the pertinent statute and rule be deemed amenable to appropriate construction, they must be construed so as to avoid illogical results. *E.g. Tampa-Hillsborough County v. K.E. Morris Alignment Serv., Inc.*, 444 So. 2d 926, 929 (Fla. 1983).

Finally, there exists a menacing prospect for chilling the untrammeled and zealous representation to which every criminal defendant is entitled, through the creation from whole cloth of an unrestricted "de-appointment" power in misdemeanor cases. That ability is compromised when an attorney must fear irremediable removal at the whim of the prosecutor. It cannot be presumed by any responsible participant in the criminal justice system that this Court and Florida Legislature intended to confer control over an indigent's right to keep his appointed counsel upon the attorney's adversary. Rather, once appointed by the court, "[t]he

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[2]/(...continued)

> . . . *Argersinger* has proved reasonably workable, whereas any extension would create confusion and impose unpredictable, but necessarily substantial, costs on 50 quite diverse States. . . .

Scott v. Illinois, 440 U.S. at 373. The goal of directing public resources appropriately is hardly served by the "de-appointment" of a public defender who is in the midst of preparing a case for trial.

The Attorney General's solicitude for overworked public defenders, Brief of Petitioner at 12, is noted with appreciation. The Attorney General may be certain that Florida public defenders are not looking for additional work; however, once appointed to a case, a public defender's unswerving obligation is to the client -- and not to the "restraints of time and money" noted in the state's brief. *Ibid.* Perhaps the Attorney General might be persuaded to express his concerns not as an advocate striving to achieve victory in a piece of litigation but as a supporter before the legislature of the public defenders' requests for adequate staff and resources.

public defender . . . is entitled to serve as counsel in the usual and ordinary ways." *Hammond v. State*, 261 So. 2d 463, 465 (Fla. 4th DCA 1972). "The state is constitutionally obligated to respect the professional independence of the public defenders whom it engages," and "'an indispensable element of the effective performance of [the public defender's] responsibilities is the ability to act independently of the Government and to oppose it in adversary litigation.'" *State ex rel. Smith v. Brummer*, 426 So. 2d 532, 533 (Fla. 1982) (citation omitted). The decision below respects that independence and the social good which it serves, and is worthy only of approbation.

Conclusion

Based upon the foregoing, respondent Ull requests this Court to approve the decision of the Third District in this cause.

Respectfully submitted,

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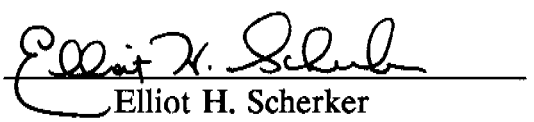
By: 
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Certificate of Service

I hereby certify that a true and correct copy of the foregoing was forwarded by mail to Angelica D. Zayas, Assistant Attorney General, 401 N.W. Second Avenue, Suite N921, Miami, Florida 33125 this 24th day of May, 1993.

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