JOSEPH R. SPAZIANO,

Petitioner,

v.

SEMINOLE COUNTY, FLORIDA,

Respondent,
_____/

JOSEPH R. SPAZIANO,

Petitioner,

v.

HARRY K. SINGLETARY, JR., Etc.,

Respondent,
_____/

SEMINOLE COUNTY,

Petitioner,

v.

JOSEPH R. SPAZIANO,

Respondent.
_____/

IN THE SUPREME COURT OF FLORIDA

CASE NOS. 92,801, 92,846 AND 93,447

SEMINOLE COUNTY AND STATE OF FLORIDA'S REPLY TO MR. SPAZIANO'S ANSWER BRIEF ON THE MERITS

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COMES NOW Seminole County, and the Office of the Attorney General, by and through their respective undersigned counsel, and file a Reply to Mr. Spaziano's Answer Brief on the Merits, as follows:

I. STATEMENT OF THE CASE AND FACTS. Defendant's Answer Brief includes improperly appended Appendices. Such Appendices will be addressed by separate motion filed of even date herewith.

II. SUMMARY OF THE ARGUMENTS. The Fifth District properly applied the law as set forth in Florida Statutes governing the appointment of counsel to represent indigent capital criminal defendants at public expense. Absent a conflict as determined solely by the Office of the Public Defender, the court shall appoint the Office of the Public Defender to represent an indigent capital criminal defendant if the defendant wishes legal counsel. Contrary to Defendant's assertions, this statutory language is directory and not permissive. An indigent capital defendant is not entitled to the public funding of a co-counsel to assist his privately retained counsel regardless of the litigation history concerning the underlying criminal matter. This particular Defendant is entitled to no greater level of representation that that provided any other indigent capital defendant in a criminal matter.

The Circuit Court departed from the essential requirements of law by not following the law established by this Court and taxing

Seminole County for payment of defense services at public expense which are neither necessary to the Defendant nor admissible in the underlying criminal proceeding.

III. ARGUMENTS

A. DEFENSE COUNSEL ISSUES - CASE NOS. 92,801 AND 92,846

Florida law mandates that the Office of the Public Defender be appointed for an indigent capital defendant if the defendant wishes legal counsel. *Section 925.035(1), Florida Statutes.* In *Spaziano v. State*, 660 So.2d 1363 (Fla. 1995), a post conviction relief proceeding, this Court ruled:

> "Spaziano is faced with a choice. He may be represented at the evidentiary hearing by CCR or by competent volunteer counsel who will comply with the rules and directions of this Court at no expense to the State, or he may choose to have no counsel at the evidentiary hearing. It is his decision."

Similarly, the Fifth District responded to the Defendant's constitutional concerns by expressly ruling that

> "…[s]ection 925.035(1), Florida Statutes (1997), provides an adequate procedure to protect the constitutional right to counsel guaranteed to indigent defendants in capital cases…" *Seminole County v. Spaziano*, 707 So.2d 931 (Fla. 5th DCA 1998).

Thus, absent a conflict, Florida law clearly requires the appointment of the Public Defender to represent an insolvent defendant in a capital case. *Id.* The Fifth District ruled that

> "Russ began representing Spaziano in the prior post conviction proceeding. Russ was not initially selected pursuant to the statute governing appointment of counsel in capital cases"… and further found that "as Spaziano is represented by private counsel, who was not appointed due to a conflict of interest, there is no statutory authority for the appointment of co-counsel at public expense." *Id.*

Further, Judge Cobb emphasized in his specially concurring opinion that:

> "Attorney Russ is willing to represent the defendant pro bono but wants the assistance of co-counsel at public expense... An indigent defendant is entitled to counsel, but is not permitted to select his or her counsel at public expense. The same is true for Russ, who should not be permitted to select his co-counsel at public expense" ... and that the decision below "sets a bad precedent, because in the future an attorney with little or no experience in capital cases could agree to represent pro bono a criminal defendant and then move the court for the appointment of a more experienced attorney for assistance, to be compensated by the county. This practice would undermine the state public defender system created by the legislature as the way of providing counsel to indigent defendants." *Id.*

Counsel for the Defendant entered into a private attorney-client arrangement for representation of the Defendant in the underlying criminal proceedings. (Answer Brief p.26). No authority exists in Florida Statutes permitting an indigent capital defendant the services of both a privately retained defense counsel and a defense counsel paid for at public expense.

The United States Supreme Court has rejected the notion that "impecunious defendants have a Sixth Amendment right to choose their counsel." *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617,624, 109 S. Ct. 2646,2652, 105 L.Ed.2d 528 (1989). In the *Caplin* case, the United States Supreme Court stated that

> "The Amendment guarantees defendants in criminal cases the right to adequate representation, but those who do not have the means to hire their own lawyers have no cognizable

> complaint so long as they are adequately represented by attorneys appointed by the courts"…"[a] defendant may not insist on representation by an attorney he cannot afford." Id.

Moreover, this Court has found that a "defendant does not have an absolute right to a particular lawyer and that it is within a trial court's discretion to deny a defendant's request for particular counsel when there is a countervailing public interest in the fair and orderly administration of justice." See, *Bundy v. State*, 455 So.2d 330 (Fla. 1984).

The appointment of the Office of the Public Defender here, an Office publicly funded and supported through taxpayers of the State, would seem to promote the "fair and orderly administration of justice." Rather, the Defendant argues an entitlement to choosing his own defense co-counsel, at public expense, to assist his privately retained defense counsel.

Simply stated, the Defendant cannot have it both ways. The Defendant must either be represented solely by the Office of the Public Defender, as mandated by Florida Statutes for indigent capital defendants, or, the Defendant can continue to be represented by his privately retained attorney. Legal assistance from other members of the criminal defense bar, if needed, may also be requested. As Judge Cobb further states,

> "Although the trial judge was correct that he could not appoint a public defender to work as co-counsel with a private attorney, the trial court did not discuss the obvious alternatives: instruct Russ to seek out other attorneys who are willing to act as co-counsel on a pro bono basis, or appoint the public defender if Mr. Russ is unable to secure pro bono assistance and is not able to handle the case alone."

It is the sole prerogative of the Office of the Public Defender to determine whether a conflict exists in representing a particular defendant given the circumstances present if and when such appointment occurs. It is not and has never been the prerogative of a privately retained defense counsel for a defendant to assert such a conflict on behalf of the Public Defender's Office.

Section 925.035(1), Florida Statutes, regarding appointment of the public defender for indigent capital defendants is not merely 'permissive' language as the Defendant argues. Historically accepted tenets of statutory construction establish that the plain meaning of the statute be given to a particular statute unless otherwise stated. The only exception to the initial appointment of the Public Defender's Office to represent an indigent capital defendant is a defendant who wishes to represent himself *pro se*.

Section 27.530(3), Florida Statutes (1997), also provides that

> [I]f at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender ... it shall be the public defender's duty to move the court to appoint one or more members of The Florida Bar...to represent those accused.

This Section further states that

> [t]he trial court shall appoint such <u>other counsel</u> upon its own motion when the facts developed upon the face of the

> record and files in the cause disclose such conflict. (Emphasis added.)

This subsection, contrary to Defendant's contentions, does not provide the trial court with "additional, independent authority" to appoint co-counsel at public expense to assist privately retained criminal defense counsel. Such construction would negate the purpose for establishing the state-wide system of the Public Defender's Office and its counterpart, the Office of the Capital Collateral Representative, at the post-conviction proceeding level. Further, the foregoing Section is inapplicable here as *Section 925.035, Florida Statutes,* supersedes *Section 27.530(3), Florida Statutes,* with regard to capital defendants and solely governs appointment of counsel in capital cases.

Section 43.28, Florida Statutes (1997), sets forth the counties' responsibilities with regard to the provision of

> "...appropriate courtrooms, facilities, equipment, and, unless provided by the state, personnel necessary to operate the circuit and county courts."

Contrary to Defendant's contentions, however, interpreting the foregoing Section as requiring the counties to pay for co-counsel at public expense to assist privately retained criminal defense counsel would render illogical results. The counties could thus be mandated to completely staff the circuit and county courts with all personnel necessary to operate the courts, including the judges, bailiffs, court clerks, and attorneys for all of the parties. Such construction would

conflict with the various court costs mandates set forth in Article V of the Florida Constitution.

It is not so rare a case as to require circumvention of the entire statutorily established public defender system in order to provide co-counsel at public expense to assist a privately retained defense attorney.

Moreover, it is not obvious that the Office of the Public Defender has a conflict here. The Public Defender has stated that no conflict would exist if the Office of the Public Defender was appointed to represent this Defendant. (Initial Brief Appendix 14, pp. 8 - 13). At to a future conflict arising regarding a specific defendant represented by the Office of the Public Defender, such conflict could be easily resolved by the Public Defender's Office declaring the existence of a statutory conflict upon its appointment as counsel for the other defendant. Accordingly, the other defendant would then receive a court-appointed special public defender as mandated by *Section 925.035, Florida Statutes (1997)*. Despite the Public Defender's best attempts to determine hypothetically whether a conflict would exist, until actually appointed to represent a Defendant, the Public Defender cannot statutorily declare a conflict. The Defendant's arguments related to a supposed conflict with the Public Defender's Office are, at this time, premature, speculative and without merit.

Despite the Defendant's desire to propose his own "dream" defense team, Florida law does not permit an insolvent defendant to select his own counsel at public expense. In enacting the foregoing, the Florida legislature expressed its clear intent to establish a procedure for providing counsel to indigent defendants in capital cases. An indigent defendant in a capital case is entitled to counsel paid for by public funds only as provided by *Section 925.305(1), Florida Statutes (1997).*

Contrary to Defendant's continuous assertions, this Court deferred enactment of proposed rules concerning the mandatory appointment by the trial courts of two (2) attorneys to represent indigent defendants in capital cases when the Public Defender's Office has a conflict of interest. See, In Re: Amendment To Florida Rules Of Judicial Administration—Minimum Standards For Appointed Counsel In Capital Cases. (Initial Brief, Appendix 13.) Here, however, the deferred rules would be inapplicable since the Defendant's counsel is privately retained and not court-appointed.

B. DEFENSE SERVICES ISSUES - CASE NO. 93,447. In *Mills v. State*, 462 So.2d 1075 (Fla. 1985), this Court held that a county could not be taxed for costs incurred by a defendant who commissioned a public opinion survey for the purpose of a motion for change of venue on grounds of pretrial publicity. In *Mills*, this Court found that "this Court has held such surveys

inadmissible in change of venue proceedings on the grounds of hearsay and unreliability." See, *Irvin v. State*, 66 So.2d 288 (Fla. 1953), cert. Denied. 346 U.S. 927 (1954). The *Mills* and *Irvin* cases, supra, decisions by this honorable Court, are still valid and applicable to this case. See also, *Rolling v. State*, 695 So.2d 278 (Fla. 1997); *Cole v. State*, 701 So.2d 845 (Fla. 1997), supporting the position that a change of venue motion must be 'proven up' during the voir dire phase of the pretrial proceedings.

This Court addressed the issue of the denial of a change of venue motion, and the proper time for proving such a motion, in *Henyard v. State*, 689 So.2d 239 (Fla. 1996). In *Henyard*, this Court stated:

> In *McCaskill v. State*, 344 So.2d 1276, 1278 (Fla. 1977), we adopted the test set forth in *Murphy v. State*, 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975), and *Kelley v. State*, 212 So.2d 27 (Fla. 2d DCA 1968), for determining whether to grant a change of venue: Knowledge of the incident because of its notoriety is not, in and of itself, grounds for a change of venue. The test for determining a change of venue is whether the general state of mind of the inhabitants of a community is so infected by the knowledge of the incident and accompanying prejudice, bias, and preconceived opinions that jurors could not possibly put these matters out of their minds and try the case solely upon the evidence presented in the courtroom. *Id.* At 1278 (quoting *Kelley*, 212 So.2d at 28). *See also, Pietri v. State*, 644 So.2d 1327(Fla. 1994), *cert. denied*, --- U.S. --, 115 S.Ct. 2588, 132 L.Ed.2d 836 (1995). In *Manning v. State*, 378 So.2d 274 (Fla. 1980), we further explained: An application for change of venue is addressed to the sound discretion of the trial court, but the defendant has the burden of ... showing that the setting of the trial is inherently prejudicial because of the general atmosphere and state of mind of the inhabitants in the community. A trial judge is bound to grant a motion for a change of venue when the evidence presented reflects that the

> community is so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result. The trial court may make that determination upon the basis of evidence presented prior to the commencement of the jury selection process, or may withhold making the determination until an attempt is made to obtain impartial jurors to try the cause. *Id.* At 276 (citation omitted).
>
> The *Henyard* court held that, **"Ordinarily, absent an extreme or unusual situation, the need to change venue should not be determined until an attempt is made to select a jury."** Emphasis added. *Henyard* at 245.

As the emphasized portion of *Henyard* clearly states, a change of venue motion should **not** be decided until *voir dire* unless there is an "extreme or unusual situation." *Id.* What the Defendant here has not attempted to establish the existence of an "extreme or unusual situation" that necessitates the extraordinary step of determining a change of venue motion before an attempt is made to swear a jury. A rational evaluation of this case leads to the conclusion that this case does not present such a situation - there is no allegation that there has been "media saturation," nor is there any allegation that it will not be possible to thoroughly inquire into the knowledge of the venire during *voir dire*[1]. The "survey report" appended to the Defendant's Answer Brief does not demonstrate that the community "is so pervasively exposed to the circumstances of the incident that prejudice, bias, and

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[1] The *ex parte* motion for appointment of a pollster (which cost $8,000) is appended to the Defendant's Answer Brief. Because that motion was filed under seal, it has not previously been available to the State. A review of that motion reveals that the only reason advanced therein for the appointment of such an

preconceived opinions are the natural result." *Henyard, supra.* This Court must require the Defendant to prove his change of venue motion during *voir dire.*

Moreover, in *Williams v. Nix,* 751 F.2d 956 (8th Cir.1988), the Eighth Circuit disposed of the public opinion poll issue by footnote, stating that

> Williams also argues that it was constitutional error for the state court to refuse his request for a public-opinion poll to assist him in seeking a change of venue. We disagree. We do not believe this argument is sufficiently substantial to deserve further discussion. *Id.* At 958 n.1.

The appropriate time in which to resolve the issue of seating a fair and impartial jury is during pretrial voir dire proceedings. Thus, in *Heath v. Jones,* 941 F.2d 1126, 1134-36 (11th Cir. 1991), the Court found that even extensive publicity concerning a criminal case does not establish prejudice when a fair and impartial jury can be seated. The Eleventh Circuit contends, in *Heath,* that the appropriate time to 'prove up' a change of venue motion is during *voir dire.* This proposition was rendered by the *Heath* Court despite the publicity surrounding that case which occurred much more recently than the lengthy which has passed since the underlying criminal events here. See also, *Bundy v. Dugger,* 850 F.2d 1402 (11th Cir. 1988).

The County contends that the trial court here made its decision based on a false assumption. The trial court appears to

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expert is that the Defendant "wants one because it might help." As set out above that is an insufficient reason.

assume that if an indigent defendant has a justifiable need for a service, then that need supports requiring the County to pay for such service despite any lack of express statutory authorization ordering counties to pay for such services. The United States Supreme Court ruled, in *Ross v. Moffit*, 417 U.S. 600,615 (1974), quoting *Griffin v. Illinois*, 351 U.S. 12,18 (1956), that the "fact that a particular service might be of benefit to an indigent defendant does not mean that there is a constitutional requirement for such service."

This Court has recently found that a court cannot require a government to pay fees or costs where that payment has not been provided for expressly and by statute. See also, *Board of County Commissioners v. Sawyer*, 620 So.2d 757 (Fla. 1993); *Wolf v. Volusia County*, 22 Fla. L. Weekly S.192 (1997); *Milligan v. Palm Beach Bd. Of County Comm.*, 704 So.2d 1050 (1998); *Goldberg v. County of Dade*, 378 So.2d 1242 (3rd DCA 1979).

In *Board of County Commissioners v. Sawyer*, this Court reversed a decision that an acquitted defendant could recover investigative costs and stated that

> "[c]ommon law provided no mechanism whereby one party could be charged with the costs of the other. Cost provisions are a creature of statute and must be carefully construed. This Court has held for over a century that cost provisions against the State must be expressly authorized….[I]t may be premised that at common law neither party could be charged with the costs of the other, and it was only by statute that such a charge came to be allowed … the sovereign or the State was not chargeable with costs, either in civil or criminal cases, unless there was express provision of law to authorize it." *Buckman v. Alexander*, 25 Fla. 46,49 (Fla. 1888).

Moreover, this Court recently ruled that a trial court did not abuse its discretion in refusing to provide an indigent defendant with funds for appointment of a jury selection expert. *San Martin v. State*, 705 So.2d 1337, 1346 (Fla. 1997). In *San Martin*, the defendant argued that due process required the appointment of a jury selection expert because the State was seeking the death penalty. In denying the defense request, the court stated that "San Martin's counsel were experienced trial lawyers who were very capable of making jury selection decisions on their own." *Id.* This Court further found, in *San Martin*, that jury selection is a legal function that should be within the competence of experienced trial lawyers. *Id.*

The County asserts that the decision to move for a change of venue is clearly a legal function analogous to that of the legal function of jury selection and thus should be within the competence of experienced trial lawyers. Here, there are no grounds to suggest that privately retained counsel for the Defendant is unable to perform this basic legal function of *voir dire* at the appropriate time of the pretrial proceedings on behalf of the Defendant. The County is not obligated to pay costs unless mandated by statute.

Here, the trial court's ruling is not authorized by statute. Moreover, such unauthorized expenditure of public funds greatly exceeds the standard of liability statutorily

imposed on the County with regard to payment of indigent criminal defense costs. Such an expense is clearly beyond the standards established by the United States Supreme Court and this Court which considered all constitutional due process ramifications before reaching the *Ake v. Oklahoma* decision and the foregoing cases cited here. The trial court's ruling greatly exceeds the expenses contemplated and authorized by the Florida Legislature in enacting *Chapters 27, 914 and 939, Florida Statutes.*

IV. CONCLUSION. The Fifth District found that the trial court had departed from the essential requirements of law and properly granted Seminole County's Petition For Writ Of Certiorari and quashed the Order Appointing Additional Counsel At Public Expense entered by the Circuit Court on December 11, 1997. *State v. Spaziano,* 707 So.2d 939 (5th DCA 1998). The Defendant has failed to establish here that the decision rendered by the Fifth District below expressly or directly conflicts with a decision of either the Florida Supreme Court or another Florida District Court of Appeal. Moreover, the appointment of co-counsel at public expense to assist a privately retained attorney may result in a method whereby indigent criminal defendants can circumvent representation by the Public Defender's Office and effectively choose their own criminal defense team. Such subterfuge is abhorrent to the judicial process statutorily

established to serve the needs of indigent criminal defendants and inequitable to the taxpaying public which already pays more than its fair share through fiscal support of the Public Defender's Office.

The Circuit Court departed from the essential requirements of law by not following the law established by this Court and taxing Seminole County for the costs of an unnecessary, unreasonable and inadmissible public opinion survey poll commissioned by an indigent criminal defendant. Seminole County contends that the *Mills* and *Irvin* cases have not been overturned or vacated and are still good law. Although the results of the public opinion survey commissioned here by the Defendant are inadmissible at any hearing concerning a change of venue, the County will be force to pay for a poll which has no usefulness to either the general public or even to the indigent criminal Defendant. The County will be forced to pay for a poll commissioned only "because the Defendant wants one because it might help." Any reasonable concerns the Defendant has regarding the appropriate venue for the proceedings may be addressed during pretrial hearings and *voir dire*. An unreliable and inadmissible public opinion survey commissioned by the Defendant will not remedy such concerns and is merely an unnecessary and unreasonable waste of the County taxpayers funds.

DATED this 14 day of August, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to: **George L. Dorsett, Assistant County Attorney**, Orange County Attorney's Office, 201 South Rosalind Avenue, Orlando, Florida 32802, **Thomas Hastings,** Assistant State Attorney, 100 East First Street, Sanford, Florida 32771, **Office of the Public Defender,** 301 North Park avenue, Sanford, Florida 32771, **James M. Russ, Esq.,** Tinker Building, 18 West Pine Street, Orlando, Florida 32801, by U.S. Mail this 14 day of August, 1998. The original and seven (7) copies have been forwarded on this date by express overnight mail delivery to **Honorable Sid J. White, Clerk,** Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.

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