SUPREME COURT OF FLORIDA

JOSEPH R. SPAZIANO,

Petitioner,

vs.

SEMINOLE COUNTY, FLORIDA,

Respondent.

CASE NOS. 92,801, 92,846 and 93,447

DISTRICT COURT OF APPEAL CASE NOS. 98-1170 and 98-1115

CIRCUIT COURT CASE NO. 75-430-CF-A

JOSEPH R. SPAZIANO,

Petitioner,

vs.

HARRY K. SINGLETARY, JR., Etc.,

Respondent.

SEMINOLE COUNTY,

Petitioner,

vs.

JOSEPH R. SPAZIANO,

Respondent.

SEMINOLE COUNTY AND STATE OF FLORIDA'S
INITIAL BRIEF ON MERITS

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PRELIMINARY STATEMENT

In this brief, the following entities will be referred to as described below:

Seminole County - "Seminole County" or "County"

Joseph R. Spaziano - "Defendant"

Fifth District Court of Appeal - "Fifth District"

Circuit Court for the Eighteenth Judicial Circuit, in and for Seminole County, Florida - "Circuit Court"

Harry K. Singletary, Jr., Secretary, State of Florida, Department of Corrections - "the State of Florida" or "State"

COMES NOW Seminole County, by and through its undersigned counsel, and the Office of the Attorney General, by and through its undersigned counsel, and file an Initial Brief on Merits pursuant to Order of the Court entered July 15, 1998, consolidating Florida Supreme Court Case Numbers 92,801, 92,846 and 93,447. Each case on appeal shall be presented by separate section, as follows:

I. CO-COUNSEL AT PUBLIC EXPENSE.

A. STATEMENT OF THE CASE AND OF THE FACTS.

On or about June 10, 1997, privately retained counsel for the Defendant in the underlying criminal matter filed *Mr. Spaziano's Motion For The Appointment Of Florida Attorney Robert N. Wesley As Co-Counsel At Public Expense*. (Appendix 1). The Defendant has previously been declared indigent here for the purposes of certain defense costs by the Circuit Court in the underlying criminal matter.

On July 2, 1997, Seminole County filed an *Objection To Defendant's Motion For Appointment Of Florida Attorney Robert N. Wesley As Co-Counsel At Public Expense*. (Appendix 2). At the first hearing on the co-counsel issue held July 7, 1997, the Circuit Court denied Defendant's Motion and entered an *Order Denying Mr. Spaziano's Motion For Appointment Of Robert N. Wesley As Co-Counsel At Public Expense*. (Appendix 3).

Notwithstanding entry of the aforementioned decision denying appointment of co-counsel at public expense to assist a privately retained defense attorney, the Defendant filed on or about September 12, 1997, a *Motion For Reconsideration And Second Motion For The Appointment Of Florida Attorney As Co-Counsel At Public Expense*. (Appendix 4).

Seminole County filed on October 2, 1997, its *Objection To Defendant's Motion For Reconsideration And Second Motion For The Appointment Of Florida Attorney Robert N. Wesley As Co-Counsel At Public Expense*. (Appendix 5). Subsequent to the second hearing on the co-counsel issue, however, the Circuit Court entered an *Order Appointing Additional Counsel At Public Expense* on December 11, 1997. (Appendix 6).

On January 12, 1997, Seminole County timely filed a *Petition For Writ Of Certiorari And Declaratory And Injunctive Relief*. (Appendix 7). On January 15, 1998, the Fifth District issued an *Order Of The Court* requiring the Defendant to respond. (Appendix 8). The Defendant filed on or about February 9, 1998, its *Response To Seminole County's Petition For Writ Of Certiorari* on February 17, 1998. (Appendix 9).

The Fifth District filed an *Order Of The Court* dated March 13, 1998, in Case No. 98-115, specifically granting Seminole County's

Petition For Writ Of Certiorari and quashing the Circuit Court Order Appointing Additional Counsel At Public Expense. *Seminole County v. Spaziano,* 707 So. 2d 931 (Fla. 5th DCA 1998).

The Defendant filed a *Notice To Invoke Discretionary Jurisdiction* with the Florida Supreme Court on April 10, 1998, (Appendix 10) and his *Amended Brief On Jurisdiction* on April 25, 1998. (Appendix 11). Seminole County filed its *Jurisdictional Brief On Review From The District Court Of Appeal, Fifth District* on May 15, 1998. (Appendix 12).

B. SUMMARY.

The Fifth District properly reviewed the matter and applied the law as set forth in Florida Statutes governing the appointment of counsel to represent indigent criminal defendants at public expense. Absent a conflict as determined solely by the Office of the Public Defender, the court shall appoint the Office of the Public Defender to represent an indigent criminal defendant. In his claim that he is not receiving effective assistance of counsel and an adequate defense, the criminal Defendant appears to disregard the truth in that Seminole County has expended tens of thousands of dollars, to date, in providing the Defendant with an "adequate and reasonable" defense as mandated by the United States Supreme Court. *Ake v. Oklahoma* case and its progeny. *Ake v. Oklahoma,* 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed. 2d 53 (1985).

Counsel for the criminal Defendant has been provided by Seminole County with expert medical and forensic witness expenses, investigative service costs, unlimited deposition and transcription costs, costs for service of subpoenas, costs for medical and other legal records, factual witness expenses and numerous other related costs requested by this privately retained counsel to zealously represent his client. Moreover, the County and the Defendant are cognizant that tens of thousands of dollars more will be spent to litigate this matter through trial and provide this Defendant previously deemed indigent by the trial court for certain enumerated costs an "adequate and reasonable" defense.

C. ARGUMENT.

I. THE DECISION OF THE FIFTH DISTRICT DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH A DECISION OF EITHER THE FLORIDA SUPREME COURT OR A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

The Florida Supreme Court may exercise its discretionary jurisdiction to review a decision of an appellate court in several clearly enumerated circumstances. *Fla. R. App. P. 9.030(a)(2)*. The Supreme Court of Florida may opt to utilize its discretionary jurisdiction to review an appellate court decision when that decision "expressly and directly conflicts with the decision of another district court of appeal or of the supreme court on the same question of law." *Article V, Section 3(b)(3), Fla. Const.*

See also, *Fla. R. App. P. 9.030(a)(2)(iv)*. Here, an alleged conflict between appellate and supreme court decisions is the sole ground argued by the Defendant in his jurisdictional brief.

The ruling of the Fifth District does not "expressly and directly conflict" with the decision of another district court of appeal or of the Supreme Court on the same question of law.

The appellate court decision to be reviewed must show on its face the existence of a direct conflict. *Seaboard Airline Railroad Co. v. Branham*, 104 So. 2d 356 (Fla. 1958). Further, for a decision to be considered in "direct conflict" with another decision, the two decisions must be wholly irreconcilable. *Williams v. Duggan*, 153 So. 2d 726 (Fla. 1963). The foremost concern is with decisions as precedents rather than the determination of the rights of particular litigants. *Ansin v. Thurston*, 101 So. 2d 808 (Fla. 1958).

In the decision rendered by the Fifth District, it found that the Circuit Court had departed from the essential requirements of law in its ruling. See, *Seminole County v. Spaziano*, 707 So. 2d 931 (Fla. 5th DCA 1998). The Fifth District stated that "[a]s Section 925.035(1), Florida Statutes (1997), provides an adequate procedure to protect the constitutional right to counsel guaranteed to indigent defendants in capital cases, the trial court's ruling

constitutes a departure from the essential requirements of law." *Id*. at 932.

The Fifth District further asserted that as

> Spaziano is represented by private counsel, who was not appointed due to a conflict of interest, there is no statutory authority for the appointment of co-counsel at public expense. *Id*.

Here, the Defendant cited no legal authority in its jurisdictional brief reflecting either a Florida Supreme Court or a District Court of Appeal decision expressly and directly conflicting with the decision rendered below by the Fifth District with regard to the appointment of co-counsel at public expense to assist a privately retained attorney. The cases cited by the Defendant in his argument that a "conflict" exists with the ruling of the Fifth District merely stand for the proposition that a particular defendant may be entitled to representation by two (2) attorneys under appropriate circumstances. See, *Schommer v. Bentley*, 500 So. 2d 118 (Fla. 1986), *Orange County v. Corchado*, 679 So. 2d 297 (Fla. 5th DCA 1996).

However, that was not the issue on appeal before the Fifth District. The sole issue on appeal and on which the Fifth District ruled was whether Seminole County must pay for an additional counsel at public expense appointed to assist an attorney who was privately retained by a criminal defendant.

Moreover, this Court has recently ruled that a trial court's refusal to appoint a second defense attorney who was requested by the court appointed conflict counsel due to the alleged complexity of a murder case and extensive preparation involved did not result in ineffective assistance of counsel. *Howell v. State*, 707 So. 2d 674 (Fla. 1998). In *Howell*, a conflict declared by the Office of the Public Defender required appointment of conflict counsel. This Court specifically held in *Howell* that "[f]urther, we find no abuse of discretion in the trial court's denial of Howell's request for the appointment of another attorney to assist Sheffield in his defense." *Id*. at 681. See also, *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994); *Reaves v. State*, 639 So. 2d 1 (Fla. 1994). In *Howell*, a conflict of interest with the Office of the Public Defender had been found and a special conflict attorney was appointed by the trial court. *Id*. at 677.

Further, this Court recently deferred the enactment of proposed rules concerning the competency and qualifications of counsel appointed to represent indigent defendants in capital cases where the services of a public defender are not available because of a conflict of interest "until the legislature has had a chance to address this issue." See, *In Re: Amendment To Florida Rules Of Judicial Administration-- Minimum Standards For Appointed Counsel In Capital Cases*. (Appendix 13). These deferred rules addressed

the mandatory appointment by the trial courts of two (2) attorneys to represent a capital indigent criminal defendant when the public defender's office has a declared conflict of interest. However, the deferred rules would not have been applicable to the scenario presented here inasmuch as counsel for the Defendant is privately retained and not appointed by the court subsequent to a conflict declared by the Public Defender's Office.

Here, counsel for the criminal Defendant is **not** a court appointed attorney and, in fact, is a criminal defense counsel privately retained by the Defendant. The Florida Legislature has carefully established a method by which counsel is provided for indigent criminal defendants who cannot afford to pay for representation by a private attorney. Accordingly, the state-wide system of the Office of the Public Defender was statutorily created and funded to provide representation to indigent criminal defendants. Further, cognizant of the fact that certain scenarios would prevent the Office of the Public Defender from ethically representing particular indigent defendants, the Florida Legislature enacted a statute by which the courts may appoint a special conflict counsel to represent indigent criminal defendants upon determination by the Office of the Public Defender that a conflict exists.

Here, privately retained counsel for the criminal Defendant is simply attempting to circumvent the system and gain the assistance

of a court appointed attorney at public expense. The obvious inequities and ramifications of this scheme are numerous. The actions of privately retained counsel for the Defendant in this case are unfair to the taxpayers of the State of Florida who are already paying for the established Office of the Public Defender and even to other criminal defendants who are paying, at their own expense, for the services of their privately retained defense counsel.

Moreover, this Court has previously addressed the counsel issue specifically with regard to this Defendant. In *Spaziano v. State*, 660 So. 2d 1363 (Fla. 1995), a post conviction relief proceeding, this Court ruled that

> "Spaziano is faced with a choice. He may be represented at the evidentiary hearing by CCR or by competent volunteer counsel who will comply with the rules and directions of this Court **at no expense to the State**, or he may choose to have no counsel at the evidentiary hearing. It is his decision." Emphasis supplied.

Capital Collateral Representative (CCR) is the state-wide system statutorily created to provide counsel to indigent defendants convicted and sentenced to death in this State. *§ 27.702, Fla. Stat. (1997)*. Specifically, *Section 27.702(1), Florida Statutes*, provides:

> "The capital collateral representative shall represent, without additional compensation,

> any person convicted and sentenced to death in this state who is without counsel and who is unable to secure counsel due to his indigency or determined by a state court of competent jurisdiction to be indigent for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court."

The CCR Office is the counterpart at the appellate capital level to the Office of the Public Defender charged with representing indigent capital defendants at the trial court level.

II. *SECTION 925.035(1), FLORIDA STATUTES (1997),* GOVERNS THE APPOINTMENT OF COUNSEL FOR AN INDIGENT DEFENDANT IN A CAPITAL CASE.

a. The sole issue on appeal and on which the Fifth District ruled was whether Seminole County must pay for an additional counsel at public expense appointed to assist an attorney who was privately retained by a criminal defendant. The Fifth District expressly found that *Chapter 925, Florida Statutes (1997)*, governs the appointment of an attorney for an indigent defendant in a capital case. *Seminole County* at 932. Specifically, the Fifth District found that *Section 925.035(1), Florida Statutes (1997)*, provides that

> [i]f the court determines that the defendant in a capital case is insolvent and desires

> counsel, it shall appoint a public defender to represent the defendant.

Section 925.035, Florida Statutes (1997), further states that

> [i]f the public defender appointed to represent two or more defendants found to be insolvent determines that neither him nor his staff can counsel all of the accused without conflict of interest, it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender in his capacity as such or in his private practice, to represent those accused.

Thus, absent a conflict with Office of the Public Defender as set forth in *Section 925.035(1), Florida Statutes (1997)*, the Fifth District held that Florida law clearly requires the appointment of the Public Defender to represent an insolvent defendant in a capital case. *Seminole County* at 932. The Fifth District, in its opinion, ruled that

> Russ began representing Spaziano in the prior post conviction proceeding. Russ was not initially selected pursuant to the statute governing appointment of counsel in capital cases"... and further found that "as Spaziano is represented by private counsel, who was not appointed due to a conflict of interest, there is no statutory authority for the appointment of co-counsel at public expense. *Id*.

Here, in fact, the criminal Defendant retained private defense counsel to represent him in this matter. The County is neither aware of nor entitled to disclosure of the specific fiduciary or

client contractual obligations between private defense counsel and the Defendant client.

Seminole County contends that the Office of the Public Defender is fully funded and supported by the taxpayers of the State of Florida to provide legal representation to indigent defendants in all criminal matters at public expense. It is clearly the prerogative of the Public Defender's Office, upon appointment as statutorily mandated in accordance with *Section 925.035, Florida Statutes (1997)*, to make an assertion, if applicable, with regard to a conflict of interest in representing a particular indigent criminal defendant.

In its jurisdictional brief, the Defendant argued that a conflict of interest exists for the Office of the Public Defender to represent this particular Defendant. This argument is meritless and premature. The Office of the Public Defender clearly cannot determine that a conflict of interest exists until appointed to represent a specific defendant.

Moreover, it is the sole prerogative of the Office of the Public Defender to make a determination that the Public Defender's Office has a conflict in representing a certain defendant. It is surely not the role of a third party, here, privately retained defense counsel to assert, argue or speculate as to whether a conflict of interest may or may not exist with regard to represen-

tation by the Office of the Public Defender. The Public Defender is statutorily and ethically mandated to make such a determination.

The statute definitively requires appointment of the Public Defender when certain circumstances are present. *§ 925.035(1), Fla. Stat. (1997)*. Upon appointment, the Public Defender may assert a conflict of interest in representing a client, if warranted, based on his or her interpretation of applicable law, including the *Florida Rules of Professional Responsibility*.

Indeed, the Honorable James W. Russo, Public Defender of the Eighteenth Judicial Circuit, in and for Seminole County, Florida, asserted at a hearing held January 30, 1998, that "So what I'm telling you is, with respect to Mr. Bradley, Judge, I know of no actual conflict of interest with respect to the Public Defender's office." (Appendix 14 at 13). Thus, the Public Defender in and for the Eighteenth Judicial Circuit has asserted before the Circuit Court that no conflict would exist with regard to his office representing the Defendant here with respect to the individual that the Defendant alleges would create a conflict if the Office of the Public Defender is so appointed.

Notwithstanding the desire of the Defendant here to propose his own defense team, Florida law does not permit an insolvent defendant to select his own counsel at public expense. Clearly, a non-indigent defendant may select whomever he or she so desires for

legal representation. However, in enacting *Section 925.035(1), Florida Statutes (1997)*, the Florida Legislature expressed its intent to establish a procedure for appointing counsel for indigent defendants in capital cases. Thus, an indigent defendant in a capital case is entitled to counsel paid for by public funds only as set forth in *Section 925.035(1), Florida Statutes (1997)*.

b. Trial level courts appoint one or more private defense attorneys to represent criminal defendants in a given case when the Office of the Public Defender asserts a conflict in representing a particular indigent defendant in that case. The Defendant is not statutorily entitled to the appointment of another defense counsel of his choosing at public expense.

Such appointment clearly acts to circumvent the established statutory procedure in cases of indigent criminal defendants. In allowing an indigent criminal defendant represented by privately retained defense counsel to add another private defense counsel, paid at public expense, the procedure set forth in *Section 925.035(1), Florida Statutes (1995)*, is effectively negated.

Prior to the Fifth District's quashal of the Circuit Court's ruling here, an indigent criminal defendant could retain private counsel with little or no criminal defense experience and simply request additional representation by a "more experienced" criminal defense attorney at public expense thereby completely disregarding

the entire statutory procedure established for indigent criminal defendants. Further, no need would exist for the state-wide system of the Office of the Public Defender.

In the Circuit Court's decision, it cites two cases as a basis for its refusal here to appoint the Public Defender to represent the Defendant as co-counsel with the Defendant's privately retained counsel. In *Behr v. Gardner*, 442 So. 2d 980 (Fla. 1st DCA 1983), the First District held that "...*section 27.51, Florida Statutes (1981),* although it permitted the appointment of the public defender to represent certain indigent defendants, did not permit the appointment of the public defender as co-counsel with privately retained counsel." *Id.* at 981.

However, in *Behr*, the appointment of the Public Defender was solely to enable the defendant to utilize the investigative services of that office. *Id.* at 981. The *Behr* court further stated that the appropriate resolution of the problem presented there was for the indigent defendant who is receiving the services of a private attorney to obtain the reasonable costs of discovery from the county pursuant to *Florida Rules of Criminal Procedure 3.220(k)*. *Id.* at 982. Here, the criminal Defendant has already been determined indigent for costs and assured of payment of certain of his costs at public expense.

Further, the statute construed in *Behr* governs only the routine duties and responsibilities of the Office of the Public Defender rather than the appointment and compensation of counsel for an indigent criminal defendant in a capital matter which is expressly addressed by *Section 925.035, Florida Statutes (1995)*. The *Behr* case did not specifically consider the appointment of an additional privately retained defense counsel at public expense but considered in its decision only the appointment of the Public Defender in conjunction with retained defense counsel in order to obtain "free" investigative services for the criminal defendant.

In the second case cited by the Circuit Court here, the Third District Court of Appeal followed the *Behr* decision due to its identical factual scenario. In *Thompson v. State*, 525 So. 2d 1011 (Fla. 3d DCA 1988), the Third District found that the defendant "...was not, as urged, required to accept the services of the public defender in order to obtain such reasonable costs of discovery." *Id.* at 1011. Here, again, the criminal defendant in the case at bar has been determined insolvent for costs purposes.

The *Thompson* court stated that although *Section 27.51, Florida Statutes (1985)*, "permits the appointment of the public defender to represent certain indigent defendants, `it' does not permit the appointment of the public defender as co-counsel with privately retained counsel." *Id.* at 1012. Again, the *Thompson* case only

considered the appointment of the Public Defender as a means to use the investigative services of that office.

Further, the *Thompson* case again construes a statute inapplicable to the situation in the instant case in that the *Thompson* Court opines that *Section 925.035, Florida Statutes (1995)*, governs the appointment of counsel to represent indigent criminal defendants in capital matters. Finally, the *Thompson* Court did not address the issue here of the appointment of an additional criminal defense counsel at public expense to assist a privately retained counsel in defending an indigent criminal defendant.

c. Contrary to Defendant's contention in his jurisdictional brief, the County will not be entitled to reimbursement for court appointed counsel fees from state funds. The citation by the Defendant of *Florida Statute 935.037* is erroneous in that the statute does not exist. However, counties may be reimbursed for certain fees paid to appointed counsel pursuant to *Section 925.037(1), Florida Statutes (1997)*. This Section sets forth criteria for payment of such reimbursement. Specifically, in order for payment to a court appointed counsel by a county to be reimbursed from state funds, an

> "[a]ttorney must have been appointed pursuant to s. 27.53(3) or s. 925.035, must have been approved for such appointment by the circuit court conflict committee prior to appointment,

> and must be compensated within the maximum fee limits provided by s. 925.036..."

Here, Seminole County would be unable to satisfy the criteria established by *Section 925.037(1), Florida Statutes (1997)*, for payment due to the Circuit Court's failure to follow the established statutory procedure for appointment of defense co-counsel at public expense. Accordingly, if this Court grants the relief sought and allows appointment of co-counsel to assist privately retained defense counsel, the County would not be in compliance with the statutory procedure set forth for reimbursement of counties' payment for court appointed counsel from state funds.

d. Finally, the Fifth District in the decision rendered below responded to the Defendant's constitutional concerns by expressly ruling that "...[s]ection 925.035(1), Florida Statutes (1997), provides an adequate procedure to protect the constitutional right to counsel guaranteed to indigent defendants in capital cases..." *Seminole County* at 932.

Further, Judge Cobb in a specially concurring opinion in the Fifth District case below observed that:

> "Attorney Russ is willing to represent the defendant pro bono but wants the assistance of co-counsel at public expense... An indigent defendant is entitled to counsel, but is not permitted to select his or her counsel at public expense. The same is true for Russ, who should not be permitted to select his co-counsel at public expense." *Id.*

Judge Cobb further observed that the Circuit Court decision below:

> "sets a bad precedent, because in the future an attorney with little or no experience in capital cases could agree to represent pro bono a criminal defendant and then move the court for the appointment of a more experienced attorney for assistance, to be compensated by the county. This practice would undermine the state public defender system created by the legislature as the way of providing counsel to indigent defendants." *Id.*

Judge Cobb's specially concurring opinion points out, with clear precision, exactly why this Court should approve the Fifth District ruling. The appointment of co-counsel at public expense in complete disregard of the statutorily established procedure will result in a method of appointment whereby indigent criminal defendants can circumvent representation by the Public Defender's Office and effectively choose their own criminal defense team at public expense. Such subterfuge is abhorrent to the judicial process statutorily established to serve the needs of indigent criminal defendants and inequitable to the taxpaying public which already pays more than its fair share through fiscal support of the Public Defender's Office.

This case includes a lengthy history of litigation in the various courts of the state and it does involve complex issues. However, all cases potentially involving the death penalty are

complex and many other cases include lengthy histories of litigation. The County contends that the indigent Defendant here is not entitled to any greater assistance of counsel than is provided to other indigent criminal defendants in accordance with Florida Statutes.

Simply put, if privately retained defense counsel is not able to continue as counsel in representing this indigent Defendant, the Office of the Public Defender must be appointed in accordance with *Section 925.035(1), Florida Statutes (1997)*. As Judge Cobb of the Fifth District clearly states in his specially concurring opinion,

> "Although the trial judge was correct that he could not appoint a public defender to work as co-counsel with a private attorney, the trial court did not discuss the obvious alternatives: instruct Russ to seek out other attorneys who are willing to act as co-counsel on a *pro bono* basis, or appoint the public defender if Mr. Russ is unable to secure *pro bono* assistance and is not able to handle the case alone."

D. CONCLUSION.

The Fifth District carefully reviewed all applicable law and pleadings submitted by all parties prior to rendering the decision below. The Fifth District properly granted Seminole County's Petition For Writ Of Certiorari And Declaratory And Injunctive Relief and quashed the Order Appointing Additional Counsel At Public Expense entered by the Circuit Court on December 11, 1997.

The Defendant has failed to establish here that the decision rendered by the Fifth District below expressly or directly conflicts with a decision of either the Florida Supreme Court or another Florida District Court of Appeal. This criterion is the sole ground cited in the Defendant's jurisdictional brief for vesting of discretionary jurisdiction in this Court pursuant to the Florida Constitution and the Florida Rules of Appellate Procedure.

Inasmuch as the Fifth District found that the Circuit Court had departed from the essential requirements of law, it properly granted Seminole County's Petition For Writ Of Certiorari And Declaratory And Injunctive Relief and quashed the Order of the Circuit Court.

Moreover, the appointment of co-counsel at public expense to assist a privately retained attorney may result in a method whereby indigent criminal defendants can circumvent representation by the Public Defender's Office and effectively choose their own criminal

defense team. Such subterfuge is abhorrent to the judicial process statutorily established to serve the needs of indigent criminal defendants and inequitable to the taxpaying public which already pays more than its fair share through fiscal support of the Public Defender's Office.

Accordingly, Seminole County and the State of Florida respectfully request this Court to afford the following relief:

A. Affirm the decision of the Fifth District rendered March 13, 1998. *Seminole County v. Spaziano,* 707 So. 2d 931 (Fla. 5th DCA 1998); and

B. Grant Seminole County and the State of Florida such other legal or equitable relief as this Court deems just and proper.

II. DEFENSE SERVICES AT PUBLIC EXPENSE.

A. STATEMENT OF THE CASE AND OF THE FACTS.

On or about January 28, 1998, privately retained counsel for the criminal Defendant, Joseph R. Spaziano, in the underlying criminal matter, filed *Mr. Spaziano's First Ex Parte, In Camera Motion for Defense Services At Public Expense*. (Appendix 15). Here, the Defendant has previously been declared indigent for purposes of certain costs in the underlying criminal matter.

Seminole County received a Notice of Filing the aforementioned Motion and a copy of a letter dated January 28, 1998, from counsel for the Defendant to the lower tribunal requesting that the lower

tribunal address the Motion at the hearing scheduled for January 30, 1998. However, Seminole County, although the actual party in interest in a criminal costs matter, was not provided a copy of the Motion or proposed order.

The Circuit Court denied Seminole County's request to be heard on the referenced Motion prior to entry of the Order at the hearing held January 30, 1998. (Appendix 14 at 6, 7). Moreover, at the hearing on the referenced Motion, the Circuit Court directed Seminole County to contact counsel for the Defendant to discuss any concerns that the County had with the Order and attempt to resolve such concerns prior to submitting further motions regarding the Order entered. (Appendix 14 at 6, 7). In compliance with the Court's instructions, Seminole County contacted and advised counsel for the Defendant on February 5, 1998, of the County's objection to the Order entered January 30, 1998.

On February 9, 1998, Seminole County filed an *Objection To Order On Mr. Spaziano's First Ex Parte, In Camera Motion For Defense Services At Public Expense And Motion For Rehearing*. (Appendix 16). On March 24, 1998, the Defendant filed *Mr. Spaziano's Motion To Compel Compliance By Seminole County, Florida, With January 30, 1998, Court Order Granting Mr. Spaziano's First Ex Parte, In Camera Motion For Defense Services At Public Expense*. (Appendix 17).

Seminole County participated in the second hearing on this issue held March 31, 1998. (Appendix 18 - Transcript of Hearing Held on March 31, 1998). On March 31, 1998, the Circuit Court entered an *Order Granting Mr. Spaziano's Motion To Compel Compliance By Seminole County, Florida, With January 30, 1998, Court Order Granting Mr. Spaziano's First Ex Parte, In Camera Motion For Defense Services At Public Expense*. (Appendix 19).

Seminole County filed a timely Notice of Appeal with the Fifth District on April 28, 1998, seeking to appeal the Circuit Court's order as a final order. However, the Fifth District subsequently notified Seminole County that the Circuit Court's order appeared to be a non-appealable, non-final order and directed Seminole County to timely respond. Accordingly, Seminole County respectfully filed a *Motion In Response To Order Of The Court Dated May 1, 1998, And Request To Substitute Petition For Writ Of Certiorari And Declaratory And Injunctive Relief* on May 13, 1998, including its *Petition For Writ Of Certiorari and Declaratory And Injunctive Relief* dated May 11, 1998. (Appendices 20 and 21).

On May 21, 1998, the Fifth District granted Seminole County's Request to Substitute Petition For Writ Of Certiorari and Declaratory and Injunctive Relief. (Appendix 22). On May 22, 1998, the Fifth District ordered Defendant to file a response to Seminole County's Petition For Writ Of Certiorari And Declaratory And

Injunctive Relief and Seminole County to file a Reply Brief. (Appendix 23). On June 1, 1998, the Defendant filed *Mr. Spaziano's Suggestion For Certification To The Supreme Court Of Florida.* (Appendix 24). On June 11, 1998, the Defendant filed *Mr. Spaziano's Response to Seminole County's Petition For Writ Of Certiorari*. (Appendix 25).

On July 1, 1998, Seminole County filed *Petitioner, Seminole County's Motion For Enlargement Of Time* and its *Reply To Mr. Spaziano's Response To Petition For Writ Of Certiorari And Declaratory And Injunctive Relief*. (Appendix 26).

On July 9, 1998, the Fifth District issued an *Order* granting Seminole County's Motion for Enlargement of Time, denying the Respondent's Motion To Strike Reply and granting the Respondent's Suggestion For Certification To The Supreme Court Of Florida. (Appendix 27).

B. SUMMARY.

Seminole County contends that the decision of the Circuit Court ordering the County to pay for certain defense expenditures incurred by a criminal defendant constitutes a departure from the essential requirements of law in that the decision of the trial court did not comport with established case law for payment of criminal defense services at public expense and no adequate remedy

exists for appeal. Seminole County further contends that the order issued by the Circuit court will cause material injury and irreparable harm to the County in both the instant case and future proceedings of this nature.

1. Notwithstanding that the underlying matter here is a criminal case, Seminole County is the actual party in interest directed by Order Granting Mr. Spaziano's Motion To Compel Compliance By Seminole County, Florida, With January 20, 1998, Court Order Granting Mr. Spaziano's First _Ex Parte_, _In Camera_ Motion For Defense Services At Public Expense to pay the costs incurred by the Defendant in commissioning a public opinion survey. (Appendix 19).

2. Throughout the pendency of the criminal proceedings in the lower court herein Seminole County has asserted its interest. Further, inasmuch as Seminole County will endure the fiscal impact of payment of defense costs incurred for these services, which are neither authorized by statute nor legally recognized as admissible in the underlying criminal matter, the County is the actual party in interest here and not the State of Florida or the Office of the State Attorney in and for the Eighteenth Judicial Circuit.

C. ARGUMENT.

WHETHER SEMINOLE COUNTY IS STATUTORILY RESPONSIBLE FOR PAYMENT OF AN INADMISSIBLE PUBLIC OPINION SURVEY COMMISSIONED BY AN INDIGENT CRIMINAL DEFENDANT.

1. This honorable Court has already conclusively ruled on the issue of whether payment of costs incurred by defense counsel for a public opinion survey undertaken for possible use in a hearing regarding a change of venue in the underlying criminal matter may be appropriately taxed against a county. In *Mills v. State*, 462 So. 2d 1075 (Fla. 1985), this Court held that a county could not be taxed for costs incurred by a defendant who commissioned a public opinion survey for the purpose of a motion for change of venue on grounds of pretrial publicity. *Id.* at 1079.

Specifically, this Court found no error in the circuit court's refusal to tax costs against Wakulla County for a public opinion survey of the community feeling commissioned for the purpose of a motion for change of venue on grounds of pretrial publicity. *Id.*

In the *Mills* case, a high profile case in rural Wakulla County, Florida, two (2) black defendants were convicted of the murder of a white victim. *Id.* at 1077. However, this Court concluded in *Mills* that a change of venue was not required in every case where a black defendant stands accused of killing a white victim in a rural county, and further found that the "trial court was concerned with his inability to control the taking of the

survey and the possibility that the survey itself would contaminate potential jurors." *Id.* at 1079.

This Court further propounded in *Mills* that "this Court has held such surveys inadmissible in change of venue proceedings on the grounds of hearsay and unreliability." Id. See, *Irvin v. State*, 66 So. 2d 288 (Fla. 1953), *cert. denied*, 346 U.S. 927 (1954). Seminole County contends that the *Mills* and *Irvin* cases, both decisions by the Florida Supreme Court, are applicable to the case presented here.

2. The Office of the Public Defender is fully funded and supported by the taxpayers of the State of Florida to provide legal representation to indigent defendants in all criminal matters at public expense. Costs incurred by criminal defendants deemed indigent for cost purposes and represented by privately retained defense counsel for which counties may be appropriately taxed may be analogized to those types of costs incurred by the Office of the Public Defender in its representation of indigent criminal defendant clients.

The Office of the Public Defender routinely tries capital cases of the nature and complexity associated with the instant matter. The Public Defender's Office is funded by the State of Florida to provide legal representation for indigent criminal defendants. See, *§ 27.54, Fla. Stat. (1997)*.

Further, *Section 27.54, Florida Statutes (1997)*, requires counties within the State of Florida to pay for certain types of routine and ordinary expenses incurred by the Office of the Public Defender in defense of its clients. Accordingly, the counties are statutorily responsible for payment of certain enumerated costs incurred on behalf of the Public Defender's Office, specifically including pretrial consultation fees for expert or other potential witnesses consulted before trial by the Public Defender; court reporter costs; deposition costs and the costs of copying depositions. See, *§ 27.54(3), Fla. Stat. (1997)*.

Payment by counties, at public expense, of the costs set forth in *Section 27.54, Florida Statutes (1997)*, acts to ensure a more equitable defense for indigent clients, more in line with both prosecutorial expenses afforded the State Attorney's Office and privately retained counsel for their non-indigent clients. See, *§ 27.34(2), Fla. Stat. (1997)*. Further, in a section entitled, "Pay of defendant's witnesses," the Florida Statutes require that counties shall pay "the legal expenses and costs, as is prescribed for the payment of costs incurred by the county in the prosecution of such cases..." *§ 939.07, Fla. Stat. (1997)*.

Section 914.06, Florida Statutes (1997), requires counties to pay for services of an expert witness "whose opinion is relevant to the issues of the case." Obviously, since the public opinion

survey at issue here is not even admissible as evidence in the underlying criminal case, it is illogical for the Defendant to argue that the survey is relevant to the issues of the case.

Moreover, counties routinely pay for those defense expenses set forth in *Section 27.54(3), Florida Statutes (1997)*, incurred in court-appointed conflict cases. *§ 925.035(6), Fla. Stat. (1997).* Further, counties must pay for certain expenses incurred in defense of a criminal matter where the lower court has determined the defendant indigent for costs. *§ 939.07, Fla. Stat (1997)*. However, nowhere in the Florida Statutes exist a mandate for counties to pay for expenses incurred on behalf of an indigent client represented by a Public Defender's Office or a court appointed conflict attorney or a privately retained attorney that are <u>not</u> statutorily recognized taxable expenses.

Further, the "adequate and reasonable" defense standard established by the United States Supreme Court in *Ake v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L. Ed. 2d 53 (1985) and its progeny clearly does not require or even contemplate counties providing a "top of the line" defense to criminal defendants indigent for costs and represented by privately retained counsel. Such a result would arguably undermine the intent of the legislature in establishing and funding the Office of the Public Defender by providing at public expense, a standard defense which fiscally exceeds that

afforded by the Public Defender's Office and even exceeds that which a non-indigent criminal defendant can afford. The Circuit Court's order here clearly conflicts with Florida law established by the *Mills* case which found that public opinion poll costs were not taxable against a county in a criminal matter.

3. Here, Seminole County is incurring and will continue to incur substantial defense costs at public expense throughout the duration of these proceedings at the trial level. Counsel for the Defendant has been provided by Seminole County with expert witness expenses, investigative service costs, unlimited deposition and transcription costs, costs for service of subpoenas, costs for medical and other legal records, witness expenses and numerous other related costs requested by this privately retained counsel to zealously represent his client. Moreover, Seminole County and the Defendant are cognizant that thousands of dollars more will likely be spent to litigate this matter through trial and provide this Defendant previously deemed indigent by the Circuit Court for certain enumerated costs with an "adequate and reasonable" defense. Seminole County is additionally responsible for witness costs and certain other litigation expenses incurred by the Office of the State Attorney in prosecuting this matter.

Subsequent to the Circuit Court's ruling here, an indigent criminal defendant may now incur any type or amount of defense

expenditures, including the commissioning of a public opinion poll, and demand that counties pay for the defense expenditures regardless of the necessity, reasonableness or merit of such expenses and regardless of whether the results of the expenses are even admissible in the underlying court proceedings. The Circuit Court's holding fails to comply with Florida Statutes insofar as it orders Seminole County to pay for defense costs which are not statutorily enumerated and appropriately taxed against the counties and imposes responsibility for costs beyond those even contemplated by the courts or the Florida Legislature.

The Circuit Court's order will result in material harm to Seminole County insofar as the County has been ordered to pay for an $8,000.00 public opinion survey. Further, the County may be potentially liable for thousands of dollars in future criminal matters for services incurred by privately retained criminal defense counsel for defense expenditures neither statutorily authorized nor admissible in the underlying criminal action.

Such an unauthorized expenditure of public funds greatly exceeds the standard of liability statutorily imposed on the County with regard to payment of indigent criminal defense costs. Such an expense is clearly beyond the standard established by the United States Supreme Court in the *Ake v. Oklahoma* case, which presumably considered all constitutional due process ramifications before

reaching its decision, and the expenses contemplated by the Florida Legislature in enacting *Chapters 27, 914 and 939, Florida Statutes (1997).*

In summary, although the results of the public opinion survey commissioned here by the Defendant are inadmissible at any hearing concerning a change of venue, the County will be forced to pay for a poll which has no benefit to either the general public or even to the indigent criminal Defendant. Seminole County will be required to pay for a survey which is neither a necessary nor reasonable expense to be incurred by a criminal Defendant deemed indigent by the lower tribunal for certain costs purposes. The County contends that it will be forced to pay for a poll which arguably even a non-indigent criminal defendant with privately retained counsel would not commission since such a poll serves no useful purpose and is inadmissible for the purposes for which it is undertaken.

D. CONCLUSION.

The Circuit Court departed from the essential requirements of law by not following the law established by the Florida Supreme Court and taxing Seminole County for the costs of an unnecessary and inadmissible public opinion survey poll commissioned by an indigent criminal defendant. Seminole County contends that the *Mills* and *Irvin* cases have not been overturned or vacated and are still good law.

Such court ordered taxation for wholly unnecessary and inadmissible criminal defense services may potentially result in severe and irreparable material harm to Seminole County for which no adequate remedy exists on appeal. To require the County to pay for expenses incurred by an indigent criminal defendant for commissioning a public opinion survey that is inadmissible at trial renders an absurd result beyond any attempts to achieve parity or equity contemplated by the United States or Florida Constitutions or the Courts of this State. Further, continued court ordered taxation of unreasonable costs may result in a clearly defined and condoned method by which indigent criminal defendants can obtain a level of representation by privately retained defense counsel utilizing methods and services beyond those provided by the Office of the Public Defender to its clients, the standard by which such defense expenditures should be measured.

Any reasonable concerns the Defendant or the Office of the State Attorney may have with regard to the appropriate venue for the proceedings may be addressed during pretrial hearings and voir dire. An unreliable and inadmissible public opinion survey commissioned by the Defendant will not remedy such concerns and is merely an unnecessary and unreasonable waste of the County taxpayers funds. Seminole County and the State of Florida respectfully request this Court to afford the following relief:

A. Quash the decision of the Circuit Court of the Eighteenth Judicial Circuit, in and for Seminole County, Florida rendered March 31, 1998, in the case at issue based on failure to follow applicable precedent; and

B. Grant Seminole County and the State of Florida such other legal or equitable relief as this Court deems just and appropriate.

III. HABEAS CORPUS.

A. STATEMENT OF THE CASE AND OF THE FACTS.

On or about April 21, 1998, Defendant filed with the Florida Supreme Court *Mr. Spaziano's Petition for Writ of Habeas Corpus* (Appendix 28). A copy of the Petition was mailed to Seminole County. Inasmuch as Seminole County was not named as a Respondent in Mr. Spaziano's Petition for Writ of Habeas Corpus, Seminole County was not required to respond pursuant to *Florida Rules of Appellate Procedure 9.100(b)*.

On June 24, 1998, the Supreme Court issued an *Order* requiring the State of Florida and the County Attorney in and for Seminole County to file a response to Mr. Spaziano's Petition for Writ of Habeas Corpus on or before noon, Monday, June 29, 1998. (Appendix 29).

On June 26, 1998, Seminole County filed *Seminole County's Response to Spaziano's Petition for Writ of Habeas Corpus*. (Appen-

dix 30). On June 26, 1998, the Office of the Attorney General filed its *Response to Petition of Habeas Corpus*. (Appendix 31).

On July 10, 1998, Defendant filed *Mr. Spaziano's Reply to State And County Responses To Petition For Writ Of Habeas Corpus*. (Appendix 32).

B. SUMMARY.

Seminole County is a political subdivision of the State of Florida. Seminole County is not the appropriate party to respond to the specific issues involving criminal law and procedure presented by the criminal Defendant in either his *Petition for Writ of Habeas Corpus* or his *Reply To State and County's Responses to Petition for Writ of Habeas Corpus*. (Appendices 28 and 32). At all times relevant to the matters on review here, Seminole County did not and does not now have in its custody, the criminal Defendant known as Joseph R. Spaziano in any Seminole County correctional facility or jail.

Seminole County avers that the criminal Defendant in the action here is incarcerated in the Florida State Prison at Starke, Florida and accordingly is in the custody of the State of Florida, Department of Corrections. Seminole County opines that the criminal Defendant is currently incarcerated at the Florida State Prison at Stake, Florida as a result of conviction in a Circuit Court of the Ninth Judicial Circuit, Orange County, Florida case.

See, *Order Denying Motion for Postconviction Relief* rendered September 17, 1996, in the *State of Florida v. Joseph Robert Spaziano,* Case No. CR 75-1305. (Appendix 33).

Seminole County is not the appropriate party to address and respond to the lengthy criminal factual and imprisonment issues argued in either the criminal Defendant's *Petition for Writ of Habeas Corpus* or his *Reply To State And County Responses To Petition For Writ Of Habeas Corpus*, but will respond to the civil component of the underlying criminal action.

The counties within the State of Florida are statutorily charged with responsibility for payment of certain expenditures incurred by the Office of the State Attorney and the Public Defender in prosecuting and defending criminal defendants in their jurisdictional circuits. See, *Chapters 27, 925 and 939, Florida Statutes (1997).*

Moreover, the counties within the State of Florida are statutorily directed to pay for certain costs incurred by conflict attorneys appointed by the court when the Office of the Public Defender in a particular circuit has a conflict in representing a certain criminal defendant. See, *§ 925.035(6), Fla. Stat. (1997).* Further, counties are statutorily responsible for payment of expenses incurred in defense of a criminal matter by criminal

defendants deemed indigent for certain costs as enumerated in *Section 939.07, Florida Statutes (1997).*

C. ARGUMENT.

The Fifth District properly reviewed the matter and "applied the correct law" as set forth in Florida Statutes governing the appointment of counsel to represent indigent criminal defendants at public expense. The Defendant, however, claims in his Petition for Writ of Habeas Corpus that he is not receiving effective assistance of counsel and an adequate defense. Counsel for the criminal Defendant, however, appears to disregard the simple truth that Seminole County has expended tens of thousands of dollars, to date, in providing the Defendant with an "adequate and reasonable" defense as mandated by the United States Supreme Court *Ake v. Oklahoma* case and its progeny. *Ake v. Oklahoma,* 470 U.S. 68, 105 S.CT. 1087, 84 L.Ed. 2d 53 (1985). Counsel for the criminal Defendant has been provided by Seminole County with expert medical and forensic witness expenses, investigative service costs, unlimited deposition and transcription costs, costs for service of subpoenas, costs for medical and other legal records, factual witness expenses and numerous other related costs needed by this privately retained counsel to zealously represent his client who has previously been deemed indigent for costs purposes. Moreover, the County and counsel for the Defendant are cognizant that tens of

thousands of dollars more will likely be spent to litigate this matter through trial and provide this Defendant previously deemed indigent by the trial court for certain enumerated costs an "adequate and reasonable" defense.

I. THE DECISION OF THE FIFTH DISTRICT DOES NOT EXPRESSLY OR DIRECTLY CONFLICT WITH A DECISION OF EITHER THE FLORIDA SUPREME COURT OR A DECISION OF ANOTHER DISTRICT COURT OF APPEAL.

In the decision rendered by the lower tribunal, the Fifth District found that the Circuit Court had departed from the essential requirements of law in its ruling. *Seminole County* at 931. The Fifth District stated that "[a]s Section 925.035(1), Florida Statutes (1997), provides an adequate procedure to protect the constitutional right to counsel guaranteed to indigent defendants in capital cases, the trial court's ruling constitutes a departure from the essential requirements of law." *Seminole County* at 932.

The Fifth District further asserted that as

> "Spaziano is represented by private counsel, who was not appointed due to a conflict of interest, there is no statutory authority for the appointment of co-counsel at public expense." *Id.*

Here, the Defendant provided no legal authority in either his Petition For Writ Of Habeas Corpus or his Reply To State And County Responses To Petition For Writ Of Habeas Corpus reflecting a

Florida Supreme Court or District Court of Appeal decision expressly and directly conflicting with the decision rendered below by the Fifth District with regard to the appointment of co-counsel at public expense to assist a privately retained attorney. The cases cited by the Defendant in his argument that a "conflict" exists with the ruling of the Fifth District merely stand for the proposition that a particular defendant may be entitled to representation by two attorneys under appropriate circumstances. See, *Schommer v. Bentley*, 500 So. 2d 118 (Fla. 1986), *Orange County v. Corchado*, 679 So. 2d 297 (Fla. 5th DCA 1996).

Moreover, this Court has recently ruled that a trial court's refusal to appoint a second defense attorney who was requested by the appointed conflict counsel due to the alleged complexity of a murder case and extensive preparation involved did not result in ineffective assistance of counsel. *Howell v. State*, 707 So. 2d 674 (Fla. 1998). This Court specifically held in *Howell* that "[f]urther, we find no abuse of discretion in the trial court's denial of Howell's request for the appointment of another attorney to assist Sheffield in his defense." *Id.* at 681. See also, *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994); *Reaves v. State*, 639 So. 2d 1 (Fla. 1994). In *Howell*, a conflict of interest with the Office of the Public Defender had been found and a special conflict attorney was appointed by the trial court. *Id.* at 677.

Further, this Court recently deferred the enactment of proposed rules concerning the competency and qualifications of counsel appointed to represent indigent defendants in capital cases where the services of a public defender are not available because of a conflict of interest "until the legislature has had a chance to address this issue." See, *In Re: Amendment To Florida Rules Of Judicial Administration-- Minimum Standards For Appointed Counsel In Capital Cases*. (Appendix 13). These deferred rules addressed the mandatory appointment by the court of two attorneys to represent a capital indigent criminal defendant when the public defender's office has a declared conflict of interest. However, the deferred rules would not have been applicable to the scenario presented here inasmuch as counsel for the Defendant is privately retained and not appointed by the court subsequent to a conflict declared by the Public Defender's Office.

Here, counsel for the criminal Defendant is <u>**not**</u> a court appointed attorney but is a criminal defense counsel privately retained by the Defendant. The Florida Legislature has carefully established a method by which counsel is provided for indigent criminal defendants who cannot afford to pay for representation by a private attorney. Thus, the state-wide system of the Office of the Public Defender was statutorily created and funded to provide representation to indigent criminal defendants. Further, cognizant

of the fact that certain scenarios would prevent the Office of the Public Defender from ethically representing particular indigent defendants, the Florida Legislature enacted a statute by which the courts may appoint a special conflict counsel to represent indigent criminal defendants upon determination by the Office of the Public Defender that a conflict exists.

Here, privately retained counsel for the criminal Defendant is simply attempting to manipulate the system and gain the assistance of a court appointed attorney at public expense. The obvious inequities in this scheme are numerous. The actions of privately retained counsel for the Defendant in this case are unfair to the taxpayers of the State of Florida who are already paying for the established Office of the Public Defender and even to other criminal defendants who are paying, at their own expense, for the services of their privately retained defense counsel.

II. *SECTION 925.035(1), FLORIDA STATUTES (1997),* GOVERNS THE APPOINTMENT OF COUNSEL FOR AN INDIGENT DEFENDANT IN A CAPITAL CASE.

a. The sole issue on appeal and on which the Fifth District ruled was whether Seminole County must pay for an additional counsel at public expense appointed to assist an attorney who was privately retained by a criminal defendant. The Fifth District expressly found that *Chapter 925, Florida Statutes (1997)*, governs the appointment of an attorney for an indigent defendant in a capital case. *Seminole County* at 932. Specifically, *Section 925.035(1), Florida Statutes (1997)*, provides that

> "[i]f the court determines that the defendant in a capital case is insolvent and desires counsel, it shall appoint a public defender to represent the defendant."

Section 925.035, Florida Statutes (1997), further states that

> "[i]f the public defender appointed to represent two or more defendants found to be insolvent determines that neither him nor his staff can counsel all of the accused without conflict of interest, it shall be his duty to move the court to appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender in his capacity as such or in his private practice, to represent those accused."

Thus, absent a conflict with the Public Defender as set forth in *Section 925.035(1), Florida Statutes (1997)*, the Fifth District held that Florida law clearly requires the appointment of the

public defender to represent an insolvent defendant in a capital case. *Seminole County* at 932. The Fifth District, in its opinion, ruled that

> "Russ began representing Spaziano in the prior post conviction proceeding. Russ was not initially selected pursuant to the statute governing appointment of counsel in capital cases"... and further found that "as Spaziano is represented by private counsel, who was not appointed due to a conflict of interest, there is no statutory authority for the appointment of co-counsel at public expense." *Id.*

Seminole County contends that the Office of the Public Defender is fully funded and supported by the taxpayers of the State of Florida to provide legal representation to indigent defendants in all criminal matters at public expense. It is clearly the prerogative of the Public Defender's Office to, upon appointment as statutorily mandated in accordance with *Section 925.035, Florida Statutes (1997)*, make an assertion, if applicable, with regard to a conflict of interest in representing a particular indigent criminal defendant.

In its Petition For Writ Of Habeas Corpus, the Defendant argued that a conflict of interest exists for the Office of the Public Defender to represent this particular defendant. This argument is meritless and premature. The Office of the Public Defender clearly cannot make a determination of a conflict of interest until appointed to represent a specific defendant.

Moreover, it is the sole prerogative of the Office of the Public Defender to make a determination that the Public Defender's Office has a conflict in representing a certain defendant. It is surely not the role of a third party, namely the privately retained counsel for the criminal Defendant, to assert a conflict of interest on behalf of the Office of the Public Defender which is statutorily and ethically mandated to make such a determination.

The Public Defender in and for the Eighteenth Judicial Circuit has asserted that no conflict would exist with regard to his office representing the Defendant here as to the individual that the Defendant alleges would create a conflict if the Office of the Public Defender is so appointed. (Appendix 14 at 13).

Notwithstanding the desire of the Defendant here to propose his own defense team, Florida law does not permit an insolvent defendant to select his own counsel at public expense.[1] Clearly, a non-indigent defendant may select whomever he or she so desires for legal representation. However, in enacting *Section 925.035(1), Florida Statutes (1997)*, the Florida Legislature expressed its intent to establish a procedure for appointing counsel for indigent defendants in capital cases. Thus, an indigent defendant in a

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[1]Notwithstanding meritless claims by counsel for the Defendant concerning his inability to effectively represent the Defendant, counsel for the Defendant is qualified and competent to represent his client during the lower tribunal proceeding. (Appendix 34 at 603).

capital case is entitled to counsel paid for by public funds only as set forth in *Section 925.035(1), Florida Statutes (1997)*.

b. Moreover, the Fifth District in the decision rendered below responded to the Defendant's constitutional concerns by expressly ruling that "...[s]ection 925.035(1), Florida Statutes (1997), provides an adequate procedure to protect the constitutional right to counsel guaranteed to indigent defendants in capital cases..." *Seminole County* at 932.

Further, Judge Cobb in a specially concurring opinion in the Fifth District case below observed that

> "Attorney Russ is willing to represent the defendant pro bono but wants the assistance of co-counsel at public expense... An indigent defendant is entitled to counsel, but is not permitted to select his or her counsel at public expense. The same is true for Russ, who should not be permitted to select his co-counsel at public expense." *Id.*

Judge Cobb further observes that the Circuit Court decision below

> "sets a bad precedent, because in the future an attorney with little or no experience in capital cases could agree to represent pro bono a criminal defendant and then move the court for the appointment of a more experienced attorney for assistance, to be compensated by the county. This practice would undermine the state public defender system created by the legislature as the way of providing counsel to indigent defendants." *Id.*

The appointment of co-counsel at public expense in complete

disregard of the statutorily established procedure will result in a method of appointment whereby indigent criminal defendants can circumvent representation by the Public Defender's Office and effectively choose their own criminal defense team at public expense. Such subterfuge is abhorrent to the judicial process statutorily established to serve the needs of indigent criminal defendants and inequitable to the taxpaying public which already pays its share through fiscal support of the Public Defender's Office.

This case includes a lengthy history of litigation in the various courts of the state and it does involve complex issues. However, all cases potentially involving the death penalty are complex and many other cases include lengthy histories of litigation. The County opines that the indigent Defendant here is not entitled to any greater assistance of counsel than is provided to other indigent criminal defendants in accordance with Florida Statutes.

Simply put, if privately retained defense counsel is not able to continue as counsel in representing this indigent Defendant, the Office of the Public Defender must be appointed in accordance with *Section 925.035(1), Florida Statutes (1997)*.

III. DEFENDANT HAS ASSERTED NO BASIS UPON WHICH A WRIT OF HABEAS CORPUS COULD PROPERLY BE GRANTED.

a. Counsel for the Defendant seeks an inappropriate remedy from this Court. The function of a Writ of Habeas Corpus permits the Petitioner to challenge by collateral attack the jurisdiction under which the process or judgment by which he is deprived of his liberty was issued or rendered. *State ex rel. Paine v. Paine,* 166 So. 2d 708 (Fla. 3d DCA 1964). Jurisdiction of the person and of the subject matter is not alone conclusive where relief is sought in habeas corpus proceedings, but the power of the court to render the order or judgment that serves as the basis of the imprisonment of the petitioner is a proper subject of inquiry. *Re: Livingston,* 156 So. 612 (Fla. 1964); *Buchanan v. State,* 167 So. 2d 43 (Fla. 3d DCA 1964). Thus, the concern is not merely whether an error has been committed in ordering or holding the petitioner in custody, but whether such error is sufficient to render the order or process void; furthermore, it may be said that the scope of a writ of habeas corpus, where directed to an inquiry into the cause of imprisonment in judicial proceedings, extends to questions affecting the jurisdiction of the court which committed the prisoner, the sufficiency in point of law of the proceedings against him, and the validity of the judgment under which he is restrained. *Bronk v. State*, 31 So. 248 (Fla. 1901); *Martin v.*

State, 166 So. 467 (Fla. 1936); *House v. State*, 172 So. 734 (Fla. 1937); *Re: Wilson*, 14 So. 2d 846 (Fla. 1943).

Clearly, Defendant's petition requesting the Florida Supreme Court to grant a Writ Of Habeas Corpus based upon a lower tribunal's refusal to appoint a co-counsel at public expense to assist a privately retained defense counsel is illogical and without merit as to the issues for which he is imprisoned. See also, *Hardwick v. Dugger*, 648 So. 2d 100 (Fla. 1994); *Collins v. State*, 559 So. 2d 1276 (Fla. 2d DCA 1990).

b. There is no basis contained in the petition which is sufficient to invoke this Court's jurisdiction. None of the appropriate bases for the exercise of such jurisdiction exist. Florida law is settled that habeas is viable to 1) attach gain time and related computations; 2) test pretrial detention and the setting of pretrial bonds; 3) determine the right to a belated appeal; 4) challenge extradition; and 5) raise claims of ineffective assistance of appellate counsel. See, *State v. Broom*, 523 So. 2d 639, 641 (Fla. 2d DCA 1988). The claim contained in the Defendant's Petition does not fall into any of those narrow categories and, because that it so, habeas is not appropriate.

To the extent that the Defendant argued, in Section I of his Petition, that habeas "is the appropriate remedy for the denial of conflict-free legal counsel for an indigent defendant in a Florida

death penalty case," the cases upon which he relies do not stand for that proposition. Both *Dougan v. Wainwright*, 448 So. 2d 1005 (Fla. 1984), and *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984), were post-direct appeal collateral attach proceedings which presented ineffective assistance of appellate counsel claims. Under settled law, "[a] petition for a writ of habeas corpus is the appropriate vehicle to raise claims of ineffective assistance of appellate counsel." *Knight v. State*, 394 So. 2d 997, 999 (Fla. 1981); *Groover v. Singletary*, 656 So. 2d 424, 425 (Fla. 1995). However, the writ is not the appropriate vehicle to raise a claim concerning the appointment of an additional attorney of the Defendant's liking at public expense.[2] There is no basis upon which this Court may exercise habeas jurisdiction.

The claim contained in the *Petition* (to the extent that it states a valid claim at all), should be raised on direct appeal (if the issue still exists). Even then, there is no entitlement to more than one attorney, and the abuse of discretion standard governs review. See, *Howell v. State*, 707 So. 2d 674, 680 (Fla.

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[2] In the Petition, the Defendant relies on the panel decision of the Eleventh Judicial Circuit in *Freund v. Butterworth,* 117 F. 3d 1543 (11th Cir. 1997). That panel decision was vacated by the Court's grant of rehearing *en banc. Freund v. Butterworth,* 135 F. 3d 1419 (11th Cir. 1998).

1998); *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994); *Reaves v. State*, 639 So. 2d 1 (Fla. 1994).

D. CONCLUSION.

The Fifth District carefully reviewed all applicable law and pleadings submitted by all parties prior to rendering the decision below. The Fifth District properly granted Seminole County's Petition For Writ Of Certiorari And Declaratory And Injunctive Relief and quashed the Order Appointing Additional Counsel At Public Expense entered by the Circuit Court on December 11, 1997.

Moreover, the Defendant has failed to establish that the decision rendered by the Fifth District below expressly or directly conflicts with a decision of either the Florida Supreme Court or another Florida District Court of Appeal. This criterion is the sole ground cited in the Defendant's jurisdictional brief for vesting of discretionary jurisdiction in this Court pursuant to the Florida Constitution and the Florida Rules of Appellate Procedure.

Inasmuch as the Fifth District found that the Circuit Court had departed from the essential requirements of law, it properly granted Seminole County's Petition For Writ Of Certiorari And Declaratory And Injunctive Relief and quashed the Order of the Circuit Court. *Seminole County* at 932.

Seminole County does not have custody of the criminal Defendant who remains in the custody of the State of Florida

Department of Corrections. The criminal Defendant rightfully remains in custody of the State of Florida Department of Corrections resulting from a conviction in the Ninth Judicial Circuit, Orange County, Florida, Case No. CR 75-1305. (Appendix 33).

Accordingly, Seminole County and the State of Florida respectfully request this Court to afford the following relief:

A. Deny the relief sought in Mr. Spaziano's Petition For Writ Of Habeas Corpus;

B. Deny the four (4) judicial acts requested by the Defendant in his Reply To State And County Responses To Petition For Writ Of Habeas Corpus; and

C. Grant the State of Florida and Seminole County such other legal or equitable relief as this Court deems just and proper.

The Fifth District has properly ruled on the issues presented here. A Petition For Writ Of Habeas Corpus is a legal action with a common-law origin providing an extraordinary remedy for persons otherwise subjected to undue burdens in our system of jurisprudence. The Defendant should not be permitted to manipulate the system in order to obtain the benefit of such extreme consequence as a Writ Of Habeas Corpus should his pending requests before the Florida Supreme Court associated with the cases consolidated herein fail.

DATED this ____ day of July, 1998.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to **THOMAS HASTINGS**, Assistant State Attorney, 100 East First Street, Sanford, FL 32771, **OFFICE OF THE PUBLIC DEFENDER**, 301 North Park Avenue, Sanford, FL 32771, and **JAMES M. RUSS, ESQ.**, 18 West Pine Street, Orlando, FL 32801 by U.S. Mail this _______ day of July, 1998. The original and seven (7) copies have been forwarded on this date by express overnight mail delivery to **HONORABLE SID J. WHITE, CLERK**, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399.

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