

**FILED**

SID J. WHITE

APR 28 1998

IN THE SUPREME COURT OF FLORIDA

JOSEPH R. SPAZIANO,  
Petitioner,

v.  
SEMINOLE COUNTY, FLORIDA,  
Respondent.

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CASE NO. 92,801

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

INDIGENT STATE PRISONER  
DEATH PENALTY CASE

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On Notice to Invoke Discretionary  
Jurisdiction to Review a Decision of the  
Florida Fifth District Court of Appeal

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**MR. SPAZIANO'S AMENDED BRIEF ON JURISDICTION**

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### PRELIMINARY STATEMENT

In this brief, the Petitioner, JOSEPH ROBERT SPAZIANO, will be referred to as "MR. SPAZIANO." The Respondent, Seminole County, Florida, will be referred as the "county." The State of Florida will be referred to as the "state." Since this was an original certiorari proceeding in the Florida Fifth District.<sup>1/</sup> This challenged order is attached to this brief (App. A) and is reported at 23 Fla.L.Weekly D717 (5th DCA 3-13-98).

A petition for habeas corpus, with appendix, is being contemporaneously filed by MR. SPAZIANO in this Court in coordination with this brief on jurisdiction. The habeas appendix contains additional relevant trial court legal documents which are incorporated herein by reference, and will be referred to as follows: H.C.Pet.App. \_\_.

### STATEMENT OF THE CASE AND OF THE FACTS

This case is based upon an appellate decision granting a petition for writ of certiorari filed by the county, and quashing a trial court order appointing Orlando, Florida, attorney Donald R. West as co-counsel for MR. SPAZIANO in the underlying death penalty case, State of Florida v. Joseph R. Spaziano, Case No. 75-430-CFA, Circuit Court, Eighteenth Judicial Circuit, Seminole County,

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<sup>1/</sup> The record in the Fifth District consists of the following: 1) County Petition for Writ of Certiorari, with appendix (R1/App. \_\_); 2) Acknowledgment of Petition for Writ of Certiorari (R2); 3) Order to Show Cause (R3); 4) Spaziano Suggestion for Certification to Supreme Court (R4); 5) Spaziano Response to Seminole County's Petition for Writ of Certiorari (R5); 6) Seminole County's Reply to Response to Seminole County's Petition for Writ of Certiorari with Appendix (R6/App. \_\_); and 7) Order Granting Petition for Writ of Certiorari and Quashing Trial Court Order (R7).

Florida (trial court). On June 3, 1997, a Florida State grand jury returned a superseding indictment charging **MR. SPAZIANO** with murder in the first degree (H.C.Pet.App. A). The next day, the state filed its notice of intent to seek the death penalty (H.C.Pet.App. B). On June 10, 1997, a motion was filed seeking the appointment of co-counsel at public expense (R1/App. B; H.C.Pet.App. C). The county filed a written objection (R1/App. C; H.C.Pet.App. D), and **MR. SPAZIANO** filed a written response to the County's objection (H.C.Pet.App. E). A hearing was held on July 7, 1997, where the trial court received additional legal authorities (H.C.Pet.App. F; H.C.Pet.App. G). On July 24, 1997, **MR. SPAZIANO** presented additional supplemental authority in support of his motion (H.C.Pet.App. H). On July 25, 1997, the trial court entered a written order denying **MR. SPAZIANO'S** motion (R1/App. D; H.C.Pet.App. I).

On September 12, 1997, there was filed **MR. SPAZIANO'S** Motion for Reconsideration and Second Motion for the Appointment of a Florida Attorney as Co-counsel at Public Expense (R1/App. E; H.C.Pet.App. J), to which the county objected on October 2, 1997 (R1/App. F; H.C.Pet.App. L), as did the state on November 7, 1997 (H.C.Pet.App. M). An order was entered setting a hearing on these legal papers for November 10, 1997 (H.C.Pet.App. K). A court hearing was held on November 10, 1997 (although this hearing was held on November 10, 1997, the transcript erroneously bears the date October 20, 1997) (H.C.Pet.App. N, Tr.). At this hearing, **MR. SPAZIANO'S** counsel presented trial court records in two criminal cases involving a defendant Albert J. Bradley, case nos. 75-437 and

J75-4766, Circuit Court, Eighteenth Judicial Circuit, Seminole County, Florida, in which defendant Bradley was represented by the Public Defender of the Florida Eighteenth Judicial Circuit (H.C.Pet.App. N, Tr. p. 5). The same Albert J. Bradley was previously listed as an "A" category "confession" witness by the state in the pending Spaziano case (H.C.Pet.App. U). Therefore, **MR. SPAZIANO'S** counsel asserted that a conflict of interest existed between **MR. SPAZIANO** and this public defender, disqualifying the Public Defender from being appointed as co-counsel (R1/App. E; H.C.Pet.App. J; H.C.Pet.App. N, Tr. p. 5, 8-11). On December 11, 1997, the trial court entered its order appointing Florida attorney Donald R. West as co-counsel at public expense for **MR. SPAZIANO** (R1/App. A; H.C.Pet.App. N).

On January 12, 1998, the county filed a petition for writ of certiorari, together with an appendix, in the Florida Fifth District Court of Appeal, Seminole County, Florida v. Joseph R. Spaziano, Case No. 98-00115, Florida Fifth District Court of Appeal (R1; H.C.Pet.App. P). **MR. SPAZIANO** filed his response to Seminole County's petition for writ of certiorari (R5; H.C.Pet.App. R) on that same date. While this matter was pending before the Florida Fifth District, on January 30, 1998, an unauthorized trial court hearing was held which was attended by the Public Defender, J.R. Russo. While not denying that the Public Defender had represented the now prosecution witness Albert J. Bradley in 1975, Mr. Russo asserted that currently all 1975 office records have been destroyed and there are no current employees who were in the office in 1975. In one breath Mr. Russo asserted, "with respect to Mr. Bradley,

Judge, I know of no actual conflict of interest with respect to the Public Defender's Office." Later, "so with Mr. Bradley, I can't tell you that we have a conflict of interest because we have nobody in the office and no records to refer to." (R6/App. A, pp. 8-9; H.C.Pet. App. S/App. A, pp. 8-9.) MR. SPAZIANO'S counsel advised the trial court that in 1975 Mr. Bradley was represented by the Public Defender's office at the same time that Bradley claims to have had contact with MR. SPAZIANO (R6/App. A, pg. 9; H.C.Pet.App. S/App. A, pg. 9; H.C.Pet.App. V). The assistant county attorney asserted that the Public Defender's comments were essentially irrelevant because the issue was beyond the jurisdiction of the trial court at that point in time (R6/App. A, pg. 16; H.C.Pet.App. S/App. A, pg. 16).

On March 18, 1998, the Fifth District filed its decision/opinion granting the petition for writ of certiorari and quashing the trial court order appointing Florida attorney Donald West as co-counsel at public expense (App. A; R7; H.C.Pet.App. T).

#### SUMMARY OF THE ARGUMENTS

**THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE  
FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY  
CONFLICTS WITH OTHER APPELLATE COURTS ON THE ISSUES  
OF STATUTORY JUDICIAL AUTHORITY, INHERENT JUDICIAL  
AUTHORITY AND AN ATTORNEY'S CONFLICT OF INTEREST;  
AND CONSTRUES THE RIGHT TO COUNSEL GUARANTEED  
BY THE STATE AND FEDERAL CONSTITUTIONS**



## ARGUMENTS

I. THIS COURT SHOULD ACCEPT JURISDICTION BECAUSE THE FIFTH DISTRICT'S DECISION EXPRESSLY AND DIRECTLY CONFLICTS WITH OTHER APPELLATE COURTS ON THE ISSUES OF STATUTORY JUDICIAL AUTHORITY, INHERENT JUDICIAL AUTHORITY AND AN ATTORNEY'S CONFLICT OF INTEREST

A. Statutory Judicial Authority. The Fifth District's opinion states, "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." (App. A, pg. 2; R7, pg. 2; H.C.Pet.App. T, pg. 2.)

The Fifth District relied upon the language found in § 925.035(1), Fla. Stat. (1997), in support of its holding that the trial court does not have the authority to appoint counsel to assist pro bono counsel at public expense absent a conflict by the public defender.

In addition to the conflict of interest fully developed below in Argument C, the Public Defender has a **statutory** conflict in this case because of controlling case law. As noted by the trial court and in the Fifth District's opinion (App. A, pg. 2 n.1; R7, pg. 2, n.1; H.C.Pet.App. T, pg. 2, n.1), the Public Defender cannot accept appointment to serve as co-counsel with a privately retained lawyer and the trial court cannot appoint the Public Defender to assist pro bono counsel. Behr v. Gardner, 442 So.2d 980 (Fla. 1st DCA 1983); Thompson v. State, 525 So.2d 1011 (Fla. 3d DCA 1988); R1/App. A, pg. 2; H.C.Pet.App. N, pg. 2. Since this opinion makes no distinction in the analysis between a privately retained attorney and a volunteer attorney representing a client pro bono, the Fifth District agreed that the option of appointing the Public

Defender to serve as co-counsel was not available to the trial court. However, the need for two lawyers in this case has been established (R1/App. A; H.C. Pet.App. N) and is not disputed by the Fifth District's opinion/ decision. See American Bar Association Guidelines for the Performance of Counsel in Death Penalty Cases, Guideline 2.1, dated February 1989 (H.C.Pet.App. F), and 21 U.S.C. § 848(q)(4), Guideline 6.01(A) (H.C.Pet.App. G). Since the Public Defender cannot serve as co-counsel due to the conflict of interest, the trial court had the authority under § 925.035(1), Fla. Stat. (1997), to appoint co-counsel from outside the Public Defender's office.

The trial court had additional, independent statutory authority under § 27.53(3), Fla. Stat., to enter its order appointing co-counsel at public expense, regardless of the Public Defender's stated position. ". . . However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict. . . ." (Emphasis added.)

The Public Defender does have a conflict of interest because the "facts developed upon the face of the record and files in the cause disclose such conflict." See, Brief on Jurisdiction, pp. 2-3, supra; pp. 8-9, infra.

The Fifth District's decision conflicts with In the Interest of D.B., 385 So.2d 83, 92-93 (Fla. 1980). Under § 43.28, Fla. Stat., the trial court also has authority to appoint counsel at public expense in the extraordinary case where counsel is constitutionally required.

B. Inherent Judicial Authority. Likewise, a Florida trial court does have the inherent authority to appoint co-counsel in a case such as this at public expense where the Public Defender is disqualified due to a conflict of interest. Contrariwise, the Fifth District's decision holds that the trial court did not have inherent authority to make this appointment because "under the statute the public defender can represent the indigent defendant.... " (App. A, pg. 3; R7, pg. 3; H.C.Pet.App. T, pg. 3.) This conclusion is based upon the false and erroneous premise that a conflict of interest does not exist and therefore **MR. SPAZIANO'S** constitutional right to conflict-free legal counsel has not been violated. It conflicts with the following Florida cases.

A Florida trial court does have the inherent authority to make an appointment of a private attorney at public expense in a capital case. Dade County v. Goldstein, 384 So.2d 183, 189 (Fla. 1980). This Court has held that it is a Florida trial court's duty to focus on the individual's constitutional right to effective legal representation. Makemson v. Martin County, 491 So.2d 1109, 1112 (Fla. 1986). It is an "essential judicial function" of the Florida trial court to ensure effective legal representation by competent legal counsel. Makemson at 1113. This Court has held that "[i]n order to safeguard that individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter." Makemson at 1113. In Makemson, this Court rejected § 925.036's limit on the amount of compensation paid to appointed counsel in a capital case, because it attempted to impose financial

restrictions on a trial court's "inherent power to ensure the adequate representation of the criminally accused." The Makemson Court held § 925.036 unconstitutional as applied because it "impermissibly encroaches upon a sensitive area of judicial concern." Makemson at 1112. This violated the separation of powers clause in the Florida Constitution, and interfered with the Sixth Amendment right to counsel. Makemson at 1112.

Since the trial court found in its December 11, 1997, order (R1/App. A; H.C.Pet.App. N) that a second lawyer was necessary due to the extraordinary and unusual nature of this death penalty case, the Fifth District's decision also conflicts with Schommer v. Bentley 500 So.2d 118 (Fla. 1986). The Fifth District's decision also conflicts with Escambia County v. Behr, 384 So.2d 147, 150 (Fla. 1980).

C. Conflict of Interest. Despite the Public Defender's prior representation as defense counsel for now state prosecution witness Albert J. Bradley (R1/App. E; H.C.Pet.App. J; H.C.Pet.App. N, Tr. pg. 5; H.C.Pet.App. U, V, X, Y), the Fifth District erroneously held "There was no need for the trial court to exercise its 'inherent' authority to ensure effective representation when under the statute the public defender can represent the indigent defendant . . . ." (App. A, pg. 3). This holding that a conflict of interest does not exist in this death penalty case expressly and directly conflicts with the following decisions of this Court: Guzman v. State, 644 So.2d 996, 999 (Fla. 1994); Foster v. State, 387 So.2d 344 (Fla. 1980) (fundamental error); see also Hope v. State, 654 So.2d 639 (Fla. 4th DCA 1995).

Interpreting the Rules Regulating The Florida Bar, Florida appellate courts have found conflicts of interest which disqualified lawyers. Zarco Supply Co. v. Bonnell, 658 So.2d 151 (Fla. 1st DCA 1995); Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976).

**II. THIS DECISION ALSO CONSTRUES THE PROVISIONS OF THE STATE AND FEDERAL CONSTITUTIONS WHICH GUARANTEE THE RIGHT TO COUNSEL IN A STATE CRIMINAL MATTER**

Also, the decision of the Fifth District expressly construed the right to counsel which is guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution and Art. I, §§ 9, 16(a), Fla. Const. The Fifth District's construction is contrary to many decisions interpreting this fundamental right of a person accused of a crime to conflict-free legal counsel. Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 1696-1697, 100 L.Ed.2d 140 (1988); Holloway v. Arkansas, 435 U.S. 475, 98 S.Ct. 1173, 1180-1182, 55 L.Ed.2d 426 (1978); Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Guzman v. State, 644 So.2d 996, 999 (Fla. 1994); Foster v. State, 387 So.2d 344 (Fla. 1980); Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976); Freund v. Butterworth, 117 F.3d 1543, 1571-1579 (11th Cir. 1997), rehearing en banc, 135 F.3d 1419 (11th Cir. 1998); United States v. McCutcheon, 86 F.3d 187 (11th Cir. 1996); United States v. Hobson, 672 F.2d 825 (11th Cir. 1982), rehearing denied, 677 F.2d 117 (11th Cir. 1982); United States v. Miranda, 936 F.Supp. 945 (S.D. Fla. 1996) United States v. Culp, 934 F.Supp. 394 (M.D. Fla. 1996).

This constitutional right to counsel includes "the right to a defense conducted by an attorney who is free of conflicts of

interest." Wheat, 108 S.Ct. at 1696-1697; United States v. Perez, 694 F.Supp. 854, 857 (S.D. Fla. 1988).

#### CONCLUSION

The Fifth District's decision involves two fundamental principles of law which are of monumental interest to the People of Florida and this Court: first, the absolute and unqualified right to the assistance of conflict-free legal counsel in a Florida death penalty case; and second, the ethical prohibition forbidding a lawyer from representing two clients who have conflicts in their individual interests.

Based on the arguments and authorities set forth in this brief, this Court must exercise its discretionary jurisdiction granted to it by the People of Florida in Art. V, § 3(b)(3), Fla. Const. and fulfill its judicial responsibilities by granting **MR. SPAZIANO'S** petition for review and ordering briefing on the merits.

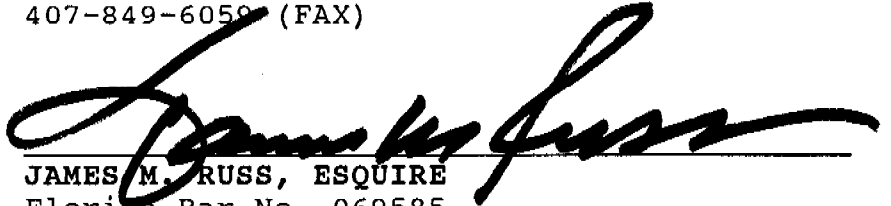
Respectfully submitted this 27th day of April, 1998, at Orlando, Orange County, Florida.

#### CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 27th day of April, 1998, by U.S. Mail to Office of the Attorney General, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida, 32118; to **SEMINOLE COUNTY ATTORNEY**, 1101 East First Street, Sanford, Florida 32771; to **HONORABLE O.H. EATON, JUDGE, CIRCUIT COURT**, Eighteenth Judicial Circuit, 301 North Park Avenue, Sanford, Florida 32711; to **THOMAS HASTINGS, ASSISTANT STATE ATTORNEY**, 100 East First Street, Sanford, Florida 32711; and the original and five copies have been sent by Federal Express to **SID**

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