2021 WL 1668416 (Fla.Cir.Ct.) (Trial Order)
Circuit Court of Florida,
Eleventh Judicial Circuit.
Miami-Dade County

State of Florida, Plaintiff,
v.
Joan De PAZ, Defendant.

No. F20-14435.
April 28, 2021.

Order Denying Motion to Appoint Penalty Phase Co-Counsel

Miguel M. de la O, Judge.

***1** SECTION (60)

THIS CAUSE came before the Court on Defendant, Joan de Paz's ("de Paz"), Motion to Appoint Penalty Phase Co-Counsel ("Motion"). The Court has reviewed the Motion, the Justice Administrative Commission's ("JAC") Response, de Paz's [Supplemental] Memorandum of Law in Support of the Motion ("Reply"), heard argument of counsel, and is fully advised in the premises. The Motion is **DENIED.**

De Paz is charged with First Degree Murder. Although subject to change in the future, at this time, the State intends to ask a jury to recommend the death penalty and the Court to impose it. De Paz has retained private counsel, Joseph Chambrot, to represent him for an agreed upon fee. Notwithstanding his ability to retain private counsel, De Paz has been declared indigent for costs. De Paz now moves this Court to appoint a lawyer off the death penalty registry, Ms. Carmen Vizcaino, to serve as co-Counsel at the State of Florida's expense. Ms. Vizcaino's role would be to handle the penalty phase of de Paz's trial if the jury convicts him during the guilt phase.

JAC objected to the Motion based on the language in Florida Statutes section 27.52(5)(h).

> The court may not appoint an attorney paid by the state based on a finding that the defendant is indigent for costs if the defendant has privately retained and paid counsel.

§ 27.52, Fla. Stat. (2019). The JAC also points to Florida Rule of Criminal Procedure 3.112 which allows for the appoint of co-counsel when "the defendant is not represented by retained counsel." Fla. R. Crim. P. 3.112(e).

Many of the points raised by de Paz are not in dispute. It is undisputed that all defendants against whom the State seeks the death penalty should be represented by two lawyers with distinct roles. It is undisputed that the financial interests of Florida taxpayers would be best served by the Court granting the Motion because otherwise de Paz may choose to dismiss Mr. Chambrot, and avail himself of the services of Regional Counsel [1] or court-appointed private counsel, in order to have two lawyers represent him. Court appointment of two private counsel would likely result in a tremendous additional expenditure of funds by the State compared to paying for only one court-appointed lawyer as de Paz requests. *See* "Death-penalty cases rack up big dollars in Miami-Dade," Miami Herald, October 2, 2016. [2] However, it is equally undisputed that this Court is not the Legislature, and

while it can have strong opinions about the wisdom of any particular policy, it is not free to rule in accordance with its personal policy preferences. The Motion is denied in spite of the excellent arguments raised by de Paz because the Legislature has made its policy preference abundantly clear.

In order for this Court to grant the Motion, it must first identify the source of its power to do so. There are two possibilities: either the Legislature has authorized it, or the Constitution requires it. De Paz argues that the Sixth Amendment right to counsel entitles him to a State-funded penalty phase lawyer pursuant to *Wheat v. United States* and *Powell v. Alabama,* 287 U.S. 45 (1932). *Powell* concerns giving defendants a fair opportunity to secure their counsel of choice. *Wheat* observes that the right to counsel of choice is not absolute.

> ***2** The Sixth Amendment right to choose one's own counsel is circumscribed in several important respects.... a defendant may not insist on representation by an attorney he cannot afford

Wheat v. United States, 108 S. Ct. 1692, 1697 (1988). Neither of these cases can be read to mean that this Court must appoint co-counsel at the State's expense.

De Paz's right to counsel of his choice is intact. He has retained Mr. Chambrot. Doubtless, the better practice is for two lawyers to represent a defendant against whom the State seeks a death sentence. However, de Paz has no constitutional right to Ms. Vizcaino's services at taxpayer expense. In fact, the Florida Supreme Court expressly rejects a requirement that a defendant facing the death penalty always be represented by two lawyers. Fla. R. Crim. P. 3.112(e) ("A court must appoint lead counsel and, *upon written application and a showing of need by lead counsel, should appoint co-counsel* to handle every capital trial in which the defendant is not represented by retained counsel") (emphasis added).

> The Florida Supreme Court adopted this rule despite the practice of other states. The American Bar Association Standards and many other state standards require the appointment of two lawyers at the trial level in every prosecution that could result in the imposition of the death penalty. The committee has modified this requirement by allowing the trial court some discretion as to the number of attorneys ....

Fla. R. Crim. P. 3.112, Committee Comments (2020).

Nor does de Paz cite to any case finding that a single lawyer representing a defendant facing a possible death sentence is *per se* ineffective. Indeed, the Comments to Florida Rule of Criminal Procedure 3.112 make clear that failing to follow the standards for Counsel in death penalty cases does not necessarily equate with ineffective counsel. Fla. R. Cr. P. 3.112, Committee Comments ("These standards are not intended to establish any independent legal rights. For example, the failure to appoint co-counsel, standing alone, has not been recognized as a ground for relief from a conviction or sentence.").

Although this Court agrees that de Paz should have two lawyers defending him, and the Court would very much like to appoint Ms. Vizcaino, it cannot find that the Sixth Amendment demands such a result.

Alternatively, de Paz points to *Spaziano v. Seminole County,* 726 So. 2d 772 (Fla. 1999), to support his argument that this Court has the authority to appoint co-Counsel at State expense "despite lead counsel being a private attorney." Reply at 6. *Spaziano* does not control the result here for two reasons. First, the issue before this Court is not that Mr. Chambrot is a *private* attorney, it is that he is a *retained* attorney. In *Spaziano,* the defendant's private lawyer was not retained, he was a volunteer (*i.e.,* pro bono).

This distinction is critical because section 27.52(5)(h) specifically bars the appointment of a State funded lawyer as co-counsel to *retained* counsel. Moreover, *Behr v. Gardner,* which binds this Court in the absence of contrary Florida Supreme

Court or Third DCA precedent, expressly held that a trial court cannot appoint the public defender as co-counsel when the defendant is represented by privately retained counsel.

> ***3** Therefore, we hold that section 27.51, Florida Statutes (1981), although it permits the appointment of the public defender to represent certain indigent defendants, does not permit the appointment of the public defender *as co-counsel* with privately retained counsel. The order sub judice departs from essential requirements of law in appointing the public defender as co-counsel.

Behr v. Gardner, 442 So. 2d 980, 982 (Fla. 1st DCA 1983). The Third DCA subsequently cited *Behr* with approval in *Thompson v. State,* 525 So. 2d 1011 (Fla. 3d DCA 1988), when it quashed a trial court order appointing the public defender as co-counsel to privately retained counsel. *See id.* at 1012 ("the trial court has no statutory authority to appoint the public defender to represent an indigent defendant, as here, as co-counsel with privately retained counsel; such an appointment is subject to quashal on a petition for certiorari"). Importantly, *Behr* and *Thompson* were both issued prior to the adoption of section 27.52(5)(h), which brings us to the second reason *Spaziano* is not controlling here.

Second, in addition to not addressing retained counsel, *Spaziano* predates a significant change in Florida law. Section 27.52(5)(h) ("The court may not appoint an attorney paid by the state based on a finding that the defendant is indigent for costs if the defendant has privately retained and paid counsel.") was enacted by the Florida Legislature on July 1, 2010 and codifies the holdings in *Behr* and *Thompson. See* 2010 Fla. Sess. Law Serv. Ch. 2010-162 (C.S.H.B. 5401).

In summary, the Sixth Amendment does not compel granting the Motion, the First and Third DCA have both held that this Court lacks the authority to grant the Motion, the Rules of Criminal Procedure provide that the Court cannot grant the Motion, and the Florida Legislature has enacted a clear mandate prohibiting the Court from granting the Motion. Therefore, although the Reply is correct that in this case such a result is "illogical" (Reply at 4), "non-sensical" (Reply at 5), and "the epitome of form [over] substance" (Reply at 6), this Court is powerless to rule differently.

DONE AND ORDERED in Chambers at Miami-Dade County, Florida, on this 28th day of April 2021.

<<signature>>

Miguel M. de la O Circuit Judge

Footnotes

1 De Paz represents to this Court that the public defender has a conflict and cannot represent him.

2 Located at https://www.miamiherald.com/news/local/crime/article105286346.html.