

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

vs.

Case No. 94,291  
4th DCA #98-1703

ROBERT REARDON,  
Respondent,

\_\_\_\_\_ /

STATE OF FLORIDA,  
Petitioner,

vs.

Case No. 94,300  
4th DCA #98-1924

VERNON M. LESLIE, JR.,  
Respondent,

\_\_\_\_\_ /

STATE OF FLORIDA,  
Petitioner,

vs.

Case No. 94,301  
4th DCA #98-1842

RICHARD FILAN,  
Respondent.

\_\_\_\_\_ /

RESPONDENTS' BRIEF ON THE MERITS

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**PRELIMINARY STATEMENT**

In accordance with the Florida Supreme Court Administrative Order, issued on July 13, 1998, and modeled after Rule 28-2(d), Rules of the United States Court of Appeals for the Eleventh Circuit, counsel petitioner hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

The petitioner's appendix will be designated by "PA," the petitioner's brief by "PB" and the respondents' appendix by "RA."

**STATEMENT OF THE CASE AND FACTS**

Respondents accept the statement of the case and facts as presented the Petitioner's Brief on the Merits.

### SUMMARY OF ARGUMENT

Petitioner's assertion that trial judges are permitted to not follow this Court's direct precedent in Guzman v. State, 644 So. 2d 996 (Fla. 1994), because it is wrongly decided, ignores the rule of basic law, that trial courts do not create precedent. Nor do the district courts have authority to overrule a decision of this Court.

Guzman relies on Babb v. Edwards, 412 So.2d 859 (Fla. 1982), which holds that when a public defender certifies a conflict of interest in representing clients that the trial court has a duty to grant the public defender's motion and appoint separate representation. Petitioner's argument is that Babb was decided under the 1980 version of the statute which states that upon the public defender's certification of conflict the trial court "shall appoint" other counsel and that the court in deciding Guzman overlooked the 1991 amendments to that statute which instead say "may appoint" other counsel. Petitioner is wrong because Babb was decided under the 1981 version of the statute which directed that upon a certification of conflict the court "may appoint" either a lawyer in private practice or a public defender from another circuit. Later, the legislature deleted the circuit court's authority to make a cross circuit appointment. The 1991 statute in effect at the time when Guzman was decided is materially unchanged from the 1981 statute in Babb which imposed a duty on the circuit court to grant the public defender's motion to withdraw upon

certification of conflict. The current 1997 statute is the same as the 1991 version. When a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment.

Section 27.53(3) is consistent with the law which in the absence of a statute would generally govern the respective responsibilities of the court and counsel in these matters. An attorney's request for the appointment of separate counsel based on his or her representations as an officer of the court regarding a conflict of interests should be granted. Where the facts which lead to seeking separate representation were derived from confidential communications, no inquiry may properly be allowed.

The trial court's inquiry into the basis of the public defender's certification of conflict in Mr. Reardon's and Mr. Leslie's cases required the public defender to allude to confidential matters, both communications and strategy, and violated this Court's directive in Guzman that the trial court not reweigh the facts. The evidentiary hearings held in these cases show the benefit of the rule of Guzman and the extensive inquiries that become necessary when trial judges view a certification of conflict of interest by the public defender as insufficient in itself to require the appointment of different counsel.

The Guzman rule should be reaffirmed by this Court because it is simple and direct, a bright line rule which everyone can easily follow. It is only one of many reasons an attorney might move to withdraw from representation in a criminal case and only applies

when a certified conflict involves adverse interests of clients or former clients, not conflicts that are personal between the defendant and the lawyer. It allows early determination of conflicts of interest, insures the defendant's right to conflict-free counsel at trial and protects the attorney/client relationship from becoming an adversarial one.

## ARGUMENT

[WHETHER] THE FOURTH DISTRICT COURT OF APPEAL  
ERRED BY RELYING UPON GUZMAN V. STATE, 644 SO.  
2D 996 (FLA. 1994) IN GRANTING WRITS OF  
CERTIORARI IN THESE CASES.

Petitioner asserts that the Fourth District's decisions demonstrate how "the judiciary has been emasculated" by this Court's decision in Guzman v. State, 644 So. 2d 996 (Fla. 1994), that the trial courts in the Fifteenth Circuit did not depart from the essential requirements of law in denying the public defender's motions to withdraw certifying conflict of interest because Guzman was wrongly decided. This bold claim contradicts basic premises of the well established law. By no known authority is a circuit judge permitted to not follow precedent from this Court or the district courts on the belief that those courts' decisions are erroneous. Trial courts do not create precedent. A system in which trial courts are not bound by direct precedent from the Florida Supreme Court on a question of law would be a system promoting the rule of individual judges rather than the rule of law. State v. Bamber, 592 So. 2d 1129,1132 (Fla. 2d DCA 1991). Nor are the district courts free to disregard precedent from this Court and to create rules of law of their own choosing. A district court of appeal does not have the authority to overrule a decision of this Court. Hoffman v. Jones, 280 So. 2d 431, 440 (Fla. 1973).

The orders of the circuit judges refusing to grant the public defender's motion to withdraw upon their certification of a conflict of interests were properly quashed by the Fourth District

as they departed from the essential requirements of law. Section 27.53(3), Florida Statutes, as construed by this Court, requires that when the public defender has certified the existence of a conflict of interests and has moved the court for appointment of other counsel, the trial court has a duty to appoint counsel who is no way affiliated with the public defender. Section 27.53(3), Florida Statutes (1991) and (1997), Babb v. Edwards, 412 So. 2d 859,862 (Fla. 1982), Guzman v. State, 644 So. 2d 996 (Fla. 1994). The trial court is not permitted to reweigh the facts considered by the public defender in determining a conflict exists. The court must grant separate representation even if the representation of one of the adverse clients has been concluded. Guzman at 999.

Petitioner's main argument here is that Guzman v. State was wrongly decided arguing that the 1991 version of Section 27.53(3) in effect at the time of Guzman was not the same as the 1980 statute construed in Babb. Although the trial judge in Babb v. Edwards had considered the 1980 statute then in effect at the time the motions were denied, when this Court issued its decision in Babb v. Edwards, the 1981 statute was then in effect and was the basis of the Court's decision in that case. The Court at the outset of its decision in Babb v. Edwards stated:

We disagree with the Fifth District's response to the question and hold that where the public defender of a given circuit determines that the interests of indigent defendants are so adverse or hostile that they cannot be represented by him or his assistant public defenders regardless of the location of their offices within the circuit without conflict of interest, the trial court shall, upon motion

of the public defender, appoint other counsel as provided by statute.

Babb further found that while the legislative intent was clear in the 1980 statute that it was "even clearer" by the 1981 amendments to Section 27.53(3), Babb at 862, which read in pertinent part:

If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict or interest, it shall be his duty to move the court to appoint other counsel. The court may appoint either:

(a) 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; or

(b) A public defender from another circuit. Such public defender shall be provided office space, utilities, telephone services, and custodial services, as may be necessary for the proper and efficient function of the office, by the county in which the trial is held.

Thus, the 1981 statute considered in Babb directed that upon a certification of conflict the court "may appoint" either a lawyer in private practice or a public defender from another circuit. Petitioner asserts this 1981 version of the statute "gave the trial court limited discretion in dealing with motions to withdraw." (PA-14). However, this interpretation by petitioner is not consistent with this Court's decision in Babb v. Edwards, where this Court

found the statute was mandatory even though it contained the words "may appoint" [other counsel]. Babb v. Edwards construed the 1981 statute as mandating the appointment of other counsel when conflict is certified.

Section 27.53(3), Florida Statutes (1991) and (1997), provides, in part, as follows:

If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it shall be his duty to move the court to appoint other counsel. The court may appoint one or more members of The Florida Bar, who are in no such way affiliated with the public defender, in his capacity as such, or in his private practice, to represent those accused.<sup>1</sup>

Petitioner's argument overlooks that it was the 1981 statute which changed "shall appoint" to "may appoint" in the context of giving the trial judge a choice of whom to appoint, either an attorney in private practice or a public defender from another circuit. This change in no way altered the trial court's duty to appoint other counsel upon the public defender's certification of conflict. The 1991 version of the statute is materially unchanged from the 1981 statute and only deletes the circuit court's authority to make a cross-circuit appointment of another public

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<sup>1</sup>The statutes also provide that "the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict." § 27.53(3), Fla. Stat. (1991) and (1997).

defender's office. Since the 1981 statute imposed a duty upon the trial court to appoint other counsel upon the public defender's certification of conflict of interest, this Court's decision in Guzman interpreting the 1991 version of the statute, which is also the present statute, correctly relies on long standing precedent to hold that the present statute imposed a duty upon the trial court to appoint other counsel as well.<sup>2</sup> Guzman v. State, supra; Babb v. Edwards, Nixon v. Segal, 626 So. 2d 1024 (Fla. 3d DCA 1993).

As is clear in these three consolidated cases, the trial judges viewed a certification of conflict of interest by the public defender as insufficient in itself to require the appointment of different counsel without further inquiry into the basis of the conflict by the court. In Reardon's case, the trial judge held not one but two hearings to probe and question the reasons for the public defender's certification of conflict, on April 28, 1998,

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<sup>2</sup> Moreover, the doctrine of stare decisis should defeat petitioner's claim that Guzman was wrongly decided. As Justice Overton stated in his concurrence in Perez v. State, 620 So. 2d 1256, 1259 (Fla. 1993) (Overton, J., concurring), "adhering to precedent is an essential part of our judicial system and philosophy." Justice Overton also explained that the doctrine of stare decisis requires an examination of:

the possible significance of intervening events, the possible impact on settled expectations, and the risk of undermining public confidence in the stability of our basic rules of law. Such a separate inquiry is appropriate not only when an old rule is of doubtful legitimacy . . . but also when an old rule that was admittedly valid when conceived is questioned because of a change of circumstances that originally justified it.

No such legitimate justification for altering the precedent of this Court due to new circumstances is suggested by petitioner.

contained in respondent's appendix (RA-1-52), as well as the April 30 hearing contained in petitioner's appendix. This was manifestly a departure from the essential requirements of law as Guzman specifically directs trial courts to grant the public defender's motion to withdraw and appoint conflict-free counsel once the public defender certifies a conflict based on adverse or hostile interests between two clients of the public defender's office under Section 27.53(3), Florida Statutes; Guzman v. State, supra.

In Babb v. Edwards, this Court rejected the state's interpretation of the 1981 statute that more was required of the Public Defender before the trial court had to accept the defender's certification of conflict. Instead Babb held that a certification of conflict by the public defender created a duty on the part of the trial court to appoint other counsel to represent the indigent defendant. Babb at 862. Under the statute, the burden of determining whether a conflict of interest exists is placed upon the public defender, and, once he determines that such conflict exists, and moves to appoint other counsel, it is the duty of the trial court to appoint counsel who is not affiliated with the public defender's office. Id. As this Court:

We do not agree that the legislature intended to place such a burden on either the public defender or the trial court. We find that the language in section 27.53(3) clearly and unambiguously requires the trial court to appoint other counsel not affiliated with the public defender's office upon certification by the public defender that adverse defendants cannot be represented by him or his staff without conflict of interest. The statute does not require the consideration and

weighing of those factors suggested by the district court and, more importantly, does not permit the appointment of other counsel affiliated with the public defender's office once conflict is certified.

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. . .[W]e hold that under the provisions of section 27.53(3), two adverse defendants should not be represented by assistant public defenders in the same circuit once the public defender has determined that to do so would be a conflict of interest and on that ground has moved the trial court to appoint other counsel.

Babb at 862.

Thus, the construction of the 1981 statute set forth in Babb was fully applicable to, and was found by this Court to control the interpretation of the 1991 statute under which Guzman was decided.

The 1991 version of Section 27.53(3), and the current 1997 version are materially unchanged from the 1981 version. "It is well-established rule of statutory construction that when a statute is reenacted, the judicial construction previously placed on the statute is presumed to have been adopted in the reenactment." Burdick v. State, 594 So. 2d 267,271 (Fla. 1992)(citations omitted). Accord, e.g., Dickinson v. Davis, 224 So. 2d 262,264 (Fla. 1969); Delaney v. State, 190 So. 2d 578,581-82 (Fla. 1966); Bermudez v. Florida Power and Light Co., 433 So. 2d 565,567 (Fla. 3d DCA 1983), review denied, 444 So. 2d 416 (Fla. 1984). The legislature must therefore be deemed to have approved the interpretation of the statute set forth by this Court in the Guzman case. Burdick v. State, supra. That the legislature has not

changed section 27.53(3) is one reason emphasized by the Fourth District in Reardon's case that trial judges must follow Guzman: "[A]ny change in the manner in which a public defender's certification of conflict is treated by the trial courts will have to come from the legislature." Reardon v. State, 715 So. 2d 348 (Fla. 4th DCA 1998).

By placing the responsibility for determining the existence of conflict upon the public defender, rather than the court, and by imposing upon the court a duty to appoint other counsel when conflict has been certified, the statute removes from the court's discretion the threshold question of whether a conflict of interests exists. See Babb at 862, Guzman at 999. The court has no discretion to inquire into the basis for the certification of conflict, or to independently determine the adequacy of that basis, should the public defender choose to disclose it. Cf. State v. Hamilton, 448 So. 2d 1007 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1st DCA 1991) (once counsel satisfies threshold requirement of Rule 3.216(a) by indicating a subjective belief that a psychiatric expert is needed to aid in the defense, the court must appoint the expert and has no discretion to inquire as to the reasonableness of counsel's asserted subjective belief). See also Artiles v. State, 691 So. 2d 1130 (Fla. 4th DCA 1997) (Trial court's failure to continue the competency hearing for defendant's confidential expert to examine him constituted an abuse of discretion).

Section 27.53(3) is consistent with the law which, in the

absence of the statute, would generally govern the respective responsibilities of the court and counsel in these matters. An attorney has a duty to determine when a conflict of interests exists or will probably develop in the course of a trial. If counsel is aware that a representation involves a conflict of interests, he should decline the representation, or withdraw from the representation if it has already been undertaken. See Comment, R. Regulating Fla. Bar 4-1.7. The court's discretion to overrule counsel's determination that a conflict exists is quite limited.

"[A]n attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted." Holloway v. Arkansas, 435 U.S. 475,485-86, 99 S. Ct. 1173,1179, 55 L. Ed. 2d 426 (1978); see also Johnson v. State, 600 So. 2d 32 (Fla. 3d DCA 1992)(reversible error to overrule counsel's objection to joint representation where the record shows a "risk" of conflict). This is because (1) an attorney "is in the best position professionally and ethically to determine when a conflict of interests exists or will probably develop in the course of a trial," (2) attorneys have the obligation to bring such problems to the attention of the court, and (3) "attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'" Holloway v. Arkansas, 435 U.S. at 485-8, 98 S. Ct. at 1179 (citations omitted).

The trial court's authority in these matters generally derives from the court's responsibility for the orderly administration of

justice. See Rubin v. State, 490 So. 2d 1001,1002 n.1 (Fla. 3d DCA), review denied, 501 So. 2d 1283(1986), cert.denied, 483 U.S. 1005 (1987); Sanborn v. State, 474 So. 2d 309 (Fla. 3d DCA 1985). Its power to inquire into the basis for the conflict, and to deny a motion to withdraw, is correspondingly limited. Where the facts which led to seeking separate representation were derived from confidential communications, no inquiry may properly be allowed. Holloway v. Arkansas, 435 U.S. at 487 n. 11. Where withdrawal would not measurably affect the interests of other parties, or the orderly administration of justice, the court should grant the motion. See id., 435 U.S. at 485-8, 98 S. Ct at 1179. The court is in no position to determine conflict between clients, as the confidentialities existing between counsel and her former clients are not known to the court. Butler v. State, 672 So. 2d 653 (Fla. 4th DCA 1996).

Section 27.53(3) carries this law one step further: Where, as here, the only issue before the court is whether or not the public defender's certification of conflict resolves that question then the court *must* appoint other counsel to represent the defendant. Guzman. In such circumstances, it is not the role of the court, as the petitioner asserts, to determine whether the public defender has properly interpreted and applied to the particular case the ethical rules and statutes which govern his conduct as a lawyer and as a constitutional officer. The responsibility for making that determination is the public defender's. Guzman, Babb.

The court's responsibility for the orderly administration of

justice does not endow it with the authority to *sua sponte* review decisions which, by statute, and under the ethical rules of the profession, are entrusted to the public defender. As a lawyer, the public defender is an officer of the court, but is not a member of the court's staff. The public defender is a constitutional officer, Art. V, § 18, Florida Constitution, and the trial court has no general authority to oversee the management of the public defender's office, see Skitka v. State, 579 So. 2d 102,104 (Fla. 1991); Woods v. State, 595 So. 2d 265 (Fla. 1st DCA 1992), nor to issue unrequested advisory opinions on the fulfillment of the public defender's ethical and statutory duties, nor to impose upon the public defender the burden of seeking to avoid a particular conflict by means other than declining, or withdrawing from, the representation, see Babb. See also Polk County v. Dodson, 454 U.S. 312,321-22, 102 S. Ct. 445,451, 70 L. Ed. 2d 509 (1981)("[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages").

Where, as here, the public defender has certified that representation would involve a conflict of interest, and has objected to the continued representation on that basis, and there are no recognizable interests which would be adversely affected by appointing other counsel, the court has a clear, ministerial duty to comply with Section 27.53(3) and appoint counsel who is not affiliated with that circuit's public defender. See Guzman.

In Mr. Reardon's case, the trial judge ignored the public

defender's certification of conflict, and denied the motion to withdraw after extensive hearings and his own fact finding mission that solicited evidence outside the hearing by memo from the administrative county judge at the Gun Club courthouse. At the hearing on April 28, 1998, the public defender was required to answer the court's questions, which revealed the defense strategy and alluded to confidential attorney/client communications that in this aggravated battery prosecution the victim was on probation (as a result of the public defender's representation of Mr. Tyson) at the time of the offense, that he had been drinking, was under the influence of alcohol, and that questions would be raised on cross-examination of Mr. Tyson's conduct as the aggressor and that he was in violation of his probation at the time of the offense for violating the conditions that he not drink to excess. (A-3,6,17, 25-6,40,41,49-50).

The court agreed that those were matters which may be legitimately raised (Respondent's appendix-26,48-49) but continued the hearing by attempting to secure a waiver of the conflict from Mr. Reardon, who declined to waive the conflict (RA-29). The assistant public defender also explained to the court that his office continues to represent individuals on probation and will present a motion for early termination of probation and other matters without seeking another order of appointment from the trial court. The trial court responded that "I know how you are into the numbers game" but the assistant public defender assured the court that his office did not "count [for funding purposes]" cases where

early termination was sought on the client's behalf (RA-42).

In spite of the public defender's expressed ethical opinion of his obligation to not cross-examine his former client on a subject related to the prior representation nor to disparage or challenge his former client's credibility or accuse him of criminal wrongdoing during the attorney's representation of Mr. Reardon, the trial judge denied the motion finding that the public defender could not have represented Mr. Tyson for more than 5 minutes.<sup>3</sup> (PA-exhibit 5,p-3). Here the trial judge's order denying the public defender's motion to withdraw concedes that the denial is based on the trial court's "opinion on the facts of the case sub judice." (PA-exhibit 5,p-3).<sup>4</sup> The court's order also acknowledges that conflict may exist based on a representation that occurred at

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<sup>3</sup> During the April 28, 1998, hearing the court first suggested that the public defender's representation of Mr. Tyson at a DUI arraignment had been very brief, maybe "10 or 15 minutes." (RA-15-16). At that time the assistant public defender attempted to explain to the court that the judge's perceptions of the quality and brevity of the public defender's DUI representation was faulty by saying:

MR. RIVERA:...I would hope whichever attorney did consult with him would go into detail about the allegations that he's charged with, go into detail about the evidence against him and I 'm sure they would probably discuss with him whether or not he might have an alcohol problem because those are some of the things that are important in the charge and in the conditions of the probation, that he's required to get an alcohol evaluation and treatment. So those are things that an attorney should go into with the person. (RA-16).

<sup>4</sup>The order denying the public defender's motion to withdraw in Mr. Reardon's case is nearly identical to the order entered by the same judge in Mr. Filan's case. (PA-exhibit 29,p-4).

arraignment (RA-exhibit 5,p-3; RA-exhibit 29,p-4). After the state and the trial judge attempted to minimize the Public Defender's representation of the state witness, Mr. Tyson, apparently to the point of asserting that it amounted to no representation at all, the assistant public defender at the April 30, hearing then inquired on Mr. Tyson's behalf if the state and the court were stipulating that Mr. Tyson's plea was therefore uncounseled. Both the state and the court quickly responded that it was not an uncounseled plea. (PA-exhibit 4,p-21).

The trial judge in denying the public defender's motion to withdraw from representing Mr. Reardon did not disagree that the public defender's prior representation of Mr. Tyson did not present any conflict at all. Rather what the trial judge said was: "This court believes that in deciding Guzman, the Supreme Court did not have this type of conflict in mind." (Emphasis supplied by respondent)(PA-exhibit 5,p-4)(RA-56). The court's identical orders in Reardon and Filan showed the court's refusal to follow Guzman as the court clearly reweighed the facts and substituted his beliefs and view of the facts for that of the public defender. This is not permitted. Guzman at 999.

In addition to re-weighing the facts on the public defender's motion to withdraw after conducting an evidentiary hearing on how much contact Mr. Tyson had with the Public Defender's office, the judge also gathered more facts on his own after the hearing was concluded. The order denying the Public Defender' motion to withdraw refers to factual matters not discussed during the

hearings which are contained in an exhibit B appended to the order, which was not included in the petitioner's appendix. The entire order in Reardon's case with both appendices are included in Respondent's appendix (RA-53-66). This exhibit B is a memorandum written by county Judge Peter Blanc that is addressed to Judge Berman, the trial judge hearing the public defender's motion to withdraw from representing Mr. Reardon, and this memorandum explains the procedure for DUI arraignments at the Gun Club courtroom. This memorandum is dated May 5, 1998, after the April 28 and April 30 hearings on the motion to withdraw in Mr. Reardon's case were concluded, and it states it is written specifically in response to Judge Berman's request for more information about the DUI arrangements.<sup>5</sup>

Soliciting more information from Judge Blanc demonstrates how the lower court not only re-weighed the facts in violation of Guzman but also developed further facts in a highly irregular manner. The judge not only solicited unsworn testimony from Judge Blanc but the order also shows that the court relied on these other

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<sup>5</sup> The Public defender did not respond to the court's factual assertions below concerning the insignificant representation of Mr. Tyson by cross examining Mr. Tyson on that or any other issue nor show to the court which assistant had represented Mr. Tyson as the court's fact finding expedition into those matters violated Guzman in the first place. Therefore the insulting aspersions concerning the level of practice in the Public Defender's office contained in Judge Blanc's May 5 memorandum should never have been made. Nonetheless, the public defender must protest that Judge Blanc's memorandum inaccurately recounts what assistant public defenders do to represent clients who wish to plead guilty at DUI arraignments. The county judges might take a DUI plea in less than 5 minutes but significantly more work is required and accomplished by the public defender at DUI arraignments of which Judge Blanc is apparently unaware. See footnote 3, supra.

extra-record facts to disagree with the public defender's certification of conflict. Judges are not supposed to gather facts from unsworn witnesses who do not testify at a hearing. See Houck v. State, 421 So. 2d 1113 (Fla. 1st DCA 1982). All of the judge's efforts to refute the public defender's certification of conflict were time intensive and unnecessary. They demonstrate how excessive judicial labor is avoided by the simple and direct rule of Guzman. This judge chose to ignore Guzman even though the assistant public defender repeatedly reminded him of what Guzman says: when the public defender certifies a conflict "that is the end of the inquiry." (RA-7,24,36,37,38,43,46,47).

In these cases not only did the trial courts attempt to exercise discretion that they did not have but their determinations that the conflict here was not the type contemplated by Guzman departed from the essential requirements of law so that the district court properly granted certiorari. The termination of representation does not terminate all ethical obligations toward the former client. A lawyer owes a duty of loyalty to his client, and a duty to hold the client's confidences and secrets inviolate. See R. Regulating Fla. Bar 4-1.7. Both duties continue after the lawyer-client relationship has ended and the existence of an attorney-client relationship raises an irrefutable presumption that confidences were disclosed. State Farm v. K.A.W., 575 So. 2d 630 (Fla. 1991). See R. Regulating Fla. Bar 4-1.9. The lawyer cannot ethically place himself in a position where he is required to choose between loyalty to a former client, and his duty to "act

with commitment and dedication to the interests of the client and with zeal in advocacy upon the clients behalf." Comment to R. Regulating Fla. Bar 4-1.3. To do so disserves both clients. Accordingly, where representation of another client would conflict with the duties of loyalty and of preserving confidentiality owed to a former client, that representation must be declined. R. Regulating Fla. Bar 4-1.9. Rule 4-1.9, provides:

A lawyer who has formerly represented a client in a matter shall not thereafter:

(a) Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation; or

(b) Use information relating to the representation to the disadvantage of the former client except as rule 4-1.6 would permit with respect to a client or when the information has become generally known.

It is these ethical rules which lead the public defender to move to withdraw from representing Mr. Leslie in the trial court because this office had been appointed to represent on appeal John Maldonado, a key state witness against Mr. Leslie. The public defender does not dispute that it should never have been appointed to represent Mr. Maldonado on his appeal, as this office had a conflict in representing Mr. Maldonado during his trial proceedings and had been withdrawn from representing him. Nonetheless, the trial judge appointed the public defender's office for purposes of appeal. For that reason the public defender moved to withdraw from representing Mr. Maldonado on appeal but not before it had

confidential attorney/client communications on behalf of Mr. Maldonado. Once those communications occurred the adversity between Mr. Maldonado and Mr. Leslie was apparent and could not be obviated just by withdrawing from Mr. Maldonado's appeal case for by then Mr. Maldonado was a former client. A conflict arising from simultaneous representation of defendant's with conflicting interests is not necessarily dissipated when the public defender withdraws from representing one of those clients; withdrawals as to both clients is often necessary. Bynes v. State, 653 So. 2d 1065 (Fla. 4th DCA 1995)(J. Pariente, concurring).

Here the petitioner claims that there was no allegation by the public defender that confidences were learned as a result of the appellate representation of Mr. Maldonado that would relate to the trial representation of Mr. Leslie(PB-23). No such allegations were necessary. Attorney/client communication can be presumed to have been exchanged, K.A.W. supra. Guzman does not require the public defender's certification of conflict of interests in representing two clients to refer to attorney/client communications or otherwise explain the basis of the conflict. When trial judges refuse to accept the public defender's certification of conflict and begin making inquiries to reweigh the facts considered by the public defender, they inevitable invade the attorney/client privilege by requiring more of an explanation than section 27.53(3) or Guzman require.<sup>6</sup> In addition, the motion to withdraw from

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<sup>6</sup>The state's position in the district court in Leslie that any confidential communications would have been unlikely to have given rise to a conflict, because the nature of the appellate

representing Mr. Maldonado on appeal referred to those attorney/client communications which underlay the motion to withdraw, due to which the conflict would continue to exist even if the district court granted the then pending petition for writ of certiorari allowing the public defender to withdraw from representing Mr. Leslie. (PA-Exhibit 20,p-10). Also, the motion to withdraw came before the trial judge on re-hearing because the court had not granted it as Guzman requires the first time the motion was before the court. The assistant public defender explained to the court why the interests of Mr. Maldonado and Mr. Leslie were adverse and hostile and necessary to avoid "intermixing information," i.e. confidential communications:

MR. LANDERS [public defender]: Judge, in the last three weeks, I was looking in terms of preparing Mr. Leslie's case for trial. Looking at one of the State witnesses, Mr. John Maldonado and trying to determine whether he was a state actor when he allegedly obtained statements from Mr. Leslie or not.

And in looking at him, it occurred to me, well, what's his benefit for testifying if he's already plead guilty and then sentenced to 30 years? And because you know, he's done. And the answer to that question is, that his case is on appeal. If his case is affirmed, or PCA'd, or disposed of quickly, then he has 60 days to file for a motion to mitigate, which puts sort of a time line on when it is that he can help himself by coming in and

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representation is confined to the record and the law is incorrect as a matter of law, State Farm v. K.A.W., and as a matter of fact according to what occurred here. The appellate division of the public defender's office does carry out its ethical obligations to communicate with its appellate clients and their trial attorneys and to keep the clients apprised of the progress of their cases, which also may involve consultation on strategy decisions. R. Regulating Fla. Bar 4-1.4.

testifying.

The short of this is, our office represents Mr. Maldonado on his appeal.

Now, how that happened, I assume is that, Mr. Maldonado was before Judge Garrison. He had previously disclosed information that he claimed to have had, as well as provided a statement under oath, to the State about statements that my client allegedly made to him.

He pled to the court. The court set off sentencing, in hopes that Mr. Maldonado could testify against Mr. Leslie. Mr. Maldonado did not get that opportunity and that's where that sort of sits. In the meantime, as trial counsel, the conflict attorney there, Mr. Pleasanton, filed a notice of appeal, preserved the appeal, and withdrew. Public defender's office was appointed and our office currently represents Mr. Maldonado. This places our office in an untenable position, because if we zealously advocate for Mr. Leslie, there is an argument by Mr. Maldonado that we didn't zealously advocate for him in preserving his appellate rights.

THE COURT: What would be the effect on the perceived conflict, if the public defender's office withdrew from representing Mr. Maldonado on the appeal?

MR. LANDERS: My argument, Judge the effect of that would still exist. Our office represented--has been representing Mr. Maldonado during this time. It's sort of like sometimes when you have two people that are in custody and they're both being represented by the public defender's office there's actually an argument that the public defender should withdraw from both of those people and they should be appointed separate, independent conflict counsel. That way there's no intermixing of information.

So, I certify in good faith that there's a conflict. We're asking for the court to permit us to withdraw. And---

THE COURT: Okay What's the County's position and State's position?

(PA-Exhibit 17,p-2-5).

Here, the court should not have asked for the state or county's positions and prolonged the inquiry, particularly since this very same trial judge had only recently been reversed for not following Guzman and not granting a public defender's motion to withdraw upon certification of conflict of interest. Costa v. State, 712 So. 2d 455 (Fla. 4th DCA 1998)(public defender motion to withdraw certifying irreconcilable conflict existed between defendant, charged with concealing a child and the child's father, a former client, based on confidential communications received from him regarding his substance abuse problems and his treatment of the child should have been granted).

When a certification of conflict is made, the only recognizable interest which needs protecting are those which the public defender is attempting to secure by the appointment of different counsel. The court need not decide whether the public defender or some other lawyer should represent the defendant. The only matter really at stake in such a decision is which governmental entity, the county or the state, shall pay the lawyer. That has been decided by the legislature (and by the recent amendments to Article V, Florida Constitution, that the state will assume those costs from the county after 2004). The legislature has acted within its prerogative, and determined that upon certification of conflict a county-paid lawyer must be appointed.

Guzman, Babb. It is firmly established that the county has no standing in this matter. In re Order on Prosecution of Criminal Appeals, 561 So. 2d 1130,1134 (Fla. 1990); Escambia county v. Behr, 384 So. 2d 147 (Fla. 1980); Turner v. State, 611 So. 2d 12 (Fla. 4th DCA 1992).

In a criminal case, the fact that the victim of the charged offense is a former client of the attorney representing the defendant, and is a key witness for the state, unquestionably presents a conflict of interest under the ethical rules, and, at least, a risk of actual conflict of interest, in the constitutional sense. Both the victim and the defendant have an interest in the outcome of a criminal case, and their interests are obviously directly adverse and hostile.<sup>7</sup> In Mr. Reardon's case, the adversity and hostility could not be more obvious or direct: Without allowing withdrawal for conflict, defense counsel for Mr. Reardon would be in the position of having to show not only that the former client, Mr. Tyson, is a liar, but that he, rather than Mr. Reardon, belongs in jail.

Had Mr. Reardon's case proceeded to trial with the public defender as his lawyer, defense counsel would inevitably have to

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<sup>7</sup>The victim's interest in the outcome is recognized by Art. I, § 16 of the Florida Constitution, which establishes the right of victims to be informed, to be present, and to be heard. The victim has the right to be consulted by the prosecution regarding the disposition of a felony case involving physical or emotional injury. § 960.001(1)(e), Fla. Stat. (1997). Moreover, the victim's interest is not merely that of obtaining vindication or justice, it can also be financial. See § 960.01, et seq. Fla. Stat. (1997)("Florida Crimes Compensation Act"); § 775.089, Fla. Stat. (1997)(providing for restitution).

choose between the duties owed to his present and former client. "An attorney who cross-examines a former client inherently encounters divided loyalties." Lighbourne v. Dugger, 829 F.2d 1012,1023 (11th Cir. 1987). Preparation for that cross-examination would certainly be aided by using the information, confidential or otherwise, which was obtained during the representation of the former client, who is now a key state witness and whose credibility must therefore be zealously attacked. To do so, however, with respect to either sort of information, is clearly improper. See, e.g., Buntrock v. Buntrock, 419 So. 2d 402 (Fla. 4th DCA 1982). On the other hand, Mr. Reardon is entitled, under the ethical rules and under the constitution, to representation which pulls no punches. See Comment to R. Regulating Fla. Bar 4-1.3; Holloway v. Arkansas, 435 U.S. 475 at 490 ("in a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to *refrain* from doing"). An attorney should decline such conflict-laden representation, and, absent some truly compelling necessity, the court cannot force the attorney to accept such a case. See R. Regulating Fla. Bar 4-1.16(c), 4-6.2(a). See also Gordon v. State, 684 S.W. 2d 888 (Mo. Ct. App. 1985)(murder conviction reversed where public defender had divided allegiances -- a conflict of interest by representing key state witness in another case).

Not only the particular attorney who represented the former client, but the entire law firm, must decline representation of a client with interests adverse to the former client. R. Regulating

Fla. Bar 4-1.10. Only the state attorney's office has been held to be exempt from this rule, and then only on condition that the disqualified attorney be absolutely screened-off from any direct, or indirect participation in, or discussion of, the case. See Castro v. State, 597 So. 2d 259 (Fla. 1992); Reaves v. State, 574 So. 2d 105 (Fla. 1991); State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985); Popejoy v. State, 597 So. 2d 335 (Fla. 3d DCA ), review denied, 604 So. 2d 488 (Fla. 1992). In the case of private law firms, the presumption that the knowledge possessed by one attorney in a law firm is shared with other attorneys in the firm, Sears, Roebuck & Co. v. Stansbury, 374 So. 2d 1051,1053 (Fla. 5th DCA 1979), is not rebutted by the institution of screening procedures, Edward J. DeBartolo Corporation v. Petrin, 516 So. 2d 6,7 (Fla. 5th DCA 1987), accord Birdsall v. Crowngap, Ltd., 575 So. 2d 231 (Fla. 4th DCA 1991).

Under the holding of Babb, a court cannot compel the public defender to adopt screening mechanisms or other conflict-avoiding procedures. Thus, whether a public defender's office, like a state attorney's office, could avoid the rule of imputed disqualification by instituting appropriate screening mechanisms has never been tried as the ethical and administrative problems such measures would engender has not lead any public defender's office to attempt to avoid disqualification by instituting such procedures. However, when a public defender seeks to disqualify himself, the office is generally treated as a private law firm for purposes of the rule of imputed disqualification. See Bouie v State, 559 So. 2d 1113,1115

(Fla. 1990) ("As a general rule, a public defender's office is the functional equivalent of a law firm. Different attorneys in the same public defender's office cannot represent defendants with conflicting interests.") Roberts v. State, 345 So. 2d 837 (Fla. 3d DCA 1977); Turner v. State, 340 So. 2d 132 (Fla. 2d DCA 1976).

The petitioner additionally argues that the Fourth District erred in following Guzman because a defendant must show prejudice, that actual conflict of interest adversely affected his lawyer's performance under Cuyler v. Sullivan, 446 U.S. 335(1980), in order to demonstrate the violation of the right to conflict-free counsel. However, that decision involves the standard for federal habeas review and post-conviction relief and has nothing to do with the application of section 27.53(3). Its holding does not limit or overrule Guzman. The standard of review on appeal when defense counsel's request to withdraw due to a conflict of interest has been denied might yet require a showing of prejudice in Florida but this Court has not addressed such a claim on direct appeal since its Guzman decision in 1984. In Hope v. State, 654 So. 2d 639 (Fla. 4th DCA 1995), the first case to cite and follow Guzman, the defendant's robbery conviction was reversed where public defender certified conflict due to prior representation of victim but the trial court had denied the motion. In reversing, the district court explained that the interests of the victim and the defendant were actually adverse, which had not been apparent to the trial judge: "Appellant had an interest in discrediting the testimony of the alleged victim and the alleged victim had an interest in

seeking retribution against appellant. These interests were directly adverse. See R. Regulating Fla. Bar 4-1.7(a)." As then Judge Pariente explained in Roberts v. State, 670 So. 2d 1042,1043(Fla. 4th DCA 1996), the Guzman rule is only one of "a spectrum of reasons for a public defender or court appointed counsel to file a motion to withdraw, with differing responses required by the trial court."

Perhaps the reason this Court has not considered the rule of Guzman, in conjunction with the prejudice standard of Cuyler v. Sullivan is that Guzman has all but eliminated issues on direct appeal of the denial of the defendant's right to conflict-free counsel, at least in capital cases under review in this Court. Guzman's simple rule prevents defense counsel's representation of defendants with conflicting interests at trial by allowing early determination of conflicts of interest and mandating appointment of other counsel on the public defender's certification of conflict. Compare Foster v. State, 387 So. 2d 344 (Fla. 1980)(murder conviction reversed where defense counsel represented defendant and co-defendant who became key state witness against defendant at trial). The advantage from the bright line rule of Guzman is that it is a clear rule which everyone can follow.

Nor has the Guzman rule generated much litigation. Only 20 appellate cases have been decided that cite Guzman. Four of those cases are reversals on direct appeal for the trial court's failure to grant the public defender's motion to withdraw certifying conflict of interests between clients or former clients. Hope v.

State, supra. Mincey v. State, 666 So. 2d 954 (Fla. 1st DCA 1996)(robbery conviction reversed); Banks v. State, 661 So. 2d 407 (Fla. 4th DCA 1995)(violation of probation reversed where trial court denied motion certifying conflict due to defender's prior representation of victim). Terry v. State, 24 Fla. L. Weekly D406 (Fla. 4th DCA Feb. 10, 1999)(conviction reversed where counsel categorically stated in his motion to withdraw that he had an irreconcilable conflict due to his representation of the mother of a victim in a separate case).

Many of the other cited cases are petitions for writs of certiorari where the trial court has declined to follow or refused to follow the clear and direct Guzman rule. Interestingly enough, not a single case on Guzman has emerged from either the Second or Third District Courts. There is but a single case from the First District, Mincey, supra, and two from the Fifth District. Crowe v. State, 701 So. 2d 431 (Fla 5th DCA 1997)(certiorari granted; public defender motion to withdraw should have been granted where conflict certified due to adverse and hostile interests between defendant and former client, the homicide victim; counsel had previously represented the victim and was privy to confidential information told to her by him) and Thomas v. State, 23 Fla. L. Weekly D66 (Fla. 5th DCA Dec. 18, 1998).

Circuit judges from within the Fourth District's jurisdiction appear to be the only ones experiencing difficulty in following Guzman as can be seen by the many cases granting certiorari from their failure to heed its easy-to-follow rule. Ross v. State, 1999

Fla. App. LEXIS 3125, (Fla 4th DCA March 17, 1999)(certiorari granted where public defender motion asserting conflict in two cases because the office represented the codefendant in one of the petitioner's cases had been denied.); Terry v. State, supra.; Sheffield v. State, 23 Fla. L. Weekly D228 (Fla. 4th DCA Jan. 20, 1999)(certiorari granted); Leslie v. State, 720 So. 2d 559 (Fla. 4th DCA 1998)(instant case, certiorari granted); Filan v. State, 720 So. 2d 549 (Fla. 4th DCA 1998)(instant case, certiorari granted); Reardon v. State, 715 So. 2d 348 (Fla. 4th DCA 1998)(instant case, certiorari granted); Costa v. State, 712 So. 2d 455 (Fla. 4th DCA 1998)(public defender motion to withdraw certifying irreconcilable conflict existed between petitioner, charged with concealing a child and the child's father, a former client, based on confidential communications received from him regarding his substance abuse problems and his treatment of the child should have been granted); Cankur v. State, 706 So. 2d 944 (Fla. 4th DCA 1998)(state's offer to refrain from calling state witness, former client of public defender's office, where defender certified this would not cure an irreconcilable conflict of interest because the interests of the two clients remained adverse and hostile; certiorari granted); Bent v. State, 1997 Fla. App. LEXIS 14524; 23 Fla. L. Weekly D 88 (Fla 4th DCA December 31, 1997)(where public defender just learned of conflict, motion made at calendar call should still have been granted, certiorari granted); Morales v. State, 699 So. 2d 771 (Fla. 4th DCA 1997)(certiorari granted for failure to follow Guzman and grant

public defender's motion to withdraw).

The Guzman rule is simple and only applies where a certified conflict involves representation of clients or former clients with competing interests. Guzman does not apply where the conflict arises from defense counsel's personal relationship, the victim was the daughter of a former secretary, and the trial court's denial of a motion certifying conflict did not violate Guzman. Thomas v. State, supra. Nor does the Guzman rule apply where the public defender's certified conflict is based on a conflict in his personal relationship with the client. Pena v. State, 706 So. 2d 1378 (Fla 4th DCA 1998). A trial court is not compelled to grant a defense counsel's motion to withdraw simply because "irreconcilable differences" between counsel and the client are alleged. Roberts v. State, 670 So. 2d supra (citing Guzman for a different reason).

Where the public defender does not actually certify conflict of interests between the client and state witness, former clients, but only suggests a conflict and asks the court for its determination, failure to grant the motion to withdraw is not controlled by Guzman. Le Captain v. State, 691 So. 2d 613 (Fla. 4th DCA 1997); Butler v. State, 672 So. 2d 653 (Fla. 4th DCA 1996).

The court system has benefited from the Guzman rule in terms of work load and other issues and it should not be discarded by this Court at this time. Instead, the Fourth District's decisions once again reminding circuit judges that they are bound by direct precedent from this Court should be affirmed.

In conclusion, it should be noted that to require the public defender routinely to impeach former clients, and to do whatever else to them that is required by the zealous representation of another, inevitably introduces into the attorney-client relationship an adversarial element which cannot be reconciled with the duty of providing effective assistance of counsel. Trust is of some importance in legal representation, and it can hardly be conducive to trust that anything a client says to his lawyer, or anything the lawyer learns about him during the course of the representation, can, and probably will, be used against him should he become a state witness. As stated by Justice Ehrlich in Fitzpatrick, and reiterated by the Supreme Court in Castro,

When defendants no longer have absolute faith that all confidential communication with counsel will remain forever inviolate, no candid communication will transpire and the guarantee of effective assistance of counsel will become meaningless. This is too high a cost for society to bear.

Castro, 597 So. 2d at 260, quoting with approval Fitzpatrick, 464 So. 2d at 1188 (Ehrlich, J., dissenting). It is certainly too great a burden to be arbitrarily imposed upon the constitutional officer charged with the duty of representing indigent criminal defendants. At the very least, it should be the public defender's decision whether or not such a burden is necessary. In enacting Section 27.53(3), pursuant to its authority to prescribe the duties to be performed by the public defender, Art. V, § 18, Fla. Const., the legislature makes this explicit: The public defender must not undertake a representation which she determines involves a conflict

of interest, and the determination of whether such a conflict exists is hers to make.

Where, as here, the public defender has certified that his undertaking of the representation would involve a conflict of interest, the trial court was under a clear duty required by section 27.53(3) and Guzman to act upon the public defender's certification of conflict and to appoint a different attorney to represent the defendants. Their failure to do so was a departure from the essential requirements of law and the decisions of the District Court granting certiorari should be upheld.

**CONCLUSION**

The decisions of the district court enforcing the rule of Guzman in these three cases were correct and supported by substantial precedent, both on the merits and under the requirements of stare decisis. This Court should affirm.

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy hereof has been furnished by courier, to CELIA TERENCE, Assistant Attorney General, Bureau Chief, DEBRA RESCIGNO, Assistant Attorney General and LESLIE T. CAMPBELL, Assistant Attorney General, 1655 Palm Beach Lakes Boulevard, Third Floor, West Palm Beach, Florida 33401, this \_\_\_\_\_ day of April, 1999.

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