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O.A. 2-1-94

FILED
SID J. WHITE
JAN 20 1994
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
_____/

REPLY 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 reply brief by J. Marion Moorman as Public Defender of the Tenth Judicial Circuit. The case concerns the withdrawal by the Public Defender due to excessive caseload and resulting conflicts. This Court accepted jurisdiction and set the matter for an expedited oral argument on February 1, 1994. The Court ordered the District Court to file the original record which has only recently occurred. A motion to supplement that record to supply 25 missing pleadings is pending as of the filing of this brief.

This reply brief will be structured by initially replying to the various briefs filed by the counties, the county associations and the other amicus. Thereafter the brief by the Attorney General will be replied to.

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.

The County and Amicus Briefs

It is clear from the record below that the 14 counties within the geographic area of the Second District Court of Appeal were invited to participate in this evidentiary proceeding. The April 22, 1993, en banc order by the Second District Court of Appeal stated that: "The counties shall have the right to participate in the proceeding" and further ordered that the "Commissioner shall have the discretion to permit other parties..." The April 27, 1993 order by Judge Driver specifically ordered all state attorneys within the geographic limits of the Second District Court of Appeal to appear and further "invited" all county attorneys within the Second District to appear.

In fact, the counties formed a loose alliance, hired a $50,000 expert and sent various county attorneys to the administrative hearing to oppose the Public Defender in every way possible. The county attorneys, at the commencement of the proceeding specifically announced that this was to be an adversarial proceeding. (Tr.810, 811). We agree with the Attorney General's amended brief only recently filed that the Attorney General did not assert the matter to be <u>adversarial</u>. A mistake in the Attorney General's initial brief on this issue has been corrected by its brief of January 19, 1994. However, certainly the

counties made the proceeding as adversarial as possible.

Numerous county attorneys were present in the courtroom throughout and Mr. Miller, an assistant county attorney from Hillsborough County, became the spokesman for the county group. Indeed, pleadings were filed on behalf of Pinellas and Hillsborough County and "on behalf of various other counties". Mr. Miller made numerous objections throughout the four day hearing and cross-examined almost every single witness extensively. Mr. Miller attempted to keep the counties' efficiency expert under wraps before he actually testified and only gave the Public Defender a copy of the efficiency expert's report when Judge Cheatwood ordered the alternative was to submit the expert for deposition. It should also be noted that the Attorney General and the various counties filed at least one joint pleading in the form of proposed findings of fact. These proposed findings were a cooperative effort by the Attorney General and the counties and were certainly adverse to the Public Defender. (See Supplemental Record, No. 22).

All of the counties and amicus argue that the Second District Court of Appeal had the inherent authority to conduct an investigation as to the internal operating procedures in the Public Defender's office and that this Court's decision in Skitka v. State, 597 So. 2d 102 (Fla. 1991) so holds.

The complete quote from this Court' Skitka opinion at page 104 is as follows:

> We acknowledge the public defender's argument 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 withdrawal automatically upon the filing of a certificate by the public defender reflecting a backlog in the prosecution of appeals. In this instance, however, we conclude that the Public Defender of the Tenth Circuit has presented sufficient grounds to be permitted to withdraw from representation of these appeals.

No one contends that the Public Defender's motions in the present situation were deficient in any manner. In Skitka the Public Defender's motions were denied by the Second District and this Court reversed holding that the motions had to be granted as a matter of law because "sufficient grounds" have been "presented". The Public Defender has now filed motions which easily give as much information as those in the Skitka case. The Public Defender does not suggest that his motions to withdraw in every case under all circumstances must be automatically granted. However, when a required and completely sufficient sworn motion, plus a conflict certificate, plus affidavits is filed, it should be granted without an inquisition as to all of the internal workings of the Public Defender's office.

There can be no question but that the hearing which occurred before Judge Cheatwood had the potential of directly involving the counties and the District Court in "the management of public defender offices".

Unfortunately, the evidence showed that assistant public defenders in the Tenth Circuit are rarely able to file reply briefs, ask for oral argument or spend time conferring directly with their clients. They simply do not have time for these steps despite the fact that they are sometimes deemed essential services.

The counties argued that the Public Defender's office should do even less so that a "commodity" approach could be adopted which would be more efficient. The counties and the Attorney General even filed a joint proposed conclusion that attorneys in the Public Defender's office should stop proofreading other attorneys briefs and that all attorneys should be forced to work on computers despite the fact that several of the most productive lawyers chose to dictate their briefs. Certainly this constituted internal management.

The Attorney General did not object to any motion to withdraw on any ground other than the selective withdrawal assertion. The inquisition resulting from the Second District's order of April 22, 1993, infringed and interfered with the independence of the Public Defender's office and involved the court in management of that office.

The Public Defender should not have been forced to defend himself and his assistants in this generalized investigatory hearing. If a truly frivolous appeal is ever pursued, then the District Court can certainly deal with it on an individual case basis. Here the court did not even suggest such a "concern".

Each of the counties expressly agree that there is a funding crisis in the State of Florida as to the Public Defenders' operations and that the Florida Legislature has grossly underfunded the Public Defender. However the counties also urge that the Public Defender should be subjected to county "budgetary oversight" just like various other local officials. The counties simply do

not respond to the arguments in the Public Defender's initial brief that the Public Defender is an independent constitutional officer and that the assistant public defenders who represent criminal defendants have professional, ethical and legal duties to fulfill in the representation of their clients. This is an entirely different question than is presented when a county oversees the services which its own lawyers provide. Certainly a county is entitled to review a lawyer's bill when the county hires that lawyer. However, the counties are not entitled to function as adversary parties against the Public Defender and argue that the Public Defender should "cut corners" in filing reply briefs, requesting oral arguments and in having client contact. The counties simply had no standing to suggest through their paid expert and arguments that the Public Defender's office should devise a "commodity" type approach to simple cases where only perfunctory briefs would be written. The Attorney General and the counties also had no standing to even suggest that the Commissioner make findings regarding how briefs are proofread.

One very curious argument is suggested by the Florida Association of Counties, Inc. which urges that this Court mandate a new policy whereby each individual assistant public defender should be required to file an individual motion to withdraw in every case in each court as soon as that individual attorney realizes there will be a future necessity to withdraw. Apparently the association would have such motions filed in each individual circuit court. This "no batch" approach is certainly not required

by law and would only cause a dramatic increase in time and paperwork.

None of the amicus briefs address any issues other than the first issue stated above. On this first issue the Attorney General argues only that the State never really objected to the withdrawal of the Public Defender in any case based upon excessive caseload and conflict. The Attorney General only wanted to raise selective withdrawal as an issue and the Attorney General had been assured that no such problem was still in existence prior to the hearing. In any event, the Commissioner found the selective withdrawal issue in favor of the Public Defender and the Public Defender does not agree that selective withdrawal would have been a valid objection to withdrawal in any event.

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 states "The Attorney General's office has no objection to the adoption of the report". (Br.p.9). However the Attorney General goes on to suggest at page 16 of its brief that the Public Defender did not "present this argument to the Second District Court of Appeal". Apparently through oversight, the Attorney General neglected that on page 4 of the Response to the Commissioner's Report, the Public Defender specifically requested that the Court "accept" the report and implement the recommendations made in the report. (R.173). The

Attorney General also suggests that before this Court should adopt and publish the Commissioner's report that the matter be remanded to the Second District Court of Appeal for clarification. We see no reason for this additional step and the Attorney General does not suggest a reason. Again, the Public Defender respectfully suggests that this Court accept and publish the Commissioner's report for precedential value.

The Attorney General has suggested that the Public Defender now has a complete and "well crafted" record which can simply be judicially noticed by any future commissioner who might be called upon to handle a further evidentiary hearing on motions to withdraw. Again, the status of this report is in doubt because the Second District Court of Appeal had done nothing other than to "receive" the report.

In footnote 5, the Attorney General also suggests that this Court should not accept Judge Cheatwood's finding of fact regarding legislative funding as "gospel". This finding of fact was based upon the testimony of Elvin L. Martinez. (Tr.144). The Attorney General had notice of this witness before the hearing, made no objection at the hearing, asked no questions on cross examination and did not suggest anything whatsoever concerning the testimony in the joint proposed findings filed by the counties and the Attorney General. It is too late to now take issue with these facts.

CONCLUSION

The relief requested in the initial brief should be granted.

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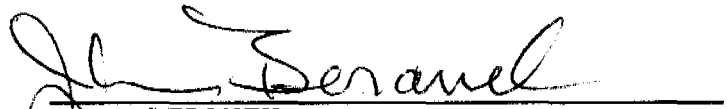

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CERTIFICATE OF SERVICE

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