

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,  
Petitioner,

vs.

ROBERT REARDON,  
Respondent,

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CASE NO. 94,291

DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT - NO. 98-1703

STATE OF FLORIDA,  
Petitioner,

vs.

VERNON M. LESLIE, JR.  
Respondent,

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CASE NO. 94,300

DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT - NO. 98-1924

STATE OF FLORIDA  
Petitioner,

vs.

RICHARD FILAN,  
Respondent.

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CASE NO. 94,301

DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT - NO. 98-1842

BRIEF OF PETITIONER ON MERITS

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CERTIFICATE OF TYPE SIZE AND STYLE

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 for the State of Florida, Appellant herein, hereby certifies that the instant brief has been prepared with 12 point Courier New type, a font that is not spaced proportionately.

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the trial court and Respondent in the Fourth District Court of Appeal. Petitioner will be referred to herein as "the State". Respondents, Robert Reardon, Vernon M. Leslie, Jr., and Richard Filan were the defendants in the trial court and Petitioners in the Fourth District Court of Appeal. They will be referred to herein as "Respondent" or by name. An Appendix of the pertinent which are included in the record are attached and will be referred to by the symbol "A".

STATEMENT OF THE CASE AND FACTS

STATE v. REARDON

Respondent, Robert Reardon, was charged with one count of Aggravated Battery upon Paul Tyson ("Tyson") by Information filed on September 23, 1997. (A 1). Respondent was found indigent and the Public Defender was appointed. (A 2). On April 28, 1998, the Public Defender filed a motion to withdraw based upon a claim of conflict of interest stemming from its prior representation of Tyson. (A 3).

In case number 97-8932CF A02, Tyson was charged with the misdemeanor of driving under the influence. At his DUI arraignment<sup>1</sup>, on April 11, 1997, he pled guilty after a brief consultation with a public defender. During the hearing on the motion to withdraw, Tyson testified "that at the time, he didn't know if he was talking to a Public Defender or somebody representing the Court or probation officer. He also stated he maybe spoke to someone 'at the table' for 'maybe a couple of

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<sup>1</sup> DUI arraignments are held weekly during which many defendants are scheduled to appear. The Assistant Public Defenders speak to the defendants about plea offers received from the State. If the plea is accepted, the Assistant Public Defenders prepare all the paperwork, and the plea agreement is signed by the Assistant Public Defender, defendant, and the Assistant State Attorney. The bailiff then runs a video tape for all defendants which explains court procedures and the defendants' rights. The judge reiterates those rights and procedures and begins calling defendants on a case-by-case basis. If the defendant has accepted the plea, the judge proceeds with the standard plea colloquy. The nature of the representation may last from one to two minutes to several minutes. (A 4, p. 1-2).

minutes, if that...'" (A 5, p. 11-12). As a result of his plea, Tyson was placed on probation which was terminated on April 15, 1998. (A 4, p. 2). It was two weeks after Tyson's probation terminated that the hearing was held on the Public Defender's motion to withdraw. At the April 28, 1998 hearing, Tyson testified he was willing to waive any conflict that may exist between the Public Defender's office and himself. (A 5, p. 19).

Subsequently, the trial court entered an order denying the motion to withdraw. (A 4). In so doing, the trial court distinguished Guzman v. State, 644 So. 2d 996 (Fla. 1994), and found "the interests of Mr. Tyson are not so adverse or hostile to those of Mr. Reardon that the Public Defender could not represent Mr. Reardon." (A 4, p 3).

A petition for writ of certiorari was filed by Respondent/Reardon on May 15, 1998 in the Fourth District Court of Appeal. (A 6). The State filed a response and Palm Beach County filed an Amicus Brief. (A 7 and 8). On August 12, 1998, the Fourth District granted the petition quashing the trial court's order and instructed the trial court to appoint different counsel. (A 9, Reardon v. State, 715 So. 2d 348 (Fla. 4th DCA 1998)). In so doing, the Fourth District stated the "manner in which a public defender's certification of conflict is treated by the trial courts" is well settled by Guzman v. State, 644 So. 2d 996 (Fla. 1994) and Babb v. Edwards, 412 So. 2d 859 (Fla. 1982), and therefore, refused to certify the question as one of great public

importance. (A 9, Reardon, 715 So. 2d at 350). The State filed a motion for rehearing and/or certification of a question of great public importance which was denied on September 29, 1998. (A 10 and 11). Following this denial, the State filed with the Fourth District a motion to stay mandate and a notice of the State's intent to invoke this Court's discretionary jurisdiction. (A 12 and 13). The Fourth District denied the stay and on February 26, 1998, this Court accepted jurisdiction and sua sponte consolidated this case with State v. Leslie and State v. Filan. (A 14).

**STATE v. LESLIE**

Respondent, Vernon M. Leslie, Jr., was charged with attempted first degree murder and burglary while armed with a firearm<sup>2</sup> and the Public Defender was appointed. (A 15 and 16). On May 18, 1998, the Public Defender filed a motion to withdraw based upon a claim of conflict of interest stemming from his appellate representation of state witness, John Maldonado ("Maldonado"). (A 16).

At the hearing on the motion to withdraw, the Public Defender asserted his office could not advocate zealously for both Respondent/Leslie, at the trial level, and Maldonado, at the appellate level. The Court inquired whether the Public Defender's position would change if it withdrew from representing witness Maldonado on appeal. (A 17, p. 4). The public defender responded a conflict would still exist because his office had represented

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<sup>2</sup> The burglary charge was dismissed by the trial court.

Maldonado for a period of time. (A 17, p. 4). The State pointed out Maldonado was not represented by the Public Defender's office at trial and there was little possibility confidential communications would have been divulged to appellate counsel as appellate issues involve questions of law. (A 17, p. 5-8).

The trial court entered an order denying the motion to withdraw, without prejudice to the Public Defender to seek withdrawal from Maldonado's case. (A 17, p 10-11 and A 18). The trial court found Respondent's case was fraught with delay and confusion because he was represented by a number of different attorneys. (A 17, p. 11). Further, the trial judge found that to change representation would add to the delay and confusion. (A 17, p. 11-13).

A petition for writ of certiorari was filed by the Respondent on June 2, 1998 in the Fourth District Court of Appeal and the State filed a response. (A 19-21). On September 9, 1998, the Fourth District granted the petition quashing the trial court's order. (A 22, Leslie v. State, 720 So. 2d 559 (Fla. 4th DCA 1998)). In so doing, the Fourth District relied upon Guzman v. State, 644 So. 2d 996 (Fla. 1994) and Reardon v. State, 715 So. 2d 348 (Fla. 4th DCA 1998) for the principle a trial court has no discretion but to grant a motion to withdraw upon certification of conflict by a public defender. (A22, Leslie, 720 So.2d at 560). The State filed a motion for rehearing which was denied on October 7, 1998. (A 23 and 24). Following this denial, the State filed with the Fourth

District notice of the State's intent to invoke this Court's discretionary jurisdiction. (A 25).

**FILAN v. STATE**

Respondent, Richard Filan, was charged with one count of felony driving under the influence (injury to property or person) and one count of felony driving while license revoked (habitual offender). (A 26). Respondent was found indigent and the Public Defender was appointed. (A 27, p. 1). On April 13, 1998, the Public Defender filed a motion to withdraw based upon a claim of conflict of interest stemming from its prior representation of Josh Eldridge ("Eldridge"). (A 27). Eldridge was an eye-witness to the crimes charged. (A 28, p. 3).

In case number 89-42772TC A02, the Public Defender represented Eldridge on a charge of driving under the influence and a subsequent violation of probation. At his DUI arraignment<sup>3</sup>, on November 13, 1989, he pled guilty. During the hearing on the motion to withdraw, Eldridge could not recall the name of the public defender with whom he spoke during his DUI arraignment. (A 28, p. 7). Additionally, he testified that he "didn't talk to the public defender too much at all," and that the public defender "didn't do too much." (A 28, p. 5). In total, Eldridge spoke with a public defender for only "a matter of minutes." (A 28, p. 6-7). All jail and probationary periods had expired by the time the

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<sup>3</sup> See footnote 1.

present alleged conflict arose. (A 328 p. 9). Eldridge testified that he did not have any objection to the Public Defender's office representing the Respondent/Filan. (A 28 p. 9).

Subsequently, the trial court entered an order denying the motion to withdraw. (A 29) In so doing, it distinguished Guzman v. State, 644 So. 2d 996 (Fla. 1994), and found "the interests of Mr. Eldridge are not so adverse or hostile to those of [Respondent/Filan] that the Public Defender could not represent [Respondent/Filan]." (A 29, p. 4).

A petition for writ of certiorari was filed by Respondent on May 27, 1998 in the Fourth District Court of Appeal and the State filed a response. (A 30 and 31). On August 12, 1998, relying upon Guzman v. State, 644 So. 2d 996 (Fla. 1994) the Fourth District granted the petition quashing the trial court's order. (A 32, Filan v. State, 720 So. 2d 549, 550 (Fla. 4th DCA 1998)). The State filed a motion for rehearing and/or certification of a question of great public importance which was denied on October 7, 1998. (A 33 and 34). Following the denial, the State filed with the Fourth District a motion to stay and a notice of the State's intent to invoke this Court's discretionary jurisdiction. (A 35 and 36). The Motion to Stay Mandate was denied on November 2, 1998. (A 37).

#### SUMMARY OF THE ARGUMENT

The trial court did not depart from the essential requirements of law in denying the Public Defenders' motions to withdraw,

pursuant to section 27.53, Florida Statute (1997). In granting the writs of certiorari in these case, the Fourth District Court of Appeal relied upon this Court's decision in Guzman v. State, 644 So. 2d 996 (Fla. 1994). However, Guzman is erroneous because it failed to consider the 1990 amendment to section 27.53.

The Fourth District's opinions demonstrate expressly how the judiciary has been emasculated; specifically, all discretion to determine the adequacy of a public defender's conflict of interest claim has been eliminated. These opinions undermine completely the trial court's ability to regulate and administer its docket or to guarantee a fair and timely trial to defendants and the people of this State when a Public Defender asserts a conflict of interest. Further, there is no other similar instance where the trial court has been removed so totally from the process, especially when a defendant's core rights are at issue. The consequence of the District Court's opinions is to abandon defendants cavalierly into the hands of third parties.

## ARGUMENT

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.

The trial court did not depart from the essential requirements of law in denying the Public Defenders' motions to withdraw in these cases, pursuant to section 27.53, Florida Statute (1997), because a plain reading of the statute shows a trial court does not have to blindly accept a public defender's certification of conflict, but rather, has discretion to determine if a conflict of interest actually exists. In granting the writs of certiorari in these case, the Fourth District Court of Appeal relied upon this Court's decision in Guzman v. State, 644 So. 2d 996 (Fla. 1994). However, the State submits Guzman is incorrect because it failed to consider the ramifications of the 1990 amendment to section 27.53, instead relying upon case law that had interpreted prior provisions of this statute. As such, the Fourth District Court of Appeal erred in basing its decision upon Guzman.

Section 27.53 states in pertinent part:

(3) 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 or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of conflict of interest, it shall be the public defender's 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 way affiliated with the public defender, in his or her capacity as such, or in his or her private practice, to represent those accused. However, 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. The court shall advise the appropriate public defender and clerk of court, in writing, when making such appointment and state the conflict prompting the appointment. The appointed attorney shall be compensated as provided in s. 925.036.

(emphasis added).

The foregoing language is plain and unambiguous. It states the trial court "may" appoint private counsel, not that it "shall" appoint private counsel. It is a fundamental principle of statutory construction that where the language of a statute is clear and unambiguous and conveys a definite meaning, the language of the statute must control and there is no need for judicial interpretation. See e.g. State v. Dugan, 685 So. 2d 1210 (Fla. 1996)(when interpreting a statute, the court must determine legislative intent the from plain meaning of the statute; if the language of the statute is clear and unambiguous, court must derive legislative intent from words used without involving rules of construction or speculating what legislature intended).

Here, there is no need for judicial interpretation of section 27.53(3) because its language is plain and unambiguous. The plain meaning of section 27.53(3) is that the trial court has the discretion to either appoint or not appoint private counsel upon

being presented with a motion to withdraw based on conflict. The legislature's use of the permissive word "may" in outlining the action the trial court could take once presented with such a motion demonstrates it was giving the trial court discretion in handling these motions. City of Miami v. Save Brickell Avenue, Inc., 426 So. 2d 1100, 1105 (Fla. 3d DCA 1983)(in statutory construction, when given its ordinary meaning, the word "may" denotes a permissive term rather than the mandatory connotation of the word "shall"); Brooks v. Anastasia Mosquito Control District, 148 So. 2d 64 (Fla. 1st DCA 1963)(it must be assumed that the legislature knows that the word "may" denotes a permissive term rather than a mandatory connotation).

The legislature is presumed to know the meaning of the words employed in a statute. By using the word "may", the legislature left it to the trial court to contemplate the necessity of appointing private counsel. As such, it necessarily empowered the trial court to determine whether a conflict actually exists. Logic dictates a trial court must first decide a conflict exists before it can decide to appoint a private counsel. Obviously, if no conflict exists, there is no need for private counsel, *a fortiori* the trial court need not appoint outside counsel.

This plain reading of section 27.53(3) is supported by consulting the statute as a whole. Immediately following the language that the "court **may** appoint . . .", it states:

However, 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. The court shall advise the appropriate public defender and clerk of court, in writing, when making such appointment and state the conflict prompting the appointment.

(emphasis supplied). The legislature's use of the term "may" in one sentence juxtaposed with the term "shall" in the very next sentence, demonstrates its intent to give the trial court discretion in the one instance, i.e., when presented with a certification of conflict and not in the other instance, i.e., when an actual conflict is found. The latter portion of the statute imposes upon the trial court a duty to appoint outside counsel when the court *sua sponte* determines that a conflict exists. When the two sentences are read together it is clear that unless and until a conflict is found, there is no duty to appoint other counsel. There is no duty to find conflict upon mere certification of the public defender. The legislature imposes a duty/requirement upon the trial court to appoint other counsel only upon a finding of conflict. See e.g. Acosta v. Richter, 671 So. 2d 149, 153-154 (Fla. 1996)(requiring statutory phrases to be read in harmony and in the context of the entire section).

Further support for the State's plain reading of section 27.53(3) is found in the statute's legislative history. A review of how section 27.53(3) has been amended from 1980 to 1990 illustrates that the trial court presently has the discretion to

determine whether a conflict of interest exists. In 1980, the trial court had no discretion when presented with such motions. At that time section 27.53(3), Florida Statute (Supp. 1980), read 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 certify such fact to the court, and the **court shall appoint** one or more members of The Florida Bar, who are in no way affiliated with the public defender, to represent those accused.

(emphasis supplied).

Use of the term "shall" in the 1980 version of the statute means that the trial court was **required**, upon motion of the public defender, to appoint other counsel as provided by section 27.53(3). The trial court **had no discretion** in the matter. Thereafter, in 1981, section 27.53(3) was amended to give the trial court the option of appointing either private counsel or a public defender from another circuit. The 1981 version of section 27.53(3) 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 of

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.

(emphasis supplied).

Thus, the 1981 version of the statute gave the trial court limited discretion in dealing with motions to withdraw. By omitting the word "shall", the legislature gave the trial court the option to appoint either a public defender from another circuit or private counsel. Subsequently, in 1990, the legislature **removed all restrictions** on the trial court and gave it complete discretion to determine whether a conflict in fact exists and whether it is necessary to appoint private counsel. The pertinent part of the amended statute now reads that "[t]he court may appoint one or more members of The Florida Bar, who are in no way affiliated with the public defender, in his or her capacity as such, or in his or her private practice, to represent those accused . . . ."

## THE CASE LAW

At the time Guzman v. State, 644 So. 2d 996 (Fla. 1994) was decided, the present version of the statute was in effect. However, Guzman failed to consider the ramifications of the 1990 amendments to section 27.53(3)<sup>4</sup> and therefore failed to acknowledge that the statute had been amended giving trial courts discretion to determine whether a conflict of interest exists. In Guzman, the defendant argued it was error for the trial court to deny his assistant public defender's motion to withdraw because the public defender's office was representing two (2) key state witnesses at the same time it was representing him. This Court agreed, holding:

The law is well established that a public defender should be permitted to withdraw where the public defender certifies to the trial court that the interests of one client are so adverse or hostile to those of another client that the public defender cannot represent the two clients without a conflict of interest. Babb v. Edwards, 412 So.2d 859 (Fla.1982). Moreover, once a public defender moves to withdraw from the representation of a client based on a conflict due to adverse or hostile interests between the two clients, under section 27.53(3), Florida Statutes (1991), a trial court must grant separate representation. Nixon v. Siegel, 626 So.2d 1024 (Fla. 3d DCA 1993). As the district court stated in Nixon, a trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists. This is true even if the representation of one of the adverse clients

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<sup>4</sup> Although the court cited to section 27.53(3) Florida Statutes (**1991**), it did not cite the statutory language nor did it consider the effect of the 1990 amendments.

has been concluded. Id. at 1025. Consequently, in this case, once the public defender determined that a conflict existed regarding [the defendant], the principles set forth in those cases required the trial judge to grant the motions to withdraw.

Id. at 999.

Guzman's reliance upon Babb v. Edwards, 412 So.2d 859 (Fla.1982) and Nixon v. Siegel, 626 So. 2d 1024 (Fla. 3d DCA 1993), as authority for the proposition that a trial court "must" grant separate representation upon certification of conflict by the public defender and that a trial court is not permitted to reweigh the facts used by a public defender in claiming conflict, clearly was **misplaced**. It was **error** to rely upon Babb because it involved the 1980 version of section 27.53(3) Florida Statutes, under which a trial court was precluded from exercising any discretion in determining whether a conflict existed. Similarly, it was **error** to rely upon Nixon because the entire foundation for that opinion is Babb and the 1980 version of section 27.53(3).

Moreover, a close reading of Babb reveals Nixon misinterpreted the decision. There is no support in Babb for Nixon's statement that "[t]he trial court is not permitted to reweigh those factors considered by the public defender in determining that there is a conflict in representing two adverse defendants." Babb noted the district court had interpreted the 1980 version of section 27.53(3) as requiring the:

public defender, as a condition precedent to

filing a motion to withdraw, not only to ascertain hostility or adversity between defendants represented by his office but also to show, after taking into account the possibility of protecting confidential information by separation of offices, facilities and personnel, that the representation of such defendants by different assistant public defenders cannot be done without conflict of interest. Additionally, the Fifth District requires the trial court to weigh those same factors before it rules on a motion to withdraw.

Babb, 412 So. 2d at 861.

While the Babb court disagreed with that interpretation, stating “[t]he statute does not require the consideration and weighing of *those factors suggested by the district court...[e.s.]*,” it never stated that the trial court did not have discretion to determine whether a conflict existed. The language used by the court in Babb is telling. This Court opined, “The Fifth District interpreted this language as requiring the public defender, as a condition precedent to filing a motion to withdraw, *not only* to ascertain hostility or adversity between defendants represented by his office *but also* ....” By using the phrases “not only” and “but also,” this Court indicated the Fifth District Court of Appeal added conditions to the requirements specifically set forth in the statute. It is clear from the remainder of the holding this Court did not intend to pass upon the burden of either the public defender or trial court to determine whether hostility or adversity existed between defendants; the statute mandated that

each bear this burden. Babb did not intend to prohibit the trial judge from weighing the facts underlying the public defender's ascertainment of hostility or adversity, but only indicated that the statute does not require the weighing of "those factors" suggested by the district court, i.e. that the confidential information can not be protected by separation of offices, facilities and personnel and that representation of the defendants can not be done without conflict of interest. Id.

As such, Guzman erred by relying upon Babb and Nixon and the plain meaning of the statute must control , thereby, giving the trial judge discretion to determine the adequacy of the reasons given for conflict and to decide whether to grant the motion to withdraw. Federal law is in accord with the State's reading of section 27.53(3). In Holloway v. Arkansas, 435 U.S. 475, 484 (1978), citing to Glasser v. United States, 315 U.S. 60 (1942), the Supreme Court held that the trial court should protect the right of an accused to have assistance of counsel. The Court indicated most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interest, should be granted. Id. The Court noted a majority of courts have acknowledge the attorney representing the client is in the best position to determine when a conflict exists or will develop. Id. However, the Court observed the state has an "obvious" interest in avoiding the filing of motions to withdraw for purposes of delay or obstruction of the

orderly conduct of the trial. Id. The Court reasoned its holding that an attorney's request for appointment of separate counsel based on his representation as an officer of the court should be granted, 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." Id. The Court indicated that when a motion is made the court must take adequate steps in response to the motion.

The Fourth District Court of Appeal's rejection of Holloway, based upon the State's inherent prerogative to expand the rights of defendants beyond those guaranteed under the United States Constitution<sup>5</sup> was also error. Section 27.53(3) is **only** a procedural device and does not impact any substantive, constitutional right of the defendant. To show a violation of the right to conflict-free counsel, "a defendant must establish that an actual conflict of interest adversely affected his lawyer's performance." Cuyler v. Sullivan, 446 U.S. 335, 350 (1980)(emphasis supplied). Section 27.53(3) does not describe or limit what constitutes an actual conflict, but merely advises the trial court of what action it may take once a conflict is alleged.

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<sup>5</sup> Consistent with existing case law, Rule 44(c) Federal Rules of Criminal Procedure codifies the trial court's inherent authority to take whatever appropriate measures are needed to determine if an actual conflict would arise if current representation were to continue. United States v. Carrigan, 543 F.2d 1503 (2nd Cir. 1976).

Regardless of how one defines the legislative intent behind Section 27.53(3), a defendant's constitutional right to effective assistance of counsel is neither expanded nor limited.

For instance, a defendant's constitutional entitlement to an impartial jury is not compromised simply because the trial court is allowed to examine the surrounding circumstances of the alleged misconduct. See Baptist Hospital v. Maler, 579 So. 2d 197 (Fla. 1991). Likewise, a defendant's right to an impartial judge is not diminished by virtue of the trial court's discretion to determine the legal sufficiency of the allegations. See Livingston v. State, 441 So. 2d 1083 (Fla. 1983).

The trial judges in these cases did not depart from the essential requirements of law in denying the motion to withdraw and properly determined there was no adequate basis for conflict. In Webb v. State, 433 So. 2d 496,498 (Fla. 1983), the supreme court found that a conflict of interest arises when, "...one defendant stands to gain significantly by counsel adducing probative evidence or advancing plausible arguments that are damaging to the cause of a codefendant whom counsel is also representing." Further, Bellows v. State, 508 so. 2d 1330, 1332 (Fla. 2d DCA 1987), the court held the key to establishing conflict is whether the public defender must serve a dual and adverse stewardship. According to Stephens v. U.S., 453 F.Supp. 1202 (M.D. 1978), where counsel's relationship with the prosecution's witness ended prior to trial, conflict of interest must be predicated upon a past attorney-client

relationship and prejudice depends on: 1) counsel's interest in possible future representation and 2) relevance to cross-examination of privileged information counsel may have acquired as a result of the past professional relationship.

In Reardon, there was no past professional "relationship" between the victim, Paul Tyson, and the public defender's office. All agree that the public defender represented the victim at a DUI arraignment. The victim indicated that he was not represented by counsel because counsel did nothing more than explain his options. Compelling is the fact that the identity of the individual public defender who "represented" the victim was never presented, and is probably not known, making the possibility that any confidences would be revealed virtually nonexistent. Other than the formation, there was no allegation by the Public Defender that confidences were learned as a result of that representation which would have relevance to cross-examination in the instant case. Moreover the judge determined the following:

On April 11, 1997, Mr. Tyson pled guilty at his DUI arraignment at the Gun Club Complex. According to the judges at the Gun Club satellite courtrooms (the Honorable Judges Peter Blanc and Paul Moyle) the following procedure takes place: DUI arraignments are scheduled for one day each week in which many defendants are scheduled to appear. (Traffic crime arraignments are scheduled four days a week, misdemeanor arraignments are scheduled two days a week, and first appearances take place everyday.) The Assistant Public Defenders speak to the defendants about plea offers received from the State. If the plea is accepted, the Assistant Public Defenders

prepare all the paperwork, and the plea agreement is signed by the Assistant Public Defender, defendant, and the Assistant State Attorney. If the plea is not accepted, the Assistant Public Defender will have the defendant fill out an Affidavit of Insolvency if they wish to have the Public Defender appointed. Once all the defendants have been interviewed, the bailiff runs a video tape which explains court procedures and the defendants' rights. The judge then takes the bench and reiterates rights and procedures and begins calling defendants on a case-by-case basis. If the defendant has accepted the plea, the judge proceeds with the standard plea colloquy. If the defendant pleads not guilty, the judge makes further inquiry as to the Affidavit of Insolvency, and, if appropriate, appoints a Public Defender. The nature of the representation may last from one to two minutes to several minutes.

On April 30, 1998, Mr. Paul Tyson testified in this Court as to what took place on April 11, 1997 concerning his representation by the Public Defenders Office. Mr. Tyson testified that at the time, he didn't know if he was talking to a Public Defender or somebody representing the Court or probation officer. He also stated that he maybe spoke to someone "at the table" for "maybe a couple of minutes, if that...". In any event, Mr. Tyson's probation was terminated April 15, 1998. In addition, Mr. Tyson testified that he was willing to waive any conflict between the Public Defenders' Office and himself.

(A 4)(citations omitted). Also, as the trial judge pointed out, DUI is not an impeachable offense and, therefore, would not be brought up at trial. Further, the judge specifically noted that the victim's probation expired; hence, there is no interest in any future representation. Thus, because the trial judge merely explored the adequacy of the basis for conflict and properly

determined that the basis was inadequate, the trial court did not abuse its discretion in denying the motion to withdraw.

Similarly, in Leslie, there was no past professional relationship between the State witness, Maldonado, and the Public Defender's officer. The Public Defender certified conflict on the basis his office was representing simultaneously Respondent/Leslie at trial and Maldonado **on appeal**. However, the basis for conflict later dissipated when the Public Defender was allowed to withdraw from appellate representation of Maldonado. The Public Defender's assertion at the hearing that a conflict would still exist, even if he were allowed to withdraw from representing Maldonado, does not establish conflict as it was based upon the fact of representation and there is no indication that counsel considered this scenario at the time the motion was filed. There was no allegation by the Public Defender that confidences were learned as a result of the appellate representation which would relate to the trial representation of Respondent. Again, because the trial judge merely explored the adequacy of the basis for conflict and properly determined the basis was inadequate, the trial court did not abuse its discretion in denying the motion to withdraw.

Finally, in Filan, there was no past professional "relationship" between the eyewitness, Josh Eldridge, and the Public Defender's office. It is undisputed, the Public Defender represented the witness at a DUI arraignment and during a violation

of probation hearing. Eldridge indicated that he was not represented by counsel because counsel did nothing more than explain his options. Here again, the identity of the individual public defender who "represented" the witness was never presented, and is probably unknown, making the possibility that any confidences would be revealed virtually nonexistent. Other than the form motion, there was no allegation by the Public Defender that confidences were learned as a result of that representation which would have relevance to cross-examination in the instant case. Moreover the judge determined the following:

On November 13, 1989, Josh Eldridge pled guilty at his DUI arraignment at the Gun Club Complex. The official court file kept by the Clerk of the Court indicated that no attorney was appointed for Mr. Eldridge and his sentencing date was passed to January 22, 1990. However, also in the court file is a "plea agreement" which appears to have been signed by an Assistant State Attorney, Mr. Eldridge and a lawyer for Mr. Eldridge. According to the judges at the Gun Club satellite courtrooms (the Honorable Judges Peter Blanc and Paul Moyle) the following procedure takes place: DUI arraignments are scheduled for one day each week in which many defendants are scheduled to appear. (Traffic crime arraignments are scheduled four days a week, misdemeanor arraignments are scheduled two days a week, and first appearances take place everyday.) The Assistant Public Defenders speak to the defendants about plea offers received from the State. If the plea is accepted, the Assistant Public Defenders prepare all the paperwork, and the plea agreement is signed by the Assistant Public Defender, defendant, and the Assistant State Attorney. If the plea is not accepted, the Assistant Public Defender will have the defendant fill out an Affidavit of Insolvency

if they wish to have the Public Defender appointed. Once all the defendants have been interviewed, the bailiff runs a video tape which explains court procedures and the defendants' rights. The judge then takes the bench and reiterates rights and procedures and begins calling defendants on a case-by-case basis. If the defendant has accepted the plea, the judge proceeds with the standard plea colloquy. If the defendant pleads not guilty, the judge makes further inquiry as to the Affidavit of Insolvency, and, if appropriate, appoints a Public Defender. The nature of the representation may last from one to two minutes to several minutes. . . .

On January 22, 1990, Mr. Eldridge was not present and a *capias* was issued, and on February 22, 1990, Mr. Eldridge appeared before Judge Bollinger without counsel and was sentenced according to the plea agreement.

On July 10, 1990, a Violation of Probation affidavit was filed and it was Amended on February 11, 1991. On February 28, 1992, Mr. Eldridge was before the Court. On March 4, 1992, after being advised of his rights, Mr. Eldridge pled guilty to a violation of probation and was sentenced accordingly.

On May 8, 1998, Mr. Josh Eldridge testified in this court as to what took place on November 13, 1989, as well as the other dates concerning his representation by the Public Defenders' Office. Mr. Eldridge testified that he didn't remember all the specifics, but it was his recollection that when he talked to the Assistant Public Defender, it was very brief each time, no more than five (5) minutes. In any event, Mr. Eldridge testified that he was willing to waive any conflict between the Public Defenders' Office and himself, and he did not talk to an attorney. He further stated he would have no problem testifying as to the events as to the events involving Mr. Filan.

(A 29). Additionally, as the judge pointed out, DUI is not an

impeachable offense and, therefore, would not be brought up at trial. Further, the judge specifically noted the victim's probation expired, hence, he was no longer represented by the public defender. Thus, because the trial judge merely examined the adequacy of the basis for conflict and properly determined it was inadequate, the trial court did not abuse its discretion in denying the motion to withdraw.

This Court must question the rule of law espoused in Guzman which stands logic on its head. The facts in the instant cases are the rule rather than the exception. In the instance where a true conflict exists, the trial court will no doubt resolve all matters on behalf of the defendant's right to receive a fair trial. For example, in Skitka v. State, 579 So. 2d 102 (Fla. 1991), this Court interpreted section 27.53(3) as allowing a trial court to reject a public defender's request to withdraw due to conflicts arising from an excessive case load. Similarly, In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit, 636 So. 2d 18, 21 (Fla. 1994) the Court, citing Skitka, found the district court did not abuse its authority in determining fact-finding by the trial judge was necessary and that the trial court is not obligated to accept automatically a public defender's motion to withdraw due to an excessive caseload. See also Pena v. State, 706 So. 2d 1378 (4th DCA 1998)(rejecting argument that trial court was required to grant motion to withdraw;

finding permissible the trial court's authority to distinguish the facts of this case from Guzman). See also, Le Captain v. State, 691 So. 2d 613 (Fla. 4th DCA 1997). These cases stand for the proposition a defendant's right to counsel is not compromised simply because a trial court has discretion in determining whether a conflict exists upon being presented with a motion to withdraw. Exercising discretion in circumstances where there is no real conflict in any constitutional sense is proper.

Justices Overton and Wells recently noted the importance of this issue in Robinson v. State, 702 So. 2d 213 (Fla. 1997), where they suggested the legislature mandate each Public Defender's office have a conflict section, and funds be provided to carry out this responsibility and relieve local governments of this expense. Under Guzman, there is virtually no check on the Public Defender's assertion of conflict, opening up the possibility of abuse and the potential of great financial burden on the counties.

CONCLUSION

Wherefore, the State requests respectfully this Court follow the plain meaning of section 27.53(3) and recede from Guzman's reading of section 27.53(3).

Respectfully submitted,  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing "Brief of Petitioner on Merits" has been furnished by courier, to: Margaret Good-Earnest, Assistant Public Defender, Fifteenth Judicial Circuit of Florida; John Cleary, Assistant Public Defender, Fifteenth Judicial Circuit of Florida, Kelly V. Landers, Assistant Public Defender, Fifteenth Judicial Circuit of Florida; The Criminal Justice Building, 421 Third Street, 6th Floor, West Palm Beach, Fl 33401 and by U.S. Mail to Daniel P. Hyndman, Assistant County Attorney, P.O. Box 1989, West Palm Beach, FL 33402 on this \_\_\_\_\_ day of March, 1999

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IN THE SUPREME COURT OF FLORIDA

**STATE OF FLORIDA,**  
Petitioner,

vs.

**ROBERT REARDON,**  
Respondent,

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CASE NO. 94,291

DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT - NO. 98-1703

**STATE OF FLORIDA,**  
Petitioner,

vs.

**VERNON M. LESLIE, JR.**  
Respondent,

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CASE NO. 94,300

DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT - NO. 98-1924

**STATE OF FLORIDA**  
Petitioner,

vs.

**RICHARD FILAN,**  
Respondent.

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CASE NO. 94,301

DISTRICT COURT OF APPEAL,  
FOURTH DISTRICT - NO. 98-1842

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