

FILED

SID J. WHITE

✓ **MAY 18 1998**

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

CASE NO. 92,801

JOSEPH R. SPAZIANO,

Petitioner,

v.

INDIGENT STATE PRISONER
DEATH PENALTY CASE

SEMINOLE COUNTY, FLORIDA,

Respondent.

_____ /

**SEMINOLE COUNTY'S JURISDICTIONAL BRIEF ON REVIEW FROM THE
DISTRICT COURT OF APPEAL, FIFTH DISTRICT
STATE OF FLORIDA**

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PRELIMINARY STATEMENT

In this brief, the following entities will be referred to as described below:

Seminole County - "Seminole County" or "Respondent"

Joseph R. Spaziano - "Defendant" or "Petitioner"

Fifth District Court of Appeal - "Fifth District"

Eighteenth Judicial Circuit, in and for Seminole County,
Florida - "Circuit Court"

JURISDICTIONAL STATEMENT

The Florida Supreme Court may exercise its discretionary jurisdiction to review a decision of an appellate court in several clearly enumerated circumstances. Fla. R. App. P. 9.030(a)(2). The Supreme Court of Florida may opt to utilize its discretionary jurisdiction to review an appellate court decision when that decision "expressly and directly conflicts with the decision of another district court of appeal or of the supreme court on the same question of law." Article V, Section 3(b)(3), Fla. Const. See also, Fla. R. App. P. 9.030(a)(2)(iv). Here, an alleged conflict between appellate and supreme court decisions is the sole ground argued by the Defendant in his attempt to obtain Florida Supreme Court jurisdictional review.

The appellate court decision to be reviewed must show on its face the existence of a direct conflict. *Seaboard Airline Railroad Co. v. Branham*, 104 So.2d 356 (Fla. 1958). Further, for a decision to be considered in "direct conflict" with another decision, the two decisions must be wholly irreconcilable. *Williams v. Duggan*, 153 So.2d 726 (Fla. 1963). The foremost concern is with decisions as precedents rather than the determination of the rights of particular litigants. *Ansin v. Thurston*, 101 So.2d 808 (Fla. 1958).

STATEMENT OF THE CASE AND FACTS

The Respondent disagrees to a substantial degree with the recital as set forth in Defendant's Statement of the Case and Facts. Accordingly, the Respondent respectfully provides here a

concise summary of the pleadings as presented to the Fifth District and Circuit Court tribunals.

On or about June 10, 1997, privately retained counsel for the Defendant in the underlying criminal matter filed Mr. Spaziano's Motion For The Appointment Of Florida Attorney Robert N. Wesley As Co-Counsel At Public Expense. (Appendix A). The Defendant has previously been declared indigent here for purposes of certain defense costs by the Circuit Court in the underlying criminal matter.

On July 2, 1997, Seminole County filed an Objection To Defendant's Motion For Appointment Of Florida Attorney Robert N. Wesley As Co-Counsel At Public Expense. (Appendix B). At the first hearing on the co-counsel issue held July 7, 1997, the Circuit Court denied Defendant's Motion and entered an Order Denying Mr. Spaziano's Motion For Appointment Of Robert N. Wesley As Co-Counsel At Public Expense. (Appendix C).

Notwithstanding entry of the aforementioned decision denying appointment of co-counsel at public expense to assist a privately retained defense attorney, the Defendant filed on or about September 12, 1997, a Motion For Reconsideration And Second Motion For The Appointment Of Florida Attorney As Co-Counsel At Public Expense. (Appendix D).

Seminole County filed on October 2, 1997, its Objection To Defendant's Motion For Reconsideration And Second Motion For The Appointment Of Florida Attorney Robert N. Wesley As Co-Counsel At Public Expense. (Appendix E). Subsequent to the second hearing on

the co-counsel issue, however, the Circuit Court entered an Order Appointing Additional Counsel At Public Expense on December 11, 1997. (Appendix F).

On January 12, 1998, Seminole County timely filed a Petition For Writ Of Certiorari And Declaratory And Injunctive Relief. (Appendix G). On January 15, 1998, the Fifth District issued an Order Of The Court requiring the Defendant to respond. (Appendix H). The Defendant filed on or about February 9, 1998, its Response To Seminole County's Petition For Writ Of Certiorari. (Appendix I).

Seminole County filed its Reply To Response To Seminole County's Petition For Writ Of Certiorari on February 17, 1998. (Appendix J).

The Fifth District filed an Order of the Court dated March 13, 1998, in Case No. 98-115, specifically granting the Respondent's Petition For Writ Of Certiorari and quashing the Circuit Court Order Appointing Additional Counsel At Public Expense. (Appendix K).

SUMMARY OF ARGUMENT

The Defendant has failed to satisfy the criteria established by the Florida Constitution and the Florida Rules of Appellate Procedure for the exercise of discretionary review by the Supreme Court. The ruling of the Fifth District does not "expressly and directly conflict" with the decision of another district court of appeal or of the Supreme Court on the same question of law. Accordingly, the decision rendered by the Fifth District does not

vest the Supreme Court with jurisdiction pursuant to Article V, Section 3(b)(3), Fla. Const. or Fla. R. App. P. 9.030(a)(2)(iv). This case is not properly before the Supreme Court of Florida.

The Fifth District properly reviewed this case and "applied the correct law" as set forth in Florida Statutes governing the appointment of counsel to represent indigent criminal defendants at public expense.

ARGUMENT

The decision of the Fifth District does not expressly or directly conflict with a decision of either the Supreme Court or a decision of another District Court Of Appeal.

A. In the decision rendered by the lower tribunal, the Fifth District found that the Circuit Court had departed from the essential requirements of law in its ruling. (App. K, pg. 3). The Fifth District stated that "[a]s Section 925.035(1), Florida Statutes (1997), provides an adequate procedure to protect the constitutional right to counsel guaranteed to indigent defendants in capital cases, the trial court's ruling constitutes a departure from the essential requirements of law." (App. K, pg. 3).

The Fifth District further asserted 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." (App. F, pg. 2).

Here, the Defendant provides no legal authority in its jurisdictional brief reflecting a Florida Supreme Court or District Court of Appeal decision expressly and directly conflicting with the decision rendered below by the Fifth District. The cases cited by the Defendant in his argument that a "conflict" exists

with the ruling of the Fifth District merely stand for the proposition that a particular defendant may be entitled to representation by two (2) attorneys under appropriate circumstances. See, *Schommer v. Bentley*, 500 So.2d 118 (Fla. 1986), *Orange County v. Corchado*, 679 So.2d 297 (5 DCA 1996).

However, that was not the issue on appeal before the Fifth District. The sole issue on appeal and on which the Fifth District ruled was whether the Respondent must pay for an additional counsel at public expense appointed to assist an attorney who was privately retained by a criminal defendant.

The Fifth District expressly found that Chapter 925, Florida Statutes (1997), governs the appointment of an attorney in capital cases. (App. K, pg. 2). Specifically, Section 925.035(1), Florida Statutes (1997), provides that

"[i]f the court determines that the defendant in a capital case is insolvent and desires counsel, it shall appoint a public defender to represent the defendant."

Section 925.035, Florida Statutes (1997), further states that

"[i]f the public defender appointed to represent two or more defendants found to be insolvent determines that neither him nor his staff can counsel all of the accused without conflict of interest, it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender in his capacity as such or in his private practice, to represent those accused."

Thus, absent a conflict with the public defender as set forth in Section 925.035(1), Florida Statutes (1997), the Fifth District held that Florida law clearly requires the appointment of the public defender to represent an insolvent defendant in a capital case. (App. K, pg. 2). The Fifth District, in its opinion, 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."

(App. K, pg. 2).

B. Seminole County contends that the office of the public defender is fully funded and supported by the taxpayers of the State of Florida to provide legal representation to indigent defendants in all criminal matters at public expense. It is clearly the prerogative of the public defender's office to, upon appointment as statutorily mandated in accordance with Section 925.035, Florida Statutes (1997), make an assertion, if applicable, with regard to a conflict of interest in representing a particular indigent criminal defendant.

In its jurisdictional brief, the Defendant argues that a conflict of interest exists for the office of the public defender to represent this particular Defendant. This argument is meritless and premature. The office of the public defender clearly cannot make a determination of a conflict of interest until appointed to represent a specific defendant. Moreover, it is the sole prerogative of the office of the public defender to make a determination that the public defender's office has a conflict in representing a certain defendant. It is surely not the role of a third party.

Notwithstanding the desire of the Defendant here to propose his own defense team, Florida law does not permit an insolvent defendant to select his own counsel at public expense. Clearly, a non-indigent defendant may select whomever he or she so desires for legal representation. However, in enacting Section 925.035(1), Florida Statutes (1997), the Florida legislature expressed its intent to establish a procedure for appointing counsel for indigent defendants in capital cases. Thus, an indigent defendant in a capital case is entitled to counsel paid for by public funds only as set forth in Section 925.035(1), Florida Statutes (1997).

Moreover, the Fifth District in the decision rendered below 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..." (App. K, pgs. 2, 3).

Further, Justice Cobb in a specially concurring opinion in the Fifth District case below observed 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." (App. F).

Justice Cobb further observes that the Circuit Court 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." (App. K).

CONCLUSION

The Fifth District carefully reviewed all applicable law and pleadings submitted by all parties prior to rendering the decision below. The Fifth District properly granted the Respondent's Petition For Writ Of Certiorari And Declaratory And Injunctive Relief and quashed the Order Appointing Additional Counsel At Public Expense entered by the Circuit Court on December 11, 1997.

Moreover, 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. This criterion is the sole ground cited in the Defendant's jurisdictional brief for vesting of discretionary jurisdiction in this Court pursuant to the Florida Constitution and the Florida Rules of Appellate Procedure.

Because the Fifth District found that the Circuit Court had departed from the essential requirements of law, it properly granted the Respondent's Petition For Writ Of Certiorari And Declaratory And Injunctive Relief and quashed the Order of the Circuit Court.

Accordingly, the Respondent respectfully submits that this Court should decline to exercise discretionary jurisdiction in this matter.

DATED this 15 day of May, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to OFFICE OF THE ATTORNEY GENERAL, 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118, HONORABLE O.H. EATON, Judge, Circuit Court, Eighteenth Judicial Circuit, 301 N. Park avenue, Sanford, Florida 32771, THOMAS HASTINGS, Assistant State Attorney, 100 East First Street, Sanford, Florida 32771, OFFICE OF THE PUBLIC DEFENDER, 301 North Park Avenue, Sanford, Florida 32771, and JAMES M. RUSS, ESQ, 18 West Pine Street, Orlando, Florida 32801 by U.S. Mail delivery this 15 day of May, 1998. The original and five (5) copies have been forwarded on this date by overnight mail delivery to HONORABLE SID J. WHITE, CLERK, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.

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