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IN THE SUPREME COURT OF FLORIDA

JACK BEHR
Petitioner,

85,024

v.

Case No. 94-3327

FRANK L. BELL
as Circuit Judge of the
1st Judicial Circuit,
Respondent.

_____ /

BRIEF OF PETITIONER OF JURISDICTION

JACK BEHR
PUBLIC DEFENDER
FIRST JUDICIAL CIRCUIT

EARL D. LOVELESS
FLA. BAR NO. 243183
CHIEF ASSISTANT PUBLIC
DEFENDER

ATTORNEY FOR PETITIONER

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TABLE OF CITATIONS

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- Escambia County v. Behr, 384 So2d 147 (Fla. 1980)
- Faretta v. California, 422 U.S. 806; 95 Sct 2525; 45 LEd 2d 562
- Hammond v. State, 264 So2d 463 (Fla. 4thDCA 1972)
- Jones v. State, 449 So2d 253 (Fla. 1984)
- Littlefield v. Superior Court, 22 Cal. Rptr. 2d 659
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- State, ex rel. Smith, v. Brummer, 443 So2d 957 (Fla. 1984)
- State v. Tait, 387 So2d 338 (Fla. 1980)

OTHER

- Art. V, Sect.18, Fla. Const.
- Chapter 27, Florida Statutes, Sect. 27.51
- Florida Rules of Criminal Procedure
- Rules Regulating The Florida Bar, Chapter 4, Preamble

IN THE FLORIDA SUPREME COURT

JACK BEHR,
Petitioner,

V.

Case No. 94-3510-J

FRANK L. BELL,
as Circuit Judge of the
1st Judicial Circuit,
Respondent.

BRIEF OF PETITIONER ON JURISDICTION

I. PRELIMINARY STATEMENT

Petitioner is the elected Public Defender of the 1st Judicial Circuit and was the petitioner in the lower tribunal. Appendix A, attached, is respondent's original motion to withdraw as counsel in the case of the State of Florida v. Paul Jennings Hill, and Appendix B is the order of respondent denying that motion and further describing petitioner's duties as "stand-by counsel". It is that order that was the subject of Appendix C, petitioner's request for writ of certiorari in the lower tribunal. Appendix D is the opinion of the 1st District Court of Appeal denying petitioner's request, and Appendix E is petitioner's request for this Court to invoke its discretionary jurisdiction.

II. STATEMENT OF THE CASE AND FACTS

Petitioner was originally appointed to represent Paul Jennings Hill in Escambia County Circuit Court on July 30, 1994. Mr. Hill was charged with, among other things, two counts of first degree murder. On September 26, 1994, in response to a request of the defendant, petitioner filed a motion to withdraw as counsel (Appendix A) and requested a hearing pursuant to Faretta v. California, 422 U.S. 806. On September 30th respondent issued an order granting the defendant's request to represent himself and requiring petitioner to act as "standby counsel" (Appendix B). The case had previously been set for trial on January 30, 1995. On October 13th, at a hearing to further discuss Faretta issues the defendant indicated he wished to demand speedy trial and requested that trial be held at the first available opportunity. The request was granted and the trial was set for October 31, 1994. Petitioner's request for writ of certiorari in the lower tribunal was filed that same day, October 13th. (Appendix C) On October 24, 1994 the First District Court of Appeal issued an order denying petitioner's request but delayed issuing a written opinion. Jury selection commenced on October 31st, with petitioner providing "standby counsel" through an assistant public defender, and the

trial ended on November 2nd. Defendant was convicted as charged on all counts, and after a penalty phase the next day the jury recommended the death sentence for each of the two first degree murder charges. At sentencing on December 6, 1994 the defendant was sentenced to death. On December 15, 1994, the written opinion on the request for the writ of certiorari was issued. (Appendix E)

III. SUMMARY OF THE ARGUMENT

The First District Court of Appeals, in its written opinion states that the trial court has the authority to order petitioner to act as "standby counsel". The court's opinion necessarily affects all Public Defenders, a class of constitutional officers, by expanding the statutory duties set forth in Chapter 27.51 Fla. Stat. (1993) and requiring them to act as "standby counsel" whenever ordered by the trial judge. In addition, this decision directly conflicts with Chapter Four of The Rules Regulating The Florida Bar and with the decision of the Fourth District Court of Appeal in Hammond v. State, 264 So2d 463 (Fla. 4thDCA 1972).

IV. ARGUMENT

FIRST ISSUE PRESENTED

THE FIRST DISTRICT'S OPINION IN THIS CASE EXPRESSLY AFFECTS THE PUBLIC DEFENDERS, A CLASS OF CONSTITUTIONAL OFFICERS. ART. V, SECT.18, FLA. CONST.

The duties of the elected Public Defenders are defined in Section 27.51 of the Florida Statutes, and this Court has clearly held that the language of that statute does not impose on them "a statutory duty to represent all insolvent defendants in all criminal proceedings." Escambia County v. Behr, 384 So2d 147 (Fla. 1980). See also Behr v. Gardner, 442 So2d 980 (Fla.App.1Dist.1983). By its decision in this case the First District has expanded the definition of the term "represent" to include acting as "standby counsel". That expansion increases the statutory duties of that elected official by increasing the caseload without increasing the staffing or funding required to competently handle it. Even if that decision is not viewed as an expansion of the definition of "represent", it is still the first to require a Public Defender to accept a court appointment to act as "standby counsel" and in that sense expands the duties set out in Section 27.51.

SECOND ISSUE PRESENTED

THE FIRST DISTRICT'S OPINION CONTRADICTS THE EXPRESS
LANGUAGE OF SECTION 27.51, FLORIDA STATUTES.

In section 27.51 of the Florida statutes the Legislature established the duties of the twenty Public Defenders by requiring them to "represent, without additional compensation, any person who is determined by the court to be indigent..." and who falls in one of four enumerated categories. The defendant in this case, Paul Jennings Hill, was determined by the court to be indigent and was charged with a felony. The appointment made by respondent that resulted in this petition, however, did not appoint petitioner to "represent" the defendant. The appointment was to act as "standby counsel" and "to aid the Defendant if and when the Defendant requests help, and to be available to represent the defendant in the event that termination of the Defendant's self-representation is necessary." (emphasis supplied). The order further required petitioner to "continue to be involved in the trial process to the extent that a delay or continuance will not be required in the event that termination is necessary." Appendix A.

The definition of an attorney as a "representative" is contained in the Preamble to the Rules of Professional Conduct and includes functioning as an advisor, a negotiator, an intermediary, and an evaluator. As "standby counsel" petitioner, to a very limited degree, could perform the first and the last of these duties. He could not perform the other two, but more importantly he could not perform the fifth duty that makes up this definition, that of an advocate. This definition is not new or unique to the State of Florida. It has existed for several hundred years, and it is certainly the definition the Legislature had in mind when it chose the word "represent". Chapter 27 has been in existence for a number of years, and has periodically been changed, usually adding to the duties and responsibilities of Public Defenders. The concept of "standby counsel" has been widely discussed in Florida case law since at least 1972, [see eg. Hammond v. State, 264 So2d 463 (4thDCA, 1972)], but the Legislature has never added that responsibility to the statute. Indeed Chapter 27 contains no language that can be construed to include any such responsibility of the Public Defender. It was clearly not the intent of the Legislature to establish a series of offices to provide counseling for persons who have already determined that they do not need an attorney, no matter how ill advised that decision may be.

THIRD ISSUE PRESENTED

THE FIRST DISTRICT'S OPINION IN THIS CASE EXPRESSLY
CONTRADICTS WITH THE OPINION OF THE FOURTH DISTRICT
IN HAMMOND V. STATE, 264 SO 2D 463 (4THDCA, 1972)

In Hammond v. State, the Fourth District ruled that the Public Defender could not be appointed to act as "standby counsel" and stated that "indigent defendants charged with criminal offenses and requesting the services of court-appointed counsel have no right to select counsel and are entitled only to the appointment of the public defender.... The public defender so appointed is entitled to serve as counsel in the usual and ordinary ways and to exercise his professional judgement as to the conduct of the case." The language of Section 27.51 was essentially the same as in the current law. The First District is correct that Hammond was decided three years before the decision in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) where the United States Supreme Court approved the concept of "standby counsel". The Hammond decision is not in conflict with Faretta, since it holds only that the appointment of "standby counsel" is not required and that, when appointed, public defenders should act as directed by the statute that created them. That holding has not been overruled, either directly or impliedly, by the Fourth District or by this Court. The ruling of Faretta and the decisions following it is that the appointment of "standby counsel" is permitted, not required. As the First District indicated, the only other apparent decision squarely on point is that of Littlefield v. California, 22 Cal. Rptr. 2d 659 (Cal.Ct.App.1993), however they declined to adopt that position because of the word "defend" as opposed to "represent" and because of the additional responsibilities given to petitioner in this case. Appendix A. However, the Littlefield definition of "defend" appears to be no more than "the assistance of counsel for his defense as specified in the Sixth Amendment" and that is surely also the basis for Section 27.51. In addition, the belief that respondent's order some how resolves the problem, does not take into consideration that the "duties" that order attempts to impose cannot be done within the Florida Rules of Criminal Procedure or within the Rules of Professional Conduct. By any definition of the term, a person acting as "standby counsel" cannot "continue to be involved in the trial process to the extent that a continuance will not be required in the event that termination of the Defendant's self-representation is necessary." Appendix A. That person cannot participate in discovery, subpoena or even interview witnesses, or perform any of the duties necessary to adequately prepare any case for trial, and in cases such as this where the defendant is charged with a capital offense, the person cannot file pretrial motions, a fact which precludes many penalty phase issues. How is it possible to assume a defense in the middle of a trial when there may be no witnesses subpoenaed? How is it possible to present mitigation in


a penalty phase without being able to conduct any background investigation? The obvious answer is that it is not possible if an adequate defense is expected. If such a situation should occur, a competent attorney would have no choice but to request a continuance and begin preparation of the case all over again, and that is the course of action if the attorney is "standing by" throughout or becomes involved when defendant realizes the mistake. Clearly, that part of respondents order should not be considered in resolving these issues.

V. CONCLUSION

By its ruling, the First District has ignored its own well reasoned opinion in Brooks v. State, 172 So2d 876 (Fla.1stDCA,1965) which was used by the Fourth District in reaching its decision in Hammond. "Counsel is not provided as a mouthpiece for the defendant, nor is such counsel required to conduct himself as an errand boy to carry out the defendant's legal theories.... We are fearful that the basic function of a lawyer appointed to represent a defendant has, to a great extent, escaped not only indigent defendants but, in many instances, the appellate courts." Brooks, at 882. As they go on to say, "[t]he right of an accused to the service of legal counsel envisages that his attorney will investigate and consider possible defenses and, if none, other procedures, and exercise his goodfaith judgement thereon." The orders of the respondent and the ruling of the First District in this case are inconsistent with these decisions, the statutes cited and with the Rules of Professional Conduct and they directly and significantly affect the manner in which petitioner and the several public defenders perform their statutory duties. It is therefore respectfully requested that this Court grant and accept review in this matter.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief Of Petitioner On Jurisdiction has been furnished by delivery to Respondent, First District Court of Appeal, Tallahassee, Florida, and to State's Attorney, 1st Judicial Circuit, Pensacola, Florida on this 26th day of January, 1995.


EARL D. LOVELESS
ASST. PUBLIC DEFENDER