IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC09-1181 & SC10-1349

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

* *

ANTOINE BOWENS,
Petitioner,

vs.

THE STATE OF FLORIDA,
Respondent.

****

ON DISCRETIONARY REVIEW
FROM THE COURT OF APPEAL, THIRD DISTRICT

* *

AMICUS CURIAE BRIEF OF THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION IN SUPPORT OF THE RESPONDENT, THE STATE OF FLORIDA

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INTRODUCTION

Amicus, the Florida Prosecuting Attorney's Association, will be referred to as FPAA. The Petitioner will be referred to as the Public Defender's Office for the Eleventh Judicial Circuit or PD-11. The Respondent will be referred to as the State. The State Attorney's Office for the Eleventh Judicial Circuit, which was allowed to appear in the trial court in Case No. SC09-1181, as amicus curiae; and as the party representing the State in Case No. SC10-1349, will be referred to as SAO-11. The letter "PR*#" will denote the record on appeal in Case No. SC09-1181, with * as the volume number and # as the page number. "BR*#" will denote the record on appeal in Case No. SC10-1349. "AEx*#" denotes a page of the Appendix to the State's Petition for Writ of Certiorari in the *Bowens* case.

STATEMENT OF INTEREST

From the beginning of this litigation, questions have been asked concerning what interest the State Attorney has in these proceedings. The FPAA, representing the twenty elected State Attorneys, has a strong and compelling interest in this case because the issue of how this Court determines whether and when a public defender can withdraw or refuse appointments in cases, is likely to have a serious impact on the prosecution of criminal cases that the State Attorneys have standing to bring.

The roles of the State Attorney and the Public Defender in our criminal justice system are very different. The Public Defender has a limited role, in that their duties

and obligations relate foremost to the needs and desires of their clients – those arrested and/or charged with committing crimes. The State Attorney however, represents all of the people of the State of Florida, and as such its role, includes prosecuting those charged with committing crimes, but also specific duties related to the administration of justice, including not only ensuring that the constitutional rights of victims of crime are protected, but also to seek justice, which includes protecting the constitutional rights of the accused. *See generally Berger v. United States*, 295 U.S. 78, 88 (1935).

The wisdom of the funding decisions made by the Legislature is clearly the proper subject of political debate and efforts by all those affected by these decisions to lobby the Legislature. There can be no question that the courts, the state attorneys and the public defenders are of the same mind when it comes to the issue of budgets and adequate funding of the judicial system. However, where the FPAA must part company with PD-11 was the method PD-11 had chosen to air its grievances.

In an unprecedented Motion, PD-11 sought to certify conflict with the future appointment for representation of all indigent defendants charged with non-capital felonies, about eighty (80) percent of its caseload. The trial court partially granted the Motion and relieved PD-11 of future appointments of third degree felonies, sixty (60) percent of its caseload, for an undetermined amount of time.

Unfortunately, under either scenario, the obvious and unavoidable consequence of this wholesale jettison of the vast majority of PD-11's caseload, would have led to a constitutional crisis that could result in either forcing the legislature to submit to PD-11's demands for funding for its Office, or suffer the possible dismissal of very serious, including violent, felony offenses and the release of those defendants back into the community.

Subsequent to the ruling in *State v. Public Defender*, 12 So. 3d 798 (Fla. 3d DCA 2009), *State v. Bowens*, 39 So. 3d 479 (Fla. 3d DCA 2010) became a test case in which all of the parties understood that if the trial court allowed the assistant public defender to withdraw in that case, then that motion to withdraw and the trial court's order would be used as a template for not only Assistant Public Defenders but for Assistant Criminal Conflict and Civil Regional Counsel to withdraw in mass numbers of cases. The FPAA believes that the Third District's opinions in *State v Public Defender* and *State v. Bowens* are well reasoned decisions which thoughtfully and realistically address the issues raised by PD-11.

If this Court reverses these cases and reinstates either of the trial courts' orders, the following scenario may very likely occur. Pursuant to section 27.511(5), Florida Statutes (2011), the Office of the Criminal Conflict and Civil Regional Counsel (OCCCRC), will be initially appointed to these thousands of cases. OCCCRC has not been funded or staffed at the levels required to accept the

appointments in all of these felony cases. It will take very little time for the OCCCRC to become overwhelmed by these cases. By allowing PD-11 to refuse to accept new appointments or withdraw from cases based simply on PD-11 saying only that they have too many cases, this Court will be setting the precedent to allow the OCCCRC to refuse to accept appointments or withdraw based on the same grounds as PD-11. The courts, under section 27.5303(1)(b), Florida Statutes (2011), would then have to appoint a massive number of private attorneys as set forth in section 27.40, Florida Statutes (2011).

Those private attorneys would be paid by the Judicial Administration Commission (JAC) as provided in section 27.5304, Florida Statutes (2011), at a considerably higher cost.[1] As part of those appointments, the private attorneys would also be entitled to due process services appropriations under section 29.007, Florida Statutes (2011). As with the OCCCRC, JAC has not been funded to pay for all remaining third degree felony cases in which both PD-11 and OCCCRC would be permitted to not accept appointments. Unfortunately, this would not affect only the Eleventh Judicial Circuit, but would affect the whole state because

[1] The purpose of the legislature in creating the OCCCRCs was to provide effective representation to indigent persons in a fiscally sound manner. *See* § 27.511(1), Fla. Stat. (2007). Furthermore, Rick Freedman, then-president of the Miami-Dade County Chapter of the Florida Association of Criminal Defense Lawyers ("FACDL") testified that if the conflict attorneys did not get paid by JAC, they would sue the State. (PR17. 2349)

the funds for appointment of conflict counsel are not sep arated by circuits. Furthermore, there is no reason to believe that if PD-11 is permitted to refuse appointments or to withdraw *en masse* based on these grounds, then other public defenders around the State, would not file similar motions in their circuits.

Section 29.015(1), Florida Statutes (2011) provides that the legislature may provide for a contingency fund that is intended by the legislature to be used for "alleviating deficits in contracted due process services appropriation categories, including private court-appointed counsel appropriation categories, that may occur from time to time due to extraordinary cases that lead to unexpected expenditures." Under section 29.015(4)(a), Florida Statutes (2011), if there is a deficiency in the statewide appropriation for private court-appointed counsel, JAC is required to first attempt to identify surplus funds from other contracted due process services appropriation categories, i.e., from the state attorneys, the other public defenders and the other OCCCRCs, within JAC and submit a budget amendment to transfer funds within JAC. If JAC is unable to identify those surplus funds from within JAC, JAC may submit a budget amendment to transfer funds from the contingency fund. Section 29.015(4)(b), Florida Statutes (2011).

Similarly, under section 29.015(3)(a), Florida Statutes (2011), in order to pay these increased costs of the due process services that private conflict attorneys are entitled to, JAC would be required to attempt to identify surplus funds from the

state attorneys, the other public defenders and the other OCCCRCs, that could be transferred pursuant to a budget amendment request by JAC under section 29.015(3)(b). If no such surplus funds are available to be transferred pursuant to a budget amendment request, JAC, pursuant to section 29.015(3)(c), Florida Statutes (2011), may request a budget amendment to transfer funds from the contingency fund that may be provided for in the General Appropriations Act in the Justice Administrative Commission.

The contingency fund may not have been funded or fully funded to cover the enormous expense that could occur in this situation. This could then require the legislature to either obtain funding from other sources, which may severely affect other important and necessary services that the State has to provide to its citizens, or refuse to provide further funds which could lead to the possible dismissal of very serious offenses. This could potentially overwhelm the judiciary, who will be trying to execute what will become their primary responsibility to provide counsel for indigent defendants when there are no attorneys to appoint. *See, e.g., Hagopian v. Justice Administrative Com'n*, 18 So. 3d 625 (Fla. 2d DCA 2009). This will force the constitutional crisis.

SUMMARY OF THE ARGUMENT

PD-11 chose twenty-one cases pending in the criminal circuit court in twenty-one different divisions as its venue to raise the issue of its alleged excessive

caseload and/or workload.[2] In each one of those pending cases, the State, through SAO-11, pursuant to section 27.02(1), Florida Statutes (2011) was a party, having filed the criminal charges. The Third District was correct when it found that the trial court erred when it determined that the State had no standing to oppose PD-11's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases.

The trial court's allowance of SAO-11 to appear as *amicus curiae* was not a sufficient substitute for party status. Therefore, this Court cannot rely on the factual findings made by the trial court in *State v. Public Defender* to determine whether PD-11 met its burden of establishing that its third degree felony caseload and/or workload was so excessive that it could not continue to ethically represent their indigent clients because it could not provide effective assistance of counsel.

The Third District's opinions in *State v. Public Defender* and *State v. Bowens* reversing the trial courts' orders granting PD-11's requests to withdraw, both as an office, and individually in the case of Mr. Bowens are imminently

[2] "Workload" as used in this context is to be distinguished from the more narrow term "caseload." Caseload is the number of cases assigned to an attorney at any given time. The concept of "workload" as acknowledged by the ABA in its TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (Feb. 2002), is more accurately measured by adjusting a caseload "by factors such as case complexity, support services, and an attorney's nonrepresentational duties[.]" (PR. 1343-1354). This Court would also have to determine the starting point for the representation as it relates to workload and caseload, and that can vary by circuit depending on what type of office structure the public defender has. This Court would also have to take into account how the public defender's representation ends, i.e., pleas, no actions, referrals to diversion programs, or the representation being taken over by another attorney.

correct. The Third District recognized the impracticability and reality in trying to determine a specific aggregate threshold number for a public defender's caseload or workload which would automatically trigger a finding that the attorney(s) are providing ineffective representation. The Third District appropriately required that an individual assistant public defender allege some specific proof of prejudice if the conflict is based on excessive workload or caseload.

PD-11 did not establish that it was violating its ethical obligations where it failed to establish that there was a substantial risk that its representation of one or more clients were materially limited by the attorney's responsibilities to another client. As such, the Third District's opinions in *State v. Public Defender* and *State v. Bowens* must be affirmed. However, if this Court were to find that the Public Defenders' Offices can withdraw or refuse to accept appointments due to excessive caseload or workload, then the FPAA urges this Court set forth specific standards that would govern review by the courts.

ARGUMENT

I

THE STATE THROUGH THE STATE ATTORNEY HAS STANDING TO BE A PARTY TO THE PUBLIC DEFENDER'S MOTION TO APPOINT OTHER COUNSEL.

a. The State Attorney Represents The Interested Party, the State, in the Criminal Cases Filed in the Trial Courts Where the Motion Was Filed

Article V, section 17 of the Florida Constitution states: "Except as otherwise provided in this constitution, the state attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law…." Section 27.02(1), Florida Statutes (2008), sets forth the duties of the state attorney as follows:

> The **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**, except as provided in chapters 39, 984 and 985….

(Emphasis added). The Motions to Appoint Other Counsel in Unappointed NonCapital Felony Cases in *State v. Public Defender* were filed by PD-11 on behalf of criminal defendants in twenty-one pending criminal cases in which the State of Florida was clearly a party. In fact, the SAO is without question the entity that represents the State in criminal prosecutions in the trial courts. *Johnson v. State*, 37 Fla.L.Weekly S1, 4 (Fla. Jan. 5, 2012). Thus, under the plain language of

section 27.02(1), it is the FPAA's position that the State of Florida had standing and SAO-11 had the authority to represent the State in the Motions filed by PD-11.

Furthermore, in its role of protecting the administration of justice, the SAO in its representation of the State (or the government), has standing to bring to the attention of the court potential conflicts when an attorney represents more than one defendant so that defendants can be colloquied as to whether a conflict exists and whether they are willing to or should be allowed to waive those conflicts. *See, e.g., Wheat v. United States*, 486 U.S. 153 (1988); *Kolker v. State*, 649 So. 2d 250 (Fla. 3d DCA 1994). *See also* Fla. R. Crim. P. 3.150(c). The State Attorney also has standing under section 960.001(7), Florida Statutes (2011), "to assert the rights of a crime victim which are provided by law or s. 16(b), Art. 1 of the State Constitution." *See State v. Famiglietti*, 817 So. 2d 901, 903 (Fla. 3d DCA 2002). Under sections 960.0015 and 918.015(1), Florida Statutes (2011), the victim and the State have a right to a speedy trial. Granting or denying a motion to withdraw by defense counsel can affect those rights.

Section 27.5303(1), Florida Statutes (2011), which provides that when a public defender moves to withdraw from a case due to a conflict of interest, "[t]he 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." As held by this Court in

Johnson v. State, "section 27.5303(1)(a) governs all public defender motions to withdraw based on conflict, both at the trial and appellate level, and the court where the motion is filed is required to review such motions for sufficiency." 37 Fla.L.Weekly at S3. Without allowing the State, through the SAO, to have standing, these hearings would turn into open court *ex parte* hearings.

In addition, the SAO would note in response to the Amicus Brief of the Florida Public Defender's Association which suggests that only the Attorney General should have been the entity representing the State in the present case PD-11 elected to file the Motions in the individual criminal cases. Perhaps if PD-11 had chosen to file a civil action for injunctive relief or declaratory judgment,[3] then the Attorney General may have been a proper entity, along with the SAO, to represent the State in that action. Thus, depending on which court these types of motions are filed, either the SAO or the Attorney General may be the entity which represents the State in the motion.

[3] The SAO had contended in the trial court that PD-11's Motions were in fact a request for temporary injunctive relief or for declaratory judgment citing *Platt v. State*, 664 N.E. 2d 357 (Ind. Ct. App. 1996) and *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996). In its Motions, PD-11 cited to *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *case subsequently dismissed on abstention grounds, Luckey v. Miller*, 976 F. 2d 673 (11th Cir. 1992), a class action case requesting injunctive relief.

b. The Failure to Allow the SAO to Participate as a Party Denied the State a Full and Fair Hearing and as Such the Record in the Proceedings in *State v. Public Defender* Cannot Be Relied On

The FPAA submits that when reviewing the record in the proceedings in *State v. Public Defender*, that this Court must keep in mind that the failure to allow the SAO to fully participate as a party skewed the evidence that was presented. The Petitioner and the various amicus' who have filed briefs rely heavily on the evidence that was presented before the trial judge to support their arguments that PD-11 had proven that it had an excessive caseload or workload. However, this Court cannot rely on that evidence when the only party to have standing to oppose PD-11's Motion was denied its rights as a party.

The trial court's allowance of the SAO to participate as an amicus *in State v. Public Defender* was not the equivalent of allowing the SAO to fully participate as a party. PD-11's Motion was filed on June 24, 2008. (PR1. 77-91). Clearly from the Motion, PD-11 had been planning the filing of the Motion for many months. At a status hearing three days later, after PD-11 asserted that the system was in immediate crisis, the trial court ordered the SAO to file its response to the Motion by July 10, 2008 and scheduled the evidentiary hearing for July 17, 2008. (PR19. 2588). The trial court had not yet determined if the SAO was entitled to party status. The SAO filed a Motion for Continuance which was only partly granted

when the hearing was rescheduled for July 30, 2011, which was significantly less than the six weeks the SAO requested. (PR4. 368-373; PR19. 2625).

At the hearing on July 8, 2008, the trial court required an exchange of witness lists, but did not permit the taking of depositions or other discovery prior to the evidentiary hearing. (PR19. 2618). The SAO had to send a public records request pursuant to Chapter 119, to PD-11 in order to obtain the necessary materials that was the basis for the claims of excessive caseload and workload. The SAO had to file in the trial court a Motion to Compel under Ch. 119 to obtain compliance with the public records statutes. (PR9. 1010-1016). At the beginning of the evidentiary hearing on July 30, 2011, the SAO again requested a continuance which was denied. (PR18. 2501). The hearing then proceeded without the SAO knowing the extent or what many of the witnesses[4] called by PD-11 would testify to.

The prejudice to the State from the trial court's denial of standing to the State is demonstrated by the trial court criticism in its written order of the SAO's failure to "present any alternative national or Florida caseload standard" or to demonstrate that the management techniques used by public defenders in other circuits to alleviate workloads might apply. (PR18. 2536). The SAO, if properly

[4] Some of the witnesses had provided affidavits that were attached to Appendix to PD-11's Motion.

given party status in the trial court proceedings in *State v. Public Defender*,[5] would have been permitted to have conducted full discovery[6]. It would have been allowed more time to investigate the claims of PD-11 and present the evidence that the trial court found was missing. It would have been better prepared to cross examine the witnesses and to rebut the anecdotal and general testimony presented at the hearing by members of PD-11.

The SAO had an interest in protecting the administration of justice, not only for defendants, but also for victims and the people of the State of Florida, whose rights could be adversely affected by the trial court's granting of PD-11's Motion. The SAO was entitled to have time to fully prepare for such an extraordinary hearing. The failure of the trial court to recognize the SAO's standing and to allow sufficient time for the SAO to prepare for this hearing, severely diminishes this Court's ability to rely on any factual findings made by the trial court in *State v. Public Defender*.

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[5] The FPAA would note that because the trial court was bound by *State v. Public Defender* at the time of the evidentiary hearing in *State v. Bowens*, the SAO had standing and was permitted by the trial court to engage in more extensive discovery, including depositions and was given more time to prepare for the hearing. (A3Ex.30. 1-28).

[6] Discovery under Rule 3.220 of the Florida Rules of Criminal Procedure applies to any trial or hearing in which a defendant has elected to participate in discovery in. *See, e.g.*, Rule 3.220(d)(1)(A) & (B)(iii). The defendants in the cases in *State v. Public Defender* had all elected to participate in discovery.

II

A Specific Aggregate Threshold Number for Caseload or Workload Numbers Cannot Be Used to Determine Whether the Public Defender as an Office or Individually is Providing Effective Representation.

a. A Specific Threshold Number Cannot Be Determined

In *State v. Public Defender*, the Third District recognized the impracticality and reality in trying to determine a specific aggregate threshold number for a public defender's office's caseload or workload[7] which would automatically trigger a finding that the attorneys are providing incompetent representation.[8] 12 So. 3d at 801-03. Each public defender's office is unique in the manner in which they choose to represent their clients. Some offices have what was deemed at the evidentiary hearing to have vertical representation where one assistant public defender represents a defendant from first appearance through the trial, and others, like PD-11, have horizontal representation, where different assistant public defenders represent the defendant at different stages in the system. Some offices may have more experienced attorneys than others. There is no one size that fits all.

[7] The FPAA is referring to both of those words although they have very different meanings and § 27.5303(1)(d), Fla. Stat. (2011) uses the word "workload," the evidence at the hearing referred to both.

[8] Other courts have held that vague statistics relating to an attorney's caseload has been held to be insufficient to establish that the attorney provided ineffective representation. *See, e.g.*, *Whatley v. Terry*, 668 S.E. 2d 651 (Ga. 2008); *Osborn v. Terry*, 466 F. 3d 1298, 1315 n.3 (11th Cir. 2006).

The same is true for an individual assistant public defender as was demonstrated in *State v. Bowens*. The Third District was imminently correct in determining that each individual assistant public defender must file his or her own motion to withdraw based on the individual case, and in doing so must allege some proof of prejudice if the conflict is based on excessive workload or caseload. *State v. Public Defender*, 12 So. 3d at 805. As set forth in *Bowens*, that prejudice has to be more than mere speculation, but a showing beyond the need to file a motion for continuance, that the defendant's interests are impaired or compromised. *Id*. at 482.[9]

[9] This does not violate the public defender's ethical obligations. The FPAA recognizes that the public defenders have certain ethical obligations to their clients, including under R. Regulating Fla. Bar 4-1.7(a)(2) – "a lawyer shall not represent a client if there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client…." (Emphasis added). The keys to this obligation are both the words "substantial" and "materially." Other than just saying so, PD-11 did not make that showing. PD-11 also emphasized that its attorneys owe the same duties of competence, diligence and communication to their clients as all members of the Florida Bar, pursuant to the Rules of Professional Conduct. The FPAA does not challenge that. However, all attorneys must prioritize their workloads. This does not automatically render an attorney in violation of the ethics rules or ineffective, absent a demonstration that any client's interest has been prejudiced thereby.
In fact, the evidence in Mr. Bowens case demonstrates that. Mr. Bowens was the defendant chosen by PD-11, to challenge the application of *State v. Public Defender* to an individual case. In an attempt to establish prejudice to Mr. Bowens, PD-11, through Mr. Kolsky, neglected his case, (BR1. 98, 114-115). In fact, as of the time of this brief, Mr. Bowens case, although some work has been done on his behalf by the assigned assistant public defenders, has still not been resolved. *See* http://www2.miami-dadeclerk.com/CJIS/CaseSearch.aspx. This is apparently with Mr. Bowens approval as he has remained out of custody on bond.

At the core of PD-11's complaint is that they are unable to provide effective representation of their clients under the Sixth Amendment. "However, the requirement that a defendant show prejudice in effective representation cases arises from the very nature of the specific element of the right to counsel at issue there - *effective* (not mistake-free) representation. Counsel cannot be 'ineffective' unless his mistakes have harmed the defense (or, at least, unless it is reasonably likely that they have). Furthermore, with any alleged conflict of interest, a defendant must first show that there is a conflict, i.e., that there is identifiable specific evidence in the record that suggests that the defendant's interests are impaired or compromised for the benefit of the lawyer or another party. Without this factual showing, the conflict is merely possible or speculative. *Herring v. State*, 730 So. 2d 1264, 1267 (Fla. 1999) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)). This is consistent with the holding in *State v. Bowens*, that the type of prejudice that is required is one that evinces "actual or imminent prejudice to [the defendant's] constitutional rights." 39 So. 3d at 481.

b. This Court Must Set Forth Objective Standards Beyond Mere Caseload Numbers to Determine Whether the Public Defender is Providing Effective Representation

If this Court were to find that the Public Defender's Offices can withdraw or refuse to accept appointments en masse, then it must establish some objective standards beyond mere caseload numbers to determine whether the public defender

is providing effective representation.[10] In determining the standards under which these motions should be reviewed by the courts, some areas that this Court should include in those standards are the funding of the office, *see e.g.*, *In re Certification of Conflicts in Motion to Withdraw Filed By Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18, 22-23 (Fla. 1994);[11] what is a caseload and/or workload;

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[10] This Court cannot rely on any organization's aspirational numbers as testified to at the hearing. There was certainly no evidence of how these numbers were arrived at and in fact, even Prof. Lefstein has stated that they are unreliable. *See Lefstein, Securing Reasonable Caseloads* 44-45 (2011), These studies need to be tested under the appropriate standards for the admission of expert testimony. This Court is not and should not be bound by them. *See, e.g., State v. Kilgore*, 976 So. 2d 1066 (Fla. 2007).

[11] In the evidentiary hearing, it was established that PD-11 received more funding from the legislature than the other public defender offices. (PR15. 2065). Mr. Brummer admitted that on several occasions since 2004 he rejected several full time equivalent ("FTE") positions offered to him by the legislature despite the fact that Mr. Brummer recognized that with an increase of the number of attorneys, the caseload for each attorney would decrease. He stated, however, that he rejected those positions because the salaries offered with the positions were not high enough to attract quality applicants to staff or maintain the positions. (PR15. 2119). That statement was belied by Amy Weber a graduate of Yale Law School, who had been a member of PD-11 for five (5) years. (PR16. 2290). Stephen Kramer, one of the senior supervising attorneys for PD-11, testified that he had been with the office for over fifteen (15) years. (PR16. 2280-2281). Both Ms. Weber and Mr. Kramer are still employed by PD-11. In addition PD-11 on its website touts the high quality of the assistants: *See* http://www.pdmiami.com/recruiting_attorneys.htm.

It should also be noted that since the 2008 hearing in *State v. Public Defender*, the number of felony cases filed in the Eleventh Judicial Circuit has substantially decreased. According to the 2008-2009 Florida State Courts Annual Report, the number of filed adult felony cases for the years 2007-2008 was 29,720. In the 2009-2010 Florida State Courts Annual Report, the number of filed adult felony cases for 2008-2009 was reported as 27,476. According to the 2010-2011 Florida State Courts Annual Report, the number of filed adult felony cases for 2009-2010

the management of the office, *see Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991) (although courts should not involve themselves in the management of public defender offices, they are not obligated to permit withdrawal automatically upon the filing of a certificate by the public defender reflecting a backlog in the their ability to file appeals);[12] and other alternatives to the withdrawal or refusal of massive numbers of appointments.[13]

All of these factors need to be considered before this Court can begin to establish standards as to when there is an "excessive workload" that required the

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was 24,291. This is an eighteen percent (18 %) decrease from the time of the hearing in *State v. Public Defender*. It is the FPAA's belief that if this case was to return to the circuit court for further hearings, the State would be able to show that for 2010-2011, the number of filed cases decreased by another thirteen percent (13) %. While the number of filed felony cases has decreased, the FTE attorney positions for PD-11 have not been reduced since 2009. In 2009, the Legislature appropriated 384 positions for PD-11. Ch. 2009-1, line 487, Laws of Florida. However, that number of 384 has not changed since then. See Ch. 2010-152, line 1013, Laws of Florida; Ch, 2011-69, line 968, Laws of Florida. As such, the caseload numbers per felony attorney in PD-11 must also have declined significantly in the years subsequent to the hearing in *State v. Public Defender*.

[12] For example, there was testimony that PD-11 encourages more than one attorney to try a case with another attorney even though this increased the caseload and/or workload of the attorneys. (PR15. 2107-2108). There is no constitutional requirement that indigent defendants are entitled to two attorneys, even in capital cases. *See Lowe v. State*, 650 So. 2d 969, 974-75 (Fla. 1994). Perhaps this is a policy decision of PD-11 that should be reviewed if they are in the caseload/ workload crisis that they claim.

[13] The Final Report of the Article V Indigent Services Advisory Board's Initial Recommendations on Uniform Standards for Use in Conflict of Interest Cases (Jan. 6, 2004), states that once an attorney had decided there is a conflict which requires withdrawal, the following guidelines should be followed: "(b) keep the most complex case or the one which will require the most time and expense."

trial court to relieve the public defender from future representation of indigent defendants.

CONCLUSION

The judiciary, the public defenders and the state attorneys' offices are all underfunded to do the optimal job that all of those involved in the criminal justice system would like. However, that does not equate to the inability of PD-11 to provide competent or effective assistance of counsel. This is the time to try to work together, not to begin a constitutional crisis. Thus, based on the foregoing, the FPAA requests that this Court affirm the Third District's opinions in *State v. Public Defender* and *State v. Bowens*.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to Parker D. Thomson, Esquire, and Julie E. Nevins, Esquire, Hogan Lovells US LLP, Attorneys for the Public Defender, 1111 Brickell Avenue, Suite 1900, Miami, FL 33131; Scott D. Makar, and Louis F. Hubener, Office of the Solicitor General**,** Office of the Attorney General**,** The Capitol PL-01, Tallahassee, Fl 32399-1050; Richard L. Polin, Bureau Chief, Office of the Attorney General**,** 444 Brickell Avenue, Suite 650, Miami, FL 33131; Linda Kelly Kearson**,** General Counsel, Eleventh Judicial Circuit of Florida, Lawson E. Thomas Courthouse Center, 175 N.W. First Avenue, 30th Floor, Miami, FL 33128**;** Eugene Zenobi, Regional Civil and Criminal Conflict Counsel and Philip Reizenstein, Esquire, Assistant Regional Counsel, 401 N.W. 2nd Avenue, Suite S-310, Miami, FL 33128, Ana Christina Martinez, General Counsel, Justice Administration Commission, P.O. Box 1654, Tallahassee, FL 32302, Steven L. Brannock, Esquire, Celene, Harrel, Humphries, Brannock & Humphries, 100 S. Ashley Drive, Suite 1130, Tampa, FL 33602; Carol Beth Lamm, Esquire, 701 13th Street NW, Washington, D.C. 20005; Sonya Rudenstine, Esquire, Attorney at Law, 204 W. University Avenue, Suite 5, Gainesville, FL 32601; Michael Ufferman, Esquire, Michael Ufferman Law Firm, P.A., 2202-1 Raymond Diehl Road, Tallahassee, FL 32308; Elliot H. Scherker, Esquire and Julissa Rodriguez, Esquire, Greenberg

Traurig, P.A., Wells Fargo Center, Suite 4400, 333 Southeast Second Avenue, Miami, FL 33131; Karen M. Gottlieb, Esquire, Post Office Box 1388, Coconut Grove, FL 33233; Nancy Daniels, President, Florida Public Defender Association, Inc., 301 S. Monroe Street, Suite 401, Tallahassee, FL 32301; H. Scott Finegerhut, Esquire, Chair-Elect, Criminal Law Section, 2400 South Dixie Highway, Second Floor, Miami, FL 33133; George E. Tragos, Esquire, Member, Executive Council, Criminal Law Section, 601 Cleveland Street, Suite 800, Clearwater, FL 33755; and Carlos Martinez, Public Defender, 1320 N.W. 14th Street, Miami, Fl 33125, on this 8th day of March 2012.

/s/ Arthur I. Jacobs
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ARTHUR I. JACOBS
General Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that this Comment complies with the font requirements of Fla.R.App.P. 9.210(c)(2).

By: /s/ Arthur I. Jacobs
_____
ARTHUR I. JACOBS
General Counsel