IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER JOHNSON
Petitioner,

v.

STATE OF FLORIDA
Respondent,

Case No. SC09-1045

4th DCA Case No. 4D08-3090
L.T. No. 07-10734CF10B

ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT

PETITIONER'S REPLY BRIEF

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SUMMARY OF THE ARGUMENT

I. Section 27.5303(1)(a), Florida Statutes (2008) applies when the PD seeks to withdraw due to multiple representation *at any time*. The Legislature set forth substantive requirements that the PD must make adequate representations regarding a conflict of interest in its written motion to withdraw and the court must review and may inquire or conduct a hearing into the adequacy of those representations before the court may grant the PD's motion to withdraw. The court must deny the PD's motion to withdraw if the court finds the asserted grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client. It is clear that the Legislature intended a motion to withdraw to indeed be a *motion* to the court instead of merely a notice to the court. Only where the PD is required to withdraw is OCCCRC authorized to handle an appeal otherwise handled by the PD.

II. The nature of OCCCRC's status in regard to the motion to withdraw is distinguishable from the analogy the PD15 makes. OCCCRC4 is a statutorily created agency with duties that are defined by whether the grounds of the PD's motion to withdraw establish a conflict of interest. A court order granting a PD's motion to withdraw on conflict grounds is the foundation for directing OCCCRC to act as counsel. The statutory determination is therefore important to OCCCRC being appointed to cases the Legislature created it to handle.

ARGUMENT

I. Section 27.5303(1)(a), Florida Statutes (2008) sets forth specific steps that the PD shall follow when filing a motion to withdraw during representation of two or more indigent defendants, *at any time*. The Fourth District Court of Appeal erred in applying section 27.511(8), Florida Statutes (2008) to all appellate proceedings. That subsection applies only to those cases when the OCCCRC handled the trial and requests that the PD handle the appeal.

A. Legislative History

Since 1967, when the Legislature first codified the procedure for the PD's withdrawal from multiple representations due to a conflict of interest, it has always provided that this applies ***at any time.*** We contend this means that the standard applies both at trial and on appeal.

Petitioner appreciates the PD15's recitation of legislative history, which supports OCCCRC4's argument that the Legislature has purposefully receded from the pre-*Guzman* certification of conflict to require more than just a PD certification when moving to withdraw due to a conflict of interest ***at any time***.

As the PD15 acknowledges in her Answer Brief, in response to *Guzman v. State*, 644 So.2d 996 (Fla. 1994), five years later the Legislature substantially changed the language of section 27.53(3), Florida Statutes (1999). (*Answer Brief* at p. 5). The new language specifies that a PD does not merely direct its own withdrawal based upon conflict, and instead requires a meaningful court review

into the adequacy of the PD's representations. The statute directs that the courts apply this standard and to inquire or conduct a hearing into the adequacy of the PD's representations regarding a conflict of interest, and withdrawal should be denied if the PD's asserted conflicts are not prejudicial to the indigent client. It is clear that the Legislature intended a motion to withdraw to indeed be a *motion* to the court instead of merely a notice to the court.

In 2003, the Legislature again revised the statute and moved it to section 27.5303(a), Florida Statutes (2003). The language further elaborated the requirement that the PD file an adequate motion to withdraw with sufficient grounds for the court to determine whether the asserted conflict requires the PD to withdraw and that the court "shall review" the adequacy of a motion to withdraw and deny withdrawal when the grounds are insufficient. This is all in addition to the remaining 1999 statutory provision that withdrawal should be denied if the court finds the asserted conflict is not prejudicial to the indigent client. A court must conduct an adequate inquiry into an assertion of conflict by publicly appointed counsel. *M.D.B. v. State*, 952 So. 2d 590 (Fla. 2d DCA 2007).

In 2007, the Legislature created the Office of Criminal Conflict and Civil Regional Counsel, codified in section 27.511, Florida Statutes (2007). The PD15's legislative history omitted the original version of section 27.511(8), Florida Statutes (2007), authorizing the duties of the OCCCRC, which contained no

statutory provision for the PD to handle the OCCCRC appeals. In 2008, the Legislature substantially changed the language to provide that the PD now handles appeals in which OCCCRC was trial counsel, unless the PD has a conflict. The 4th DCA erroneously relied on this section which exclusively implicates only those cases in which OCCCRC was trial counsel.

B. Issue

The PD15 identifies the issue as a procedural one of what procedure applies when the appellate public defender asserts a conflict of interest. Petitioner contends that the issue is a substantive one of whether the courts must review and make the determination that the Legislature requires.

C. Argument

The PD15's argument is that its motion to withdraw from representation in Johnson's case (or Mayfield's case) should have been automatically granted because section 27.511(8), Florida Statutes (2008) applies. OCCCRC4 did not handle the trial, so section 27.511(8), Florida Statutes (2008) does not apply.

Section 27.5303(1)(a), Florida Statutes (2008) sets forth plainly the specific requirements that the PD (and OCCCRC for that matter under subsection 1b) must follow before filing a motion to withdraw. It requires the PD to first determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender without a conflict of interest. The statute

contemplates that the court "shall review" the grounds to determine that a conflict exists and may conduct further proceedings, if necessary. Finally, the court "shall deny" the motion if the court finds the grounds for withdrawal are insufficient or found not prejudicial to the indigent client.

In the case *sub judice*, the PD15's November 4, 2008 motion to withdraw filed with the 4th DCA was wholly inadequate for any court to determine whether there was a conflict of interest or the likelihood of one developing. The record shows only that the PD17 withdrew at trial and separate counsel was appointed for each of the defendants. The PD15's motion showed only the fact of multiple representations on appeal, and simply stated:

> Also charged with the same crimes was James Mayfield. This office has a conflict of interest in representing Mr. Johnson as Assistant Public Defender Peggy Natale currently represents co-defendant/appellant Mayfield on appeal in District Court case number 4D08-1608.

PD15 concedes that this situation does not pose a conflict on appeal in all cases. (*Answer Brief at pp 10,15*). Since the PD15 concedes that joint appellants do not constitute an automatic conflict, its motion did not adequately show grounds to withdraw based upon conflict between defendants/appellants. The 4th DCA failed to require any additional showing of conflict that would necessitate the PD15 to withdraw, and its appointment of the OCCCRC4 was erroneous.

Furthermore, the PD15's presumption that the trial court had already sufficiently reviewed the conflict between these defendants/appellants as required by section 27.5303(1)(a), Florida Statutes is contrary to the record. (*Answer Brief* at p. 9). Section 27.5303(1)(a) has required that the PD file a written motion to withdraw since the 1999 amendments. (*Answer Brief* at p. 9, fn. 9). Here, the PD17 did not file the statutorily required written motion to withdraw and the record does not show that any findings were made.[1] There is no record basis to rely on the appointment of separate counsel below as reflecting a continuing conflict at the appellate level. Thus, in absence of a finding that is shown to carry over on appeal, the PD15's motion is based on joint representation that it admits does not necessarily establish a conflict on appeal.

Section 27.511 (8), Florida Statutes (2008) deals exclusively with cases in which OCCCRC represented the defendant at the trial level. The 4th DCA and PD15's contentions that section 27.5303 applies only to the trial courts and not appellate courts, because the language refers to "the court" and not some other language indicating a three judge panel, is clearly erroneous. According to the PD15, section 27.511(8) applies *only* in the appellate courts. But that section also

[1] A docket search, as well as the record on appeal, reveals that the PD filed a Notice of Appearance on June 22, 2007, and then the circuit court signed an order appointing court-appointed counsel at the July 3, 2007 arraignment. (R. 10-15). The PD filed no written motion to withdraw.

refers to "the court" and provides for "the court appointment" of private counsel and specifically references section 27.40, which expressly refers to the circuit courts. Additionally, Section 27.51 (4), Florida Statutes, deals specifically with cases in which the public defender represented the defendant at the trial level. The 4th DCA's reliance on 27.511(8) is not soundly based.

The PD15 casts OCCCRC4's position as a departure from the plain meaning of the statute. OCCCRC4 agrees that this Court should follow the plain meaning of the statutes. Section 27.5303(1)(a), Florida Statutes (2008) requires that the court shall review and make a determination of the adequacy of the motion to withdraw on grounds of conflict. In order to comply with this statute the PD must make an adequate assertion of the basis for a court to find a conflict before a court can permit the withdrawal and appoint OCCCRC. Here, the motion was deficient and the 4th DCA failed to require an adequate assertion of conflict before it made the determination to grant the withdrawal and appoint OCCCRC4. Moreover, the court below stated that it would henceforth refuse to enforce these statutory requirements before granting the motions to withdraw.

The PD15 next argued that the Legislature's failure to act in short time to amend the statute indicates approval of the 4th DCA's interpretation of section 27.511(8). However, in the PD's citation to the Legislature's response in disapproving *Guzman*, it should be noted that *Guzman* was decided in 1994 while

the legislature's response was a 1999 amendment to section 27.53, Florida Statutes (Supp. 1980). Too much should not be read into the fact that the Legislature did not amend the statute in response to the 4th DCA's opinion, especially in view of the fact that the issue was before this Court for review.

The parties agree that there is not always a conflict in representing co-defendants on appeal. The parties further agree that "the public defender has to assess the *risk* that dual representation will impair the effective and ethical functioning of counsel." (*Answer Brief* at p. 15). Where the parties disagree is whether a motion to withdraw that contains no allegations of risk assessment or any indication that the PD based its motion upon more than the bare fact of co-defendants on appeal. OCCCRC4 believes this is an insubstantial representation. The motion was not adequate to demonstrate conflict on appeal nor was it adequate for any court to make a proper determination of whether the PD15 was required to withdraw due to a conflict of interest. Only where the PD is required to withdraw is OCCCRC authorized to handle an appeal otherwise handled by the PD. "What is critical to our decision is that the OCCCRC are appointed in criminal cases *only* where the public defender must withdraw due to a conflict of interest." *Crist v. Fl. Ass'n of Crim. Defense Lawyers*, 978 So. 2d 134, 145 (Fla. 2008) (emphasis in original).

OCCCRC4 disagrees with the PD15's argument that "[a] public defender's motion to withdraw need not show an actual conflict of interest, just the likelihood of one." (*Answer Brief* at pg. 15). Criminal defendants are guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution, *see Gideon v. Wainwright*, 371 U.S. 335, 83 S. Ct. 792, 9 L. Ed 2d 799 (1963), and under Article I, section 16 of the Florida Constitution. This Court has stated, "the right to effective assistance of counsel encompasses the right to **representation free from actual conflict**." *Hunter v. State*, 817 So.2d 786, 791 (Fla. 2002) (emphasis added). The courts have often referred to the requirement of showing actual conflict in measuring whether constitutionally required counsel is afforded. *Alessi v. State*, 969 So. 2d 430 (Fla. 2007); Q*uince v. State*, 732 So. 2d 1059, 1065 (Fla. 1999)(showing of denial of effective counsel requires "that an actual conflict of interest adversely affected" lawyer's judgment). The question is a mixed question of fact and law. *Quince*, at 1064, citing to *Cuyler v. Sullivan*, 446 U. S. 335, 342, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980); *Wright v. State*, 857 So. 2d 861 (Fla. 2003)(actual conflict); *Hernandez v. State*, 750 So. 2d 50, 52 (Fla. 3d DCA 1999)(6th Amendment denial occurs when "an actual conflict of interest" adversely affected counsel's performance). In *McCrae v. State*, 510 So. 2d 874 (Fla. 1987), this Court looked to whether an actual conflict existed when a state witness was represented by an attorney in the same PD office. The essential

question *sub judice* that the certification of conflict failed to include was whether an "actual conflict of interest exists" or if counsel's course of action would be affected by the dual representation creating a divided loyalty resulting in a course of action beneficial to one client and damaging to the interests of the other. *See Porter v. Wainwright*, 805 F. 2d 930 (11th Cir. 1986).

The purpose of publicly financed counsel for indigent criminal defendants, at trial and on direct appeal, is to provide constitutionally required effective assistance of counsel. It follows that the withdrawal of the PD and appointment of OCCCRC on grounds of conflict should follow a similar standard. An actual conflict, or its equivalent under Rule of Professional Responsibility 4-1.7 where the likelihood that a conflict will eventuate that will materially interfere with a lawyer's professional judgment or advancing courses of action that reasonably should be pursued, must be shown for a PD motion to withdraw where actual conflict is not present. The Advisory Committee standards appear mainly directed toward trial situations. Some meaningful assertion that the issues in the case require taking opposite legal positions, or that an issue such as a defense of independent act requires arguments for one client at the appellate level that would cast the other in an adverse light should be necessary where an actual conflict does not presently exist. This is the only way to give effect to the full legislative design that a court "shall review" the motion for, at minimum, its facial adequacy.

Accordingly, the PD15 posits a too insubstantial standard of certifying possible future conflict.

The PD15 characterizes the "…RCC's argument [as] that appellate representation is little more than a dry exercise in selecting and presenting issues from a cold, public record." (*Answer Brief* at p. 15). OCCCRC4 argued the opposite. It is the PD15 that treats conflict on appeal as a mechanical exercise where a co-defendant status, with nothing more being shown, requires the courts to order withdrawal and appoint an OCCCRC. Counsel, both the PD and OCCCRC represents, advises and advocates on behalf of clients in the fullest sense of professional obligation. At the appellate level, where the record is the primary reference, an actual conflict or the likelihood that one will develop can often be identified by consultation with trial counsel and perusal of the record. Those issues are not implicated here, though, because the motion to withdraw did not allege any of those grounds. If any existed, the PD did not tell the court. The OCCCRC is authorized to be appointed only when a conflict exists and not when there is merely an unevaluated semblance of possible future conflict.

The PD15 notes that a lawyer's assessment of risk of conflict is to be given deference. This is because counsel is in the best position to evaluate whether an actual conflict or the likelihood of a prejudicial conflict developing exists. Counsel's representations are made as an officer of the court and are taken as

virtually under oath. This does not mean that the motion does not need to demonstrate that a conflict exists. That is what OCCCRC4 seeks. No court can make this determination without sufficient declarations of conflict.

In Section 27.5303(1)(a), Florida Statutes (2008), the Legislature has set the formal substantive requirements to appoint OCCCRC. A court must make this determination because the ground for appointment of OCCCRC is a matter of substance. The Legislature left the procedural determination of whether to inquire further, whether to require more specificity, or whether to hold a hearing to the court's discretion under its own procedures.

II. The Fourth District Court of Appeal erred in denying the OCCCRC4 standing to contest the PD15's motions to withdraw due to a conflict of interest. The OCCCRC has standing as a party to the motion to withdraw affected by the outcome of the motion.

OCCCRC4 and JAC are not analogous. PD15's argument that OCCCRC stands in the position of the JAC, or a county, in regard to the grounds of a motion to withdraw is flawed. (*Answer Brief* at p. 21). OCCCRC4 is a statutorily created agency with duties that are well defined by whether the PD must withdraw due to a conflict of interest. A court order granting a PD's motion to withdraw results in OCCCRC being appointed as counsel. The nature of OCCCRC's status in regard to the motion to withdraw is distinguishable from the analogy the PD15 makes.

The JAC is an administrative body which serves an important support function but has no active duties to act as counsel in the case. Therefore, OCCCRC stands in a different position with respect to the grounds for withdrawal than either the JAC or respective counties. OCCCRC's lawful appointment is, however, dependent upon a proper determination of an actual conflict. OCCCRC4 contends that an inadequate motion, offering insufficient grounds, is not the showing contemplated by a certification, because it amounts to a designation rather than a motion.

Because a PD's motion to withdraw directly implicates an OCCCRC's statutory responsibilities and obligations, OCCCRC should be entitled to notice and a reasonable timely opportunity to inform the court whether the motion sets forth adequate grounds for finding conflict and appointment of the OCCCRC. OCCCRC4 does not seek adversary hearings. The court determines whether to inquire further, but that decision should be made following input from both the PD and the OCCCRC regarding whether the grounds for withdrawal reflect a facially sufficient showing of conflict. A court, having input from the OCCCRC, is in a better position to exercise its discretion whether to inquire further, require a fuller statement of grounds or even whether to hold a hearing on the adequacy of the PD's conflict. Requiring courts to address the issue only after the OCCCRC is appointed requires the busy courts to revisit the issue on multiple occasions. OCCCRC would be obligated to move for reconsideration when a court enters an

order of appointment where there is no conflict shown to authorize appointment of OCCCRC. This would be an inefficient waste of state resources and a burden to busy courts that OCCCRC, and we believe the PD, wish to avoid. Early determination of grounds, following a more complete assessment by a PD and more adequate showing in a motion to withdraw would serve these purposes. Since the OCCCRC is not a subsidiary of the PD nor created to be a relief value for case overload, adherence to these statutory requirements is essential to a proper functioning of the system. "The Legislature continues to rely, first and foremost, on the public defenders to provide court-appointed counsel to indigent persons in criminal and civil proceedings. It is only when a public defender is unable to provide representation because of a conflict of interest or is not authorized to provide representation that a regional counsel office is appointed in its place." *Crist*, 978 So.2d at 144.

CONCLUSION

The 4th DCA's opinion holds that OCCCRC4 will not heard with regard to the adequacy of the grounds of the PD's motions to withdraw that affects the duties of OCCCRC as a class of state officers.

The OCCCRC4 respectfully requests that this Honorable Court quash the 4th DCA opinion in *Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009), because it is contrary to the plain meaning of section 27.5303 and section 27.511, Florida Statutes (2008). Furthermore, the OCCCRC4 respectfully requests that this Honorable Court quash the 4th DCA opinion in *Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009) and require the courts to make the determination required by section 27.5303, Florida Statutes (2008), and such other relief as may be appropriate.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Petitioner's Reply Brief** was mailed via U.S. Mail first class, postage prepaid, on September ___, 2010 to the **Office of the Florida Attorney General**, Assistant Attorney General Diane Medley, 1515 North Flagler Drive, 9th Floor, West Palm Beach, FL 33401; and **Office of the Public Defender**, **Appellate Division**, Assistant Public Defender Paul Petillo, 421 3rd Street, 6th Floor, West Palm Beach, Florida 33401.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rule of Appellate Procedure Rule 9.210(a)(2).

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