IN THE SUPREME COURT OF FLORIDA

CASE NO. SC18-1171

JULIANNE HOLT,
Public Defender, Thirteenth Judicial Circuit

Petitioner,

-vs-

MICHAEL EDWARD KEETLEY, and
THE STATE OF FLORIDA

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

INITIAL BRIEF OF PETITIONER

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INTRODUCTION

Julianne Holt is the elected public defender in Tampa ("public defender") who has been appointed as co-counsel to a private attorney, Lyann Goudie, Esq. ("private attorney"), in a death penalty case. The District Court dismissed the public defender's petition for certiorari holding that the public defender was not materially injured by being ordered to act contrary to the law governing her office. That is an issue of great public importance affecting all constitutional and state officers whose authority is controlled by statute—which is to say all constitutional and state officers.

STATEMENT OF THE CASE AND FACTS

The District Court's opinion details the factual history of this case. (R.[1] 344-51); *Holt v. Keetley*, 250 So. 3d 206, 207-09 (Fla. 2d DCA 2018). That recital needs no elaboration, except in two places, as noted below. Therefore, this brief will quote that opinion and insert citations to the record appeal:

> On December 16, 2010, Keetley was indicted on two counts of murder in the first degree (premeditated) and four counts of attempted murder in the first degree. (R. 17-20). On that date, private attorney Ariel Garcia filed a notice of appearance on Keetley's behalf. (R. 23). Thereafter, the clerk determined that Keetley was indigent and appointed the Public Defender to represent him, (R. 320), but Keetley declined her services.
>
> In 2011, the State filed its notice of intent to seek the death penalty, (R. 26), and private attorney Lyann Goudie filed a notice of appearance on Keetley's behalf. (R. 27). Less than a year later, private attorney Paul Carr officially appeared on Keetley's behalf although he had been representing Keetley since December 2010. (R. 28). Attorney Garcia later withdrew, (R. 30-31), and another private attorney also came and went. (R. 29, 249).
>
> In October 2014, Attorney Goudie moved to have Keetley declared indigent for costs pursuant to section 27.52(5), Florida Statutes (2014). (R. 32-37). The trial court granted the motion. (R. 41-42). All along, Keetley's parents had been footing the bill for private counsel and had already incurred approximately $200,000 in fees with respect to Attorney Goudie and Attorney Carr. (R. 32, 38).
>
> Attorney Goudie subsequently filed an ex parte motion to appoint a third attorney as penalty-phase counsel. The

[1] In this brief, the symbol "R." followed by numerals indicates the page number in the record on appeal.

> Public Defender personally appeared at the August 19, 2015, hearing on this motion, and the Justice Administrative Commission (JAC) appeared telephonically. (R. 43-64). Although present, the Public Defender declined to comment on the motion, while the JAC generally argued in opposition to the appointment of a third attorney at state expense. (R. 43-56). The trial court orally denied the motion at the hearing. (R. 57). With respect to the appointment of the Public Defender, the court explained that its decision was "based on the plain reading of the rules and statutes relating to this that prohibit appointment when a Defendant ... is being represented by retained counsel." (R. 57).
>
> In May 2016, Keetley, through Attorney Goudie, moved for the trial court to declare Florida's amended death penalty statute unconstitutional in light of Hurst v. Florida, 136 S.Ct. 616 (2016). The trial court granted the motion, and the State sought certiorari review in this court. The Public Defender represented Keetley in that certiorari proceeding.

Id. at 207-08 (footnotes omitted; citation shortened); (R. 356-58).

Here is the first fact that requires clarification. Public Defender Holt did not represent Mr. Keetley in that proceeding. *See State v. Keetley*, 205 So. 3d 602 (Fla. 2d DCA 2016)(unpublished). Instead, he was represented by another Public Defender, Howard L. Dimming, who is the public defender for the Tenth Circuit, which is responsible for representing indigent defendants on appeal in the Second District. *Id*.; *see* § 27.51(4)(b), Fla. Stat. (2018).

The Second District's recital of the facts then continues:

> On July 8, 2016 (during the pendency of the certiorari proceeding), the trial court entered an order of substitution of counsel that relieved Attorney Carr from further

responsibility and substituted Attorney Goudie as lead counsel. (R. 65). That same day, Attorney Goudie filed a second motion to appoint penalty-phase counsel, (R. 66-72), requesting cocounsel on the grounds that it is "standard practice in death penalty cases, for a defendant to be represented by at least two lawyers" and that she did not feel that she could "prepare for both first phase motions and trial and competently and effectively prepare motions, conduct hearings and arguments on the penalty phase issues." (R. 67, 68). Attorney Goudie asserted in her motion that the JAC had informed her that the Public Defender "typically, in these situations, ... cites the Statute, the commentary[,] and case law to refuse appointment," at which point the court will "turn[ ] to JAC." (R. 69). She contended, however, that the trial court was not precluded from appointing the Public Defender to represent Keetley in the penalty phase. (R. 69-71).

At the hearing on this motion, the JAC appeared telephonically and opposed the appointment of a second attorney for the same reasons that it had previously opposed the appointment of a third and also because the death penalty seemed to be off the table in light of Hurst. The record does not indicate that anyone appeared on behalf of the Public Defender. The trial court denied the motion in light of its prior determination that the death penalty statute (as it was then effectuated) was unconstitutional. (R. 73).

In March 2017, with the death penalty apparently back on the table, *see Evans v. State*, 213 So. 3d 856 (Fla. 2017), Attorney Goudie filed a renewed motion to appoint penalty-phase counsel. (R. 74-80). The motion was substantively identical to the motion that she had filed in July 2016. Attorney Goudie served the Public Defender with this motion. (R. 80). The Public Defender, however, did not file a response to the motion, no one from her office appeared at the April 3, 2017, hearing, and no one at the hearing purported to represent her. (R. 286). The JAC appeared at the hearing telephonically and reiterated

> its objection that it lacked the statutory authority to pay for court-appointed counsel. (R. 298-99).
>
> On April 24, 2017, the trial court granted Keetley's renewed motion to appoint penalty-phase counsel and appointed the Office of the Public Defender to serve as cocounsel. (R. 82-88). In its order, the court noted that it "did not hear from the Office of the Public Defender" at the hearing, although it did conclude that "[t]he substance of the JAC's objections appl[ied] with equal force" to its appointment. (R. 83).
>
> On May 15, 2017, the Public Defender moved for reconsideration (R. 89-97), arguing, in sum, "There is no provision in Florida law that allows the appointment of the Office of the Public Defender when a defendant has retained counsel." (R. 97). At the hearing (R. 147-65)—at which an attorney from the Office of the Public Defender did appear (R. 148-57)—the trial court orally denied the motion for reconsideration. (R. 163-64). No written order was rendered. Thereafter, the Public Defender filed this petition for a writ of certiorari. (R. 4-14).

Holt v. Keetley, 250 So. 3d at 208-09; (R. 358-59).

The second factual clarification relates to this last paragraph. As the Second District's opinion states, the trial court's written order was filed April 24, 2017. (R. 82). The public defender's motion for reconsideration was filed May 15, 2017. (R. 89). That motion was heard the next day, May 16, 2017. (R. 147). At the end of the hearing, the trial court issued no new rulings, instead saying: "I am not going to vacate my order appointing the public defender. And you can seek the relief you need to seek." (R. 164). On May 24, 2017, the thirtieth day after the filing of the written order, the public defender filed a petition for certiorari from

that order. (R. 4).

The Second District denied that petition on June 20, 2018. *Holt v. Keetley*, 250 So. 3d 206 (Fla. 2d DCA 2018). After which, the public defender sought review in this Court.

On February 4, 2019, after this Court accepted jurisdiction in this case, the state announced that it was not continuing to pursue the death penalty in this case. As a result of that announcement, the trial court discharged the public defender. A copy of the written order to that effect, signed the next day, was provided to this Court in the supplemental record filed contemporaneously with this brief.

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. The decision below affects not only public defenders, but all constitutional and public officers whose duties are controlled by statute. The District Court held that such public officers can be ordered to act contrary to the governing law, and that there is no appellate relief available because there is no material injury. In other contexts, other courts have held that ordering a public official to act contrary to the statute governing their office constitutes a material injury. That is the better rule, and this Court should follow it.

Although the public defender has now been discharged, this case is not moot because it meets all three exceptions to the mootness doctrine. The question of ordering state and constitutional officers to violate the statutes governing their offices is one of great public importance. This issue will likely recur, and when it does no other District Court, even if it disagrees with the decision below, will be able to grant certiorari relief because the state-wide precedential effect of the decision below means there can be no violation of clearly established law. Finally, the statutorily-mandated costs of defense, and possible lien to secure those costs, create a collateral consequence that precludes mootness.

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 when the trial court still 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 same is true here because the motion for rehearing was filed (and denied) at a time when the trial court could have corrected its error.

Finally, the trial court's order was based on alleged violation of the right to counsel, but without any evidence to support that assertion. The law requires such evidence, and without it, the trial court's order cannot be sustained.

ARGUMENT

I.
A JUDICIAL ORDER TO A PUBLIC OFFICIAL TO ACT CONTRARY TO THE GOVERNING LAW CREATES A MATERIAL INJURY.

The District Court held that the public defender had not demonstrated material injury in this case, (R. 363), focusing only on the second of the three elements necessary for certiorari: "[T]o obtain a writ of certiorari, there must exist "(1) a departure from the essential requirements of the law, (2) resulting in material injury for the remainder of the case (3) that cannot be corrected on postjudgment appeal." *Reeves v. Fleetwood Homes of Florida, Inc.*, 889 So. 2d 812, 822 (Fla. 2004) (quoting *Bd. of Regents v. Snyder*, 826 So. 2d 382, 387 (Fla. 2d DCA 2002).

The material injury in this case is that the public defender is being ordered to act in contravention of the statute and rule governing her office. The District Court does not address this injury because its opinion jumps straight to the second element, never looking at the departure from the essential requirements of law. (R. 362-63). Such a departure occurs "when there has been a violation of a clearly established principle of law resulting in a miscarriage of justice." *Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889 (Fla. 2003). "'[C]learly established law' can derive from a variety of legal sources, including recent controlling case law, rules of court, statutes, and constitutional law." *Id.* at 890.

In this case, the trial court's order departed from three of the four: statute, rule and case law. The governing statute is clear that a public defender cannot accept appointment on a case if private counsel 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. (2018). The governing rule echoes that restriction:

> 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). Finally, 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*). Thus, the trial court's order departed from clearly established law.[2]

[2] As to the third prong, the public defender would have no remedy for this illegal appointment in any direct appeal should Mr. Keetley be convicted. The public defender is an attorney in, not a party to, the criminal case and can raise no issues in the direct appeal. Therefore, the departure from clearly established law cannot be remedied through the normal appellate process. *See, e.g.*, *Dep't of Children & Family Services v. Ramos*, 82 So. 3d 1121, 1124 (Fla. 2d DCA 2012) ("because the Department is not a party to the criminal proceeding, it cannot seek a remedy on direct appeal.").

The trial court's order would require the public defender to expend her office's resources to represent Mr. Keetley in contravention of this governing law. Such an order necessarily results in a material injury to a public official. As the Fourth District explained in another case where the Department of Children and Families ("DCF") was ordered to accept commitment of someone contrary to the governing statutes:

> DCF suffered material injury because Defendant's commitment interfered with DCF's responsibility to expend its appropriated funds in accordance with the laws governing DCF.

Dep't of Children & Families v. Lotton, 172 So. 3d 983, 988 (Fla. 5th DCA 2015); *Dep't of Children & Family Services v. Amaya*, 10 So. 3d 152, 154 (Fla. 4th DCA 2009) ("Certiorari jurisdiction lies to review DCF's claim that the trial court has acted in excess of its jurisdiction by ordering DCF to undertake responsibilities beyond what is required by statute.").

The same rationale applies here because "[t]he 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 decision on review directly conflicts with *Lotton*.

The trial court's order also violates clearly established law in another way that causes a different material injury. Under the trial court's order, the private

attorney is still lead counsel; the public defender was appointed to work on the penalty phase issues, the traditional role of co-counsel. The system of appointing two attorneys to death penalty cases originated with the ABA minimum standards. *See* I*n re Amendment to Florida Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610, 612 (Fla. 1999) (quoting Commission on Legislative Reform of Judicial Administration). The ABA standards envision that "lead counsel bears the overall responsibility for the performance of the team, and should allocate, direct, and supervise its work in accordance with these Guidelines and professional standards." American Bar Association, Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, 31 Hofstra L. Rev. 913, 999 (2003).[3] Additionally, "lead counsel may delegate to other members of the defense team duties imposed by these guidelines" unless the guidelines otherwise make them nondelegable. *Id*. As such, the trial court's order makes the public defender the junior partner to private counsel.

The Rules of Procedure, however, are clear that if a public defender is appointed in a capital case, the public defender has the authority to designate both the lead and co-counsel:

> In capital cases in which the Public Defender or Criminal

[3] Available at: https://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_representation/2003guidelines.authcheckdam.pdf (last visited February 5, 2019).

> Conflict and Civil Regional Counsel is appointed, the Public Defender or Criminal Conflict and Civil Regional Counsel shall designate lead and co-counsel.

Id. The trial court's order violates this clearly established law by appointing the public defender but leaving the private attorney as lead counsel. *Cf. In re Certification of Conflict in Motions to Withdraw*, 636 So. 2d 18, 22 (Fla. 1994) ("We note that the court did not attempt to interfere in the management of the Public Defender's office, or attempt to instruct the Public Defender on how best to conduct his affairs."). This Court has "acknowledge[d] the public defender's argument that the courts should not involve themselves in the management of public defender offices." *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991). This diminution of public defender authority is another material injury. *See Dep't of Children and Families v. Statewide Guardian Ad Litem Program*, 186 So. 3d 1084, 1988-92 (Fla. 1st DCA 2016) (court caused material injury by invading DCF's authority to select adoptive families); *Florida Dep't of Children & Families v. State*, 923 So. 2d 1290, 1291 (Fla. 3d DCA 2006) (granting certiorari when court limited DCF's authority to place defendant in facility of its choosing).

The District Court's reasons for reaching the opposite conclusion are puzzling. First, the District Court noted that the public defender "was initially appointed to represent the indigent Keetley." (R. 350). That initial appointment of the public defender to represent Mr. Keetley is immaterial because 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. § 27.52(5)(h), Fla. Stat. (2018); Fla. R. Crim. P. 3.112(e).

Second, the District Court claims that public defender Holt "has previously represented him in his certiorari petition to this court." (R. 350). The District Court's facts are incorrect—Mr. Keetley was previously represented by another public defender with appellate responsibilities. *See State v. Keetley*, 205 So. 3d 602 (Fla. 2d DCA 2016)(unpublished). 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. Defendants (or more often, their families) often hire private counsel at the trial level, only to run out of money and seek representation by the public defender on appeal. It would be a significant (and expensive) change in Florida law if that eventual appellate public defender representation allowed the appointment of a trial court public defender to assist private trial counsel.

Third, the District Court observed that the public defender "does not dispute the she routinely assigns two attorneys to represent an indigent defendant facing the

death penalty, while here she has been ordered to assign only one," citing *Spaziano v. Seminole County*, 726 So. 2d 772 (Fla. 1999). This is as close as the District Court came to addressing the violation of the governing statute and rule, but *Spaziano* is both different on crucial facts and predates the governing statute and rule.

The facts of *Spaziano* were unique by this Court's own admission:

> We also find that the trial judge properly exercised his discretion under section 27.53(3), Florida Statutes (1997), in appointing a private attorney to serve as co-counsel at public expense in this unusual and complex case. We note that the co-counsel appointed by the trial judge has, at the time of this action, worked more than 200 hours in this case under the authority of the initial order of appointment. To accept Seminole County's challenge would have raised a constitutional question concerning the right to counsel where, by government action, a defendant is required to change counsel at this stage of the proceedings. We also note that this case is unique because Spaziano's counsel is a volunteer and the government is not responsible for his compensation. Even with our holding today the government is having to provide compensation for only one counsel. Irrespective of these considerations, we find that the trial judge was clearly within his discretionary authority to appoint co-counsel at public expense.

Spaziano, 726 So. 2d at 774 (citations omitted). Even if *Spaziano* is not limited to its facts (as suggested by this Court's use of the words "unusual" and "unique"), there are two crucial factual differences from Mr. Keetley's situation. First, the attorney representing Mr. Spaziano was a volunteer. Hence, Mr. Spaziano was not "represented by <u>retained</u> counsel" under the language of the Rule. The private attorney in this case is not a volunteer and has been paid a substantial fee. (R. 32,

38). Second, the attorney appointed in *Spaziano* was not a public defender, and therefore the portion of the rule giving public defenders or regional counsel the authority to designate lead and co-counsel also does not apply.

Moreover, both the governing rule and statute came into being after this Court's opinion in *Spaziano*, which is why that opinion does not discuss them. Section 27.52(5)(h), Florida Statutes, was first enacted in 2010. Ch. 2010-162, Laws of Fla., §8. Rule 3.112 was first promulgated by this Court in October 1999, ten months after the *Spaziano* decision, and only became "effective and appl[ied] to the appointment of counsel made after July 1, 2000." *In re Amendment to Fla. Rules of Criminal Procedure-Rule 3.112 Minimum Standards for Attorneys in Capital Cases*, 759 So. 2d 610, 614 (Fla. 1999). Thus, even if Mr. Spaziano's attorney had not been a volunteer, and the attorney appointed had been a public defender, the Rule would have no impact on the appointment made before that date.

Without *Spaziano*, the District Court's rationale makes little sense. 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 being forced to be the junior partner to (and alternative funding source for) a private attorney.

A public defender is a constitutional officer. *Johnson v. State*, 78 So. 3d 1305, 1309 (Fla. 2012). The question in this case—whether a public officer ordered to act contrary to the law governing that person's office is a material injury—affects all such constitutional and state officers, not just public defenders. The District Court's decision would allow any of the hundreds of Circuit Court judges to order public officials to act contrary to the law governing their office without any remedy. That position is an anathema to the rule of law.

The District Court's decision also directly conflicts with *Lotton*'s holding that public officials being forced to expend resources contrary to their governing statute is a material injury. This Court should exercise its jurisdiction to reverse the opinion below and adopt the reasoning of *Lotton* instead.

II.
THIS CASE IS NOT MOOT BECAUSE ALL THREE EXCEPTIONS TO THE MOOTNESS DOCTRINE APPLY IN THIS CASE.

The trial court has now discharged the public defender due to the state's subsequent decision to waive the death penalty. That development does not alter the fact that the Second District's opinion is now binding law in Florida that a public defender suffers no material injury by being ordered to act contrary to the statutes controlling her office. That law is binding on every trial court in Florida. *Pardo v. State*, 596 So. 2d 665, 666 (Fla. 1992).

The only review from such an order is by certiorari. As noted above, certiorari requires a departure from "a clearly established principle of law." *Reeves* 889 So. 2d at 822. The continuing judicial education and continuing legal education courses involving death penalty cases will ensure that even jurists and practitioners who do not rigorously read the Florida Law Weekly will know that public defenders can be appointed as second chair in death penalty cases,. Given the work and expense of defending a capital case, many private attorneys would like to draw on the resources and experience of the public defenders' offices. It is only a matter of time before another trial court copies the procedure utilized in this case.

When that happens, no other District Court, even if it disagrees with the Second District, can hold that the trial court departed from "clearly established law" because of the binding precedent created by the decision on review here. The result

is, that unless this Court reverses the Second District in this case, that opinion will become binding law in Florida and there can be no conflict for later review by this Court.

There are two well-known exceptions to mootness, and both apply here. First, the question in this case is of great public importance because of its impact on all constitutional and state officers whose duties are controlled by statute. Second, the question in this case is likely to recur. "It is well settled that mootness does not destroy an appellate court's jurisdiction, however, when the questions raised are of great public importance or are likely to recur." *Holly v. Auld*, 450 So. 2d 217, 218 (Fla. 1984); *see also Banks v. Jones*, 232 So. 3d 963, 965 (Fla. 2017) (collecting citations).

A third, lesser-known exception to mootness is if there are collateral consequences. The leading case on this exception is *Godwin v. State*, 593 So. 2d 211 (Fla. 1992), where this Court held that the mere possibility of a future lien to pay for services rendered (in that case, for a Baker Act hospitalization) was sufficient to avoid mootness. *Id*. at 212-14.

In this case, if Mr. Keetley is convicted (of anything, including lesser offenses, even misdemeanors) and the appointment of the public defender was valid, Mr. Keetley will be subject to mandatory imposition of the costs of defense pursuant to section 938.29, Florida Statutes. By statute, those costs are at least $100 in a case

with a felony charge, although in this case they would be higher "upon a showing of sufficient proof of higher fees or costs incurred." § 938.29(1)(a), Fla. Stat. (2018). That judgment then becomes a lien against Mr. Keetley. § 938.30(6), (8), Fla. Stat. (2018). As in *Godwin*, there is no practical way to litigate the issue of the validity of this appointment after the lien is imposed—it must be done now. 593 So. 2d at 214. A $100 lien (or probably more) is not much in the course of a murder case, but it is enough to avoid this case becoming moot.

Because all three exceptions to the mootness doctrine apply, this Court has jurisdiction to decide this case.

III.
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 explained:

> 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."); *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 185 (Fla. 3d DCA 2005) (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."). This case law has 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.").

Here, the motion for rehearing was filed at a time when the trial court could have vacated the illegal appointment. 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.

IV.
NO COMPETENT AND SUBSTANTIAL EVIDENCE SUPPORTS THE CLAIM THAT MR. KEETLEY'S CONSTITUTIONAL RIGHTS ARE BEING VIOLATED.

In the District Court below, Mr. Keetley did not mention any preservation or material injury issues, instead defending the trial court's order by claiming a constitutional violation of the right to counsel. (R. 249-63). The District Court silence suggests this issue lacks merit. Nevertheless, because that rationale undergirded the trial court's order, this brief will discuss this issue as well.

The trial court's order is premised on the claim Mr. Keetley's Sixth Amendment right to effective assistance of counsel is being violated. (R. 84-89). Although tellingly not cited, the trial court's position is almost identical to the prevailing position in *Mass v. Olive*, 992 So. 2d 196 (Fla. 2008), arising out of "fee cap" litigation addressing remuneration of postconviction attorneys in death penalty cases. A prior decision, *Olive v. Mass*, 811 So. 2d 644 (Fla. 2002), held that the statute allowed trial courts to exceed fee caps "where extraordinary or unusual circumstances exist in capital collateral cases." *Id*. at 654. The Legislature then amended the statute to make clear its intent that attorneys' fees were never to exceed the fee caps. *Mass*, 992 So. 2d at 200. While conceding that "this may have been the Legislature's intent," this Court held that such an "interpretation of the statute would render it unconstitutional" and therefore, as an

exercise of the court's inherent authority, the new statute must be similarly interpreted to allow fees in excess of the cap. *Id*. at 203-04.

The reason *Mass* was not cited was because this Court's opinion contains an important caveat: "In fact, only in those cases where counsel requests additional compensation due to extraordinary and unusual circumstances, the trial court issues an order awarding such fees, *and* there is competent, substantial evidence in the record to support fees in excess of the statutory limit will the statutory caps not apply." *Id*. at 204 (italics in original). The evidence should not go to whether the attorney can make a profit, or even cover expenses. *Sheppard & White, P.A. v. City of Jacksonville*, 827 So. 2d 925, 931 (Fla. 2002). Rather, the evidence should address whether the defendant was deprived of constitutionally adequate representation. *Id*.

This requirement of competent, substantial evidence on the record is also not new. The ethical conflicts allegedly faced by private counsel in this case are the same ethical conflicts public defenders face with excessive workloads—too much work results in ineffective assistance. When public defenders seek to withdraw in those situations, the courts require proof at an evidentiary hearing. *See In re Certification*, 636 So. 2d 18, 21-22 (Fla. 1994) (upholding the district court's decision to require an evidentiary hearing). As this Court taught: "[W]e do not believe the courts are obligated to permit the withdrawal automatically upon

the filing of a certificate by the public defender reflecting a backlog in the prosecution of appeals." *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991). Indeed, an attorney claiming excessive workload "bears a heavy burden to demonstrate that she and her staff are unable to provide that representation . . ." *Day v. State*, 570 So. 2d 1003, 1004 (Fla. 1st DCA 1990).

Such evidence was the deciding factor in the most recent case, *Public Defender v. State*, 115 So. 3d 261 (Fla. 2013) ("While we cannot succinctly recount the lengthy records in these two cases, we are struck by the breadth and depth of the evidence of how the excessive caseload has impacted the Public Defender's representation of indigent defendants.) (footnote omitted). In other cases, the lack of such evidence renders the trial court's order without support:

> While an attorney assigned to represent a death row inmate for the first time at the federal appeal stage may face extraordinary or unusual circumstances requiring many hours of work to justify payment in excess of the statutory limits, the attorney has the burden of establishing facts in support of such an award. The record in this case, however, provides no evidence upon which the judge could rely to determine if extraordinary or unusual circumstances existed to support an award of excess fees. . . . . While the transcript of the hearing includes arguments of counsel, no sworn testimony was presented. . . . .
> Because there is no competent, substantial evidence in the record to support an award of fees in excess of the statutory amounts, we remand this case to the trial court for an evidentiary hearing on this issue.

Florida Dept. of Fin. Services v. Freeman, 921 So. 2d 598, 601-02 (Fla. 2006).

Here, the private attorney made representations and argument, but presented no evidence. (R. 158-63, 300-02). Accordingly, the trial court made no findings, and could not have done so, because such findings would not have been supported by competent, substantial evidence. Therefore, there is no evidence to support the theory of the trial court that it is necessary to go beyond the plain language of the statute to protect Mr. Keetley's Sixth Amendment rights.

The District Court could not, and therefore did not, uphold the trial court's order on this basis, and this Court should not do so either.

CONCLUSION

The District Court's opinion holds that public officials have no remedy from an order to act in contravention of governing law because such an order does not result in a material injury. The better view, expressed in *Lotton* and other cases, is that public officials being ordered to expend funds to comply with such an order have suffered a material injury. To remove that conflict, and because this issue is of great public importance, affecting all constitutional and state officers, and is likely to recurr, this Court should exercise its jurisdiction and reverse the decision below.

Respectfully submitted,

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CERTIFICATES

I HEREBY CERTIFY that a true and correct copy of this brief was served through electronic portal on 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, and Counsel for Mr Keetley, Lyann Goudie, Esq., 3004 W. Cypress Street, Tampa, Florida 33609, at lyann@goudiekohnlaw.com on this eighth day of February 2019.

I HEREBY CERTIFY that this brief is printed in 14-point Times New Roman.

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