SC18-1171

In the Supreme Court of Florida

JULIANNE HOLT, PUBLIC DEFENDER, THIRTEENTH JUDICIAL CIRCUIT,

Petitioner,

v.

MICHAEL EDWARD KEETLEY, AND THE STATE OF FLORIDA,

Respondents.

RESPONDENT STATE OF FLORIDA'S ANSWER BRIEF

ON DISCRETIONARY REVIEW FROM THE
THIRD DISTRICT COURT OF APPEAL
Case No. 2D17-2157

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SUMMARY OF ARGUMENT

Respondent State of Florida agrees with Petitioner on the two threshold issues in this appeal. The discharge of the public defender does not moot this case because it presents an issue of great public importance that will likely recur, and because the potential imposition of a lien for the costs of his defense means that Keetley has a live stake in this appeal even though the State no longer seeks the death penalty. Moreover, Petitioner's arguments were properly preserved for appellate review because those arguments were both raised and considered below.

The State also agrees that the public defender's appointment as second-chair to privately retained counsel constitutes a material injury for the purposes of certiorari jurisdiction. The appointment materially injured Petitioner by wresting control of the representation from her while allowing privately retained counsel to commandeer her personnel and resources. Allowing such appointments in death-penalty cases would significantly expand the duties and increase the expenditures of public defenders throughout Florida.

The Court need not, however, consider the appointment's legality to resolve this case. Instead, the Court should reverse the Second District's holding regarding material injury and remand for the Second District to consider the other predicates for certiorari jurisdiction in the first instance. For the same reason, the Court need not consider whether Keetley's rights were being violated absent the appointment.

STANDARD OF REVIEW

Whether a district court of appeal has certiorari jurisdiction is a pure question of law that this Court reviews de novo. *E.g.*, *Bd. of Trs. of Internal Improvement Tr. Fund v. Am. Educ. Enters., LLC*, 99 So. 3d 450, 456 (Fla. 2012).

ARGUMENT

I. THIS CASE IS NOT MOOT.

Respondent State of Florida agrees with Petitioner that the State's decision not to seek the death penalty, and the resulting discharge of Petitioner as penalty-phase co-counsel, does not moot this case, for three reasons.

A. This case is not moot because it presents an issue of great public importance.

"It is well settled that mootness does not destroy an appellate court's jurisdiction . . . when the questions raised are of great public importance or are likely to recur." *Holly v. Auld*, 450 So. 2d 217, 218 n.1 (Fla. 1984); *see also Banks v. Jones*, 232 So. 3d 963, 965 (Fla. 2017) (collecting citations). The question in this case is of great public importance because, as explained below, if left standing, the Second District's decision will impose significant costs on public defenders throughout the State while simultaneously displacing their authority to manage and direct the representations of defendants in death penalty cases. *See also* Pet. Br. 11-17.

B. This case is not moot because the question is likely to recur.

The issue presented in this case (whether a trial court may appoint a public defender as second-chair to privately retained counsel in death-penalty cases) is also likely to recur. As Petitioner points out, defendants represented by private counsel in death-penalty cases would be well-advised to seek the appointment of a public defender as second-chair to reduce the costs of their defense. Pet. Br. 17. And as Petitioner notes, public defenders appointed in such circumstances will be unable to obtain a writ of certiorari in light of the decision below, which clearly establishes statewide the principle of law that a public defender suffers no material injury by such appointment. Pet. Br. 18-19. In other words, "the district court's incorrect resolution of the question will only cause more problems in the future." *Holly*, 450 So. 2d at 218 n.1.

C. This case is not moot because collateral consequences may flow from the public defender's appointment.

If Keetley is convicted, or if the public defender's appointment is determined to be valid (either because this Court refuses to decide the question, letting the appointment order stand; or because the Court reaches the issue and decides that the appointment was valid), Keetley will be required to pay the costs of defense, which will be reduced to a lien against him. *See* §§ 938.29, 938.30, Fla. Stat.; Pet. Br. at 19-20. On the other hand, if Keetley is acquitted or if this Court concludes that the

public defender's appointment was invalid, he will not be required to pay the costs of defense. Thus, he maintains a live stake in this appeal.

Indeed, the mere possibility that Keetley will be subject to a lien based on the public defender's appointment means that this case is not moot because "collateral legal consequences that affect the rights of a party flow from the issue to be determined." *Godwin v. State*, 593 So. 2d 211, 212 (Fla. 1992). In *Godwin*, the collateral legal consequence at issue—a lien, as here—was likewise only a "possibility." *Id.* at 214. And as in *Godwin*, the lienholder has not indicated any intent to waive the imposition of the lien. *Id.* Thus, like *Godwin*, this proceeding is not moot because of the collateral legal consequences at stake.

II. PETITIONER'S ARGUMENTS WERE PRESERVED BELOW.

The Second District correctly determined that the order on certiorari review is the April 24, 2017 order granting Keetley's renewed motion to appoint penalty-phase counsel, not the order denying Petitioner's motion for reconsideration. But the Second District incorrectly determined that the arguments in Petitioner's motion for reconsideration were not properly before the court.

It is true that "a petitioner cannot raise in a petition for writ of certiorari a ground that was not raised below." *Firstservice Residential Fla., Inc. v. Rodriguez*, 261 So. 3d 674, 676 (Fla. 5th DCA 2018), *reh'g denied* (Jan. 15, 2019). Yet here, Petitioner raised in her petition grounds that *were* raised below, in her motion for

reconsideration. Although Petitioner did not file a response to Attorney Goudie's renewed motion to appoint penalty-phase counsel, and although neither Petitioner nor anyone representing Petitioner appeared at the April 3, 2017 hearing on the motion, Petitioner moved for reconsideration and raised the arguments she raised in her petition for certiorari after the motion was granted and Petitioner was appointed to serve as co-counsel. In denying the motion for reconsideration, the trial court considered and rejected those arguments. Thus, those arguments were properly preserved for appellate review.

The cases on which the Second District relied in reaching the opposite conclusion do not counsel otherwise. Indeed, the arguments precluded on appeal in those cases were not raised below in any of them.

· In *Sarasota Renaissance II, Ltd. Partnership v. Batson Cook Co.*, 117 So. 3d 1184, 1189 (Fla. 2d DCA 2013), a party not only failed to object to a motion to drop it as a party but also "urged" the trial court to enter an order to that effect. The Second District therefore refused to allow that party to argue the opposite on appeal (that the party should not have been dropped as a party).

· In *First Call Ventures, LLC v. Nationwide Relocation Services, Inc.*, 127 So. 3d 691, 693 (Fla. 4th DCA 2013), a trial court ordered the production of confidential documents "subject to a confidentiality order." In petitioning for certiorari, the producing party argued that the court should have inspected the

documents in camera before ordering production; the Fourth District noted that the party did not request an in camera inspection below at all.

· In *Leonhardt v. Masters*, 679 So. 2d 73, 74 (Fla. 4th DCA 1996), the petitioner was ordered to produce documents and argued that they were privileged. But because the petitioner raised privilege "for the first time on appeal," the Fourth District denied the petition for certiorari.

· And in *Johnson v. State*, 348 So. 2d 646, 647 (Fla. 3d DCA 1977), a criminal defendant did not expressly adopt his co-defendant's objection below; the Third District therefore concluded that he had waived that objection.

Thus, in the cases cited by the Second District below, district courts of appeal refused to allow parties to (1) argue the opposite of what they argued below; (2) request an in camera examination not requested below; (3) assert privilege for the first time on appeal; or (4) advance an objection not joined at trial.

Here, by contrast, Petitioner expressly raised below—and the trial court considered and rejected—the arguments that the Second District refused to consider. As Petitioner points out, moreover, the purpose of requiring arguments to have been raised below is to allow the trial court an opportunity to consider and address those arguments in the first instance, potentially precluding an appeal. Pet. Br. 22-23. The trial court had that opportunity here; in other words, the Second District was simply incorrect that the "Public Defender" was "rais[ing] . . . arguments . . . for the first

time in this proceeding." *Holt for Thirteenth Judicial Circuit, Hillsborough Cty. v. Keetley*, 250 So. 3d 206, 209 (Fla. 2d DCA 2018). Thus, just as Petitioner's arguments were properly before the Second District, they are properly before this Court.

III. THE TRIAL COURT'S ORDER RESULTED IN MATERIAL INJURY TO PETITIONER.

The Second District erroneously concluded that Petitioner "failed to explain, let alone establish, how she will suffer a material injury." *Holt*, 250 So. 3d at 210. Respondent agrees that Petitioner's appointment as penalty-phase co-counsel to privately retained counsel did indeed result in a material injury sufficient to invoke the Second District's certiorari jurisdiction.

1. Requiring Petitioner to serve as penalty-phase co-counsel to privately retained lead counsel constitutes a material injury. As Petitioner explains, when the public defender is appointed to death penalty cases, she is entitled to control the representation by designating lead counsel. *See* Fla. R. Crim. P. 3.112(e). By allowing Keetley's privately retained counsel to continue serving as lead counsel, the trial court displaced Petitioner's authority over the representation.

What is more, the trial court's order materially injured Petitioner by commandeering her personnel and resources. As lead counsel, Keetley's privately retained counsel was entitled to direct and supervise co-counsel, usurping

Petitioner's authority to manage and direct her own personnel and to conduct the representation as she saw fit. And appointing public defenders as co-counsel in death-penalty cases where defendants have privately retained co-counsel would significantly expand the duties (and increase the expenditures) of public defenders throughout Florida—all while displacing their authority.

2. Although Petitioner argues at length that the material injury here "is that the public defender is being ordered to act in contravention of the statute and rule governing her office," the Court need not and should not reach that issue to resolve this case. Pet. Br. 9. The Second District did not address the first element necessary for certiorari—whether the trial court departed from the essential requirements of the law—and so never analyzed whether the appointment contravened the law. This Court should conclude that, for the reasons established above, the appointment here constituted a "material injury," and remand for the Second District to address the legality of the appointment in the first instance.

3. None of the reasons the Second District set forth in concluding that Petitioner did not establish material injury are persuasive.

To begin with, as Petitioner points out, the initial appointment of the public defender is irrelevant because Keetley declined it; moreover, that appointment would not have resulted in the public defender serving in a subordinate role. Pet. Br. 13-14. Likewise, the appointment of another public defender as appellate counsel in

an earlier stage of this case is irrelevant: that public defender was lead (and sole) counsel on appeal. Pet. Br. 14.

Although the public defender "routinely assigns two attorneys to represent an indigent defendant facing the death penalty," and "here she has been ordered to assign only one," *Holt*, 250 So. 3d at 210, when the public defender assigns two attorneys to represent an indigent defendant facing the death penalty, one of those attorneys is lead counsel. Thus, in those circumstances, Petitioner is not deprived of her authority to control the representation and her own personnel and resources.

Next, the Second District relied on *Spaziano v. Seminole County*, 726 So. 2d 772, 774 (Fla. 1999), but that case stands only for the proposition that the trial court has inherent authority to appoint co-counsel and require the State to reimburse that counsel in the unique circumstances present there—not for the proposition that a trial court can require a public defender to serve as co-counsel to privately retained counsel in a death penalty case.

The Second District also faulted Petitioner for not objecting to the appointment "until after she had been appointed." *Holt*, 250 So. 3d at 210. To the extent the belated nature of her objection sheds any light on Petitioner's perception of the materiality of her injury, Petitioner's continued pursuit of this appeal should dispel any notion that Petitioner does not consider the injury to be sufficiently material.

IV. THE COURT SHOULD NOT ADDRESS THE MERITS OF THE PETITION FOR CERTIORARI.

Petitioner also contends that the evidence does not support the trial court's conclusion that absent the public defender's appointment, Keetley's constitutional rights were being violated. Pet. Br. 24-27. Instead of considering that issue, however, this Court should reverse and remand to the Second District. The Second District did not reach the merits of the petition for certiorari because it erroneously concluded that Petitioner failed to properly preserve her arguments below and that Petitioner failed to establish a material injury. On remand, the Second District can consider in the first instance whether the trial court departed from the essential requirements of the law in appointing Petitioner as penalty-phase co-counsel.

CONCLUSION

For the foregoing reasons, this Court should reverse the Second District's holding that Petitioner failed to establish a material injury and remand for that court to consider whether Petitioner met the other elements of certiorari review.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing brief has been furnished by electronic service through the Florida Courts E-Filing Portal on this 19th day of March, 2019, to the following:

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I certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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