SUPREME COURT OF FLORIDA
CASE NO. SC09-1181and SC10-1349

Lower Tribunal 3D08-2272
3D08-2537

PUBLIC DEFENDER
ELEVENTH JUDICIAL CIRCUIT OF FLORIDA
Petitioner

vs.

STATE OF FLORIDA
Respondent
_______________________________/

BRIEF AMICUS CURIAE OF CRIMINAL CONFLICT AND CIVIL REGIONAL COUNSEL, THIRD REGION OF FLORIDA IN SUPPORT OF PETITIONER.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL OF FLORIDA.

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STATEMENT OF IDENTITY AND INTEREST

The Office Of Criminal Conflict And Civil Regional Counsel [hereinafter "Regional Counsel"] was established by the Florida Legislature in 2007 pursuant to section 27.511 Florid Statutes. Starting on October 1, 2007, Regional Counsel was authorized to provide original and appellate representation in most criminal cases from misdemeanors to capital felonies where the public defender withdrew from representation because of a conflict. Pursuant to section 27.511, Regional Counsel also assumed primary responsibility for representing individuals in civil proceedings who "are entitled to court appointed counsel under the Federal or State Constitution or where otherwise authorized by law." *§27.511(6)(a) Florida Statutes.* In 2009 the Regional Counsel's Office for the Third Region handled approximately 10,499 cases in Dade and Monroe counties, including 8,579 criminal cases.

The interest of the Office Of Regional Counsel in this matter is affected by the lower court's ruling granting the State Attorney's Office standing to challenge the Public Defender's motion to withdraw. The lower court held that pursuant to section 27.02(1) Florida Statutes, the State Attorneys' Office has standing to

challenge motions to withdraw that were filed by the Public Defender. *State v. Public Defender Eleventh Judicial Circuit*, 12 So.3d 798, 801 (Fla. 3rd DCA 2009). Because Regional Counsel is frequently appointed to represent multiple clients, Regional Counsel routinely seeks permission to withdraw from representation due to a conflict. The Third District's ruling giving the prosecution standing directly affects Regional Counsel since the prosecution will now have standing to challenge any motions to withdraw filed by Regional Counsel. It should be noted that Regional Counsel for the Third Region of Florida has never sought to withdraw *en masse* from representation due to excessive caseload. However, the lower court's decision does not distinguish between the types of motions to withdraw that the prosecution has standing to contest.

SUMMARY OF THE ARGUMENT

The lower court erred in interpreting section 27.02 Florida Statutes as providing the prosecution with standing to appear and challenge motions to withdraw from representation. The lower court held that since the State Attorney was party to the action, section 27.02 automatically conferred standing on the prosecution on the Public Defender's motion to withdraw. The lower court's application of section 27.02 was excessively broad and overreaching and failed to

distinguish between a party to an action and a party to a motion. There are a myriad of motions in criminal cases in which the prosecution has no standing to intervene or be heard. The distinction in those cases is that the State Attorney while party to the case, is not party to the motion. Having failed to recognize and apply this distinction, the lower court's ruling was in error.

STANDARD OF REVIEW:

An appellate court reviews *de novo* the issue of standing. *Payne v. The City of Miami,* 927 So.2d 904 (Fla. 3rd DCA 2005); *Alachua County v. Scharps*, 855 So.2d. 195 (Fla. 1st DCA 2003).

An appellate court reviews *de novo* statutory interpretation and pure issues of law. *D'Angelo v. Fitzmaurice* 863 So.2d 311 (Fla. 2003); *State v. Sigler*, 967 So.2d 835, 841 (Fla. 2007).

I) THE LOWER COURT ERRED IN DETERMINING THAT SECTION 27.02 GIVES THE PROSECUTION STANDING TO OBJECT TO A DEFENSE COUNSEL'S MOTION TO WITHDRAW.

In *Johnson v. State*, SC09-1045 (Fla. January 5, 2012) this court recently addressed the issue of standing. Standing "requires a would be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly." *Id, citing Hayes v. Guardianship of Thompson*, 952 So.2d 498, 505 (Fla. 2006). It is the position of *Amicus* that the prosecution is not affected by who represents the defendant in any particular case in a manner which would give them standing to challenge a motion to withdraw.

The Third District Court of Appeals reversed the trial court on the issue of standing for two reasons. The Third District held that section 27.02 Florida Statutes provided the prosecution with standing. Additionally, the Third District ruled that the trial court erred in relying upon *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So.2d 1130 (Fla. 1990) (hereinafter "*In re Prosecution*") and *Escambia County v. Behr*, 384 So.2d 147 (Fla. 1980). The Third District distinguished those two cases stating that "*These cases address the unrelated issue of whether a county's financial stake in the withdrawal of an assistant public defender is sufficient to grant the county*

standing to oppose a motion to withdraw." *State v. Public Defender Eleventh Judicial Circuit*, *supra* at 801.

It is respectfully argued that the Third District erred in both the application of section 27.02 and the interpretation of *In re Prosecution* and *Behr*.

The decision in *In Re Prosecution* cited to the decision in *Behr,* in which the court held:

> *We hold that the court has the option of appointing the public defender or private counsel. This is a matter within the sound discretion of the trial court judge. The court does not have to make any prerequisite findings or allow the county an opportunity to be heard before appointing private counsel.*

Behr, supra at 150.

The decision in *Behr* was not on "an unrelated issue" of a county's financial interest in a motion to withdraw as the lower court reasoned. Rather the decision in *Behr* was a forerunner of the issues before this court now: the appropriateness of a public defender seeking to withdraw because of an excessive case load. The specific issue in *Behr* had little to do with the financial interest of the county. Rather, the issue in *Behr* was whether section 27.51 (which imposed upon the public defender the duty to represent indigent defendants) as it existed in 1980, allowed, when read in *pari materia* with section 27.53 (which allowed for the appointment of private attorneys to represent indigent defendants) gave the courts the option of appointing either a private attorney or the public defender. The court in *Behr* adopted Judge Hubbart's dissent in *Dade County v. Baker*, 362

So.2d 151 (Fla. 3rd DCA 1978) and held that (at the time) there was a dual system of appointments for indigent defense allowing a trial court to either appoint the public defender or private attorney to represent an indigent client.

Although *Amicus* argues that the lower court erred in its interpretation of the decisions in *In Re Prosecution* and *Behr,* there is still the issue of the lower court's reliance on section 27.02 in vesting standing in the prosecution when the public defender or any defense counsel files a motion to withdraw.

Section 27.02 Florida Statutes states, *inter alia*, "*1) The state attorney shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party…*".

In the practical application of criminal law and procedure in the courts of this state, there are a myriad of situations in which the State Attorney has no standing to intervene or challenge a motion filed by the defense. This is because while the prosecution is a *party to the case*, they are not *a party to the motion.* This was a distinction not made by the lower court and goes to the heart of this issue of standing in this case.

Starting with the appointment of private counsel, the public defender, or regional counsel for indigent defendants, the prosecution is not party to the selection or appointment process. This was the procedure under the prior statutory scheme for appointment of private counsel. *see ,* § 27.42(1), Fla. Stat. (2006). The prosecution has only the rare [1] right to object to the selection of an appointment of a particular attorney, although the Third District's ruling as to the breadth of section 27.02 could now grants them such a right in every case.

Nor is the State Attorney party to a private appointed counsel's request for fees under section 27.5304 Florida Statutes. Section 27.5304(12) provides for the method and circumstances of when a private appointed attorney may seek fees in excess of the statutory maximum. The statute creates a procedure involving the defense attorney, the Justice Administration, and the Chief Judge or his or her designate from the circuit where the case arose.

Giving the prosecution standing to challenge an attorneys' request for reasonable compensation would have a chilling effect upon an attorney's relationship with his or her client. The client might reasonably be worried that his or her counsel might not aggressively challenge the prosecution's evidence if the

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[1] The prosecution may, in limited circumstances, object to a defendant's choice of counsel where defense counsel has previously worked as a prosecutor with knowledge of the case, or other rare and unusual reasons. *State v. De La Osa*, 28 So.2d 201 (Fla. 4th DCA 2010). See also, *Wheat v. U.S.*, 486 U.S. 153 (1988).

prosecution had an ultimate say in an attorney's request for fees at the conclusion of the case. However, the Third District's application of section 27.02 would confer such standing upon the prosecution because they are a party to the case under the statute.

There are additional circumstances in which a defense attorney may appropriately engage in *ex parte* communication with the court by way of motion. Florida Rule of Criminal Procedure 3.220(m)(1) allows the defendant to make "an ex parte showing of good cause for taking the deposition of a Category B witnesses." Florida Rule Of Criminal Procedure 3.216(a) requires the trial court to appoint an expert to examine an indigent defendant upon motion of defendant's counsel that she or he has "reason to believe that the defendant may be incompetent to proceed or that the defendant may have been insane at the time of the offense." In *State v. Hamilton*,448 So.2d 1007 (Fla. 1984), this court held that

> *[t]he rule is designed to give an indigent defendant the same protection as afforded to a solvent defendant. Further, and as important, in many instances the basis for the request for such an expert is founded on communications between the appointed lawyer and his client. Any inquiry into those communications would clearly violate the basic attorney-client privilege. Any inquiry into counsel's basis to believe that his indigent client is incompetent to stand trial or was insane at the time of the offense also impermissibly subjects the*

> *indigent defendant to an adversary proceeding concerning issues which may be litigated in the trial of the cause. No solvent defendant would be subjected to this type of inquiry or proceeding.*
> *Hamilton supra 448 So.2d 1008-09.*

In *State v. Nolasco* ,803 So.2d 757 (Fla. 3rd DCA 2001) the court held that requests for expenses relating to an indigent defendant's need to hire an expert order to prepare the defendant's case are heard in *quasi ex parte* proceedings, where the motion requesting the funds is served on the County Attorney but not on the State and the written motion is filed under seal. Under the authority Of *Hamilton* and *Nolasco*, the defense often seeks appointment of *ex parte* mental health experts, or fingerprint or firearm or DNA or other experts and the courts of the Florida routinely grant such motions without notice to the state because due process requires the defense have access to experts without initially alerting the prosecution to the possible theories of defense.

In all of these cases, which are not covered by the enumerated exceptions in section 27.02, the defense routinely files motions and seeks relief from the court in cases in which the prosecution is a party to the case. In each of these circumstances the state attorney is not a *party to the motion*, meaning the motion does not affect the State Attorneys' ability to exercise its duties and obligations to prosecute the case. This distinction was not recognized by the Third District in

the decision to grant the prosecution standing in the Public Defender's motion to withdraw.

In order to remedy the consequences of the overbroad interpretation the Third District gave to §27.02, this court should recognize the distinction between a *party to a motion* and a *party to the case*. Every party to a motion has right to be noticed and heard. Every party to a case does not have the same right in every motion.

Chief Justice England's concurrence in *Behr* is illustrative of the distinction between parties to a motion and parties to a case. In writing in support of the proposition that counties had standing to be heard on the decision to allow a public defender to withdraw and the appointment of private counsel, Chief Justice England wrote: *Clearly, the counties are the only* ***real parties in interest*** *in such a proceeding, and they should be able to challenge the evidence offered to support a claim of excess caseload." Behr, supra* at 150, *C.J. England, concurring*. **(emphasis added.)**

The decision of the Third District on the issue of standing may seem innocuous upon first inspection. However, as illustrated above, the decision has far ranging and unforeseen consequences that now vests the prosecution the power to intervene in a myriad of circumstances where due process and the attorney-client

privilege currently prohibits them from doing so. Because the Third District failed to distinguish between a party to a motion and a party to the case, it is respectfully argued that the Third District erred in holding that section 27.02 conferred upon the State Attorney standing to object to the Public Defender's motion to withdraw.

CONCLUSION

For the foregoing reasons, this court should reverse the Third District's decision on the issue of conferring standing upon the prosecution when the defense files a motion to withdraw.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this brief was sent by US Mail to all of the individuals listed on the following pages on January 11, 2011.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Response to the Petition complies with the form requirement of Rule 9.210 of the Florida Rules Of Appellate Procedure. The Brief is written in Times New Roman 14 point font and is twelve pages not including the table of contents and authorities.

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