

IN THE SUPREME COURT OF FLORIDA

**CHRISTOPHER JOHNSON,
Petitioner,**

v.

**STATE,
Respondent.**

**CASE NO. SC09-1045
L.T. No. 07-10734CF10B**

**ON DISCRETIONARY REVIEW FROM
THE DISTRICT COURT OF APPEAL
FOURTH DISTRICT**

PETITIONER'S INITIAL BRIEF

Philip Massa, Director
Office of Criminal Conflict and Civil
Regional Counsel, Fourth District

Melanie L. Casper
Assistant Regional Counsel
Florida Bar No. 0271070
605 N. Olive Avenue
Second Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5156
Facsimile: (561) 837-5423

Counsel for Petitioner

TABLE OF CONTENTS

	<u>PAGE</u>
1) Table of Authorities	iii
2) Preliminary Statement.....	1
3) Statement of the Case and Facts.....	2
4) Summary of Argument.....	6
5) Argument.....	7
I. Section 27.5303, Florida Statutes (2008) sets forth specific the steps that the PD shall follow when filing a motion to withdraw during representation of two or more indigent defendants, <i>at any time</i> . The Fourth District Court of Appeal erred in applying section 27.511(8), Florida Statutes (2008) to all appellate proceedings. That subsection applies only to those cases when the OCCCRC handled the trial and requests that the PD handle the appeal.....	7
II. The Fourth District Court of Appeal erred in denying the OCCCRC standing to contest the PD’s motions to withdraw due to a conflict of interest. The OCCCRC has standing, as a party to a criminal case substantially affected by the outcome of the proceedings.....	18
6) Conclusion	25
7) Certificate of Service	27
8) Certificate of Compliance	28

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGES</u>
<i>A.R. Douglass, Inc. v. McRainey</i> , 102 Fla. 1141, 137 So. 157 (Fla. 1931).....	9
<i>Barclay v. Wainwright</i> , 444 So. 2d 956 (Fla. 1984).....	16
<i>C.S. v. S.H.</i> , 671 So. 2d 260 (Fla. 4th DCA 1996).....	7
<i>Escambia County v. Behr</i> , 384 So. 2d 147 (Fla. 1980).....	23
<i>Fla. Dep’t of Env’tl. Prot. v. Contract Point Fla. Parks, LLC</i> , 986 So. 2d 1260 (Fla. 2008).....	9
<i>Fla. State Racing Comm’n v. McLaughlin</i> , 102 So. 2d 574 (Fla. 1958).....	9
<i>Hayes v. Guardianship of Thompson</i> , 952 So. 2d 498 (Fla. 2006).....	18
<i>Holloway v. Arkansas</i> , 435 U.S. 478, 98 S.Ct. 1173 (1978).....	14, 16
<i>Holly v. Auld</i> , 450 So. 2d 217 (Fla. 1984).....	9
<i>Hunter v. State</i> , 770 So. 2d 232 (Fla. 4 th DCA 2000).....	16
<i>In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender</i> , 561 So. 2d 1130 (Fla. 1990).....	23
<i>Johnson v. State</i> , 6 So.3d 1262 (Fla. 4 th DCA 2009).....	2, 3-4, 9, 11-14, 17, 24-25
<i>Knowles v. Beverly Enterprises-Florida, Inc.</i> , 898 So. 2d 1 (Fla. 2004).....	14, 21
<i>MW v. Davis</i> , 756 So. 2d 90 (Fla. 2000).....	7
<i>Payne v. City of Miami</i> , 927 So. 2d 904 (Fla. 3d DCA 2005).....	18
<i>Sanchez v. Century Everglades, LLC</i> , 946 So. 2d 563 (Fla. 3d DCA 2006).....	18

State v. Bowens, 2010 Fla.App. LEXIS 9851 (Fla. 3d DCA 2010),
review granted, No. SC10-1349 (Fla. July 12, 2010).....5, 22-26

*State and Ofc. of Crim. Conflict and Civ. Reg’l. Counsel, 3rd District v.
PD, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009),
review granted, No. SC09-1181 (Fla. May 19, 2010).....4-5, 22-26

State v. Sigler, 967 So. 2d 835 (Fla. 2007).....7

Turner v. State, 611 So. 2d 12 (Fla. 4th DCA 1992).....12

Weiss v. Johansen, 898 So. 2d 1009 (Fla. 4th DCA 2005).....18

Wilson v. State, 789 So.2d 536 (Fla. 5th DCA 2001).....17

FLORIDA STATUTES

Section 27.40, Florida Statutes (2008).....8, 18, 21

Section 27.51(4), Florida Statutes (2008).....8, 12

Section 27.511(8), Florida Statutes (2008).....*passim*

Section 27.5303, Florida Statutes (2008).....*passim*

Section 27.5303, Florida Statutes (2003).....19-20

OTHER AUTHORITIES

Florida Rule of Appellate Procedure 9.210(a)(2).....28

Uniform Standards for Use in Conflict of Interest Cases found in appendix
C to the Final Report of the Article V Indigent Services Advisory
Board dated January 6, 2004.....10, 15-16

PRELIMINARY STATEMENT

This initial brief is submitted on behalf of Petitioner, Christopher Johnson. Hereinafter, Petitioner shall be referred to as “Johnson.” The co-defendant, James Mayfield, shall be identified as “Mayfield.” The Office of Criminal Conflict and Civil Regional Counsel for the Fourth District shall be identified as “OCCRC4.” The Office of Criminal Conflict and Civil Regional Counsel, generally, shall be identified as “OCCRC.” The Office of the Public Defender for the Fifteenth Judicial Circuit shall be identified as “PD15.” The Office of the Public Defender for the Seventeenth Judicial Circuit shall be identified as “PD17.” The Office of the Public Defender, generally, shall be identified as “PD.” The District Court of Appeal for the Fourth District shall be referred to as “4th DCA.” The District Court of Appeal for the Third District shall be referred to as “3rd DCA.” The Justice Administrative Commission shall be referred to as “JAC.” The Office of the State Attorney, generally, shall be referred to as “State.” The Office of the Florida Attorney General shall be referred to as “AG.”

All references to motions shall be identified by the name of the motion, the filing date and the filing party, because the parties do not have a record with respect to the motions filed with the 4th DCA.

STATEMENT OF THE CASE AND FACTS

This case is on discretionary review from the District Court of Appeal for the Fourth District in *Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009). At the trial court, the PD17 withdrew from representing both Johnson and Mayfield, citing that the PD17 represented the co-defendant in each of their respective cases. Both defendants were represented by court-appointed counsel at trial and were convicted after a joint trial in the Seventeenth Judicial Circuit, Broward County, Florida. Both Johnson and Mayfield appealed their judgment and sentence to the 4th DCA. The PD15 was appointed as appellate counsel for both defendants.

On October 15, 2008, the PD15 filed an initial brief on behalf of the co-defendant, Mayfield. On or about November 3, 2008, after filing the co-defendant's initial brief, the PD15 filed an unopposed motion to withdraw from representation of Appellant and requested the court appoint the OCCCRC4 as appellate counsel with the 4th DCA. The PD15 cited the AG as the non-opposing party. The PD15 alleged a conflict of interest in representing Johnson on appeal, because the office represented the co-defendant, Mayfield, on appeal. In response, on November 10, 2008, the OCCCRC4 filed an objection to the PD15's motion to withdraw arguing that a conflict of interest at the trial level does not automatically extend through to the appellate level and that a conflict of interest must be shown before the OCCCRC4 is appointed for appeal.

On November 19, 2008, the 4th DCA issued an order relinquishing jurisdiction to the trial court for thirty days to determine whether a conflict existed and to appoint appellate counsel. However, the relinquishment period expired before the trial court held a hearing on the adequacy of the PD15's representations regarding a conflict of interest. Therefore, there was no trial court order for the 4th DCA to review. On January 7, 2009, the OCCCRC4 filed a motion to extend the relinquishment period.

On or about January 15, 2009, the PD15 filed a status report on the motion to withdraw, in which it renewed its motion to withdraw and requested oral argument to "establish an appropriate procedure for further motions to withdraw" when the PD15 asserts a conflict of interest at the 4th DCA. In response, the OCCCRC4 filed an objection to the PD15's renewed motion to withdraw and request for oral argument as an improper request for an advisory opinion from the 4th DCA. However, on February 10, 2009, the 4th DCA heard with oral argument on the motion to withdraw without first ordering briefing on the issue.

On March 18, 2009, the 4th DCA issued an order denying the OCCCRC4's January 7, 2009 motion to extend the relinquishment period to determine whether a conflict existed and to appoint appellate counsel, granting the PD15's renewed motion to withdraw, and appointing the OCCCRC4 to represent Appellant. In addition, the 4th DCA issued a written opinion holding that, "[w]e will no longer

relinquish jurisdiction on such motions for inquiry in the trial court. As the statute provides, if the PD certifies that a conflict exists, then RCC shall assume representation...” *Johnson v. State*, 6 So.3d 1262, 1268 (Fla. 4th DCA 2009). The 4th DCA went on to hold that the OCCCRC4 has no standing to oppose the PD’s motions to withdraw due to a conflict of interest at either the appellate court or the trial court. *Id.*

On April 1, 2009, the OCCCRC4 filed a motion for re hearing *en banc*, motion to vacate the 4th DCA’s March 18, 2009 opinion and request for oral argument. On April 6, 2009, the OCCCRC4 also filed a motion to dismiss the 4th DCA’s March 18, 2009 opinion for lack of jurisdiction, in that the 4th DCA infringed upon this Court’s exclusive constitutional power to promulgate rules of practice and procedure in all courts of Florida.

On May 13, 2009, the 4th DCA entered an order denying the OCCCRC4’s motion for rehearing *en banc* and motion to vacate the March 18, 2009 opinion and motion to dismiss.

Also on May 13, 2009, the 3rd DCA issued its opinion in *State and Office of Criminal Conflict and Civil Regional Counsel, Third District v. Public Defender, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009), which expressly grants a state agency, the State Attorney’s Office, standing to contest a PD’s

motion to withdraw, and expressly conflicts with the 4th DCA's March 18, 2009 opinion.

On June 2, 2009, the OCCCRC4 timely filed its notice to invoke the discretionary jurisdiction of this Court. This Court granted discretionary review on May 19, 2010.

Also, on May 19, 2010, this Court also granted discretionary review on *State and Ofc. of Crim. Conflict and Civ. Reg'l. Counsel, 3rd District v. PD, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009) *review granted*, No. SC09-1181 (Fla. May 19, 2010). On July 12, 2010, this Court granted discretionary review on *State v. Bowens*, 2010 Fla.App. LEXIS 9851 (Fla. 3d DCA 2010), *review granted*, No. SC09-1181 (Fla. May 19, 2010). These 3rd DCA cases, reviewing the denial of the PD's motions to withdraw, have been consolidated and are pending before this Court.

SUMMARY OF THE ARGUMENT

- I. Section 27.5303, Florida Statutes (2008) applies to all cases in which the PD seeks to withdraw due to a conflict of interest. Section 27.511(8), Florida Statutes (2008) applies only in those cases where the OCCCRC handled the trial and requests that the PD handle the appeal. In such cases, section 27.511(8) (2008) contemplates that the trial court already reviewed the PD's motion to withdraw pursuant to section 27.5303, Florida Statutes (2008) and appointed the OCCCRC due a to multiple representation conflict. The procedures required to allow the PD to withdraw from cases of multiple defendant representation, *at any time*, are codified in section 27.5303, Florida Statutes (2008).
- II. The OCCCRC has standing to oppose the PD's withdrawal at the trial court and appellate court, because the OCCCRC is a party to a criminal case and is directly affected by the outcome of the proceedings.

ARGUMENT

- I. Section 27.5303, Florida Statutes (2008) sets forth specific the steps that the PD shall follow when filing a motion to withdraw during representation of two or more indigent defendants, at any time. The Fourth District Court of Appeal erred in applying section 27.511(8), Florida Statutes (2008) to all appellate proceedings. That subsection applies only to those cases when the OCCRC handled the trial and requests that the PD handle the appeal.**

Judicial interpretations of statutes are pure questions of law subject to *de novo* review. *State v. Sigler*, 967 So. 2d 835, 841 (Fla. 2007). Statutory construction requires that all parts of a statute must be read together in order to achieve a consistent whole. Where possible, courts must give effect to all statutory provisions and construe related statutory provisions in harmony with one another. (See *MW v. Davis*, 756 So. 2d 90 (Fla. 2000); *See also C.S. v. S.H.*, 671 So. 2d 260, 269 (Fla. 4th DCA 1996)).

Section 27.5303, Florida Statutes, governs *all cases*, in both the trial and courts of appeal, in which the PD moves to withdraw from representation of an indigent defendant due to a conflict of interest:

If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or none can be counseled by the public defender or his staff because of conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. The **court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a**

conflict of interest without requiring the disclosure of any confidential communications. **The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.** If the court grants the motion to withdraw, the court shall appoint one or more attorneys to represent the accused, as provided in s. 27.40...

Section 27.5303(1)(a) (2008) (emphasis added).

On the other hand, section 27.511(8), applies when the OCCRC handled the trial and then requests the PD to handle the appeal. In such cases, the PD necessarily already moved to withdraw from representation of the defendant in the trial court pursuant to a conflict of interest that the trial court then reviewed and found met the criteria of section 27.5303, Florida Statutes. As a result, the PD is able to certify a conflict of interest pursuant to section 27.5303 and move to withdraw in the appellate court pursuant to 27.511(8).

The **public defender** for the judicial circuit specified in s. 27.51(4) shall, after the record on appeal is transmitted to the appellate court by the **office of criminal conflict and civil regional counsel which handled the trial** and if requested by the regional counsel for the indicated appellate district, **handle all circuit court appeals** authorized pursuant to paragraph (5)(f) within the state courts system and any authorized appeals to the federal courts required of the official making the request. **If the public defender certifies** to the court that the public defender has **a conflict consistent** with the criteria **prescribed in s. 27.5303 and moves to withdraw**, the **regional counsel shall handle the appeal**, unless the regional counsel has a conflict, in which case the court shall appoint private counsel pursuant to s. 27.40.

Section 27.511(8), Fla. Stat. (2008) (emphasis added).

In its opinion, the 4th DCA misinterpreted section 27.511(8), Florida Statutes to govern all cases where the PD moves to withdraw from an appeal due to a conflict of interest. *See Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009). The court isolated the second sentence in the statute and applied it to all cases where the PD seeks to withdraw on appeal, thereby misconstruing the language and legislative intent behind section 27.511(8), Florida Statutes. *See e.g., Holly v. Auld*, 450 So. 2d 217, 219 (Fla. 1984) (“[W]hen the language of a statute is clear and unambiguous and conveys a clear and definite meaning, . . . the statute must be given its plain and obvious meaning.”) (quoting *A.R. Douglass, Inc. v. McRainey*, 102 Fla. 1141, 137 So. 157, 159 (Fla. 1931)); *see also Fla. Dep’t of Env’tl. Prot. v. ContractPoint Fla. Parks, LLC*, 986 So. 2d 1260, 1265-66 (Fla. 2008) (citing *Fla. State Racing Comm’n v. McLaughlin*, 102 So. 2d 574, 575-76 (Fla. 1958)) (noting that “if part of a statute appears to have clear meaning if considered alone but when given that meaning is inconsistent with other parts of the same statute or other [statutes] *in pari materia*, the Court will examine the entire act and those [other statutes] *in pari materia* in order to ascertain the overall legislative intent.”).

The Florida Legislature enacted section 27.5303, Florida Statutes, to codify the procedures the PD shall follow in order to withdraw during the representation of two or more defendants, *at any time*. Pursuant to Section 27.5303(1)(e), Florida

Statutes (2008), the PD must first determine if a conflict of interest exists, applying the standards contained in the Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004. Section 27.5303(1)(e), Florida Statutes (2008). Then, before the PD files a motion to withdraw, it must “determine if there is a **viable alternative to withdrawal from representation** which would remedy the conflict of interest, and, if it exists, implement that alternative; [or] [a]pprove in writing the filing of the motion to withdraw.” Section 27.5303(1)(e)1&2, Florida Statutes (2008) (emphasis added).

Once the PD determines that it will file a written motion to withdraw, the motion is not self-executing. Section 27.5303(1)(a), Florida Statutes (2008), requires that the public defender “file a motion to withdraw and move the court to appoint other counsel.” Section 27.5303(1)(a), Florida Statutes (2008). At which point, the “court **shall review and may inquire or conduct a hearing** into the adequacy of the public defender’s representations regarding a conflict of interest without requiring the disclosure of any confidential communications.” *Id.* (emphasis added). The statute goes on to say that “the **court shall deny the motion** to withdraw if the court finds the **grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.**” *Id.* (emphasis added).

If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or none can be counseled by the public defender or his staff because of conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. **The court shall review and may inquire or conduct a hearing into the adequacy of the public defender’s representations regarding a conflict of interest** without requiring the disclosure of any confidential communications. **The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.** If the court grants the motion to withdraw, the court shall appoint one or more attorneys to represent the accused, as provided in s. 27.40...

Section 27.5303(1)(a) (2008) (emphasis added).

In reading the first sentence of section 27.5303(1)(a), Florida Statutes (2008), it is clear that the Florida Legislature intended this to be the procedure that the PD must follow *at any time*, not simply at the trial court level. Thus, the 4th DCA opinion holding that whenever the PD certifies a conflict of interest, withdrawal should be automatically granted and the OCCCRC shall be appointed, is contrary to the plain meaning of section 27.5303, Florida Statutes (2008). *Johnson*, 6 So.3d at 1266.

The 4th DCA relied heavily on section 27.511(8), Florida Statutes (2008), concluding that this section applies to all appellate cases. “[W]e conclude that § 27.511(8) is meant to control in the appellate court when multiple defendants are involved in appeals after a trial court has found a conflict.” *Johnson*, 6 So.3d at

1267. The panel opinion assumes, pursuant to *Turner v. State*, 611 So. 2d 12 (Fla. 4th DCA 1992), that once a conflict is asserted by the PD at the trial court level, the conflict cannot be extinguished at the appellate level, because the “appeal is merely a continuation of the original proceedings.” *Id.* at 13. However, this assertion contradicts the clear intent and application of section 27.511(8), Florida Statutes (2008). The 4th DCA opinion fails to account for the fact that the PD15 handles appeals for the Seventeenth, Fifteenth and Nineteenth Judicial Circuits. Section 27.51(4)(d), Florida Statutes (2008). An established conflict resulting from multiple representation at the trial court level in the Seventeenth or Nineteenth Judicial Circuits does not necessarily create a conflict at the Fifteenth Judicial Circuit. There are numerous cases where OCCCRC4 was appointed due to a conflict with the PD, but the PD15 handles the appeal pursuant to section 27.511(8), Florida Statutes (2008). This is the situation contemplated by section 27.511(8), Florida Statutes (2008), not to be applied across the board in all appellate cases.

The 4th DCA’s broad conclusion that any conflict asserted by the PD requires that the OCCCRC “shall handle the appeal” is simply contrary to the *in pari materia* reading of sections 27.511 (8) and 27.5303(1)(a), Florida Statutes (2008). The all encompassing statement that the court “will no longer relinquish jurisdiction on such motions for inquiry in the trial court” is contrary to the plain

meaning and wording of the statute. *Johnson*, So.3d at 1268. In doing so, the 4th DCA takes away power given explicitly to the trial courts to review and inquire, if necessary, into the “**adequacy** of the public defender’s **representations** regarding a conflict of interest.” Section 27.5303(1)(a), Florida Statutes (2008) (emphasis added). Additionally, the 4th DCA is adjudicating/disposing of procedural matters in future cases which are not before the court.

Furthermore, the 4th DCA’s opinion is contrary to the checks and balances established in the legal court system, whereby all decisions made by all attorneys, trial courts, appellate courts, and supreme courts are subject to review. It allows the PD to make a decision with regard to an asserted conflict, without being subject to any review. “[W]e have been given no reason to doubt the good faith of the PD...” *Johnson*, 6 So.3d at 1268. The OCCCRC does not debate the sincerity of the PD, just the legal sufficiency of some of its withdrawal motions. The OCCCRC is simply asking that the lower courts be allowed to exercise their statutory right to conduct an inquiry into the adequacy of the PD’s representations regarding a conflict of interest, and for the OCCCRC to be noticed for such event.

Finally, the 4th DCA opinion cites an alleged legislative “contradiction,” by noting that this one sentence in section 27.511(8), Florida Statutes (2008), appears “at odds” with the mission to establish the OCCCRC. “General statements of legislative intent have little power to change substantive directives stated plainly in

the same statute which may seem at odds with the general intent.” *Johnson*, 6 So.3d at 1266. The OCCCRC4 insists that there is “consistency” in the legislative scheme, and that if section 27.511(8), Florida Statutes (2008), were read *in pari materia* with section 27.5303, Florida Statutes (2008), there would be no contradiction in this unambiguous statute. In fact, if the whole of section 27.511(8), Florida Statutes (2008), were read in conjunction with the one isolated sentence extracted therefrom in the 4th DCA opinion, one could discern a reconciled, uncontradictory legislative intent.

The primary guide to statutory interpretation is to determine the purpose of the legislature. ... Florida courts are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications.

Knowles v. Beverly Enterprises-Florida, Inc., 898 So. 2d 1, 2 (Fla. 2004).

With regards to the underlying November 3, 2008 Motion to Withdraw and Appoint the OCCCRC4 filed by the PD15 *sub judice*, the PD15’s motion was not specific enough on its face for this Court or any court to grant the motion. The PD15 merely asserted that a conflict of interest existed because it represented a co-defendant, Mayfield, on appeal. However, the mere fact that the PD represented a co-defendant in and of itself does not establish a conflict per se. *See Holloway v. Arkansas*, 435 U.S. 478, 98 S.Ct. 1173 (1978) (noting that joint representation of co-defendants is not per se violative of the constitutional guarantee of effective assistance of counsel).

Moreover, if the trial court had conducted a conflict hearing, it would have been informed that the PD17 withdrew from representing Johnson on July 3, 2007 because it was representing the co-defendant, Mayfield. And then *two weeks later* on July 25, 2007, the PD17 withdrew from representing Mayfield because of an alleged conflict in representing co-defendant, Johnson. *Thus, the PD17 did not represent either co-defendant at the trial court level, because it alleged to be representing both co-defendants and ultimately represented neither.*

In the PD15's November 3, 2008 motion to withdraw on defendant Johnson at the appellate level, the PD15 claims that it cannot represent Johnson because it represents Mayfield on appeal. However, an appellate record with no further fact finding would not necessarily place the PD15 in a conflict of interest. The appellate arena is different from the trial court where confidential information is abundant, attorney work product/attorney client communication is necessary, and the facts of the case are being developed and established, and the questions of conflict of interest can arise, particularly in the area of strategy. The appellate record is public information and there is no risk of confidential information being disclosed. The court should look at the specific facts of each case to see if there is an actual conflict of interest on appeal using the specific standards contained in the Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6,

2004, as referenced in section 27.5303(1)(e), Florida Statutes (2008). (“The fact that information was obtained during an attorney-client relationship does not necessarily create a conflict if the information is equally available in the public record (e.g. the fact of a felony conviction.)”). In fact, the 4th DCA previously held that “[t]here is no blanket duty of loyalty by the mere fact of some representation which translates to automatic disqualification any time the prior client is in any way involved in a subsequent case and there is no privileged information indicated.” *Hunter v. State*, 770 So. 2d 232 (Fla. 4th DCA 2000). The significant differences in trial and appellate representation alone should illustrate the need for trial courts to “inquire into the adequacy of the representations of the PD.” Section 27.5303(1)(a), Florida Statutes (2008).

Furthermore, the 4th DCA cites *Holloway v. Arkansas*, 435 U.S. 475 (1978), 98 S.Ct. 1173 (1978) and *Barclay v. Wainwright*, 444 So. 2d 956 (Fla. 1984), for the proposition that an “attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably exist **in the course of a trial.**” *Holloway*, 435 U.S. at 485-86 (emphasis added). However, both *Holloway* and *Barclay* concern the representations *made at trial* by trial counsel, where confidential information is abundant, attorney work product and attorney client communication is necessary,

the case is still in a posture of fact development, conflicts may arise, particularly in the area of strategy, if one attorney represented two co-defendants.

Unlike the attorneys in *Holloway* and *Barclay*, the appellate arena is dramatically different. The record is public information that can only be supplemented in a few instances. The record is fixed. While a trial is forward looking, because counsel is seeking to establish and disprove certain facts, an appeal is backwards looking and reflects on the errors that have already occurred. Moreover, competing or conflicting arguments on appeal will not detrimentally affect a co-defendant on appeal even if argued by different attorneys in the same office. There is no material prejudice to either co-defendant based on an asserted conflict if the PD handles both co-defendants on appeal. *See, e.g., Wilson v. State*, 789 So.2d 536 (Fla. 5th DCA 2001) (noting that appellate counsel who fails to raise the same issue on appeal that resulted in reversal of the conviction of a co-defendant is ineffective; the appellant is entitled to the same relief afforded the co-defendant).

The OCCRC4 respectfully requests that this Honorable Court quash the 4th DCA opinion in *Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009), because it is contrary to the plain meaning of section 27.5303 and section 27.511, Florida Statutes (2008).

II. The Fourth District Court of Appeal erred in denying the OCCCRC standing to contest the PD's motions to withdraw due to a conflict of interest. The OCCCRC has standing, as a party to a criminal case substantially affected by the outcome of the proceedings.

The issue of standing is reviewed *de novo*. *Sanchez v. Century Everglades, LLC*, 946 So. 2d 563, 564 (Fla. 3d DCA 2006); *Payne v. City of Miami*, 927 So. 2d 904, 906 (Fla. 3d DCA 2005).

The OCCCRC, as a statutorily created state agency, responsible for providing adequate representation to indigent clients in a fiscally sound manner, has standing to contest conflicts alleged by the PD, at both the trial court and appellate court. Section 27.511(1), Florida Statutes (2008). Generally, standing “requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly.” *Hayes v. Guardianship of Thompson*, 952 So. 2d 498, 505 (Fla. 2006). Standing depends on whether a party has a sufficient stake in a justiciable controversy, with a legally cognizable interest which would be affected by the outcome of the litigation. *Weiss v. Johansen*, 898 So. 2d 1009 (Fla. 4th DCA 2005). The OCCCRC is a party in interest because it receives all of its criminal cases directly from the PD withdrawals. Section 27.5303 (1)(a) and section 27.40(1), Florida Statutes (2008).

The 4th DCA determined that the OCCCRC did not have standing to object to the PD's motion to withdraw based on statutory standing. The 2003 version of section 27.5303(1)(a), Florida Statutes, states:

If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. If requested by the Justice Administrative Commission, the public defender shall submit a copy of the motion to the Justice Administrative Commission at the time it is filed with the court. **The Justice Administrative Commission shall have standing to appear before the court to contest any motion to withdraw due to a conflict of interest.** The Justice Administrative Commission may contract with other public or private entities or individuals to appear before the court for the purpose of contesting any motion to withdraw due to a conflict of interest. The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of confidential communications. The court shall deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client. If the court grants the motion to withdraw, the court shall appoint one or more attorneys to represent the accused.

Section 27.5303(1)(a), Florida Statutes (2003) (emphasis added).

At that time, the Florida Legislature statutorily granted the JAC standing to contest any PD motion to withdraw due to a conflict of interest. The JAC required a statutory grant of standing, because the JAC is an administrative agency and not a

party to the criminal proceedings. OCCCRC, however, derives its standing as a party, and therefore does not require statutorily created standing.

In 2007, the portion of the statute that the legislature *omitted* from the 2003 version is as follows:

If requested by the Justice Administrative Commission, the public defender shall submit a copy of the motion to the Justice Administrative Commission at the time it is filed with the court. **The Justice Administrative Commission shall have standing to appear before the court to contest any motion to withdraw due to a conflict of interest. The Justice Administrative Commission may contract with other public or private entities or individuals to appear before the court for the purpose of contesting any motion to withdraw due to a conflict of interest.**

Section 27.5303(1)(a), Florida Statutes (2003) (emphasis added).

In this omitted portion, it is clear that originally the legislature gave the JAC power to contest the PD's motions to withdraw due to a conflict of interest. *Id.* In contesting those motions, the JAC could contract out public or private entities or individuals to appear on its behalf. *Id.* The legislature's 2007 JAC omission also came with new wording to the existing section 27.5303, Florida Statutes (2008), and the creation of the OCCCRC. Section 27.511, Florida Statutes (2008). Thus, the legislature no longer needed the provision that gave the JAC standing to contest the PD's motions to withdraw due to a conflict of interest, because the legislature created the OCCCRC, a state agency, which is affected by the outcome of the

litigation. Section 27.511(1), Florida Statutes (2008); section 27.40(1), Florida Statutes (2008).

“[C]ourts must presume that the Legislature passes statutes with the knowledge of prior existing statutes and that “the legislature does not intend to keep contradictory enactments on the books or to effect so important a measure as the repeal of a law without expressing an intention to do so.” *Knowles*,, 898 So. 2d at 8. Consequently, the OCCCRC, not the JAC, now challenges any PD motions to withdraw and appointments to its agency, as the party in interest to that motion.¹

The 4th DCA ignores the legislative intent to establish the OCCCRC to be an independent and autonomous agency so that it could act on its own initiative without review from another agency. Section 27.511(2), Florida Statutes (2008), explains that the JAC “shall provide administrative support and service” to the OCCCRC when requested by the OCCCRC “within the available resources” of the JAC, but that the OCCCRC would “not [be] subject to control, supervision, or direction by the [JAC] in the performance of their duties, but the employees of the offices shall be governed by the classification plan and the salary and benefits plan for the commission.” Section 27.511(2), Fla. Stat. (2008). Thus, the legislature had to omit the portion of section 27.5303(1)(a), Florida Statutes (2003), giving the JAC standing to contest the PD’s motions to withdraw due to a conflict of interest

¹ The AG took no position at oral argument and declines any comment or position on the PD’s assertion of a conflict of interest.

or the legislature would be giving the JAC, in essence, control over the OCCCRC. The OCCCRC now occupies the JAC's former role to challenge the sufficiency of an alleged conflict by the PD. The legislature did not need to statutorily grant OCCCRC standing to contest, because the OCCCRC is a party with a legally cognizable interest which is affected by the outcome of the litigation.

Moreover, when the motion to withdraw is not specific on its face, it seems logical, pursuant to section 27.5303(1)(a), Florida Statutes (2008), that the court has the authority to conduct this hearing on its own initiative, if it concludes that the facts alleged are not clear on the face of the motion to withdraw, or if the OCCCRC points to a particular deficiency. The effect of the 4th DCA's opinion precludes lower courts from making this inquiry on any meaningful adversarial basis, especially if the PD files a motion to withdraw after a notice of appeal is filed and this Court summarily denies any relinquishments. *The net effect denies the OCCCRC or any trial courts the ability to test the legal sufficiency of the PD's representations in an asserted conflict of interest.*

The 3rd DCA correctly recognized that the State Attorney's Office has standing to contest the PD's motions to withdraw, as a party to the criminal proceeding in both *State and Ofc. Of Crim. Conflict and Civ. Reg'l. Counsel, 3rd District v. PD, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009), *review granted*, No. SC09-1181 (Fla. May 19, 2010) and just recently in *State v. Bowens*,

2010 Fla.App. LEXIS 9851 (Fla. 3d DCA 2010), *review granted*, No. SC10-1349 (Fla. July 12, 2010), in consolidated appeals. The 3rd DCA correctly distinguished the cases where counties were denied standing to oppose the PD's motions to withdraw simply because of their financial stake. *In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990) (“*In re Prosecution*”) and *Escambia County v. Behr*, 384 So. 2d 147, 150 (Fla. 1980). Those cases address the unrelated issue of whether a county's financial stake in the withdrawal of an assistant public defender is sufficient to grant the county standing to oppose a motion to withdraw. The 3rd DCA correctly concluded that:

[t]he State, as a party to the criminal cases, is treated by statute differently than the counties. *Section 27.02, Florida Statutes*, provides in pertinent part, “[t]he state attorney shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend on behalf of the state all suits, applications, or motions, civil or criminal, in which the state is a party” § 27.02(1), *Florida Statutes* (2004). **The State's status as a party to the criminal cases**, as well as its statutory obligation under *section 27.02*, distinguishes this case from *Behr* and *In re Prosecution*. Therefore, **we hold that the State had standing to challenge the motions filed by PD11.**

State v. PD, Eleventh Judicial Circuit, 12 So.3d at 801 (emphasis added).

The 3rd DCA further recognized not only the State Attorney's Office standing, but the OCCRC's standing to contest the PD's motions to withdraw in a footnote “...affirming the trial court's denial of Regional Counsel's motion to intervene as it was filed eight days after the trial judge's order, which is the subject of this

appeal.” *Id.* at 800. The trial court and the 3rd DCA denied the motion to intervene because it was untimely, not because the OCCCRC lacked standing to contest the PD’s motions.

Also, in the recent *Bowens* 3rd DCA opinion, granting the State’s petition for a writ of certiorari to quash the trial court’s order granting the PD’s motion to withdraw, the court again recognized that the OCCCRC has standing to contest the PD’s motion to withdraw in a footnote. “We note that the Office of Criminal Conflict and Civil Regional Counsel for the Third District has not chosen to intervene in this case which would indicate to this Court that the Office is willing to and can take on *Bowens*’ defense if needed.” *Bowens*, 2010 Fla.App. LEXIS 9851.

The OCCCRC4 respectfully requests that this Honorable Court quash the 4th DCA opinion in *Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009) that the OCCCRC lacks standing, and approve the 3rd DCA opinion in *State and Ofc. Of Crim. Conflict and Civ. Reg’l. Counsel, 3rd District v. PD, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009), *review granted*, No. SC09-1181 (Fla. May 19, 2010) and *State v. Bowens*, 2010 Fla.App. LEXIS 9851 (Fla. 3d DCA 2010), *review granted*, No. SC10-1349 (Fla. July 12, 2010) that the OCCCRC has standing to contest the PD’s motions to withdraw.

CONCLUSION

The 4th DCA's opinion that OCCCRC has no standing to contest the PD withdrawals affects the OCCCRC as a class of state officers, because the OCCCRC districts throughout the state of Florida receive all of their criminal cases from the PD's conflict withdrawals. Furthermore, the 4th DCA opinion directly conflicts with the 3rd DCA opinion in *State and Office of Criminal Conflict and Civil Regional Counsel, Third District v. Public Defender, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009), *review granted*, No. SC09-1181 (Fla. May 19, 2010) and *State v. Bowens*, 2010 Fla.App. LEXIS 9851 (Fla. 3d DCA 2010), *review granted*, No. SC10-1349 (Fla. July 12, 2010).

The OCCCRC4 respectfully requests that this Honorable Court quash the 4th DCA opinion in *Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009), because it is contrary to the plain meaning of section 27.5303 and section 27.511, Florida Statutes (2008).

Furthermore, the OCCCRC4 respectfully requests that this Honorable Court quash the 4th DCA opinion in *Johnson v. State*, 6 So.3d 1262 (Fla. 4th DCA 2009) that the OCCCRC lacks standing, and approve the 3rd DCA opinion in *State and Ofc. Of Crim. Conflict and Civ. Reg'l. Counsel, 3rd District v. PD, Eleventh Judicial Circuit*, 12 So.3d 798 (Fla. 3d DCA 2009), *review granted*, No. SC09-1181 (Fla. May 19, 2010) and *State v. Bowens*, 2010 Fla.App. LEXIS 9851 (Fla.

3d DCA 2010), *review granted*, No. SC10-1349 (Fla. July 12, 2010) that the OCCCRC has standing to contest the PD's motions to withdraw as a party to a criminal case substantially affected by the outcome of the PD's motions to withdraw.

Respectfully submitted,

OFFICE OF CRIMINAL CONFLICT AND
CIVIL REGIONAL COUNSEL,
FOURTH DISTRICT
Philip J. Massa, Director
605 N. Olive Avenue
Second Floor
West Palm Beach, Florida 33401
Tel. (561) 837-5156
Fax (561) 837-5423

Counsel for Petitioner

Melanie L. Casper
Assistant Regional Counsel
FL Bar No. 0271070

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed via U.S. Mail first class, postage prepaid, on this ____ day of July, 2010, to: **Office of the Florida Attorney General**, 1515 North Flagler Drive, Suite 900, West Palm Beach, Florida 33401; **Office of the Public Defender, Appellate Division**, 421 3rd Street, 6th Floor, West Palm Beach, Florida 33401.

Melanie L. Casper
Assistant Regional Counsel
FL Bar No. 0271070

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this writ of certiorari complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Philip Massa, Director
Office of Criminal Conflict and Civil
Regional Counsel, Fourth District

605 N. Olive Avenue
Second Floor
West Palm Beach, FL 33401
Telephone: (561) 837-5156
Facsimile: (561) 837-5423

Counsel for Petitioner

By: _____
Melanie L. Casper
Assistant Regional Counsel
Florida Bar No. 0271070