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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,782

IN RE: CERTIFICATION OF CONFLICT IN MOTIONS TO WITHDRAW FILED BY PUBLIC DEFENDER OF THE TENTH JUDICIAL CIRCUIT

BRIEF OF METROPOLITAN DADE COUNTY AS AMICUS CURIAE

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QUESTIONS PRESENTED

I. WHETHER A PUBLIC DEFENDER'S CHALLENGE TO AN EVIDENTIARY HEARING USED BY A COURT TO RULE ON THE PUBLIC DEFENDER'S MOTIONS TO WITHDRAW IS MOOT, WHEN THE PROCEEDING HAS ENDED AND THE COURT HAS RESOLVED THE MOTIONS IN THE PUBLIC DEFENDER'S FAVOR?

II. WHETHER A COURT RULING ON A PUBLIC DEFENDER'S MOTION TO WITHDRAW DUE TO A WORKLOAD CONFLICT IS ALWAYS COMPELLED TO GRANT THE MOTION AND THUS LACKS POWER TO ASSESS THE NATURE OF THE PUBLIC DEFENDER'S WORKLOAD BEFORE RULING?

III. WHETHER THE SECOND DISTRICT COURT OF APPEAL ABUSED ITS DISCRETION BY CONDUCTING FACT FINDINGS ON A PUBLIC DEFENDER'S MOTIONS TO WITHDRAW FROM 382 APPEALS DUE TO A WORKLOAD CONFLICT, WHEN GRANTING THOSE MOTIONS WOULD IMPOSE A SIGNIFICANT FINANCIAL OBLIGATION ON COUNTY GOVERNMENTS?

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INTRODUCTION

This Brief is submitted by Metropolitan Dade County ("Dade County") as amicus curiae. Dade County's January 5, 1994, motion for permission to file an amicus curiae brief is attached as an Appendix to this Brief.

STATEMENT OF THE CASE AND FACTS

The Public Defender of the Tenth Judicial Circuit ("the Public Defender") has requested review under Art. V, § 3(b)(3), of the Florida Constitution of two decisions of the Second District Court of Appeal. The first, entered on April 22, 1993, appointed a commissioner to make findings regarding the Public Defender's motions to withdraw from 382 appeals. See In re Order on Motions to Withdraw Filed by the Tenth Circuit Public Defender, 622 So. 2d 2 (Fla. 2d DCA 1993) (en banc). The second, entered on October 25, 1993, granted those motions to withdraw. See In re Certification of Conflict and Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit, 18 Fla. L. Weekly D2324 (Fla. 2d DCA October 25, 1993) (en banc).

Dade County does not contest the Statements of Facts set forth in the briefs already filed by the Public Defender and amicus the Florida Public Defender Association ("the Public Defender Association"). See Fla. R. App. P. 9.210(c).

SUMMARY OF THE ARGUMENT

By granting the Public Defender's motions to withdraw from 382 appeals, the Second District has accorded the Public

Defender the complete relief he had requested. The Public Defender nonetheless protests the Second District's use of an evidentiary hearing to resolve the motions. Because the procedure has concluded, the dispute is moot, and this Court should not address it. The dispute surrounding the Second District's procedure is not certain to recur. Neither the Second District nor any other court has expressed an intention to follow such a procedure on future motions to withdraw. If the issue were to recur, a peition for either a writ of prohibition or writ of mandamus should afford this Court a means of addressing it.

In the event the Court chooses to address the matter posed by the Public Defender, the Court should reaffirm what it said in Skitka v. State, 579 So. 2d 102 (Fla. 1991): when a public defender moves to withdraw due to an excessive workload, a court is not obliged to automatically approve his motion. Moreover, this Court should explain that a court's inherent power to promote the proper administration of justice permits it to examine how a public defender's workload difficulties may be alleviated at the least possible expense to county governments. This case is part of a larger public policy problem resulting from chronic state underfunding of public defender salaries. Permitting courts faced with this problem to ascertain cost-efficient ways to address it accords with both basic principles of responsible government and relevant statutory and constitutional provisions. Subjecting a public defender to financial oversight does not unduly

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encroach upon his professional independence. In our legal system, attorneys of all varieties must answer to budgetary concerns and do not enjoy the autonomy to which the Public Defender contends he is entitled.

The Second District did not abuse its discretion by directing the commissioner to conduct a detailed inquiry in this case. The Public Defender's motion proposed to shift 382 appeals to private-attorneys who would be funded by county governments. Even assuming that the appeals all were to stay within the $2,000 statutory cap, the potential cost still could run as high as $764,000. The Second District acted prudently in asking the commissioner to consider carefully whether less costly responses were available and in permitting the Attorney General and the counties to participate in that process.

ARGUMENT

I. BECAUSE THE PROCEDURE THE SECOND DISTRICT USED TO RULE ON THE PUBLIC DEFENDER'S MOTIONS TO WITHDRAW HAS CONCLUDED, THE PUBLIC DEFENDER'S CHALLENGE TO IT IS MOOT.

This case arises out of motions filed by the Public Defender to withdraw from 382 appeals before the Second District. In those motions, the Public Defender asserted that an excessive workload in his office created a conflict of interest that prevented him from providing effective representation on the 382 appeals. The motions requested that the Public Defender be replaced on those appeals by

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court-appointed private attorneys. The court-appointed attorneys would have been paid by county governments.

The Second District granted the motions in their entirety and permitted the Public Defender to withdraw from all 382 appeals. See In re Certification of Conflict and Motions to Withdraw, 18 Fla. L. Weekly D2324. Not surprisingly, the Public Defender does not challenge the substance of that ruling. However, the Public Defender does contest the method by which the Second District reached its result.

Before ruling on the motions, the Second Distrct appointed a commissioner and directed that he make factual findings on whether the Public Defender's workload problems could be resolved at less cost to the affected counties. See In re Order on Motions to Withdraw, 622 So. 2d 2. The Public Defender contends that the referral to the commissioner was improper. According to the Public Defender, once he certified in the motions at issue that an excessive workload created a conflict of interest that prevented him from providing effective representation, the Second District was compelled to grant the motions and lacked authority to inquire on its own into the nature of the Public Defender's workload. Moreover, the Public Defender maintains that the scope of the

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fact-finding that the commissioner conducted on the Second District's behalf was unduly burdensome.[1/]

Because the Second District has completed its fact-finding procedure and has ruled in the Public Defender's

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1/ The Second District had asked the commissioner to address seven specific questions as part of his fact-finding process:

1. Whether the productivity of the appellate division of the Public Defender's office is within an acceptable range.

2. Whether all of the attorneys assigned to that division are working exclusively on appellate matters.

3. Whether the Public Defender has taken adequate steps to assure that repetitive issues are handled effectively.

4. Whether the Public Defender uses a team approach to maximize the efficiency of the briefing process.

5. Whether there are steps that the Public Defender, the Attorney General, and this court could collectively take to assure timely appellate review of indigent appeals.

6. Whether there are other steps which could be taken to allow for the timely prosecution of indigent appeals without transferring the cost for such appeals to the counties.

7. Ignoring earlier motions to withdraw filed with this court, whether the cases selected for the present motions have been chosen for any particular reason that should be made known to the court.

In re Order on Motions to Withdraw Filed By Tenth Circuit Public Defender, 622 So. 2d 2, 4 (Fla. 2d DCA 1993) (en banc).

favor on the merits of the motions, the issue on which the Public Defender seeks review is moot. In fact, the Public Defender appears to recognize this much. See Brief for J. Marion Moorman, Public Defender, Tenth Judicial Circuit, at 25 (conceding that "[t]he past proceeding may be moot"). The Public Defender nonetheless asserts that this Court should review the Second District's proceeding, because it falls within the category of events that are "capable of repetition yet evading review."

This argument fails to appreciate the narrow scope of the "capable of repetition yet evading review" exception. That exception is a limited one to the rule that courts ordinarily do not pass upon moot issues. Instances in which courts utilize the "capable of repetition" exception serve to illustrate its narrow scope.

For example, courts invoke the "capable of repetition" exception to permit review of issues that arise out of childbirth or terminal illness. See, e.g., In re T.A.C.P., 609 So. 2d 588, 589 n.2 (Fla. 1992). They do so because such events recur regularly, and strict application of mootness principles, coupled with the short time frame in which pregnancies and terminal illnesses may run their courses, would forclose judicial review in most instances. Appellate courts similarly use the exception to permit review of a trial court order that restricts public access to a criminal proceeding. See, e.g., Tribune Co. v. Cannella, 458 So. 2d 1075, 1076 (Fla. 1984), appeal dismissed, 471 U.S. 1096

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(1985). Because a criminal proceeding in which a trial court restricts public access generally will conclude before aggrieved parties can obtain appellate review of the restriction, the "capable of repetition" exception is necessary to provide appellate courts a means to review it.

This case differs from those paradigms in two important respects. First, there is no certainty that the procedure used by the Second District in this case will be repeated in other public defender workload conflict cases. Neither the Second District nor other courts have indicated that they will follow that procedure if faced with future public defender motions to withdraw. Second, if the matter were to recur, an affected public defender would have means for securing appellate review while the dispute remained live. For instance, the public defender could petition for either a writ of prohibition requiring the lower court to halt the procedure, or a writ of mandamus requiring the lower court to grant the motion to withdraw, or both. See Sandegren v. State ex rel. Sarasota County Public Hosp. Bd., 397 So. 2d 657 (Fla. 1981) (holding that funding of local programs is enforceable through mandamus); Department of Health and Rehabilitative Servs. v. Schreiber, 561 So. 2d 1236, 1242 (Fla. 4th DCA 1990) (granting writ of prohibition to prevent trial court from acting outside of its power in examining inner workings of public agency), review denied, 581 So. 2d 1310 (Fla. 1991).

Apparently, earlier in the case the Court denied the Public Defender's request for review of the Second District's

April 22, 1993, order that had referred the motions to withdraw to the commissioner for fact findings. See Brief for J. Marion Moorman, Public Defender, Tenth Judicial Circuit, 4-5. However, the Court's earlier action in this case does not preclude either the Court or the district courts of appeal from exploiting writ review if needed in later proceedings. Because this case is not the sort that should occasion departure from the practice disfavoring review of moot questions, see Pace v. King, 38 So. 2d 823, 827 (Fla. 1949), this Court should stay its hand for now and refrain from addressing the Second District's procedure.

II. COURTS HAVE THE INHERENT POWER TO MEANINGFULLY REVIEW A PUBLIC DEFENDER'S MOTION TO WITHDRAW, PARTICULARLY WHERE GRANTING THE MOTION RESULTS IN SUBSTANTIAL COSTS TO COUNTY GOVERNMENTS.

As noted, the Public Defender maintains that when a court faces a public defender's motion for a workload conflict withdrawal, it is compelled to grant the motion and cannot independently assess the public defender's workload.[2/] In Skitka v. State, 579 So. 2d 102 (Fla. 1991), this Court firmly rejected that contention.

2/ The Florida Public Defender Association ("Public Defender Association") hedges slightly on this point. See Brief for the Florida Public Defender Association as Amicus Curiae, at 29 (staing that "generally" a court should grant a public defender's motion for a conflict withdrawal without conducting an evidentiary hearing (emphasis added)). The Public Defender Association, however, does not identify the circumstances in which it envisions that courts may engage in more meaningful review.

Like this case, Skitka arose out of the Tenth Circuit Public Defender's motions to withdraw from appeals on grounds of a workload conflict. The Second District denied the motions. It found that the Public Defender could not justify the workload conflict withdrawals, given the number of such withdrawals he had taken previously and the resulting increases in funding he had received. See id. at 103-04.

On appeal, this Court considered whether a court facing a public defender's motion for a workload conflict withdrawal is compelled to grant the motion without independently examining the nature of the public defender's workload. The Court refused to confine courts to such a ministerial role in these matters. "[W]e do not believe that courts are obligated to permit the withdrawal automatically upon the filing of a certificate by the public defender reflecting a backlog in the prosecution of appeals." Id. at 104.

In reaching this conclusion, the Court approved the proactive approaches taken not only by the Second District, see id. (commending the Second District for "be[ing] in the forefront in addressing the dilemma of delayed appeals caused by the underfunding of public defenders"), but by the First District as well, see id. (citing Day v. State, 564 So. 2d 137 (Fla. 1st DCA 1990) and Day v. State, 570 So. 2d 1003 (Fla. 1st DCA 1990)). Day involved public defender motions for workload conflict withdrawals from 300 appeals. The First District initially granted the motions with respect to 100 appeals and deferred consideration on the remaining 200. See

Day v. State, 564 So. 2d 137. Three months later, the First Circuit addressed the remaining 200 cases. Finding that the public defender's overall funding was sufficient to allow her to handle 100 of those cases, the First District permitted only 100 of the requested 200 withdrawals. See Day v. State, 570 So. 2d 1003.

In so doing, the First District dismissed the public defender's objection that she already had committed to other purposes the funds needed to handle the remaining 100 appeals. The First Circuit ruled that in view of the "serious effect" public defender withdrawals impose on county finances the public defender would have to dedicate available funds to meet her outstanding workload demands. See id. at 1004-05. As the court recognized:

> [W]hile the right to effective representation of appellate counsel is our foremost considerations with these proceedings, we believe that [a public defender] bears a heavy burden to demonstrate that she and her staff are unable to provide that representation before we shift the financial reponsibilities to the counties. Id. at 1004.

Were the Court to revisit the proper role courts play when faced with public defender workload conflict withdrawal requests, it should reaffirm the proactive judicial role that it endorsed in Skikta. Such a role permits courts to address most responsibly a difficult public policy problem that imposes significant financial burdens on county governments.

That problem, of course, is the result of the Legislature's chronic underfunding of public defender salaries. Even though state statute assigns the Legislature

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responsibility for funding public defender salaries, see §, 27.5301, Fla. Stat. (1993), the Legislature has consistently failed to fulfill that obligation, as this Court has noted on several occasions. See Skitka v. State, 579 So. 2d at 104; In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990).

The cost of meeting the shortfall has fallen upon county governments.[3/] When a public defender withdraws from a case because of a conflict of interest, state law requires county governments to pay the private attorney appointed to take the the public defender's place. This Court has held that counties must absorb this expense even when the public defender withdraws from multiple cases because of insufficient state funding. See In re Order on Prosecution of Criminal Appeals, 561 So. 2d at 1135-38.

Given the consequences a public defender's motion to withdraw may pose on county governments, the Public Defender's contention that courts should be compelled to rubber-stamp public defender motions for workload conflict withdrawals is untenable. This Court's prior decisions recognize that when the Legislature fails to fulfill its assigned functions,

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3/ Because courts lack power to compel the Legislature to appropriate funds, see In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Public Defender, 561 So. 2d 1130, 1136, 1139 (Fla. 1990), courts have not been able to mandate that the State provide the necessary funding.

courts should step in and fill the void. See In re Order on Prosecution of Criminal Appeals, 561 So. 2d at 1130 (citing Dade County Teachers Assn. v. Legislature, 269 So. 2d 684, 686 (Fla. 1972)). When legislative inaction interferes with the proper functioning of the judicial system, courts play a particularly important part in devising solutions. "Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid laws and constitutional provisions." Rose v. Palm Beach County, 361 So. 2d 135, 137 (Fla. 1978).

When legislative underfunding prompts a public defender's motion for a workload conflict withdrawal, a court's "inherent power" necessarily must include the authority to consider the full range of possible responses to the public defender's workload difficulties. Cf. Rose v. Palm Beach County, 361 So. 2d 135 (holding that trial courts may exceed statutory witness fee to afford indigent witnesses ability to testify at trial). Ordinary legislative funding of public defender offices presumably is subject to the Legislature's regular budgeting and oversight powers. See generally Art. III § 19, Fla. Const. It stands to reason that when courts are required to supplement legislative funding with extraordinary county funding, courts, too, should have recourse to means for ascertaing the required extent of such supplemental county funding.

Indeed, there is a substantial need for courts to have recourse to these means when addressing a public defender's requests for workload conflict withdrawals. Such requests can pose substantial financial burdens on county governments. See Day v. State, 570 So. 2d at 1004. For instance, in fiscal year 1992-93, Dade County spent at least $2.9 million to pay attorneys used to fill shortfalls caused by state underfunding of the Public Defender for Eleventh Judicial Circuit. Moreover, because criminal prosecution is essentially a state function, see Art. IV, § 4(c), Fla. Const, compelled county financing of indigent criminal defendant representation may raise bonafide constitutional questions, see Art. VII, § 9(a), Fla. Const. (limiting a county's authority to levy ad valorem taxes to those necessary for county purposes).

The Public Defender makes essentially three arguments in support of his position. He asserts that judicial scrutiny of a public defender's request for a workload conflict withdrawal (1) clashes with the 6th Amendment, (2) violates state law, and (3) unjustifiably undermines a public defender's professional independence. These assertions all lack merit.

Examining a public defender's productivity and the nature of his overall workload does not raise 6th Amendment concerns. In this case, the Public Defender has not indicated that the commissioner's examination of his operations delved into attorney-client material, or otherwise interfered with his relationships with his clients. See, e.g., Maine v. Moulton, 474 U.S. 159, 176-77 (1985).

Moreover, oversight of public defender spending is consistent with state law. As noted, routine legislative appropriations for public defender salaries presumably are subject to the legislative budgeting and review process. See generally Art. III, § 19, Fla. Const. Moreover, state statutes expressly provide for judicial review of several forms of public defender spending. For instance, Fla. Stat. §§ 27.54(3) and 939.15 (1993) permit counties to contest various litigation-related expenditures made by public defenders. When read together, Fla. Stat. §§ 27.53(3), 925.036, 925.037, and 939.08 (1993), envision that counties may audit fees requests of private attorneys appointed following a public defender conflict withdrawal. In short, state law contemplates that public defender expenditures all submit to some form of meaningful review.[4/]

Finally, permitting a court to examine public defender productivity as part of its scrutiny of public defender workload conflict claims does not subject public defenders to unique or troubling limits on their independence. While the Public Defender Association contends that independent oversight makes public defenders less than "real lawyers," see

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4/ The Public Defender cites a number of cases indicating courts ordinarily should grant motions for conflict withdrawals once a public defender certifies that a conflict exists. See, e.g., Babb v. Edwards, 412 So. 2d 859 (Fla. 1982). However, none of the cases he cites hold that courts are compelled to do so in cases of motions for workload conflict withdrawals, and Skitka v. State, 578 So. 2d 102, 104 (Fla. 1991), is directly to the contrary.

Brief for the Florida Public Defender Association as Amicus Curiae, at 29, the reality is that in our legal system lawyers generally are accountable to those who pay them. Government lawyers answer to legislatures; legal service attorneys answer to courts or granting bodies; private practitioners answer to their clients. See 18 U.S.C.A. § 3006A(g)(1) & (h) (West. Supp. 1993) (Federal Public Defender Organizations); 42 U.S.C.A. §§ 2996g & 2996h (West Supp. 1993) (Legal Service Corporation grant and contract recipients); R. Regulating Fla. Bar 4-1.5, Statement 6 of Client's Rights (private practitioners). When a public defender proposes to shift workload costs onto county governments, he has no greater entitlement to exempt himself from accountability.

III. BECAUSE THE PROCEDURE USED BY THE SECOND DISTRICT WAS A REASONABLE RESPONSE TO A MOTION THAT WOULD IMPOSE A SIGNIFICANT FINANCIAL OBLIGATION ON COUNTY GOVERNMENTS, THE SECOND DISTRICT DID NOT ABUSE ITS DISCRETION.

The Public Defender raises two primary objections to the evidentiary hearing the commissioner conducted on the Second District's behalf. First, he contends that the commissioner's four-day evidentiary hearing was unduly burdensome. Second, he submits that by allowing the Attorney General and the affected counties to participate in the proceedings the Second District contravened this Court's ruling in Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980). Both objections are easily answered.

Given the significant costs Public Defender's proposed workload conflict withdrawals would have imposed on the affected counties, the scope of the hearing was reasonable. The Public Defender had sought to withdraw from 382 appeals. Even assuming that those appeals were to stay within the $2,000 statutory cap for court-appointed attorneys on appeal, see § 925.036, Fla. Stat. (1993),[5/] the request would have shifted potentially $764,000 onto county governments. The Second District was entitled to direct a careful inquiry into whether it should require the counties to absorb that full burden.

Behr poses no obstacle to the Second Distrct's invitations to the Attorney General and the counties to participate in the process. Behr held that counties are not entitled as a matter of right to be heard prior to a court's ruling on a public defender's motion to withdraw. But, contrary to the Public Defender's suggestion, Behr does not hold that a court can never allow counties or the Attorney General to participate in such a proceeding. This distinction is readily evident from the words the Court used in Behr: "The court does not have to . . . allow the county an opportunity to be heard before appointing private counsel." 384 So. 2d at 150 (emphasis added). Thus, Behr leaves to lower courts the

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5/ Courts may pay court-appointed criminal defense attorneys above the statutory cap in individual cases. See Makemson v. Martin County, 491 So. 2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043 (1987).

question whether to allow counties or the State to be heard on particular public defender motions to withdraw. In view of the financial burden the Public Defender's motions would have passed onto county taxpayers, the Second District acted well within its discretion in inviting the Attorney General and the counties to assist the commissioner in determining whether less costly alternatives were available.

CONCLUSION

Because the Public Defender's objection to procedure the Second District used to rule on his motions to withdraw is moot, this Court should not address it. In the event that the Court chooses to pass upon the Public Defender's objection, the Court should hold that when a public defender seeks to withdraw because of a workload conflict, a court has the inherent authority to examine how the workload problem can be resolved at the least possible expense to the affected counties. The Court should also hold that the procedures the Second District employed in this case were not an abuse of discretion.

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IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,782

IN RE: CERTIFICATION OF CONFLICT
IN MOTIONS TO WITHDRAW FILED BY
PUBLIC DEFENDER OF THE TENTH
JUDICIAL CIRCUIT
_____/

MOTION FOR PERMISSION TO FILE
AMICUS CURIAE BRIEF

The undersigned counsel, on behalf of Metropolitan Dade County, pursuant to Rule 9.370, Florida Rules of Appellate Procedure, respectfully asks this Honorable Court to grant permission to file an Amicus Curiae and as grounds for this Motion, states as follows:

1. Metropolitan Dade County is Florida's most populous county and is generally recognized as facing unique law enforcement issues.

2. This cause presents an issue of a county's obligation to pay for the services of attorneys for indigent criminal defendants. Since Metropolitan Dade County is currently paying more money than any other county in Florida for such services, it has an interest in the outcome of this cause.

3. The County is prepared to promptly file its brief at the direction of this Court.

WHEREFORE, Metropolitan Dade County respectfully asks this Honorable Court to grant permission to file an Amicus Curiae brief.

Respectfully submitted,

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