D.A. 2-1-94 047

IN THE SUPREME COURT OF FLORIDA

CASE NO. 82,782

IN RE: CERTIFICATION OF CONFLICT IN MOTIONS TO WITHDRAW FILED BY PUBLIC DEFENDER OF THE TENTH JUDICIAL CIRCUIT

ON DISCRETIONARY REVIEW
FROM THE FLORIDA DISTRICT COURT OF APPEAL
SECOND DISTRICT

BRIEF OF THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC., AS AMICUS CURIAE

BENNETT H. BRUMMER
Public Defender
Florida Bar No. 91347

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 833320

Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER AUTHORITIES

FLORIDA STATUTES (1991)

RULES REGULATING THE FLORIDA BAR

INTRODUCTION

This brief is submitted by the Florida Public Defender Association, Inc. ("FPDA") as amicus curiae. The FPDA is composed of the twenty elected Florida public defenders, who are constitutional officers, their 800 assistant public defenders, and support staff. The FPDA focuses not only on matters of interest to public defenders, but on the administration of justice as well.

STATEMENT OF THE CASE AND FACTS

The Public Defender for the Tenth Judicial Circuit certified to the district court of appeal the existence of a conflict of interest "due to excessive caseload and underfunding", and sought the appointment of other counsel to represent 382 appellants whose initial briefs were overdue. *Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 622 So. 2d 2, 3 (Fla. 2d DCA 1993) (en banc). The certification of conflict read as follows:

> I, J. MARION MOORMAN, Public Defender for the Tenth Judicial Circuit of Florida, hereby certify a conflict to exist in the representation of appellants in the attached motion. The nature of the conflict is that, due to excessive caseload and underfunding, my agency is unable to timely file briefs in all designated appeals. In spite of my office's productivity, which exceeds the caseload standards of the Florida Public Defender Association, Inc. and which far exceeds the suggested maximum appellate caseload standards of other national groups, a backlog has developed. This puts the Public Defender in the position of having to choose between clients in contravention of ethical standards or move to withdraw pursuant to *In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990); *Hatten v. State*, 561 So. 2d 562 (Fla. 1990).
>
> I further certify that the caseload statistics and appropriations figures cited in support of my motion to withdraw are complete and accurate. This certification of conflict and the attached motion to withdraw are done in good faith and solely for the purpose of insuring the constitutional rights of my clients.

(R.).

Additional facts and statistics were presented in the motions to withdraw and attached documentation. The information presented was essentially the same as

that supplied in *Skitka v. State*, 579 So. 2d 102 (Fla. 1991), and included the following facts: The briefs were more than sixty days overdue. During the time period when the records were received in the affected cases, the number of records received by the office exceeded the number of briefs and dispositive motions filed. The figures presented show that, during this period, the public defender's office filed an average of over five briefs per appellate attorney per month. This exceeded FPDA standards and, thus, far exceeded all other recognized standards.

Despite the public defender's certification, and the facts set forth in the accompanying motions and documentation, the district court of appeal stated that it did not have before it an "adequate factual record" upon which to resolve the matter, and that an evidentiary hearing was required. *Order on Motions to Withdraw*, 622 So. 2d at 3.

The court noted that it had previously warned that it would not accept the public defender's representations and conclusions "at face value", and was concerned about its role as "factfinder". 622 So. 2d at 3. Moreover, the state was opposed to the motions to withdraw, and asserted that the public defender had been selective in seeking to withdraw from cases. *Id.*[1] According to the court, the issues

---

[1]The state had filed a response to the motions to withdraw, urging that the motions should be "closely scrutinized," and objecting that the public defender was "keep[ing] cases with limited records and issues, while farming out the more complex appeals." (R.). According to the state, the attorneys appointed to handle cases from which the public defender had withdrawn were filing multiple-issue briefs, while the more experienced appellate attorneys in the public defender's office were filing briefs in cases involving short records, and raising only sentencing issues. (R.). The state requested that the public defender not be allowed to withdraw from any case involving more than two volumes of record. (R.).

The state also complained that the public defender's office was "engaged in a substantially increased motion practice, thus creating an unnecessarily increased workload," and was spending too much time seeking further review in the federal courts, when it should be "working exclusively on their long-overdue state appellate briefs." (R.).

The public defender denied that withdrawal was selective, and explained his practice relating to filing motions and seeking further review in certain cases. (R.).

were "too complex to be resolved summarily". *Id.* Besides, the counties "want this problem solved without additional demand on already overburdened budgets". *Id.*

The court ordered that an evidentiary hearing be conducted before a commissioner, who would report his findings of fact, conclusions, and recommendations to the district court of appeal. *Order on Motions to Withdraw*, 622 So. 2d at 3.

The commissioner was given a broad mandate to inquire into the management and administration of the public defender's office. He was specifically directed to consider the following "concerns":

> 1. Whether the productivity of the appellate division of the Public Defender's office is within an acceptable range.
>
> 2. Whether all of the attorneys assigned to that division are working exclusively on appellate matters.
>
> 3. Whether the Public Defender has taken adequate steps to assure that repetitive issues are handled efficiently.
>
> 4. Whether the Public Defender uses a team approach to maximize the efficiency of the briefing process.
>
> 5. Whether there are steps that the Public Defender, the Attorney General, and this court could collectively take to assure timely appellate review of indigent appeals.
>
> 6. Whether there are other steps which could be taken to allow for the timely prosecution of indigent appeals without transferring the cost for such appeals to the counties.
>
> 7. Ignoring earlier motions to withdraw filed with this court, whether the cases selected for the present motions have been chosen for any particular reason that should be made known to the court.

Order on Motions to Withdraw, 622 So. 2d at 4.

The district court further ordered that the attorney general and the counties would have the right to participate in the proceedings. *Id.* at 4.

The motions to withdraw had been filed in March and April, 1993. When they were filed, the briefs were already 60 days overdue. The hearing was held in August.

An extensive evidentiary hearing was conducted. The public defender testified. He also presented the testimony of members of his staff, other appellate public defenders, and several expert witnesses. The counties cross-examined these witnesses and presented an expert witness of their own. The essence of the process was aptly captured in a local headline: "Public Defender Criticized: Consultant Takes Aim at Efficiency", Tampa Tribune, Florida Metro Section, August 17, 1993, at 4.

On September 7, 1993, the commissioner reported his factual findings, conclusions, and recommendations. His findings included the following:

- The public defender's office caseload was excessive and relief should be granted.
- The public defender's productivity was "definitely within an acceptable range."
- The "workload/caseload demands on the Public Defenders in Florida are extremely high."
- "[T]he appellate caseload problem exists in every Public Defender's office in the State of Florida."
- The legislature does not use the FPDA funding formula to determine what should be appropriated for the operation of the public defenders' offices, but simply appropriates about fifty percent of what it allocates to the state

attorneys.

- Aside from increased funding, not much can be done which would have a substantial impact on the problem.

On October 25, 1993, the district court of appeal entered an en banc order granting the motions to withdraw. *In re: Certification of Conflict and Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 18 Fla. L. Weekly D2324 (Fla. 2d DCA Oct. 25, 1993).

The court noted that it had received its commissioner's report, and that the only party to the proceeding who had filed a response was the public defender. *In re Certification*, 18 Fla. L. Weekly at D2325. The district court made no reference to the commissioner's findings, conclusions, or recommendations.

The public defender sought discretionary review of the en banc orders of April 22, 1993, which required the evidentiary hearing, and of October 25, 1993, which, by its failure even to mention the commissioner's findings, implied that any future motions to appoint other counsel would require a repetition of the same ordeal. This Court accepted jurisdiction by order of December 1, 1993.

SUMMARY OF ARGUMENT

Public defenders are constitutional officers, and lawyers, whose professional and official independence the state is constitutionally obligated to respect. The courts should not involve themselves in the management of public defender offices.

The certification of conflict by a public defender is the exercise of a legal and constitutional duty, and generally must be respected by the courts and the state. A certification of conflict and motion to appoint other counsel are all that is legally necessary for the court to appoint other counsel. Absent exceptional circumstances, the role of the court when reviewing a public defender's certificate of conflict, is to review the facial sufficiency of the certificate and to appoint other counsel. Unless the court articulates some reason for concluding that the defender's certificate of conflict lacks a rational basis or for doubting its credibility, the court's inquiry should be limited to assessing the facial validity of the certificate, and to fashioning a remedy.

Contrary to the Second District Court of Appeal's position, when a court reviews a public defender's rationally-based and legally-sufficient certificate of conflict, the certificate should be conclusive and no evidentiary hearing should be required. To do as the Second District did in this case, and require an evidentiary hearing rather than promptly appoint other counsel, is legally unnecessary, and unconstitutionally interferes with the public defender's professional and official independence.

As this case illustrates, judicial inquiry beyond review of the legal sufficiency of the certificate of conflict impermissibly arrogates to the court the role of managing the public defender's office and making decisions which under the federal and state constitution are entrusted to the public defender. The Second District made it necessary for the public defender to use already insufficient resources to

present detailed testimony on the legal practice, organization, and management of his office, and expert testimony as to the professional standards applicable to each as aspect of the appellate process. This burdensome and embarassing intrusion was completely unnecessary.

The certificate of conflict filed in this case was obviously legally sufficient. The grounds stated were essentially the same as those which this Court has found sufficient, and similar to those found sufficient by other courts. There was also no apparent reason to doubt the facts upon which it was based. The district court did not articulate any reason for doubting the public defender's credibility or good good faith, or the accuracy of the facts certified to the court. The findings produced by the evidentiary hearing simply confirmed the facts previously certified to the court, months before, and fully justified the public defender's conclusion that his caseload was so excessive as to give rise to a conflict of interest. The requirement of an evidentiary hearing served only to obstruct the efficient and timely administration of justice. It caused needless delay, expense, and embarassment. It will exacerbate the problems cause by excessive caseloads by chilling the public defenders' willingness to deal effectively with those caseloads.

ARGUMENT

THE DISTRICT COURT OF APPEAL SHOULD HAVE PROMPTLY ACTED UPON THE PUBLIC DEFENDER'S LEGALLY SUFFICIENT CERTIFICATE OF CONFLICT AND MOTIONS TO APPOINT OTHER COUNSEL, INSTEAD OF REQUIRING AN EVIDENTIARY HEARING WHICH WAS LEGALLY UNNECESSARY, UNCONSTITUTIONALLY INTERFERED WITH THE PUBLIC DEFENDER'S PROFESSIONAL INDEPENDENCE, AND OBSTRUCTED THE EFFICIENT AND TIMELY ADMINISTRATION OF JUSTICE.

The legislature's inadequate funding of the public defenders' offices has produced a chronic, statewide problem of excessive trial and appellate public defender caseloads, which has translated into ineffective representation of the public defenders' indigent clients. *See, e.g., In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1132 (Fla. 1990); *Denmark v. State*, 616 So. 2d 1104 (Fla. 1st DCA 1993); *Bennett v. State*, 605 So. 2d 552 (Fla. 1st DCA 1992); *Kiernan v. State*, 485 So. 2d 460 (Fla. 1st DCA 1986). Since "it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount", *In re Order*, 561 So. 2d at 1136, the only judicial solution is to allow the public defender to reduce the caseload. The mechanism for doing so is provided by section 27.53(3), Florida Statutes, which requires the public defender to move the court "to appoint other counsel" when he determines that representation involves a conflict of interest. *Id.* at 1135.

Under the procedure established by this Court, courts will continue to appoint the public defender to represent indigent criminal defendants, but the public defender must move the court to appoint other counsel when he determines that his caseload is so excessive as to create a conflict of interest. "If the court finds that the public defender's caseload is so excessive as to create a conflict, other counsel for the indigent should be appointed pursuant to subsection 27.53(3)". *In re Order*, 561 So.

2d at 1138. The county, which, by operation of law, will have to compensate the attorney appointed to replace the public defender, does not have standing to challenge the appointment. *Id.* at 1134, 1138; *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980); *Turner v. State*, 611 So. 2d 12 (Fla. 4th DCA 1992); *Terry v. State*, 547 So. 2d 712 (Fla. 1st DCA 1989).

In re Order provided a practical procedure for addressing excessive public defender caseloads, and made clear the desired and legally required consequences of that procedure. Except in the Second District Court of Appeal, the backlogs and delays produced by case overloads are being dealt with effectively through direct implementation of the *In re Order* procedure, or through public defender-county negotiations premised on the existence of that procedure.[2]

However, *In re Order* left uncertain the question of the respective responsibility and authority of the courts and the public defenders in the context of a motion to appoint other counsel based upon excessive caseload. This case clearly demonstrates how that uncertainty can be manipulated to avoid the procedure and consequences mandated by *In re Order*. It illustrates the need to clarify two interrelated aspects of the *In re Order* procedure: Generally, what is the nature of the court's role when the public defender moves to appoint other counsel based on a certification that his caseload is so excessive as to create a conflict of interest, and, more specifically, what legal effect should be given to the public defender's certification.

It has been clear to every court, except the Second District Court of Appeal, that the "find[ing]" which is made before appointing other counsel, *see In re Order*,

---

[2]Section 27.54(2)(b), Florida Statutes, permits a county or municipality to provide funds to "[e]mploy legal and support staff to be supervised by the public defender upon certification by the public defender that inadequate resources will result in withdrawal from current cases or inability to accept additional appointments."

561 So. 2d at 1138, is based upon a review of the legal sufficiency of the public defender's certification of conflict. *See, e.g, Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991) (concluding that public defender's certificate and motions presented sufficient grounds for relief); *Denmark*, 616 So. 2d at 1104 ("no apparent reason to deny relief" in view of public defender's averments). The decisions of the First District Court of Appeal which preceded *In re Order* and offered a model for the procedure adopted by this Court likewise were based solely on the legal sufficiency of the public defender's representations. *See, e.g., Terry*; *Grube v. State*, 529 So. 2d 789 (Fla. 1st DCA 1988). This limited inquiry is consistent with the fact that the certification of conflict by a public defender is the exercise of a legal and constitutional duty and generally must be respected by the courts and the state. As this Court recognized, it is not a judicial function "to decide what constitutes adequate funding and then order the legislature to appropriate such an amount". *In re Order*, 561 So. 2d at 1136. In the context of a motion to appoint, it is not a judicial function to second-guess a public defender's certification of conflict or determine whether his resources are adequate. *See Skitka*.

The Second District Court of Appeal takes the unique position that a public defender's representations and conclusions regarding his caseload should not be taken at face value, and a certificate of conflict does not constitute an adequate factual basis upon which to predicate the appointment of other counsel. *See Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 622 So. 2d 2, 3 (Fla. 2d DCA 1993) (en banc) (referring to previous warning that public defender's representations and conclusions would in future not be taken at "face value", and concluding that motions could no longer be resolved "without an adequate factual record", despite provision by the public defender of a certificate of conflict stating that his office was "receiving more cases than it can adequately handle" and

supporting facts concerning the defender's budgetary problems and caseload). Furthermore, the court may order that an evidentiary hearing be held, in which the court makes a broad inquiry into the manner in which the public defender conducts his legal practice and uses the funds available to him. *Id.* at 3-4. The state, the counties, and others may be granted the right to participate in this hearing. *Id.* at 4.

This procedure is not consistent with *In re Order* or with the constitutional obligation to respect the professional and official independence of the public defenders. It also obstructs the efficient and timely administration of justice.

Contrary to the Second District Court of Appeal's position, when a court reviews a public defender's rationally-based and legally-sufficient certificate of conflict, the certificate should be conclusive and no evidentiary hearing should be required. In the absence of a reason articulated by the court which would support the conclusion that the public defender lacks a rational basis for his determination or that he is perpetrating a fraud upon the court, the court's inquiry should be directed only toward the fashioning of a remedy, not toward second-guessing the public defender's judgment that a conflict of interest exists. To do as the Second District did in this case, and require an evidentiary hearing when the public defender seeks the appointment of other counsel, is legally unnecessary, and unconstitutionally interferes with the public defender's professional and official independence.

A certificate of conflict and motion to appoint other counsel are all that is legally necessary for the court to appoint other counsel; absent exceptional circumstances, no more should be required, and the court's inquiry should be limited to assessing the facial sufficiency of the pleadings filed by the public defender.

When a public defender certifies that he has determined that the representation of one or more individual clients involves a conflict of interest and moves the court to appoint other counsel, the court has before it all that is legally necessary to make the appointment. § 27.53(3), Fla. Stat. (1991). Generally,

nothing more should be required.

Contrary to the view expressed by the Second District, *Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 622 So. 2d 2, 3 (Fla. 2d DCA 1993) (en banc), *quoting In re Order on Motions to Withdraw Filed by Tenth Circuit Public Defender*, 612 So. 2d 597, 598 (Fla. 2d DCA 1992) (en banc), the public defender's certificate, as well as his representations and conclusions, should be taken "at face value", and given legal effect.

It is well-established that, under section 27.53(3), a public defender's certification of conflict is normally conclusive as to the existence of such conflict, and requires the court to act upon his motion to appoint other counsel. *See Babb v. Edwards*, 412 So. 2d 859, 862 (Fla. 1982) (holding that under 1980 version of section 27.53(3), a certification of conflict by the public defender created a duty on the part of the court to appoint other counsel, and noting that the 1981 amended version--which is materially the same as the present statute--"continue[d] to place the burden of determining conflict on the public defender", and made it "even clearer" that once a public defender has determined conflict and moved the court to appoint other counsel, his assistant public defenders should not be appointed); *Nixon v. Siegel*, 18 Fla. L. Weekly D2378 (Fla. 3d DCA Nov. 9, 1993) (denial of motion to withdraw based on court's view that the public defender's certificate of conflict is not conclusive on the question of whether there is a real conflict was a departure from the essential requirements of law; "the 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"); *see also Volk v. State*, 436 So. 2d 1064, 1067 (Fla. 5th DCA 1983) (statute does not distinguish between elected public defender and his staff, and court should give certification of conflict filed by assistant public defender "the same credence it would give to similar information

from *the elected public defender or from any other credible source*") (emphasis added).

Even in the absence of the statute, a court would usually be required to accept, and act upon, a lawyer's representations that a conflict of interest requires the appointment of other counsel:

"[M]ost 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 interests, should be granted". *Holloway v. Arkansas*, 435 U.S. 475, 485-86, 98 S.Ct. 1173, 1179, 55 L.Ed.2d 426 (1978). 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 485-86, 98 S.Ct. at 1179 (citations omitted).

There is no necessary, judicial difference between traditional conflicts of interest and those that are caused by an excessive caseload. All conflicts arise from the attorney relationship to individual clients. As this Court has noted, when the public defender must choose between the rights of his various clients a conflict is inevitably created. *In re Order*, 561 So. 2d at 1135. Of course, when the conflict of interest arises from an excessive caseload, the relevant factors must be assessed from an office-wide perspective. This circumstance, however, should have no effect on the conclusiveness or credibility of the public defender's certificate. Because the decision as to whether the caseload is excessive must be based on facts which are within the knowledge of the public defender, and, more importantly, on a

professional and official judgment which the public defender has both the obligation and the authority to make, his certification that the caseload is excessive should resolve that question. *See Holloway*, 435 U.S. at 485-86, 98 S.Ct. at 1179; *Babb* at 862; *Nixon*; *see also Skitka* at 104.

Contrary to the district court's position, *Order on Motions to Withdraw*, 622 So. 2d at 3, *quoting In re Order on Motions to Withdraw*, 612 So. 2d at 598, a court's role in disposing of a certification of conflict is not that of a "factfinder". As a general rule, the court's role is to review the facial sufficiency of the certification and to appoint other counsel. Unless the court articulates some reason for concluding that the public defender's determination that a conflict exists lacks a rational basis, or for doubting the public defender's credibility, *see Day v. State*, 570 So. 2d 1003 (Fla. 1st DCA 1990), the court's inquiry should be limited to assessing the facial validity of the certification of conflict, and to fashioning a remedy. *See Skitka*; *Denmark*; *See also Babb*; *Nixon*.[3]

The scope of judicial inquiry should not extend beyond examination of the legal sufficiency of the facts asserted in support of the public defender's judgment that the caseload is so excessive as to create a conflict of interest. If the public defender's judgment has a rational basis, the certification should be deemed legally sufficient to require the appointment of other counsel. The distinction between finding facts and passing on the legal sufficiency of the motion is similar to that which is observed in reviewing a motion to disqualify a judge. *See Bundy v. Rudd*, 366 So. 2d 440, 442 (Fla. 1978) (a judge must examine only the legal sufficiency of a suggestion of prejudice; if the judge looks beyond the question of sufficiency

---

[3]*Cf. also State v. Hamilton*, 448 So. 2d 1007 (Fla. 1984) (once counsel satisfied the threshhold requirements of Florida Rule of Criminal Procedure 3.216(a), by indicating his belief that a psychiatric expert was needed, court was required to appoint an expert, and could not inquire into the reasonableness of counsel's subjective belief).

and attempts to refute the charges of partiality, then the judge has exceeded the proper scope of inquiry, and on that basis alone established grounds for disqualification); *Reynolds v. State*, 568 So. 2d 76, 78 (Fla. 1st DCA 1990) (judge must strictly observe the fine line of distinction between passing on the legal sufficiency of the motion and ruling on the facts and adjudicating the motion).

With the exception of the Second District, Florida trial and appellate courts have experienced no difficulty in operating within these limitations, and in granting motions to appoint other counsel based solely on the legal sufficiency of the pleadings filed by the public defender. *See, e.g., Skitka*; *Denmark*; *Bennett*; *Woods v. State*, 595 So. 2d 264 (Fla. 1st DCA 1992).

As this case illustrates, judicial inquiry beyond review of the legal sufficiency of the certification of conflict arrogates to the court the role of managing the public defender's office and making decisions which under the federal and state constitutions are entrusted to the public defender. This is not permissible. *See Skitka*, 579 So. 2d at 104 ("courts should not involve themselves in the management of public defender offices"); *Woods*, 595 So. 2d at 265 (same); *see also Babb* (court is not permitted to reweigh those factors considered by the public defender in determining that there is a conflict of interest).

Contrary to *In re Order* and *Skitka*, the district court ordered a broad inquiry into the management and operation of the public defender's office as well as into other matters irrelevant to the proper disposition of the motions to withdraw.

The breadth of the inquiry is indicated by the court's explanation that its order was motivated by concern regarding its "'role as a factfinder in deciding these motions and especially in such matters as public defenders['] staffing standards, adequacy of funding, etc.'" *Order on Motions to Withdraw*, 622 So. 2d at 3, *quoting In re Order on Motions to Withdraw*, 612 So. 2d at 598. The court was

unwilling to respect the public defender's professional judgment as to caseload standards, and required him to prove that the productivity of his office "was within an acceptable range". *Order on Motions to Withdraw*, 622 So. 2d at 4. Accordingly, all the decisions which determine that productivity had to be justified with evidence. The Second District made it necessary for the public defender to present detailed testimony on the legal practice, organization, and management of his office, and expert testimony as to the professional standards applicable to each aspect of the appellate process.[4] Among the court's specific concerns were the responsiblities allocated to the appellate attorneys, their approach to the briefing process, the procedures for handling "repetitive issues", and the reasons for selecting the cases in which the appointment of other counsel was sought. *Id.*

In addition, the Second District required that the evidentiary hearing address possible administrative responses to the general problem of the untimely prosecution of indigent appeals (which has been a problem known to the district court for a considerable time). The commissioner was directed to explore what steps could be taken to assure the timely prosecution of indigent appeals without transferring the cost for such appeals to the county. 622 So. 2d at 4. These matters are always worth discussing, but were completely irrelevant to resolving the issue before the court.

In order to justify his determination that he could not adequately handle his caseload with the resources available to him and address the "concerns" of the district court, the public defender was forced to use already insufficient resources to present four days of detailed testimony regarding the professional responsibilities of appellate counsel, the overall funding and operations of the public defender's

[4]This was, of course, done to the satisfaction of the commissioner. However, the cost of this unnecessary proceeding to the public defender, his clients, and the administration of justice was substantial.

office, and the operation of every appellate public defender office in the state. The findings produced by this expensive and time-consuming proceeding simply confirmed the accuracy of the facts previously certified to the court, six months before, and fully justified the public defender's conclusion that his caseload was so excessive as to give rise to a conflict of interest. Nevertheless, it appears that the district court contemplates a repetition of the process "'on any future motions filed here'". *Order on Motions to Withdraw*, 622 So. 2d at 2, *quoting In re Order on Motions to Withdraw*, 612 So. 2d at 598.

Compelling a public defender to submit to an evidentiary hearing regarding how he manages his office when he seeks relief from an excessive caseload constitutes an unconstitutional interference with his professional and official independence.

"[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages". *Polk County v. Dodson*, 454 U. S. at 321, 102 S.Ct. at 451. *Accord Green v. State*, 620 So. 2d 188 (Fla. 1993); *State ex rel. Smith v. Brummer*, 426 So. 2d 532, 533 (Fla. 1982). Courts should not involve themselves in 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 264, 265 (Fla. 1st DCA 1992).

Public defenders are elected, constitutional officers, charged with the responsibility of effectively representing indigent criminal defendants, and certain other indigent persons who face the loss of their liberty. *See* Art. V, § 18, Fla. Const.; § 27.51, Fla. Stat. (1991).

As constitutional officers, public defenders must have the discretion and independence needed to discharge the duties and functions entrusted to them. Public defenders, while judicial officers and officers of the court, Art. V. § 18, Fla. Const., are not part of any court. The constitutional provision which creates the office requires the public defender to perform duties prescribed by general law. Art.

V. § 18, Fla. Const. It does not place the public defender under the administrative direction of the courts.

Moreover, the nature of the public defender's function requires the exercise of independent, professional judgment, which cannot constitutionally be subordinated to that of an administrative superior.

Public defenders are lawyers, with the ethical and professional responsibilities which that implies. Every public defender and assistant public defender must be a member of The Florida Bar, Art. V, § 18, Fla. Const.; § 27.50, Fla. Stat. (1991), and must comply with the ethical, self-policing requirements of the rules of professional conduct.

The constitution does not permit public defenders to be anything less than real lawyers. The right to counsel guaranteed by the sixth and fourteenth amendments to the federal constitution, and by Article I, section 16, of the Florida Constitution, requires public defenders to adhere to the same professional standards as other criminal defense lawyers. *See Polk County v. Dodson*, 454 U.S. 312, 321-22, 102 S.Ct. 445, 451-52, 70 L.Ed.2d 509 (1981); *see also State v. Meyer*, 430 So. 2d 440 (Fla. 1983) (all attorneys, whether state supplied or privately retained, are under the professional duty not to neglect any legal matters entrusted to them); *Hatten v. State*, 561 So. 2d 562, 565 (Fla. 1990) ("lack of support by the legislature does not relieve the public defender of his legal and professional duty to safeguard each of his client's interests and to act with reasonable diligence in the representation of his clients").

A public defender works under rules of professional responsibility that require him, among other things, to exercise independent judgment on behalf of his clients, to provide competent representation, to avoid conflicts of interest, and to control his

workload so that each client can be adequately represented.[5]

Every lawyer, and, accordingly, every public defender, has the ethical obligation to control his workload to ensure that each client's case is being competently handled. An excessive caseload necessarily involves a breach of the duty to provide competent representation. Moreover, "[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created". *In re Order*, 561 So. 2d at 1135.

A public defender should not "accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations", ABA *Standards Relating to the Administration of Criminal Justice*, Providing Defense Services, (Third Edition 1990) (hereinafter "ABA *Standards*"), Standard 5-5.3(a). When public defenders "determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations ... [they] must take such steps as may be appropriate to reduce their pending or projected

---

[5] "A lawyer shall not permit a person who recommends, employs, or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services." R. Regulating Fla. Bar 4-5.4(c).

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation." R. Regulating Fla. Bar 4-1.1.

"A lawyer shall act with reasonable diligence and promptness in representing a client." R. Regulating Fla. Bar 4-1.3.

"A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless: (1) the lawyer reasonably believes the representation will not adversely affect the lawyer's responsibilities to and and relationship with the other client; and (2) each client consents after consultation." R. Regulating Fla. Bar 4-1.7(a).

"A lawyer's workload should be controlled so that each matter can be handled adequately." Comment to R. Regulating Fla. Bar 4-1.3

caseloads, including the refusal of further appointments", ABA *Standards*, Standard 5-5.3(b). *See generally* Richard Klein, *Legal Malpractice, Professional Discipline and Representation of the Indigent Defendant*, 61 Temp.L.Rev. 1171 (1988).

The determination of whether a caseload is excessive and the determination of whether the representation of a client involves a conflict of interest are both necessarily matters of professional judgment.

Ultimately, it is the public defender's judgment as to what must be done to effectively represent each of his clients which determines whether he can responsibly represent them all. Decisions as to how much of the record must be reviewed, what issues to research, whether to request oral argument, whether to file motions, and whether to seek further review in certain cases may all result in an increased workload, but they are all decisions which are entirely within the professional discretion of the lawyer. *See Green v. State*, 620 So. 2d 188 (Fla. 1993) (although not required to do so, it was within public defender's discretion to establish policy that, in every case in which the defendant was sentenced to death, certiorari review would be sought in the United States Supreme Court, and where public defender withdrew because of excessive capital appellate workload, substitute counsel was entitled to the same professional independence to seek federal review and to have the county compensate him accordingly); *State ex rel. Smith v. Brummer*, 426 So. 2d 532 (Fla. 1982), *cert. denied*, 464 U.S. 823, 104 S.Ct. 90, 78 L.Ed.2d 97 (1983) (appointed counsel's responsibility may dictate that counsel continue representation and seek federal relief, although a state court could not mandate such action); *Graham v. State*, 372 So. 2d 1363, 1365 (Fla. 1979) (same).

If the productivity of the defender's office were something different from the sum of the professional judgments of its lawyers, and depended on policies regarding the quality of the representation and decisions assigning the available

resources among the different areas of practice, those policies and decisions would still fall squarely within the province of the public defender--the official elected to make those decisions and to establish those policies. *See Green*; *Skitka*; *Woods*; *see also* § 27.58, Fla. Stat. (1991) ("the public defender of each judicial circuit of the state shall be the chief administrator of all public defender services within the circuit...."). Such a determination necessarily involves professional and official judgments as to the manner in which the legal practice of the office should be conducted and the office should be managed.

In short, as stated in the Commentary to ABA *Standards*, Second Edition (1980), Standard 5-4.3:

> The determination of whether workloads are excessive must necessarily be entrusted to defender organizations and to assigned counsel. Only the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take.

The procedure established by this Court in *In re Order*, is consistent with this. In contrast, the procedure followed by the Second District requires a broad, unconstitutionally-intrusive inquiry into the management and administration of the public defender's office.

As the present case illustrates, review of the public defender's conclusion that the caseload is excessive means review of managerial and policy decisions affecting the practice of his office. The organizational structure of the office, its salary scales, the composition of its staff, its workload standards, and the allocation of responsibilities within the office, all have a bearing upon the productivity of the office and the quality of its work. Decisions made by individual assistant public defenders regarding about their legal practice, e.g., whether and how often they consult one another, file motions, and request oral argument also affect productivity. If the court must make an independent determination as to whether the public

defender has done everything possible to make reasonable use of the resources available to him, then it must assess all this and more.[6]

This broad, intrusive inquiry places the court in the role of overseeing the management of the public defender's office, and of making decisions which under the constitution are entrusted to the public defender. It treats the public defender as an administrative servant of the court and of the state.

The Second District's approach is inconsistent with the efficient and timely administration of justice.

When a court is presented with a legally sufficient certification of conflict and motion to appoint other counsel, its role is to fashion an appropriate remedy. The court should rule promptly upon such motions. Their purpose is to avoid that lengthy delay in the prosecution of appeals which this Court found to be "a clear

---

[6]In his proposed findings of fact, the attorney general suggested the following ways of making the public defender attorneys more efficient:

- appellate attorneys should not field questions from trial attorneys, or advise them on matters of law;
- appellate attorneys should not be involved in trial court proceedings after remand;
- the initial evaluation of the appellate file could be delegated to nonlawyer personnel;
- paralegals could be "assigned the tasks of isolating and researching issues, drafting statements of fact, and communicating with clients";
- attorneys should stop the practice of reviewing one another's briefs.

The state also believed that the vigor with which the public defender represented his clients in proceedings to which the state was an adversarial party was susceptible to judicial control because of vigorous representation takes up valuable attorney time: In opposing the motion to appoint other counsel, the state complained that the public defender's office was "engaged in a substantially increased motion practice, thus creating an unnecessarily increased workload", and was spending too much time seeking further review in the federal courts, when it should be "working exclusively on their long-overdue state appellate briefs". (R.).

violation of the indigent state defendant's constitutional right to effective assistance of counsel on appeal". *In re Order*, 561 So. 2d at 1132. The requirement of an evidentiary hearing on the general subject of the public defender's efficiency imposes a substantial delay. In this case, the filing of briefs which were already over sixty days overdue was delayed by an additional six to seven months.

Public defenders should be permitted, and even encouraged, to anticipate and avoid excessive caseload, and move to appoint other counsel before backlogs appear. *See Thomas v. State*, 593 So. 2d 617 (Fla. 1st DCA 1992) (rather than file excessive motions for extension of time, public defender "must, either by moving to withdraw and/or taking remedial measures in the administration of her office, promptly reduce the case backlog and the resulting delays in briefing"); *Terry v. State*, 547 So. 2d 712, 713 (Fla. 1st DCA 1989) (allowing appointment of other counsel in "up to 150 future cases); *Grube v. State*, 529 So. 2d 789 (Fla. 1st DCA 1988) (court would "entertain motions to withdraw in up to 100 new cases"); *see also* § 27.54(2)(b), Fla. Stat. (1991) (county or municipality may appropriate or contribute funds to "[e]mploy legal and support staff to be supervised by the public defender upon certification by the public defender that inadequate resources *will result* in withdrawal from current cases or inability to accept additional appointments") (emphasis added).

Professionalism requires a lawyer to "act with reasonable diligence and promptness in representing a client", R. Regulating Fla. Bar 4-1.3, and to control his workload to ensure that "each matter can be handled adequately", Comment to R. Rule Regulating Fla. Bar 4-1.3. Public defenders should be encouraged to act before they breach these obligations. *See* ABA *Standards*, Standard 5-5.3. This is professionaly required and consistent with the efficient administration of justice.

Evidentiary hearings are generally unnecessary. Unnecessary resort to them

is inherently evil; they improperly intimidate public defenders and will chill their willingness to deal effectively with their excessive caseloads.

The effectiveness of an evidentiary hearing, as a means of intimidating the public defender and coercing his acceptance of excessive workloads, is apparent from a consideration of the practical and political context in which the public defender's decisions to withdraw must necessarily be made. Withdrawal requires both an acknowledgement by the public defender that he is unable to do the work assigned to him within the funds allocated to him by the legislature, and the imposition of additional costs on the public defender's constituents. These factors act as powerful, built-in disincentives to seeking the appointment of other counsel, even when the justification is clear and the matter is handled simply through pleadings filed in an appellate court. Public defenders, understandably, have not been eager to admit that they are unable to do the job they were elected to do with the funds allocated to them. Despite the long-standing and well-recognized problem of legislative underfunding, public defenders have withdrawn from relatively few cases, and have been extremely reluctant to do so until a substantial backlog forces them to act. *See Woods v. State*, 595 So. 2d 264 (Fla. 1st DCA 1992) (after court found requested extensions of time were unacceptable, public defender moved to withdraw, explaining that delay in filing motion to withdraw was based on her belief that her state-funded office, not the counties, should have responsibility to handle direct criminal appeals). *See also Hatten v. State*, 561 So. 2d 562 (Fla. 1990) (issuing writ of mandamus compelling public defender to file motion to withdraw if unable to file brief within specified period).

When added to these disincentives, the political and financial obstacles created by the requirement of an evidentiary hearing in which the public defender must overcome a presumption of inefficiency, will certainly deter public defenders

from filing motions to withdraw. It will do so, of course, at the cost of coercing a lower standard of representation than should be permitted, and by producing unnecessary and unconstitutional delay.

In the present case, there was no reason whatever to do anything but promptly appoint other counsel to represent the indigent appellants. The public defender's motion should have been promptly granted. Instead, the district court chose to subject the public defender to a totally unnecessary evidentiary hearing, and to delay relief for several months.

The district court of appeal had before it the public defender's facially valid and legally sufficient certification that, "due to excessive caseload and underfunding", he had been placed in the position of having to choose between his clients, and thus faced a conflict of interest which required him to move for the appointment of other counsel. This was sufficient for the court to act. *See* § 27.53(3), Fla. Stat. (1991); *In re Order*.

The public defender's certification of conflict was obviously legally sufficient and his determination obviously had a rational basis. The grounds stated by the public defender were essentially the same as those which this Court found sufficient in *Skitka*. They were similar to those which had been found sufficient in *Bennett*, *Denmark*, and *Woods*.

Moreover, as a matter of fact, this was not the only information available to the court. As is typical when a public defender moves to appoint other counsel based on excessive caseload, the district court could have resorted to its own records to confirm many of the details of the public defender's certification, including that the attorneys had been filing briefs at a rate which exceeded all recognized standards, and the relevant briefs were significantly overdue.

The court's purported concern that the productivity of the office might be too

low cannot be taken seriously. The productivity of the office--more than five briefs per attorney per month--exceeded all recognized standards. *See Woods*, 595 So. 2d at 265 (recognizing that output of 4.5 initial briefs per attorney per month, "exceeds all recognized standards for appellate counsel workload"). No one who was even minimally aware of the work involved in an appeal could think that an attorney could turn out significantly more than five initial briefs each month, every month, without detriment to the quality of representation. And even if the court's standard of adequate representation were that low, there could be no legal authority for imposing it on the public defender.

It is at least unusual, and perhaps unprecedented, for a court to question a lawyer's integrity and professionalism on the ground that he is devoting too much time to his clients' cases, and is not cutting enough corners. There can be no justification for doing so when the lawyer is dedicating, on the average, less than a week to each case, and where the price of ineffective representation would be to leave uncorrected serious and illegal deprivations of liberty.

The certification of conflict was not only obviously sufficient, there was no apparent reason for doubting the facts upon which it was based. The district court of appeal did not articulate any reason for doubting the public defender's credibility or good faith, or the accuracy of the facts certified to the court.

This needless proceeding continued the Second District's established pattern of opposing necessary motions to appoint other counsel until the resulting backlog reaches crisis proportions. *See In re Order*; *Skitka*. In this case, however, the district court magnified the unnecessary delay, expense, and embarassment caused by appointing a commissioner and requiring an evidentiary hearing of this nature.

The court expanded the complexity of the procedure by inviting participation by the state and several counties in direct contravention of *In re Order*. The Second

District's order expressly states that "the Attorney General, and the counties shall have the right to participate" in the hearing conducted by the commissioner. *Order on Motions to Withdraw*, 622 So. 2d at 4. The court's granting of this right to the counties flies in the face of the principle firmly-established by this Court that a county has no standing to intervene in withdrawal proceedings. *In re Order*, 561 So. 2d at 1133-34; *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980); *Turner v. State*, 611 So. 2d 12 (Fla. 4th DCA 1992).

The district court explicitly noted that the counties "want this problem solved without additional demand on already overburdened budgets". *Order on Motion to Withdraw*, 622 So. 2d at 3. However, as repeatedly made clear by this Court, the fact that the counties must pay for the services of appointed counsel is not a legally cognizable consideration. *In re Order*; *Behr*. The sole matter before the court was that of the existence of a conflict of interest requiring the appointment of other counsel. Once that matter was determined, the county's responsibility followed by operation of law. *See In re Order*.

As if this breach of procedure were not enough, the court expressly invited the participation of other entities who not only had no legitimate interest in the merits of the motion, but who could be expected to be hostile to the position of the public defender. The district court expressly invited the attorney general, an adversarial party, to participate in decisions directly affecting the quality of the representation provided to the public defender's clients. The lack of any substantive basis on which to oppose the public defender's position was clearly demonstrated by the attorney general's silence at the hearing.

Given the express rights of participation granted by the district court, it is of some significance that it did not expressly invite the participation of any entity which could have been expected to support the position of the public defender, for

example the FPDA or the National Assocation of Criminal Defense Lawyers.

The district court's order reads like an indictment. The charges were inefficiency and unspecified improprieties in selecting the cases from which he sought to withdraw. The message to the public was aptly summarized in a local headline: "Public Defender Criticized: Consultant Takes Aim at Efficiency". Tampa Tribune, Florida Metro Section, August 17, 1993, at 4.

The district court apppointed a commissioner and directed him to make factual determinations. The court specifically directed the comissioner to determine "whether the cases selected for the present motions have been chosen for any particular reason that should be made known to the court." *Order on Motions to Withdraw*, 622 So. 2d at 4. Thus, the court insinuated that the public defender's conduct was improper, but made no attempt to articulate any ground for that implication. On its face, selectivity in withdrawing from cases presents no impropriety.

The district court's commissioner made factual findings completely supporting the public defender's position and did not find any improper motive. The district court ignored its commissioner's findings and recommendations. It made no reference to the positive findings in the commissioner's report. The result was that the district court had published an indictment, but did not publish the acquittal.

CONCLUSION

Wherefore, the Florida Public Defender Association, Inc. respectfully recommends that this Court:

(1) Take steps to ensure that the Second District Court of Appeal follows in *In re Order* in the future, to avoid unnecessary delay, expense and embarassment and to otherwise promote the effective administration of justice.

(2) Reaffirm that the certification of conflict by a public defender is the exercise of a legal and constitutional duty, and generally must be respected by the courts and the state.

(3) Clarify the limited role of the court when reviewing a public defender's certification of conflict: As a general rule, the role of the court is to review the facial sufficiency of the public defender's certification and to appoint other counsel. Unless the court articulates some reason for concluding that the defender's certificate of conflict lacks a rational basis or for doubting its credibility, the court's inquiry should be limited to assessing the facial validity of the certificate, and to fashioning a remedy.

(4) Clarify that, generally, when a court reviews a public defender's rationally-based and legally-sufficient certificate of conflict, the certificate should be conclusive and no evidentiary hearing should be required.

(5) Emphasize that courts should not involve themselves in the management of public defender offices.

(6) Direct that a court entertaining a motion to appoint other counsel should follow such procedures as will insure an expeditious ruling. The court reviewing the motion should not expand the number of issues or parties beyond those absolutely necessary to dispose of the motion, especially when the motion involves overdue cases.

(7) Encourage public defenders to anticipate when inadequate resources will result in withdrawal from current cases or inability to accept additional appointments, and to act expeditiously to seek a remedy so as to promote the efficient administration of justice and minimize the harmful consequences of their excessive caseloads on their clients and on the courts.

(8) Encourage other courts to avoid embarassment of the public defender in proceedings in which a defender seeks to remedy an excessive caseload resulting from legislative underfunding.

Respectfully submitted,

BENNETT H. BRUMMER
Public Defender
Florida Bar No. 91347

LOUIS CAMPBELL
Assistant Public Defender
Florida Bar No. 833320

Eleventh Judicial Circuit
of Florida
1320 N.W. 14th Street
Miami, Florida 33125
(305) 545-1958

Attorneys for Florida Public Defender
Association, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of the Florida Public Defender Association, Inc., as Amicus Curiae was delivered by mail this 21st day of December, 1993, to the following:

Richard A. Doran
Assistant Attorney General
The Capital
Tallahassee, Florida 32399

Mark F. Carpanini
Polk County Attorney
P.O. Box 60
Bartow, Florida 33830

Frederick A. Bechtold, and
Gary A. Vorbeck
Attorneys for DeSoto County
and Hardee County
Vorbeck & Vorbeck
207 East Magnolia Street
Arcadia, Florida 33821

Hon. J. C. Cheatwood
412 Fern Cliff Avenue
Temple Terrace, Florida 33617

Hon. Richard L. Jorandby
Public Defender
Fifteen Judicial Circuit
Room 408
330 East Bay Street
Jacksonville, Florida 32202

Hon. Nancy Daniels
Public Defender, 2nd Circuit
Second Judicial Circuit
Post Office Drawer 12666
Pensacola, Florida 32574-2666

Hon. J. Marion Moorman
Public Defender
Tenth Judicial Circuit
P.O. Box 9000-Drawer PD
Bartow, Florida 33830

H. Hamilton Rice, Jr.
Manatee County Attorney
P.O. Box 1000
Bradenton, Florida 34206

William P. Buztrey
Assistant County Attorney
Hillsborough County
P.O. Box 1110
Tampa, Florida 33601

Suzanne T. Smith
Assistant County Attorney
Pinellas County
315 Court Street
Clearwater, Florida 34616

Paul Bangle
Assistant County Attorney
Manatee County
P.O. Box 1000
Bradenton, Florida 34206

Hon. James B. Gibson
Public Defender
Seventh Judicial Circuit
200 N. Marion Street
Post Office Drawer 1209
Lake City, Florida 32056

John Beranek, Esq.
Aurell Radey Hinkle Thomas
& Beranek
Suite 1000, Monroe-Park Tower
101 North Monroe Street
Post Office Drawer 11307
Tallahassee, Florida 32302

BENNETT H. BRUMMER
Public Defender
Eleventh Judicial Circuit