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IN THE SUPREME COURT OF THE STATE OF FLORIDA

JAMES RUSSO,
Public Defender for the
Eighteenth Judicial Circuit,

Petitioner,

vs.

WESLEY AKERS,

Respondent.
_____/

Case No. 91,943

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

PETITIONER'S REPLY BRIEF

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I.

THE COURT SHOULD REJECT RESPONDENT'S ARGUMENT TO THE COURT TO IMPLEMENT PUBLIC POLICY FAVORED BY THE RESPONDENT INSTEAD OF GIVING EFFECT TO THE PLAIN MEANING OF THE LANGUAGE IN SECTION 27.51 FLORIDA STATUTES.

The public defender argued in his brief on the merits that s. 27.51 does not authorize the public defender to represent the respondent because a state prisoner making a Fla. R. Crim. P. 3.850 postconviction collateral challenge to a conviction is no longer under arrest or charged with a felony crime. The respondent does not contend that he is under arrest or charged with a felony. Instead the respondent urges the Court to rule in his favor to implement certain public policy espoused by the respondent. Respondent asserts that the public defender should represent him because public defenders are specialists and are efficient and cost effective. (brief on merits at 1,5). While the compliment is appreciated, this public policy argument by the respondent should be disregarded because it is not the Court's prerogative to modify or shade legislative intent in order to uphold a policy that may be favored by the Court. Holly v. Auld, 450 So.2d 217 (Fla. 1984). In construing a statute, the Court should not seek a desired result and then tailor its interpretation to fit that result, but should restrict its construction to a

rational interpretation of the act as written based on the legislative intent in enacting it. Pfeiffer v. Tampa, 470 So.2d 10(Fla. 2d DCA 1985), review den. 478 So.2d 53.

The legislature enacted s. 27.51 in 1963 to ensure that indigent defendants who are under arrest or charged with a crime and therefore are threatened with a loss of liberty are afforded representation as commanded by Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963) . In establishing the office of the public defender, it was never the intent of the legislature to provide public defenders to represent state prisoners making collateral challenges to their convictions.

The Court may be of the opinion that sound public policy would require the public defender to represent state prisoners at rule 3.850 evidentiary hearings to achieve the effectiveness and cost efficiency of the office.' However, the Court's function is to construe and interpret the law. The Court should never assume the prerogative of judicially legislating. Hancock v. Board of Public Instruction, 158 So.2d 519 (Fla. 1963).

The language in s. 27.51 is plain and unambiguous and the Court's duty therefore is to give effect to the

[1] Concurring opinions of Justice Over-ton advocate that the legislature substantially increase the duties of the public defender's office in the areas of appeals and conflict of interest cases to realize the efficiency, accountability. and effectiveness of the office. Robinson v. State, 702 So.2d 213 (Fla. 1997); In Re: Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus. 23 Fla.L.Weekly S215 (Fla. Sup. Ct. April 8, 1998).

legislative intent expressed by the plain meaning of the words used in the statute. It would be intellectually dishonest to say that a state prisoner making a rule 3.850 postconviction challenge is under arrest or charged with a felony. Indeed, the respondent has not even made this contention. The attorney general only had to accept the plain meaning of the unambiguous language in s. 27.51 in concluding that a state prisoner making a postconviction challenge to a conviction ". . . is no longer charged with a crime within the contemplation of the public defender law. . ." op. Att'y Gen. Fla. 64-77 (1964).

In his brief on the merits, respondent Akers opines that the issue before the Court is whether s. 27.51 prohibits a trial court from appointing the public defender to represent an indigent state prisoner in a postconviction proceeding. (brief on merits at 1). The public defender does not agree with this assessment of the issue before the Court. The issue before the Court is whether the legislature intended that the public defender represent prisoners making a postconviction collateral challenge to their conviction. The respondent, in framing the issue, implicitly takes the position that the trial courts have virtually unlimited inherent authority to appoint the public defender. However, the "Office of the Public Defender is a creature of the state constitution and of statute, not of

the common law." State ex rel. Smith v. Brummer, 443 So.2d 957, 959 (Fla. 1984). The trial courts thus do not possess any inherent authority to appoint the public defender and s. 27.51 can be accurately described as a legislative grant of authority to the judiciary that permits judges to appoint the public defender in those circumstances intended by the legislature.

Throughout the respondent's brief the respondent alleges that the public defender advocates a "narrow construction" of s. 27.51. However, the public defender has not argued that the Court should narrowly construe the statute. The public defender has argued that the public defender only has authority to represent a defendant who is under arrest or charged with a crime. The language of s. 27.51 is plain and unambiguous so there is no need for the Court to give a narrow or liberal construction to the statute. The Court's only duty in this regard is to give effect to the plain meaning of the unambiguous language of the statute.

11.

A RULING THAT SECTION 27.51 FLORIDA STATUTES DOES NOT AUTHORIZE PUBLIC DEFENDER REPRESENTATION WOULD NOT PREVENT TRIAL COURTS FROM APPOINTING PRIVATE COUNSEL.

Respondent argues that, "If a court cannot appoint a public defender because there is no direct statutory authority to appoint him in postconviction cases, the court also cannot appoint private counsel as there is no direct statutory authority to appoint private counsel absent a conflict. Thus, such a narrow construction of section 27.51 prevents the trial court from appointing any post-conviction counsel for an indigent inmate when constitutionally required." (brief on merits at 5).

Respondent's position is wrong because it is not necessary that there be a specific statute that authorizes the appointment of counsel whenever the constitution mandates the right to counsel in a legal proceeding. The government has an obligation to provide legal representation when such appointment is required by the constitution. In the Interest of D.B. and D.S., 385 So.2d 83, 92 (Fla. 1980). When the appointment of counsel is constitutionally required and there is not a statute that prescribes payment, appointed counsel should be compensated in a reduced but

fair manner. Id at 92. In In the Interest of D.B. and D.S., there was no statute that authorized the courts to appoint counsel in dependency cases. This fact did not prevent the Court from holding that the government would have to provide appointed counsel in those cases where the constitution required the appointment of counsel. Thus, if the Court rules that s. 27.51 does not authorize the public defender to represent respondent, the trial courts will still have the authority to appoint private counsel in those Fla. R. Crim. P. 3.850 evidentiary hearing cases where the appointment of counsel is constitutionally required under Graham v. State, 37.2 So.2d 1363 (Fla. 1979) and State v. Weeks, 166 So.2d 892 (Fla. 1964).

III.

THE CASELAW RELIED UPON BY RESPONDENT DOES NOT CONTRADICT THE PUBLIC DEFENDER'S POSITION.

Respondent Akers cites a number of decisions in support of his position. The public defender submits that these district court of appeal decisions were either incorrectly decided or do not contradict the public defender's position because the defendant in the cases were under arrest or charged with a crime and public defender representation is therefore appropriate under s. 27.51.

The respondent cites Bentzel v. State, 585 So.2d 1118 (Fla. 1st DCA 1991), to rebut the public defender's argument that s. 27.51 does not authorize the public defender to represent prisoners making a post-conviction challenge to their convictions. The respondent incorrectly states that Bentzel authorized public defender representation in a post-conviction proceeding. Although the defendant in Bentzel happened to be a state prisoner, Bentzel was an extradition case and the defendant was not making a postconviction challenge to a Florida conviction. The holding in Bentzel that public defender representation in extradition prosecutions is not contrary to s. 27.51 is correct because a person facing extradition is, at that time, either under

arrest or already charged with the commission of a crime. The respondent also claims that the Bentzel holding repudiates the public defender's argument that Behr v. Gardner, 442 So.2d 980 (Fla. 1st DCA 1983), stands for the proposition that the public defender can be appointed only in those circumstances where appointment of counsel is constitutionally required under Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and the Gideon progeny. However, in Bentzel, after the court initially proclaims that it will decline to reach the issue of whether a person facing extradition is constitutionally entitled to appointed counsel, the court then goes on to actually decide that an indigent person under extradition prosecution is entitled to court appointed counsel under the Fourteenth Amendment: "Upon examination of the cited cases, it is our view that the language of section 941.10(1) which originated in the Uniform Criminal Extradition Act, gives a prisoner the right to legal counsel and that the Fourteenth Amendment prohibits the denial of this right to indigents, when it has been made available to those able to afford counsel." Bentzel at 1120. The public defender submits that a person under extradition prosecution by the state is entitled to public defender representation because the person, at that point in time, is in "circumstances entailing prosecution by the state threatening an indigent's liberty interest."

State ex rel. Smith v. Joranby, 498 So.2d 948 (Fla. 1986). By the same line of reasoning, the court was also correct when it held that the legislature intended that the public defender represent indigent persons charged with indirect criminal contempt. Moorman v. Bentley, 490 So.2d 186 (Fla. 2d DCA 1986). A person charged with indirect criminal contempt of court is also under prosecution by the state which threatens the person with a potential loss of liberty.

The public defender submits that the district courts of appeal incorrectly decided Graham v. Vann, 394 So.2d 176 (Fla. 1st DCA 1981) and Florida Parole and Probation Commission v. Alby, 400 So.2d 864 (Fla. 4th DCA 1981). In Graham v. Vann, the court held that the appointment of the public defender to represent state prisoners making a challenge to prison conditions through a civil lawsuit is not contrary to the legislature's intent in enacting s. 27.51. In Alby, the court cited Graham v. Vann in concluding that public defender representation of a state prisoner in an action against the Florida Probation and Parole Commission is authorized. These two decisions were incorrectly decided. The court did not base its decision on the language of s. 27.51. The court did not conclude that state prisoners challenging prison conditions are "under arrest" or "charged with" a crime. The court's mistake in Graham v. Vann was its reliance on Fla. R. Crim. P. 3.111

(b) (2) as blanket authority for the trial courts to appoint counsel in any type of proceeding. Rule 3.111(b)(2) only allows the court to appoint counsel in cases that arise from a criminal action against a defendant. Florida Rule of Criminal Procedure 3.111(b)(2) reads:

> Counsel may be provided to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant, including postconviction proceedings and appeals therefrom, extradition proceedings, mental competency proceedings, and other proceedings that are adversary in nature, regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal.

In Graham v. Vann the court improperly interpreted the phrase "and other proceedings that are adversary in nature" as blanket authority for the trial court to appoint counsel. The application of the rule of *ejusdem generis* dictates that this portion of the rule only allows appointment of counsel in criminal or quasi-criminal proceedings - not civil proceedings. The Florida Rules of Criminal Procedure certainly do not provide authority for the trial courts to provide appointed counsel to litigants engaged in civil litigation.

The court in Graham v. Vann essentially concluded that the legislature created and has funded the office of the public defender, in part at least, to represent state

prisoners making civil lawsuit challenges to state prison conditions. Although it would be magnanimous to think that the legislature had such altruistic motives, it is probably unrealistic to believe that the legislature created the office of the public defender to provide such legal representation. It is certainly unrealistic to believe that the legislature has funded the public defender to provide such representation. Enormous prison construction in the Florida panhandle during the past decade has located prisons with thousands of prisoners in rural counties that might have a single assistant public defender represent every indigent criminal defendant in the county - from juvenile cases to first degree murder cases. It is unrealistic to believe that the legislature intended that the public defender office in these rural areas be responsible for the representation of thousands of prisoners in a civil lawsuit challenging prison conditions.

The validity of the district court of appeals decisions in Graham v. Vann and Florida Parole and Probation Commission is very doubtful considering the holding in State ex rel. Smith v. Joranby, 498 So.2d 948 (Fla. 1986), that the public defender does not have statutory authority in s. 27.51 to represent state prisoners challenging prison conditions in federal court. The fact that the representation challenging prison conditions in Joranby was

made in federal court whereas the challenge to prison conditions in Graham v. Vann was made in state court is, the public defender submits, an irrelevant distinction.

The respondent attempts to downplay the significance of the Court's decision in State ex rel. Butterworth v. Kenny, 23 Fla. L. Weekly S. 229 (Fla. Sup. Ct., April 23, 1998), by arguing that the Court did not hold that s. 27.51 bars the appointment of the public defender to represent state prisoners making post-conviction challenges to their convictions. However, as previously argued, the issue is not whether s. 27.51 bars an appointment - the issue is whether s 27.51 authorizes the appointment. The public defender did not exist at common law and is a creature of statute with no authority outside of that provided by statute. Graham v. Vann, 394 So.2d 176, 177 (Fla. 1st DCA 1981). In Kenny the Court correctly recognized that s. 27.51 provides no authority for public defenders to represent noncapital defendants in postconviction cases. Therefore, the public defender has no lawful authority to represent respondent.

CERTFICATE OF SERVICE

I certify that a true copy of the foregoing petitioner's reply brief has been furnished by U.S. mail delivery to Stephen F. Hanlon, counsel for Wesley Akers, P.O. Drawer 810, Tallahassee, FL 32302-0810, this 7th day of July, 1998.

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