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

REPLY BRIEF OF PETITIONER

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INTRODUCTORY NOTE

References to the record on appeal will be abbreviated as "R." Citations in quotations from case law have been modified to comport with Florida Rule of Appellate Procedure 9.800. Punctuation in quotations from transcripts has been modified to conform to standard English.

SUMMARY OF THE ARGUMENT

Because the state's answer brief is largely supportive of Public Defender Holt's ("public defender") position, this reply will largely focus on the arguments in Mr. Keetley's amended answer brief.

Neither the state nor Mr. Keetley contest that the governing law does not allow the appointment of a public defender as co-counsel in a case where the defendant is already represented by private counsel. Ordering a public official to act contrary to the law governing her office is a material injury. That conclusion necessarily implies a violation of the essential requirements of law, and therefore a remand on that question would be pointless and redundant.

Mr. Keetley's brief does not address this central issue but instead numerous meritless arguments that distract from it: certiorari has long been used to challenge interlocutory orders concerning who is counsel in a case, the public defender in this case never represented Mr. Keetley in the state's earlier certiorari because she is not an appellate public defender, and an alternative holding is not

dicta. That last point also defeats Mr. Keetley's claim that this case is moot. Finally, the record does not support the multitude of allegations that the issues in this case were not preserved below.

Amidst this distraction, the public defender asks this Court to focus on three points. First, the trial court's order was contrary to the law governing her office. Second, being ordered to act contrary to that governing law is a material injury to a public official. And third, if this Court does not reverse, the Second District's opinion will become binding law in Florida that the other District Courts will not be able to create conflict with for later review.

STATEMENT OF FACTS

One factual issue needs to be addressed: Mr. Keetley suggests that in 2016, Public Defender Holt (Thirteenth Circuit) accepted an appointment to represent Mr. Keetley in a previous state petition for certiorari after *Hurst v. Florida*, 136 S.Ct. 616 (2016). Mr. Keetley claims that "[a]fter the PD Office accepted the appointment, it transferred responsibility for representation to the Office of the Public Defender for the Tenth Circuit." (Keetley Br. 5). The order Mr. Keetley cites for this proposition, which accompanies his brief with a motion to supplement the record, states that the trial court is appointing "the Office of the Public Defender" without specifying which public defender: Public Defender Holt in the Thirteenth Circuit, or Public Defender Dimming in the Tenth Circuit.

ARGUMENT

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

Neither the state nor Mr. Keetley dispute that the appointment of the public defender violated the law governing the public defender, specifically section 27.52(5)(h), Florida Statutes, and Florida Rule of Criminal Procedure 3.112(e). The state suggests that this Court reverse on the material injury point while remanding for the District Court to determine whether there was a departure from the essential requirements of law. (State's Br. at 8, 10). While that sentiment may be understandable in the abstract, it makes little sense in the context of this case.

Ordering a public official to act contrary to the law controlling her office satisfies both certiorari elements simultaneously. A public official being ordered to act in contravention of the governing law is a material injury, as held in *Department of Children & Families v. Lotton*, 172 So. 3d 983, 988 (Fla. 5th DCA 2015). And not following the governing statute, rule, and precedent is also a departure from the essential requirements of law because "'applied the correct law' is synonymous with 'observing the essential requirements of law.'" *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 530 (Fla. 1995); *see Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 889, 890 (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."). In this case, once this Court decides the material injury issue, that decision necessarily entails a decision on the essential requirements of law element, and a remand on that point would be redundant and unnecessary.

Mr. Keetley's brief takes a different tack and argues that a party's cost of litigation is not a material injury, citing *Rodriguez v. Miami-Dade County*, 117 So. 3d 400 (Fla. 2013). (Keetley Br. at 18). *Rodriguez* relied on an earlier decision from this Court that taught:

> [T]o establish the type of irreparable harm necessary in order to permit certiorari review, a party cannot simply claim that continuation of the lawsuit would damage one's reputation or result in needless litigation costs. To hold otherwise would mean that review of every non-final order could be sought through a petition for writ of certiorari.
> . . . .
> [E]quating the defense of a lawsuit with the type of irreparable harm necessary for the threshold decision to invoke certiorari has the potential to eviscerate any limitations on the use of this common law writ."

Citizens Prop. Ins. Corp. v. San Perdido Ass'n, Inc., 104 So. 3d 344, 353, 356 (Fla. 2012).

The public defender is not a party; she is a public official and an attorney (illegally) in the underlying criminal case. And the issue is not cost of litigation but control over her public office. It is a rare occurrence for a trial court to order a public official to act contrary to the governing law. Moreover, certiorari has long been used to adjudicate interlocutory orders removing (or not) an attorney from a case. *See,*

e.g., *Furman v. Furman* 233 So. 3d 1280, 1281 (Fla. 2d DCA 2018); *Evert Firm, LLC v. Augustin*, 985 So. 2d 1174, 1175 (Fla. 3d DCA 2008); *Whitener v. First Union Nat. Bank*, 901 So. 2d 366, 369 (Fla. 5th DCA 2005) ("orders disqualifying or refusing to disqualify counsel are generally reviewable by certiorari."). Unlike *Citizens Property* or *Rodriguez*, this case is well within the bounds of traditional certiorari, and would not open this writ to review of all interlocutory orders.

Mr. Keetley's brief argues only one of the three reasons the district court gave for holding there was no material injury: the representation of Mr. Keetley during the state's earlier certiorari petition involving *Hurst* and the constitutionality of the death penalty. (Keetley Br. at 15). That argument, however, misunderstands the statute governing public defender appointments. The order shows that the trial court appointed only the "public defender" without specifying which one. (Keetley Supp. R.). That is because the statute allows only certain public defenders to be appointed for representation in appellate courts, namely the public defenders for the Second, Tenth, Eleventh, Fifteenth and Seventh Circuits, corresponding to the five District Courts. § 27.51(4), Fla. Stat. (2018). Pursuant to that statute, the trial court in this case could not have appointed Public Defender Holt (Thirteenth Circuit) to an appeal, nor could she have accepted and "transferred" that appointment—there is no statutory authority for either action. The appointment was to the only public defender who could have accepted: Public Defender Dimmig of the Tenth Circuit,

who actually did represent Mr. Keetley. *State v. Keetley*, 205 So. 3d 602, 602 (Fla. 2d DCA 2016). That same statute separates trial court appointments from appellate court appointments for public defenders. *Compare* § 27.51(1), Fla. Stat. (2018) (trial court appointments) *with* § 27.51(4), Fla. Stat. (2018) (appellate court appointments). Mr. Keetley's attorney never claims she represented him in the certiorari petition. Thus, until the order in question here, neither Public Defender Holt nor Dimmig were appointed as co-counsel to a private attorney.

Finally, Mr. Keetley also claims (Keetley Br. at 11) that the Second District's holding on lack of material injury is dicta because the Second District phrased that holding in the alternative: "Even if we were to consider the merits of the Public Defender's arguments . . . ." (R. 349). Mr. Keetley relies on this claim for both his jurisdictional argument on affecting a class of constitutional officers, (Keetley Br. at 11) and his argument on the exception to mootness for issues of great public importance. (Keetley Br. at 16-17).

Florida law is clear that alternative holdings are not dicta:

> A ruling in a case fully considered and decided by an appellate court is not dictum merely because it was not necessary, on account of one conclusion reached upon one question, to consider another question the decision of which would have controlled the judgment.
>
> Two or more questions properly arising in a case under the pleadings and proof may be determined, even though either one would dispose of the entire case upon its merits, and neither holding is a dictum, so long as it is properly

raised, considered, and determined.

Parsons v. Fed. Realty Corp., 105 Fla. 105, 126 (1931); *see also Clemons v. Flagler Hosp., Inc.*, 385 So. 2d 1134, 1136 (Fla. 5th DCA 1980) ("[W]here a decision rests on two or more grounds, none can be relegated to the category of obiter dictum.") (quoting *Woods v. Interstate Realty Co.*, 337 U.S. 535 (1949), alteration in original); *Sturdivant v. State*, 84 So. 3d 1053, 1060 (Fla. 1st DCA 2010) (collecting cases).

The Second District issued a holding determining the materiality issue (R. 349-40), and regrettably, for the reasons stated in the initial brief (Initial Br. at 18-19; *see* State's Br. at 3), that holding on lack of material injury is precedent and will forever control Florida law unless this Court reverses.

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

As noted above, Mr. Keetley's argument on mootness relies on the above misconception that alternative holdings create only dicta. (Keetley Br. at 17). Mr. Keetley's brief does not dispute that, if it is not dicta, the question of whether ordering a public official to act contrary to the law governing her office creates a material injury is a question of great public importance. Nor does Mr. Keetley dispute that this issue is likely to recur.

This Court often accepts jurisdiction to decide questions of great public importance because they govern the actions of multiple public officials. *See Keck v.*

Eminisor, 104 So. 3d 359, 360 (Fla. 2012) (certified question on immunity for public officials); *St. John Medical Plans, Inc. v. Gutman*, 721 So. 2d 717, 718 (Fla. 1998) (certified question on existence of cause of action for public employees' breach of trust); *Tucker v. Resha*, 648 So. 2d 1187, 1187 (Fla. 1994) (certified question on review of public official's right to qualified immunity). The answer to the jurisdictional question is the same as the exception to mootness: questions that affect large numbers of public officials are questions of great public importance. *See Joughin v. Parks*, 143 So. 306, 306-07 (Fla. 1932) (refusing to dismiss case as moot because it affected all elected public officials).

Additionally, Mr. Keetley disputes whether the collateral consequences exception applies, claiming that Mr. Keetley would already owe the fee because of the aforementioned appointment of a different public defender to represent him on the state's previous certiorari petition. (Keetley Br. at 17). Under the statute, however, a $100 fee is only the minimum. § 938.29(1)(a), Fla. Stat. (2018) ("no less than $100 per case when a felony offense is charged"). "The court may set a higher amount upon a showing of sufficient proof of higher fees or costs incurred." *Id*. Whatever Mr. Keetley may owe for Public Defender Dimmig's earlier representation, he now is exposed to paying additional costs for Public Defender Holt's services. The chance of a mental health patient owing fees for services was not "silly" in *Godwin v. State*, 593 So. 2d 211 (Fla. 1992), and this exception to

mootness also applies here.

III.
A MOTION FOR REHEARING, IF THE ERROR CAN STILL BE CORRECTED, IS A TIMELY OBJECTION PRESERVING THE ISSUE FOR REVIEW.

Mr. Keetley's brief attempts to create a distinction between this case and *Bailey v. Treasure*, 462 So. 2d 537 (Fla. 4th DCA 1985), by reciting the facts of both cases. (Keetley Br. at 12-15). That is an easy game; all cases have different facts. The question is the operative facts on which the decisions rely. For the District Court below, the key fact was the sequence of the order and the subsequent motion for reconsideration: "the Public Defender did not appear at the hearing on Keetley's renewed motion to appoint penalty-phase counsel,[1] nor did she otherwise respond until after the order on the motion had been rendered." (R. 348). The District Court underscored the word "after" to make clear the basis for its ruling. *Bailey*, however held that "mov[ing] for rehearing on this ground just a few days after the hearing . . . was sufficient to preserve the point for appeal." 462 So. 2d at 539. Again the same

[1] No law suggests that attendance at a hearing is a requirement for preservation. April 2017 was the third time a virtually identical motion had been filed, and the trial court had denied the previous two. (R. 57, 73). The first ruling specifically said that the denial 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). The public defender has a burdensome case load and her calendar cannot be subject to the whims of a private attorney who keeps filing the same meritless motion contrary to the governing statutes. For the reasons stated in the main text above, a motion for reconsideration filed after the granting of that meritless motion was all that is required to preserve the issue.

material fact: the issue was first raised after the ruling by motion for reconsideration. The outcomes in *Bailey* and this case conflict on the same material fact.

Mr. Keetley does not distinguish (or even discuss) the other cases cited in the initial brief all holding similarly: the sequence of the ruling and the objection do not matter if the trial court had the opportunity to correct the error in a timely manner. *Jackson v. State*, 451 So. 2d 458, 461 (Fla. 1984); *Castor v. State*, 365 So. 2d 701 (Fla. 1978); *Bradley v. State*, 214 So. 3d 648, 654-55 (Fla. 2017); *Fittipaldi USA, Inc. v. Castroneves*, 905 So. 2d 182, 185 (Fla. 3d DCA 2005).

The cases Mr. Keetley cites involve an utter lack of an objection, not an objection made subsequent to an erroneous ruling. *Aills v. Boemi*, 29 So. 3d 1105, 1108 (Fla. 2010) ("a ground that we find from the record was not presented to the trial court and thus not preserved for appellate review."); *Overton v. State*, 976 So. 2d 536, 547 (Fla. 2007) ("There is no indication in the record that Overton ever objected or attempted to disqualify Judge Jones due to his alleged improper conduct during the evidentiary hearing."); *Sunset Harbour Condo. Ass'n v. Robbins*, 914 So. 2d 925, 928 (Fla. 2005) ("Because an objection to the availability of this affirmative defense to the property appraiser was not made at the trial court or the district court, we hold that any objection to the defense was waived."); *Harrell v. State*, 894 So. 2d 935, 940 (Fla. 2005) ("Because Harrell never invoked that rule, however, the court never had an opportunity to address the issue.").

Alternatively, Mr. Keetley claims that the petition for certiorari did not raise the issue of material harm in the Second District. (Keetley Br. at 22-23). To the contrary, the petition argued that the "order sought to be reviewed constitutes a departure from the essential requirements of law, [and] results in a material injury for the remainder of the trial." (R. 8). The petition explained that the order was contrary to the statutes and rule governing the public defender, namely section 27.52(5)(h), Florida Statutes, Florida Rule of Criminal Procedure 3.112(e), and controlling case law. (R. 8-12). The petition concluded with a plea to remember that the "office of the public defender is totally a creature of the state constitution and of statue, not common law." (R. 12). As noted above, the elements of a departure from the requirements of law and material injury overlap in this case, and the Second District clearly had before it and decided, (R. 349-50), the issue of whether ordering a public official to act contrary to the law governing her office was a material injury.

Mr. Keetley also claims that the public defender's position in the trial court was contrary to that presented here. (Keetley Br. at 22-23). In the hearing on the motion for reconsideration, the public defender cited section 27.52(5)(h), Florida Statutes, Florid Rule of Criminal Procedure 3.112(e), and *Behr v. Gardner*, 442 So. 2d 980, 982 (Fla. 1st DCA 1983), and *Thompson v. State*, 525 So. 2d 1011, 1011-12 (Fla. 3d DCA 1988). (R. 151-52). The public defender objected to being appointed

in violation of that law:

> He [Mr. Keetley] has paid for these attorneys to represent him at the beginning of the case. . . . At this point for the Office of the Public Defender to be appointed, which is outside of the rules that the Court indicated in the hearing by the plain reading of the statute[2] doesn't allow for this type of representation.

(R. 156; *see also* R. 153). The public defender also picked up on the JAC's position that if the trial court had concerns about penalty phase counsel (especially given that Mr. Keetley did not want to present mitigation), it could appoint an independent special counsel to present mitigation pursuant to *Marquardt v. State*, 156 So. 3d 464, 490 (Fla. 2015), and *Muhammad v. State*, 782 So. 2d 343, 363-65 (Fla. 2001). (R. 156-57). In that context, the public defender made the comments, one sentence of which was quoted in Mr. Keetley's brief. (Keetley Br. at 22). A fuller quotation makes clear the public defender's point that hybrid private/public representation is unworkable:

> Judge, all I will say is based on the cases that I cited to you, it does allow if Mr. Keetley wants to proceed with his first phase and this is his priority and does not want to present mitigation it is—the Court is able to bifurcate those proceedings and proceed with the first phase with Ms. Goudie representing him and then appoint an independent counsel. If Ms. Goudie wants Mr. Terrana [another private attorney] as well on the case, that would be something that would go more in line with what has already been done in the sense that she has a mitigation

[2] The reference is to the trial court's first ruling, (R. 57), not the second, diametrically opposite ruling (R. 140-46) on review here.

> expert that has been retained through the JAC funds and she also has experts retained through the JAC funds.
>
> Obviously, the Office of the Public Defender [has] our own mitigation, our own investigators and that would disrupt what has already been done by Ms. Goudie. If the Court wants to appoint Mr. Terrana, but we are in a position where the rules and the law don't allow for this hybrid representation with retained counsel and the Office of the Public Defender.

(R. 162-63). Those comments used the facts of this case to illustrate that the private attorney's control and actions in this case were inconsistent with Florida Rule of Criminal Procedure 3.112(e) granting control over the defense to the public defender if appointed. That is the same argument the public defender is making before this Court.

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

Mr. Keetley also claims the public defender did not preserve the lack of evidence to support a constitutional violation in the trial court. (Keetley Br. at 23). This claim misunderstands the history of this case. The trial court's order was an interpretation of the language in section 27.52(5)(h), Florida Statutes, and Florida Rule of Criminal Procedure 3.112(e). (R. 142-46). The trial court's interpretation was based upon constitutional concerns, but made no findings of a constitutional

violation. (R. 142-46). The public defender challenged that statutory interpretation. (R. 7-12, 93-97). In the Second District, Mr. Keetley attempted to defend the trial court's order by taking the position that a violation of the constitutional rights to counsel and due process already had been established. (R. 250-63). That position is a "tipsy coachman" or "right for the wrong reason" type of argument.

Therefore, in the reply brief in the Second District, the public defender pointed out the lack of evidentiary findings or support for such a claim. (R. 270-75). "[A]n appellate court cannot employ the tipsy coachman rule where a lower court has not made factual findings on an issue and it would be inappropriate for an appellate court to do so." *Bueno v. Workman*, 20 So. 3d 993, 998 (Fla. 4th DCA 2009); *see G.F. v. Department of Children and Families*, 256 So. 3d 224, 226 (Fla. 3d DCA 2018); *Foley v. Azam*, 257 So. 3d 1134, 1139 n.3 (Fla. 5th DCA 2018); *HSBC Bank USA v. Nelson*, 246 So. 3d 486, 489 (Fla. 2d DCA 2018). Tipsy coachmen arguments, and responses thereto, are appellate issues. By their very nature, they are not for argument or preservation before the trial court.

In any event, this issue has now fallen to the wayside in this case. The Second District did not take the tipsy coachman approach, and even Mr. Keetley's brief in this Court raises it only in a "preliminary statement," (Keetly Br. at 5-7), but not as part of his argument.

CONCLUSION

Mr. Keetley's brief cannot distract from what it implicitly concedes—section 27.52(5)(h), Florida Statutes, and Florida Rule of Criminal Procedure 3.112(e) both prohibit the trial court from appointing the public defender as co-counsel to a private attorney representing Mr. Keetley. A public officer ordered to act contrary to the law governing her office suffers a material injury. This Court should hold accordingly, 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, Christopher J. Baum, Deputy Solicitor General, The Capital, PL-01, Tallahassee, Florida 32399 at christopher.baum@myfloridalegal.com , and Counsel for Mr Keetley, Lyann Goudie, Esq., 3004 W. Cypress Street, Tampa, Florida 33609, at lyann@goudiekohnlaw.com on this 6th day of May 2019.

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

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