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IN THE SUPREME COURT OF FLORIDA

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

CASE NO. 82,782

______/

AMENDED ATTORNEY GENERAL'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

This brief is filed on behalf of the Office of the Attorney General, the office responsible for defending the judgments and sentences entered by the trial courts of the State of Florida in all appellate proceedings. The Second District Court of Appeal has not requested representation from the Attorney General's Office, and this brief should not be construed as the position of the Second District Court of Appeal. Because this case has been set for expedited treatment and because the public defender did not provide a record on appeal or transcripts of the fact-finding proceeding, this brief will contain references to an appendix of documents by use of the symbol "APP.," followed by the appropriate page number(s). Reference to the transcript of proceedings before The Honorable Judge Cheatwood will be by use of the symbol "TR," again followed by the appropriate page number(s).

All emphasis is original, unless otherwise noted.

STATEMENT OF THE CASE AND FACTS

In March of 1993, the Public Defender for the Tenth Judicial Circuit of Florida, filed a motion in the Second District Court of Appeal in which he certified a conflict and moved to withdraw from 249 appeals due to an excessive case load. The Public Defender also moved for a writ of mandamus to compel appointment of other counsel to represent those clients involved in the 249 appeals. (APP. A) In support of that motion, the Public Defender set forth a rather detailed presentation which referred to case law from this Court, office case load figures, budgetary information, and information related to public defender ethical standards. Appended to the motion were affidavits from Mr. J. Marion Moorman, Public Defender for the Tenth Judicial Circuit, and Ms. Holly N. Stutz, indicating that figures contained in the motion were true and accurate to the best of their knowledge. The Attorney General's Office took no position on the motion.

In April of 1993, additional motions to withdraw were filed in regard to 133 new cases. These motions contained essentially the same documentation and affidavits provided with the first set of motions filed in March. (APP. B)

The Attorney General's Office filed a response to this second motion which did not specifically object to the Public Defender's withdrawal from cases based upon his assertions of

workload induced conflict. (APP. C) However, the response did raise an issue about the manner in which the Public Defender had previously proceeded to withdraw from certain cases. The narrow concern was that it appeared that the Public Defender's Office was removing itself from the complex multiple-volume cases and retaining simplistic, small-volume records on appeal. The specific purpose of the Attorney General's notice was to advise the Court of this situation because of the impact this process was having upon the level of representation afforded indigent appellants. At no time did the Office of the Attorney General object to any withdrawal from cases based upon assertions of conflict. Rather, the state would request that this Court allow the Public Defender to withdraw from only those cases with records not exceeding two volumes. The Attorney General's Office did not request that the Court set the case for an evidentiary hearing or inquire concerning any matter beyond that outlined in the Office's response.

On April 22, 1993, the Second District Court of Appeal, sitting en banc, entered an order recognizing the Public Defender's outline of budgetary problems, monthly increase in backlog of cases, and stated that the staff attorneys were unable to adequately handle their case load. The Second District Court's order characterized the Attorney General's Office's response as an opposition to the Public Defender's motion and further noted:

> Among the Attorney General's objections is the assertion that the Public Defender has been selective in seeking to withdraw from cases. The Attorney General asserts that the Public Defender is retaining simple cases and is attempting to transfer more difficult cases or cases with larger records on appeal to the counties. The Public Defender in replying to the Attorney General has denied the assertion.

Order on Motions to Withdraw, 622 So.2d 2 (Fla. 2d DCA 1993).

The Court reminded the parties that, in its previous order entered on the subject, it had raised its concern over its role as a fact-finder when motions to withdraw are based upon assertions of work overload.[1] The Court indicated that "the issues raised by these motions are too complex to be resolved summarily. The result we will ultimately reach will affect too many people and the fiscal affairs of too many governments." Id. at 3. While the Court noted that one option was to direct that the circuit courts in the affected counties hold separate fact-finding hearings, it was neither efficient nor fair to allow the circuits to resolve these matters and create potential inter-circuit conflict. Id. Thereupon, citing Baggett v. Wainwright, 229 So.2d 239 (Fla. 1969), abrogated in part not pertinent to this Order by State v. District Court of Appeal, First District, 569 So.2d 439 (Fla. 1990), it ruled it had the authority and

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[1] See **In re Order on Motions to Withdraw Filed by the Tenth Circuit Public Defender**, 612 So.2d 597, 598 (Fla. 2d DCA 1992). That case involved a December 1992 request to withdraw from 143 cases.

obligation to utilize a fact-finding commissioner to make appropriate factual determinations. The Court directed that a commissioner be selected to take evidence regarding this matter and to prepare a report containing findings of fact and conclusions "as he deems appropriate" based upon the criteria set forth in In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1132 (Fla. 1990). Id. at 3-4.

The Court listed seven specific concerns it indicated "have arisen in our consideration of the Public Defender's current and past motions." These concerns focused upon productivity of the appellate staff of the Public Defender's Office; efforts taken by the Public Defender to ensure efficient handling of repetitive issues; whether the Public Defender utilized a team approach to brief writing; what steps, if any, the Attorney General, the Public Defender and the Second District Court could take towards better handling of indigent appeals; what steps, if any, could be taken to provide a timely appeal without transferring the cost of the appeals to the counties; and lastly, "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." Id.

The Order concluded with directions that the commissioner be called from the ranks of retired circuit court judges and invited the impacted counties, public defenders, and the Attorney General to participate in the proceeding. The Court also stated that the commissioner would have broad discretion in how to handle the hearing and that the commissioner should act quickly to provide it with findings of fact. The Court concluded the order by indicating that it would rule upon the fourteen pending motions after receiving the commissioner's report. Id.

The Public Defender sought review of the April 22, 1993 order in this Court. (APP. D) The Attorney General's Office moved to dismiss the notice to invoke discretionary jurisdiction on the grounds that the order was not a final order but only an interim proceeding. The Second District Court granted the State's motion by Order entered June 24, 1993. (APP. D)

Due to the illness of the originally selected commissioner,[2] the proceedings in the trial court did not commence until August 16, 1993, and lasted through August 19, 1993. (TR I-997) Eighteen witnesses were presented by the Public Defender's Office, including expert witnesses, Public Defenders (including Mr. Moorman), and senior assistant public defenders experienced in appellate practice. All testified

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[2] The commissioners were both appointed by order of this Court, Judge Driver by order of Acting Chief Justice McDonald. His replacement, Judge Cheatwood, was appointed by the Chief Justice. (APP. E)

regarding matters of legal ethics, work loads, approach to brief writing, staffing concerns, and matters related to the seven concerns outlined by the Order. The Public Defender also presented testimony from a prominent legislator, Representative Elvin Martinez, regarding the Legislature's methods of handling public defender financing on a statewide level. (TR 144-154) The counties presented expert witness testimony addressing the seven concerns raised by the Court. (TR 517-658) The Attorney General's Office offered the testimony of one senior assistant attorney general, certified in the area of criminal appellate practice, as to the methods by which the Attorney General handled work load, budgeting, efficiency and several of the other matters outlined in the court's April 22nd Order. (TR 964-991)

At the commencement of the hearing, counsel for the Public Defender announced that, while it had been his understanding that the proceedings were to proceed in a non-adversarial fashion, the counties had taken a contrary position as it pertained to the production of a report of one of their experts. (TR 7-10, 16) Public Defender Moorman also indicated during a brief opening statement that it was his intention to approach the proceeding in a non-adversarial fashion. (TR 25) Immediately thereafter, the assistant attorney general stated the Attorney General's position that the process was not adversarial and that the intent of the exercise was to allow all affected parties the opportunity to tender evidence in an effort to provide a foundation for future resolution of the matter. (TR 26-27)

Upon conclusion of the presentation of evidence, the commissioner entered a detailed report.[3] In short, the commissioner found that the Florida Legislature had not adequately funded the Public Defender for the Tenth Judicial Circuit and that, based upon that lack of funding, it was appropriate to grant all pending motions to withdraw. No parties disputed the commissioner's findings, and they were transmitted to the court. The Court subsequently granted the motions to withdraw, with the exceptions of those cases briefed by the Public Defender's Office during the pendency of the hearing. (APP. F)

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[3] The commissioner's report is quoted in its entirety in the Public Defender's Brief, pp. 8-19.

SUMMARY OF ARGUMENT

Petitioner raises three arguments in this discretionary appeal. First, he asserts that the Second District Court of Appeals erred in ordering an evidentiary hearing to further explore the facts surrounding the Petitioner's request to withdraw from a substantial number of cases due to a conflict of interest generated by a work overload. The Attorney General's position is that this Court provided the District Court the authority to hold an evidentiary hearing in a prior decision discussing this same issue, and it was not error for the Second District to take the action that it did. The Attorney General also disagrees with the Petitioner's assertion that the Court conducted an adversarial hearing.

The second issue raised by the Petitioner is that the lower court failed to adopt the findings of the commissioner as its own. This issue was never presented to the District Court of Appeal and should merit, at best, a remand for further consideration by that Court. The Attorney General's Office has no objection to the adoption of the report.

Lastly, the Petitioner urges this Court to take steps to improve the efficiency of the criminal appellate process. The Attorney General's Office has consistently, over the years, attempted to reach solutions to this problem which would ease the burdens of the counties and, at the same time, ensure adequate

funding for the Public Defenders' Offices, the Attorney General's Office and the courts so that the rights of indigent appellants can be maintained.

ARGUMENT

ISSUE I

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

At the outset, the Attorney General's Office disputes the way the issue is framed. As conceded below by both Mr. Moorman and Mr. Beranek and reinforced by the assistant attorney general, the proceedings before the commissioner were not intended to be adversarial in nature. Review of the first several pages of the transcript shows a single reference by one assistant county attorney to an "adversarial administrative proceeding." (TR 10) That reference was made in the context of an argument concerning public records law and the propriety of releasing an expert witness report prior to the hearing. The report was made available to the Public Defender's Office prior to the witness's testimony, and no other adversarial posture was asserted by any of the parties during the proceeding. (TR 962-63) The Petitioner has also alluded to remarks by Judge Driver, the original commissioner, during a prehearing status conference, which directed that certain state attorneys be involved in the hearing and that Public Defender Moorman be available to testify. However, it does not appear that a record of those remarks will be provided to this Court, and undersigned counsel fails to

recall any such remarks. Based upon the transcript of the hearing before Judge Cheatwood, it is apparent that Judge Cheatwood did not view the proceeding as adversarial in nature and he did not compel Public Defender Moorman to testify.

Contrary to the Petitioner's argument and suggestions contained in the April 22nd Order, the Attorney General's Office did not object to the motions to withdraw. The concerns raised were based upon evidence that complex, multi-volume cases were being "farmed out" while simple one-volume records were being maintained,[4] and was limited to the methodology utilized in the withdrawal process. Based upon discussions between counsel during the weeks following the issue of the April 22nd Order, that concern was allayed. Accordingly, the Attorney General's

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4 Of particular concern was the example of one Hillsborough County attorney who received cases from the Public Defenders which included one case with a 20-volume record, a second case with a 7-volume record, a third case with an 8-volume record, a fourth case with a 20-volume record, a fifth case with a 10-volume record, and a sixth case with a 20-volume record. Juxtaposed against those reassignments, the Attorney General's Office recently had received 26 initial briefs from defense counsel. Only five of those briefs were filed by the Public Defender's Office, while sixteen of those briefs were filed by attorneys handling indigent clients. Of the five briefs filed by the Public Defender's Office, four of them raised only sentencing issues, and the fifth brief merely responded to a question raised by the Second District Court of Appeal. All five cases involved records on appeal of four volumes or less. In contrast, of the sixteen cases filed by replacement counsel, it appeared that at least four of the cases involved large volumes and/or complex, multiple issues. It also appeared to the supervising attorney of the Attorney General's Office that the level of experience and understanding of criminal law of these "farm out" attorneys was not on the same level of the very experienced and able staff of the Public Defender's Office.

Office did not raise the issue as it pertained to the current batch of cases due to its understanding that a methodology for withdrawal would be installed by the Public Defender in future cases. The Public Defender himself explained what had occurred in prior releases and told the commissioner how he intended to resolve our concern. (TR 953-56)

With respect to the Public Defender's contention that the Court erred in seeking to hold an evidentiary hearing, the Court should look to that portion of Judge Grimes' opinion in Skitka v. State, 579 So.2d 102, 104 (Fla. 1991), wherein it was held:

> We acknowledge the Public Defender's arguments that the courts should not involve themselves in the management of Public Defender offices. At the same time, we do not believe the 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.

It was therefore entirely within the discretion of the District Court of Appeal to undertake a fact-finding procedure. A similar procedure was undertaken by the First District of Appeal in Day v. State, 570 So.2d 1003 (Fla. 1st DCA 1990), and to a lesser extent in Thomas v. State, 593 So.2d 617 (Fla. 1st DCA 1992).

Furthermore, as indicated by the Second District Court of Appeal in December of 1992, this Court's decision in In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit

Public Defender, 561 So.2d 1130 (Fla. 1990), allows the appellate courts the opportunity to remand these motions to the circuit courts for their consideration. See In re Order on Motions to Withdraw filed by the Tenth Circuit Public Defender, 612 So.2d 597 (Fla. 2d DCA 1992). However, as indicated in its April 22nd Order, the Second District decided that it would be more appropriate to consolidate all of these matters for one detailed hearing before a commissioner rather than remand them to a variety of circuit courts where multiple rulings might lead to even more problems rather than better solutions. Order, 622 So.2d at 3-4. Unlike the decisions in Babb v. Edwards, 412 So.2d 859 (Fla. 1982), Nixon v. Siegel, 18 F.L.W. D2378 (Fla. 3d DCA, November 9, 1993), and Holloway v. Arkansas, 435 U.S. 475, 91 S.Ct. 1173, 55 L.Ed.2d 426 (1978), the concerns raised by the Court did not focus upon matters of conflict personal to each client but rather upon assertion of conflict based upon excessive case loads. Additionally, it is clear from the court's charge that it was attempting to discover ways to improve the efficiency of the entire appellate process, given its reference to possible improvements to be made between the Public Defender's Office and the Attorney General's Office regarding the handling of the cases. At no time during this evidentiary process has the Office of the Attorney General or the Court suggested that the Court was entitled to order Mr. Moorman to run his office in a particular way or that the courts had the ability to interfere with the

professional, ethical obligations of an assistant public defender vis-a-vis his client.

It is easy to appreciate the frustration of the Public Defender. However, he has now crafted a substantially undisputed record which details a variety of workload standards, ethics standards, and practice methodologies, which are part of a judicial record. If, at any time in the future, evidentiary matters were raised, he would have ready access to these files which, upon motion for judicial notice, could be moved into evidence by a subsequent commissioner if, in fact, such a speculative concern were to arise in the future.

As indicated by the Public Defender, Hatten v. State, 561 So.2d 562 (Fla. 1990), makes it clear that an elected public defender is expected to handle his professional and legal duties with reasonable diligence. It does not appear from a reading of the Second District Court's April 22nd Order, the transcript of proceedings, the report of the commissioner, nor the numerous orders of the Court granting the Public Defender's motions to withdraw, that the Second District Court of Appeal intended or, in fact, acted in a manner to invade the Public Defender's role as an independent defense attorney for his clients.

To the extent that the Public Defender protests the amount of time and money spent in the District Court of Appeal, this Court can take notice that nearly the entire four-day proceeding

consisted of witnesses, many of them offering repetitive testimony, on behalf of the Public Defender's Office. This is not to say the Public Defender did not present a well crafted and logical presentation of his concerns. Clearly, he and his attorney did just that. As noted above, a very thorough record has now been made, and it is unclear under what scenario the Second District Court of Appeal would seek any further evidentiary hearing regarding these issues. Speculation is not a legitimate basis upon which to decide a case. The hearing is over, the issues are resolved, and it is unclear how a ruling by this Court reversing Skitka would be of benefit to the Court of Appeals or to the parties.

ISSUE 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 Attorney General's Office has no objection to the commissioner's findings of fact being accepted by the Second District Court of Appeal or by this Court. However, it does not appear that the Public Defender ever presented this argument to the Second District Court of Appeal. This Court could remand the case and direct the District Court of Appeal to make clear its position regarding the report of the commissioner.[5]

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[5] This Court should be extremely cautious in accepting that portion of the Petitioner's argument contained in pages 42 and 43

ISSUE III

WHETHER THIS COURT SHOULD TAKE THE RECOMMENDED AVAILABLE STEPS TOWARDS (1) REMEDYING THIS LONG-STANDING EXCESSIVE CASE LOAD PROBLEM AND (2) PROTECTING THE RIGHTS OF INDIGENT DEFENDANTS TO EFFECTIVELY AND TIMELY APPELLATE REVIEW IN THE SECOND DISTRICT AND ALL APPELLATE COURTS OF THIS STATE.

Much of what was recommended by Judge Cheatwood in his report to the Second District and promoted in the Public Defender's third issue was brought to the attention of this Court by the Attorney General's Office in its brief in In re Order case from 1990. Furthermore, the In re Order provides a very powerful tool for obtaining appropriate attention to this matter by providing that failure to timely process a brief can result in the granting of a writ of habeas corpus and the release of any incarcerated inmate on his own recognizance. In re Order, 561 So.2d at 1139.[6]

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of his brief, wherein he seeks to utilize the findings of the commissioner regarding the Legislature's funding of the Public Defender's system as absolute gospel. The Public Defender presented testimony from a single legislator, albeit one with experience in the appropriations process for both the state attorney and the public defender offices. With all due respect for the views of the legislator in question, the Office of the Attorney General suggests that it would be unwise for this Court to rely on such limited information to make any sweeping pronouncement on how the current or future Legislatures will conduct their affairs.

[6] The Office of the Attorney General wishes to inform this Court of yet another federal court lawsuit filed against Governor Chiles based on these funding issues. **Axelsen, et al. v. Chiles,** Case No. PCA 93-30273-RV, U.S. District Court for the Northern District of Florida, Pensacola Division. In that case, the plaintiff asserts that he has been deprived of his civil rights

In reviewing the findings and suggestions presented by Judge Cheatwood, the Office of the Attorney General notes its approval of any solutions that would increase funding for assistant public defenders and assistant attorneys general involved in the criminal appellate process. The Attorney General's Office has no objection to the adoption of a prospective withdrawal procedure similar to that used in the First District Court of Appeal. Such a procedure was suggested by Justice England in his concurring opinion in Escambia County v. Behr, 384 So.2d 147, 150 (Fla. 1980). As far as the adoption of any binding case load, workload standards, the Attorney General's Office suggests that such an issue be referred to the appropriate committees of The Florida Bar, including the Judicial Administration Commission, Criminal Rules Committee, and Appellate Rules Committee, for their consideration. In regard to Judge Cheatwood's suggestion that a study commission be created to further look into this issue, this Office notes that a rather detailed study by Judge Campbell of the Second District Court already exists and that currently the Judicial Council of Florida is seeking to study methods of reducing overall appellate case loads in Florida. It may be worthwhile for the Judicial Council to explore these issues as part of that larger study.

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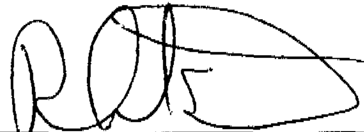
and seeks an injunction directing that adequate funding be made to the state public defender system.

CONCLUSION

This Court should not reverse its previous decision in Skitka and prohibit the lower courts from undertaking, when advisable, non-adversarial fact-finding hearings in order to ensure that the rights of indigent appellants are being adequately protected, that state and local tax dollars are being expended in the most effective means possible, and that the courts themselves are not overlooking possible changes in process or procedure which might assist in reducing the ever-increasing case loads. This Court should not take action to affirm or ratify the report of the commissioner without first affording the Second District Court of Appeal the opportunity to rule upon the Public Defender's second argument. Lastly, the Attorney General's Office is supportive of many of the recommendations made by Judge Cheatwood which may encourage the Legislature to once again review the issue of adequate funding for the criminal appellate system in Florida.

Respectfully,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL



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I HEREBY CERTIFY that a true and correct copy of the foregoing **AMENDED ATTORNEY GENERAL'S BRIEF ON THE MERITS** has been furnished to **JOHN BERANEK, ESQ.**, Aurell, Radey, Hinkle, Thomas & Beranek, Suite 1000, Monroe-Park Tower, 101 North Monroe Street, Post Office Drawer 11307, Tallahassee, Florida 32301, Counsel for Petitioner Moorman; **J. MARION MOORMAN**, Public Defender, Tenth Judicial Circuit, Post Office Box 9000-Drawer PD, Bartow, Florida 33830; **SUZANNE T. SMITH, ESQ.**, Assistant County Attorney, 315 Court Street, Clearwater, Florida 34616, Counsel for Pinellas County; **RICHARD L. JORANDBY**, Public Defender, Fifteenth Judicial Circuit, Criminal Justice Building, 421 Third Street, West Palm Beach, Florida 33401; **H. HAMILTON RICE, JR., ESQ.**, Manatee County Attorney, and **PAUL BANGEL, ESQ.**, Assistant Manatee County Attorney, Post Office Box 1000, Bradenton, Florida 34206; **NANCY DANIELS**, Public Defender, Second Judicial Circuit, 301 South Monroe Street, Suite 401, Tallahassee, Florida 32301; **MARK F. CARPANINI, ESQ.**, Polk County Attorney, Post Office Box 60, Bartow, Florida 33830, Counsel for Polk County; **JAMES B. GIBSON**, Public Defender, Seventh Judicial Circuit, The Justice Center, 251 North Ridgewood Avenue, Daytona Beach, Florida 32114; **WILLIAM P. BUZTREY, ESQ.**, Assistant County Attorney, Hillsborough

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RICHARD E. DORAN