DA 10-3-95

IN THE FLORIDA SUPREME COURT

JACK BEHR,
Petitioner,

V.

Case No. 85,024

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

PETITIONER'S BRIEF ON THE MERITS

JACK BEHR
PUBLIC DEFENDER
FIRST JUDICIAL CIRCUIT

EARL D. LOVELESS
FLORIDA BAR #: 243183
CHIEF ASSISTANT PUBLIC DEFENDER

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TABLE OF CITATIONS

IN THE FLORIDA SUPREME COURT

JACK BEHR,

Petitioner,

V. Case No. 85,024

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

PETITIONER'S BRIEF ON THE MERITS

I. PRELIMINARY STATEMENT

Petitioner is the elected Public Defender of the 1st Judicial Circuit and was the petitioner in the First District Court of Appeal. 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 "standby 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 order of the 1st District Court of Appeal denying petitioner's request, and Appendix E is the later issued opinion. Appendix F is this Court's order accepting 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) Petitioner subsequently asked this Court to accept jurisdiction, and on June 9, 1995 an order was issued accepting jurisdiction and setting the matter for oral argument on October 3, 1995

III. SUMMARY OF THE ARGUMENT

The powers and duties of a public defender are established by the legislature and set forth in §27.51 of the Florida Statutes. As it applies in this case, those duties are to "represent" a person who is indigent and charged with a felony. Respondent's order requiring petitioner to act as "standby counsel" and the opinion of the First District Court of Appeals approving that order have improperly expanded those statutory duties. In addition, the order issued by Respondent and approved by the Court of Appeals would require "standby counsel" to render ineffective assistance.

IV. ARGUMENT

THE DISTRICT COURT SHOULD HAVE GRANTED CERTIORARI AND RULED THAT §27.51 OF THE FLORIDA STATUTES DOES NOT PERMIT THE APPOINTMENT OF THE PUBLIC DEFENDER AS "STANDBY COUNSEL"

The duties of the elected Public Defenders are defined in §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.1st DCA 1983). This Court has also held that "[t]he Office of the Public Defender is a creature of the state constitution and of statute, not of common law." The Court went on to say that "[t]he functioning of that office is regulated by statute... and by court rule." State ex rel Smith v. Brummer, 443 So2d 957 (Fla. 1984)(Brummer II). The defendant in the case below, Paul Hill, was

charged with, among other things, two counts of first degree murder which would clearly place him within the class of persons that the public defender can be appointed to represent. However, since Hill elected to represent himself, the matter was removed from the operation of §27.51 since that statute states, in pertinent part, that the public defender shall "represent" persons charged with felonies. Black's Law Dictionary (Revised Fourth Edition) states "To represent a person is to stand in his place; to supply his place; to act as his substitute." Chapter Four of the Rules of Professional Conduct states, in part:

> As a representative of clients, a lawyer performs various functions. As an advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As an advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As a negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others. As an intermediary between clients, a lawyer seeks to reconcile their interests as an advisor and, to a limited extent, as a spokesman for each client. A lawyer acts as an evaluator by examining a client's legal affairs and reporting about them to the client or to others.

The First District Court of Appeal when addressing a similar situation in Brooks v. State, 172 So.2d 876 (1stDCA, 1965) stated "Counsel is not provided for the purpose of serving as a mouthpiece for the defendant, nor as an errand boy to carry out the defendant's legal theories...." It went on to say that "[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." In other words he will represent the defendant as that

term is defined in "Black's" and in the Rules of Professional Conduct. By it's use of the term "represent" the legislature surely intended that a public defender perform those same duties. However, the role of "standby counsel" as it has been defined in case law, is inconsistent those duties. "Standby counsel" cannot be an advocate, intermediary, negotiator, or a spokesperson, and in most cases cannot even be an effective advisor or evaluator. Rule 4-1.1 of the Rules of Professional Conduct states "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." Rule 4-1.16 states, in part, "Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or law." Subsection (c) states: "When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation." Even assuming such "counsel" can provide representation, they cannot provide competent representation, because they cannot do the "preparation reasonably necessary for the representation." "Counsel" would then be required to comply with Rule 4-1.16 and decline or terminate representation, unless the court ordered him to continue, in which case he would forced to provide ineffective assistance by providing representation without any preparation.

The use of "standby counsel" is usually attributed to the case of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), but the concept was at least considered here several years before that. In Hammond v. State, 264 So.2d 463 (4thDCA, 1972) the court stated that defendant's in Florida "are entitled only to the appointment of the public defender", and that 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." They further state that "[t]here is not and neither should there be any requirement for the appointment of 'assisting counsel'." By its decision the 4th District rejected the argument that had been put forth three years earlier in "Defense Pro Se" 23 U.Mi.L.Rev. 551 (1969). For the reasons stated above, that finding was correct. However, in the decision below (Appendix E), the First District finds that since Hammond was pre-Faretta it should no longer be followed, even though there is nothing in the Faretta opinion that directs the use of "stand-by counsel". More importantly, they say that the appointment of the public defender in these situations is appropriate since "the term 'represent' can be read broadly enough to include the role of 'standby counsel' in circumstances such as these." By so ruling they have ignored the requirements of the Rules of Professional Conduct and the very clear language of their own prior decision in Brooks. There is nothing in the prior decisions of this court, any of the District Courts, or the Florida Statutes that so defines the term "represent". Clearly the

legislature has the power to include the duties of a "standby" or an "assisting" counsel within the duties it has given the public defenders. Just as clearly it has chosen not to do so. Chapter 27, and particularly §27.51, has been in existence for many years, and the opportunity to so amend the language has presented itself many times, yet no such action has ever been taken. It was clearly not the legislature's intent 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.

As the First District indicated, the only other apparent decision 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 B. 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 §27.51 of the Florida Statutes. 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 performed within the Florida Rules of Criminal Procedure or 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 B. 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 only 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. We would ask this court to so find and to further rule that §27.51 of the Florida Statutes does not permit the appointment of the public defender to serve as "standby counsel" as that term has been used by the various courts.

Respectfully submitted,

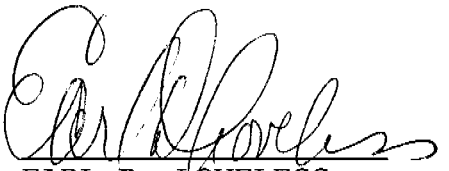
JACK BEHR
PUBLIC DEFENDER
FIRST JUDICIAL CIRCUIT

EARL D. LOVELESS
FBN: 243183
Assistant Public Defender
M. C. Blanchard Bldg.
190 Governmental Center,
Ste. 101-E
Pensacola, FL 32501
(904) 436-5400 Ext. 206

ATTORNEY FOR PETITIONER

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief of Petitioner on the Merits has been furnished by delivery to Mr. James Rogers, Assistant Attorney General, Tallahassee, Florida on this 27th day of June, 1995.



EARL D. LOVELESS
ASST PUBLIC DEFENDER

APPENDIX

A. PETITIONER'S MOTION TO WITHDRAW

B. ORDER OF RESPONDENT DATED SEPT. 30, 1994

C. REQUEST FOR WRIT OF CERTIORARI

D. ORDER OF FIRST DISTRICT COURT OF APPEALS

E. OPINION OF FIRST DISTRICT COURT OF APPEALS

F. SUPREME COURT ORDER ACCEPTING JURISDICTION

APPENDIX

A. PETITIONER'S MOTION TO WITHDRAW

B. ORDER OF RESPONDENT DATED SEPT. 30, 1994

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E. OPINION OF FIRST DISTRICT COURT OF APPEALS

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Appendix A

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO.: 94-3510-J

PAUL JENNINGS HILL,

Defendant. /

MOTION FOR FARETTA HEARING AND
MOTION TO WITHDRAW

COMES NOW the Public Defender, through the undersigned Assistant Public Defender, and says:

1. Defendant, PAUL JENNINGS HILL, has been indicted for First Degree Premeditated Murder.

2. At his first appearance on July 30, 1994, he was found to be indigent and eligible for the services of the Public Defender, and the office of the Public Defender was appointed.

3. Defendant has expressed his desire to represent himself and has stated that he does not wish to be represented by the Public Defender.

WHEREFORE the Public Defender requests that the Court hold a hearing pursuant to Faretta v. California, 422 U.S. 806, 45 L. Ed 2nd 562, 95 S.Ct. 2525 (1978) to determine whether Defendant may represent himself. If the Court finds that Defendant may represent himself, the Public Defender requests that he be allowed to withdraw from his appointment in this case and have no further responsibility for representing or advising Defendant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing was furnished to Jim Murray, Assistant State Attorney, 190 Governmental Center, Pensacola, Florida, by delivery this September 26, 1994.

JACK BEHR, PUBLIC DEFENDER

EARL D. LOVELESS, #243183
Assistant Public Defender
190 Governmental Center
Pensacola, Florida 32501
Phone: (904) 436-5400 Ext. 206
Attorney for Defendant

Appendix B

A

IN THE CIRCUIT COURT IN AND FOR ESCAMBIA COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. CASE NO. 94-3510

PAUL JENNINGS HILL,

Defendant.

==========

ORDER ON PUBLIC DEFENDER'S MOTION TO WITHDRAW AND THE DEFENDANT'S MOTION FOR SELF-REPRENSENTATION

These proceedings were conducted consistent with 3.111(d)(3), Fla. R. Cr. Pr., and in accordance with the requirements of Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975).

Present at the hearing on September 27, 1994, were Mr. Jim Murray, Assistant State Attorney, and Mr. Dee Loveless and Mr. Peter France, counsel for the Defendant, from the Public Defender's Office for the First Judicial Circuit for the State of Florida. The Defendant was also personally present.

The Public Defender's Office has filed a Motion to Withdraw from representing their Defendant based upon the Defendant's Motion for Self-Representation. The Public Defender's Office also requested that the Court not appoint the Public Defender's Office as standby counsel if the Defendant is allowed to represent himself at trial.

The Defendant has filed through his attorney a motion to represent himself at trial. In determining whether his decision to represent himself is intelligently and knowingly reached, the Court has heard testimony from Mr. Hill first as to his present and past health and physical condition, his emotional and mental health, stability, age and education level. This Court need not reach the merits of the reasons upon which Mr. Hill wishes to represent himself. This Court finds the Defendant, Paul Jennings Hill, to be confident, competent, articulate and intelligent, well educated and with appropriate demeanor for the courtroom setting and a more than adequate ability to express himself.

This court has discussed with Mr. Hill the overwhelming disadvantage of self-representation, and the complexity of the discovery process. Mr. Hill has been advised of his right to private or appointed counsel and asserts that he wishes absolutely to represent himself at the trial proceedings.

Although the Defendant has not previously represented himself in either civil or criminal proceedings, this Court observes that he has the ability to understand legal concepts and the Rules of Criminal Procedure. Mr. Hill advises the Court that should his motion be granted to represent himself, he has available a law library at the Escambia County Jail.

Based upon the testimony and the entire record of the Faretta Hearing, the Court finds as follows:

1. Mr. Paul Hill, the Defendant, is capable of waiving, and has knowingly and intelligently, waived counsel for the trial process, is capable of *pro se* representation, and he should, therefore, be allowed to proceed *pro se*.

2. The Public Defender's Office for the First Judicial Circuit of Florida is appointed "standby counsel" 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. As "standby counsel," the Public Defender's Office should 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 of the Defendant's self-representation is necessary.

DONE AND ORDERED in Escambia County, Florida this the 30th day of September, 1994.

FRANK L. BELL
CIRCUIT JUDGE

Copies furnished to:

Paul Jennings Hill, c/o Escambia County Jail
James Murray, Assistant State Attorney
Dee Loveless, Assistant Public Defender
Peter France, Assistant Public Defender

Appendix C

IN THE DISTRICT COURT OF APPEAL

FOR THE FIRST DISTRICT

STATE OF FLORIDA

JACK BEHR,
Petitioner,
vs.
FRANK L. BELL
as Circuit Judge of the
1st Judicial Circuit,
Respondent.

Case No. 94-3510-J

Appellate Case No 94-3327

PETITION FOR WRIT OF PROHIBITION OR
IN THE ALTERNATIVE FOR WRIT OF CERTIORARI

Pursuant to Fla.R.App.P.9.100, Jack Behr, Petitioner, respectfully petitions the court for a writ of prohibition or in the alternative for writ of certiorari restraining the Honorable Frank L. Bell from requiring the petitioner as Public Defender of the 1st Judicial Circuit to serve in the capacity as "standby counsel" to assist the defendant in this case, and further requiring him to grant petitioner's motion to withdraw.

I.
BASIS FOR INVOKING JURISDICTION

This court has jurisdiction to issue a writ of prohibition or a writ of certiorari under Art. V, Sect 4(b)(3) Fla. Const.(1980), and Fla.R.App.P. 9.030(b)(3).

II.

FACTS UPON WHICH THE PETITIONER RELIES

The petitioner is the elected Public Defender for the 1st Judicial Circuit, and as such was appointed to represent Paul J. Hill, the defendant in this case, on July 30, 1994 at first appearance. Mr. Hill was subsequently indicted for two counts of 1st degree murder and one count of attempted 1st degree murder. At a hearing on Sept. 26 and 27, 1994 (Appendix A), petitioner moved to withdraw as attorney in this case based upon Mr. Hill's expressed desire to represent himself, and respondent, in an order dated Sept 30, 1994 (Appendix B), granted the defendant's request to proceed pro se but ordered the Public Defender's Office for the First Judicial Circuit to serve as "standby counsel" and further required that Office "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." Respondent further ordered that

"[a]s "standby counsel" the Public Defender's Office should 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 of the Defendant's self-representation is necessary." At a further hearing on October 13, 1994, petitioner renewed his motion to withdraw, which was again denied. Defendant, acting pro se then filed a demand for speedy trial.(Appendix D) The demand was accepted by respondent and both prosecution and the defendant indicated they would be ready for trial during the first part of November.(Appendix C)

III.
THE NATURE OF THE RELIEF SOUGHT

The nature of the relief sought by this petition is for this Court to quash the order entered by respondent requiring petitioner to act as "standby counsel" for the defendant in this case, and to further require respondent to grant petitioner's motion to withdraw as attorney of record.

IV.
ARGUMENT

The concept of "standby counsel" has been approved in Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed. 2d 562 (1975), and was recently impliedly accepted by this court, Payne v. State, 19 FLW 1903 (Sept 8, 1994). However, there is no authority requiring such assistance when a defendant wishes to exercise the right to self representation. In fact, the case law makes it clear there is no constitutional right to that form of assistance. Jones v. State, 449 So2d 253(Fla. 1984); and State v. Tait 387 So2d 338(Fla. 1980).

The Office of the Public Defender was created by the Constitution and Legislature, and is therefore governed by statute as to whom it can represent.(F.S. Chap 27, Part III.) As a result there are limitations to the appointment of the Public Defender. See e.g. Behr v. Gardner, 442 So2d 980 (1stDCA, 1983), and in the only case that appears to be directly on point, the 4thDCA specifically disapproves the appointment of the public defender as "standby counsel". Hammond v. State, 264 So2d 463 (4thDCA, 1972). There the court recognizes the practical and ethical problems presented in these situations. As the court states "[t]he 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." Hammond, p.465 He is not to serve as a "mouthpiece" or an "errand boy", but to fulfill his ethical duties. [see also Brooks v. State, 172 So2d 876 (1stDCA, 1965)]. Unfortunately the specific directions in Respondent's order appear to require Petitioner to perform these very acts. (Appendix B)

That order also requires petitioner to perform duties not permitted by the Rules of Procedure. To comply with respondent's order will require, among other things, conducting pre-trial discovery, which likely will include depositions, and issuing trial subpoenas. Since the defendant is proceeding pro se (Appendix B), Petitioner is not attorney of record and has no authority to do either. In addition, these actions may be against the wishes of the defendant, or petitioner's view of the appropriate strategy and defenses may not agree with that of the defendant. Admittedly, these same issues apply to any attorney appointed as "standby counsel", but the Public Defenders, being established by the Constitution and Legislature, are clearly unique. They may only represent those persons to whom they are appointed, and they may only be appointed in those circumstances specifically permitted by Chap. 27. Behr v. Gardner, supra. That statute does not include any requirement that a Public Defender serve as "standby counsel" or to perform any function other than as a lawyer as that term is defined by the Rules of Professional Conduct. Further, it is the belief of petitioner that requiring the Public Defender to serve as "standby counsel" encourages criminal defendants to attempt to act pro se in the mistaken belief that they can have the "best of both worlds" by representing themselves and, at the same time, have a defense attorney to fall back on in case they get in trouble. This procedure would be a disservice to both the defendants and the legal system.

WHEREFORE, Petitioner respectfully submits that Respondent has exceeded his authority in denying Petitioner's motion to withdraw and requiring him to serve as "standby counsel" for a pro se defendant, and request this Court direct that the motion to withdraw be granted, and restrain Respondent from requiring Petitioner to serve as "standby counsel" for the defendant in this case.

JACK BEHR, FBN: 121880
PUBLIC DEFENDER
190 GOVERNMENTAL CENTER
PENSACOLA, FL 32501
(904) 436-5400 Ext. 245
Petitioner

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing petition for writ has been furnished to Respondent, Defendant and James Murray, Assistant State Attorney, 190 Governmental Center, Suite 106-W, Pensacola, Florida 32501 by hand delivery, this 13th day of October, 1994.

Jack Behr

JACK BEHR, FBN: 121880
PUBLIC DEFENDER

Appendix D

DISTRICT COURT OF APPEAL, FIRST DISTRICT

Tallahassee, Fl. 32399

Telephone (904) 488-6151

DATE October 24, 1994

LT 94-3510-J

CASE NO. 94-3327

JACK BEHR v. FRANK L. BELL, etc.
appellant/petitioner appellee/respondent

BY ORDER OF THE COURT:

The petition for writ of prohibition or certiorari is denied. This court will issue an opinion regarding this decision at a later date.

I HEREBY CERTIFY that the foregoing is (a true copy of) the original court order.

Jon S. Wheeler, Clerk

By: Laurie Black
Deputy Clerk

Copies:

Jack Behr
Robert A. Butterworth
James R. Murray
Frank Bell

Appendix E

IN THE DISTRICT COURT OF APPEAL
FIRST DISTRICT, STATE OF FLORIDA

JACK BEHR, PUBLIC DEFENDER,
FIRST JUDICIAL CIRCUIT

Petitioner,

v.

FRANK L. BELL, as Circuit Judge of the First Judicial Circuit,

Respondent.

_____/

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND DISPOSITION THEREOF IF FILED

CASE NO. 94-3327

Opinion filed December 15, 1994.

Petition for Writ of Prohibition or Certiorari - Original Jurisdiction.

Jack Behr, Public Defender, First Judicial Circuit, for petitioner.

No appearance for respondent.

PER CURIAM.

Paul Jennings Hill was charged with two counts of first degree murder and one count of attempted first degree murder in the First Judicial Circuit. Hill was determined to be indigent and the public defender for that circuit, Jack Behr, was appointed to represent him in the prosecution. Hill filed a motion for leave to represent himself at trial. The trial court, Honorable Frank L. Bell presiding, held a hearing and determined that Hill's motion for self-representation should be granted. Over the objection of

an assistant public defender, the public defender was appointed to serve as "standby counsel." In his written order Judge Bell found that Hill was competent and had knowingly and intelligently waived his right to counsel for trial. The public defender was appointed as

> "standby counsel" 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. As "standby counsel," the Public Defender's Office should 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 of the Defendant's self-representation is necessary.

The public defender timely petitioned this court for a writ of prohibition or certiorari for review of this order. He acknowledged that the concept of "standby counsel" has been approved in Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 45 L. Ed. 2d 562 (1975). The public defender argued that, as a creature of statute, he is limited by law in the representation he can provide. See, e.g., Behr v. Gardner, 442 So. 2d 980 (Fla. 1st DCA 1983)(public defender cannot be appointed to serve as co-counsel to privately retained counsel who has been hired by third parties to represent an indigent defendant). According to petitioner, the only case on point disapproved the appointment of the public defender as "standby counsel." Hammond v. State, 264 So. 2d 463 (Fla. 4th DCA 1972). This court denied the petition by unpublished order with a commitment therein to issue an opinion setting forth our rationale.

As a preliminary matter, petitioner did not allege that the trial court acted without jurisdiction and therefore he made no colorable claim for issuance of the writ of prohibition. See English v. McCrary, 348 So. 2d 293 (Fla. 1977). The petitioner's proper remedy, if any, is a writ of certiorari. However, the order of the trial court was not a departure from the essential requirements of law.

After Faretta, it is clear that the trial court may appoint "standby counsel" for a defendant who successfully asserts his right to represent himself at trial. Thus, the only question presented here is whether Florida law permits the public defender to be appointed to this particular role where the self-representing party is financially unable to afford his own counsel. Section 27.51(1), Florida Statutes, provides that the public defender shall represent indigent defendants charged with a felony. We find that the term "represent" can be read broadly enough to include the role of "standby counsel" in circumstances such as these. Petitioner's reliance on Hammond is misplaced. That case was decided three years prior to Faretta and it appears to be a general condemnation of the concept of "standby counsel." Its continued vitality is doubtful after Faretta. We do not find that Hammond supports the petitioner's proposition that the appointment of the public defender to serve as "standby counsel" is impermissible once the court determines "standby counsel" should be appointed.

After the issuance of this court's unpublished order, petitioner brought to this court's attention the decision of

Littlefield v. Superior Court, 22 Cal. Rptr. 2d 659 (Cal. Ct. App. 1993). This is apparently the only reported decision which has squarely addressed the question presented here and, in a two-to-one decision, the court found that the appointment of the public defender to serve as "standby counsel" was not authorized by state law. The majority noted that the controlling California statute authorizes the public defender to "defend" persons charged with crimes and concluded that "[s]tanding by is not defending." Id. at 661. We choose not to follow Littlefield, finding that the majority's reliance on earlier California precedent in construing the term "defend" militates against adopting the reasoning of the majority in construing section 27.51(1), Florida Statutes, which by contrast provides that the public defender shall "represent" indigent defendants. Moreover, the public defender in the instant case was given responsibilities as "standby counsel" for defendant Hill which went beyond those assigned to the public defender by the trial court in Littlefield.

The appointment of the public defender to serve as "standby counsel" is authorized by section 27.51(1), Florida Statutes, and therefore the petition for writ of prohibition or certiorari was and is DENIED.

ERVIN, JOANOS and BARFIELD, J.J., CONCUR.

Appendix F

Supreme Court of Florida

FRIDAY, JUNE 9, 1995

JACK BEHR, ETC.,

Petitioner,

vs.

FRANK L. BELL, JUDGE, ETC.,

Respondent.

ORDER ACCEPTING JURISDICTION AND SETTING ORAL ARGUMENT

CASE NO. 85,024

DISTRICT COURT OF APPEAL, FIRST DISTRICT - NO. 94-3327

The Court has accepted jurisdiction of this case and will hear oral argument at 9 a.m. TUESDAY, OCTOBER 3, 1995.

A maximum of TWENTY (20) minutes to the side is allowed, but counsel is expected to use only so much of that time as is necessary.

Petitioner's brief on the merits shall be served on or before JULY 5, 1995; respondent's brief on the merits shall be served 20 days after service of petitioner's brief on the merits; and petitioner's reply brief on the merits shall be served 20 days after service of respondent's brief on the merits. Please file an original and seven copies of all briefs. UNLESS BRIEFS ARE TIMELY FILED, THE PRIVILEGE OF ORAL ARGUMENT WILL BE FORFEITED.

The Clerk of the District Court of Appeal, FIRST District, shall file the original record on or before JULY 25, 1995.

NO CONTINUANCES WILL BE GRANTED EXCEPT UPON A SHOWING OF EXTREME HARDSHIP.

A True Copy

SUPREME COURT OF THE STATE OF FLORIDA

Clerk, Supreme Court.

sg

cc: Hon. Jon S. Wheeler, Clerk
✓Mr. Earl D. Loveless
Mr. James W. Rogers