

FTAA Arrests

Block that defense

Prosecutors won't seek jail time, denying defendants the use of public defenders

By Matthew Haggman and Steve Ellman

In a move critics say is designed to weaken potential civil claims against the city of Miami, the Miami-Dade state attorney's office is seeking to block people who were arrested during the Free Trade Area of the Americas demonstrations from being represented by the public defender's office.

In hearings last week, prosecutors announced they would not seek jail time in cases involving FTAA defendants charged with misdemeanors. Prosecutors can seek to remove a public defender if the accused does not face jail time.

Ed Griffith, a spokesman for State Attorney Katherine Fernandez-Rundle's office, said the PD's office routinely is removed from cases where imprisonment is not sought.

He denied that the move is part of an effort to thwart any civil cases that may be brought by FTAA defendants who allege they were wrongfully arrested.

But Lida Rodriguez-Taseff, president of the Greater Miami American Civil Liberties Union, said that because many of the defendants live out of state and cannot afford to hire private defense lawyers, disqualifying the public defender might leave many of those who face misdemeanor charges without representation. That could force them to plead guilty or no contest to charges such as failure to obey a lawful order, loitering, and disorderly conduct.

"The reason [prosecutors] are doing it is to cover up bad arrests made by the cops and force these people into taking pleas so they don't have to dismiss cases," Rodriguez-Taseff said.

If defendants offered a vigorous legal defense and the state attorney's office was forced to dismiss weak misdemeanor cases, that would give those arrested stronger civil liability cases. "But if [those arrested] take a plea then their prospects with respect to a civil suit disappear," Rodriguez-Taseff said. "By taking a plea, they would be conceding that the government had a right to arrest them."

Critics also contend that forcing the defendants to take a plea enables the city to justify the arrests as lawful. It also avoids any political embarrassment that could stem from trying and potentially losing these cases.

"It allows the city of Miami to say, 'See, they are guilty and they said it themselves,'" said Marc Steier, an attorney with the New York City-based National Lawyers Guild, which monitored protests last month.

Griffith said prosecutors have given no consideration to the issue of how removing the PD's office from representation affects potential civil lawsuits.

"It is really up to the courts to decide if they will establish representation, because there is no legal requirement to appoint a public defender when the state attorney is not seeking jail time," he said. "The average individual cited with a misdemeanor who comes into criminal court defends himself." Griffith said "civil cases are immaterial to our decisions."

Over the past week, at status hearings in the Miami-Dade County Court criminal division, prosecutors who work for Fernandez-Rundle have asked judges to disqualify the PD's office from providing representation. They have said they will not seek jail time for the defendants. Thus far, the PD's office has been discharged in 20 of the 98 open misdemeanor cases.

Public defenders were initially appointed to represent those who were arrested during the anti-FTAA demonstrations at their bond hearings. Under Florida law, the state must appoint counsel in all prosecutions punishable by imprisonment. But under federal and state law, if an individual is not threatened with imprisonment, the state is not required to provide legal counsel.

The state attorneys office has certified that it will not seek jail time in misdemeanor cases arising from the FTAA protests.

"Discharging the public defender is an unfair way of tipping the scales in favor of the prosecution," said Miami-Dade Public Defender Bennett H. Brummer. "It effectively prevents a person from having a meaningful day in court because it pits untrained poor people against state-paid prosecutors."

City, county, and police officials have faced mounting criticism over what some observers contend was oppressive handling of demonstrations in Miami last month. According to the state attorney's office, 231 people were arrested; 194 were charged with misdemeanors, 30 with felonies, and seven with juvenile offenses. National civil rights groups have said that many lawsuits will be filed for unjust arrests and injuries suffered at the hands of police.

#### Private lawyers volunteering

Four of the eight judges presiding over FTAA misdemeanor cases in the criminal division of the Miami-Dade County court have agreed to discharge the public defender's office in misdemeanor cases where jail time is not being sought. Judge Karen Mills-Francis has discharged the PD's office in eight cases, while Judge Shiryln McWhorter has discharged seven.

The Miami chapter of the Florida Association of Criminal Defense Lawyers has asked its members to provide pro bono representation to any FTAA protester who lacks representation.

On Dec. 10, senior assistant public defenders Ray Taseff and Carol Ferrero made a presentation to the board of directors of the Miami chapter of the criminal defense lawyer's group about the state attorney's effort in the FTAA cases. Taseff declined comment and Ferrero was on vacation and could not be reached.

In response to their talk, more than 20 private lawyers have volunteered to represent FTAA defendants, said Kenneth P. Hassett of Hassett & Associates in Coral Gables and president of the defense attorneys' chapter. Many lawyers have agreed to take more than one case.

Hassett pledged to find representation in every case where a public defender is discharged. "We find it suspicious that the state attorney is actively getting involved in these cases to get the public defender discharged," Hassett said. "It is one thing to have misdemeanors where the public defender is discharged on a case by case basis. But to take an active role specifically with regard to FTAA cases, I think that perhaps there is political pressure."

Fernandez-Rundle and Brummer are facing contested reelection bids next year.

Gaining the support of local police groups is considered important in winning election to these offices.

Law unclear

Benjamin S. Waxman, whose firm has agreed to represent a dozen FTAA defendants, said Fernandez-Rundle's office is trying "to put the screws to the defendants."

"Most people are from out of town and have no practical means to access counsel," Waxman said, who is a partner at Robbins Tunkey Ross Amsel Raben Waxman & Eigarsh in Miami. "It seems appropriate to have public defender representation."

But the law is unclear about whether people charged with misdemeanors should be able to keep their public defender for representation.

In 1994, the Florida Supreme Court, in *State of Florida v. Gabriel Ull*, stated that "a court may decline to provide counsel whenever the court certifies prior to trial that it will not impose incarceration." The court, however, offered a caveat to that broad rule. It said that due process considerations dictate that a court cannot first appoint and then discharge counsel when it is to the detriment of the defendant.

Justice Leander Shaw, who authored the opinion, added that "an indigent defendant can successfully block discharge by showing that he or she will be substantially disadvantaged by loss of counsel."

Miami lawyer Alberto Milian, a former prosecutor who is running against Fernandez-Rundle for state attorney, criticized the incumbent for seeking to disqualify the PD's office in the FTAA misdemeanor cases. He said that in his 12 years as a prosecutor, he only saw that done once.

"It is a very intimidating and daunting task for any citizen to go to court," he said. "I know technically they can certify that and have the public defender discharged. But if I were state attorney, I would not seek to deny anybody representation."

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[Photo caption and credit: Local members of the Florida Association of Criminal Defense Lawyers have been asked to provide pro bono counsel to any FTAA defendant that needs representation. Photo by Aixa Montero]