O.A. 2-1-94 D+7 w/disc

FILED
SID J. WHITE
DEC 21 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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 ON THE MERITS BY J. MARION MOORMAN, PUBLIC DEFENDER, TENTH JUDICIAL CIRCUIT

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STATEMENT OF THE CASE AND FACTS

This is a brief on the merits by J. Marion Moorman, the Public Defender of the Tenth Judicial Circuit who serves indigent clients seeking appellate review in the Second District Court of Appeal.[1] This Court accepted jurisdiction and ordered expedited briefs and oral argument by order of December 1, 1993. This is another in the line of cases concerning excessive caseloads and Public Defender appellate representation in the Second District Court of Appeal. The District Court issued en banc orders on April 22, 1993 and October 25, 1993, both of which affect Public Defenders in their capacity as a class of constitutional officers. This Court has jurisdiction pursuant to Article V § 3(B), Florida Constitution, and this Court has previously written extensively in two previous cases on similar issues. See In Re: Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990) and Skitka v. State, 597 So. 2d 102 (Fla. 1991).

In March of 1993, the Public Defender moved in the Second District Court of Appeal to withdraw from 249 overdue appeals due to an excessive caseload. Motions to withdraw in an additional 133 cases were filed in April, 1993. The motions to withdraw were accompanied by formal Certifications and supporting statistical and fiscal information which was sworn to. These motions and supporting documentation were basically the same as the information

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[1] The Second District has never assigned a case number to this matter. No index to the record exists. The transcript of testimony will be designated (Tr._).

supplied in Skitka v. State, 579 So. 2d 102 (Fla. 1991). As indicated in these motions, the records in the involved cases had been received over a 5 month period from October 1992 through February, 1993. During that time the appellate attorneys in the Public Defender's office had filed 448 briefs, representing 97,832 pages of record, averaging over 5 briefs per attorney per month and over 1,100 record pages per attorney per month. See March 12, 1993 Certification and Motion and attached Affidavit by H. Stutz.[2]

In response to these two motions to withdraw the Second District Court of Appeal entered its order of April 22, 1993. Order on Motions To Withdraw Filed By Tenth Circuit Public Defender, 622 So. 2d 2 (Fla. 2d DCA 1993). This order recognized the Public Defender's filing of the 382 motions all in cases where initial appellants' briefs were overdue. The order recites reference to the Public Defender's budgetary problems, a monthly increase in the backlog of cases and the Public Defender's certification that he was receiving more cases than he can adequately handle on a current basis. The order notes that the Attorney General had filed written opposition to the Public Defender's motions and described the state's objections to the effect that the Public Defender had allegedly been selective in seeking to withdraw from the more simple cases while attempting to

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[2] No one has ever suggested that the budgetary and fiscal data concerning production of briefs in these documents was inaccurate.

transfer more complex cases.[3] The inference is that selective withdrawal might have been a valid objection to withdrawal.

The court quoted from its own previous order entered 4 months before the April 22 order noting its increasing concern as to its role as fact finder in deciding motions to withdraw based on excessive caseloads. The order concludes that the court would no longer resolve motions to withdraw "without an adequate factual record" because the issues raised in such motions "are too complex" and "will ultimately ... affect too many people and the fiscal affairs of too many governments". To avoid engaging in fact finding and the possibility of inconsistent results if the many motions were considered by individual circuit judges, the court chose to appoint a retired circuit judge as a Commissioner to "conduct an evidentiary hearing and the preparation of a report which is to contain findings of fact" conclusions and recommendations. The Commissioner was instructed to employ the criteria set forth in In Re: Order and to further make recommendations as to the appointment of private counsel to handle the appeals pursuant to § 27.53(3) if the Commissioner found the Public Defender had a conflict based upon his excessive caseload.

Although the order did not restrict the "range of issues" the Commissioner might consider, it listed 7 specific concerns which

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[3] This issue was determined in favor of the Public Defender by the Commissioner. See Commissioner's Report p.4-5 holding there was no selective withdrawal. The Public Defender asserts selective withdrawal would not have been a valid objection in any event.

were of importance to the district court. These concerns were as follows:

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 efficiently.

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 c.

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.

The Public Defender sought review of this April 22, 1993 order before this Court in a proceeding designated as Case No. 81,734. The State of Florida, through the Attorney General, moved to dismiss the Public Defender's Notice to Invoke Discretionary Jurisdiction asserting that the order was not a final order but was instead only an interim procedural step. (See State Motion of May 14, 1993.) This Court granted the state's motion and dismissed the notice seeking discretionary review by order of June 24, 1993. The Public Defender's jurisdictional brief had argued that the Second

District's April 22, 1993 order directly involved the court in the management of the Public Defender's office and that such a proceeding was improper because the Public Defender was an independent constitutional officer. The issue of improper interference with the internal operations of the Public Defender's office was not reached on the merits because of the dismissal of the notice in the June 24, 1993 order.

Thereafter the matter proceeded pursuant to the April 22, 1993 order. Retired Judge B.J. Driver was initially appointed by this Court as the court's Special Commissioner but due to unfortunate health problems it was necessary to replace Judge Driver. The position as Commissioner was assumed by retired Circuit Judge J.C. Cheatwood pursuant to order by this Court. (See Second District Order of June 30, 1993.) Thereafter, pursuant to his authority as this Court's Commissioner, Judge Cheatwood presided over an evidentiary hearing on August 16, 17, 18 and 19, 1993. (Tr.1-997). The Public Defender presented eighteen witnesses. The Counties presented one witness, an efficiency expert in law office management (Tr.517) and the Attorney General presented one very brief witness. (Tr.964). Voluminous documentary evidence regarding ethics, caseloads, workloads, appellate brief production, staffing, budgets and funding by the Legislature was admitted into evidence. (See Record and description of exhibits at Tr.991, etc.). At the beginning of the hearing the Counties declared this to be an adversary proceeding. (Tr.8, 10, 11). Thereafter the Public Defender preserved his objection to the entire proceeding as

an improper interference with his functions as an independent, elected constitutional officer. (Tr.27-8).

Directly in response to the Second District's April 22, 1993 order, the Public Defender then presented extensive evidence for four days as to each of the 7 "concerns" announced by the court, the Attorney General's assertion of selective withdrawals, the proper ethical responsibilities of appellate counsel in the representation of clients and the overall funding and operations of his office. Absolute full disclosure of every financial aspect of Mr. Moorman's office was made along with full evidence concerning the operation of every other appellate Public Defender office in the state. (Tr.405, 439, 475, 659, 896). Leading national experts on the national crisis in indigent representation and ethics for public defenders were called. (Tr.28-143, 311-403). The Public Defender's witnesses included the most knowledgeable and respected group of attorneys ever gathered in Florida to speak on this subject. The evidence as indicated by the Commissioner's uncontested factual findings will be detailed in a later section of this brief.

After listening to all the evidence and ruling on numerous objections by the Counties, the Commissioner took the matter under advisement. The parties submitted proposed findings of fact and by report of September 7, 1993 the Commissioner issued his findings of fact, conclusions and recommendations on all issues designated by the district court and on numerous other issues which had been raised at the hearing.

Basically, the Commissioner found that the Public Defender's appellate production was "definitely within an acceptable range" and that "the appellate Public Defenders of the Tenth Circuit function under excessive caseloads and relief should be granted". (Report p.2, 14). The Commissioner found that funding by the Florida Legislature was absolutely inadequate and concluded that all pending motions to withdraw should be granted. The Commissioner found that the only immediate solution was for the Counties to step in and provide funding for effective and immediate appellate representation on the short term. Although invited to do so, the Counties chose not to contest their ability to pay. The Commissioner noted that withdrawal of the Public Defender was not a solution but "merely dramatizes the problem of excessive caseloads and underfunding". The Commissioner listed 6 suggestions for long term resolution of the chronic excessive caseload problem in the Second District but pointed out that the problem was really statewide.

The Commissioner's factual findings and recommendations were submitted to the court and thereafter the Public Defender, but no other party, filed a formal Response to the report. (Response 9-24-93). Since the Commissioner had ruled overwhelmingly in support of the Public Defender's position, the Response was a resounding endorsement of the report. No other party filed opposition to or even a comment on the report despite the fact that the April 22, 1993 order specifically gave "any party to the proceeding before the Commissioner" the right to file a response.

Thereafter, by en banc order of October 25, 1993, the Second District Court of Appeal merely received the report. The court's en banc order states: "The court receives the report of the Commissioner". The order does not expressly approve or adopt the report or take any step other than indicating that the motions to withdraw would be granted. No comment whatsoever is made regarding any of the factual findings, regarding any of the 7 stated "concerns" nor the Attorney General's assertion that the Public Defender had been selective in his withdrawals. Absolutely nothing is said about any of the recommendations offered by Judge Cheatwood. The en banc order says absolutely nothing about the effect of this proceeding and the factual findings upon any future motions to withdraw.

The Facts Found By The Commissioner

The report of the Commissioner was submitted to the district court and the court's April 22 order had invited "any party" including the Attorney General and the Counties to file a Response. Only the Public Defender filed a Response and that document endorsed and approved the report. Rather than detailing all of the evidence, the Public Defender simply quotes the uncontested report as his factual statement.

CASE NO. (none assigned)

IN RE: MOTION TO WITHDRAW FILED BY
TENTH CIRCUIT PUBLIC DEFENDER.
_____/

COMMISSIONER'S REPORT

This matter was referred to the undersigned as a Commissioner to hear evidence and make findings of fact,

conclusions, and recommendations pursuant to the order of the Second District Court of Appeal of April 22, 1993. At issue are motions to withdraw and petitions for mandamus by the Public Defender based on asserted excessive caseloads in 382 separate appellate cases. These 382 cases were the subject of motion sot withdraw and petitions for mandamus filed in March and April 1993. Additionally motion have been filed in the months between the District Court's order of April 22, 1993, and the hearing which began on August 16, 1993. Pursuant to the District Court's order, the fourteen counties in the Second District geographic area were invited to participate along with all other Public Defenders, State Attorneys, and the Florida Attorney General. The fourteen counties formed a loose alliance and Hillsbororgh, Pinellas, and Manatee County took the lead in representing the interests of some but not all the counties. During the actual hearing, county attorneys were present from Hillsborough, Manatee, Sarasota, and Pinellas Counties.

Concerns of the Court and the Pending Motions

The Second District Court of Appeal stated the following seven concerns:

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 efficiently.

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 know to the court.

The court's order did not restrict consideration to these concerns alone. The immediate question is of course the 382 pending motions. The transcript of the full hearing has been ordered and will be filed for record purposes. The undersigned commissioner recommends that the 382 motions be granted.

Your commissioner finds that the productivity of the Public Defender's office is definitely within an acceptable range. Only one other appellate public defender's office exceeded the productivity of Mr. Moorman's

All of the attorneys assigned to the appellate division are working exclusively on such matters except for fielding questions from trial attorneys on issues of law, handling weekend and holiday first appearances on a rotational basis with all other assistant public defenders, and occasionally, jail inspections. From your commissioner's former service as a circuit judge, I find that rotational service on weekend and holiday first appearances does not interfere with normal duties. The testimony received estimated that 99.5% of appellate attorneys' time was devoted to appeals. I accept that testimony.

Your commissioner is not completely satisfied that adequate steps have been taken to assure that repetitive issues are being handled efficiently. Prior to July or August 1993, the Office of the Public Defender for the Tenth Judicial Circuit did not keep time records. Therefore, it is impossible to evaluate the relative productivity, i.e., speed and efficiency with which the various assistant appellate public defenders work. As a corollary, it could not be determined how much time each assistant devoted to an assigned case. Mr. Moorman is in the process of developing a time-keeping system.

The Public Defender does not use a team approach in the actual briefing process. Testimony was received that this would actually delay the briefing process because each team member would need to become familiar with the record. The system used requires that each brief be reviewed by another assistant public defender prior to filing, not only to check grammar and spelling but to review legal citations and make suggestions for improvement in overall content. For the most part, sharing of ideas and prior legal research between appellate attor-

neys is done informally and efficiently. There are also regularly scheduled review sessions on current case law known as Florida Law Weekly Reviews. At present, greater use of a more formal team approach would not enhance the efficiency of the Public Defender's brief writing. This finding is based on the consistent testimony of the numerous lawyers who testified, many of whom were not associated with the Tenth Circuit office. Most of the witnesses were simply unfamiliar with a multiple lawyer team approach to brief writing.

When an illegal sentence is the only issue in an appeal, the Public Defender's and Attorney General's offices could stipulate to a resentencing, with this court's permission, without going through the whole briefing and decision process. In order to assure the trial court's cooperation it may require an order of this court finding the sentence illegal.

No evidence was presented concerning other steps that could be taken in handling indigent appeals without transferring the cost to the counties.

The cases which are the subject of all pending motion to withdraw were selected solely because the initial briefs are in excess of sixty days overdue. The Public Defender's March 1993 motions related to forty-five percent of the cases received in October. There-after, the Public Defender has moved to withdraw from all cases received when the initial briefs are in excess of sixty days overdue. Cases sought to be withdrawn from are based upon the number of records received from the respective counties which cannot be briefed timely.

Pursuant to section 27.51(4), Florida Statutes (1991) the elected Public Defenders located in the second, seventh, nineteenth, eleventh, and fifteenth judicial circuits are assigned the additional duty of handling all indigent criminal appeals within their respective district court's jurisdiction. Thus the Tenth Circuit Public Defendant, Mr. J. Marion Moorman, has the responsibility for handling all indigent criminal appeals in the Second District Court of Appeal upon designation by the respective trial Public Defenders. The Second District is unique in that it has the largest population, the largest civil and criminal caseloads, the highest jury trial rate (4.24%) in criminal cases, the highest number of appeals assigned to a Public Defender, and the highest criminal appeal backlog within the office of a Public Defender.

These are problems of long-standing. See Skitka v. State, 579 So. 2d 102 (Fla. 1991); In Re: Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990). Although this proceeding technically concerned only the motions to withdraw and petitions for mandamus in the Second District Court of Appeal, the Commissioner was furnished with evidence concerning the four other appellate Public Defender offices. Either the elected Public Defender or the head of the appellate division from each of these offices testified to the local situation in the First, Third, Fourth, and Fifth Districts. The Commissioner was thus given a statewide view of the overall workload problem. Generally, the workload/caseload demands on the Public Defenders in Florida are extremely high.

Tenth Circuit Personnel and Organization

Mr. J. Marion Moorman, the Public Defender of the Tenth Circuit, has both trial and appellate responsibilities. His office is divided into trial and appellate divisions and generally the lawyers do not cross lines between trials and appeals. Mr. Moorman is the overall supervisor of the office. His executive director is Ms. Holly Stutz. Ms. Deborah Brueckheimer is the head of the noncapital appeals division. Generally the appellate Public Defenders have substantial experience in their field and this is not an entry level position. The appellate division is further divided between capital and noncapital attorneys. Again, these divisions are maintained except for individual instances where a noncapital attorney wishes to gain capital experience and may handle one such capital case. There are fifteen noncapital appellate attorneys located in very cramped quarters in Bartow and two other appellate noncapital attorneys located in Pinellas County. There are five additional attorneys doing capital appeals. There are three secretaries serving the fifteen noncapital appellate attorneys in Bartow. These attorney are directly managed by Ms. Deborah Brueckheimer who has until recently carried a full appellate caseload in addition to her management responsibilities. A production quota of seven briefs or 1300 record pages per month is enforced. This quota is enforced but not without exception.

1992 Caseload/Workload for the Second District Court of Appeal - Tenth Circuit

During calendar year 1992, there were seventeen attorneys assigned exclusively to noncapital appeals. The total number of briefs filed by these attorneys

during that period was 1,067. The average per attorney was 62.7 briefs. All Tenth Circuit attorneys who testified stated they considered the caseload excessive.

For purposes of this analysis, the word "brief" included initial briefs, answer briefs in state appeals, Anders briefs, dispositive motions, and Florida Supreme Court merit briefs. Not included in the definition of "brief" were reply briefs, supplemental briefs, extraordinary writs, Supreme Court jurisdictional briefs, oral arguments, or motions for rehearing.

The Tenth Judicial Circuit's overall productivity in noncapital appeals in 1992 was as follows:

885 initial briefs
53 answer briefs in state appeals
242 Anders briefs
82 reply briefs
49 Florida Supreme Court jurisdictional appeals
30 Florida Supreme Court merit briefs
79 dispositive documents
250 other case actions such as motions for rehearing, supplemental briefs, and extraordinary writs
53 oral arguments

Included in the totals listed above are briefs filed by attorneys normally assigned to capital appeals as follows:

77 initial briefs
9 Anders briefs
13 reply briefs
1 dispositive document

State and National Standards

Considerable expert evidence and documentary evidence was presented on the standards which have been adopted by state and national groups. Because similar problems have been faced before, attempts have been made to reach a consensus on just how many cases a Public Defender should be able to handle in one year. In addition, nonnumerical standards have been adopted.

The workload standard adopted by the American Bar Association is Standard 5-5.3, Workload which provides as follows:

> (a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their

excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. Special consideration should be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will led to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.

"Workload" as used in this standard, is to be distinguished from the more narrow term "caseload." Caseload is the number of cases assigned to an attorney at any given time. Workload is the sum of all work performed by the individual attorney at any given time, which includes the number of cases to which the attorney is assigned, but also includes other tasks for which that attorney is responsible.

The National Advisory Commission on Criminal Justice Standards and Goals developed standards in 1973 which remain in effect and are numerical in nature. These standards recommend that an attorney such as a public defender handle no more than twenty-five appeals per year. The standard of the National Advisory Commission is contained at Courts 13.12 (1973) as follows:

150 felonies per attorney per year; or
400 misdemeanors per attorney per year; or
200 juvenile cases per attorney per year; or
200 mental commitment cases per attorney per year; or
25 appeals per attorney per year.

These standards were recently endorsed by the American Bar Association Committee studying the criminal justice system with only slight modifications. See ABA, Special

Committee on Criminal Justice in a Free Society, Criminal Justice in Crisis, 43 (1989).

The State of Florida promulgated a workload measurement system called the Florida Funding Formula. This formula was designed to determine staffing needs and budgetary requirements for Public Defenders and, at fifty appeals per year, these were the highest standards in the country. They provided that a Public Defender is assumed to be able to handle the following annual caseloads:

8 capital felonies; or
200 noncapital felonies; or
250 juvenile; or
250 mental health; or
5 capital appeals; or
50 noncapital appeals.

These standards are contained in a publication by the Office of the State Court Administrator, State Attorney - Public Defender Workload Project: Descriptive Information and Circuit Profile (Florida Supreme Court January 1981).

The Florida Bench/Bar Commission recently adopted the Florida Public Defender Association's maximum annual caseload standards in its recommendations to the Supreme Court of Florida. The current caseload standards are as follows:

3 capital felonies; or
200 noncapital felonies; or
400 criminal traffic cases; or
400 misdemeanor cases; or
250 juvenile cases; or
250 mental health cases.

The Commission recommended criminal and appellate procedure rule changes setting maximum caseload standards. See The Necessities of the Times - Facing Challenges in the Legal System; The Report of the Bench/Bar Commission, A Commission Created by the Supreme Court of Florida and The Florida Bar, January 1993.

In preparation for this hearing, Mr. Robert Spangenberg, an attorney and expert on the indigent defense crisis and the provision of legal services to indigent defendants, did a survey of other states and testified to a representative sampling of briefs filed per attorney. In the majority of states, attorneys file between twenty and thirty initial briefs per year. None of the surveyed states do more than fifty cases per year:

Ohio	27	
California	26	
North Carolina	30	
Hawaii	12	
Washington	42	
New York	20	to 22
Illinois	24	
Michigan	36	
Colorado	24	
New Hampshire	20	to 25
Massachusetts	20	
Arizona	25	

The Florida Legislature's Funding Approach
(50% of State Attorney's Budget

Based on unrefuted evidence from the Honorable Elvin L. Martinez, member of the Florida House of Representatives and past chair of the House Criminal Justice Appropriation Committee, the court finds that the Florida Legislature devised its own approach to the funding of the Public Defender offices. Each year the twenty State Attorneys from each circuit submit their budget request to the Office of the Governor and these are eventually placed before the Legislature along with the separate funding requests under the formula by the Public Defenders. The Legislature initially considers the total amount requested by the State Attorneys. After deciding on the amount to be appropriated to the State Attorneys, the Legislature then appropriates approximately fifty percent of that amount for the operation of the Public Defenders. In retrospect one can compute a percentage of the funding formula but the appropriations process is in fact driven entirely by the budgetary requests and appropriations for State Attorneys. The Florida Funding Formula becomes a purely hypothetical or artificial exercise in terms of generating funding. The commissioner accepts the testimony of Representative Martinez as true. It was undisputed.

Brief Banks

The Public Defender's Office does not possess a formal brief bank. The lawyers do have their own research and brief files, and all lawyers attempt to use and take advantage of each other's research. Although cases are treated individually, there is no attempt to "reinvent the wheel" on every case. A statewide computerized brief bank is presently under development by the Florida Public Defender's Association under the supervision of Mr. Bennett Brummer, Public Defender of

the Eleventh Judicial Circuit. The Tenth Circuit Public Defender's Office would increase its efficiency if it had access to a current computerized brief bank. Attempts have been made in the past by the Tenth Circuit to use brief banks and such attempts have often fallen into disuse because of two problems. Initially, compiling the brief banks and daily upkeep are very time consuming. Secondarily, brief banks must be continuously purged of old materials which become dated and clutter the data base. Criminal appellate issue tend to be "hot issues" until resolved by the courts or the legislature and then quickly go out of style. Clearly, at this point in time, the new statewide system should be used and efficiency will be increased but only minimally, and clearly not to the extent of solving the backlog problem.

Computerization

Under Chapter 27 of the Florida Statutes the counties have the responsibility of furnishing the physical quarters for the Public Defenders. Counties may also furnish office equipment such as computers. The Tenth Circuit presently has computers purchased through its state budget available to all appellate attorneys who desire them. Even though available, certain attorneys choose to dictate or write their briefs by hand. Other attorneys do all of their drafting on a computer and the attorneys who are completely computer literate were of the view that total computer use is the fastest system. Computer literacy also enables an attorney to maintain a private brief bank. The computers in the trial and appellate divisions use different software and this is a disadvantage. None of the computers are networked and the absence of networking reduces efficiency. Generally, computerization, networking, computer literacy, and the simple ability to type increases the efficiency of the lawyer. On the other hand, some of the lawyers who are in fact the most productive appellate specialists still retain old work habits and continue to write or dictate their briefs. In the final analysis, the work habits of the individual attorneys will dictate their ability to use computers.

Other Appellate Public Defenders

Generally, the appellate caseload problem exists in every Public Defender's office in the State of Florida. Without question the Second District situation is the most aggravated followed by the First District which routinely withdraws from cases and has done so for many years. The Fifth District Court of Appeal produces many more briefs per attorney than does any of the other

districts but this appears to be due to a low jury trial rate, a substantial number of guilty plea appeals, and a substantial number of Anders briefs being filed on meritless appeals.

The Counties' Law Office Management Consultant

The counties presented the testimony of Mr. Richard Reed who is a consultant on the subject of law office management. Mr. Reed has written extensively for the American Bar Association on the subject of law office economics and billable hours. Without question Mr. Reed is an expert on billing and the generation of income from a private law firm.

If all of Mr. Reed's suggestions were followed they would possibly create a "state of the art" appellate division, but when questioned by your Commissioner he stated that none of these proposed changes could be put into effect "Monday" in order to relieve the present crisis. Significantly, most of Mr. Reed's suggestions would cost the counties or the state more money; which is of course the problem in the fist place. However, under no circumstances would implementation of Mr. Reed's suggestions remedy the current caseload problem in the Second District Court of Appeal. Even if all of his suggestions were implemented production would only be minimally increased. If all of his suggestions were implemented the backlog of 382 cases which are the subject of current motions would be hardly dented. The weight of Mr. Reed's testimony was substantially diminished by his lack of expertise in the particular area in question.

Recommendations

The appellate public defenders of the Tenth Circuit function under excessive caseloads and relief should be granted. The immediate issue to be resolved is how best to protect the constitutional rights of those appellants whose cases are backlogged to effective assistance of counsel on appeal. Records transmitted to the Public Defender in October and November of 1992 have already been assigned. Records transmitted in December 1992 and January 1993 should all be assigned for briefing by November 1993. To appoint private counsel in these cases could result in even further delay. Therefore, the recommendation to alleviate the pending backlog is as follows:

> The Tenth Circuit Public Defender should continue to represent those appellants whose

record were transmitted in December 1992 and january 1993. He should be allowed to withdraw from those cases in which the records were transmitted in February, March, April, and May 1993. He should continue to represent appellants whose records were transmitted in June, July, and August 1993. He should be permitted to withdraw from cases received in September, October, and November 1993.

Solutions to the problems of excessive caseload and chronic underfunding are not so simple. Every witness was invited to make suggestions as to steps which might help. Unfortunately, with the exception of additional funding, no one suggested that any of these steps would substantially impact the present caseload problem. Allowing the Public Defender to withdraw merely dramatizes the problem and is not a solution.

Some of the suggestions for a long-term resolution are as follows:

A. Increased funding for more lawyers, support staff, and computerization.

B. Adoption of a prospective withdrawal procedure similar to that used in the First District Court of Appeal to allow the Public Defender to withdraw early based on a recognition that the cases cannot be timely handled in the future.

C. Adoption of binding caseload/workload standards based upon the Florida Formula approach. These standards should be made a part of the Florida Rules of Judicial Administration or the Florida Criminal and Appellate Rules.

D. Increased pro bono representation by private counsel.

E. Appointment and funding of the study commission recommended by the Florida Supreme Court in In Re: Order on Prosecution of Criminal Appeals, 561 So. 2d at 1138 n.7.

F. The Public Defender should constantly review the productivity of his office to insure that all improvements possible are being implemented to continue to increase the efficiency of his office in handling indigent criminal appeals.

Review Before This Court

The Public Defender now seeks further review before this Court because the orders below affect public defenders as a class of constitutional officers. This Court has accepted jurisdiction by order of December 1, 1993, scheduled an expedited oral argument for February 1, 1994 and required the filing of briefs on an expedited basis.

The Public Defender incorporates and relies upon the arguments contained in the brief of the Florida Public Defender Association, Inc. filed as Amicus Curiae.

ISSUES

I.

WHETHER THE PUBLIC DEFENDER, AS AN INDEPENDENT CONSTITUTIONAL OFFICER, MAY BE PROPERLY SUBJECTED TO AN ADVERSARIAL INVESTIGATORY PROCEEDING CONCERNING A REQUIRED AND LEGALLY SUFFICIENT MOTION TO WITHDRAW.

A. The Past Proceeding May Be Moot But The Issue Will Recur.

B. Future Motions to Withdraw Based on A Certified Conflict and Excessive Caseload Should Not Require An Investigation.

II.

WHETHER THE FINDINGS OF FACT OF THE COMMISSIONER SHOULD HAVE BEEN ADOPTED BY THE SECOND DISTRICT COURT OF APPEAL AND WHETHER THOSE FINDINGS SHOULD BE APPROVED BY THIS COURT.

III.

WHETHER THIS COURT SHOULD TAKE THE RECOMMENDED AVAILABLE STEPS TOWARD: (1) REMEDYING THIS LONG STANDING EXCESSIVE CASELOAD PROBLEM, AND, (2) PROTECTING THE RIGHTS OF INDIGENT DEFENDANTS TO EFFECTIVE AND TIMELY APPELLATE REVIEW IN THE SECOND DISTRICT AND ALL APPELLATE COURTS OF THIS STATE.

SUMMARY OF ARGUMENT

In a break from case law including In Re: Order and Skitka the Second District Court of Appeal chose not to rule on a completely sufficient motion by the Public Defender to withdraw based on a conflict created by an excessive caseload. The motion was sufficient on its face and fully supported by documentation. Instead of promptly granting the motions the district court ordered a full scale investigation of the Public Defender's office by a specially appointed Commissioner who was ordered to hold an evidentiary hearing and make findings of fact, conclusions and recommendations. The Commissioner, at the request of the Second District, was actually appointed by this Court.

This procedure was overly broad and violated the Public Defender's right to run his own office as an independently elected constitutional officer. The Public Defender may not be supervised by the court and the Public Defender's clients are entitled to representation by a lawyer who makes independent professional judgments as to how clients' cases should be handled. The court simply does not have the power to run the Public Defender's office nor to decide how much time should be spent on a given case. These are professional decisions which must be made by the lawyers who represent the clients. These lawyers are subject to the control of The Florida Bar which ultimately reports to this Court in enforcing the Rules of Professional Conduct applicable to all lawyers.

The Second District Court of Appeal should not have required or permitted the adversarial investigation into the Public

Defender's office and operation any more than that court would have required an investigation into the Attorney General's office and operation.

At this point the Public Defender has now been through the entire investigation and evidentiary demonstration. A tremendous amount of time and money was spent presenting an array of experts to the Commissioner. The four day hearing entailed the presentation of some of the finest minds in the country concerning these problems. Full documentary evidence was presented including all of the current literature in the country on the subject.

The specially appointed commissioner then made extensive factual findings, conclusions and recommendations. The Second District Court of Appeal merely "received" the Commissioner's report and did not say whether it had even adopted the factual findings as the court's findings. The court made no comment on any factual finding despite its specific direction to the Commissioner to make findings on specific issues. The court also made no comment whatsoever on any of the recommended changes and solutions to the long-term problem.

Although the Public Defender respectfully submits that he should never have been forced to go through this procedure, now that the procedure has been completed, the Public Defender respectfully suggests that something worthwhile should have been accomplished by virtue of all of the time, effort and money expended. This Court should deal with the issues presented and in doing so publish the Commissioner's whole report. This Court

should deal with the fact as found by the Commissioner that the Florida Legislature had chosen to totally disregard the funding formula. This Court should deal with the fact that the Counties chose not to present any evidence whatsoever indicating a lack of ability to pay for the private counsel who must be appointed in place of the public defenders. This Court should implement some of the recommendations growing out of this proceeding by promulgating binding standards as a part of the Florida Rules of Judicial Administration or the Criminal Rules of Procedure.

In short, the procedure was not appropriate but something good should come out of it. Further, no public defender should ever have to go through this procedure again absent some compelling new set of circumstances.

The orders of the Second District Court of Appeal clearly affect public defenders as a class of constitutional officers. This Court thus has jurisdiction and this Court is again presented with a long-standing problem which is statewide. The solutions, other than adequate funding by the Legislature, are not clear or easy but at least steps in that direction should be taken.

ARGUMENT

I.

WHETHER THE PUBLIC DEFENDER, AS AN INDEPENDENT CONSTITUTIONAL OFFICER, MAY BE PROPERLY SUBJECTED TO AN ADVERSARIAL INVESTIGATORY PROCEEDING CONCERNING A REQUIRED AND LEGALLY SUFFICIENT MOTION TO WITHDRAW.

A. The Past Proceeding May Be Moot But The Issue Will Recur.

Instead of promptly ruling on the Public Defender's March and April 1993 motions to withdraw and certifications, the Second District declared that a full trial and factual findings were necessary. In addition, the order stated that the 14 Counties within the Second District's jurisdiction had the right to participate s parties. The April 22, 1993 Order on Motions to Withdraw is reported at 622 So. 2d 2 (Fla. 2d DCA 1993).

In fact, the Counties formed a loose alliance resisting the Public Defender's motions and hired a $40,000 - $50,000 efficiency expert in an attempt to defeat the motions to withdraw. The Counties asserted a work produce privilege against disclosure of their expert's report, declared the proceeding to be "adversarial", objected to most of the evidence and severely cross-examined the witnesses. The state attorneys for each county within the Second District and all elected public defenders and other interested parties, at the discretion of the Commissioner, were allowed to participate. In a preliminary order Commissioner Driver expanded the proceeding by including the state attorneys as mandatory participants. It was made clear before the hearing that Mr.

Moorman himself would be required to testify and be cross-examined to defend his office.

The Second District delegated fact finding authority to a Commissioner directing him to investigate all aspects of the Public Defender's appellate operations. The court specifically directed the Commissioner to inquire into and make findings on the productivity of the lawyers in the appellate division, the day-to-day duties of appellate attorneys, the manner in which issues were briefed and documents prepared, and the reasons why the Public Defender chose to withdraw in some cases and remain in other cases. The Second District order had one immediate impact -- further delay in the progress of the appeals of the usually incarcerated appellants represented by the Public Defender. This delay was twofold. As the motions to withdraw remained unruled upon new cases arrived and the backlog grew. Further, the Public Defender was placed in the extremely difficult position of having to prepare to act as the plaintiff in an adversarial trial before a fact finding commissioner and to present witnesses and voluminous evidence to defend himself, his lawyers, and the operation of his office. In addition the Public Defender had to be an advocate for his clients whose appeals remained unbriefed and unresolved. The Public Defender who knew he would have to testify and be cross-examined found it necessary to hire independent counsel who assisted in filing pleadings and presenting evidence. A great deal of time was spent by Mr. Moorman, his assistants and by public

defenders from all over Florida in preparation for and in presenting the "case" of the Public Defender.

Mr. Moorman was of course directly involved in this Court's decision in In Re: Order issued in 1990 and Mr. Moorman has scrupulously attempted to comply with the time requirements set forth in In Re: Order. He has moved to withdraw when briefs could not be completed in compliance with that mandate. The 1993 motions to withdraw were accompanied by exactly the same kind of statistical and financial information which had been submitted along with the motions to withdraw in the 1991 Skitka v. State matter. In Skitka, despite the Second District's denial, this Court found sufficient grounds for withdrawal from representation in 29 overdue appeals. Grounds stated in the 1993 motions were essentially the same as the previous motions to withdraw which were found by this Court to be sufficient and to mandate withdrawal. The delay resulting from the April 22, 1993 order deprived the indigent defendants of their constitutional right to timely appeals and their constitutional right to effective assistance of appellate counsel.

As this Court stated in In Re: Order at pages 1131-1132:

> The state of Florida provides defendants with the statutory right to appeal their judgments and sentences. § 924.06, Fla. Stat. (1980). When a state affords a first appeal of right, it must supply indigent appellants with an attorney, Douglas v. California, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963), because under the doctrine of equal protection, indigent appellants must have the same ability to obtain meaningful appellate review as wealthy appellants. Id.; Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). Because of the tremendous backlog of indigent appeals, the briefs of nonindigents in the Second District are being filed at

> least a year sooner than those of indigents represented by the public defender. Certainly this creates a serious constitutional dilemma. [footnote omitted here] Further, as we noted in Hatten v. State, 561 So. 2d 562 (Fla. 1990), the lengthy delay in filing initial briefs in appeals by indigents is a clear violation of the indigent state defendant's constitutional right to effective assistance of counsel on appeal. See Hooks v. State, 253 So. 2d 424 (Fla. 1971), cert. denied, 405 U.S. 1044, 92 S.Ct. 1330, 31 L.Ed.2d 587 (1972); McDaniel v. State, 219 So. 2d 421 (Fla. 1969); see also Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985).

The April 22 order was in conflict with Skitka, Hatten and In Re: Order because it allowed the Counties to participate as adversaries in a proceeding against the Public Defender. This Court stated in In Re: Order that the Counties need not be given an opportunity to be heard in motions to withdraw even though the Counties would have a financial responsibility in compensating private counsel after withdrawal. Again, allowing the Counties to participate because of concern for their financial burden is understandable from the c' point of view but it substantially infringes upon the defendants' constitutional right to go forward with their appeals in a timely manner. The In Re: Order decision specifically finds that the Counties are responsible when the Legislature fails to adequately fund the Public Defender's office. The criminal defendants represented by the Public Defender's office simply should not be held hostage to a dispute over funding between the Legislature and the Counties of this state. This is a political problem which cannot be allowed to determine or even affect the outcome of the Public Defender's well founded motions to withdraw.

Contrary to the Second District's April 22, 1993 Order the Public Defender's motion and certificate, as well as his representations should be taken "at face value" and should be sufficient without an inquisition.

Under § 27.53(3), a public defender's certification of conflict is normally enough to demonstrate the existence of such conflict requiring the court to act upon his motion to appoint other counsel. See Babb v. Edwards, 412 So. 2d 859, 862 (Fla. 1982) (holding that under the 1980 version of § 27.53(3), a certification of conflict by the public defender created a duty on the part of the trial court to appoint other counsel, and noting that the 1981 amended version -- which is materially the same as the present statute -- "continue[d] to place the burden of determining conflict on the public defender," and made it "even clearer" that once the public defender of a given circuit has determined conflict and moved the court to appoint other counsel, assistant public defenders from that circuit should not be appointed). Also see, Nixon v. Siegel, 18 Fla. L. Weekly D2378 (Fla. 3d DCA Nov. 9, 1993) where the trial court's denial of motion to withdraw based on the court's view that the public defender's certificate of conflict was not conclusive on whether there was a real conflict, was held a departure from the essential requirements of law. The Third District stated that "the court is not permitted to reweigh those factors considered by the public defender in determining that there is a conflict in representing two adverse defendants". In Volk v. State, 436 So. 2d 1064, 1067 (Fla. 5th DCA

1983) it was held that the statute does not distinguish between the elected public defender and his staff, and the court should give the certification of conflict filed by an assistant public defender "the same credence it would give to similar information from the elected public defender or from any other credible source".

"[M]ost courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." Holloway v. Arkansas, 435 U.S. 475, 485-86, 98 S.Ct. 1173, 1179, 55 L.Ed.2d 426 (1978). This is because (1) an attorney "'is in the best interest professionally and ethically to determine when a conflict of interests exists or will probably develop in the course of a trial,'" (2) attorneys have the obligation to bring such problems to the attention of the court, and (3) "attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'" Holloway v. Arkansas, 435 U.S. at 485-86, 98 S.Ct. at 1179 (citations omitted).

A conflict of interest based on an excessive caseload does not make the certificate any less conclusive or credible than those filed where the conflict arises in individual cases. Because the decision as to whether the caseload is excessive must be based on facts which are within the knowledge of the public defender, and on a professional and official judgment which the public defender has both the obligation and the authority to make, his certification that the caseload is excessive should resolve that question.

The court's role is not that of a "factfinder". It is that of reviewing the facial sufficiency of the certification and motion to appoint other counsel. Unless the court is able to articulate some reason for doubting the public defender's credibility, or for believing that his determination that a conflict exists lacks a rational basis, see Day v. State, 570 So. 2d 1003 (Fla. 1st DCA 1990), the court's inquiry should be limited to assessing the facial validity of the certification of conflict, and to fashioning a remedy. See Nixon v. Siegel; Cf. State v. Hamilton, 448 So. 2d 1007 (Fla. 1984) (once counsel satisfied the threshold requirements of Florida Rule of Criminal Procedure 3.216(a), by indicating his belief that a psychiatric expert was needed, court was required to appoint an expert, and could not inquire into the reasonableness of counsel's subjective belief).

The nature of the Public Defender's function likewise requires the exercise of independent, professional judgment, which cannot constitutionally be subordinated to that of an administrative superior.

Public defenders are lawyers, with the ethical and professional responsibilities which that implies. Each public defender, and every assistant public defender, must be a member of The Florida Bar, Art. V, § 18, Fla. Const.; § 27.50, Florida Statutes (1991), and must comply with the ethical, self-policing requirements of the rules of professional conduct.

The constitution does not permit public defenders to be anything less than real lawyers. The right to counsel guaranteed

by the sixth and fourteenth amendments to the federal constitution, and by Article I, Section 16, of the Florida Constitution, requires public defenders to adhere to the same professional standards as other criminal defense lawyers. See Polk County v. Dodson, 454 U.S. 312, 321-22, 102 S.Ct. 445, 451-52, 70 L.Ed.2d 509 (1981); see also State v. Meyer, 430 So. 2d 440 (Fla. 1983) (all attorneys, whether state supplied or privately retained, are under the professional duty not to neglect any legal matters entrusted to them).

Last but not least, several of the issues go substantially beyond what the Second District Court of Appeal needed for consideration and decision on the motions to withdraw and invade the powers and duties of the Public Defender as an independent constitutional officer. These inquiries directly concerned the management and operation of the Public Defender's office. Article V § 18, Florida Constitution, states: "Public defenders shall appoint such assistant public defenders as may be authorized by law"; and § 27.53(1) Florida Statutes (1991) states: "Each assistant public defender shall serve at the pleasure of the public defender".

Although the Second District Court of Appeal has inherent authority to issue orders protecting the rights of indigent appellants charged with crimes, this inherent power does not include having the court investigate how the Public Defender or any other independent public official operates his office. The order was excessive in its breadth.

The Public Defender was not subject to such an inquiry and investigation any more than the Attorney General would have been. If the Attorney General were to be overloaded and file multiple motions for extensions of time on a large number of briefs, certainly the district court would not appoint a commissioner to start investigating the Attorney General and the manner in which issues are researched and briefs are written in that office. Certainly the Counties and all the public defenders in the entire district would not be given party status to send in investigators and assert the Attorney General could "cut corners" and thereby do things (prepare briefs) faster.

In Skitka at page 104, this Court acknowledged: "That the courts should not involve themselves in the management of the Public Defender's offices." As a constitutional officer pursuant to Article V, § 18, the Public Defender must be left free to carry out his constitutional duties in compliance with his professional obligation to his clients without interference from the courts. It is not up to the courts to say whether the Public Defender or his assistant appellate Public Defenders should spend more or less time on a particular defendant's case or on a particular brief or issue. This is solely and exclusively the responsibility and duty of the elected Public Defender and if there is an abuse, the remedy is with the people.

The United States Supreme Court clearly held in Polk County v. Dodson, 454 U.S. 312 (1981) that the public defender must be viewed as an officer whose functions cannot be externally controlled by

the state of which the court is a branch. Dodson states at page 321:

> First, a public defender is not amenable to administrative direction in the same sense as other employees of the State. Administrative and legislative decisions undoubtedly influence the way a public defender does his work. State decisions may determine the quality of his law library or the size of his caseload. But a defense lawyer is not, and by the nature of his function cannot be, the servant of an administrative superior.

And as stated by Chief Justice Burger, concurring, 454 U.S. at 327:

> [T]he government undertakes only to provide a professionally qualified advocate wholly independent of the government. It is the independence from governmental control as to how the assigned task is to be performed that is crucial. The advocate, as an officer of the court which issued the commission to practice, owes an obligation to the court to repudiate any external effort to direct how the obligations to the client are to be carried out.

Also see, Hatten v. State, supra., holding at page 565: "lack of support by the Legislature does not relieve the public defender of his legal and professional duty . . . to act with reasonable diligence." The Second District's order invaded the Public Defender's independence as a defense counsel under the Rules of Professional Responsibility and as a constitutional officer.

The Counties offered evidence that individual assistant public defenders would be more efficient if they were prohibited by supervisors from filing reply briefs and requesting oral arguments. This same county expert suggested that many appeals should be treated as "commodity" type cases on a perfunctory type briefing approach. The Commissioner rejected this testimony in the face of overwhelming contrary evidence that the ethical standards of public defenders were much higher than the county expert suggested. See

testimony of Mr. Joseph Vince Aprile. (Tr.353-390). In addition to this evidence on "cutting professional corners" which clearly violated ethical standards, the Counties also failed to present evidence on an important related point concerning the Counties' ability to fund the private attorneys made necessary by the Public Defender's withdrawal. The Public Defender, through public record requests was prepared to present fiscal information regarding each Counties' millage rate and ability to pay for the private lawyers that would have to be hired in each conflict case. The Counties objected to this evidence and the Commissioner sustained the objection stating that the ruling was without prejudice to the Public Defender's offering of the financial evidence in the event that the Counties were to offer evidence asserting they had an inability to pay. Absolutely no evidence was offered by any county concerning inability to pay. In fact, the Counties totally abandoned any effort to even deal with their ability to pay.

Mootness

The Public Defender recognizes that he has already been through the full evidentiary inquiry and has been fully vindicated and exonerated by the findings of Commissioner Cheatwood who concluded his caseload was "excessive" and that his office was underfunded. Thus, these arguments are arguably moot but this Court should exercise its discretion and rule because this is a matter of "general interest" involving "the duties and authorities of public officials in the administration of justice". State v. Causey, 503 So. 2d 321 (Fla. 1987); In Re: Byrne, 402 So. 2d 383

(Fla. 1981) and Sadowski v. Shevin, 345 So. 2d 330 (Fla. 1977). Clearly, withdrawals for excessive caseloads are a repetitive issue which will avoid review if this Court does not consider the problem now. See Scott v. Gunter, 447 So. 2d 272 (Fla. 1st DCA 1983).

It is respectfully submitted that for the foregoing reasons the Public Defender should never have been subjected to the inquiry in question. Although the Public Defender has "passed the test" he should never have been required to open his office to the Counties' paid expert acting in an adversarial capacity and to produce every conceivable internal record all of which are now before the court in the form of a voluminous record. If particular facts become essential to an appellate court's determination of an issue before it such as in habeas corpus proceedings then a Commissioner is certainly appropriate to determine such issues. See Baggett v. Wainwright, 229 So. 2d 239 (Fla. 1969), abrogated in part, 569 So. 2d 439 (Fla. 1990). However, this does not mean that a district court of appeal has the discretion to do a generalized investigation into the details of the operation of the Public Defender's office. Further, it is highly improper for the district court to add adversarial parties who may litigate against the Public Defender and against the interests of the clients represented by the Public Defender. Fortunately, the Commissioner rejected the "commodity" case approach of the county expert. However, that expert hired by the Counties simply had no standing to be in the courtroom.

B. Future Motions To Withdraw Based On A Certified Conflict and Excessive Caseload Should Not Require An Investigation.

It would be wholly unrealistic to believe that this long standing problem produced by underfunding and an excessive caseload will simply cease to exist. There will be future motions to withdraw. There have been such motions in the past and unfortunately they will occur again. The Public Defender spent thousands of dollars and 4 days in court presenting expert testimony and voluminous documentary evidence. The Public Defender for the Tenth Circuit should not have to go through this again and no other Public Defender should be subjected to such a process. A great deal of work went into the presentation of the case before Commissioner Cheatwood and something of importance should have been accomplished by this process.

The Florida Public Defenders Association through Mr. Bennett H. Brummer has filed an amicus brief on this point which J. Marion Moorman, petitioner herein, incorporates and relies upon. The brief is an excellent legal analysis of the correct procedure for the district courts in dealing with public defender motions to withdraw.

II.

WHETHER THE FINDINGS OF FACT OF THE COMMISSIONER SHOULD HAVE BEEN ADOPTED BY THE SECOND DISTRICT COURT OF APPEAL AND WHETHER THOSE FINDINGS SHOULD BE APPROVED BY THIS COURT.

The en banc order of October 25, 1993 merely notes that the Commissioner's report has been "received". The findings of fact are not adopted or approved in any way. Absolutely no comment has been made regarding the conclusions and recommendations. The Commissioner was ordered to provide the district court with findings, conclusions and recommendations and the Public Defender was ordered to provide the evidence upon which the Commissioner's report was to be based. Adversary parties were invited and indeed ordered to participate to test the evidentiary basis. The parties; the Counties, the state attorneys, the Attorney General and the public defenders should all be bound by these findings.

We are frankly in doubt as to the district court's acceptance of the Commissioner's findings of fact. The request to present oral argument before the Second District on the steps to be taken pursuant to the report was denied. (See Order of October 25, 1993.) The Public Defender respectfully suggests that at least the findings of fact must have been accepted by the court as supported by competent substantial evidence and adopted by the Second District Court of Appeal. The Public Defender thus requests that the Commissioner's unchallenged report be published in full by this Court in a decision approving the report but disapproving the procedure by which it was created.

The April 22, 1993 order appointing the Commissioner to make findings of fact and conclusions of law is an uncommon occurrence in district courts of appeal but it now exists in the decisional law of Florida as Order on Motions to Withdraw Filed by Tenth Circuit Public Defender, 622 So. 2d 2 (Fla. 2d DCA 1993). The procedure was clearly patterned after the use of special masters in the circuit courts and hearing officers under § 120.65 in administrative matters pursuant to § 120.57, Florida Statutes (1993). Hearing officers are provided by the Department of Administrative Hearings and serve as fact finders. The facts found by such administrative judges go to the administrative agency decisionmakers with a presumption of correctness and those facts must be accepted and adopted unless they are not supported by competent substantial evidence. The parties are required to file exceptions if they disagree with any of the hearing officer's factual findings and the failure to file an exception constitutes a waiver. There is an unbroken line of administrative cases of which Heifetz v. Department of Business Regulation, 475 So. 2d 1277 (Fla. 1st DCA 1985) is an oft-cited example. Heifetz states the general rule that:

> Despite a multitude of cases repeatedly delineating the different responsibilities of hearing officers and agencies in deciding factual issues, we too often find ourselves reviewing final agency orders in which findings of fact made by a hearing officer are rejected . . . Section 120.57(1)(b)9, Florida Statutes (1983), mandates that an agency accept the factual determinations of a hearing officer unless those findings of fact are not based upon 'competent substantial evidence.' A number of cases have defined the competent, substantial evidence standard. The seminal case is DeGrott v. Sheffield, 95 So.2d 912 (Fla. 1957).

Thus, the administrative model clearly holds that the findings of fact must be accepted by the eventual decisionmaker unless there is no evidence to support them.

The same rule universally prevails regarding special masters or other fact finders in the circuit court setting. See Harmon v. Harmon, 40 So. 2d 209 (Fla. 1949); Frank v. Frank, 75 So. 2d 282 (Fla. 1954); Reynolds v. Diamond, 605 So. 2d 525 (Fla. 4th DCA 1992) and Sloan v. Sloan, 393 So. 2d 642 (Fla. 4th DCA 1981). The factual findings made by a special master come to the circuit judge with a presumption of correctness similar to a jury verdict on fact issues. The parties are required to file exceptions if they disagree. If there is competent substantial evidence in the written record supporting the finding of the master then the court is mandated to accept and adopt those factual findings unless they are clearly erroneous. The parties are of course bound by the findings of the master. The Second District has strongly endorsed the view as to the importance and binding nature of a master's factual findings. See the extensive opinion in McAnespie v. McAnespie, 200 So. 2d 606 (Fla. 2d DCA 1967).

There is simply no reason to apply any other standard to the factual findings made by Judge Cheatwood serving as a specially appointed Commissioner with specific directions to make factual findings. Certainly Judge Cheatwood's efforts, after the Second District's request and this Court's appointment, are not a nullity. All of the concerned parties were present before Judge Cheatwood and given the opportunity to offer evidence. After Judge Cheatwood

filed his comprehensive report the district court's April 22, 1993 order gave each party the opportunity to file a response to the report. Only the Public Defender filed such a response and it was a strong endorsement of the report and an argument that the court should adopt the report and act upon the facts and recommendations within the report. No one suggested that the report was not supported by overwhelming competent substantial evidence. We do not suspect that any party will make any such suggestion before this Court. The transcript and the voluminous evidence could not be clearer. The findings of fact should have been adopted and published by the Second District Court of Appeal even if the Second District has chosen not to follow any of the recommendations in the report other than the granting of all of the Public Defender's motions to withdraw. This Court should now publish the report in its disposition of the matter.

Clearly the Second District Court of Appeal entered its original April 22, 1993 order as an exercise in inherent authority to manage its own caseload and to take steps in promoting "effective appellate review" as a right guaranteed by the Constitution to every client represented by the Public Defender. As stated in the April 22 order:

> The appellants in these cases are constitutionally entitled to timely appeals. An untimely appeal may be little better than no appeal at all when, for example, a sentence expires before the appeal is complete. Moreover, an inundated attorney may be only a little better than no attorney at all.

Thus it is clear that the court had ventured into the area of caseload management and improving the overall system but has then

retreated from the endeavor by failing to implement or even note its consideration of the steps which might be taken towards solving the problems.

These recommendations will be addressed in point III herein but as a first step the findings of fact must be adopted so that all concerned parties are bound by them and interested parties in general are aware of them.

Without question the most important single finding of fact was that the Public Defender was functioning under an excessive caseload and the conclusion that all of the motions to withdraw had to be granted. Florida Public Defenders function under a standard of 50 appeals per year which is by far the highest standard in the country. Every other state expects their Public Defenders to do substantially fewer appeals per year. Further, the uncontested facts were that even though more is expected from a Florida Public Defender than any other similar lawyer in the country, the Florida Legislature has repeatedly declined to adequately fund the public defender. The single most compelling factual finding on this subject of funding was that the Florida Legislature has chosen to disregard the statutory funding formula and to instead adopt its own approach which actually violates its own statute § 27.53(4). Instead of funding the public defender in accordance with the required funding formula the Florida Legislature has adopted the approach of first deciding what appropriation will be made to the state attorneys and then appropriating approximately 50% of that amount to the public defenders.

In the current year this 50% approach resulted in the Public Defender being funded at approximately 47% of what the funding formula would have required. The Tenth Circuit Public Defender's budget request for 1992/1993 was $9.9 million and the amount actually appropriated by the legislature was $4.6 million or 47.02% of the documented need under the formula. The Tenth Circuit's budget request for fiscal year 1993/1994 was $11.5 million. The 1991/1992 budget was reduced by over $100,000 in salaries requiring furloughs of personnel during that period. This meant that all employees simply did not receive pay for the furloughed days. Many of the attorneys worked without pay on those furloughed days. The highest that the Florida Legislature has ever funded the Public Defenders in this state is at 78% of the formula. The formula was shown to be a valid indication of the money actually necessary to produce 50 cases per year based on the preceding year's caseload numbers. It is important to note that the 47% figure is not a conscious legislative decision. It is merely a retrospective computation which can be arrived at after the Legislature simply funds the public defenders statewide at 50% of what they have already chosen to fund the state attorneys statewide at. Indeed, the Florida funding formula was shown to be a widely praised and accepted standard throughout the rest of the country. The formula had been adopted in other states because it was a true representation of what is needed to do 50 cases per year. All of these facts were well supported by the evidence and should be adopted herein.

III.

WHETHER THIS COURT SHOULD TAKE THE RECOMMENDED AVAILABLE STEPS TOWARD: (1) REMEDYING THIS LONG STANDING EXCESSIVE CASELOAD PROBLEM, AND, (2) PROTECTING THE RIGHTS OF INDIGENT DEFENDANTS TO EFFECTIVE AND TIMELY APPELLATE REVIEW IN THE SECOND DISTRICT AND ALL APPELLATE COURTS OF THIS STATE.

This Court is vested with the constitutional responsibility of administering the courts of the State of Florida and has the inherent authority to take all steps necessary to fulfill its broad responsibilities under Article V of the Florida Constitution and its responsibilities under the United States Constitution. Rose v. Palm Beach County, 361 So. 2d 135 (Fla. 1978). The opinion in In Re: Order makes it obvious that this Court will exert the necessary pressure on the Florida Legislature to fulfill its corresponding responsibilities. The courts do not fund the administration of justice -- that is the responsibility of the legislature.

At the conclusion of his report, Judge Cheatwood listed the following as suggestions for long-term resolution of the excessive caseload problem:

> A. Increased funding for more lawyers, support staff and computerization.
>
> B. Adoption of a prospective withdrawal procedure similar to that used in the First District Court of Appeal to allow the Public Defender to withdraw early based on a recognition that the cases cannot be timely handled in the future.
>
> C. Adoption of binding caseload/workload standards based upon the Florida Formula approach. These standards should be made a part of the Florida Rules of judicial Administration or the Florida Criminal and Appellate Rules.

D. Increased pro bono representation by private counsel.

E. Appointment and funding of the study commission recommended by the Florida Supreme Court in In re: Order on Prosecution of Criminal Appeals, 561 So. 2d at 1138 n.7.

F. The Public Defender should constantly review the productivity of his office to insure that all improvements possible are being implemented to continue to increase the efficiency of his office in handling indigent criminal appeals.

In the Public Defender's response to the Commissioner's report filed in the district court of appeal on September 24, 1993 the Public Defender stated his suggestions as follows:

> The transcript of the four days of testimony is voluminous, and a total of 18 witnesses testified for the public defender. Except for the executive director of the public defender's office, these witnesses were all attorneys and experts in various fields including representation of indigents on appeal, the national crisis in the representation of indigents on appeal, the national crisis in the representation of the poor, general appellate practice, ethical considerations in public defender representation and other related subjects. Representatives of all five appellate public defender offices testified and gave a statistical and workload analysis of each office.
>
> In view of the overwhelmingly favorable report by Judge Cheatwood, J. Marion Moorman, as Public Defender of the Tenth Circuit and as the appellate Public Defender functioning before this court, respectfully suggests that the court accept the Commissioner's report and order the following:
>
> * * *
>
> The Court should establish prospective withdrawal procedures in consultation with the Public Defender and the Office of the Attorney General.
>
> The Court should actively participate in case management, holding regularly scheduled quarterly meetings with the Public Defender and

> the Office of the Attorney General for status reports.
>
> This Court and the Court's Clerk should become more active and involved in monitoring trial court clerk record preparation, transcript preparation by court reporters, supplementation of the record, and all other matters which might promote the more efficient handling and processing of appeals in this Court, entering orders to compel or to show cause as necessary to insure timely record preparation.
>
> This Court should enter an order adopting maximum caseload standards for the Public Defender in accordance with the evidence previously presented before Judge Cheatwood and upon further consideration with representatives of the Public Defender and the Attorney General. Such an order setting binding standards should be published as a reported decision in Southern Reporter so that it will have precedential authority. This court has the inherent power to do whatever is reasonably necessary to administer justice within its jurisdiction.

All of these suggestions bear careful consideration by this Court. At an absolute minimum this Court should again take steps to require the creation of a commission to study the funding formula and its implementation in the Florida Legislature. This was strongly suggested in footnote 7 of this Court's In Re: Order opinion and it is even more necessary now since the facts show that the Florida Legislature totally disregards the funding formula.

The prospective withdrawal procedure has worked in other districts and should be implemented in the Second District or at least considered by the court and the interested parties. Binding caseload standards for appellate public defenders should be promulgated by this Court in the form of a Rule or at least

submitted to the appropriate committee for further study with this Court's recommendation.

CONCLUSION

The orders below affect Public Defenders as a class of constitutional officers and this Court should address the issues presented herein. The Public Defender should not be subjected again to the type of inquiry involved in this case. The findings of fact by the Commissioner should have been adopted by the Second District Court of Appeal and this Court should now publish the report and address the recommendations on long-term solutions to this problem.

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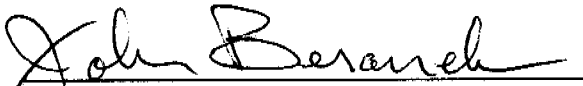
and



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by U.S. Mail to: **RICHARD DORAN**, Assistant Attorney General, The Capitol, Tallahassee, FL 32399; **H. HAMILTON RICE, JR.**, Manatee County Attorney, P.O. Box 1000, Bradenton, FL 34206; **MARK F. CARPANINI**, Polk County Attorney, P.O. Box 60, Bartow, FL 33830; **WILLIAM P. BUZTREY**, Assistant County Attorney, Hillsborough County, P.O. Box 1110, Tampa, FL 33601; **FREDERICK A. BECHTOLD, GARY A. VORBECK**, Attorneys for DeSoto County and Hardee County, Vorbeck & Vorbeck, 207 East Magnolia Street, Arcadia, FL 33821; **SUZANNE T. SMITH**, Assistant County Attorney, Pinellas County, 315 Court Street, Clearwater, FL 34616; **PAUL BANGEL**, Assistant County Attorney, Manatee County, P.,O. Box 1000, Bradenton, FL 34206; **HONORABLE JULIANNA M. HOLT**, Public Defender, Thirteenth Judicial Circuit, Courthouse Annex, North Tower, 801 E. Twiggs Street, 5th Floor, Tampa, FL 33602-3548; **HONORABLE BENNETT H. BRUMMER**, Public Defender, and **LOUIS CAMPBELL**, Assistant Public Defender, Eleventh Judicial Circuit, 1351 N.W. 12th Street, Miami, FL 33125; **HONORABLE RICHARD L. JORANDBY**, Public Defender, Fifteenth Judicial Circuit, Criminal Justice Building, 421 Third Street, West Palm Beach, FL 33401; **HONORABLE NANCY DANIELS**, Public Defender, Second Judicial Circuit, 301 South Monroe Street, Suite 401, Tallahassee, FL 32301; **HONORABLE JAMES B. GIBSON**, Public Defender, Seventh Judicial Circuit, The Justice Center, 251 N. Ridgewood Avenue, Daytona Beach, FL 32114; and **HONORABLE J.C. CHEATWOOD**, 412 Fern Cliff Avenue, Temple Terrace, FL 33617, this 21st day of December, 1993.