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IN THE SUPREME COURT OF FLORIDA

Case No. 91,943

Discretionary Review From The
Fifth District Court of Appeal

JAMES RUSSO, Public Defender for
the Eighteenth Judicial Circuit,

Petitioner,

v.

WESLEY AKERS,

Respondent.

ANSWER BRIEF OF RESPONDENT WESLEY AKERS

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SUMMARY OF THE ARGUMENT

The issue before the Court is whether section 27.51, Fla. Stat., prohibits a Florida trial court from appointing a public defender to represent an indigent inmate in a post-conviction proceeding when the court has determined that the inmate has a constitutional right to counsel. Respondent urges the Court to reject the narrow construction of section 27.51 advanced by Petitioner James Russo, Public Defender of the Eighteenth Judicial Circuit's (the "Public Defender"), and find that there is no statutory prohibition on the appointment of public defenders when due process requires the assistance of counsel in post-conviction proceedings. Such a holding both protects Respondent's constitutional right to competent counsel, and ensures the most efficient and effective delivery of legal services to indigent inmates.

ARGUMENT

I. RESPONDENT HAS A CONSTITUTIONAL RIGHT TO COUNSEL

It is undisputed that Respondent has a constitutional right to counsel in his post-conviction proceeding. Over thirty years ago, this Court recognized that due process required the appointment of counsel for indigent inmates in post-conviction proceedings if "the post-conviction motion presents apparently substantial meritorious claims for relief and if the allowed hearing is potentially so complex as to suggest the need." State v. Weeks, 166 So. 2d 892, 896 (Fla. 1964). The Weeks Court directed trial courts to decide on a case by case basis whether the assistance of counsel was "essential to accomplish a fair and thorough presentation of the prisoner's claims." Id. at 897. Any doubts should be resolved in favor of appointment of counsel. Id.

The Court reaffirmed the Weeks standard for appointment of post-conviction counsel in Graham v. State, 372 So. 2d 1363 (Fla. 1979). In Graham, the Court declined to recognize an absolute right to capital post-conviction counsel, but directed trial courts to appoint such counsel on a case by case basis as required by the due process clause. Under Graham, the right to post-conviction counsel attached after the trial court determined that the post-conviction motion raised meritorious and complex claims requiring the assistance of counsel.[1] 372 So. 2d at 1365.

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[1] Implicit in the Court's recognition that due process requires the assistance of counsel in certain post-conviction cases is the acknowledgement that challenges asserted for the first time at post-conviction are not "technicalities;" rather they often are complex issues that go to the heart of the fair administration of

Pursuant to the Weeks and Graham standards, the trial court appointed, and the district court affirmed the appointment of the Public Defender to assist Respondent. Russo v. Akers, 701 So.2d 366, 367 (Fla. 5th DCA 1997), rev granted 1998 Fla. LEXIS 879 (Fla. Apr. 13, 1998); Order on Reconsideration of Defense Counsel's Motion to Withdraw, May 8, 1997, Appendix to Petition, #8. The Public Defender does not quarrel with Respondent's need for counsel; in fact he affirmatively recognizes both his need and his right, and asks the Court not to use this case to recede from Graham and Weeks. (Brief on the Merits at 15).[2]

II. SECTION 27.51, FLA. STAT. MUST BE CONSTRUED CONSISTENT WITH GRAHAM AND WEEKS

The constitutional requirements of Graham and Weeks must underlie this Court's interpretation of section 27.51. Digital Equipment Corporation v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994)("[W]hen possible, courts should construe statutes...to foster harmony with other statutory and constitutional law.");

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justice. See, e.g. State v. Spaziano, 692 So. 2d 174 (Fla. 1997)(key witness recanted); Hildwin v. Dugger, 654 So. 2d 107, 110 (Fla.), cert. denied, 516 U.S. 965 (1995)(ineffective assistance of counsel; Garcia v. State, 622 So. 2d 1325 (Fla. 1993)(Brady violation).

[2] In his Brief on the Merits the Public Defender affirmatively abandoned his argument that under Chapter 924, Fla. Stat., Respondent had no right to counsel. (Brief on the Merits at 4). The district court below acknowledged that section 924.066(3) Fla. Stat. provides that there is no statutory right to non-capital post-conviction counsel, but found that the statute did not preclude appointment when constitutionally mandated under Weeks and Graham. Russo, 701 So. 2d at 367. See section 924.051(9) Fla. Stat. (employees of State may assist in collateral criminal proceedings if constitutionally mandated). If the Court revisits this issue, Respondent urges the Court to affirm the Russo court's interpretation of section 924.066(3), Fla. Stat.

State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994)(court should construe statute consistent with state and federal constitutions). Indeed, in prior decisions this Court has governed its interpretation of section 27.51 so as not to run afoul of constitutional rights.

In Behr v. Bell, 665 So. 2d 1055 (Fla. 1996), the public defender sought to quash his appointment as "standby counsel" to an indigent defendant who was acting pro se. The public defender argued that the word "represent" in section 27.51(1) did not specifically authorize him to act as standby counsel. The Court rejected the public defender's "narrow construction" of section 27.51 because appointment of standby counsel was constitutionally permissible under state and federal decisions (Jones v. State, 449 So. 2d 253 (Fla. 1984), cert. denied, 469 U.S. 893 (1984); Faretta v. California, 422 U.S. 806 (1975)). Behr, 665 So. 2d at 1056. In upholding the Court of Appeal's decision, this Court rejected also the public defender's argument that because the public defender is a creature of statute, the literal words of the statute alone dictated the type of representation the public defender may provide. See Behr v. Bell, 646 So. 2d 837, 838 (Fla. 1st DCA 1994).

In State v. Ull, 642 So. 2d 721, 723 (Fla. 1994), the public defender argued that section 27.51 did not expressly authorize the trial court to discharge him from a case after the court determined that incarceration would not be imposed upon conviction. The Court concluded that the broad language of the statute permitting the court to decline to provide counsel if there was no incarceration,

"embraces the situation where a public defender has already been appointed." Id. at 724. The Court held further that to reconcile its interpretation of section 27.51 with the defendant's constitutional right to due process, discharge was prohibited if the defendant demonstrated that the discharge left him in a worse position than if counsel had not been appointed in the first place. Id.

This Court similarly must reject the Public Defender's narrow interpretation of section 27.51 because such an interpretation nullifies Respondent's constitutional right to counsel under Weeks and Graham. If a court cannot appoint a public defender because there is no direct statutory authority to appoint him in post-conviction 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. This is precisely what happened to Respondent in this case.

The Public Defender is best able to provide Respondent with the competent representation required by Weeks and Graham. Florida has established an innovative state-wide public defender system as the primary delivery system for indigent defense. Public defenders are specialists, and are thus able to provide competent criminal representation in an efficient and cost-effective manner. See Babb v. Edwards, 400 So. 2d 1239, 1241 (Fla. 5th DCA 1981), quashed on other grounds, 412 So. 2d 859 (Fla. 1982)(basic purpose of public

defender's office is to provide effective legal representation to indigents at minimum cost).[3]

III. SECTION 27.51, FLA. STAT. DOES NOT PROHIBIT THE APPOINTMENT OF THE PUBLIC DEFENDER IN POST-CONVICTION PROCEEDINGS

Section 27.51, Fla. Stat. does not expressly prohibit the Public Defender from representing indigent inmates in post-conviction proceedings when required by due process. The Public Defender's argument is based solely on a very narrow interpretation of section 27.51(a), which authorizes appointment for indigent persons "under arrest for, or charged with, a felony." The Public Defender claims that this section prohibits his appointment in post-conviction hearings because an already convicted and sentenced inmate is no longer "charged with" or "arrested for" a felony.

In urging this restrictive interpretation of section 21.51, the Public Defender fails to acknowledge three District Court of Appeal decisions concluding that section 27.51 authorizes public defender representation in non-capital post-conviction proceedings. In Bentzel v. State, 585 So. 2d 1118 (Fla. 1st DCA 1991), an inmate filed a petition for habeas corpus attacking his extradition to North Carolina. The trial court permitted the appointed public defender to withdraw based on his contention that Florida law did not require the public defender to represent persons in extradition hearings. The First District Court of Appeal reversed, holding

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[3] Respondent acknowledges that acceptance of its interpretation will increase the caseload of public defender offices, even though Weeks and Graham do not authorize appointment of counsel in every post-conviction challenge. The Public Defender must receive adequate additional funding to provide competent counsel in post-conviction cases.

that the appointment of a public defender in a habeas proceeding did not violate either section 27.51 Fla. Stat. or Fla. R. Crim. P. 3.111(b)(2). Accord Graham v. Vann, 394 So. 2d 176 (Fla. 1st DCA 1981)("[w]e cannot believe that it was legislative intent that under such circumstances the trial judge is free to appoint counsel, but in so doing he may not consider the Office of the Public Defender."); Florida Parole and Probation Commission v. Alby, 400 So. 2d 864 (Fla. 4th DCA 1981)(section 27.51 authorized the representation of an indigent prisoner by the public defender in a non-capital post-conviction case.)[4]

The Public Defender's argument that section 27.51 must specifically authorize his appointment in a certain type of case has been consistently rejected. In Moorman v. Honorable E. Randolph Bentley, 490 So. 2d 186 (Fla. 2d DCA 1986), the court found that the doctrine of expressio unius est exclusio alterius did not bar appointment of the public defender in an indirect criminal contempt case. The court concluded that "criminal contempt bears sufficient indicia of a criminal offense that it may be classified as such." Id. at 187. See Thompson v. Office of the Public Defender for Ninth Judicial Circuit, 387 So. 2d 541, 542

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[4] These decisions trump the Public Defender's reliance on Op. Att'y Gen. Fla. 64-77 (1964), which interprets Fla. R. Crim. P. 1, the predecessor to Fla. R. Crim P. 3.850. (Brief on Merits at 11-12). These decisions, particularly Bentzel, a 1991 First District Court of Appeal case, also repudiate the Public Defender's argument that a 1983 First District decision, Behr v. Gardner, 442 So. 2d 980 (Fla. 1st DCA 1983), stands for the proposition that a public defender can be appointed "only in those circumstances where appointment of counsel is constitutionally required under the Gideon decision and the Gideon progeny." (Brief on Merits at 10).

(5th DCA 1980)(appointment appropriate in DUI cases because "[i]t is inconceivable that the legislature would deliberately single out DUI and impose on the counties the additional cost of paying private attorneys to serve as special public defenders...").

Finally, the Public Defender's narrow interpretation cannot be reconciled with Fla. R. Crim. P. 3.111(b)(2). Section 27.51 must be read in pari materia with other relevant statutes, standards and rules. Kiernan v. State, 485 So. 2d 460, 461 (Fla. 1st DCA 1986); Thompson v. Office of Public Defender of Ninth Judicial Circuit, 387 So. 2d 541, 542 (Fla. 5th DCA 1980). Rule 3.111(b)(2) provides for appointment of counsel "to indigent persons in all proceedings arising from the initiation of a criminal action against a defendant, including post-conviction proceedings and appeals therefrom...regardless of the designation of the court in which they occur or the classification of the proceedings as civil or criminal." Although Rule 3.111(b)(2) does not specifically provide for the appointment of the public defender in such cases, it is undisputed that the public defender system is the "counsel" in Florida that provides criminal representation to indigent persons.

Contrary to the Public Defender's contention, the Supreme Court decision State ex. rel. Smith v. Jorandby, 498 So. 2d 948 (Fla. 1986), actually supports Respondent's interpretation of section 27.51. In Jorandby, the Court recognized that appointment of a public defender is appropriate when a person faces a loss of liberty, but not of property. Here, Respondent is challenging his loss of liberty. See Bentzel v. State, 585 So.2d 1118, 1120 (Fla. 1st DCA 1991)("it cannot be seriously contended that [a habeas

corpus petitioner] has not been faced with a possible loss of liberty, a circumstance which permits representation under section 27.51.")

The Public Defender's reliance on State ex. rel. Butterworth v. Kenny, 23 Fla. Weekly S229 (Fla. April 23, 1998) is misplaced. Kenny merely stated in dicta that section 27.51 created no statutory right to counsel for non-capital post-conviction claims. Kenny does not hold, however, that section 27.51 bars the appointment of the Public Defender to represent inmates in non-capital post-conviction claims where, as here, the appointment of such counsel is constitutionally required.[5]

CONCLUSION

The issue in this case is not whether section 27.51 creates an affirmative duty on the part of the Public Defender to represent all inmates in post-conviction proceedings. The issue is whether section 27.51 authorizes the Public Defender to accept appointment in post-conviction cases when due process requires such counsel. The interpretation of section 27.51 most consistent with the constitutional requirements is that absent a specific prohibition, public defenders may be appointed to represent inmates in post-conviction challenges. This Court should look at the broad intent

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[5] State ex. rel. Smith v. Brummer, 426 So. 2d 532 (Fla. 1982), the Public Defender's other authority, is inapposite here. In Brummer, this Court ruled that federal judges could not appoint state public defenders to represent indigent clients in federal habeas corpus proceedings. The Court did not address whether section 27.51 prohibited state courts from appointing the public defender in state post-conviction proceedings.

of the legislature in establishing the public defender system and direct the Public Defender to assist Respondent in this case.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this the 15th day of June, 1998 a true and accurate copy of the foregoing was furnished by United States mail to **BLAISE TRETTIS**, Executive Assistant Public Defender, Building E, 2725 Judge Fran Jamieson Way, Viera, Florida 32940.

Attorney

TAL-132864