IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1171

JULIANNE M. HOLT,
Public Defender, Thirteenth Judicial Circuit

Petitioner,

-vs-

MICHAEL EDWARD KEETLEY, and
THE STATE OF FLORIDA

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

BRIEF OF PETITIONER ON JURISDICTION

JULIANNE M. HOLT
Public Defender
Thirteenth Judicial Circuit of Florida
Post Office Box 172910
Tampa, Florida 33672-0910
(813) 272-5980

JENNIFER SPRADLEY
Assistant Public Defender
Florida Bar No. 0183482
appeals@pd13.state.fl.us

TABLE OF CONTENTS

PAGE(s)

TABLE OF CITATIONS

CASES **PAGE(s)**

CONSTITUTIONS AND STATUTES

RULES

INTRODUCTION

Julianne M. Holt is the elected public defender in Tampa ("public defender") who has been appointed as co-counsel to a private attorney in a death penalty case. The District Court dismissed the public defender's petition for certiorari claiming the public defender was not materially injured by being ordered to act contrary to the law governing her office. This decision affects all constitutional and public officers whose duties are governed by statute. This Court should exercise its discretionary jurisdiction in this case because appointing public defenders to cases where there is already private counsel creates a serious threat to the ability of these elected constitutional officers to manage their budgets and personnel.

STATEMENT OF THE CASE AND FACTS

The District Court's opinion details the factual history of this case. (A. 2-5).[1] For present purposes, the important facts are that private counsel was retained by the family and appeared on behalf of Mr. Keetley in a quadruple-murder death penalty case. (A. 2). Four years later, after the family had paid approximately $200,000, private counsel moved for the appointment of an additional attorney at state expense. (A. 3). The trial court denied that motion "based on the plain reading of the rules and statutes relating to this that prohibit appointment when a

[1] References to the District Court decision, attached as the appendix to this petition, are denoted by "A." followed by a page number.

Defendant . . . . is being represented by retained counsel." (A. 3).

A year later, private counsel filed a second motion to the same effect, and with the same result. (A. 4). A year after that, private counsel refiled the same request for a third time. (A. 5). The public defender did not appear or file a response. (A. 5). This time, however, the trial court granted the motion. (A. 5). The public defender moved for rehearing, relying on the plain language of the statute and rule that the trial court had previously relied upon. (A. 5). The trial court orally denied that motion. (A. 5).

That motion for rehearing was denied before the public defender sought timely certiorari review within 30 days of the order appointing her to a case. (A. 2). The District Court, however, dismissed that petition, holding that the public defender did not preserve the issue because she did not "respond to the motion until after the order on the motion had been rendered." (A. 6-7).

The trial court's order advances the theory that appointing a public defender to assist private counsel was constitutionally required on the facts of this case. There was no testimony presented to the trial court to support that constitutional claim, however, and the District Court did not rely upon it. Instead, the District Court also held that the public defender had not shown material injury because she was initially appointed to represent Mr. Keetley (which he declined in favor of private counsel, (A. 2), because a different public defender, one with

appellate responsibilities, represented Mr. Keetley in an earlier state petition for certiorari on a death penalty issue, *State v. Keetley*, 205 So. 3d 602 (Fla. 2d DCA 2016) (denied pursuant to *Hurst v. State*, 202 So. 3d 40 (Fla. 2016)), and because the public defender "routinely assigns two attorneys to represent an indigent defendant facing the death penalty, while here she has been ordered to assign only one." (A. 8).

SUMMARY OF THE ARGUMENT

Public defenders are constitutional officers whose duties are controlled by statute and rule. The statute, rule, and precedent all state that a public defender cannot be appointed concurrently with private counsel. By holding that an order contrary to that law is not a material injury, the decision below affects not only public defenders, but all constitutional and public officers whose duties are controlled by statutes. This Court should grant review to avoid private counsel being allowed to tap the public defenders' personnel and budgets.

The District Court's decision also conflicts with precedent from this Court and other District Courts that an objection is timely if it is made at a time when the trial court can cure the error. *Bailey v. Treasure*, 462 So. 2d 537 (Fla. 4th DCA 1985), held that a motion for rehearing preserves an issue for certiorari review in a situation where the trial court could have granted that motion and corrected the error. The District Court's decision is in direct and express conflict with *Bailey*.

ARGUMENT

I.

A JUDICIAL ORDER TO ACT CONTRARY TO THE GOVERNING STATUTE IS A MATERIAL INJURY. THE DECISION BELOW AFFECTS A CLASS OF CONSTITUTIONAL OFFICERS.

Both the governing statute and rule are clear that a public defender cannot accept appointment on a case where private counsel also represents the client:

> The court may not appoint an attorney paid by the state based on a finding that the defendant is indigent for costs if the defendant has privately retained and paid counsel.

§ 27.52(5)(h), Fla. Stat. (2017).

> A court must appoint lead counsel and, upon written application and a showing of need by lead counsel, should appoint co-counsel to handle every capital trial <u>in which the defendant is not represented by retained counsel</u>.

Fla. R. Crim. P. 3.112(e) (emphasis supplied). The case law is equally clear:

> we hold that section 27.51, Florida Statutes (1981), although it permits the appointment of the public defender to represent certain indigent defendants, does not permit the appointment of the public defender *as co-counsel* with privately retained counsel.

Behr v. Gardner, 442 So. 2d 980, 982 (Fla. 1st DCA 1983); *see also Thompson v. State*, 525 So. 2d 1011, 1011-12 (Fla. 3d DCA 1988) (quoting *Behr*). That law is binding on the public defender: "The Office of the Public Defender is a creature of the state constitution and of statute, not of the common law. . . . The functioning of that office is regulated by statute, sections 27.50-27.59, Florida Statutes (1981), and by court rule." *State ex rel. Smith v. Brummer*, 443 So. 2d 957, 959 (Fla. 1984).

The District Court's decision did not pass on this question, but instead held that if there were such a violation, a public defender is not materially injured by being ordered to act in contravention of the governing statute and rule. (A. 7-8).

A public defender is a constitutional officer. *Johnson v. State*, 78 So. 3d 1305, 1309 (Fla. 2012). Whether being ordered to act in violation of the controlling law is a material injury remediable in certiorari is a legal question affecting a class of constitutional officers. In the court below, the Attorney General supported the public defender's position, and the last section of its response brief explains how this decision affects a class of constitutional officers:

> Florida Statutes, Florida Rules of Criminal Procedure, and case precedent have determined that a criminal defendant's constitutional rights do not mandate the appointment of publicly funded counsel concurrent with privately funded counsel. The criminal defendant in this case may wish to build his own defense team, financed by the public treasury. However, Chapter 27 does not permit a criminal defendant to select his own attorneys at public expense. Therefore, a criminal defendant who has privately retained counsel in a capital case cannot obtain the appointment of publicly funded co-counsel, which includes the Public Defender, Office of Criminal Conflict and Civil Regional Counsel, or a private attorney "from the conflict list as co-counsel and require JAC to pay him reasonable statutory fees" [Exhibit B]. *See* § 27.52 (5)(h) (2016). The lower court's order in this matter acts to circumvent and negate the established statutory procedures in Florida Statute § 27.52. This Court should grant the Petition for Writ of Certiorari in order to ensure that the functions of a class of constitutional officers are not altered.

The trial court's order places the public defender (and the resources of her office) at the command of the private attorney who is lead counsel in the case. Any appeal from the criminal case will not remedy a public defender's loss of control over her office. A synonym for "material injury" is "irreparable harm." *Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc.*, 104 So. 3d 344, 351 (Fla. 2012) (stating the requirement as "whether there is a material injury that cannot be corrected on appeal, otherwise termed as irreparable harm."). Here, the harm is irreparable because it cannot be addressed on appeal.

The District Court's decision will not be limited to public defenders. The class of officers affected by this decision includes all constitutional and public officers whose duties are controlled by statute. Which is to say, virtually all such officers. The lower court's decision would prohibit certiorari review of all judicial orders requiring these officials to act contrary to the statutes governing their duties.

The District Court's reasons for reaching its conclusion are puzzling. First, the trial court's initial appointment of the public defender to represent Mr. Keetley is immaterial. He declined that appointment in favor of private counsel, and that continued private representation is what prevents appointment of the public defender under the statute and rule quoted above.

Second, it does not matter whether the public defender assigns one, two, or ten attorneys to a death penalty case. If a private attorney continues representing the

defendant, then the public defender does not need to assign any attorneys or expend resources. If the private attorney were to withdraw from the case, then the public defender would be able to manage the personnel and resources of her office and deploy them as efficiently and effectively as possible. Either way, the material injury is the loss of managerial control over personnel and resources caused by the forced partnership with a private attorney.

Finally, Mr. Keetley's representation by another public defender with appellate responsibilities is irrelevant to this issue. The appellate public defender was not appointed as co-counsel; he was the only attorney representing Mr. Keetley in the state's earlier certiorari proceeding. The appellate process is separate from the trial process, and the trial attorney's duties end with filing the notice of appeal. Fla. R. Crim. P. 3.111(e). No court has ever (before) suggested that public defender appellate representation justifies a concurrent appointment with private counsel in the trial court.

Thus, the decision below that a trial court's order contrary to the statute governing public defenders is not a material injury affects a class of constitutional officers and this Court has jurisdiction. Art. V, § 3, Fla. Const. This Court should exercise that jurisdiction to decide if the public defenders will become adjuncts to (and piggybanks for) private counsel.

II.

THE DISTRICT COURT'S DECISION DIRECTLY CONFLICTS WITH ANOTHER DECISION HOLDING THAT A MOTION FOR REHEARING, IF THE ERROR CAN STILL BE CORRECTED, IS A TIMELY OBJECTION PRESERVING THE ISSUE FOR REVIEW.

The District Court's decision on preservation conflicts with established case law that a motion for rehearing preserves an issue for review if the trial court can still correct the error. *Bailey v. Treasure*, 462 So. 2d 537 (Fla. 4th DCA 1985), also involved petition for certiorari. *Id*. at 538. The respondent (in that case, a receiver appointed to handle the affairs of a partnership) defended against the certiorari petition by claiming that the petitioner "failed to object on that ground at the hearing." *Id*. at 539. The Fourth District held:

> Petitioner did, however, move for rehearing on this ground just a few days after the hearing, which motion was denied. This was sufficient to preserve the point for appeal, as the trial judge was provided with an early opportunity to correct the error, which is the purpose of requiring a contemporaneous objection. *Castor v. State*, 365 So. 2d 701 (Fla. 1978).

Id. at 539.

This Court's decision in *Castor*, cited in *Bailey*, teaches that: "The requirement of a contemporaneous objection is based on practical necessity and basic fairness in the operation of a judicial system. It places the trial judge on notice that error may have been committed, and provides him an opportunity to correct it at an early stage of the proceedings." *Castor*, 365 So. 2d at 703.

Thus, the test for timeliness of an objection is not whether an objection comes before or after the ruling; the test is whether an objection comes in time for the trial court to correct the error. As this Court taught:

> An objection need not always be made at the moment an examination enters impermissible areas of inquiry. . . . In the case now before us, objection was made during the impermissible line of questioning, which is sufficiently timely to have allowed the court, had it sustained the objection, to instruct the jury to disregard the testimony or to consider a motion for mistrial.

Jackson v. State, 451 So. 2d 458, 461 (Fla. 1984); *see also Bradley v. State*, 214 So. 3d 648, 654-55 (Fla. 2017) ("Although the State contends that this claim was not properly preserved by a contemporaneous objection, trial counsel objected shortly after the comment and before the witness was relieved."). This law has literally become hornbook law. Phillip J. Padovano, *Florida Appellate Practice* § 8.3, at 156 (2011-12 ed.) ("An objection may be considered timely if it is made soon enough to allow the trial court to provide a remedy.").

The need for a contemporaneous objection is most pressing in jury trials (where it may be difficult to "unring the bell"), but even in that situation an evidentiary objection four-to-five questions after the objectionable testimony was uttered preserves the issue because, given the purpose of the contemporaneous objection rule, the "objection was sufficiently timely to afford the trial court an opportunity to address the issue." *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d

182, 185 (Fla. 3d DCA 2005).

Here, the motion for rehearing was filed at a time when the trial court could have vacated the illegal appointment. Indeed, the trial court could still do so today or any time in the future. The trial court did not think the objection was untimely and it ruled on the merits. *See White v. Consol. Freightways Corp. of Delaware*, 766 So. 2d 1228, 1233 (Fla. 1st DCA 2000) ("The trial court treated the objection as timely, and ruled upon it. Thus, the purpose of the contemporaneous objection rule was satisfied.").

Under the case law of this Court and the other District Courts, the motion for rehearing was timely because it was made when the trial court could have remedied the problem and vacated the appointment. The decision below expressly and directly conflicts with *Bailey v. Treasure*, in which the method of preservation was identical to that employed here. And it conflicts with the other Florida case law holding that an objection is timely if done at a time when the trial court could have addressed and rectified the error.

CONCLUSION

This Court should grant review because the decision below affects a class of constitutional officers (public defenders) and directly conflicts with precedent on the meaning of a timely objection.

Respectfully submitted,

LAW OFFICE OF JULIANNE M. HOLT
PUBLIC DEFENDER

/s/ JULIANNE M. HOLT
Public Defender
Florida Bar No. 0323195
Thirteenth Judicial Circuit of Florida
Post Office Box 172910
Tampa, Florida 33672-0910
(813) 272-5980
appeals@pd13.state.fl.us

/s/ JENNIFER SPRADLEY
Assistant Public Defender
Florida Bar No. 0183482
Thirteenth Judicial Circuit of Florida
Post Office Box 172910
Tampa, Florida 33672-0910
(813) 272-5980
appeals@pd13.state.fl.us

CERTIFICATES

I hereby certify that a copy of this brief and appendix was electronically served through the e-filing portal to:

Counsel for the State of Florida
Caroline Johnson Levine, Assistant Attorney General
501 E. Kennedy Blvd., Suite 1100,
Tampa, Florida 33602-5242
at Caroline.johnsonlevine@myfloridalegal.com,

Counsel for Mr. Keetley,
Lyann Goudie, Esq.,
Goudie & Kohn, 3004 W. Cypress Street, Tampa, Florida 33609
at lyann@goudiekohnlaw.com

this 20th day of July 2018.

I hereby certify that this brief and appendix is printed in 14-point Times New Roman.

/s/ JULIANNE M. HOLT
Public Defender
Thirteenth Judicial Circuit

/s/ JENNIFER SPRADLEY
Assistant Public Defender
Thirteenth Judicial Circuit