

IN THE DISTRICT COURT OF APPEAL OF FLORIDA,  
THIRD DISTRICT

**Case No. 3D08-2537**  
(L.T. Case No. 08-01)

OFFICE OF CRIMINAL CONFLICT AND  
CIVIL REGIONAL COUNSEL, THIRD DISTRICT  
COURT OF APPEAL REGION,

Appellant,

v.

PUBLIC DEFENDER, ELEVENTH  
JUDICIAL CIRCUIT,

Appellee.

---

APPEAL FROM CIRCUIT COURT,  
ELEVENTH JUDICIAL CIRCUIT,  
IN AND FOR MIAMI-DADE COUNTY, FLORIDA

---

INITIAL BRIEF OF APPELLANT

**OFFICE OF CRIMINAL CONFLICT  
AND CIVIL REGIONAL COUNSEL,  
THIRD REGION**

1501 N.W. North River Drive

Miami, Florida 33125

Phone: (305) 325-3000

Fax: (305) 325-3003

Counsel for Appellant

**TABLE OF CONTENTS**

	<u>Page</u>
Table of Contents.....	i
Table of Citations .....	iii
Introduction.....	1
Statement of the Case and Facts .....	2
Summary of the Argument .....	4
Argument and Citations of Authority .....	5
I. THE COURT ERRED WHEN IT DENIED REGIONAL COUNSEL 3’S MOTION TO INTERVENE, BECAUSE RC3 IS MANIFESTLY A NON-PARTY DIRECTLY AND IMMEDIATELY AGGRIEVED BY THE TRIAL COURT’S ORDER GRANTING PD11’S MOTION TO APPOINT “OTHER COUNSEL” — REGIONAL COUNSEL 3 — IN ALL THIRD-DEGREE FELONY CASES INVOLVING INDIGENT DEFENDANTS .....	
5	
II. THE COURT ERRED WHEN IT ORDERED REGIONAL COUNSEL 3 TO ACCEPT ALL THIRD-DEGREE FELONY CASES INVOLVING INDIGENT DEFENDANTS, SUBJECT ONLY TO RC3’S MOTION TO WITHDRAW (AND HEARING THEREON), IN THE EVENT OF AN ACTUAL CONFLICT .....	
11	
A. <i>Ordering RC3 to accept all third-degree felonies was error</i> .....	
12	
Conclusion .....	17

Certificate of Service ..... 18  
Certificate of Compliance..... 18

## TABLE OF CITATIONS

	<u>Page</u>
<u>Cases:</u>	
<i>Barnhill v. Florida Microsoft Litigation</i> , 905 So. 2d 195 (Fla. 3d DCA 2005) .....	5, 7
<i>Crist v. FACDL</i> , 978 So. 2d 134 (Fla. 2008).....	14, 15
<i>J.R. and A.R. v. R.M. and S.M.</i> , 679 So. 2d 64 (Fla. 4th DCA 1996).....	8
<i>Litvak v. Scylla Properties, LLC</i> , 946 So. 2d 1165 (Fla. 1st DCA 2006).....	7
<i>Morgareidge v. Howey</i> , 75 Fla. 234, 78 So. 14 (1918) .....	9
<i>Omni Natl. Bank v. Georgia Banking Co.</i> , 951 So. 2d 1006 (Fla. 3d DCA 2007) .....	5
<i>Racing Properties, L.P. v. Baldwin</i> , 885 So. 2d 881 (Fla. 3d DCA 2004).....	8
<i>Stas v. Posada</i> , 760 So. 2d 954 (Fla. 3d DCA 1999) .....	8
<i>The Florida Bar v. Brown</i> , 2008 WL 150402 (Fla. 2008).....	14
<i>Turner v. State</i> , 340 So. 2d 132 (Fla. 2d DCA 1976).....	14
<i>Union Cent. Life Ins. Co. v. Carlisle</i> , 593So. 2d 505 (Fla. 1992) .....	9, 11
<i>U.S. v. Miranda</i> , 936 F. Supp. 945 (S.D. Fla. 1996) .....	14
<u>Other authorities:</u>	
§27.50, Fla. Stat. ....	9
§27.511, Fla. Stat. ....	9, 14, 15
§27.5303, Fla. Stat. ....	2, 9, 13, 15

Fla. R. App. P. 9.370(a).....	10
Fla. R. Civ. P. 1.230.....	7, 10, 11
R. Regulating Fla. Bar 4-1.7(a)(2).....	13

## INTRODUCTION

The Office of Criminal Conflict and Civil Regional Counsel, Third District Court of Appeal Region (“RC3”) appeals from the trial court’s Amended Order Denying [RC3’s] Motion to Intervene and Motion to Stay, based upon the court’s Order granting in part, the Eleventh Judicial Circuit Public Defender’s Motion to Appoint Other Counsel in Unappointed Non-Capital Felony Cases, as modified by the court’s later order granting PD11’s Motion for Clarification.

The parties will be referred to as “RC3” and “PD11.” “The State” is represented in this litigation by the State Attorney of the Eleventh Judicial Circuit and the Florida Attorney General. (In Case No. 3D08-2272, the State has appealed from the court’s “Order Granting in Part and Denying in Part Public Defender’s Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases,” as modified by the court’s later order granting PD11’s Motion for Clarification.)

References to the Appendix to this brief will be indicated by “RC3 A-[document].” References to the transcript of the September 11, 2008, hearing on PD11’s Motion for Clarification and RC3’s Motion to Intervene (which is included in the Appendix, as RC3 A-6) will be indicated by “T-[page].”

## STATEMENT OF THE CASE AND FACTS

The Office of Criminal Conflict and Civil Regional Counsel, Third District Court of Appeal Region ("RC3") adopts the Statement of the Case and Facts submitted by the State in *The State of Florida v. In re: Reassignment and Consolidation of Public Defender's Motions, etc.*, Case No. 3D08-2272, with the following additions which relate specifically to RC3's Motion to Intervene, Motion for Stay, and Response to PD11 Motion for Clarification, and the Order denying intervention. RC3 A-2; RC3 A-3; RC3 A-4; and RC3 A-5.

Until the trial court entered its Order Granting in Part and Denying in Part PD11's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, RC3's interests were adequately represented by the State Attorney, Attorney General, and Solicitor General. RC3 A-1. However, the court's order had an additional result and effect on RC3, in that it would force RC3 to take on a caseload and daily in-court responsibilities that were far in excess of those authorized by the Legislature in §27.511, Fla. Stat., the statute which created the Office of Regional Conflict Counsel, and set forth its duties.

Thus, RC3 filed a Motion to Intervene, in which it pointed out the "direct and immediate effect" that the court's order would have on RC3. RC3 A-3. RC3 appeared at the hearing on the Motion for Clarification on September 11, 2008, and

argued in favor of intervention; the court denied the motion by written order dated September 12. RC3 A-5; RC3 A-6 (T 1-19). The order granting clarification ordered RC3 to accept all third-degree felonies where the defendants were indigent, and further directed RC3, if RC3 chose to withdraw, to file a formal motion and have it heard, on a case-by-case basis (a requirement of which the court entirely relieved PD11). RC3 A-4. This appeal followed.

## SUMMARY OF ARGUMENT

I. The Florida rule and case law on intervention uniformly support granting RC3's motion to intervene. The direct and immediate impact on RC3 of the court's orders with respect to allowing PD11 to refuse to accept appointments in any third-degree felony case, and ordering RC3 to accept all of those cases, cannot be doubted. The order denying intervention must be reversed.

II. On the merits, the court had no legal basis, under the legislative scheme, and pursuant to the Supreme Court's reasoning and holding in *Crist v. FACDL, infra*, to order RC3 to accept all third-degree felony cases involving indigent defendants. The court's order was also in error in requiring RC3 (but not PD11), on a case-by-case basis, to file a formal motion to withdraw, and have it heard, in any case where RC3 asserted a conflict of interest.

Pursuant to its enabling statutes, RC3 was not created and intended to be used as the indigent legal aid of first resort, so the order granting PD11's motion in part (as clarified) must be vacated as to RC3, even if the court, on review, otherwise affirms.

## ARGUMENT AND CITATIONS OF AUTHORITY

I. THE COURT ERRED WHEN IT DENIED REGIONAL COUNSEL 3'S MOTION TO INTERVENE, BECAUSE RC3 IS MANIFESTLY A NON-PARTY DIRECTLY AND IMMEDIATELY AGGRIEVED BY THE TRIAL COURT'S ORDER GRANTING PD11'S MOTION TO APPOINT "OTHER COUNSEL" — REGIONAL COUNSEL 3 — IN ALL THIRD-DEGREE FELONY CASES INVOLVING INDIGENT DEFENDANTS

*Standard of review:* The standard of review of an order on a motion to intervene is abuse of discretion. *Barnhill v. Florida Microsoft Litigation*, 905 So. 2d 195, 199 (Fla. 3d DCA 2005). That discretion has been abused if the motion to intervene has been denied, although the movant has shown that its interest in the matter in litigation is "direct and immediate," that the movant has accepted the pleadings as they existed, and that the intervenor will either gain or lose by the direct legal operation and effect of the judgment. *Id.*; accord, *Omni Natl. Bank v. Georgia Banking Co.*, 951 So. 2d 1006, 1007 (Fla. 3d DCA 2007).

\* \* \*

Until the trial court entered its Order Granting in Part and Denying in Part PD11's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, RC3's interests were adequately represented by the State, which vigorously

opposed PD11's motion, and litigated it at length in the trial court.<sup>1</sup> RC3 A-1. It was only when the trial court entered its Order on September 3, 2008, with an effective date of September 15, 2008, that RC3 was "directly and immediately affected," because the order required RC3 to (1) staff each of some 22 criminal courtrooms on a daily basis, and (2) accept, regardless of any conflict with PD11, representation of all indigent individuals charged with third-degree felonies, subject only to (3) RC3's later filing of a formal motion to withdraw, and a hearing thereon. RC3 A-1.

RC3 promptly moved to intervene, and that motion was heard along with PD11's Motion for Clarification on September 11, 2008. RC3 A-2; RC3 A-6 (T 1-18). The court acknowledged, when the hearing opened, that it had received RC3's motion to intervene, and purported to permit RC3 to argue in support of the motion. RC3 A-6 (T 3). The court then ordered *all* third-degree felonies to be assigned to RC3, relieving PD11 of all its responsibilities for that entire class of cases, and regardless of whether PD11 actually had a conflict of interest in each of the cases. RC3 A-6 (T 7: "The Court thinks there would be some disruption of due process if I do not appoint Regional Conflict Counsel, if the person is indigent, to represent the [defendants charged with third-degree felonies]")

---

<sup>1</sup> See transcripts of the hearings, filed in Case No. 3D08-2272.

The court further ordered that, if RC3 discovered that it then had “a conflict for whatever reasons, you file your motions [to withdraw] in front of each of the individual judges. . . . If you just file the conflicts saying, ‘We just can’t represent the person,’ then the judge will appoint [private counsel from among those who have contracts with the Judicial Administration Commission].” RC3 A-6 (T 7-8)

The trial court then denied RC3’s motion to intervene, apparently because it believed that, having chosen not to seek *amicus* status, RC3 had waived the right to intervene. RC3 A-6 (T 12) That ruling was in error, and reversal is required.

As an initial matter, RC3 has standing to intervene under Florida Rule of Civil Procedure 1.230 because, as required by that rule, RC3 “claim[ed] an interest in pending litigation.” The case law limits the right to intervene by requiring that the purported intervenor have a “direct and immediate” interest which is “already at issue in the proceeding.” See *Litvak v. Scylla Properties, LLC*, 946 So. 2d 1165 (Fla. 1st DCA 2006); *Barnhill v. Florida Microsoft Litigation*, 905 So. 2d 195 (Fla. 3d DCA 2005), *reh. and reh. en banc den; rev. denied* 926 So. 2d 1269. The effect of the trial court’s order, as modified on motion for clarification, was the immediate need for RC3 to staff some 22 courtrooms and to accept, regardless of actual conflict, every single third-degree felony case in Miami-Dade County in which the defendant was found to be indigent. RC3 A-4.

As well, the court's order placed an additional burden on RC3. After being forced to represent all indigent defendants charged with third-degree felonies, if RC3 learned that there was a legal or factual conflict in an individual case, RC3 would have to file a motion to withdraw, and have it heard. In contrast, PD11 was allowed merely to decline to accept an entire category of case — third-degree felonies — and thus was relieved of any need to file any motions to withdraw (or to have them heard). Because of these several “direct and immediate” effects on RC3, the trial court abused its discretion when it denied RC3's motion to intervene.

*See also, J.R. and A.R. v. R.M. and S.M.*, 679 So. 2d 64 (Fla. 4th DCA 1996) (holding that persons approved as adoptive parents had direct and immediate interest in the case, and were entitled to intervene in foster parents' adoption proceeding); *Stas v. Posada*, 760 So. 2d 954, 955 (Fla. 3d DCA 1999) (collecting cases; holding that non-party aggrieved by a judgment must seek intervention in the trial court, or he will be precluded from seeking appellate review); *cf. Racing Properties, L.P. v. Baldwin*, 885 So. 2d 881, 883 (Fla. 3d DCA 2004) (reversing an order permitting intervention, where the prospective intervenor had conceded that his claims were “quite dissimilar” to those in the underlying case).

The leading case explaining the prerequisites for a successful motion to intervene is *Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 507 (Fla. 1992),

where Justice Barkett spoke for a unanimous Supreme Court: “The test to determine what interest entitles a party to intervene” is that the interest is “of such direct and immediate character that the intervenor will either gain or lose by the direct legal operation and effect of the judgment.” *Id.* quoting *Morgareidge v. Howey*, 75 Fla. 234, 238-239, 78 So. 14, 15 (1918). RC3 has just such an interest: the court’s order appointed RC3 as the lawyers of first resort as to *all* third-degree felonies, provided only that the defendants were indigent. RC3 A-4, para. 1, 2, 6. As RC3 pointed out in its motion to intervene, such an order appeared to direct RC3 to “violate its [limited] statutory authority under sections 27.50, 27.511, and 27.5303 (1)(a), Florida Statutes,” because the Legislature intended that RC3 be appointed only to that group of cases where, after the Public Defender was appointed, it was learned that there was a factual or legal conflict, and the Public Defender therefore “has withdrawn from a case.” §27.511, Fla. Stat.; RC3 A-3, para. 5, 6, 7. While such appointments would include third-degree felonies, the enabling legislation did not intend that RC3 would be appointed to all of them. Thus, regardless of whether the court agreed with RC3’s view, it cannot be gainsaid that RC3 “has a dog in this fight,” and thus should have been permitted to intervene.

At the hearing on the motion to intervene, it appeared that the trial court may have understood that intervention is synonymous with appearing as an *amicus*

*curiae*: “I would consider you an *amicus* if you had asked for it,<sup>2</sup> of course I would. Would I have found that you had standing, *per se*? I don’t know because it wasn’t ever presented to me.” RC3 A-6 (T 13) The case law on intervention, as noted, authorizes “anyone claiming an interest in pending litigation” to intervene, although “in subordination to, and in recognition of, the propriety of the main proceeding.” Fla. R. Civ. P. 1.230. RC3 clearly had standing to intervene, under the rule and the case law, and the order denying its motion to intervene should be reversed.

---

<sup>2</sup> The appellate rules authorize a non-party to file a brief as *amicus curiae*, if permitted by the court, on motion for leave to do so, which states “the movant’s interest, the particular issue to be addressed, how the movant can assist the court in the disposition of the case, and whether all parties consent to the filing of the brief.” Fla. R. App. P. 9.370 (a). No such provision appears in the rules of civil procedure.

II. THE COURT ERRED WHEN IT ORDERED REGIONAL COUNSEL 3 TO ACCEPT ALL THIRD-DEGREE FELONY CASES INVOLVING INDIGENT DEFENDANTS, SUBJECT ONLY TO RC3'S MOTION TO WITHDRAW (AND HEARING THEREON), IN THE EVENT OF AN ACTUAL CONFLICT

*Standard of review:* Once it is determined that the interest asserted supports intervention, the trial court must exercise its sound discretion in determining the parameters of the intervention, in accordance with Florida Rule of Civil Procedure 1.230. *See Union Cent. Life Ins. Co. v. Carlisle*, 593 So. 2d 505, 508 (Fla. 1992) (quoting Authors' Comment – 1967 to Rule 1.230).

\* \* \*

The trial court claimed that “it is the legislative intent, through the creation of criminal conflict and civil regional counsel, that RC3 be the appropriate remedy [sic] to be appointed in said cases.” RC3 A-4, para. 6. By so ordering, the court made a “finding” (as a fact? as a matter of law?) that RC3, with its tiny staff of part-time attorneys, could cover all 22 or so felony divisions, and would only be permitted to withdraw, on a case-by-case basis, after filing a motion to withdraw (asserting that there was a “conflict” — “for whatever reason” (RC3 A-6 (T 7))) and having a hearing thereon. RC3 A-4. To that end, the court ordered RC3 to appear at arraignments in each criminal courtroom, and reminded RC3's

