OA 9-3-98

IN THE SUPREME COURT OF FLORIDA

JOSEPH R. SPAZIANO,

Petitioner,

v.

SEMINOLE COUNTY, FLORIDA,

Respondent.

_____/

JOSEPH R. SPAZIANO,

Petitioner,

v.

HARRY K. SINGLETARY, JR., SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS

Respondent.

_____/

SEMINOLE COUNTY,

Petitioner,

v.

JOSEPH R. SPAZIANO,

Respondent.

_____/

CASE NOS. 92,801, 92,846 and 93,447 (Consolidated)

DISTRICT COURT OF APPEAL, FIFTH DISTRICT - NOS. 98-1170 98-115

CIRCUIT COURT CASE NO. 75-430 CFA

MR. SPAZIANO'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

By its July 15, 1998, order, this Court accepted jurisdiction and consolidated for briefing on the merits, and oral argument, all issues in the following three cases: Case No. 92,801 (Notice to Invoke Discretionary Jurisdiction, Fifth District Court of Appeal No. 98-00115); Case No. 92,846 (original Habeas Corpus); and Case No. 93,447 (District Court Certification, Fifth District Court of Appeal No. 98-1170).

The parties in these three consolidated cases are the State of Florida, Seminole County, Florida, and **JOSEPH R. SPAZIANO**. In this brief, the State of Florida and Seminole County will be referred to as "state/county" or "S/C"; **JOSEPH R. SPAZIANO** will be referred to as "**MR. SPAZIANO**."

In compliance with the July 15, 1998, order of this Court, the state/county filed its **Initial Brief on Merits** (hereafter referred to as "IB") dated July 28, 1998, together with **Appendix**. This is **MR. SPAZIANO'S Answer Brief**, together with **Appendix and Master Index**.

The July 15, 1998, order of this Court directed the Clerk of the Circuit Court, Seminole County, Florida (hereafter "trial court"), to file the original record on or before August 10, 1998. On or about July 24, 1998, the Clerk did file with this Court an abbreviated and incomplete record (hereafter referred to as "R/____") consisting of one volume, together with a one-page index. The

"original record" -- meaning the entire contents of the trial court file in State v. Spaziano, Case No. 75-430 CFA, Circuit Court, Eighteenth Judicial Circuit, Seminole County, Florida -- is voluminous. While this Clerk's record is totally inadequate for the purposes of briefing this case, the following appendices on file with this Court are more than adequate and somewhat duplicative. In this **Answer Brief**, they shall be referred to as follows:

1. **Appendix** to state/county's **Initial Brief** (S/C App. ___/___);
2. **Appendix** to **SPAZIANO Answer Brief** (Spaz. App. ___/___);
3. **Appendix** to the **SPAZIANO** Petition for Writ of Habeas Corpus and Reply(H/C Pet. App. ___/___)(Case No. 92,846); and
4. **Appendix** to Seminole County's Response to Petition for Writ of Habeas Corpus (H/C Resp. App. ___/___)(Case No. 92,846).

A **Master Index to Spaziano Appendices** and **Appendix** (Spaz. App. __/__) are appended to this **Answer Brief**.

Pursuant to § 90.202(6) and (12), Fla. Stat. (1995), it is requested that this Court take judicial notice of the contents of the entire case file in State v. Spaziano, Case No. 75-430 CFA, Circuit Court, Eighteenth Judicial Circuit, Seminole County, Florida, and the other records of this Florida trial court discussed in this **Answer Brief**. **MR. SPAZIANO** also requests this Court to take judicial notice of the briefs and records on appeal in Spaziano v. State, 393 S.2d

1119 (Fla. 1981), cert. denied, 454 U.S. 1037, 102 S.Ct. 581, 70 L.Ed.2d 484 (1981); Spaziano v. State, 433 So.2d 508 (Fla. 1983); Spaziano v. State, 489 So.2d 720 (Fla. 1986), cert. denied, 479 U.S. 995, 107 S.Ct. 598, 93 L.Ed.2d 598 (1986); Spaziano v. State, 545 So.2d 843 (Fla. 1989); Spaziano v. Dugger, 557 So.2d 1372 (Fla. 1990); Spaziano v. State, 570 So.2d 289 (Fla. 1990); Spaziano v. Dugger, 584 So.2d 1 (Fla. 1991); Spaziano v. State, 660 So.2d 1363 (Fla. 1995); State v. Spaziano, 692 So.2d 174 (Fla. 1997); and Seminole County v. Spaziano, Case Nos. 98-00115 and 98-1170, Florida Fifth District Court of Appeal.

By its July 15, 1998, order, this Court accepted jurisdiction and ordered the filing of briefs **on the merits**. However, the state/county's **Initial Brief** contains three arguments pertaining **to jurisdiction** (IB/5-10, 36-39, and 44-47). **MR. SPAZIANO** moves to strike these specific pages of the **Initial Brief** since these arguments concerning jurisdiction are now irrelevant because this Court has accepted jurisdiction. If this motion to strike is denied, **MR. SPAZIANO** adopts, reasserts, and incorporates by reference into this **Answer Brief** the jurisdiction arguments and authorities contained within the following legal papers filed with this Court previously by **MR. SPAZIANO**: in Case No. 92,801, **MR. SPAZIANO'S** Brief on Jurisdiction dated April 27, 1998; in Case No. 92,846, **MR. SPAZIANO'S** Petition for Writ of Habeas Corpus dated April 23, 1998, p.

1; and **MR. SPAZIANO'S** Reply to State and County Responses to Petition for Writ of Habeas Corpus dated July 10, 1998, pp. 1-7.

By its July 15, 1998, order, this Court directed the filing of briefs **on the merits as to all issues**. **MR. SPAZIANO** holds the opinion that the factual statements contained within the state/county's **Initial Brief** are incomplete and not totally accurate. **MR. SPAZIANO** holds the further opinion that the issues as framed in the state/county **Initial Brief** are misleading, narrow, and incomplete. **MR. SPAZIANO** also opines that the format of the state/county's **Initial Brief** does not comply with Fla.R.App.P. 9.210(b).

Therefore, **MR. SPAZIANO'S Answer Brief** is organized in accordance with Rule 9.210(b), and contains a restatement of the facts and the issues.

STATEMENT OF THE CASE AND FACTS

A.

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

1. Common Procedural Background and Facts -- Case Nos. 92,801 and 92,846

These two cases legally challenge the Fifth District's decision granting the petition for 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 and pending death penalty case, State of Florida v.

Joseph R. Spaziano, Case No. 75-430 CFA, Circuit Court, Eighteenth Judicial Circuit, Seminole County, 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). Since **MR. SPAZIANO** is indigent and represented on a pro bono basis by volunteer Florida lawyer James M. Russ, on June 10, 1997, a motion was filed seeking the appointment of co-counsel at public expense (S/C App. 1; H/C Pet. App. C). The county filed a written objection (S/C App. 2; 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 consisting of American Bar Association Guidelines for the Performance of Counsel in Death Penalty Cases, dated February 1989 (H/C Pet. App. F), and the federal guidelines promulgated in association with 21 U.S.C. § 848(q)(4) (H/C Pet. App. G). On July 24, 1997, **MR. SPAZIANO** presented additional supplemental authority in support of his motion consisting of In re: Proposed Amendment to Florida Rules of Judicial Administration -- Minimum Standards for Appointed Counsel in Capital Cases, Case No. 90,635, Supreme Court of Florida (July 3, 1997)(H/C Pet. App. H).

On July 25, 1997, the trial court entered a written order denying **MR. SPAZIANO'S** motion (S/C App. 3; H/C Pet. App. I).

On September 12, 1997, **MR. SPAZIANO** filed his Motion for Reconsideration and Second Motion for the Appointment of a Florida Attorney as Co-counsel at Public Expense (S/C App. 4; H/C Pet. App. J) raising a Public Defender conflict-of-interest claim, to which the county objected on October 2, 1997 (S/C App. 5; H/C Pet. App. L), as did the state on November 7, 1997 (H/C Pet. App. M). A September 25, 1998, order was entered setting a hearing on these legal papers and the Public Defender conflict-of-interest issue for November 10, 1997 (H/C Pet. App. K). A court hearing was held on November 10, 1997[1/] (H/C Pet. App. N, Tr.). At this hearing, **MR. SPAZIANO'S** counsel presented the evidence and argument stated at pp. 27-28, infra. **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 (S/C App. 4; H/C Pet. App. J; H/C Pet. App. N, Tr.).

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**

1/ Although this hearing was held on November 10, 1997, the transcript erroneously bears the date October 20, 1997.

(S/C App. 6; H/C Pet. App. N). In this order, the trial court made the following findings.

1. A Florida trial court does have inherent authority to appoint a private attorney, but not the Public Defender, as additional counsel in a death penalty case at public expense.

2. The Spaziano case is so extraordinary and unusual that it requires the appointment of additional defense counsel, with a detailed explanation, "in order to preserve the right of the defendant to effective assistance of counsel."

3. While recognizing the cost to the county resulting from the fractionalized funding of the Florida judicial system, a Florida trial court has the duty to provide "effective assistance of counsel to indigents accused of capital crimes."

On January 12, 1998, the county filed a petition for writ of certiorari, together with 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 (S/C App. 7; H/C Pet. App. P). **MR. SPAZIANO** filed a suggestion for certification to the Florida Supreme Court on February 9, 1998 (H/C Pet. App. Q), which the Fifth District denied (H/C Resp. App. M). **MR. SPAZIANO** also filed his response to Seminole County's petition for writ of certiorari (S/C App. 9; 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." (S/C App. 14, Tr. pg. 8; H/C Pet. App. S, Tr. pg. 8.) Later, Mr. Russo asserted,

> I think the Court needs to understand and recognize that there are possible conflicts of interest and there are actual conflicts of interest. And anything, I guess, could become a possible conflict of interest, and I can't predict what that may or may not be today as to what those may be with respect to the witnesses in Spaziano in the future.

(S/C App. 14, Tr. pp. 8-9; H/C Pet. App. S, Tr. pp. 8-9.) **MR. SPAZIANO'S** counsel again 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** (S/C App. 14, Tr. pg. 9; H/C Pet. App. S, Tr. pg. 9). 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 (S/C App. 14, Tr. pp. 15-16; H/C Pet. App. S, Tr. pp. 15-16). The assistant county attorney further asserted that the county would not

pay for the services of appointed co-counsel Donald R. West provided to **MR. SPAZIANO** while the petition for writ of certiorari was pending (S/C App. 14, Tr. pg. 17; H/C Pet. App. S, Tr. pg. 17).

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 R. West as co-counsel at public expense (H/C Pet. App. T). Seminole County v. Spaziano, 707 So.2d 931 (Fla. 5th DCA 1998).

2. Procedural Background -- Case No. 92,801

On April 10, 1998, **MR. SPAZIANO** filed his Notice to Invoke Discretionary Jurisdiction of this Court to review the Fifth District's decision cited above (S/C App. 10). By its July 15, 1998, order, this Court has accepted jurisdiction.

3. Procedural Background -- Case No. 92,846

On April 24, 1998, **MR. SPAZIANO** also filed his Petition for Writ of Habeas Corpus with Appendix in this Court in this case in conjunction with the filing of **MR. SPAZIANO'S** Amended Brief on Jurisdiction in Case No. 92,801 (S/C App. 28, 11).

The state filed its response dated June 26, 1998 (S/C App. 31). The county filed its response, together with appendix, dated June 26, 1998 (S/C App. 30).

MR. SPAZIANO filed his reply to state and county responses to Petition for Writ of Habeas Corpus, together with a supplement to his Appendix, dated July 10, 1998 (S/C App. 32).

On July 15, 1998, this Court entered its order accepting jurisdiction and setting a schedule for the filing of briefs on the merits addressed to all issues.

B.

DEFENSE SERVICES ISSUES -- CASE NO. 93,447

1. Procedural Background and Facts

On October 28, 1997, undersigned legal counsel filed under seal **MR. SPAZIANO'S First Ex Parte, In Camera Motion for Defense Services at Public Expense** (Spaz. App. 1; S/C App. 17/1-2 ¶A). This **SPAZIANO** motion sought a court order authorizing undersigned legal counsel to employ a psychologist to conduct a change-of-venue survey at public expense to be paid by Seminole County, Florida. Since this was an ex parte, in camera motion, undersigned legal counsel did not serve copies upon legal counsel for the State of Florida or Seminole County, Florida. Undersigned legal counsel did file and serve upon the attorney for the State of Florida and the attorney for Seminole County, Florida, **MR. SPAZIANO'S Notice of Filing of MR. SPAZIANO'S First Ex Parte, In Camera Motion for Defense Services at Public Expense**, dated October 28, 1997 (S/C App. 15).

On November 10, 1997, at an open court hearing, undersigned legal counsel called up for hearing before the trial judge **MR. SPAZIANO'S First Ex Parte, In Camera Motion for Defense Services at Public Expense**. The attorneys for the State of Florida and Seminole County, Florida, were excluded from this hearing, which hearing was stenographically reported. Following this hearing, the trial court entered its November 13, 1997, order under seal granting **MR. SPAZIANO'S First Ex Parte, In Camera Motion for Defense Services at Public Expense**, which specifically authorized undersigned legal counsel to employ a "change-of-venue survey/psychologist" at public expense to be paid by Seminole County, Florida, up to a maximum amount of $8,000.00 (Spaz. App. 1; S/C App. 17/2 ¶B).

Based upon the authority of this November 13, 1997, court order, psychologist Randy D. Fisher, Ph.D., was employed to conduct a change-of-venue survey by undersigned legal counsel under the terms and conditions of the November 13, 1997, court order. Dr. Fisher did perform these services -- described in a 37-page written report -- and advanced the cost of this survey (Spaz. App. 2). Thereafter, Dr. Fisher submitted his invoice for professional services and out-of-pocket expenses (Spaz. App. 2; S/C App. 17/2 ¶C).

On January 30, 1998, in open court at a hearing attended by undersigned legal counsel, the attorney for the State of Florida, and the attorney for Seminole

County, Florida, Dr. Fisher's invoice and a proposed "payment" order on **MR. SPAZIANO'S First Ex Parte, In Camera Motion for Defense Services at Public Expense** were presented to the trial court and served upon the attorney for the State of Florida and the attorney for Seminole County, Florida (Spaz. App. 2, 9, Tr. pp. 5-7; S/C App. 17/2-3, ¶D, Ex. B). This January 30, 1998, "payment" order was entered (Spaz. App. 9).

On or about February 9, 1998, the attorney for Seminole County, Florida, filed a legal paper titled **Seminole County's Objection to Order on Mr. Spaziano's First Ex Parte, In Camera Motion for Defense Services at Public Expense and Motion for Rehearing** (S/C App. 16), which legal paper contained a series of factual allegations within paragraphs 1-4, which factual allegations were answered by **MR. SPAZIANO** in his March 25, 1998, **Motion to Compel Compliance by Seminole County** (S/C App. 17; R/1-39).

On March 31, 1998, the trial court held a hearing (S/C App. 18/17-25) and entered its order granting **MR. SPAZIANO'S Motion to Compel Compliance by Seminole County** (S/C App. 19; R/42-43).

When the county failed to comply with the March 31, 1998, trial court order, **MR. SPAZIANO** filed his **Motion for Order to Show Cause** dated April 27, 1998 (Spaz. App. 3). The next day, on April 28, 1998, the county filed in the

Fifth District its Notice of Appeal in Fifth District Case No. 98-1170, directed to the trial court's March 31, 1998, order (R/44-50).

On June 1, 1998, **MR. SPAZIANO** filed in Fifth District Case No. 98-1170 his Suggestion for Certification to the Supreme Court of Florida, which the Fifth District granted by its order dated July 9, 1998 (S/C App. 24, 27).

By its July 15, 1998, order, this Court accepted jurisdiction of this case.

SUMMARY OF THE ARGUMENTS

I.

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

This is a restatement of the issues raised and addressed in the state/county's **Initial Brief** at pp. 10-20 (**Argument II**, Case No. 92,801) and at pp. 40-44 (**Argument II**, Case No. 92,846).

The effective assistance of conflict-free trial counsel is a constitutional right. The trial court has the inherent authority to appoint two lawyers in this case. This is a matter of sound judicial discretion and financial concerns are irrelevant to the trial court's decision to appoint co-counsel. The trial court's order of appointment is supported by statutory authority.

The Seminole County Public Defender is not conflict free because of actual and statutory conflicts of interest. A trial court has the inherent authority to disqualify a "conflict of interest" lawyer.

II.

DEFENSE SERVICES ISSUES -- CASE NO. 93,447

This is a restatement of the issues raised and addressed in the state/county's **Initial Brief** at pp. 25-31 (**Argument**, Case No. 93,447).

Since this is a district court certification of a certiorari proceeding, the standard of review includes the following: 1) the Court's exercise of its review power is discretionary, not mandatory; 2) there must be a violation of a clearly established principle of law; 3) resulting in a miscarriage of justice. The March 31, 1998, "compliance" order has been identified by the county as the trial court order to be reviewed. However, the **Initial Brief** does not address the legality of the March 31, 1998, "compliance" order.

The entry of the January 30, 1998, "payment" order is within the discretionary authority of the trial court. This is both an inherent and a statutory judicial authority.

Mills v. State, 462 So.2d 1075 (Fla. 1985), and Irvin v. State, 66 So.2d 288 (Fla. 1953), are not controlling precedent. Mills v. State is distinguishable from the instant case. The ruling on the evidence issue in Irvin v. State has been superseded by intervening law; further, this case involves the scope of trial court judicial authority and not an admissibility of evidence issue.

The March 31, 1998, and January 30, 1998, court orders -- as entered -- do not depart from the essential requirements of the law, do not violate a clearly established principle of law, and do not result in a miscarriage of justice.

ARGUMENTS

I.

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

THE TRIAL COURT DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW BY APPOINTING A CO-COUNSEL AT PUBLIC EXPENSE TO ASSIST VOLUNTEER, PRO BONO DEFENSE COUNSEL REPRESENTING AN INDIGENT DEFENDANT IN THIS FLORIDA DEATH PENALTY TRIAL

A. Effective Assistance of Conflict-Free Trial Counsel: Constitutional Right

In a Florida death penalty trial, both the Florida and federal constitutions mandate that **MR. SPAZIANO**, an indigent defendant, be provided the effective assistance of trial counsel who is not tainted and encumbered by conflicts of interest. Art. I, §§ 9, 16(a), Fla. Const., Amend. V, VI, and XIV, U.S. Const. See 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). For a recent case with a related constitutional issue, see State of Louisiana v. Jones, 707 So.2d 975 (La. 1998).

B. The Trial Court Has the Inherent Authority to Appoint Two Lawyers

1. The Need for Two Lawyers

The state/county's **Initial Brief** (in its sections on "jurisdiction") now challenges and disputes the trial court's finding establishing the need for two lawyers in this case (IB/7, 37-38, 47), relying upon the three cited cases of Howell v. State, 707 So.2d 674 (Fla. 1998); Armstrong v. State, 642 So.2d 730 (Fla. 1994); and Reaves v. State, 639 So.2d 1 (Fla. 1994). However, these three cases are inapposite to the factual and legal situation presented in this case. In each of the three cited capital cases, the trial judge **refused and rejected a defense request for the appointment of a second defense counsel**. Further, in each of the three cited capital cases, the lead defense counsel was court-appointed at public expense, rather than being a volunteer, pro bono lawyer. Armstrong, at p. 737, specifically holds as follows.

> Appointment of multiple counsel to represent an indigent defendant is within the discretion of the trial judge and is based on a determination of the complexity of a given case and the attorney's effectiveness therein.

Here the Spaziano trial court held two court hearings in July and November 1997, and then entered its order appointing co-counsel (S/C App. 6; H/C Pet., App. I, N). The trial court made specific written findings of fact and law that the appointment of co-counsel at public expense was warranted due to the complexity of this specific case (S/C App. 6; H/C Pet. App. N).

In a complex capital case, such as this one, the need for two attorneys is well recognized. A Florida trial court has the discretionary authority for the appointment and compensation of two lawyers in complex capital cases, Armstrong v. State, 642 So.2d 730 (Fla. 1994); Ferrell v. State, 653 So.2d 367 (Fla. 1995). This Court's current proposed Rule of Judicial Administration requires it **in every capital case in which the state seeks the death penalty**. In Re: Amendment to Florida Rules of Judicial Administration -- Minimum Standards for Appointed Counsel in Capital Cases, No. 90,635 (June 12, 1998)(S/C App. 13).

The state/county's **Initial Brief** (IB/13, 42) erroneously asserts that **MR. SPAZIANO** is attempting to manipulate the trial court, and dictate the appointment of specific co-counsel. This is not true! By way of suggested recommendation, the names of two highly-qualified and competent Central Florida criminal defense

lawyers were submitted for the trial court's consideration (S/C App. 1, 4). The appointed co-counsel, Donald R. West, Esquire, received this trial court appointment based upon his sterling qualifications as a death penalty defender. Mr. West has been previously appointed -- and served -- as **lead counsel** in Seminole County in capital cases (S/C App. 9/3, n.1).

Due to the uniqueness of the prosecution of a capital case involving dual proceedings determining the issues of "guilt" and "death" by a single jury, the Florida Supreme Court -- as well as the federal Congress and the American Bar Association -- has recognized that the constitutional concept of the right to counsel in this setting encompasses two lawyers, lead counsel and co-counsel. Guideline 2.1, American Bar Association Guidelines for the Employment and Performance of Counsel in Death Penalty Cases, February 1989 (H/C Pet. App. F); 21 U.S.C. § 848(q)(4), (5), (7)(H.C.Pet. App. G). The underlying rationale placing the responsibility upon the Florida trial court to ensure competent legal representation in death cases has been clearly stated.

> In addition to the high standards of preparation and performance judicial officers assume for themselves, judges responsible for the appointment of counsel must be certain that only highly qualified lawyers are appointed to represent indigent capital defendants. As with physicians charged with enormous responsibility for the lives of their patients, there is no margin of error for the qualifications of counsel in a capital case. Too many times this Court has reviewed records where the

> incompetence of counsel is patent and the attendant consequences to the particular case and the justice system are disastrous. Cf. Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 Yale L.J. 1835 (1994).

In re: Amendment to The Florida Rules of Judicial Administration, Rule 2.050(b)(10), 688 So.2d 320, 321 (Fla. 1997)(J. Anstead concurring). See also, Stephen B. Bright, "Death Penalty Moratorium: Fairness, Integrity at Stake," Vol. 13, No. 2, Criminal Justice, 28-35 (Spaz. App. 10).

The appointment of two lawyers in capital cases is becoming the standard rather than the exception in many jurisdictions, and as the trial court pointed out, he has seen less complicated cases than this one where two attorneys have been appointed. It is clear that this case is sufficiently complex to warrant dual counsel under any current legal or factual standard. Further, the need for two lawyers in this case has been established and was not disputed before the Fifth District by the county or by the Fifth District in its decision/opinion.[2/] (S/C App. 7/7; H/C Pet. App. P/7, T.)

2/ Before the Fifth District the county conceded that this case warrants multiple attorneys (S/C App. 7/7; H/C Pet. App. P/7). The county's only objection was being required to pay for these legal services. Id. See also **Initial Brief** at 6-7. Since Mr. West's appointment is statutorily authorized under the circumstances of this case by §§ 925.035(1) and 27.53(3), Fla. Stat. (1997), Seminole County is entitled to reimbursement from the State of Florida for its payment of these legal services pursuant to § 925.037, Fla. Stat. (1997).

2. Judicial Discretion

Since the State of Florida through its prosecutors enforces the death penalty (H/C Pet. App. B), the same State of Florida has the primary obligation to ensure that indigents are provided competent and effective conflict-free legal counsel in capital cases. White v. Board of County Com'rs., 537 So.2d 1376, 1379 (Fla. 1989). A Florida trial court has the discretion to determine that a second, court-appointed (and fairly compensated) co-counsel is necessary in a particular case for effective representation under the parameters of Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986). Schommer v. Bentley, 500 So.2d 118, 120 (Fla. 1986)(court authorized appointed counsel to use other members of his firm as needed to represent defendant charged with murder).

Based upon the knowledge acquired by the trial court via the January 1996 evidentiary hearing, the volumes of pleadings, the numerous post-1997 indictment hearings, the trial court knew the specific needs of this particular case. The trial court further knew that the guarantees of the state and federal constitutions concerning the assistance of conflict-free legal counsel could only be satisfied through the appointment of the fully-qualified, conflict-free, private attorney Mr. West as co-counsel (S/C App. 9/3, n.3). The trial court had the discretionary authority to fully satisfy these constitutional guarantees at this critical moment in this litigation through the appointment of Mr. West as conflict-free co-counsel,

rather than allowing a seed of constitutional error to be planted at this early point in the litigation based upon economic considerations. Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 1696-1697, 100 L.Ed.2d 140 (1988).

3. Financial Concerns Are Irrelevant to the Trial Court's Decision to Appoint Co-Counsel

The county's objections to Mr. West's appointment are motivated primarily by its financial considerations (S/C App. 6/4; H/C Pet. App. N/4). However, it is a trial court's duty to focus instead on **MR. SPAZIANO'S** right to effective conflict-free legal representation, which is guaranteed him by the Sixth and Fourteenth Amendments, United States Constitution, and Art. I, §§ 9, 16(a), Fla. Const. Makemson v. Martin County, 491 So.2d 1109, 1112 (Fla. 1986).

It is an "**essential judicial function**" of a Florida trial court to ensure effective conflict-free legal representation of **MR. SPAZIANO** 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. The Court quoted from a decision of the Indiana Supreme Court.

> The security of human rights and the safety of free institutions require freedom of action on the part of the court. . . . Our sense of justice tells us that a court is not free if it is under financial pressure, whether it be

> from a city council or any other legislative body. . . . One who controls the purse strings can control how tightly those purse strings are drawn, and the very existence of a dependent.

Makemson at 1112, quoting Carlson v. State ex rel. Stodola, 247 Ind. 631, 633-34, 220 N.E.2d 532, 533-34 (1996); see also Remeta v. State, 559 So.2d 1132 (Fla. 1990).

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.

On these **defense counsel issues**, the state/county's **Initial Brief** bases its arguments entirely and solely upon misinterpretations of § 925.035(1), Fla. Stat. (1997)(I/B 10-20, 40-44). The **Initial Brief** interprets the following language from § 925.035(1), Fla. Stat. (1997), to be exclusive and mandatory, and to require the trial court to appoint the public defender in all indigent capital cases unless the public defender has a conflict.

> If 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.

While this language may appear to limit the trial court's authority to appoint counsel other than the Public Defender, the trial court still retains the inherent

authority to enter such orders as are necessary to carry out its constitutional responsibilities. Appointment of conflict-free counsel in capital criminal cases is constitutionally guaranteed and is an essential judicial function. Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963); Wheat, supra; Makemson v. Martin County, 491 So.2d 1109 (Fla. 1986), cert. denied, 479 U.S. 1043, 107 S.Ct. 908, 93 L.Ed.2d 857 (1987). The legislature may not interfere with the proper exercise of that judicial authority. Walker v. Bentley, 678 So.2d 1265 (Fla. 1996)(term "shall" as used in statute providing that court shall enforce domestic violence injunction through civil contempt proceeding is discretionary rather than mandatory). This statute recognizes the "conflict" case.

As in Makemson, the companion statute at issue here, § 935.035, Fla. Stat. (1997), must be read as directive rather than mandatory when the complexities and the special circumstances of the specific case suggest that the interests of justice and the interests of the accused would be best served by appointing co-counsel at public expense to assist volunteer, pro bono counsel. It is precisely under this sort of rare circumstances that the trial court must have the discretion to enter orders which serve the interests of justice, the interests of the accused, and the interests of the court in the orderly administration of its duties. As with departures from statutory fee caps, the trial court has the inherent authority to determine that justice

requires a departure from the statute that directs appointment of the public defender.

The stated financial concern that a decision against the county would create a precedent for any indigent criminal defendant to retain private counsel with little or no criminal defense experience and then request additional representation by a more experienced criminal defense attorney at public expense is unfounded and virtually ignores the facts of this case (IB/14, 17-19, 42-44; H/C Pet. App. T, Seminole County v. Spaziano, 707 So.2d 931 (Fla. 5th DCA 1998), special concurring opinion, J. Cobb; S/C App. 9/13, n.4; 34).

First, this case is distinguishable because it is a capital case like no other case the trial court has seen. Second, it is a capital case involving longstanding volunteer, pro bono counsel. Third, as will be explained below, the Public Defender is disqualified due to conflicts of interest. A decision against the county will be so specific due to the extraordinary procedural history and special circumstances of this case that it will not constitute far-reaching precedent for private counsel appointments in the future.

4. The Trial Court's Order of Appointment is Supported by Statutory Authority

In the Fifth District, the county challenged the trial court's authority to appoint counsel outside the Public Defender's office for an indigent defendant in

this extraordinary capital case (S/C App. 7; H/C Pet. App. P). The state/county's **Initial Brief** reasserts this challenge on statutory grounds (IB 10-19, 40-44).

The state/county's **Initial Brief** and the Fifth District's decision rely upon the language found in § 925.035(1), Fla. Stat. (1997), in support of its argument that the trial court does not have the authority to appoint co-counsel to assist pro bono counsel at public expense absent a "conflict" determination **by the Public Defender**.

In addition to the **actual** conflicts of interest described in ARGUMENT I.C., pp. 27-30, infra, the Public Defender also has a disabling **statutory** conflict because of case law, which was recognized by the trial court in its order of appointment (S/C App. 6; H/C Pet. App. N/2). The Public Defender cannot accept appointment to serve as co-counsel, 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). Since the state/county's **Initial Brief** and the Fifth District's decision make no distinction in their argument and analysis between a privately retained attorney and a volunteer attorney representing a client pro bono, they effectively concede that the option of appointing the Public Defender to serve as co-counsel was not available to the trial court. However, the state/county's **Initial Brief** discusses and attempts to distinguish the holdings in Behr and Thompson (IB 14-16), drawing a distinction

between the providing of legal services and the providing of reasonable discovery costs. This distinction does not change the ultimate judicial holding that a trial court does not have the authority to appoint a public defender as co-counsel with a private defense lawyer for an indigent defendant.

Furthermore, the application of the legal principle enunciated in Behr and Thompson, supra, is not absolutely necessary in resolving these **defense counsel issues**. As established in ARGUMENT I.C., pp. 27-34, infra, actual conflicts of interest exist which disqualify the Public Defender from representing **MR. SPAZIANO** because the Public Defender now and in the past has represented at least two prosecution witnesses, Albert J. Bradley and Christopher Andrew Moore. Since the Public Defender, due to these multiple conflicts in interest, is disqualified from serving as co-counsel, the trial court had the authority under § 925.035(1), Fla. Stat. (1997), to appoint co-counsel from outside the Public Defender's office. This is exactly what the trial court did.

The trial court also has additional, independent authority under § 27.53(3), Fla. Stat. (1997), to enter its order appointing co-counsel at public expense. Under § 43.28, Fla. Stat. (1997), the trial court also has authority to appoint counsel at public expense in the extraordinary case, such as this, when counsel is constitutionally required. See In the Interest of D.B., 385 So.2d 83, 92-93 (Fla. 1980).

C. The Seminole County Public Defender is not Conflict-Free

1. Conflict of Interest: Facts

When **MR. SPAZIANO** was first indicted in September 1975 on this first degree murder charge, a Seminole County, Florida, jail inmate named Albert J. Bradley was under prosecution in the same Seminole County, Florida, circuit court on the charges of robbery (Case No. K75-467, Circuit Court, Seminole County, Florida) and rape (Case No. J75-476, Circuit Court, Seminole County, Florida), defended by the local Public Defender (including a jury trial)(H/C Pet. App. V, Z).

After **MR. SPAZIANO** was indicted the second time in June 1997 on the same first degree murder charge (H/C Pet. App. A), the same Albert J. Bradley was listed by the state as a prosecution witness to whom **MR. SPAZIANO** had made incriminating statements (H/C Pet. App. U). Mr. Bradley made his contact with the police and prosecutor in October 1995, when the media reported this Court's decision granting a post-conviction hearing (H/C Pet. App. W). In his sworn testimony contained within his January 22, 1998, deposition, Mr. Bradley confirms these two 1975 charges (H/C Pet. App. V/23-28); confirms his representation by the Public Defender (H/C Pet. App. V/42); and asserts that **MR. SPAZIANO** made incriminating statements to him in late 1975 while both were confined in the Seminole County, Florida, jail (H/C Pet. App. V/59-66). Mr.

Bradley's 1975 criminal charges and Public Defender representations are confirmed by the public records of the trial court (H/C Pet. App. J, ¶7; H/C Pet. App. N, tr. 5, 8-9; H/C Pet. App. Z).

Despite the 1998 ambiguous position of the Public Defender (pp. 7-8, supra; S/C App. 14, Tr. pp. 7-9, 11-13; H/C Pet. App. S, Tr. pp. 7-9, 11-13), it is clear beyond any question that the same Mr. Bradley was defended by the same Public Defender in 1975 on two serious criminal cases; and that the same Mr. Bradley is now a prosecution witness on the vital issue of **criminal liability** in the upcoming second Spaziano trial in which the same Public Defender is **MR. SPAZIANO'S** potential defense counsel.

After **MR. SPAZIANO** was indicted the second time in June 1997 on the same first degree murder charge (H/C Pet. App. A), a person named Chris Moore was listed by the state as a prosecution witness to whom **MR. SPAZIANO** had made incriminating statements (Spaz. App. 4). In his sworn testimony contained within his December 22, 1997, and February 9, 1998, deposition, Mr. Moore asserts that **MR. SPAZIANO** made incriminating statements to him in the early 1980s while both were confined in the Orange County, Florida, Jail (Spaz. App. 5). Mr. Moore had reported this matter to the police and prosecuting authorities in September 1995, the point in time when this Court entered its order requiring the trial court to conduct a post-conviction hearing under Fla.R.Crim.P. 3.850 --

a judicial decision which was publicized in the Florida media (Spaz. App. 6). By receipt of July 10, 1998, state supplemental discovery, **MR. SPAZIANO** and his legal counsel learned for the first time that Mr. Moore is currently under felony prosecution in the Circuit Court, Eighteenth Judicial Circuit, Seminole County, Florida, in two separate felony cases -- Case Nos. 98-1603 CFA and 98-2547 CFA (Spaz. App. 7).

An examination of the trial court records in State v. Moore, Case No. 98-1603 CFA, revealed the following information (Spaz. App. 8). On April 20, 1998, Mr. Moore was arrested and temporarily confined in the Seminole County, Florida, Jail, where he appeared before a judge and bail was set. Mr. Moore completed an affidavit of indigency and a court order was entered finding him indigent and appointing the Public Defender, which appointment was acknowledged in writing by the Public Defender for the Eighteenth Judicial Circuit of Florida. On or about May 19, 1998, a criminal information was filed in the trial court -- Case No. 98-1603 CFA -- against Mr. Moore, which included a felony charge. Mr. Moore was before the court for arraignment on May 26 and June 9, 1998, entered a plea of not guilty, and has a scheduled trial date of August 12, 1998. The Public Defender has demanded and received discovery materials from the State Attorney in preparation for this trial (Spaz. App. 8).

It is clear beyond any question that the Mr. Christopher Andrew Moore, who is currently being defended by the same Public Defender in a serious criminal case involving a felony charge, is the same Mr. Christopher Andrew Moore who is currently a prosecution witness on the vital issue of **criminal liability** in the upcoming second Spaziano trial in which the same Public Defender is **MR. SPAZIANO'S** potential defense counsel (Cf. Spaz. App. 5 and 8).

2. Conflict of Interest: Legal Analysis

This Public Defender cannot legally, constitutionally, and ethically defend **MR. SPAZIANO** in this upcoming second trial because conflicts of interest exist among Mr. Bradley, Mr. Moore, and **MR. SPAZIANO**; specifically, now Mr. Bradley will testify as a state witness that in 1975 **MR. SPAZIANO** confessed to him, and now Mr. Moore will testify as a state witness that in the early 1980s **MR. SPAZIANO** confessed to him. Such facts raise both constitutional and ethical barriers to the current representation of **MR. SPAZIANO** by the Public Defender.

In its January 12, 1998, petition for writ of certiorari filed in Fifth District Case No. 98-00115, the county failed to acknowledge this "conflict of interest" issue (S/C App. 7). Although this "conflict of interest" issue was raised in **MR. SPAZIANO'S** response to this petition for writ of certiorari (S/C App. 9, pp. 7-9), the decision/opinion of the Fifth District also ignored this issue (H/C App. T;

Seminole County v. Spaziano, 707 So.2d 931 (Fla. 5th DCA 1998)). The state/county's **Initial Brief** continues to deal with this **conflict of interest** as a non-issue, asserting only that claiming a conflict is the sole prerogative of the attorney under scrutiny -- the Public Defender (IB/11-13, 40-44).

The constitutional right to legal counsel means a lawyer who is independent, zealous, unencumbered, and conflict free. The truth recorded in the New Testament almost 2,000 years ago remains valid and unwavering, "no [lawyer] can serve two masters." To do so violates the constitutional right to the effective assistance of legal counsel. Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988); Holloway v. Arkansas, 435 U.S. 482, 98 S.Ct. 1173, 1177-1180, 55 L.Ed.2d 426 (1978).

This Court has found constitutional violations of the right to conflict-free legal counsel in cases where a prosecution witness and the criminal defendant have been represented by the same lawyer. "We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another." Guzman v. State, 644 So.2d 996, 999 (Fla. 1994); see also Foster v. State, 387 So.2d 344 (Fla. 1980) (fundamental error). These state and federal constitutional guarantees concerning legal counsel interweave with the fundamental rules of ethics controlling the professional conduct of all Florida lawyers, particularly Rules 4-1.6 (confidentiality of information); 4-1.7 (conflict of interest;

and general rule); 4-1.9 (conflict of interest; former client); and 4-1.10 (imputed disqualification; general rule). These guarantees were eloquently recognized by United States Eleventh Circuit Judge Gerald B. Tjoflat in Freund v. Butterworth, 117 F.3d 1543, 1572-1579 (11th Cir. 1997), rehearing en banc, 135 F.3d 1419 (11th Cir. 1998). Judge Tjoflat emphasized that all trial lawyers have the following duties:

1. to represent their client zealously;
2. to maintain all confidentialities and all secrets of all clients forever; and
3. not accept a client if the lawyer cannot completely and without limit exercise independent professional judgment on behalf of this client because of a conflict of interest arising from a prior representation of a second client.

As previously reported to this Court by undersigned counsel for **MR. SPAZIANO** (Case No. 92,846) in his written Notice Re: Freund v. Butterworth, dated May 11, 1998, this case was re-argued before the Eleventh Circuit on June 3, 1998. A decision has not yet been issued according to the Clerk of the Eleventh Circuit Court of Appeals.

Other fact-specific cases analyzing this constitutional/ethical matter are the following: Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976); United States v.

McCutcheon, 86 F.3d 187 (11th Cir. 1996)(trial attorney previously represented a co-defendant -- conflict/disqualified); United States v. Hobson, 672 F.2d 825 (11th Cir. 1982), rehearing denied, 677 F.2d 117 (11th Cir. 1982)(trial attorney allegedly engaged in pretrial criminal conversations with prosecution witnesses -- conflict/disqualified); United States v. Miranda, 936 F.Supp. 945 (S.D. Fla. 1996) (trial attorney previously represented prosecution witness -- conflict/disqualified); United States v. Culp, 934 F.Supp. 394 (M.D. Fla. 1996)(trial counsel previously represented prosecution witnesses -- conflict/disqualified).

In order to represent **MR. SPAZIANO** zealously and competently in this second trial, the Public Defender must attack the credibility of his client Mr. Bradley. The Public Defender must: 1) establish that Mr. Bradley is a multi-convicted felon who is wiggling his way out of the Florida prison system (H/C Pet. App. W/11-12; H/C Pet. App. X); 2) impeach Mr. Bradley by showing that his claimed 1975 conversation with **MR. SPAZIANO** is totally uncorroborated (H/C Pet. App. V/83; H/C Pet. App. W/5-6; H/C Pet. App. Y); 3) show that Mr. Bradley waited almost 20 years before reporting this alleged 1975 **SPAZIANO** conversation to the police and prosecuting authorities (H/C Pet. App. W); 4) show that in 1997 -- 22 years later -- the FDLE interceded to assist Mr. Bradley in a Florida parole violation hearing (H/C Pet. App. X); and 5) attack his former client

by showing that the corroborating witnesses named by Mr. Bradley -- Jolly and Tucker -- do not support his testimony (H/C Pet. App. Y).

In order to represent **MR. SPAZIANO** zealously in this second trial, the Public Defender must also attack the credibility of his current client, Mr. Moore. The Public Defender must: 1) establish that Mr. Moore is a multi-convicted felon who is wiggling his way out of two Florida felony prosecutions (Spaz. App. 7, 8); 2) impeach Mr. Moore by showing that his claimed early 1980s conversation with **MR. SPAZIANO** is totally uncorroborated (Spaz. App. 5); and 3) show that Mr. Moore waited almost fifteen years before reporting this alleged early 1980s **SPAZIANO** conversation to the police and prosecuting authorities, only after the case was publicized (Spaz. App. 6).

Due to the representation of Mr. Bradley in 1975-1976, and the current 1998 representation of Mr. Moore, it is now impossible in this second trial for the same Public Defender to zealously represent and defend **MR. SPAZIANO**; and it is impossible for the same Public Defender to exercise independent judgment on behalf of **MR. SPAZIANO**. Conversely, it is also impossible for the Public Defender to maintain his duties of confidentiality and fidelity owed to Mr. Bradley and to Mr. Moore -- "confidentiality" meaning to preserve the confidences and secrets of a former client forever. Freund, supra at 1573.

3. A Trial Court Has the Inherent Authority to Disqualify a "Conflict of Interest" Lawyer

The state/county's **Initial Brief** erroneously asserts, "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." (IB/41; see also IB/12-13; 40-42.) The **Initial Brief** does not cite any supporting legal authority for this broad assertion because there is none.

The United States Supreme Court, interpreting the federal constitution, held that the authority to decide a "conflict of interest" issue is held by the trial court, not legal counsel. Wheat, supra, at 1696-1700. The Florida Legislature, through the enactment of § 27.53(3), Fla. Stat. (1995), attempted to partially shift this decision-making authority to the Public Defender in indigent cases. However, this is only one piece of a much larger constitutional picture.

It is clear that a trial court has the judicial authority to hear and decide conflict of interest issues, and disqualify criminal defense counsel over objection by both the client and the defense lawyer in appropriate circumstances. Wheat v. United States, 486 U.S. 153, 160, 108 S.Ct. 1692, 1697, 100 L.Ed.2d 140 (1988); Turner v. State, 340 So.2d 132 (Fla. 2d DCA 1976); United States v. McCutcheon, 86 F.3d 187 (11th Cir. 1996)(trial attorney previously represented a co-defendant -- conflict/disqualified); United States v. Hobson, 672 F.2d 825

(11th Cir. 1982), rehearing denied, 677 F.2d 117 (11th Cir. 1982)(trial attorney allegedly engaged in pretrial criminal conversations with prosecution witnesses -- conflict/disqualified); United States v. Miranda, 936 F.Supp. 945 (S.D. Fla. 1996) (trial attorney previously represented prosecution witness -- conflict/disqualified); United States v. Culp, 934 F.Supp. 394 (M.D. Fla. 1996)(trial counsel previously represented prosecution witnesses -- conflict/disqualified).

While this trial court order does not make a specific finding that the Public Defender has a conflict of interest, this finding is obvious from the September 25, 1997, order scheduling this hearing (H/C Pet. App. K) and the ultimate ruling. The disqualification of the Public Defender to serve in this co-counsel capacity for **MR. SPAZIANO** is well-established in the records of the trial court (H/C Pet. App. U, V, W, X, Y, Z), in the legal papers (S/C App. 4, ¶7; H/C Pet. App. J, ¶7), in the oral presentation at the November 10, 1997, hearing (H/C Pet. App. N, Tr.)(Bradley); and in the court records pertaining to prosecution witness Christopher A. Moore (Spaz. App. 4, 5, 6, 7, 8).

II.

DEFENSE SERVICES ISSUES -- CASE NO. 93,447

THE TRIAL COURT'S ORDERS AUTHORIZING THE EMPLOYMENT OF A PSYCHOLOGIST AT PUBLIC EXPENSE TO CONDUCT A COMMUNITY SURVEY FOR AN INDIGENT DEFENDANT IN THIS FLORIDA DEATH PENALTY TRIAL DID NOT VIOLATE A CLEARLY ESTABLISHED PRINCIPLE OF LAW, DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW, AND DID NOT RESULT IN A MISCARRIAGE OF JUSTICE

STANDARD OF REVIEW

The focus must be placed on the specific nature of the orders which the state and county seek to have this Court review. These are pre-trial, non-final orders entered in a state criminal case by a Florida circuit court acting in its trial capacity, and therefore within the definitions stated in Fla.R.App.P. 9.030(b)(2)(A) (S/C App. 19; Spaz. App. 9). While the original proceeding in the Fifth District, Case No. 98-1170, was an appeal initiated by the county, the Fifth District treated it as a certiorari proceeding (S/C App. 20, 22, 25, 27). Consequently, the controlling standard of review is that applicable to a Florida certiorari proceeding.

A. First Standard of Review

The first standard of review is as follows: **the Court's exercise of its review power is discretionary, not mandatory**. Combs v. State, 436 So.2d 93, 95-96 (Fla. 1983). Since this Court has accepted jurisdiction by its July 15, 1998,

order, this first standard of review has been met. But see State v. Matute-Chirinos, 23 Fla.L.Weekly S386 (Fla. July 16, 1998).

B. Second and Third Standards of Review

The second and third standards of review are as follows: (2) **there must be a violation of a clearly established principle of law; (3) resulting in a miscarriage of justice**. State v. Pettis, 520 So.2d 250, 254 (Fla. 1988).

ANALYSIS AND ARGUMENT

The state/county's **Initial Brief** contends (IB/24),

> . . .that the decision of the Circuit Court ordering the County to pay for certain defense expenditures incurred by a criminal defendant constitutes a departure from the essential requirements of law in that the decision of the trial court did not comport with established case law for payment of criminal defense services at public expense and no adequate remedy exists for appeal. Seminole County further contends that the order issued by the Circuit court will cause material injury and irreparable harm to the County in both the instant case and future proceedings of this nature.

The **Initial Brief** has failed to demonstrate any of these assertions.

A. No Violation of a Clearly Established Principle of Law; No Departure from the Essential Requirements of Law

1. March 31, 1998, Trial Court Order (S/C App. 19)

As specifically stated in the Petition for Writ of Certiorari filed by Seminole County in Fifth District Case No. 98-1170, the county petitioned that Court "**to**

review a non-final court order entered by the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida dated March 31, 1998, ..." (S/C App. 21/1). This March 31, 1998, trial court order, which is the subject of this appellate review, ordered the following (S/C App. 19):

> 2. Seminole County, Florida, shall comply with the January 30, 1998, **Order on Mr. Spaziano's First Ex Parte, In Camera Motion for Defense Services at Public Expense** within fifteen days of the date of this order, or shall show cause in writing why Seminole County, Florida, should not be held in contempt of court.

Consequently, the lower court order under appellate review is an order **compelling compliance** with an earlier January 30, 1998, order.

In a Florida criminal proceeding, Rule 3.840, Florida Rules of Criminal Procedure, sets out the procedural framework for an indirect criminal contempt, that is a contemptuous act which occurs outside the presence of the court. Where the purpose of the contempt proceeding is to coerce compliance with a court order this is designated as civil contempt, which is an inherent power of the court. The Florida Bar v. Taylor, 648 So.2d 709 (Fla. 1995); Pugliese v. Pugliese, 347 So.2d 422 (Fla. 1977); Ducksworth v. Boyer, 125 So.2d 844 (Fla. 1961). Florida statutes also confer the power of contempt on Florida courts. § 38.22, Fla. Stat. (1997).

> A refusal to obey any legal order . . . . made or given by any judge . . . relative to any of the business of said

> court, after due notice thereof, shall be considered a contempt. . . .

§ 38.23, Fla. Stat. (1997). See also, Sandstrom v. State, 309 So.2d 17 (Fla. 4th DCA 1975), cert. discharged, 336 So.2d 572 (Fla. 1975); South Dade Farms, Inc. v Peters, 88 So.2d 891 (Fla. 1956); State ex rel. Everette v. Petteway, 131 Fla. 516, 179 So. 666 (1938). Since a Florida judge has the inherent power of civil contempt to coerce compliance with a court order, this same Florida judge has the authority - as a gentle first step -- to enter an order requiring compliance with an earlier court order. The state/county's **Initial Brief** does not refer to or analyze the March 31, 1998, court order (S/C App. 19; IB/24-32). Consequently, the **Initial Brief** totally fails to show that a clearly established principle of law has been violated -- that the trial court departed from the essential requirements of the law -- by the entry of its March 31, 1998, order.

2. January 30, 1998, Trial Court Order (Spaz. App. 9)

This January 30, 1998, trial court order ordered the following (Spaz. App. 9):

> 1. Seminole County, Florida, shall make immediate payment to Randy D. Fisher, Ph.D., 601 Briarcliff Street, Sanford, Florida 32773-5001, in the amount of Eight Thousand and no/100 Dollars ($8,000.00).

The state/county's argument that, "**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. Id. at 1079.**" (IB/25), misinterprets the Mills decision. The Mills per curiam opinion, 462 So.2d at 1079, actually states the following:

> We find no abuse of discretion in the trial court's refusal to grant a change of venue in the circumstances of the present case.
>
> On this same issue [change of venue] we find no error in the refusal to tax costs for a public opinion survey of the community feeling about this case in Wakulla County. **The trial court was concerned about his inability to control the taking of the survey and the possibility that the survey itself would contaminate the potential jurors. These were valid grounds to deny the petition. (Emphasis added.)**

Contrary to the state/county's assertion, the Mills decision does not stand for the legal proposition that a Florida trial court does not have the discretionary authority to enter an order authorizing defense counsel to engage the services of a psychologist to conduct a change-of-venue survey at public expense in a death penalty case where the defendant is indigent. The Mills decision merely upholds the trial court's discretionary authority to refuse to authorize a change of venue

survey because of its stated concerns regarding lack of judicial control and possible juror contamination.

As an indigent prisoner, **MR. SPAZIANO** was forced to look to the trial court for the necessary funds to have fulfilled his basic constitutional rights to due process -- a fair trial by an unbiased jury. He made the necessary factual showing which the trial court accepted (Spaz. App. 1). The 37-page Fisher Report confirms the validity of this motion and the trial court order (Spaz. App. 2).

These basic constitutional rights require the expenditure of public funds for the employment of non-legal defense services. Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087, 1092-1093, 84 L.Ed.2d 53 (1985); Griffin v. Illinois, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956); see also, Lozano v. State, 584 So.2d 19, 21-23 (Fla. 3d DCA 1991).

Whether or not the results of this change-of-venue survey are admissible as evidence in a "change of venue" hearing does not address the issue of the trial court's constitutional authority to authorize defense counsel to engage these professional services at public expense. Moreover, many changes have occurred since the state/county's cited authority, Irvin v. State, 66 So.2d 288 (Fla. 1953), was decided 45 years ago[3/] (IB/26), thus calling into question Irvin's continuing

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3/ This ignominious case involving the Florida prosecution of four negro males charged with the rape of a white female teenager constitutes one of the darkest days in the history of both the Executive and Judicial branches of

viability. As in Mills, this case also involves the **discretionary authority** of a trial court. 66 So.2d at 291-293.

The impact of contemporary media conduct and media coverage upon the impartial administration of criminal justice in the court system -- particularly the integrity of the jury -- is monumental and devastating to basic constitutional rights. As a consequence of the uncontrolled and undisciplined manipulation of the administration of criminal justice in our courts by the American press, the courts -- since 1953 -- have attempted to maintain an atmosphere of fairness through such devices as sequestered juries, continuances, and changes in venue. See generally, ABA Standards for Criminal Justice, Fair Trial and Free Press, Vol. II, Chap. 8 (2d Ed. 1986 Supp).

Over the last 45 years, the methodology involved in community surveys, the acceptability of community survey results in many facets of American life, and the

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Florida State Government. See Shepherd v. State of Florida, 341 U.S. 50, 71 S.Ct. 549, 95 L.Ed.2d 40 (1951), reversing, Shepherd v. State, 46 So.2d 880 (Fla. 1950), and remanding for new trial, 52 So.2d 903 (Fla. 1951)(S/C App. 17/Ex. D). Despite the valiant efforts of future United States Supreme Court Justice Thurgood Marshall, future NAACP Legal Defense Fund Director Counsel Jack Greenberg, and future Florida Black Bar leader Paul C. Perkins, justice was never fully achieved in the courts of Florida. Irvin v. Chapman, 75 So.2d 591 (Fla. 1954). This 1953 Florida Supreme Court case cited as authority in the **Initial Brief** would certainly be disavowed today. In the words of Mr. Justice Jackson, "The case presents one of the best examples of one of the worst menaces to American justice." 71 S.Ct. at 551.

reliability of their results, have resulted in their admissibility as legal evidence. The use of data obtained by community surveys as a basis for formulation and expression of an opinion of an expert witness is recognized by § 90.704, Fla.Evid.Code, and Rule 703, Fed.R.Evid. See generally, § 208, McCormick on Evidence (4th ed. 1992)(S/C App. 17, Ex. E). In n.6, § 208, the McCormick authors contrast the 1953 Irvin decision with modern cases and recognized legal writings which support the current view that, "properly conducted polls can help reveal the extent of prejudice against a defendant in the district from which jurors will be drawn," citing ABA Standards for Criminal Justice (S/C App. 17/Ex. E). See also, Zippo Manufacturing Co. v. Rogers Imports, Inc., 216 F.Supp. 670, 680-686 (D.C.N.Y. 1963).

Moreover, this Court did not enunciate a clearly established principle of law that a Florida trial court was prohibited from ordering the Florida county where the case was being prosecuted to pay for defense services rendered to an indigent defendant in a Florida death penalty case by a psychologist who conducted a change-of-venue survey in either Mills or Irvin. In Mills the Florida Supreme Court treated the decision of the trial court as **discretionary**. Irvin deals with the admissibility in a court proceeding of the results of a public opinion poll. Besides being an erroneous decision in the context of the modern law of evidence, Irvin

does not deal with the **authority of a trial court** to authorize and require the payment of these defense services at public expense.

The argument presented in the **Initial Brief** based upon an analysis of the several cited sections of the Florida Statutes also fails to establish that there has been a violation of a clearly established principle of law and a departure from the essential requirements of the law (IB/26-29). The **Initial Brief** does not cite any statute which prohibits a Florida trial court from ordering a county to pay a court appointed expert for services and expenses expended on behalf of an indigent defendant in a state death penalty case, which is what the trial court did on January 30, 1998. The fact that an expense flowing from defense services is not specifically recognized by the Florida Legislature as a specific, statutorily recognized taxable expense does not establish a violation of a clearly established principle of law -- a departure from the essential requirements of the law. The funding of defense services at public expense for an indigent defendant is a matter of constitutional right as contained within the concepts of fair trial, trial by jury, due process, and effective assistance of legal counsel -- all guaranteed by the Fifth, Sixth, and Fourteenth Amendments, United States Constitution, and the parallel provisions of the Florida Constitution. As recognized by the trial court at the end of the March 31, 1998, hearing, the county's problem is financial rather than legal -- financial problems flowing from what is called "fractionalized funding," where

the state and counties share the financial responsibility for providing for these constitutionally mandated defense services (S/C App. 18/20-21).

Further, § 914.06, Fla. Stat. (1997), specifically mandates a Florida trial court to award expert witness fees for an indigent defendant at public expense. The relevancy of this community survey is clearly established by the 23-year history of this litigation and the contents of the 37-page Fisher Report (Spaz. App. 1, 2).

Consequently, the **Initial Brief** does not identify any clearly established principle of law that was violated -- does not identify any departure from the essential requirements of the law -- by the entry of the January 30, 1998, court order.

B. No Resultant Miscarriage of Justice

The **Initial Brief** "contends that the order issued by the Circuit court will cause material injury and irreparable harm to the County in both the instant case and future proceedings of this nature." (IB/24.) The state/county provides no evidence to support this bald and unsupported assertion. Thus, the **Initial Brief** fails to establish that a **miscarriage of justice** has resulted from the trial court's orders authorizing this community survey, and compelling the county to compensate the psychologist who funded and conducted the community survey.

1. March 31, 1998, Trial Court Order (S/C App. 19)

Again, the **Initial Brief** does not analyze the March 31, 1998, order (S/C Ap. 19) against this "miscarriage of justice" standard of review (IB/21-32). It is this March 31, 1998, trial court order for which the county now seeks appellate review by this Court (S/C App. 21, Pet. p.1). The state and county have totally failed to show in the **Initial Brief** either by analysis and/or legal authority that a **miscarriage of justice** has resulted from the entry of this March 31, 1998, trial court order.

2. January 30, 1998, Trial Court Order (Spaz. App. 9)

The **Initial Brief** has not demonstrated a **miscarriage of justice** as a result from the January 30, 1998, trial court order, ordering payment for defense services at public expense (IB/21-32; Spaz. App. 9). Once again, this is a pretrial, non-final order requiring the county to make payment to a previously court appointed defense expert, whose defense services were rendered and funded on behalf of the indigent defendant in this death penalty case. This indigent defendant has been continuously incarcerated by the State of Florida for more than 23 years.

Arrayed against this single defendant and his defense counsel is the entire power, might, and treasury of the State of Florida, the sovereign that rules over and governs sixteen million plus humans who inhabit this peninsula and its panhandle; sixteen million plus humans who depend upon the **rule of law** to

protect their liberty, freedoms, person, way of life, and property against the **force** of the state. This **force** includes millions of dollars, thousands of police agents, and hundreds of prosecutors -- the "Chinese Army." This **force** has the legal authority to stop and question humans; subpoena these humans for interrogation; subpoena the records, documents, and tangible items of these humans and their business entities; arrest these humans, and charge both these humans and their business entities with criminal offenses; jail -- at least temporarily -- these humans; threaten these humans and their business entities with perjury, contempt, and criminal violations; and ultimately through the unilateral and non-reviewable decision by a prosecuting attorney bring serious criminal charges -- carrying long penitentiary sentences and sentences of death -- against these humans.

In civil cases where the parties are at parity, certiorari review has been granted where a trial court ordered the **affirmative** act of discovery, an act which was **irreparable** in nature. See e.g., Healthtrust, Inc. v. Saunders, 651 So.2d 188 (Fla. 4th DCA 1995); General Hotel & Restaurant Supply Corp. v. Skipper, 514 So.2d 1158 (Fla. 2d DCA 1987). On the other hand, pretrial orders in civil cases **denying** discovery are ordinarily not reviewable by certiorari, the exception being those cases **where the injury caused by the order denying the discovery is irreparable.** Ruiz v. Steiner, 599 So.2d 196, 197 (Fla. 3d DCA 1992), and cited cases.

The targeted order requiring the county to pay for the defense services of one previously court-appointed psychologist who conducted a community survey for **MR. SPAZIANO** to ensure his right to a fair trial by an unbiased jury does not and could not cause any irreparable injury to the State of Florida or the county. This trial court order does nothing in any way to hamper, slow down, limit, or restrain the State of Florida -- with its millions of dollars, its thousands of police agents, its hundreds of prosecutors, and its unlimited experts -- from developing and presenting to a jury evidence proving the charge it has brought against **MR. SPAZIANO**. In turn, this trial court order in no way limits the statutory authority of the county to turn to **MR. SPAZIANO** and obtain reimbursement for payment of Dr. Fisher's services and out-of-pocket expenses. If and when **MR. SPAZIANO** is convicted and sentenced, he can be compelled by court order to reimburse the county for payment of Dr. Fisher's defense services and out-of-pocket expenses. § 939.03, Fla. Stat. (1997).

Therefore, the state and county have totally failed to establish that the January 30, 1998, trial court order has resulted in a **miscarriage of justice.**

CONCLUSION

DEFENSE COUNSEL ISSUES

Based upon the foregoing legal authorities and arguments, this Court must provide **MR. SPAZIANO** with the following relief:

- an order reversing and vacating the March 13, 1998, Florida Fifth District Court of Appeal decision/opinion in Fifth District Case No. 98-00115; and
- an order affirming nunc pro tunc the December 11, 1997, order entered in the Circuit Court, Eighteenth Judicial Circuit of Florida, in State v. Spaziano, case no. 75-430 CFA, appointing co-counsel for **MR. SPAZIANO** at public expense.

DEFENSE SERVICES ISSUES

- an order affirming the January 30, 1998, and March 31, 1998, orders entered in the Circuit Court, Eighteenth Judicial Circuit of Florida, in State v. Spaziano, Case No. 75-430 CFA, ordering Seminole County, Florida, to pay Randy D. Fisher, Ph.D., by date certain Eight Thousand and no/100 Dollars ($8,000.00) for his professional services and funding for a community survey based upon his court appointment under trial court order dated November 13, 1997; and
- an order dismissing with prejudice the appeal/certiorari proceeding now pending in the Florida Fifth District Court of Appeal styled Seminole County, Florida v. Joseph R. Spaziano, Fifth District Case No. 98-1170.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this **Answer Brief** is typed in 14 point CG Times, and that a true and correct copy of the foregoing has been furnished by United States Mail this 7th day of August, 1998, to the **Office of the Attorney General** (with appendix), 444 Seabreeze Boulevard, Suite 500, Daytona Beach, Florida 32118; to **Honorable O.H. Eaton, Judge, Circuit Court** (courtesy, without appendix), Eighteenth Judicial Circuit, 301 North Park Avenue, Sanford, Florida 32711; to **Thomas Hastings, Assistant State Attorney** (courtesy, without appendix), 100 East First Street, Sanford, Florida 32711; to **Susan Dietrich, Assistant County Attorney** (with appendix), Seminole County, Florida, 1101 East First Street, Sanford, Florida 32771; and the original and seven copies (with diskette), with appendix, has been sent via Federal Express to **Honorable Sid J. White, Clerk**, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.

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