IN THE SUPREME COURT OF THE STATE OF FLORIDA

CASE NO. 85,050

THE HONORABLE JOE A. WILD,
County Court Judge,

Petitioner,

vs.

ROBERT LEE DOZIER,

Respondent.

**********

ON PETITION FOR CERTIORARI REVIEW

**********

# RESPONDENT'S ANSWER BRIEF ON THE MERITS

Respectfully submitted

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## PRELIMINARY STATEMENT

Respondent adopts Petitioner's Preliminary Statement except as noted.

Petitioner will be referred to as such and as "Judge Wild". Respondent will alternatively be referred to as "Dozier".

The Fourth District Court of Appeal will also be referred to as the "District Court". A District Court of Appeal, generally, will alternatively be referred to as "DCA".

Petitioner's Appendix will be referred to by "A" followed by page number.

Dozier's supplemental appendix will be referred to by "RSA" followed by page number.

## STATEMENT OF THE CASE AND FACTS

Dozier agrees with the State's Statement of the Case and Facts, except to the extent set out below.

Both in the Motion To Disqualify Trial Judge and in the Petition For Writ of Prohibition, Dozier pointed out that, for the period January 1 - June 30, 1994, Judge Wild handled 50% of the Indian River County felony caseload and County Judge James Balsiger handled the other 50% of the Indian River County felony caseload. Dozier pointed out that no felony defendant in Indian River County during this time period could expect to appear before a Circuit Judge.

Judge Wild denied Dozier's request for a hearing on the disqualification motion. (RSA18) Judge Wild entered a written order denying disqualification and making certain factual findings. Judge Wild made the following findings in his Order On Motion To Disqualify:

> 1. The Court has been assigned as an Acting Circuit Judge since assuming the Office of County Judge in January, 1989. The assignments have been by order of the Chief Judge. Each order has been six (6) months in duration.
>
> 2. The Court was assigned all juvenile cases and HRS hearings in Indian River County during 1989 and the first six (6) months of 1990 (three consecutive orders).
>
> 3. The Court has been assigned one half (1/2) of all felony cases in Indian River County since July 1, 1990 (eight consecutive orders).
>
> 4. In June of 1990, the Court made a request to the Chief Judge that the Chief Judge not assign the Court to be an Acting Circuit Judge in any area. The Court was told that the assignments were necessary to conduct the judicial business of the Nineteenth Circuit and that the Chief Judge would be

> making further assignments of this Court and that the Court could not refuse an assignment from the Chief Judge.
>
> 5. The Court requested assignment to felony cases based on considerations of efficiency, competency, and judicial economy.
>
> 6. The Chief Judge and all successor Chief Judges have continued the same six (6) month assignment, although this Court has not made any further requests regarding the temporary assignments.
>
> 7. The Fourth District Court of Appeals has affirmed this Court sitting as an Acting Circuit Judge.

(RSA19-20)

On September 28, 1994, the District Court issued an *en banc* decision which "quash(ed) the order denying disqualification, as well as the administrative orders appointing the two county judges throughout 1994, and remanding this cause for further consistent proceedings". *Dozier v. Wild*, 19 Fla. L. Weekly D 2068 (Fla. 4th DCA September 28, 1994) (RSA 1-2). Thereupon, Judge Wild filed a Motion For Rehearing and Clarification. (RSA22-26).

In paragraph 3 of the Motion For Rehearing, Judge Wild stated:

> [R]espondent carefully requests this Honorable Court grant rehearing and correct the facts as set out in the opinion to reflect that Judge Balsiger had not been Acting Circuit Court Judge since 1990, but only since 1994.

Petitioner's appendix shows that Judge Balsiger has, since 1990, been successively and repeatedly assigned by the Chief Judge of the Nineteenth Judicial Circuit for six (6) month periods to serve as an Acting Circuit Judge in Indian River County. Judge Balsiger's Circuit Court assignments during this time period are summarized as follows (Appointment Orders are numbered consecutively):

1. January 1, 1990 - June 30, 1990 - *All* matters in the juvenile division and in the civil division, *all* HRS filings, *all* spouse abuse filings, *all* temporary hearings for injunction, alimony, child support and child custody in dissolution cases, and all enforcement of alimony, child support, child custody or other final judgment provisions, and uncontested dissolutions as schedule permits (A4-10).

2. July 1, 1990 - December 31, 1990 - *All* filings in probate, guardianship and trust division (less Baker and Myers filings and guardianship filings), *all* uncontested name changes, *all* uncontested adoptions, *all* uncontested foreclosures, and *all* uncontested dissolutions (A15).

3. January 1, 1991 - June 30, 1991 - *All* uncontested dissolutions and *all* simplified dissolutions (A17).

4. July 1, 1991 - December 31, 1991 - *All* uncontested dissolutions, *all* simplified dissolutions, and *all* filings in the probate, guardianship and trust division (less Baker and Myers filings, drug dependency filings and guardianship filings) (A18-19).

5. January 1, 1992 - June 30, 1992 - *All* uncontested dissolutions, *all* simplified dissolutions, *all* HRS and URESA filings and *all* filings in probate, guardianship and trust division (less Baker and Myers filings, drug dependency act filings, and guardianship filings) (A25-28).

6. July 1, 1992 - December 31, 1992 - Domestic violence *ex parte* injunctions for protection cases arising out of Chapter 91-210 (A29-30).

7&8. January 1, 1993 - December 31, 1993 - *All* uncontested dissolutions, *all* simplified dissolutions, *all ex parte* petitions for injunction for protection, *all* filings in probate, guardianship and trust division (less Baker and Myers filings, drug dependency act filings, guardianship filings, and adult protective services filings) (A35-37).

8&9. January 1, 1994 - December 31, 1994 - 50% of *all* filings in the circuit criminal division, detention and shelter care hearings as provided in Administrative Order 90-5 and *all ex parte* petitions for injunction for protection in the absence of the assigned judge (A40,42).

On January 18, 1994, on rehearing *en banc*, the District Court issued a new opinion. The revised decision modified the factual history with respect to Judge Balsiger's special

**assignments. The revised decision correctly states that, as of January 1994, Judges Wild and Balsiger presided over all felony cases arising within Indian River County. The District Court held this practice to be unconstitutional and granted prohibition. *Dozier v. Wild*, 20 Fla. L. Weekly D 199 (Fla. 4th DCA January 18, 1995) (*on rehearing*).**

## ISSUES PRESENTED

### POINT I

**Whether Rule 2.050(b)(3) establishes an exclusive vehicle for review of unconstitutional judicial assignments**

**A. Whether the District Court has original jurisdiction to issue a writ of prohibition**

**B. Whether Rule 2.160 confirms trial court jurisdiction to rule on disqualification motions**

**C. Whether Rule 2.050(b)(3) requires a litigant to seek administrative review**

**D. Whether Petition waived any challenge to the District Court's concurrent jurisdiction**

### POINT II

**Whether the continuing appointment of Judge Wild to handle half of the Indian River County felony docket is unconstitutional either as a *de facto* permanent appointment or as an encroachment upon legislative and executive powers**

## SUMMARY OF THE ARGUMENT

### POINT I

The District Court properly issued a writ of prohibition based upon its original jurisdiction established under Article V, Section 4, of the Florida Constitution. The Court should reject Judge Wild's assertion that an exclusive vehicle for review of unconstitutional judicial assignments exists under Florida Rule of Judicial Administration 2.050(b)(3). Initially, the adminstrative review argument should be considered waived because it was not presented to the District Court. Even if an administrative review process exists, Rule 2.050(b)(3) is a vehicle for review either of an "administrative plan" or by disgruntled judges. The rule does not refer to "parties" or "litigants" who, by virtue of not being described, are not encompassed within the rule. The exclusive administrative remedy sought by Judge Wild is inconsistent with the legislature's power to establish the circuit court's general jurisdiction and with a DCA's original jurisdiction to issue a writ of prohibition. An exclusive administrative remedy should not be inferred from a strained interpretation of a rule governing internal court operation, particularly when constitutional issues are involved.

### POINT II

The administrative order appointing Judge Wild to Circuit Court duty violates the Florida Constitution by encroaching upon powers reserved to the legislative and executive branches. What Petitioner is actually attacking is the dual trial court system established by the 1972 amendments to Article V. Petitioner's request to have the judicial branch encroach upon the powers reserved to co-equal branches should be rejected. If this Court

countenances the appointment orders at issue, there would be an effective repeal of the dual trial court system, and an unauthorized reduction of the legislature's power to define general jurisdiction, the executive's power to appoint judges, and the electorate's power to select judges. These are political questions which should be left to the political arena.

## ARGUMENT

### POINT I

### RULE 2.050(b)(3) DOES NOT ESTABLISH AN EXCLUSIVE VEHICLE FOR REVIEW OF UNCONSTITUTIONAL JUDICIAL ASSIGNMENTS.

Petitioner's assertion that there is an exclusive administrative remedy for challenging illegal judicial assignments involves a stilted and unsupportable interpretation of the following sentence:

> Questions concerning the administration or management of the courts of the circuit shall be directed to the Chief Justice of the Supreme Court through the state court's administrator.

Fla. R. Jud. Adm. 2.050(b)(3).

#### A.

#### THE DISTRICT COURT HAS ORIGINAL JURISDICTION TO ISSUE A WRIT OF PROHIBITION

Article V, Section 4, of the Florida Constitution, establishes a DCA's original jurisdiction to "issue writs of mandamus, certiorari, prohibition, quo warranto, and other writs necessary to the complete exercise of its jurisdiction". Since a disqualification motion may be reviewed by the filing of a Petition For Writ of Prohibition, it is clear that the District Court had jurisdiction in issuing the Dozier decision. *Jenkins v. Fleet*, 530 So.2d 993 (Fla. 1st DCA 1988); *Jackson v. Korda*, 402 So.2d 1362 (Fla. 4th DCA 1981); State *ex rel. Zacke v. Woodson*, 399 So.2d 7 (Fla. 5th DCA 1981). *See* F.R.A.P. 9.030(b)(3) and 9.100.

Petitioner's claim that the District Court lacked jurisdiction is specious. The District

Court's jurisdiction arises directly from the Constitution and is buttressed by appellate rules. Petitioner's implausible interpretation of Rules 2.050(b)(3) would require this court to ignore the constitutional grant of authority, the appellate rule grant of authority, and the precedent holding that prohibition is an appropriate method for seeking review, then to conclude that a trial judge's authority is not reviewable on direct appeal.

The principal cases cited by Petitioner, *Crusoe v. Rowls*, 472 So.2d 1163 (Fla. 1985) and *Payret v. Adams*, 500 So.2d 136 (Fla. 1986), have approved the procedure used by Dozier. Although Petitioner asserts their authority, he asks this Court to ignore *Crusoe* and *Payret* on the issue of procedure for review of a jurisdictional challenge to a trial judge assignment.

Troy Rowls questioned the jurisdiction of County Judge John Crusoe to preside over child support proceedings pursuant to a special circuit court assignment. When the challenge was denied, Rowls sought to obtain a writ of prohibition from the DCA. The First District Court of Appeal granted the writ, but certified the issue to the Florida Supreme Court. *Rowls v. Crusoe*, 463 So.2d 237 (Fla. 1st DCA 1984) (*on rehearing*). This Court quashed the DCA's decision on the ground that Judge Crusoe's assignment was a lawful temporary assignment to circuit duty. *Crusoe v. Rowls*, 472 So.2d at 1166.

Manuel Payret questioned the jurisdiction of County Judge Don Adams to preside over a felony prosecution in a special geographic division of Palm Beach County. Payret challenged the validity of the non-temporary assignment to circuit court duty. Following denial of the challenge, Payret sought a writ of prohibition in the Fourth District Court of Appeal, alleging that Judge Adams was without jurisdiction to act as a circuit judge. The

Fourth DCA denied the writ, but certified the issue to this Court. *Payret v. Adams*, 475 So.2d 300 (Fla. 4th DCA 1985). This Court quashed the DCA's decision on the ground that Judge Adams had "become a permanent circuit judge not by the method mandated by the Constitution, but by administrative order". *Payret v. Adams*, 500 So.2d at 139.

While neither *Crusoe*, nor *Payret* directly addressed the issue of jurisdiction for DCA review of a jurisdictional challenge to a trial judge's assignment, implicit in both holdings is that such jurisdiction exists. *See Stein v. Foster*, 557 So.2d 861 (Fla. 1990), *cert. denied*, 111 S.Ct. 134 (1990) (Held that objection to trial court authority must be timely made and reversing DCA without saying DCA lacks jurisdiction to review circuit court assignment).

B.

RULE 2.160 SPECIFIES THAT THE TRIAL COURT HAS JURISDICTION TO CONSIDER A MOTION FOR DISQUALIFICATION

Rule 2.160, Florida Rules of Judicial Administration, became effective January 1, 1993 via amendments to and renumbering of the previous disqualification rule, applicable in criminal cases, which had been located at Rule 3.230, Florida Rules of Criminal Procedure. *The Florida Bar Re: Amendment to Florida Rules of Judicial Administration*, 609 So.2d 465 (Fla. 1992). The requirement that a Motion To Disqualify be presented to the trial court is inconsistent with Judge Wild's assertion that disqualification of an illegal judge shall proceed only via administrative review. *See Rogers v. State*, 630 So.2d 513 (Fla. 1993) (all motions for disqualification must comply with disqualification rules). Indeed, it has been held that disqualification may not be conditioned upon compliance upon some other aspect of the rules of judicial administration. *Samuels v. Franz*, 632 So.2d 73 (Fla.

2d DCA 1993).

The current disqualification rule, Rule 2.160, specifically provides that statutory grounds may be raised to recuse a trial judge. Dozier has maintained all along that Judge Wild's assignment violated Section 26.012(2), Florida Statutes (1993). This section specifically states that the circuit courts "shall have exclusive original jurisdiction" of all felonies and all misdemeanors arising out of the same circumstances as a felony which is also charged. Clearly, the disqualification rule allows Dozier to raise this bar to the improper exercise of circuit court jurisdiction by a county court judge.

In arguing that judicial authority may not be challenged via a disqualification motion, Petitioner requests this Court to ignore its subsequently enacted disqualification rule and to deny to a litigant the opportunity to interpose statutory and constitutional jurisdiction violations. Such an interpretation would run afoul of the legislature's power to establish the circuit court's general jurisdiction. *See* Art. V, Section 5(b), Florida Constitution, and Florida Statute 38.01-10 (1993); *Crusoe v. Rowls*, 472 at 1164.

C.

RULE 2.050(b)(3) DOES NOT REQUIRE A LITIGANT TO SEEK ADMINISTRATIVE REVIEW OF DISQUALIFICATION MOTIONS

Petitioner asserts that "questions" should be interpreted to include any challenges to a county judge's authority to act as a circuit judge. If the rule was meant to require a litigant to challenge via an administrative process, the rule should more clearly state such an intent. In fact, the common sense reading of the rule does not establish an exclusive administrative remedy for a litigant challenging judicial authority.

**The context of Rule 2.050 is trial court administration. The context of Rule 2.050(b)(3) is a "plan" for the efficient administration of the trial courts on a circuit-wide basis. Rule 2.050(b)(3) can be characterized as encouraging the establishment of internal rules within a circuit for the assignment of judges. The term "questions" refers to matters contested by trial judges unhappy with an assignment. For example, trial judges may contest an assignment by raising "questions" through the State court's administrator. *See Administrative Order, Fourth Judicial Circuit*, 378 So.2d 286 (Fla. 1979).**

**Recent decisions establish a litigant's right to seek review of administrative orders, establishing special divisions of circuit court, entered under the authority of Rule 2.050. *Garcia v. Rivkind*, 639 So.2d 177 (Fla. 3rd DCA 1994) (mandamus issued to set aside administrative orders establishing domestic violence division); *Hartley v. State*, 20 *Fla. L. Weekly* D 186, 187 (Fla. 4th DCA January 11, 1995) ("We hold that the habitual felony offender division should have been established by local rule rather than by administrative order [footnote omitted]); *Sapp v. Ross*, Case No. 94-2839 (Fla. 4th DCA October 7, 1994) (unpublished order granting stay and order to show cause regarding creation of domestic violence court).[1]**

**The term "parties" or "litigants" is not mentioned in Rule 2.050(b)(3). Presumably, the omission of these terms, or terms of similar meaning, implies that such persons would not be covered by the rule. *See Interlachen Lakes Estate's, Inc. v. Snyder*, 304 So.2d 433 (Fla. 1973) (rule of construction).**

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[1] The Florida Supreme Court peremptorily approved administrative orders creating certain family law divisions statewide. *In re: Report of the Commission on Family Courts*, 19 *Fla. L. Weekly* S542 (Fla. October 26, 1994). In considering the effect of this decision, the *Hartley* Court, *supra*, said it "signifies implicit endorsement of the result reached in *Garcia* and to a certain extent *Sapp*". *Hartley at 187.*

**Even if, *arguendo*, the rule is interpreted to apply to parties, Dozier has not raised a "question" regarding the "administrative plan"; he has challenged the statutory and constitutional authority of Judge Wild to preside over a felony prosecution.**

**Even if, *arguendo*, "questions" regarding the "administrative plan" may be interpreted to include challenges to a trial judge's statutory and constitutional authority to proceed, there is no indication that the administrative proceduring is an exclusive remedy. The subsequent amendment and renumbering of the disqualification rule implies that at least one way to disqualify a trial judge is via a motion filed in the trial court.**

**Petitioner's citation to *Kruckenberg v. Powell*, 422 So.2d 994 (Fla. 5th DCA 1982) is inapposite. *Kruckenberg* said, "administrative orders evidencing internal matters of self-government of the court do not limit the lawful authority of any judge of the court, nor do they bestow rights on litigants". Unlike *Kruckenberg*, which involved the reassignment of cases to a different, but authorized judge, Dozier has challenged the lawful authority of Judge Wild. Moreover, if matters of internal self-government do not bestow rights on litigants, how can it be said that Dozier had a "right" to administrative appeal of Judge Wild's appointment? *Kruckenberg* answered this question: The internal assignment of trial judges *is* subject to "substantive law relating to disqualification of judges". *Id. at* 995-996. *Accord*, *Gallagher v. State*, 476 So.2d 754, 756 (Fla. 5th DCA 1985) ("Normally, assignment and reassignment cases in a multi-judge court is a matter within the internal government of that court and a party possesses no right to have a particular judge hear or not hear his case *absent grounds for disqualification.*" [Emphasis supplied])**

D.

## PETITIONER HAS WAIVED ANY CHALLENGE TO THE DISTRICT COURT'S CONCURRENT JURISDICTION

Although a lack of subject matter jurisdiction can be raised at any point, the Petitioner has waived any challenge to the concurrent jurisdiction of the district court to issue the writ of prohibition. Under the rule announced in *Card v. State*, 497 So.2d 1169 (Fla. 1986), *cert. denied*, 481 U.S. 1059 (1987), Judge Wild, just as any other litigant, must lodge a timely challenge to the authority of the presiding tribunal. Absent a timely challenge, the authority cannot be attacked for the first time on appeal.

In this case, Judge Wild responded to the substantive allegations contained in Dozier's Petition For Writ of Prohibition. Not until its brief on the merits before this Court did Judge Wild challenge the authority of the District Court to consider Dozier's Petition For Writ of Prohibition.

Assuming that the District Court had jurisdiction, concurrent or otherwise, to consider Dozier's Petition For Writ of Prohibition, Judge Wild's failure to assert that the District Court ought to decline to exercise such jurisdiction is procedurally barred at this point. *Steinhorst v. State*, 412 So.2d 332 (Fla. 1982) (procedural default rule). Therefore, this Court should limit its substantive review to the certified question.

Any action having such a far-reaching effect should not be taken lightly and certainly should not be taken because of a strained interpretation of a rule governing internal court operation. If the Petitioner's position is sustained, it may well be necessary for the state court's administrator to create a division to specially hear and decide motions for disqualification for lack of trial judge jurisdiction. Such an added bureaucratic layer

**may be economically indefensible and, moreover, inconsistent with the policy of "immediately" determining such motions and requiring that the motions be filed, if at all, within ten (10) days after discovery of the facts constituting the grounds for the motion.** ***See*** **Fla. R. Jud. Adm. 2.160.**

## POINT II

### THE CONTINUING APPOINTMENTS OF JUDGE WILD TO HANDLE HALF OF THE INDIAN RIVER COUNTY FELONY DOCKET VIOLATES THE FLORIDA CONSTITUTION, EITHER BY CONSTITUTING A *DE FACTO* PERMANENT APPOINTMENT OR, ALTERNATIVELY, ENCROACHING UPON POWERS RESERVED TO THE LEGISLATIVE AND EXECUTIVE BRANCHES

**Dozier maintains that, under the facts and circumstances of this particular case, the certified question must be answered in the negative. The District Court's *en banc* decision cogently, and correctly, outlines why the successive and repeated six (6) month assignments, for a period of over four (4) years constitute an unconstitutional practice. If the present practice of handling felony cases in Indian River County is constitutional, then, effectively, this Court will judicially repeal the dual trial court system established by the 1972 constitutional revisions. Such a decision is a political matter going far beyond the authority of the Supreme Court to govern practice and procedure.[2]**

**Article V, Section 5, of the Florida Constitution, establishes the circuit courts and describes their original jurisdiction. Article V, Section 6 establishes the county court, but provides for no original jurisdiction. The division of jurisdiction between the circuit and county court is established by general law. Section 26.012(2), Florida Statutes (1993), states that the circuit courts "shall have exclusive original jurisdiction" of all felonies and all misdemeanors arising out of the same circumstances as a felony which is also charged. *See Crusoe v. Rowls*, 472 So.2d *at 1164*. The Petitioner's position is inconsistent with Florida's**

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[2] The 1972 adoption of Article V "followed a detailed and painstaking review of past judicial practices...with a goal of establishing a cohesive and efficient vehicle to administer justice in Florida." *Crusoe v. Rowls*, 472 So.2d *at* 1164

constitutional framework: "[u]nlike the federal approach, Florida has not relied on implied powers, arguments of expedience or necessity, or any penumbral theory in gauging the contours of the separation of powers...What the Constitution's plain language says on this subject is what the courts of Florida enforce. If a statute purports to give one branch powers textually assigned to another by the Constitution, then the Statute is unconstitutional". *B.H. v. State*, 645 So.2d 987, 992 (Fla. 1994) (citation omitted). Although Article V deals with courts, certain key powers, such as defining the scope of circuit court general jurisdiction by the legislature and the executive appointment of judges, are powers given to other co-equal branches. *See Chiles v. Children A,B,C,D, E, and F*, 589 So.2d 260 (Fla. 1991); *Times Publishing Co. v. Ake*, 645 So.2d 1003 (Fla. 2d DCA 1994).

Article V, Sections 2(b) and (d), Florida Constitution does empower the chief judge to assign county judges for duty within a circuit, but such power may be abused. Article V, Section 2(b) limits the power of a chief judge of the judicial circuit to assign judges "temporary duty" in any court for which they are qualified in their respective circuit. Florida Rule of Judicial Administration 2.030(a)(4)(C) further describes the process of temporary judicial assignments:

> [W]hen necessary for the prompt dispatch of the business of the court, the chief judge of the circuit may assign any judge in the circuit to temporary service for which the judge is qualified, in accordance with Rule 2.050.

Rule 2.050(b)(4) limits such assignments to "temporary service for which the judge is qualified in any court of the same circuit".

As recognized by both *Crusoe* and, especially, by *Payret*, the process of appointing

a county judge to temporary circuit court duty is limited by other constitutional provisions. *Payret* concluded that a county judge assignment to circuit duty violated Article V, Section 10(b) which mandates that circuit judges be elected by qualified electors within the territorial jurisdiction of the court; and violated Article V, Section 11(b) which provides that the governor shall appoint a judge to fill a vacancy on a circuit court. *Payret* succinctly stated that a county judge cannot become a permanent circuit court judge by a method not mandated by the constitution. *Payret at* 139.

The District Court stated the operative facts:

> Since 1990, one county court judge has been successively and repeatedly assigned by the chief judge of the Nineteenth Judicial Circuit for six (6) month periods to serve as a acting circuit court judge to preside over one-half of all criminal cases in Indian River County. Since January 1994 a second county judge has been added, so that these county judges now preside over all felony cases arising within that county. Effectively, this procedure means that, if a person is accused of a felony in Indian River County, the person will never see a duly elected or appointed circuit judge. The entire case, including sentencing, will be conducted by a county court judge assigned to duty in a criminal division of the circuit court.

20 *Fla. L. Weekly at* D199.

The revised decision omits several references to Judge Balsiger who handled the other half of the 1994 felony docket. It is relevant for this court to understand that Judge Balsiger had also been successively and repeatedly appointed to handle entire classes of circuit court cases since January 1, 1990. Judge Balsiger's appointment to handle the other half of the 1994 felony docket is just the most recent of a long series of appointments to handle circuit court matters.

Beginning January 1, 1990, both Judge Wild and Judge Balsiger had regular circuit

court caseloads. These county judges were not assisting the circuit court on a "as needed" or a "temporary" basis. These county judges had become, for all practical purposes, the circuit court judges for the entire class of cases to which they were appointed. Beginning January 1, 1994, both county judges assumed joint control of the entire felony docket in Indian River County.

To the extent that Judge Wild and Judge Balsiger may have continued to perform county court duties, the record does not reflect the hardship or effect placed upon either judge by the demands of a regular and continuing circuit caseload.[3] Petitioner's suggestion, at page 13 of his brief on the merits, that "only one of the county judges had been assigned to temporarily handle a portion of the Indian River County felony caseload" ignores the fact that the other county judge had, meanwhile, been handling other entire classes of circuit court cases.

Petitioner's citation to *J.G. et al. v. Holtzendorf*, 20 *Fla. L. Weekly D39* (Fla. 2d DCA December 21, 1994), is inapposite. In *Holtzendorf*, the county judge, while continuing to fulfill his duties as a county judge was "assigned to share with a circuit judge some circuit court duties involving juvenile matters and domestic relations cases". 20 *Fla. L. Weekly at D39*. Although the reviewed assignments were for six (6) month periods beginning July 1, 1991 through December 1994, the *Holtzendorf* court rejected conflict with the original

[3] In his order denying disqualification, Judge Wild indicates that he requested not to receive additional circuit court assignments. Judge Wild was advised that he could not refuse to accept a circuit court assignment (20 *Fla. L. Weekly at D199*, A2).

decision in *Dozier v. Wild*, 19 *Fla. L. Weekly D2068* (Fla. 4th DCA September 28, 1994).[4] The revised *Dozier* decision did not retreat from the finding that Judge Wild and Judge Balsiger were handling *all* of the felony docket, not merely assisting a duly constituted circuit judge.

Petitioner's citation to *Hollingsworth v. Hollingsworth*, 540 So.2d 904 (Fla. 2d DCA 1989), *review denied*, 548 So.2d 663 (Fla. 1989), at page 14 of his brief of the merits, is equally unavailing. The *Hollingsworth* decision does not indicate that a timely objection was interposed to the county court's temporary assignment to domestic relations duty. Furthermore, the facts do not reflect which circuit court duties the county judge had been temporarily appointed to handle and did not indicate whether the county judge handled a regular, ongoing docket, or simply assisted in an emergency or as-needed basis. Implicit in both the *Hollingsworth* and *Holtzendorf* decisions is the DCA jurisdiction to review appointment orders of this sort.

Petitioner's attempt to distinguish *Payret v. Adams*, 500 So.2d 136 (Fla. 1986), at page 15 of his brief on the merits, is facile and superficial. Petitioner incorrectly maintains that the county judge in *Payret* was serving as a "full time circuit judge for the Belle Glade district in Palm Beach County". What *Payret* actually said is that the county judge "acknowledged for all practical purposes, he is *the* circuit judge for the Glades District" (Emphasis in original) *Id. at* 137. The *Payret* decision does not show either that the county

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[4] In the original decision, the District Court struck the appointment order as it applied to Judge Balsiger also. Upon rehearing, the District Court limited the decision and rephrased the certified question. However, the District Court more emphatically emphasized the special appointment of county judges to handle all felony work.

judge devoted all of his time to circuit court duties or that the time devoted was equivalent to a full time circuit judge. *Payret* simply observed that the county judge had been assigned to handle all circuit court matters in the Glades District, the appointment having been renewed annually for a period of five (5) years. *Id. at* 138. The real distinction, if it is one, is that *Payret* involved an assignment to handle all circuit court cases in a geographic zone, whereas Judge Wild's assignment was to handle half of all felony cases for an entire county.

In considering this difference, the District Court in *Dozier* said:

> It would require of us similar judicial legerdemain to characterize as temporary these virtually indistinguishable continuous assignments of county judges to preside over all felony cases in Indian River County for what appears to be longer than the last four (4) years. We see no validation in the notion that two county court judges have been used rather than one, or that the assignments have been in six (6) month periods rather than one (1) year. Dividing the operative facts in *Payret* by two simply does not avoid its essential holding and thus yield validity (Footnote omitted)

20 *Fla. L. Weekly at D200.*

Petitioner's reliance upon *Judges of Polk County v. Ernst,* 615 So.2d 276 (Fla. 2d DCA 1993), *review denied,* 624 So.2d 265 (Fla. 1993), was rejected by the District Court. *Ernst* involved the assignment of county court judges from one county to county court duty in an adjoining county. As explained by the District Court, "there was no question of county judges permanently being assigned to circuit court duty". 20 *Fla. L. Weekly at D200, fn3. Ernst* may also be distinguished in that there was no requirement for the county judges to appear on a continuing, regularly scheduled basis to preside over a complete docket.

The District Court fully considered *Crusoe v. Rowls*, 472 So.2d 1163 (Fla. 1985) and *Payret v. Adams*. The District Court applied the same "if it looks like a duck, walks like a duck, and sounds like a duck, its a duck" test used in *Payret*:

> We cannot simply close our eyes to the *de facto* permanency of Respondent's assignment, and no exercise in liberal construction of the administrative order before us can transform this permanent assignment into a valid temporary one; such a result could only be accomplished by legerdemain.

*Payret at 138* (cited in *Dozier at D199*).

In *Crusoe*, the county judges were not assigned to hear all support orders, but only those falling into a specified and more limited class. The *Crusoe* court assumed that the Chief Judge culled those limited cases appropriate for disposal by county judges. In contrast, there was no such culling process involved in Judge Wild's appointment. Judge Wild was appointed, simply and without limitation, to handle half of the felony docket. Further, beginning January 1, 1994, *all* cases were handled by county judges.[5]

Petitioner argues, without record support, that the Chief Judge of the Nineteenth Judicial Circuit has determined that the instant assignment of county judges to circuit court duties was "necessary for the speedy, efficient and proper administration of justice in Indian River County". Petitioner's Brief on the Merits, page 16. A review of the appointment orders, however, does not support this assertion. The appointment orders merely recite that "it has been officially made known to me (the Chief Judge of the

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[5] Following the analysis of Judge Wild and Judge Vocelle (in the *amicus curiae* submission), there could never be a *de facto* judge problem in any county requiring more than one judge to perform a task. For example, no single judge could handle all felony cases in Dade, Broward or Palm Beach counties; yet, according to this defective analysis, a series of county judges can do what no single county judge alone could do. This defies logic and was implicitly rejected in *Payret*. There was no claim that *Payret* involved an assignment to handle all Palm Beach County felony cases.

Nineteenth Judicial Circuit) that it is necessary to the dispatch of business in the circuit court in and for Indian River County...that an additional judge be assigned..." (A10-42). The assignment orders do not indicate that the chief judge of the Nineteenth Judicial Circuit made an independent determination as to the basis for the temporary assignments. The assignment orders do not indicate the source of the information or that there has been an independent evaluation. In fact, the assignment orders at no point indicate that the assignments are to "temporary duty" or that the individual case assignments are subject to the supervision of a circuit judge.

Petitioner suggests, without evidentiary support, that dockets are too crowded. Petitioner suggests, without substantiation, that speculative circumstances have affected the need for judicial resources in Indian River County, e.g., circuit judge illnesses, call up to military duty and "population explosion". Petitioner's Brief on the Merits, pp. 16-17. The need for judicial manpower is addressed annually by the Supreme Court. The need for an additional circuit judge has not been certified since January 9, 1992. *See In Re: Certification of Need For Additional Judges*, 631 So.2d 1088 (Fla. 1994); *In Re: Certification of Judgeships*, 611 So.2d 1244 (Fla. 1993); *In Re: Certification of Judicial Manpower*, 592 So.2d 241 (Fla. 1992). In light of the lack of certification of additional need for manpower, and in light of the recent creation of a new circuit judgeship, there is a complete lack of showing of a greater need for judicial manpower in the Nineteenth Judicial Circuit then elsewhere in the State of Florida.[6]

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[6] The new circuit judgeship was filled by Cynthia Angelos who assumed her duties on January 4, 1994 (RSA 28-29).

**As Judge Wild has been hearing half of the Indian River County felony caseload for over four (4) years, the assignment has become a *de facto* permanent assignment which is prohibited by the Florida Constitution. In Indian River County, there was no possibility of a felony case being tried before a circuit judge. The administrative order unlawfully created a circuit judgeship. The District Court's decision, that Dozier is entitled to be tried before a lawfully constituted court, should be sustained.**

## CONCLUSION

**Based on the foregoing argument and citation of authority, the certified question should be answered in the negative.**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail to Georgina Jimenez-Orosa, Senior Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Suite 300, West Palm Beach, Florida 33401, Louis B. Vocelle, Jr., Esquire, Clem, Polackwich & Vocelle, 2770 Indian River Boulevard, Suite 501, Univest Building, Vero Beach, Florida 32960-4278, and to The Honorable L.B. Vocelle, Circuit Court Judge, P.O. Box 488, Vero Beach, Florida 32961-0488, on this 10th day of February, 1995.

Respectfully submitted

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By: 

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