IN THE SUPREME COURT OF FLORIDA

CASE NO. 81,372

STATE OF FLORIDA,

Petitioner,

-vs-

GABRIEL ULL,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW
CERTIFIED QUESTIONS

PETITIONER'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

The Petitioner, the **STATE OF FLORIDA,** was the prosecution and the Respondent was the Defendant in the Traffic Division of the County Court of the Eleventh Judicial Circuit, in and for Dade County, Florida. Respondent was also the petitioner in the Appellate Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County Florida, and the Appellant in the Third District Court of Appeal.

In this brief, the parties will be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the state; Respondent may also be referred to as Defendant. All emphasis is supplied unless otherwise indicated.

The following symbols will be used:

"R." Record on Appeal

"T." Transcript of Proceedings

"App." Appendix to Petitioner's Brief

STATEMENT OF THE CASE AND FACTS

On August 7, 1992, Respondent was charged with driving under the influence in violation of §316.193 of the Florida Statutes and other related traffic offenses. (R. 16-21).[1] Prior to trial, the public defender was appointed to represent Respondent. (App. 22). When the case was called on September 23, 1992, the trial court granted Respondent's motion to discharge bond in favor of Respondent's release on his own recognizance. (R. 31). The trial court also granted Respondent's motion for a continuance. (R. 32). Following the foregoing action, the state requested discharge of the public defender and represented that the state would not be requesting imprisonment in the event of a conviction. (R. 32). Defense counsel argued that the public defender should be allowed to "stay on" because his client had informed him of "some exceptional circumstances leading to the arrest." (R. 32). The state argued in favor of discharge on the grounds that Respondent was not legally or statutorily entitled to the services of the public defender since he was not threatened with imprisonment. (R. 32-34). The trial court agreed that Respondent was not entitled to representation at the taxpayers' expense and rejected Respondent's claim of special circumstances by stating "I can't justify keeping the public defender on one case and not another." (R. 32-34). In support of the discharge, the trial court noted

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[1] The symbol "R" refers to the record on appeal prepared in the Third District Court of Appeal, Case No. 92-2341.

in the court file that no jail time would be imposed and ruled that the county judge who had entered the initial appointment had no authority to appoint the public defender at arraignment and stated:

> [T]he public defender was appointed at jail arraignment as a matter of course which is done on all cases for the purpose of that hearing and that hearing only. There is no investigation, there are no questions asked. The Judge does nothing at [the] hearing to determine whether he is eligible for a public defender.

(R. 23, 33-34).

On October 18, 1992, Respondent filed a petition for writ of certiorari in the circuit court of the Eleventh Judicial Circuit of Florida, seeking review of the order discharging counsel. (R. 1-14). The petition was denied for failure to demonstrate a prima facie case. (R. 43).

Respondent challenged the denial of his petition for certiorari review in the Third District Court of Appeal, arguing that the Florida Rules of Criminal Procedure did not provide for the "de-appointment" of the public defender. (App. 1). Respondent further argued that once the public defender was appointed to represent a defendant charged with a misdemeanor, the public defender could not be discharged regardless of the trial court's certification that no jail time would be imposed. (App. 1). Because a defendant charged with a misdemeanor is not

entitled to counsel at the taxpayers' expense where the court, prior to trial, states in writing that the defendant will not be imprisoned in the event that he is convicted, the state maintained that the trial court properly discharged the public defender in this case. (App. 2). Because Respondent failed to demonstrate a departure from the essential requirements of law, the state also argued that the circuit court, sitting in its appellate capacity, properly denied Respondent's petition for certiorari review. (App. 2).

On January 26, 1993, the Third District Court of Appeal quashed the order of the circuit court and remanded the cause to the circuit court with directions that the order of the county court revoking the appointment of counsel be quashed. (App. 3).

On February 12, 1993, the Third District Court of Appeal granted a stay of the mandate and certified the following questions to be questions of great public importance:

I.

DOES THE POWER TO APPOINT THE PUBLIC DEFENDER PURSUANT TO FLA.R.CRIM.P. 3.111 AND §27.51, FLA. STAT. (1991) CARRY WITH IT THE POWER TO REVOKE THE APPOINTMENT IF THE CONDITIONS FOR REPRESENTATION CEASE TO BE MET?

II.

MUST THE DETERMINATION THAT NO JAIL SENTENCE WILL BE IMPOSED IN THE EVENT OF A CONVICTION, FOR THE PURPOSE OF DETERMINING ENTITLEMENT TO REPRESENTATION BY THE PUBLIC DEFENDER, BE MADE PRIOR TO THE APPOINTMENT OF COUNSEL AT ARRAIGNMENT OR MAY THIS DETERMINATION BE MADE AT ANY TIME PRIOR TO TRIAL?

(App. 4).

QUESTIONS PRESENTED

I.

DOES THE POWER TO APPOINT THE PUBLIC DEFENDER PURSUANT TO RULE 3.111 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE AND §27.51, FLA. STAT. (1991) CARRY WITH IT THE POWER TO REVOKE THE APPOINTMENT IF THE CONDITIONS FOR REPRESENTATION CEASE TO BE MET?

II.

MUST THE DETERMINATION THAT NO JAIL SENTENCE WILL BE IMPOSED IN THE EVENT OF A CONVICTION, FOR THE PURPOSE OF DETERMINING ENTITLEMENT TO REPRESENTATION BY THE PUBLIC DEFENDER, BE MADE PRIOR TO THE APPOINTMENT OF COUNSEL AT ARRAIGNMENT OR MAY THIS DETERMINATION BE MADE AT ANY TIME PRIOR TO TRIAL?

SUMMARY OF THE ARGUMENT

Rule 3.111 of the Florida Rules of Criminal Procedure and Section 27.51 of the Florida Statutes expressly state that a defendant charged with a misdemeanor of violation of Chapter 316 of the Florida Statutes is entitled to counsel at taxpayers' expense unless the trial judge files a statement in writing prior to trial assuring the defendant that no jail sentence will be imposed in the event of a conviction.

The decision to waive an authorized jail term can only be made after a full investigation of the facts and circumstances surrounding each case. Because the criminal rules of procedure provide for the appointment of counsel when a defendant is formally charged, upon first appearance before a committing magistrate or as soon as feasible after custodial restraint, it is likely that counsel will be appointed before the decision to waive an authorized jail term can be made. If counsel is provided before a case has been investigated and the decision to waive any authorized jail sentence has been made, the exception to the requirement that a defendant be given counsel at taxpayers' expense if written assurance that no jail sentence will be imposed is filed prior to trial, becomes meaningless if the court is precluded from revisiting a defendant's entitlement to counsel at taxpayers' expense. Inherent in the power to appoint counsel where incarceration is a possibility is the power

to revoke the appointment where the threat of incarceration no longer exists.

Furthermore, because both the rule and the statute allow the written assurance of no incarceration to be filed "prior to trial" without other limitation, the decision to waive an authorized jail sentence in the event of conviction need not be made prior to the appointment of counsel. As discussed above, this decision may be made at any time prior to trial.

ARGUMENT

I.

THE POWER TO APPOINT THE PUBLIC DEFENDER PURSUANT TO RULE 3.111 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE AND SECTION 27.51 OF THE FLORIDA STATUTES (1991) CARRIES WITH IT THE POWER TO REVOKE THE APPOINTMENT IF THE CONDITIONS FOR REPRESENTATION CEASE TO BE MET?

In Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), the Supreme Court of the United States held that the assistance of counsel must be provided to indigent defendants under the Sixth Amendment of the United States Constitution unless the right to counsel was competently and intelligently waived. In Argersinger v. Hamlin, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972), the Supreme Court ruled that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."[2] 407 U.S. at 37.

When asked to clarify the scope of Argersinger and its application, the Supreme Court reasoned that the central premise of Argersinger -- that actual imprisonment is a penalty different in kind from fines or the mere threat of imprisonment -- warranted "adoption of actual imprisonment as the line defining

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[2] In so doing, the Supreme Court expressly declined to "consider the requirement of the Sixth Amendment as regards the right to counsel where loss of liberty is not involved" because the petitioner was in fact sentenced to jail. 407 U.S. at 37.

the constitutional right to appointment of counsel." Scott v. Illinois, 440 U.S. 367, 373, 99 S.Ct. 1158, 59 L.Ed.2d 383 (1979). The court then held "that the Sixth and Fourteenth Amendments to the United States Constitution require only that no indigent criminal defendant be sentenced to a term of imprisonment unless the state has afforded him the right to assistance of appointed counsel in his defense." 440 U.S. 373-374).

Consistent with the foregoing United States Supreme Court rulings, this Honorable Court and the Florida Legislature have set forth the procedure for appointment of counsel to represent indigent defendants. See Fla.R.Crim.P. 3.111(b)(1); Section 27.51, Fla. Stat. (1991).

Rule 3.111 of the Florida Rules of Criminal Procedure provides for the appointment of counsel in all prosecutions for offenses punishable by imprisonment or incarceration in a juvenile corrections Institution unless in a prosecution for a misdemeanor or violation of a municipal ordinance, "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." Section 27.51 of the Florida Statutes (1991) charges the public defender with the duty of representing any person determined by the court to be indigent as provided in §27.51 of the Florida Statutes and, inter alia, is under arrest for, or is

charged with a violation of Chapter 316 of the Florida Statutes which is punishable by imprisonment "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."[3] §26.51(1)(b), Fla. Stat. (1991).

Respondent below suggested that once the public defender is appointed, he may never be discharged. In support of this suggestion, Respondent argued that Rule 3.111 of the Florida Rules of Criminal Procedure and Section 27.51 of the Florida Statutes "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." (R. 5). Respondent further suggested that by failing to describe the procedure for "de-appointment" or discharge of a wrongfully appointed public defender, the Florida Supreme Court and the Florida Legislature necessarily intended that all wrongfully appointed public

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[3] Because the trial court stated in writing prior to trial that Respondent would not be imprisoned in the event of conviction, Respondent clearly does not qualify under Florida law for the appointment of counsel at the taxpayers' expense.

This is true regardless of whether or not Appellant is indigent. Defense counsel's self-serving questions notwithstanding, nothing in the record suggests that Respondent is indigent as defined by §27.529 of the Florida Statutes. (R. 34).

defenders remain as counsel at taxpayer expense.[4] Petitioner submits that these contentions are meritless.

Rule 3.111(a) states that:

> 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.

Respondent's interpretation of Rule 3.111(b)(1) would require the court to state in writing that no jail term will be imposed the moment a DUI suspect is arrested and held in custody pending release on bond. Under the scenario contemplated by Respondent, the decision to waive the statutorily authorized penalties would necessarily have to be made before a complete

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[4] As the "Certificate Of Excessive Caseload Conflict and Motion To Recognize Such Conflict And Appoint Other Counsel" and supporting documents attached to the state's brief below indicate, the Office of the Public Defender in the Thirteenth Judicial Circuit, like many others, is extremely overburdened, understaffed and under-budgeted. (App. 2, Ex. 1). As the attached certificate indicates, the restraints of time and money have caused the Office of the Public Defender to seek permission to withdraw as counsel in at least one hundred twenty-five cases and to decline appointment in future cases indefinitely in all cases where the public defender is authorized by statute to represent indigent defendants or juveniles. (App. 2, Ex. 1, p. 2). It makes absolutely no sense to allow the public defender to represent a defendant who a) has not been shown to be indigent, and b) is not entitled to representation at taxpayer expense under Florida law due to the fact that he is not threatened with imprisonment, because of some unexplained "exceptional circumstances leading to the arrest."

investigation of the surrounding facts and circumstances could reasonably be made.

Both Rule 3.111 and §27.51 provide that an indigent defendant charged with a misdemeanor, violation of a municipal ordinance or violation of Chapter 316 of the Florida Statutes is not entitled to appointed counsel where the judge, prior to trial, files a statement in writing that the defendant will not be imprisoned in the event he is convicted. Rule 3.111 and §27.51 do not state that the judge must file a statement in writing that the defendant will not be imprisoned in the event that he is convicted before the appointment of counsel. Furthermore, both the rule and the statute expressly state that counsel need not be provided to defendants charged with a misdemeanor or a violation of Chapter 316 of the Florida Statutes if the judge files a statement in writing guaranteeing that the defendant will not be imprisoned in the event of a conviction. See Fla.R.Crim.P. 3.111(b)(1); §27.51(1)(b), Fla. Stat. (1991). Appellee submits that the plain language of both the statute and the rule contemplate that the trial judge may file a statement of non-imprisonment any time before trial and that a defendant in such a case is not entitled to appointed counsel.[5] In light of

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[5] The situation in State v. Reynolds, cited in Allen v. McClamma, No. 87-65 1 (Fla. 2d Cir. Nov. 1, 1988) is distinguishable from the case at bar. In State v. Reynolds, the trial judge discharged the public defender sua sponte on the last working day before a trial that had been pending nearly five months. (R. 36-42). In the instant case, the public defender was discharged at the request of the state after trial had been

the plain and obvious intent of Rule 3.111 and §27.51, Respondent's contentions must be rejected. See e.g. In Re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130 (Fla. 1990)(in interpreting statutes, best evidence of legislative intent is generally plain meaning of statute; courts should not add additional words to statute not placed there by legislature); Reino v. State, 352 So. 2d 853 (Fla. 1977); Thayer v. State, 335 So. 2d 815 (Fla. 1976)(legislature must be assumed to know the meaning of words and to have expressed its intent by words found in the statute).

Petitioner submits 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 where there is written assurance that no jail time would be imposed. Just as a judge is authorized or mandated to reevaluate a defendant's entitlement to appointed counsel on the grounds of indigency, the trial court properly may review a defendant's constitutional entitlement to court appointed counsel based on the threat of imprisonment or lack thereof. See e.g. Porteous v.

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continued to a later date as Respondent's request approximately six and one-half weeks after Respondent's arrest. During this period the Dade County courts were closed for at least one week and most matters were stayed at least two weeks due to the effects of Hurricane Andrew which hit Miami on August 24, 1992. See e.g. In Re Emergency Petition to Extend Time Periods Under All Florida Rules of Procedure, 17 Fla. L. Weekly S579 (Fla. September 2, 1992).

State, 582 So. 2d 131 (Fla. 2d DCA 1991)(trial court may terminate appointment of public defender if proper procedures are followed); Cooper v. State, 576 So. 2d 1379 (Fla. 2d DCA 1991)(issue of indigency may be revisited at defendant's request).

Because Respondent is not entitled to the appointment of counsel at the taxpayers' expense under Florida law nor under the Sixth and Fourteenth Amendments of the United States Constitution, Petitioner submits that the trial court properly discharged the public defender in accordance with the obvious dictates of Rule 3.111 and Section 27.51 of the Florida Statutes. Petitioner further submits that Respondent below failed to demonstrate a departure from the essential requirements of law and that the circuit court, sitting in its appellate capacity, properly denied Respondent's petition for certiorari review.

II.

THE DETERMINATION THAT NO JAIL SENTENCE WILL BE IMPOSED IN THE EVENT OF A CONVICTION, FOR THE PURPOSE OF DETERMINING ENTITLEMENT TO REPRESENTATION BY THE PUBLIC DEFENDER MAY BE MADE AT ANY TIME PRIOR TO TRIAL.

As discussed above, both Rule 3.111 of the Florida Rules of Criminal Procedure and Section 27.51 clearly provide that an indigent defendant charged with a misdemeanor or violation of Chapter 316 of the Florida Statutes is not entitled to counsel at taxpayer expense where the trial judge, prior to trial, files a statement in writing indicating that the defendant will not be imprisoned in the event of a conviction. Neither Rule 3.111 nor §27.51 suggest that written assurance that no jail term will be imposed must be filed at any particular time prior to trial. More specifically, neither the statute nor the rule state that the determination that no jail time will be imposed in the event of a conviction must be made at arraignment when counsel is appointed for limited purposes. See Rule 3.130(c)(1), Fla.R.Crim.P. (1992).

When interpreting statutes, the best evidence of legislative intent is the plain meaning of the words contained in the statute. The legislature is presumed to know the plain meaning of words and to have expressed its intent with the words found in the statute. See In Re Order on Prosecution of Criminal Appeals, 561 So. 2d at 1130; Reino v. State, 352 So. 2d at 853; Thayer v. State, 335 So. 2d at 815. If the legislature intended

the trial court to determine the need or desire for the imposition of jail time in the event of a conviction at any particular time before trial, e.g. at arraignment, the rule and statute would clearly say so. By stating simply that a defendant charged with a misdemeanor or violation of Chapter 316 is entitled to counsel at taxpayers' expense unless the court filed a written assurance of no jail time "prior to trial" the legislature clearly intended that this determination could be made at any time prior to trial.

CONCLUSION

WHEREFORE, based on the foregoing reasons and authorities cited herein, Petitioner, the State of Florida, respectfully requests this Honorable Court answer the first question in the affirmative and issue an opinion indicating that the determination that no jail sentence will be imposed in the event of a conviction, for the purposes of determining entitlement to representation by the public defender, may be made at any time prior to trial.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **PETITIONER'S BRIEF ON THE MERITS** was furnished by mail to **ELLIOT H. SCHERKER, ESQUIRE,** Greenberg, Traurig, Heffman, Lipoff, Rosen & Quentel, P.A., 1221 Brickell Avenue, Miami, Florida 33131, on this 4th day of ~~April~~ May, 1993.

ANGELICA D. ZAYAS
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/blm