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DATE: June 14, 1999

****FINAL ACTION****

****SEE FINAL ACTION STATUS SECTION****

**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
CRIME AND PUNISHMENT
FINAL ANALYSIS**

BILL #: CS/HB 327

RELATING TO: Conflict of Interest/Indigents

SPONSOR(S): Committee on Crime & Punishment and Representative Warner

COMPANION BILL(S): SB 1910

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:

- (1) CRIME AND PUNISHMENT YEAS 6 NAYS 0
- (2) CRIMINAL JUSTICE APPROPRIATIONS YEAS 9 NAYS 0
- (3)
- (4)
- (5)

I. FINAL ACTION STATUS:

CS/HB 327 was approved by the Governor on June 8, 1999 and became Chapter 99-282.

II. SUMMARY:

Section 27.53 currently provides that when a public defender determines that a conflict of interest exists between two or more clients, the public defender has a duty to file a motion for the court to appoint other counsel. CS/HB 327 provides that when a public defender files a motion to withdraw, the court should review the motion and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. The committee substitute also provides that, after the inquiry, the court is to permit withdrawal unless the court determines that the claimed conflict is not prejudicial to the indigent client.

The committee substitute requires each circuit conflict committee to assess the conflict representation in its circuit and determine whether another system would be more cost-effective, offer greater administrative control and provide higher quality representation in conflict cases. Each committee is required to report its findings to the legislature by February 1, 2000.

The committee substitute shall take effect upon becoming law.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

The state of Florida is divided into twenty judicial circuits. Art. V, section 19, Fla.Const. Each circuit has a public defender's office headed by an elected public defender.

Conflict of Interest

Rule 4-1.7(b) of the Rules Regulating the Florida Bar states in part:

A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest.....

When a public defender is appointed to represent two or more co-defendants, a conflict of interest can arise if their defenses are adverse or hostile. A conflict can also arise if a public defender had previously represented a witness or victim who will testify against the public defender's current client. Hostility of a personal nature between a defendant and his public defender does not constitute "conflict". Pena v. State, 706 So.2d 1378 (Fla. 4th DCA 1998). If a public defender cannot represent a defendant because of a conflict of interest, the conflict is imputed to other attorneys in the public defender's office. Bouie v. State, 559 So.2d 1113, 1115 (Fla. 1990).

Motion to Withdraw

Currently, under sec. 27.53(3), if the public defender determines that the interests of those represented are so adverse or hostile that they cannot be represented by the same office, the public defender has a duty to move the court to appoint other counsel. According to this section, the trial court may then appoint one or more members of the Florida Bar who are not affiliated with the public defender's office to represent the accused.

Although the statute uses permissive language, according to the Florida Supreme Court, when a public defender certifies that there is conflict of interest, the trial court must grant the motion to withdraw. The trial court may not reweigh the facts that gave rise to the public defender's determination that a conflict exists. Guzman v. State, 644 So.2d 966 (Fla. 1994).

The Federal Constitution does not preclude a trial court from "exploring the adequacy of the basis of defense counsel's representations regarding a conflict of interest without improperly requiring disclosure of the confidential communications of the client." Holloway v. Arkansas, 435 U.S. 475, 487, 98 S.Ct. 1173, 55 L.Ed.2d 426 (1978). When a defendant objects to joint representation, a federal court must either appoint conflict counsel or conduct a searching inquiry "targeted at the conflict issue". Selsor v. Kaiser, 81 F.3d 1492 (10th Cir. 1996). For example, in United States v. DeRobertis, 771 F.2d 1057 (7th Cir. 1985), in granting habeas relief to a defendant who had been represented by the same counsel as his co-defendant at their joint trial, the Seventh Circuit stated:

When presented with [counsel's] claim of conflicting defenses, at a minimum the trial court should have requested that [counsel] give him some idea of what the conflict entailed, to allow him to determine whether to order [counsel] to withdraw... Holloway does not require that [counsel] disclose his trial strategy or violate duty of confidentiality to his clients, so that the substance of what he disclosed may have been quite limited.

However, Florida courts have interpreted section 27.53(3) as affording greater protection than the Sixth Amendment right to counsel. Reardon v. State, 715 So.2d 348 (Fla. 4th DCA 1998). The Reardon court concluded that, "[a]ny change in the manner in which a public defender's certification of conflict is treated by the trial courts and reviewed will have to come from the legislature." Id. at 349.

Section 27.53(3) does not apply to "overload conflicts". Unlike ethical conflicts which are based on a conflict of interest arising from the facts of a case, overload conflict occurs when an public defender determines that his or her office is experiencing an excessive workload.

When a public defender withdraws from a case, a "special public defender" is appointed from the private defense bar. In November 1998, Floridians approved Revision 7 which provides that by July 1, 2004, the state is to assume the full costs of court-appointed conflict counsel, which counties have paid for until now. In fiscal year 1995-96, counties reported an aggregate conflict counsel cost of just over \$26 million.

Attorney-Client Privilege

Section 90.502 provides that a client has a privilege to refuse to disclose and to prevent any other person from disclosing the contents of confidential communications made to the client's attorney during the rendition of legal services to the client. Courts have noted that it is difficult for a public defender to fully explain the nature of a conflict of interest without revealing confidential communications and thus violating the attorney client privilege. Moorman v. Threadgill, 462 So.2d 573, 574 (Fla. 2d DCA 1985).

Alachua County Court Cost Containment Office

Section 925.037(3), F.S. creates a conflict committee in each circuit made up of the chief judge of the judicial circuit, a representative from each board of county commissioners within the circuit and the public defender of the circuit. The responsibility of the circuit is to select and approve attorneys for conflict case appointments.

In 1990, the Eight Judicial Circuit established a Court Cost Containment Office in Alachua County with the goal of reducing the costs of the conflict public defender system. A recent report by the Senate Criminal Justice Committee described the Alachua County office as follows:

The Court Cost Containment office works with two types of conflict attorney systems:

- ▶ hourly rate: the office maintains a list of qualified attorneys who agree to take assignments pursuant to the hourly rate and terms established by the court.
- ▶ contract: counties solicit bids from local attorneys to provide legal services for specified number and types of cases.

Rather than simply assigning conflict cases to available attorneys the Court Cost Containment office assesses each case to determine whether it would be more cost-effective for an hourly rate or contract attorney to handle the case. For example, a case determined to settle quickly is assigned to an hourly rate attorney, but a more complex trial case is assigned to a contract attorney.

Fla.S.Comm. on Crim.J., Review of the Public Defender System and Appellate Overload, Rep.No. 989-16 (Nov. 1998).

The Alachua County office also matches each case to an attorney with the appropriate experience or skill level. The office also maintains a database for all conflict attorney cases which allows for tracking the assessment of fees, fines and costs. Attorney fees and costs are reviewed for errors and inappropriate charges.

B. EFFECT OF PROPOSED CHANGES:

The committee substitute to HB 327 provides that if a public defender determines that a conflict of interest exists between two or more represented defendants, the public defender shall file a motion to withdraw and move the court to appoint other counsel. The committee substitute further provides that the court should review the motion and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. After the inquiry, the court is required to permit withdrawal unless the court determines that the claimed conflict is not prejudicial to the indigent client. This would change the holding in cases such as *Guzman* which interpret section 27.53(3) as requiring a trial court to grant a motion to withdraw when a public defender certifies conflict without permitting the court to reweigh the facts to determine if conflict exists.

The committee substitute also requires each circuit conflict committee to assess the conflict representation system in its circuit and determine whether another system would be more cost-effective, offer greater administrative control and provide higher quality representation in conflict cases. Each committee is required to report its findings to the legislature by February 1, 2000 and in its determination is to consider other conflict representation systems including the attorney management program established in the Eighth Judicial Circuit.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

No.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

a. Does the bill increase anyone's taxes?

No.

b. Does the bill require or authorize an increase in any fees?

No.

c. Does the bill reduce total taxes, both rates and revenues?

No.

d. Does the bill reduce total fees, both rates and revenues?

No.

e. Does the bill authorize any fee or tax increase by any local government?

No.

3. Personal Responsibility:

a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

No.

b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

No.

4. Individual Freedom:

a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

No.

b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

No.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

- b. Does the bill directly affect the legal rights and obligations between family members?

No.

- c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

- (1) parents and guardians?

N/A

- (2) service providers?

N/A

- (3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

Section 27.53.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Revises section 27.53 to provide that a court may inquire into the adequacy of a public defender's representation that a conflict of interest exists and provides that the court should permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client.

Section 2: Requires each circuit conflict committee to assess the conflict representation in its circuit and determine whether another system would be more cost-effective, offer greater administrative control and provide higher quality of representation.

Section 3: Provides that the act shall take effect upon becoming a law.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

4. Total Revenues and Expenditures:

See Fiscal Comments.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

See Fiscal Comments.

2. Recurring Effects:

See Fiscal Comments.

3. Long Run Effects Other Than Normal Growth:

See Fiscal Comments.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

To the extent that this committee substitute reduces the number of private defense attorneys appointed as conflict counsel, it will have a negative private sector impact.

2. Direct Private Sector Benefits:

See Fiscal Comments.

3. Effects on Competition, Private Enterprise and Employment Markets:

See Fiscal Comments.

D. FISCAL COMMENTS:

Allowing a trial court to deny a defendant's motion to withdraw upon a finding that the conflict is too remote or attenuated will limit the cost of conflict attorneys which are generally more expensive than the public defenders, however, the committee substitute may increase appellate costs to the state. The Criminal Justice Estimating Conference has determined that this committee substitute will not have any effect on prisons.

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill is exempt from the requirement of Article VII, Section 18 of the Florida Constitution because it is a criminal law.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that municipalities or counties have to raise the revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

VI. COMMENTS:

This committee substitute would permit the trial court to determine whether there is conflict which would prejudice a defendant. In Reardon v. State, 715 So.2d 348 (Fla. 4th DCA 1998), the trial court found that the victim had been represented by an unidentified assistant public defender for "just a couple of minutes", that the victim was no longer on probation and that the victim would not suffer any prejudice in being questioned by the defendant's public defender in the pending criminal case. The trial court found that the interests of the victim were not so adverse or hostile to the petitioner that the public defender could not represent the defendant. The Fourth District granted the defendant's petition for writ of certiorari and quashed the trial court's order because it was "clear under *Guzman* that the trial court has no discretion in this matter." Similarly, in Filan v. State, 720 So.2d 549 (Fla. 4th DCA 1998), the assistant public defender learned that the Public Defender's Office previously had represented a witness on a substantive charge and on a subsequent violation of probation. In granting the defendant's petition for writ of certiorari, the Fourth District stated:

Although the representation of the witness was very limited, taking place at arraignment, and the witness was willing to waive any conflict, the trial court should have granted the assistant public defender's subsequent motion to withdraw which certified conflict.

The committee substitute may allow a trial court to deny a motion to withdraw in cases such as Filan and Reardon, where the prior representation of a witness against the defendant had been very limited. However, it may be difficult for a trial court to determine whether a conflict exists without access to the confidential attorney-client communications. Further, even if no conflict is apparent before trial, it is possible that if a public defender represents co-defendants, a conflict may arise during the course of trial. For example, it is common for a defendant to place blame for the crime on his or her co-defendant. Failing to grant a motion to conflict out of a case may also raise additional issues on appeal.

Committee Amendments

The original bill amended section 27.53 to provide that a court shall permit withdrawal of a public defender's office when the office has moved to withdraw due to conflict of interest between two or more represented indigent defendants unless the court determines that the asserted conflict is too remote or attenuated to result in prejudice to the indigent client.

On February 17, 1999, Representative Warner offered a strike everything amendment at the Committee on Crime & Punishment meeting. As discussed earlier, the strike everything amendment provided that when a public defender files a motion to withdraw, the court should review the motion and inquire into the adequacy of the public defender's representation regarding a conflict of interest and that after the inquiry, the court should permit withdrawal unless the court finds that the claimed conflict is not prejudicial to the defendant. The bill, with the strike everything amendment, was adopted by the Committee on Crime & Punishment and made a committee substitute.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On the floor of the House of Representatives, Representative Warner and Representative Goodlette offered a clarifying amendment to provide that a trial court should inquire or "conduct a hearing" regarding the alleged conflict if a defense counsel files a motion to withdraw. The committee substitute passed the House and the Senate as amended.

VIII. SIGNATURES:

COMMITTEE ON CRIME AND PUNISHMENT:

Prepared by:

Trina Kramer

Staff Director:

J. Willis Renuart

STORAGE NAME: h0327s1z.cp

DATE: June 14, 1999

PAGE 9

AS REVISED BY THE COMMITTEE ON CRIMINAL JUSTICE APPROPRIATIONS:
Prepared by: Staff Director:

James P. DeBeaugrine

James P. DeBeaugrine

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON CRIME AND PUNISHMENT:
Prepared by: Staff Director:

Trina Kramer

J. Willis Renuart