IN THE SUPREME COURT OF FLORIDA
Case Nos. SC09-1181 & SC10-1349

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,
Petitioner,
v.

THE STATE OF FLORIDA,
Respondent.

ANTOINE BOWENS,
Petitioner,
v.

THE STATE OF FLORIDA,
Respondent.

ANSWER BRIEF OF RESPONDENT

On Discretionary Review from the Third District Court of Appeal

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STATEMENT OF THE CASES AND FACTS

These two consolidated cases present legal issues of first impression about what extreme circumstances justify judicial intervention at the trial court level when a public defender's office or individual assistant public defenders, who are experiencing high caseloads and tight budgets, seek to withdraw en masse or individually from their statutorily assigned cases based on claims of potentially inadequate representation. In both cases, the trial judges granted broad relief to petitioners despite the lack of evidence of imminent or actual constitutional violations. The Third District's review of the record confirmed that the petitioners in each case failed to show that the constitutional rights of any defendants were in danger of such imminent or actual harm that preemptive judicial intervention was warranted.

I. *Public Defender v. State of Florida*, Case No. SC09-1181.

A. Background.

During late June 2008, the Public Defender for the Eleventh Judicial Circuit ("PD-11") filed a motion in one designated case in each of the twenty-one criminal divisions within its circuit, seeking prospectively to relieve PD-11 of its entire responsibility for representing all indigent defendants in these divisions and to

appoint other counsel. [R1 77, 92][1] Its "Certificate of Conflict of Interest" provided:

> that accepting further appointments of noncapital felony cases at this time would create a conflict of interest with previously appointed clients and newly appointed clients in cases other than noncapital felonies. *The underfunding of the Public Defender's office has created excessive caseloads such that PD-11 cannot ethically or legally accept additional noncapital felony cases at this time* until the noncapital felony caseload reaches an appropriate level such that PD-11 can carry out his duties in accordance with the Florida Constitution and the United States Constitution … and the Rules Regulating The Florida Bar.

[R1 91 (emphasis added)] As highlighted, PD-11's sole grounds for declining future representation were "underfunding" and "excessive caseloads." The twenty-one cases were consolidated for a hearing before the circuit administrative judge.

B. Trial Court Proceedings.

The trial court held a two-day evidentiary hearing on PD-11's motions just over a month after the motions were filed. [PR15-17 2030-2499] PD-11 presented the testimony of seven witnesses: (a) then-public defender, Bennett Brummer; (b) then-public defender-elect, Carlos Martinez; (c) Rory Stein, PD-11's general counsel, training director, and chief recruiter; (d) Stephen Kramer, a senior supervising attorney for PD-11; (e) Amy Weber, a five-year assistant public

[1] Citations to the record in SC09-1181 are [PR* #], where * is the volume number and # is the page number.

defender; (f) Rick Freedman, president of the Miami-Dade County Chapter of the Florida Association of Criminal Defense Lawyers ("FACDL"); and (g) Norman Lefstein, Professor and Dean Emeritus of the Indiana University School of Law-Indianapolis. These witnesses testified about the average caseload of PD-11's attorneys as well as the lack of funds or the difficulties in hiring new attorneys for existing PD-11 openings.

1. Caseload (versus Workload) Evidence

PD-11 is the nation's fourth largest public defender office, winning numerous awards over the years for its work. [R15 2033-34] Its leader, Mr. Brummer, stated that prior funding of PD-11 had resulted in excessive caseloads, thereby justifying the relief sought, which was a massive transfer of its non-capital felony caseload to conflict counsel. [R15 2072] He and other PD-11 witnesses opined that assistant public defenders must have been rendering ineffective assistance given the caseload numbers. [PR15 2033-34; PR15 2072; PR16 2233; PR17 2399] Brummer identified a number of aspirational felony caseload standards developed as far back as 1973, none of which are approved for use in Florida courts. These include: (a) Florida Bench/Bar Commission (200 cases/year) (1993); (b) Florida Governor's Commission (100 cases per attorney) (1976); (c)

Florida Public Defenders' Association (200/250 cases/year)[2] (2007); and

(e) National Advisory Commission on Criminal Justice Standards and Goals (150 cases/year) (1973). Brummer testified that PD-11's caseload "far exceed[s]" national and local caseload standards in each of the twenty-one criminal divisions. [PR15 2065]

Martinez opined that the annual caseload standard should be less than 150 cases due to more enhanced sentencing statutes, delays with foreign language interpretation, and the need for more time for attorneys to talk to their clients. [R16 2155-56] He stated his belief that defendants are not getting proper representation because they are simply given attractive plea offers, which they accept at first appearance to avoid returning to court. [R16 2164]

The average annual caseload statistic upon which PD-11 relied is simply the ratio of the total number of cases assigned to PD-11 in a given year (numerator) divided by the number of attorneys handling the cases (denominator). Under PD-11's approach, the total number of cases includes all cases from first appearance forward, even though the assistant public defenders who ultimately handle non-capital felonies have no involvement prior to arraignment. [PR15 2066]

[2] Over the previous five years, the Florida Public Defenders Association Long Range Program Plan, which was provided to the Legislature for its guidance, stated a felony caseload of 250, which Brummer and Martinez asserted was a typographical error and should be 200. [PR15 2086-87; PR16 2138-40]

Notably, assistant public defenders in the Early Representation Unit ("ERU"), which is funded by Miami-Dade County to decrease the jail population, are responsible for representing defendants prior to arraignment, resulting in the early resolution of literally thousands of cases. [PR16 2163-64] In determining the total number of cases, PD-11 counts each charging document separately as a case. [PR15 2103] If multiple defendants are on a charging document, each defendant is counted separately as a case, even if the defense counsel conflicted out the next day. [PR15 2104, 2106-07] Brummer conceded that PD-11's caseload could include cases where no non-ERU attorney did any work. [PR15 2105]

Under its methodology, PD-11 determined it was appointed to 45,395 cases in fiscal year 2007-08. [Ex.16, PR11 1295] Stein testified that presently, the average caseload per attorney is 436. [PR16 2246] Based on its own data, however, the total number of cases handled by PD-11 *post-arraignment* was about 45 percent of the total (20,388) in 2007-08. [*See* Ex. 16, PR11 1296] The reason is that more than 25,000 cases were resolved during the initial time period: 7,234 cases were pled at arraignment; 8,171 cases were "no-actioned"; 1,916 cases were bound down to misdemeanors; 1,118 cases were referred to pretrial intervention; 2,586 conflict cases were transferred out; and 3,982 cases were transferred to private attorneys. Id. Taking into account only the 20,388 cases that survive post-

arraignment, and the 85[3] attorneys that handle these cases post-arraignment, the average annual caseload was around 240.[4]

The State Attorney's Office for the Eleventh Circuit (SAO-11), whose requests for continuances were denied[5] and who was uncertain of its party status until the trial court's post-trial order denied it standing [PR 2532-2538], presented the testimony of Hamilton Davies, Information Systems Director for SAO-11, who did an analysis of database excerpts supplied by PD-11 for fiscal year 2006-07. He found that the total number of PD-11 cases was 35,110. [PR17 2461] Of this total, 27,124 remained with PD-11, and 15,025 (55% of those cases) closed in less than 45 days. [St. Ex. E, PR15 1991] Moreover, 960 cases closed the same day the public defender was appointed. [PR17 2462]

Finally, Professor Lefstein, an expert on ethical issues involving caseloads, testified that PD-11's current caseload is "inordinately excessive" for both felonies and misdemeanors. [R17 2399] The numbers were provided to Professor Lefstein by PD-11, and he did not weigh cases differently depending on the amount of work

[3] This number does not include the bond and ERU attorneys. [PR16 2272]

[4] As noted below, this number has likely dropped significantly due to the reduced number of cases initiated in the past few years.

[5] The law firm of Holland & Knight was counsel of record for SAO-11for less than a week, withdrawing when a conflict arose, leaving SAO-11 with little time to prepare for the expedited proceeding. PD-11 was represented by the law firm of Hogan & Hartson from the outset.

they required. [R17 2423] His professional opinion was that a lawyer should handle no more than 100 felony cases per year. [R17 2405] But did not dispute that national caseload standards are outdated or that they were not empirically based. [R17 2383][6]

2. Funding, Unfilled/Unaccepted Positions, and Anecdotes.

Brummer testified generally that he had unsuccessfully sought increased funding from the Legislature a number of times over the years leading up to this litigation. [R15 2044] He also sought withdrawal of his attorneys based on underfunding and caseload issues over his tenure. [R15 2080-81] Neither he (nor Martinez) disputed, however, that since 2004, PD-11 had turned down sixteen full-time attorney positions the Legislature offered because they felt the salaries were insufficient to attract applicants. [R15 2119, R16 2201-2202] Brummer also left some attorney positions unfilled, and instead allocated those additional funds for pay increases to other assistant public defenders. [R15 2119-2120]

Beyond caseload and funding matters, testimony was given on anecdotes and personal views regarding whether PD-11 was meeting constitutional and ethical standards. Stein, PD-11's general counsel, opined that PD-11 lacks the

[6] Rick Freedman, President of the Miami-Dade Chapter of FACDL, noted the organization's adoption of a resolution supporting PD-11's motion to withdraw. [R17 2323] He believed that private attorneys would accept overflow cases, but they would sue the state if they were not paid. [R17 2349]

resources necessary to render effective assistance under the Sixth Amendment. [PR16 2233] Kramer, a senior supervisor, stated that he did not have enough time to fully investigate all of his cases and see all of his clients. [PR16 2285]

Weber, an assistant public defender with five years experience, stated that she currently had 62 felony cases and did not have enough time to discuss all issues with her clients. [PR16 2293-95] She would like to do more of her own investigation of her cases, such as going to crime scenes. [PR16 2295] She asserted that she is not always able to meet speedy trial demands or file appropriate motions. [PR16 2297] She claimed that she does not provide competent representation, giving the example of a defendant to whom she did not convey a plea offer timely because she was in trial on another case. [PR16 2300-01]

3. The Trial Court's Order

About a month after the hearing, the trial court on September 3, 2008 issued its "Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases." [PR18 2532] As an initial matter, the court denied standing to SAO-11, yet allowed its participation as an amicus. [PR18 2534] The court reasoned that it had discretion to deny standing to SAO-11 to challenge claims of conflict of interest. [PR18 2533-34]

On the merits, the court held that PD-11 functions "under extreme and excessive caseloads" that conflict with its attorneys' duties under Florida ethical rules. [PR18 2534-35] The court did not explicitly determine what PD-11's caseload was or what standard applied. Instead, the court held that under any standard, based on the caseload testimony alone, PD-11 could not provide competent representation. [PR18 2537] The court found that C-class felony cases, which it later clarified are third degree felonies, are now "clogging the system and negatively impacting PD-11's felony attorneys' caseload." [PR18 2535-36] This class of cases makes up about 60% of all felony filings. [PR18 2535]

The court concluded that future appointments to noncapital felony cases "will create a conflict of interest in the cases presently handled by PD-11." [PR18 2537] The court permitted "PD-11 to decline to accept appointments to "C" felony cases until such time as [it] determines that PD-11 is able to resume its constitutional duties with respect to these cases." [PR18 2537] The court further ordered the Office of Criminal Conflict and Civil Regional Counsel for the Third District ("RCC-3")[7] to accept all C-class felony cases for indigent persons. [PR18 2537-38] The court held that if RCC-3 determines that it has a conflict of interest, it can move to withdraw and ask the court to appoint other counsel. [PR18 2538]

[7] RCC-3 had a staff of 22 attorneys assigned to the criminal felony division; a number of attorneys are part-time employees. [PR18 2557]

Appointed private counsel would presumably be paid by the Judicial Administration Commission under section 27.5304, Florida Statutes, at an additional cost to the state.

The court reviewed PD-11's motion ostensibly under section 27.5303(1), which limits a trial court's authority to allow the public defender to move to withdraw from a pending case. Subsection (1)(d) of that section provides that "[i]n no case shall the court approve a *withdrawal* by the public defender . . . based *solely* upon inadequacy of funding or excess *workload* of the public defender . . . ." (Emphasis added). Despite the statutory prohibition on withdrawal, the court's order permitted PD-11 to be appointed to C-class felonies prior to arraignment and then withdraw, shifting the cases to RCC-3. [PR18 2537-38] The trial court explained in response to PD-11's motion for clarification that it did not consider its prior order as allowing PD-11 to "withdraw" from C-class felonies, but instead considered its order as a temporary appointment of PD-11 to such cases only for first appearance, after which time the cases are to be transferred to RCC-3.

C. The Appeal at the Third District.

On September 5, 2008, SAO-11 filed a notice of appeal. [R18 2539-41] On September 11, 2008, the State filed an emergency motion to stay the trial court's order, contending that it was either entitled to an automatic stay or, alternatively,

that the balance of equities favored a stay. [R18 2554] The Third District granted the stay, established an expedited briefing and argument schedule, but certified this case as presenting issues of great public importance for this Court's immediate consideration. [R19 2565-67; Case No. 3D08-2272, Sept. 24, 2008 Order] This Court declined review on November 7, 2008, dismissing the action for lack of jurisdiction.

On remand, another briefing schedule was set. The Third District specifically requested the Florida Bar's Standing Committee on Professional Ethics to appear and submit a brief on five specific issues regarding what objective standards and bar regulatory rules the court should apply in its analysis. [8] The Committee declined. Oral argument was held on March 30, 2009.

Six weeks later, the Third District reversed the trial court order permitting PD-11 to decline representation in all future third-degree felony cases, finding "insufficient evidence to support" the trial court's "drastic remedy." State v. Public Defender, Eleventh Judicial Circuit, 12 So. 3d 798, 805 (Fla. 3d DCA 2009) ["Public Defender"]. Before reaching the substantive issue, the court first determined that the State is a party to all criminal cases under section 27.02, and therefore, SAO-11 had standing to participate in the trial court. Id. at 801.

[8] Order, Dec. 3, 2008 [R 2646]

Turning to the merits, the court found that PD-11 failed to prove that it was operating under an excessive number of open cases, noting that "even if the threshold for withdrawal could be defined as a certain number of open cases per attorney—and we do not believe it can be—no such figure was proven in this record." Id. The court elaborated:

> We acknowledge the difficulty in selecting a single "correct" standard and do not believe that a magic number of cases exists where an attorney handling fewer than that number is automatically providing reasonably competent representation while the representation of an attorney handling more than that number is necessarily incompetent. … Moreover, even if such a number could be divined, it would certainly only have meaning when applied to an individual attorney and not an office as a whole.

Id. at 801-02. Instead of withdrawal in the aggregate, "meaningful individualized information" is required by a motion for withdrawal; a determination of whether counsel is competent "must occur on a case-by-case basis." Id. at 802. That determination cannot simply be "based on caseload averages and anecdotal testimony." Id. at 803.

The Third District distinguished this Court's decision permitting aggregate withdrawal in another case where the "relief was granted only after individual assistant public defenders had first been removed from representation and a backlog of cases had caused the delayed filing of appeals for almost all defendants in the Public Defender's Office." Id. 12 So. 3d at 802 (citing In re Public

Defender's Certification of Conflict & Mot. to Withdraw Due to Excessive Caseload & Mot. for Writ of Mandamus, 709 So. 2d 101 (Fla. 1998)).

Similarly, the Rules Regulating the Florida Bar, which PD-11 asserted its attorneys violated because of their caseloads, were deemed by the court to only "apply to attorneys, individually, and not the office of the Public Defender as a whole." Id. at 803. Were it to view the rules otherwise, a court would lose sight of the individual attorney's skills and expertise as well as the unique features of an individual case. Id.

Further supporting the Third District's determination was section 27.5303(1)(d), which prohibits withdrawal solely based on excessive "workload" (not caseload). Id. at 804. To withdraw under the statute, the Third District concluded that "individualized proof of prejudice or conflict other than excessive caseload" is required. Id. at 805. The Third District noted that the trial court's distinction between the withdrawals prohibited by the statute and PD-11's motion seeking to avoid future appointments was a mere circumvention of the plain language of the statute.[9] Id.

[9] Additionally, "given that the trial court's order requires PD-11 to accept appointments at first appearances and continue representation until arraignment, it is fanciful to suggest that the subsequent appointment of alternate counsel is anything other than withdrawal." Id. at 804.

The Third District noted that PD-11 accepted almost one million dollars for sixteen new full-time positions but did not fill them, using the funds for pay raises for current employees. Id. at 805. It concluded that while it was sympathetic to the problem of inadequate funding, "it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function." Id. at 805 (quoting In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1136 (Fla. 1990) ["1990 Public Defender"]. The Third District reversed the trial court's order, and held that an assistant public defender must prove prejudice or conflict separate from excessive caseload before withdrawal may be permitted. Id. at 805-06.[10]

PD-11 asked the Third District to certify a question of great public importance, which the court declined to do. [PR20 2692] Following jurisdictional briefing, this Court exercised its discretionary jurisdiction over the Third District's decision but stayed briefing pending resolution of jurisdiction in the Bowens case.

II. *Bowens v. Florida*, Case No. SC10-1349.

A. Background.

[10] Judge Shepherd specially concurred, pointing out that "not a single client of PD-11" objected to representation "on anything close to the grounds being urged by PD-11 to shift representation outside its offices." Id. at 806 n.10.

In August 2009, a few months after the Third District's opinion in Public Defender, PD-11 brought its first individual test case that, if successful, would serve as its model for larger scale withdrawal. PD-11 specifically and strategically chose Bowens's case because it was believed to be an exemplar of the circumstances its attorneys confronted. [A16 33] Assistant Public Defender Jay Kolsky moved to withdraw from his representation of Antoine Bowens,[11] who was facing a first-degree felony charge for the sale of cocaine within 1000 feet of a school. [A2, A7][12] Kolsky, along with PD-11, asserted that his caseload of 164 third-degree felony cases prevented him from providing effective, competent, diligent, and conflict-free representation to Bowens. [A2 1] The motion also asserted that section 27.5303(1)(d) was unconstitutional. [A2 9] In the affidavits attached to the motion, Kolsky swore that he was not providing effective assistance of counsel due to his excessive caseload. [A2 Ex. A]

[11] Bowens, who has since been free on bail, has continued his trial date many times, which is currently scheduled for March 26, 2012.

[12] Citations to the record in SC10-1349 are [BR* #] where * is the volume number and # is the page number. Citations to the appendix to the State's petition for certiorari at the Third District, which, according to the index, are bound separately from the record are [A* #] where * is the exhibit number and # is the page number.

B. Trial Court Proceedings.

The parties stipulated that during 2008-2009, Kolsky handled a total of 736 felony cases, including trial and probation violation cases involving 637 separate clients. [A11] Only two cases went to trial; the remaining cases were either closed due to pretrial diversion or intervention, plea, nolle prosse, court dismissal, or termination of probation taken; some were taken over by other counsel. Id.

PD-11 met with Bowens to obtain an affidavit, in which he stated he had spoken to Kolsky about the motion to withdraw and, although he was "impressed and like[d] Mr. Kolsky," he wanted the trial court to provide him with another attorney "solely because Mr. Kolsky has too many cases to represent [him] properly." [A7 1] Bowens believed that he has "significant defenses to the charge filed" against him, that "the truth of the statements from the prosecution's witnesses should be tested immediately," and that further delay would "significantly prejudice" his case. [A7 2] Nothing in his affidavit indicated that Bowens wanted a speedy trial [A7], nor does the record reflect PD-11 did anything of consequence to prepare his case for trial.[13]

[13] Moreover, despite meeting with Bowens and obtaining his affidavit, PD-11 obviously had the opportunity to explore potential defenses and strategies with him but did not.

Because Bowens requested that PD-11 be discharged as his counsel, the trial court held an ex parte hearing under Nelson v. State, 274 So. 2d 256 (Fla. 4th DCA 1973), to determine if ineffective assistance of counsel existed that required the appointment of new counsel. [A8] After the hearing, SAO-11 inquired of the court whether it was going to grant the motion to discharge. The trial court stated that "based on what I have seen so far. [sic] I don't think there is you know sufficient grounds." [A8 12]

Two weeks after the Nelson hearing, the trial court held a three-day evidentiary hearing. [A16; A17; BR2 197 (Ex. 34)] At that hearing, Kolsky testified that his excessive caseload prevented him from meeting the rules and standards for counsel set by the Florida Bar. [A16 8] He could not, however, explain adequately how he chose to devote less attention to Bowens versus other clients. [A16 47, 48] He estimated that he could handle 65-75 pending cases at one time, as opposed to the 125-130 pending cases for which he was responsible at the time of the hearing. [A16 8] Kolsky explained that he was not providing ineffective assistance of counsel, but that he was providing "less effective" assistance with his current caseload. [A16 20 ("I would not say ineffective, I would say less effective.")] He said he had not yet had an adequate interview with Bowens, investigated the case, taken depositions, or drafted any motions. [A16 17-18]

Rick Freedman, Carlos Martinez, and Norman Lefstein also testified at the hearing, each maintaining that Kolsky's caseload was too high for him to render effective and competent counsel to his clients. [A16 57; A16 69; A17 17] Two assistant state attorneys who had appeared against Kolsky in recent months testified that he was a tough opponent and prepared. [A17 42, 58, 59] One noted that Kolsky was ready for trial 99% of the time. [A17 40]

Following the hearing, the trial court determined that section 27.5303(1)(d) was constitutional because it permits the court to consider excessive caseload as a non-exclusive factor in considering an attorney's motion to withdraw. [A1 8] The trial court, however, granted the motion to withdraw, concluding that Kolsky had demonstrated sufficient prejudice to the preparation of Bowens's case to permit withdrawal under Public Defender. [A1 9-10] The court determined that Kolsky's caseload had a detrimental effect on his ability to competently and diligently represent and communicate with all of his clients concurrently and that Kolsky had done virtually nothing to prepare Bowens's case. Id.

C. Certiorari at the Third District.

The Third District granted the State's petition for writ of certiorari and reversed the trial court order. State v. Bowens, 39 So. 3d 479, 480 (Fla. 3d DCA 2010). The Third District found that the order granting the motion to withdraw

departed from the essential requirements of the law, concluding "there was no evidence of actual or imminent prejudice to Bowens' constitutional rights." Id. at 481. The court continued:

> Prejudice means that there must be a real potential for damage to a constitutional right, such as effective assistance of counsel or the right to call a witness, or that a witness might be lost if not immediately investigated. And this is the critical fact—the PD11 has not made any showing of individualized prejudice or conflict *separate from* that which arises out of an excessive caseload. Neither the PD11 nor the trial court has demonstrated that there was something substantial or material that Kolsky has or will be compelled to refrain from doing.

Id. The need to file a continuance due to a heavy caseload, the Third District noted, did not create the requisite prejudice. Id. at 482. The court therefore granted the petition for writ of certiorari and quashed the portion of the trial court's order granting Kolsky's motion to withdraw. Id.

The Third District summarily denied Bowens's cross-petition for certiorari, which challenged the constitutionality of section 27.5303(1)(d). Id. The court stated that it "agree[d] with the trial court's analysis of the constitutionality of the statute." Id. Because Public Defender was pending in this Court, the Third District certified the following question:

> Whether section 27.5303(1)(d), Florida Statutes (2007), which prohibits a trial court from granting a motion for withdrawal by a public defender based on "conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client," is unconstitutional as a violation of an indigent client's right to effective assistance of counsel and access to the courts, and a

> violation of the separation of powers mandated by Article II, section 3 of the Florida Constitution as legislative interference with the judiciary's inherent authority to provide counsel and the Supreme Court's exclusive control over the ethical rules governing lawyer conflicts of interests?

Id. Notably, the quoted language in the certified question is not from section 27.5303(1)(d), which states that "[i]n no case shall the court approve a withdrawal by the public defender … based *solely* upon inadequacy of funding or excess workload of the public defender. …" § 27.5303(1)(d) (emphasis added). Instead, the quoted language is from a sentence in Public Defender that summarized the types of workload conflicts that are *absent* from the Uniform Standards for Use in Conflict of Interest Cases. 12 So. 3d at 804.

Following jurisdictional briefing, and despite the State's suggestion that the case was moot because Kolsky no longer represents Bowens, this Court accepted jurisdiction and consolidated Bowens with Public Defender.

SUMMARY OF ARGUMENT

The central issue in these consolidated cases is not whether public defenders handle a large number of cases (they do) or whether budget constraints and increases in crime in years past caused increasing workloads in the criminal justice system (they did). Rather, the issue is by what objective standards and burdens of proof a trial court determines that the constitutional rights of indigent criminal defendants to an adequate defense are imperiled to such an extreme degree that judicial intervention is warranted at the early stages of representation, long before the conclusion of the trial and appellate litigation processes that address ineffectiveness of counsel issues. Further complicating the issue is the unique two-tiered structure of the public defender system in Miami-Dade County, one that is utilized nowhere else in Florida. Adding further complexity is that much time has passed since the first trial court order in 2009; crime rates and caseloads have declined significantly, making the trial court's analysis and conclusions even more doubtful.

The Third District reviewed two orders. The first – unprecedented in its scope and effect – relieved the fourth largest public defender office in the nation (the largest in Florida) of approximately 60 percent of its non-capital felony cases based on allegations of underfunding and high caseloads. The second, relying on the Third District's decision reversing the first, relieved one assistant public

defender from further representation in a single case. Common to both cases was the petitioners' failure to prove any demonstrable prejudice or imminent harm to the defendants' constitutional right to effective representation.

The Third District's approach to resolving these types of situations is consistent with applicable statutes and previous excessive caseload cases from this Court; it also strikes the proper balance between judicial administration and indigent defendants' rights.

First, it minimizes separation of powers concerns by preserving the legislative structure for indigent defense, specifically the language of section 27.5303(1)(d), Florida Statutes, which states that courts must not allow public defenders and regional conflict counsel to withdraw from cases "based *solely* upon inadequacy of funding or excess workload of the public defender or regional counsel." (Emphasis added.) What the statute forbids is precisely what occurred in the first trial court order, which transferred responsibility for 60 percent of PD-11's felonies to the regional conflict counsel office based on underfunding/caseload when the Legislature did not intend nor fund that office to handle conflicts arising solely from claims of underfunding or excessive workload.

The Third District gave deference to the Legislature's judgment, which merely prohibits withdrawal based *solely* on claims of inadequate funding or excessive workload; the statute does not foreclose—as a last resort after a finding

that constitutional rights of indigent criminal defendants are being prejudiced or in imminent danger—a carefully crafted judicial relief. That did not occur in the trial courts below, which is why the Third District's approach is the most workable. It requires that a public defender's office must first exhaust other avenues of relief, including all operating, organizational, and managerial efficiencies such as cost-reductions, before resorting to the court system for relief. It is also balanced because PD-11's suggested approach, which would have authorized withdrawal in *all* of its non-capital felony cases (such relief would have constituted an appreciably more significant reduction of its caseload than was ultimately granted by the trial court, i.e., permission to decline appointments to all "C" felony cases—or, 60% of its caseload) simply upon the unilateral filing of a motion alleging excessive caseload, vests far too much discretion in public defender offices and will unquestionably result in significant costs, burdens, and unfunded responsibilities being shifted to others in the criminal justice system without the realization of meaningful benefits overall.

Section 27.5303, when read properly, does not prohibit a court from granting remedial relief where constitutional rights are jeopardized or subject to imminent abuses. Rather, the statute only prohibits withdrawal when the *sole* grounds are excessive workload or underfunding. Nor is the statute unconstitutional as applied in Bowens where the assistant public defender (who no longer represents Bowens)

presented insufficient evidence for withdrawal. The evidence showed that the assistant public defender sought a continuance, waiving the state speedy trial rule, because he claimed insufficient trial preparation time. But it was not asserted, let alone proven, that this delay had or would have any detrimental effect, constitutional or otherwise, on his client's rights. Multiple continuances for Bowens have been sought and granted over the two-and-a-half years this case has been pending.

Second, the Third District's approach is consistent with Florida caselaw that generally requires a showing of actual prejudice to real clients to support withdrawal or transfers of cases from a public defender. Anecdotal beliefs about the quality of indigent representation and speculation about Bar rule violations are inadequate substitutes for a showing of actual or imminent prejudice to the constitutional rights of specific indigent criminal defendants. Courts should not allow relief when a record contains no evidence (beyond claimed underfunding and caseload data) of actual or imminent Sixth Amendment violations. Here, no proof of such prejudice was made; indeed, no evidence was provided that any PD-11 attorney has ever provided ineffective representation to its clients or that the Bar has disciplined a PD-11 attorney for ineffectiveness as a direct result of excessive caseload.

Third, the Third District's approach recognizes that the average caseload methodology is an outdated and inadequate measure alone for determining whether the Sixth Amendment rights of indigent defendants are being prejudiced. Average caseloads, by themselves, provide little meaningful guidance in resolving the complex trial-level problems presented in these cases with a uniquely-structured public defender office. Like many statistics, they tend to be one-dimensional measurements that lack meaning or depth. Moreover, no objective guidepost exists for what average caseload level triggers a constitutional problem. Trial courts are left to guesswork, not knowing whether 100, 200, 250, or some other number is the proper standard. Indeed, the trial court in Public Defender made no finding on the average caseload statistic for PD-11, concluding only that it is "excessive" and beyond recognized standards. The malleability of this standard is itself problematic, particularly when it cannot explain or predict whether constitutional rights are actually prejudiced. Evidence of actual workloads or weighted caseload data provide greater evidence and explanatory power, and should be considered (along with other factors) to establish greater objectivity and accountability in this process. Indeed, the adoption of meaningful standards, much like those developed for determining the need for additional judges, provide useful benchmarks and methodologies.

In contrast to the Third District's approach, PD-11 argues that a public defender office should be able to withdraw by merely filing a certification of conflict that is deemed presumptively valid without meaningful critical or adversarial examination. This view of the law and process is outmoded in light of the statutory structure the legislature has created; it is also inconsistent with the caselaw that requires a showing of real and imminent prejudice to the constitutional right of effective assistance of counsel. Moreover, to ensure that such claims are subject to adversarial testing, the state attorney, as a party to all criminal actions, must have standing in these cases.

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In conclusion, confidence in the indigent criminal defense system is enhanced when protection of constitutional rights is objectively justified and based on accepted standards of accuracy and accountability, particularly given the Legislature's recent overhaul of the system and the significant decline of caseloads in recent years. Any remedy must respect separation of powers principles, and be both incremental and proportionate to the magnitude of the problem. The lack of objective caseload standards and the lack of a showing of actual or imminent prejudice to indigents' constitutional rights undermine this confidence, as does a ruling that state attorneys lack standing to participate in the process. Because the Third District's approach properly balances separation of powers principles, the

constitutional rights of indigent defendants, and the need for orderly judicial administration, this Court should affirm the decisions in Public Defender and Bowens.

ARGUMENT

I. PD-11 presented insufficient evidence of actual or imminent constitutional violations to support en masse withdrawal.[14]

A. Withdrawal due to claimed workload conflicts is permissible only when actual or imminent harm to clients' constitutional rights to effective counsel is proven.

Petitioners seek unprecedented and far-reaching relief: a decision of this Court that requires—whenever a public defender claims a conflict due to an excessive caseload—judicial approval of withdrawal of that office from its caseload. In PD-11's case, that relief—as ordered by the trial court— withdrawal en masse from 60% of its cases.

Our judicial system, however, does not presume constitutional violations arising from claims of a lack of effective representation: a violation of the constitutional right to effective counsel must be proven with a showing of prejudice. *See* U.S. v. Gonzalez-Lopez, 548 U.S. 140, 147 (2006) ("a violation of the Sixth Amendment right to *effective* representation is not 'complete' until the

[14] **Standard of review:** Because the questions presented involve the interpretation and application of section 27.5303(1)(d), Florida Statutes, which is a purely legal issue, review is de novo. Marrero v. State, 71 So. 3d 881, 887 (Fla. 2011). Challenged "statutes come clothed with a presumption of constitutionality and must be construed whenever possible to effect a constitutional outcome." Lewis v. Leon Cnty., 73 So. 3d 151, 153 (Fla. 2011).

defendant is prejudiced.").[15] That is why the Third District's approach is justified: withdrawal based on claimed ineffective representation arising from an excessive workload is permissible only when it is shown that actual harm to defendants' constitutional rights to effective representation exists or is imminent.

Likewise our judicial system does not halt trials or the indigent defense appointment process when an alleged constitutional violation of the right of effective counsel occurs and implement some prospective and potentially disruptive or costly remedial measure. Instead, the system has in place many structural and constitutional protections (such as the right to speedy trial) to ensure the judicial process moves forward with the expectation that if and when an error allegedly occurs, curative measures will be applied, at trial or on appeal, to either correct those errors or render them harmless. Direct appellate review as well as post-conviction review exists for this important purpose. Art. I, § 16, Fla. Const.; Art. V, § 4(b)(1), Fla. Const.; Fla. R. Crim. P. 3.850.

For these reasons, PD-11's approach is misguided and its use of an average office-wide caseload statistic ill-advised because it sheds little light on the workload burden of any particular attorney, let alone how that burden affects the constitutional right to effective counsel of indigent clients. It is the violation of

[15] The Court noted that depriving a defendant of his counsel of choice is prejudicial itself, but that this "right to counsel of choice does not extend to defendants who require counsel to be appointed for them." 548 U.S. at 151.

those constitutional rights that is important and the primary consideration in whatever withdrawal standard is established.

1. Section 27.5303(1)(d), Florida Statutes, does not permit withdrawal based solely on excessive caseload.

PD-11 seeks relief that conflicts with section 27.5303(1)(d), Florida Statutes, which states: "In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel *based **solely** upon inadequacy of funding or excess workload* of the public defender or regional counsel." § 27.5303(1)(d), Fla. Stat. (emphasis added). Because the statute facially prohibits withdrawal based *solely* on claims of excessive workload, public defenders (and regional conflict counsel) must base their withdrawal motions on some actual harm beyond mere claims of overload conflicts. As the Third District recognized, "absent individualized proof of prejudice or conflict other than excessive caseload," a motion to withdraw based solely on excessive caseload "is defeated by the plain language of the statute." Public Defender, 12 So. 3d at 805.[16]

This Court recently applied similar analysis in concluding that section 27.5303(1)(a)—in conjunction with other portions of the statutory conflict of interest provisions—allows both trial and appellate courts to review withdrawal

[16] To be accurate, the Third District should have used the statutory term "workload" rather than "caseload."

motions of public defenders and to inquire into their adequacy. In Johnson v. State, 2012 WL 16692, at *5 (Fla. Jan. 5, 2012) the Fourth District had concluded to the contrary, but this Court disagreed and based its conclusion on the "history of the statute" and its "plain language" as well as the "Legislature's stated intent in amending" the statute. Id. at *5-7. No member of the Court expressed any concern that the Legislature by statute—versus this Court by rule—had established the framework for handling alleged conflicts of interests and withdrawal requests of public defenders.

Indeed, subsection (1)(a) was enacted partly in response to this Court's cases involving the public defender system and claims of high caseloads or underfunding, primarily in the appellate context. This case history, along with the Court's exhortation for a long-term solution to the structure and funding of indigent representation in criminal cases, *see* In re Public Defender's Certification of Conflict, 709 So. 2d at 104, resulted in the Legislature studying[17] and substantially changing the structure and funding of Florida's criminal defense system in 1998. Concurrently, the electorate passed a constitutional revision that

[17] The Florida Senate expended considerable effort studying the cost-effectiveness of public defender systems and the old conflict system/appellate overload. *See* Fla. S. Committees on Crim. Justice, Judiciary, & Gov't Reform & Oversight, How to Promote Cost-Efficiencies in the Public Defender System Through Legislation (Dec. 1996); Fla. S. Comm. on Crim. Justice, Review of the Public Defender Conflict System & Appellate Overload (Nov. 1998).

shifted funding of due process costs (including payment of conflict counsel) for indigent defendants from counties to the state effective in 2004. *See* Art. V, §14(c), Fla. Const. To implement its changes, the Legislature passed new laws at issue here that explicitly addressed public defender conflicts of interest.

In 1999 the Legislature amended section 27.53(3) to provide that courts "shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest…." Ch. 99-282, § 1, Laws of Fla. This change abrogated Guzman v. State, 644 So. 2d 996 (Fla. 1994), which held that once the public defender certified a conflict, the trial court was required to appoint other counsel. *See* Snelgrove v. State, 921 So. 2d 560, 567 n.11 (Fla. 2005) (finding that Guzman is no longer good law).

In 2003, this portion of section 27.53 was eliminated and new language was established in section 27.5303. *See* Ch. 2003-402, § 19, Laws of Fla. Effective July 1, 2004, section 27.5303 established procedures for when and how a public defender may address conflicts of interest. It distinguishes ethical conflicts (such as representing two co-defendants) from "overload" conflicts based on inadequate funding or excessive workload, the latter being prohibited grounds for withdrawal under subsection (e).[18] As to ethics-based conflicts, subsection (1)(a) permits a

[18] In addition, section 27.5303(1)(e), Florida Statutes, provides that "[i]n determining whether or not there is a conflict of interest, the public defender or

public defender to withdraw, but only upon the court's inquiry into the adequacy of the public defender's representations about a conflict of interest. § 27.5303(1)(a), Fla. Stat. Overload conflicts were addressed in section 27.5303(1)(d), as noted above.

The relief PD-11 seeks would do precisely what the statute forbids: transfer thousands of cases based *solely* on underfunding and excessive caseload. As the Third District held, PD-11 and the trial court's efforts to distinguish the statute because PD-11 sought to decline rather than withdraw from representation are unavailing, particularly given PD-11's unique structure. Public Defender, 12 So. 3d at 804.

First, as set out in the trial court's order, PD-11 must actually withdraw from its third-degree felony cases because its ERU attorneys accept appointments at first appearances and represent clients until arraignment. Because PD-11 accepts appointments at first appearance, it must actually withdraw from those cases, thereby falling within the statute's language. Ignoring or redefining "withdrawal"

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regional counsel shall apply 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." The Uniform Standards address only ethics-based conflicts and do not mention "overload" conflicts based on funding or workload issues. *See also* Johnson v. State, 2012 WL 16692, at *3 (discussing Uniform Standards as they apply to conflicts involving co-defendants).

does not cure the fatal defect of contravening the statute's intent. *See* id., at 804 ("it is fanciful to suggest that the subsequent appointment of alternate counsel is anything other than withdrawal").

PD-11 claims that its "temporary" appointment at first appearance for all new third-degree felonies is "necessary" under Florida Rule of Criminal Procedure 3.130(c)(1)'s narrow exception. [IB 57-58] Its position is insupportable under the rule, the applicable statutes, and caselaw. As the Third District noted in 1998, rule 3.130(c)(1) and section 27.51(2), Florida Statutes (which states that a "court may not appoint the public defender to represent, even on a temporary basis, any person who is not indigent"), make "clear that the indigency determination must be made at the first appearance." Office of Public Defender v. State, 714 So. 2d 1083, 1084 (Fla. 3d DCA 1998). The necessity of a limited appointment is to facilitate the initial determination of whether a defendant is indigent (e.g., defendant cannot fill out indigency affidavit or speaks a foreign language). Id. at 1085. The temporary appointment of PD-11, however, was not done to fulfill the narrow task of determining indigency; instead, it was done on an across-the-board basis for expedience. Limited appointment or not, it is clear that PD-11 must withdraw to comply with the trial court's order.

Second, if PD-11 is correct, then the statute is easily circumvented by motions couched in terms of relief from future appointments when, in fact, a public

defender is effectively withdrawing from its statutory responsibilities. Section 27.40(1), Florida Statutes, mandates that the public defender "shall" be appointed to represent indigent defendants. Section 27.51(1) states, "[t]he public defender shall represent, without additional compensation, any person determined to be indigent under s. 27.52 … ." The only way PD-11 can remove itself from a case is to withdraw; any other interpretation is a mere exercise in semantics, upon which the statute may not be circumvented. Gannett Co., Inc. v. Anderson, 947 So. 2d 1, 8 (Fla. 1st DCA 2006) (noting that statutory protections "cannot be undone by engaging in a semantic exercise."). As the Third District found, to permit this circumvention would render the statute meaningless. Public Defender, 12 So. 3d at 804.

Contrary to the initial brief's arguments, the statute does not contravene rules of this Court; it does not propose any new or different ethical requirements. Indeed, the statute does not prohibit using excessive caseload as a factor for withdrawal, as the Third District recognized. *See* Public Defender, 12 So. 3d at 802 ("To be sure, whenever an attorney is burdened with an excessive caseload, there exists the possibility of inadequate representation."). If an attorney is operating under a workload so excessive that it can be shown that a violation of the ethics rules has occurred, jeopardizing the constitutional rights of a client to effective representation, withdrawal would be permitted under the statute. The statute

anticipates review of allegations that workload may interfere with ethical obligations; it does not alter ethical obligations or the means by which attorney conduct is regulated. What the statute does not allow is for a public defender's unilateral certification that caseload is excessive (or funds inadequate) to be the sole ground for withdrawal. As the Third District correctly concluded, the relief sought departs from the plain language, meaning, and purpose of section 27.5303.

2. The requirement of actual prejudice to constitutional rights is consistent with this Court's caselaw on withdrawals.

The Third District's approach, which requires a showing of actual or imminent harm to the constitutional right of effective representation, is consistent with this Court's cases on the topic. A uniform commonality in cases that have allowed withdrawal based on claims of excessive workload is a demonstration of actual prejudice to constitutional rights. For example, in 1990 Public Defender, 561 So. 2d at 1138, this Court held that judicial intervention was warranted due to a massive backlog of criminal appeals that resulted in constitutional rights "being ignored or violated." The standard it set was a stringent one: withdrawal is permissible where an appellate backlog "is so excessive that *there is no possible way*" cases can be handled in a timely fashion. Id. (emphasis added). Reflecting the urgency of the situation, and the ongoing violation of constitutional rights

primarily due to many incarcerated appellants serving their full sentences[19] without the filing of timely appellate briefs, this Court went so far as to say it "will entertain motions for writs of habeas corpus" from indigent appellants and, if appropriate, it "will order the immediate release pending appeal of indigent convicted felons who are otherwise bondable." Id. at 1139 ("There can be no justification for their continued incarceration during the time that their constitutional rights are being ignored or violated.").

Similarly, in In re Public Defender's Certification of Conflict, 709 So. 2d at 102, the Court faced a "major crisis" involving hundreds of appeals by criminal defendants who had already served their prison time or completed their probation before their appellate briefs had been filed. The prejudice in these cases was palpable and proven: the appeals of these indigent defendants bordered on becoming meaningless exercises due to the lack of any representation whatsoever. *See also* Hatten v. State, 561 So. 2d 562, 563, 565 (Fla. 1990) (ordering filing of

[19] This concern was even greater in 1990 because gain time allowances, which are no longer available, substantially reduced many sentences making it possible that sentences of 5+ years could be moot for failure to file timely appellate briefs. *See, e.g.*, In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d at 1138 (observing that if sufficient funds were not appropriated for representation of indigents, courts with jurisdiction to "entertain motions for writs of habeas corpus from those indigent appellants whose briefs are delinquent sixty days or more, and upon finding of merit to those petitions, will order the immediate release pending appeal of indigent convicted felons who are otherwise bondable").

appellate brief within 30 days, or withdrawal, where all parties agreed that defendant's rights were being violated due to untimely appeal).

Likewise, in 1994 this Court in In Re Certification of Conflicts in Motion to Withdraw Filed By Public Defender of the Tenth Judicial Circuit, 636 So. 2d 18 (Fla. 1994) ["1994 Public Defender"], upheld the Second District's methodology, which involved the appointment of a retired judge to oversee an evidentiary hearing and submit findings and conclusions on a range of detailed issues involving the operations of the public defender's office (including productivity, briefing and staffing efficiencies, etc.). This detailed inquiry into these operations and practices was warranted and objective, and not an interference with the operations of the public defender's management of his office. Id. at 22-23.

Common to each of these cases is a demonstration of actual prejudice to constitutional rights. Public defenders seeking withdrawal in each case could point to palpable harm to their clients' constitutional rights. Petitioners err in reading this caselaw to conclude that no prejudice to constitutional rights must be established, particularly for the expansive relief sought.

The only other case of this Court that addresses harm caused by excessive caseload is over thirty years old and based on now defunct statutes.[20] In 1980, the

[20] This Court's cases, excepting Johnson, predate the Legislature's restructuring of the provision of criminal counsel for indigents, making it critical for separation of

Court considered whether public defenders could be relieved of heavy trial and appellate caseloads after two district courts had split on the issue.[21] It concluded that trial courts had broad discretion under the then-applicable statute, section 27.53(2), to appoint private counsel to relieve a public defender's excessive caseload under appropriate circumstances. *See* Escambia Cnty. v. Behr, 384 So. 2d 147, 149 (Fla. 1980). The Court's holding, particularly in light of its subsequent decisions and the latter-enacted section 27.5303(1)(d), does not foreclose the standard set by the statute and the Third District's decision. Also of note, in Behr, the public defender sought withdrawal from only six non-felony defendants' cases, and in Baker, withdrawal was sought from one appellate proceeding, as opposed to the thousands of felony cases at issue here.

Indeed, the legislative history of section 27.5303 reveals that the statute's intent was consistent with this caselaw requiring a showing of prejudice:

> *As is current law*, the motion to withdraw may not be granted if the asserted conflict is not prejudicial to the indigent person. Additionally, the court may not grant such motion if the grounds for withdrawal are insufficient, or if solely based on inadequacy of funding or excess workload.

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powers purposes to fully consider the role of the Legislature in restructuring and funding indigent criminal defense.

[21] State ex. rel. Escambia Cnty. v. Behr, 354 So. 2d 974, 975-76 (Fla. 1st DCA 1978); Dade Cnty. v. Baker, 362 So. 2d 151 (Fla. 3d DCA 1978); *see also* . Schwartz v. Cianca, 495 So. 2d 1208 (Fla. 4th DCA 1986) (certifying question).

Fla. S., SB 34-A (2003), Staff Analysis 13 (May 13, 2003) (emphasis added). This staff analysis was for a related bill that ultimately enacted section 27.5303, which also prohibited withdrawal based solely on excessive workload.

This caselaw also reflects a strong adherence to the separation of powers principle that judicial relief must be a last resort upon a showing of urgent necessity. In each case, the Court was presented with evidence of real injury to indigent defendants, and did not allow withdrawal based on speculation that constitutional or ethics rule violations might occur.

This approach is consistent with other states that require a showing of specific harm before permitting withdrawal based on excessive caseloads. For example, in Platt v. State, 664 N.E.2d 357 (Ind. Ct. App. 1996), the court rejected a claim that an entire public defender system denied indigents the effective assistance of counsel. The court reasoned that because no showing was made that the outcome of any criminal proceeding was unreliable, and thus no Sixth Amendment violation was shown, the claim was not ripe. Id. at 363. The court further noted the absence of irreparable injury because the defendant had an adequate remedy at law via various post-conviction options for ineffective assistance of counsel. Id. at 363-64. The reasoning in this case and others[22] is

[22] *See also* Kennedy v. Carlson, 544 N.W.2d 1, 8 (Minn. 1996) (no justiciable claim absent actual or imminent injury showing of "injury in fact" to client's

consistent with the standards for injunctive relief, which require that actual or imminent injury be demonstrated, along with the unavailability of legal remedies.[23]

This approach to claims of workload conflicts contrasts with cases addressing ethical conflicts of interest, such as representing co-defendants. With the latter type of conflict, a defendant must first show an actual 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. Even where the lack of counsel is so obvious that harm is presumed,

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constitutional rights based on underfunding); People v. Dist. Ct. of El Paso Cnty., 761 P.2d 206, 207, 210 (Colo. 1988) (counsel not inherently ineffective pre-trial because Sixth Amendment requires showing that performance was so substandard that it prejudiced the outcome of trial); State ex rel. Stephan v. Smith, 747 P.2d 816, 831 (Kan. 1987) ("Simply because the system could result in the appointment of ineffective counsel is not sufficient reason to declare the system unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually. . ."). Even in states where courts have found system-wide violations of the Sixth Amendment right to counsel, the courts have required individualized examinations of each case before permitting withdrawal or determining counsel ineffective. *See, e.g.*, State v. Peart, 621 So. 2d 780, 788, 791 (La. 1993) (although system did not always provide constitutionally-guaranteed effective assistance of counsel, trial courts must examine indigent defendants' claims case by case, because "any inquiry into the effectiveness of counsel must necessarily be individualized and fact-driven").

[23] *See* Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) (plaintiffs did not have to show prejudice under Strickland in class action challenge to Georgia's indigent defense system, but had burden to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law"), appeal dismissed sub nom. Luckey v. Miller, 976 F.2d 673 (11th Cir. 1992). Though relied on by PD-11 and its amicus briefs, Luckey has never been cited by any Florida court in the ensuing near quarter of a century since its release.

it is still necessary to look to the "surrounding circumstances" of the particular case and the attorney's skills and abilities before permitting withdrawal. United States v. Cronic, 466 U.S. 648, 664 (1984). And prejudice is presumed in these actual conflict cases because it is apparent, on the face of the circumstances, how a lawyer's interest could be divided by representing co-defendants. *See* Mickens v. Taylor, 535 U.S. 162, 175 (2002) (noting "the high probability of prejudice arising from multiple concurrent representation" and that "[n]ot all attorney conflicts present comparable difficulties").

In contrast, it is far from clear for workload conflicts whether a particular office's or lawyer's level of representation raises constitutional concerns. In some circumstances, depending on the type of case and experience of the particular lawyer, the addition of one complex and highly unremunerative case may raise concerns. *See* Hagopian v. Justice Administrative Comm'n, 18 So. 3d 625, 640 (Fla. 2d DCA 2009) (withdrawal allowed because RICO prosecution was so complex and compensation so minimal that practice of involuntarily appointed attorney would fail). In other situations, the ebb and flow of literally hundreds of cases in a multi-attorney, dual-track public defender's office make meaningful analysis of claimed prejudice exceedingly difficult, if not impossible. For these reasons, actual individualized harm must be shown before withdrawal is permitted.

3. Potential violations of Bar ethics rules are a non-dispositive factor in reviewing withdrawal motions.

PD-11 emphasizes that its attorneys owe the same duties of competence, diligence, and communication to their clients under the Florida Rules of Professional Conduct as do other members of the Florida Bar. The fact that attorneys may be overworked and have to juggle their clients' matters on a daily basis, however, does not automatically render an attorney ineffective or in violation of the ethics rules; government and private counsel do not withdraw from cases whenever financial and time constraints limit what they can accomplish for clients. There must instead be a specific demonstration that constitutional rights have been harmed to justify the type of judicial intervention at issue in these cases. Absent proof that a constitutional "tipping point" has been reached, and that harm to the right of effective representation is proven or imminent, no basis exists for a court to allow withdrawal due solely to claims of excessive caseloads.

The rules provide only general guidance and principles, none focusing squarely on the unique situation presented; none establish objective standards for concluding that the constitutional rights of indigent defendants to effective representation are prejudiced to such a degree that the mass transfer of cases from a public defender's office is warranted. The rules cannot be read in isolation from the caselaw addressing indigent defense; nor should they be read without

consideration of the statutory structure the Legislature has established for the provision of indigent defense in criminal cases. Rather, the entire body of law—statutes, rules, and constitutional provisions—must be considered together in making the momentous decision of whether a court will exercise its judicial powers.

The Rules of Professional Conduct never have been, on their own, a basis for relief due to, or irrefutable proof of, a Sixth Amendment violation. In its analysis of ineffective assistance of counsel claims, the United States Supreme Court noted that the prevailing professional standards for determining what is a reasonable amount of cases "are only guides," and that no unified set of rules can account for the myriad situations that might arise. Strickland v. Washington, 466 U.S. 668, 688-89 (1984) (citation omitted). The Court also noted that the purpose of the effective assistance guarantee "is not to improve the quality of legal representation. ... The purpose is simply to ensure that criminal defendants receive a fair trial." Id. A few years later, the Court stated that "the breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." Nix v. Whiteside, 475 U.S. 157, 165 (1986). The goal of Sixth Amendment cases, even when prejudice is presumed, "is not to enforce the Canons of Legal Ethics, but to apply needed prophylaxis in situations where

Strickland itself is evidently inadequate to assure vindication of the defendant's Sixth Amendment right to counsel." Mickens, 535 U.S. at 176.

And even when defense counsel has actually violated ethics rules, courts have generally required evidence of prejudice before concluding that these violations rendered counsel's assistance ineffective. This Court, in holding that a contingent fee contract in a criminal case was "improper and unethical," concluded nonetheless that "it does not alone establish denial of effective assistance of counsel." Downs v. State, 453 So. 2d 1102, 1109 (Fla. 1984). Rather, counsel's unprofessional conduct was "one factor to be considered by the trial court under the totality of the circumstances" and the defendant must prove "that this agreement affected trial counsel's representation" to establish a claim of ineffective assistance. Id.

PD-11 points to the rule requiring managers to monitor their subordinates and ensure compliance with the rules of professional conduct. Nothing in the statute or the Third District's decision conflicts with that rule. The logical disconnect is PD-11's leap from the rule to some perceived right of managing attorneys to dictate when a system-wide withdrawal from the office's caseload should occur. The latter does not inherently follow from the former; nothing in the rules prohibits courts from requiring that public defenders seek remedial relief on a case-by-case basis.

Differences will exist in how public defender offices, as opposed to private entities, discharge their ethical obligations. Private attorneys do not have cases assigned to them and do not have to take on any particular matter; their duties are not defined by the Legislature. But the constitution explicitly makes the duties of the public defenders subject to general law.[24] Art. V, § 18, Fla. Const.

Additionally, it bears noting that Florida Rule of Professional Conduct 4-1.2(a), entitled "Lawyer to Abide by Client's Decisions" requires that "[i]n a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify." Despite their attorney's advice or efforts, many criminal defendants may wish to accept plea deals or waive rights to speedy trials rather than face the burdens and risks of trials. The rules and constitution serve to protect the interests of the indigent defendants, which may diverge from the interests or advice of their legal counsel.

In the end, the proper focus is on whether actual or imminent violations of the constitutional rights of indigent defendants exist, not whether counsel perceive possible risks of violating the Rules of Professional Conduct due to underfunding

[24] Additionally, in the case upon with PD-11 relies to show that private attorneys are treated differently, the court permitted an attorney's withdrawal from one case that record evidence showed to have "enormous scope and complexity." Hagopian, 18 So. 3d at 640. No similar showing has been attempted here.

or caseloads. Actual or potentially imminent ethical violations are the starting point – not the end point – in analyzing whether counsel should be permitted to withdraw where overload conflicts are alleged. In this regard, it is notable that no proof was presented in either case that any PD-11 attorney has ever been found to have provided ineffective assistance of counsel due to excessive workloads or subject to bar discipline for such conduct. *See* Public Defender, 12 So. 3d at at 806 n.10 (Shepherd, J., specially concurring) ("not a single client of PD-11 has objected to the representation being received by him or her on anything close to the grounds being urged by PD-11 to shift representation outside its offices."). Because no proof of actual or imminent harm in any case was made, the Third District's determination that "insufficient evidence" supported the "drastic remedy" sought is supportable.

4. Withdrawal cannot be based on outdated caseload standards, but must capture the actual workload of defense counsel.

Even if the actual or imminent harm standards were not required to justify withdrawal, the relief PD-11 seeks should not be granted because it failed to show that it carries an excessive *workload*, the word the Legislature used in its restructuring of the indigent criminal defense system. § 27.5303(1)(d), Fla. Stat. The caseload data presented, even if accurate representations of the number of

cases that PD-11 attorneys handled in years past (which they were not), are an insufficient basis for relief.

The average annual caseload methodology, upon which PD-11 based its withdrawal motion, is antiquated in today's world of contemporary workload methodologies. The caseload method has been eclipsed by workload or weighted case methodologies. Indeed, this Court adopted a workload-based methodology in its rule for determining the need for additional judges. The reason was its dissatisfaction with a single one-dimensional 350-case-filings-per-judge threshold adopted in 2004. *See* In re Report of the Comm'n on Dist. Ct. of App. Performance & Accountability—Rule of Judicial Administration 2.035, 933 So. 2d 1136, 1143 (Fla. 2006). The Court specifically adopted the conclusion that "*a single case filing threshold is insufficient to capture the intricacies that make up judicial workload* in the district courts." Id. at 1143 (emphasis added). Rather than an annual caseload statistic, the Court adopted a multi-factored, weighted caseload approach, which "accommodates the important distinction between the number of cases filed and the judicial effort required to dispose of those cases." Id. Virtually all analysis done in the last ten to fifteen years, and there is much,[25] relies upon a

[25] *See*, *e.g.*, B. Brummer, Policy Studies Inc., Final Report Productivity Improvement Study of the Maricopa County Public Defender's Office (October 2000), *available at* http://www.centerforpublicpolicy.org/index.php?s=16415.

workload/weighted caseload methodology, each going beyond the outdated single statistic caseload model.

Much like this Court's rejection of a one-dimensional approach for assessing the need for more judges, a single caseload filing threshold is insufficient to capture the intricacies that are involved in the workload of the almost 100 attorneys in Florida's largest public defender office. Yet that was the method used by the trial court. Here, PD-11's evidence established no objective means of quantifying actual workloads, the concept that the Legislature has set forth in section 27.5303(1)(d). Only Davies of SAO-11 addressed workload, testifying about the significant reduction in the public defender's workload after 45 days due to case closings. [R17 2464] Regardless of what factors are considered in evaluating the components of a felony attorney's workload, the single annual average caseload statistic is insufficient and must be replaced or adjusted in some empirically acceptable fashion to evaluate workloads objectively, which PD-11 did not do.

Even PD-11's own witnesses have recognized that caseload alone is an insufficient means of demonstrating how hard an attorney is working, let alone whether his or her clients are receiving effective representation. As Brummer testified at the hearing, "[i]t's very difficult to use number to establish whether people are getting adequate representation." [T36] And Professor Lefstein commented in his book:

> [C]aseload standards are not to be applied automatically. They are simply guides to what may be a reasonable caseload, on average, for public defender programs and individual lawyers, but they should never be the "sole factor" in determining whether a lawyer's caseload is excessive. … *Theoretically, even if a lawyer had exceeded the maximum caseload standard during the prior twelve months, he or she might still have an insufficient caseload when requesting not to be appointed*.

Norman Lefstein, Securing Reasonable Caseloads 159-60 (2011) (emphasis added).

Putting aside the question of whether any of the existing guidelines are applicable in Florida, the empirical ability of the average annual caseload statistic—one that is severely overbroad by PD-11's inclusion of first appearance cases—to predict or prove prejudice to the constitutional rights of the tens of thousands of indigent clients that PD-11 represents annually is dubious. The average caseload data presented reveals little about individual defenders' workloads, particularly given the unique structure of PD-11. The methodology below was insufficient for this task, and the evidence well short of proving that a constitutional violation exists or is imminent.

B. Under any standard, the systemic en masse withdrawal in this case is insupportable on the record below.

In its motion to the trial court and in its presentation of testimony at the evidentiary hearing, PD-11 relied almost exclusively on its average caseload count

to show that it carried a workload so excessive that withdrawal was required to preserve indigent defendants' constitutional rights. But PD-11 must show that its clients are subject to actual or imminent harm owing to specific deficiencies in counsel's performance before it may withdraw from even one case, let alone 60% of its felony caseload. While PD-11 cites caselaw asserting that the issue presented is justiciable because the Court must protect fundamental rights [IB 41], they showed no instance where the constitutional right to effective representation has been in imminent jeopardy because of the office's caseload. Instead, the evidence presented below and the arguments in the initial brief focus on a lawyer's obligation under Bar rules. PD-11 failed to demonstrate that any violation of or imminent threat to, or even a substantial risk of harm to, the constitutional rights of the indigent criminal defendants it represents.

Furthermore, PD-11 has failed to demonstrate that its caseload is causing any particular instances of incompetent representation. PD-11's own expert acknowledged that no investigation was done to determine whether any assistant public defender provided substandard representation to a client. [R17 2417] No record evidence shows that any of PD-11's attorneys has faced a substantiated claim of professional misconduct or malpractice. PD-11 presented no objective evidence that any client received ineffective assistance of counsel, or that any bar grievance has ever been filed against the office. Indeed, at the hearing it was

established that PD-11 has been recognized as recently as 2007 as being one of the best public defender offices in the country.

The standard proposed by the State and adopted by the Third District is not identical to the ineffective assistance of counsel analysis in Strickland, 466 U.S. 668. Evidence of ineffective assistance of counsel claims against PD-11 attorneys that meet the Strickland test, of course, would be a strong indicator of the type of circumstances that could support a withdrawal motion; but the proposed standard here is based on a showing of prejudice as this Court tacitly endorsed in 1990 Public Defender, 561 So. 2d at 1138, where it found withdrawal was warranted when an appellate backlog "is so excessive that there is no possible way" that cases can be handled timely, thereby harming incarcerated defendants who served their time before their initial appellate briefs were even filed. This type of showing is necessary to preserve the balance of powers under the Constitution.

Aside from the lack of specifics, the evidence that PD-11 did present is not ultimately helpful given its inaccuracies. The usefulness of the numbers that PD-11 actually did provide was undermined by the figures it took into account. As the Third District noted, "there are a number of different ways to count [PD-11's] cases." Public Defender, 12 So. 3d at 802. The average caseload was determined by taking the number of noncapital felony cases in which PD-11 is appointed in a fiscal year, and dividing it by the number of assistants assigned to the felony

divisions. [R17 2436] Using this method, *but applying it only to the cases post-arraignment* (where the noncapital felony assistant public defenders do the overwhelming majority of their work),[26] the caseload numbers become quite different. The annual caseload statistic declines from over 400 (under PD-11's approach) to approximately 240 cases per attorney, a more manageable level that is within the upper range of some of the proposed caseload standards. Moreover, this more reasonable approach does not include all 95 PD-11 attorneys, only 85 (removing the bond hearing and the ERU attorneys from the equation) thereby showing the malleability of the statistic and its unreliability.

And anecdotal evidence from one assistant public defender is not enough to demonstrate a system wide problem. The only attempt at showing actual client prejudice was the testimony of Assistant Public Defender Amy Weber. She stated that while she was in the middle of a trial she neglected to convey a plea offer to another client and that the offer was withdrawn before she was able to do so. [R16

[26] PD-11's witnesses claimed that the starting point for counting cases must be the time of appointment at first appearance, which resulted in a larger number of cases in the numerator of the average caseload statistic. The appropriate starting point for the caseloads of assistant public defenders who handle noncapital felonies, however, is after arraignment. Indeed, Brummer's own testimony supports this position [R15 2093-94], as do the ABA standards PD-11 used in their initial motion, which defined caseload as "the number of cases *assigned* to an attorney at any given time." ABA Standards for Criminal Justice: Providing Defense Services 5-5.3 (3d Ed. 1992) (emphasis added). PD-11 does not assign its noncapital felony cases to the felony assistants until after arraignment. [R15 2097-98]

2300-02] Far from proof of actual constitutional injury, this isolated incident reflects what could happen to any defense attorney at any time. It is simply not enough to justify the conclusion that prejudice to constitutional rights permeates PD-11's operations. The opinions of PD-11 attorneys that the office is not providing competent representation without any particular demonstration of their statements' accuracy lack persuasive value for withdrawal analysis. *See, e.g.*, Routly v. State, 590 So. 2d 397, 401 n.4 (Fla. 1991) (attorney's admission of ineffectiveness lacks persuasive value).

The type of harm that should be shown must be more concrete and specific than the generalized testimony given at the hearing. For instance, if an assistant public defender was able to show that because of excessive workload, and if no other available attorney was in the office, if a defense witness could not be interviewed before that witness was to be permanently unavailable, withdrawal would be appropriate. But general anecdotes showing that attorneys as a whole do not have the time they need to perform their job perfectly is the truth universal for attorneys (at least those in the government) in lean budgetary times, and not necessarily evidence that the attorneys are providing incompetent representation.

C. SAO-11 was improperly denied standing and was unable to present evidence and operate as a true advocate of its position, thereby diminishing the accuracy of the record.

Finally, SAO-11 should have been permitted to appear as a party in this case. 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). The state is affected when, as here, a court orders relief that dramatically affects state resources, involves the application or constitutionality of a Florida statute, and involves a methodology for calculating an excessive caseload for a state-funded public defender's office. The state has an interest in the potential transfer of thousands of cases to the legislatively-created RCC-3 and potentially from that office to private attorneys. Moreover, section 27.01(2) and article I, section 16(b), Florida Constitution confer, standing on SAO-11 in these types of situations as the representative of crime victims. Contrary to what PD-11 has contended, an assertion of a conflict of interest is not unassailable or taken at face value in every case; instead, it is subject to review and critique, as the caselaw and statutes have made evident.

As the Third District held and this Court recently recognized, "[t]he state attorney has a statutory obligation to '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.' " Johnson v. State, 2012 WL 16692, at *8 (quoting Public Defender, 12 So. 3d at 801). In Johnson, this Court distinguished the standing of regional conflict counsel in an appellate proceeding in which the public defender sought to withdraw, noting that, by contrast, the state attorney had party status "as well as [a] statutory obligation … to prosecute or defend on behalf of the State." Id. at *9.

In 1994 Public Defender, the Court—over the objection of the public defender—made clear that a detailed inquiry into the operations and practices of a public defender's office is permissible (provided confidential information is not compromised). 636 So. 2d at 22-23. Further, section 27.5303(1)(a) allows a court to hold a hearing on the adequacy of a public defender's representations. The lower court acknowledged that participation by the state attorney was important to a meaningful hearing in this case by conferring it *amicus curiae* status. [R18 2534] Allowing the cross-examination of witnesses and presentation of some evidence while denying party status is illogical and could thwart the state's ability to seek appellate review.

Petitioners and their amici's attempt to reframe this question as one of what entity is best suited to appear opposite the public defender on these motions (i.e., the state attorney versus the attorney general versus the JAC) is fatally flawed. First and foremost, this argument was never formulated in this fashion before the

trial court or Third District. It is inappropriate for it to be raised now for the first time. Farinas v. State, 569 So. 2d 425, 429 (Fla. 1990) ("Absent fundamental error, an issue will not be considered for the first time on appeal.").

Moreover, no authority supports the proposition that any entity other than the state attorney should appear at these withdrawal hearings. There is no reason to assume that the state attorney will find more cause to object than any other entity. If sufficient circumstances and evidence for withdrawal is presented, then the state attorney would be wise to, concede that withdrawal is necessary. *See* Hagopian, 18 So. 3d at 634 ("the State did not present any evidence at the hearing in opposition to [the] motion to withdraw").

The standing issue is exceptionally important because the trial court criticized the state'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. [R18 2536] With adequate time (the court denied SAO-11's requests for a longer continuance) and relevant data (PD-11 did not initially provide all necessary data sought in SAO-11's public records requests), SAO-11 might have been able to address concerns the court raised. [R4 369-373; R9 1021-39] Given that the proceedings affect the interests of the State, the Third District properly determined that the state attorneys should have had standing in the trial court proceedings.

II. *Bowens* should be affirmed because section 27.5303(1)(d), Florida Statutes, is constitutional and because no actual or imminent threat to Bowens's constitutional right of effective counsel was shown. [27]

A. Section 27.5303(1)(d), Florida Statutes, is constitutional because it permits withdrawal when a public defender's excessive workload is shown to prejudice a defendant's constitutional right to effective counsel.

Bowens asserts that section 27.5303(1)(d), Florida Statutes, is unconstitutional, on its face and as applied. The trial court rejected his arguments, and the Third District agreed with the trial court's reasoning and affirmed. For the reasons that follow, if this Court reaches the merits in this case,[28] the Third District's decision should be affirmed and the statute upheld as constitutional.

Bowens's arguments regarding the constitutionality of section 27.5303 are answered when the statute is properly construed. Bowens asserts that the statute

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[27] **Standard of review:** The constitutionality of the statute is a question of law reviewed de novo. Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc., 978 So. 2d 134, 139 (Fla. 2009). Whether the trial court's grant of withdrawal was proper, which was subject to certiorari review in the Third District, is reversible if it departed from the essential requirements of the law. Williams v. Oken, 62 So. 3d 1129, 1132 (Fla. 2011).

[28] Rather than reach the merits, the Court may wish to reconsider whether the withdrawal of attorney Kolsky in September 2010, who no longer represents Bowens, renders his motion to withdraw moot. The Third District's decision was entirely dependent on the particular facts of Kolsky's workload and representation of Bowens, making the factual predicate for this case no longer relevant and the issues academic.

deprives public defenders of the ability to withdraw, but the language of the statute makes it clear that excessive workload may be a factor a court may consider, just not the sole factor. As the trial court held:

> The use of the word "solely" in Section 27.5303(1)(d) is not a prohibition on consideration of excessive caseload as a factor in an attorney's motion to withdraw; rather the statute intends that other considerations be present. … When examining the plain language of the statute, as interpreted by the Third District in State v. Public Defender, there exists a cognizable difference between a withdrawal based solely on workload, and a withdrawal where an individualized showing is made that there is a substantial risk that a defendant's constitutional rights may be prejudiced as a result of the workload. This distinction allows for judicial relief where prejudice to constitutional rights is adequately demonstrated.

[A1 8] In contrast, Bowens's interpretation of the statute ignores the word "solely" and misreads it in a way that negates its intent.

As discussed above, excessive caseload alone is not enough; some types of cases may be so rudimentary that an attorney effectively could process a thousand in a year, while others may be so complex and time-consuming that handling more than a few could work a hardship. It is necessary, therefore, that the circumstances of each withdrawal motion be examined; only when actual harm to a defendant's constitutional right to effective representation exists or is imminent should withdrawal be allowable. This view of the specific statute at issue is consistent with the remaining provisions of the statute. *See* § 27.5303(1)(a), Fla. Stat. (in cases of actual conflict, "[t]he 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"); *see also* Fla. Dep't of Envtl. Prot. v. ContractPoint Fla. Parks LLC, 986 So. 2d 1260, 1265 (Fla. 2008) ("A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts and is not to be read in isolation, but in the context of the entire section.") (internal quotation marks and citation omitted).

When the proper interpretation of the statute is applied, each of Bowens's arguments fails. First, the statute does not violate the inherent authority of the courts; a trial court may permit withdrawal when actual or imminent harm to the constitutional right of effective representation has been shown. Under the language of the statute, a court has the authority to rectify constitutional violations stemming from ineffective representation that is shown via various factors (that may include excessive workload). Although courts have a central role in protecting constitutional liberties, including the right to effective assistance of counsel, the judicial branch must take care to ensure that its actions are necessary, narrowly drawn, and incrementally applied when enactments of the legislative branch are implicated. The Third District's approach is the proper one.

Second, the statute does not conflict with the Rules of Professional Conduct. The statute does not directly alter how attorneys are to conduct themselves or how attorney discipline is handled. While PD-11 asserts it will violate the rules by

continuing to represent indigent defendants with resulting caseloads, no evidence in the record shows that any Bar complaint, let alone an actual violation against a PD-11 attorney, has occurred because of the attorney's or the office's caseload (or workload). Nor has PD-11 pointed to a single such complaint or violation in prior years or the three and a half years that have passed since the trial court's decision in this case was stayed.

Third, the statute does not violate the separation of powers by impermissibly legislating on matters of practice and procedure. The Legislature has the authority to determine whether the public defender can represent an indigent person in a particular action. *See* Fla. Ass'n of Criminal Defense Lawyers, Inc., 978 So. 2d at 141 (the Florida Constitution "clearly and unequivocally grants the legislature the authority to control the duties to be performed [by the public defenders], which naturally includes the types of cases for which public defenders are appointed"). The authority to control the duties of the public defender must include the authority to delineate the circumstances under which a public defender may withdraw.

In fact, the Legislature has constitutional authority over the control of public defenders and thereby their conflicts of interest and grounds for withdrawals. The constitution specifically provides that public defenders "shall perform duties prescribed by general law." Art. V, § 18, Fla. Const. Courts considering motions to withdraw look to the language of the public defender statutes to determine whether

the court has the authority to permit withdrawal. *See, e.g.*, Babb v. Edwards, 412 So. 2d 859, 861-62 (Fla. 1982) (finding it is within the Legislature's authority to prescribe the duties of the public defender and to prescribe when there is a conflict presented that would allow the public defender to withdraw from a case).

Perhaps most importantly, this Court recently in Johnson v. State, 2012 WL 16692, at *5, provided no indication whatsoever that the legislature's enactment of the public defender conflict statute invades the powers of the judicial branch. Instead, the Court treated the legislature's work deferentially, involving purely statutory interpretation matters, without any hint of discomfort that the Court's "inherent" powers were being stepped upon, thereby negating much of the thrust of PD-11 (and its amici's) arguments. For these reasons, the statute is facially constitutional.

B. Withdrawal is impermissible because insufficient evidence was presented that Bowens's constitutional right to effective representation was violated.

The statute is also constitutional as applied in this case because no showing was made that Bowens's constitutional right to effective assistance of counsel was harmed due to Kolsky's representation. Rather, the trial court departed from the essential requirements of the law in concluding that sufficient evidence was presented to permit withdrawal. Kolsky must show that his representation

prejudiced Bowens by some actual or imminent harm to his constitutional right to effective representation. For example, in this Court's decision in 1998 Public Defender, this Court found it prejudicial that many defendants had served their prison sentences or completed probation before briefs in their appeals had been filed. 709 So. 2d at 103.

In contrast, no testimony or evidence showed that Kolsky specifically harmed Bowens's constitutional rights. All that was shown was that Kolsky would have to seek a continuance to properly prepare Bowens's case for trial. A mere request for a continuance that results in the waiver of the defendant's 175-day procedural speedy trial period under Florida Rule of Criminal Procedure 3.191(a) is not the kind of individualized prejudice necessary for withdrawal under the statute, as the Third District concluded. First, there was no evidence that either Bowens or any of Kolsky's clients wanted to exercise that procedural right or wanted a trial sooner than when Kolsky could have been prepared. And if they wanted to, they may always recapture the speedy trial rule under Florida Rule of Criminal Procedure 3.191(b), once Kolsky is ready. Any potential harm to Bowens's constitutional rights are remediable.

Second, it was Kolsky's strategy to avoid continuances to not waive the speedy trial time period under the rule. [A16 39] PD-11 has no policy that

discourages seeking continuances. [A16 101] In fact, Professor Lefstein testified that taking continuances was an acceptable alternative to withdrawal. [A17 32-33]

Most importantly, it is well settled that "the right to speedy trial provided in rule 3.191 is not coextensive with the broader *constitutional* right to a speedy trial. No constitutional right exists to a trial within 175 days of arrest." State v. Naveira, 873 So. 2d 300, 308 (Fla. 2004). As such, a defendant's consent or waiver is not required when defense counsel waives speedy trial for whatever purpose. State v. Earnest, 265 So. 2d 397 (Fla. 1st DCA 1972). The application of the rule, "a principle of sovereign grace," State v. Bivona, 496 So. 2d 130, 133 (Fla. 1986), that might be waived by Kolsky's lack of preparation "is a procedural device only and not a constitutional right." Naveira, 873 So. 2d at 308 (quoting Blackstock v. Newman, 461 So. 2d 1021, 1022 (Fla. 3d DCA 1985)). "The mere fact that [a defendant must] elect between a speedy trial under the rule and adequate preparation [does] not violate his constitutional rights." Id.

As recognized by the Third District in State v. Guzman, 697 So. 2d 1263, 1265 n.1 (Fla. 3d DCA 1997), "[b]ecause it is usually favorable to the defense, delay (although second best to outright dismissal) is, ironically enough, what the defendant is often really after in her claims to a 'speedy trial.' " Requesting a continuance may be the most advantageous decision for his clients that Kolsky

could make, because it may make the State's case weaker and allow his out-of-custody clients to remain free for a longer period of time.

Moreover, the delay in Kolsky's handling of Bowens's case was due to choices by Kolsky whose uncontradicted testimony shows that he chose to work on cases of other out-of-custody clients who were arraigned after Bowens and who were facing less serious charges and consequences than Bowens. [A16 44-48] The evidence also showed that no client had complained about the quality of Kolsky's representation.

As such, the trial court departed from the essential requirements of the law. Potential ethical violations attributable to excessive workloads are the starting point, and not the ending point, in analyzing whether counsel should be permitted to withdraw in overload conflicts. As the Third District held, Kolsky's argument essentially was a mere variant of the argument that public defender attorneys are overworked and the office understaffed. Bowens, 39 So. 3d at 481. Without a showing that the defendant's interests are impaired or compromised, withdrawal is impermissible. Because Kolsky failed to show any actual or imminent harm to Bowens's constitutional rights, the Third District properly reversed the trial court's order permitting withdrawal.

CONCLUSION

For the foregoing reasons, the Court should affirm the Third District's decisions.

Respectfully Submitted,

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