

**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC09-1181

**PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,**

Petitioner,

-vs-

**THE STATE OF FLORIDA,**

Respondent.

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ON PETITION FOR REVIEW  
FROM THE THIRD DISTRICT COURT OF APPEAL  
L.T. CASE NOS. 3D08-2272 AND 3D08-2537 (Consolidated)

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**BRIEF OF PETITIONER ON JURISDICTION**

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## STATEMENT OF THE CASE AND FACTS

This petition by the Public Defender for the Eleventh Judicial Circuit (the “Public Defender”) seeks this Court’s review of a decision of the Third District Court of Appeal (the “Decision”). A copy of the Decision is attached as an Appendix. 1/

The Public Defender filed a motion in each of the twenty-one criminal divisions in the Eleventh Judicial Circuit seeking approval of his decision to temporarily decline appointment to new noncapital felony cases, doing so because excessive caseloads prevented him from meeting his constitutional obligations to afford effective representation to clients through the assistant public defenders he supervises. (A. 2). He thereby sought to ensure that these assistant public defenders comply with their ethical obligations to their clients. Each motion was accompanied by a certification of conflict of interest. The motions were consolidated. (*Id.*).

The State Attorney for the Eleventh Judicial Circuit (the “State Attorney”) opposed the Public Defender’s motions. The trial court allowed the State Attorney to participate as amicus curiae. (*Id.*).

Following an evidentiary hearing, the trial court entered an order finding that the Public Defender’s “excessive caseload permitted only minimally competent

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1/ A copy of the Decision is attached as the Appendix. In this brief, the abbreviation “A.” followed by a numeral refers to the page number in the Decision.

representation and ordered that [the Public Defender] may decline all future representation of indigent defendants charged with third-degree felonies.” (A. 2-3).

The trial court had determined that the Public Defender’s “caseloads are excessive by any reasonable standard” and that “it is clear that future appointments to noncapital felony cases will create a conflict of interest in the cases presently handled by PD-11.” *In re: Reassignment and Consolidation of Public Defender’s Motions*, 15 Fla. L. Weekly Supp. 1078, 1080 (Fla. 11th Cir. Ct. 2008). It concluded that “[the Public Defender] is in need of relief sufficient to ensure that the assistant public defenders are able to comply with the Florida Rules of Professional Conduct and to carry out their constitutional duties.” *Id.* The trial court allowed the Public Defender to decline appointments only in third-degree felony cases “until such time as the Court determines [the Public Defender] is able to resume its constitutional duties.” *Id.* The State appealed, and the Third District Court of Appeal (“Third District”) stayed that order. (A. 3).

The Third District certified the appeal to this Court because “this case implicates not only the manner in which the criminal justice system is structured and funded, but also constitutional separation of powers principles as well as the Sixth Amendment right to counsel in criminal cases . . . .” (A. 3). This Court dismissed for lack of jurisdiction. (*Id.*).

The Third District then entered its Decision, reversing, concluding that the statutory prohibition on a public defender's withdrawal from cases "based solely upon inadequacy of funding or excess workload" applies equally to declinations of new appointments, (A. 12), even though the plain language of section 27.5303(1)(d), Florida Statutes, expressly deals only with withdrawals from existing representations. The Decision held that the Legislature had permitted withdrawal from representation only for the narrow range of conflicts referenced in section 27.5303(1)(e), Florida Statutes, being "conflicts involving codefendants and certain kinds of witness or parties" and not "conflicts arising from underfunding, excessive caseload, or the prospective inability to adequately represent a client." (A. 11). The Third District determined that "the trial court did not reach the question of whether [the Public Defender] had presented evidence sufficient to prove [this form of] statutory conflict." (A. 12). The Decision reversed the trial court's conclusion that ethical violations created by excessive caseload permitted its exercise of inherent authority to act to prevent such violations.

The Decision also held that conflicts can be determined only "on an individual basis" or a "case-by-case basis" by assistant public defenders and not to overall caseload by the elected Public Defender. (A. 7, 10). Finally, the Decision

held the State Attorney had standing to oppose the Public Defender's motions. (A. 4-5).

The Third District declined to certify its Decision to this Court, necessitating this petition for review.

### **SUMMARY OF THE ARGUMENT**

This Court has jurisdiction to review the Decision because it expressly affects two classes of constitutional officers, namely Public Defenders and State Attorneys, and because it expressly and directly conflicts with this Court's prior decisions. The Decision directly and expressly affects Public Defenders because it precludes Public Defenders from obtaining any relief when faced with excessive caseloads that impair their office's ability to provide constitutional and ethical representation to new clients. The Decision contradicts this Court's decision in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1132 (Fla. 1990) ("*In re Order 1990*"), in which this Court took jurisdiction on the same basis sought here, accepting, adopting, and italicizing the words: "When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created." It likewise rejects the similar conclusions of this Court in *In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18

(Fla. 1994) (“*In re Certification 1994*”), and *In re Public Defender’s Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus*, 709 So. 2d 101 (Fla. 1998) (“*In re PD’s Certification 1998*”).

The Decision also expressly affects both Public Defenders and State Attorneys by holding that a prosecutor may contest a Public Defender’s decision to decline a new appointment by reason of its ethical obligation to existing clients, thereby giving a State Attorney a voice in determining who will defend against its prosecution.

Finally, the Decision expressly and directly conflicts with holdings of this Court in the three cases cited above, all of which permit or require Public Defenders to not accept new cases if excessive caseload exists.

This Court should exercise its discretion to review here because, as the Third District acknowledged in its pre-Decision certification, (A. 3), it involves important and pressing issues facing the Florida criminal justice system that impact both the constitutional rights of indigent criminal defendants and the ethical responsibilities of each public defender and all assistant public defenders.

## **ARGUMENT**

**THIS COURT HAS JURISDICTION TO REVIEW THE DECISION BELOW BECAUSE IT EXPRESSLY AFFECTS CLASSES OF CONSTITUTIONAL OFFICERS AND BECAUSE IT EXPRESSLY AND DIRECTLY CONFLICTS WITH DECISIONS OF THIS COURT**

**A. The Decision Expressly Affects Classes of Constitutional Officers**

Both Public Defenders and States Attorneys are classes of constitutional officers. Art. V, §§ 17, 18, Fla. Const. The Decision eliminates Public Defenders' ability to secure relief when excessive caseloads impair their ability to provide constitutional and effective representation to their clients. The Decision also applies a different ethical standard for Public Defenders as compared to private attorneys for conflicts of interest, contrary to the obligations imposed by the Rules of Professional Conduct. R. Regulating Fla. Bar, Chap. 4. The Decision, therefore, has statewide impact.

The Decision holds that a legislative prohibition of non-representation for excess caseload applies even when it has been judicially determined that such representation would violate the ethical obligations of Public Defenders and their assistants to existing clients. In doing so, the Decision ignored the obligation imposed by Rule Regulating the Florida Bar 4-5.1 on Public Defenders to ensure compliance by assistants with the Rules of Professional Conduct. <sup>2/</sup> The Decision further holds that the only conflicts which the Legislature has statutorily found to be a legitimate basis for withdrawal (including declination of new appointments)

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<sup>2/</sup> The Decision states that these Rules “are only meant to apply to attorneys, individually, and not the office of the Public Defender as a whole,” citing to various portions of Rule Regulating the Florida Bar 4-1 and 4-3.2. (A. 9). But Rule Regulating the Florida Bar 4-5 applies to law firms and associations and 4-5.1 specifically to all supervisors and managers, which must include the Public Defender.

were those involving codefendants, witnesses and the like. (A. 11). It concluded that the Legislature’s prohibition of withdrawals (including declinations of new appointments) for “underfunding, excessive caseload, or the prospective ability to adequately represent a client,” (A. 11), must be honored.

The Rules of Professional Conduct do not limit the types of conflict applicable to Public Defenders. For example, Rule Regulating the Florida Bar 4-1.7(a)(2) requires that an attorney “shall not represent a client if . . . there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.” This Court has held that “[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he [or she] represents, a conflict of interest is inevitably created.” *In re Order 1990*, 561 So. 2d at 1135. In contrast, the Decision precludes the Public Defender from seeking relief for excessive caseload or the judiciary from granting it.

The Decision also expressly affects Public Defenders’ ethical duties by holding that the Rules of Professional Conduct only apply to individual assistant public defenders and not to the elected Public Defender himself. (A. 9-10). This is contrary to the express terms of Rule Regulating the Florida Bar 4-5.1(b) and (c), which imposes direct obligations on a supervising lawyer to ensure compliance by

his/her assistants with those Rules. Although the trial court had relied on this obligation, the Decision ignores this Rule.

The Decision's determination that the Legislature's prohibition of withdrawals from existing representations applies to declinations of new appointments, (A. 12-13), despite the plain language of section 27.5303(1)(d), Florida Statutes, contradicts this Court's position that the Public Defender *must* reject new appointments in cases of excessive caseload. <sup>3/</sup> This Court's prior decisions direct elected Public Defenders to decline new appointments, making clear the inherent authority of the judiciary to do so. *See, e.g., In re PD's Certification 1998*, 709 So. 2d at 102-04 (approving order that elected Public Defender decline cases and requiring monthly reporting of caseloads).

The Decision further directly affects Public Defenders by ruling that violations of the Rules of Professional Conduct can only be addressed on a case-by-case basis, directly contrary to this Court's prior decisions allowing elected Public Defenders to withdraw from or decline representation in large numbers of cases, without reference to the specific individual attorneys assigned to them. *See*

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<sup>3/</sup> The propriety of declining new appointments by reason of excessive caseload was first articulated in *Escambia County v. Behr*, 384 So. 2d 147, 150 (Fla. 1980) (England, C.J., Overton and Alderman, JJ. concurring) ("The problem of excessive caseload in the public defender's office should be resolved at the outset of representation, rather than at some later point in a trial proceeding" since "[p]ublic defenders, at the time of their appointment to a new case, are in the best position to know whether existing caseloads render unlikely their ability to continue to conclusion a new representation.").

*In re Order 1990*, 561 So. 2d at 1131-33 (ordering elected Public Defender to decline certain types of new cases until caseloads reduced); *In re Certification 1994*, 636 So.2d at 19-21 (approving order for elected Public Defender to withdraw from cases initiated during certain time periods); *In re PD's Certification 1998*, 709 So. 2d at 102-04 (approving order for elected Public Defender to decline cases beginning on a specific date and requiring monthly reporting of caseloads).

Finally, the Decision expressly affects both Public Defenders and State Attorneys by finding State Attorneys have standing to contest a Public Defender's decision to decline representation to satisfy ethical and constitutional obligations. The objection to State Attorneys representing the State is due to the inherent conflict in having the prosecutor determine who should represent the defendant she is prosecuting.<sup>4/</sup> The Decision holds that the direction of section 27.02, Fla. Stat., that State Attorneys represent the State overrides this inherent conflict. (A. 5).

**B. The Decision Directly and Expressly Conflicts With This Court's Decisions**

The Decision directly and expressly conflicts with this Court's decisions in *In re Order 1990*, *In re Certification 1994*, and *In re PD's Certification 1998* for the reasons stated above.

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<sup>4/</sup> See *Escambia County*, 384 So. 2d at 150 n.1 (England, C.J., Overton and Alderman, JJ., concurring): "The office of the state attorney cannot realistically be placed in the position of challenging the public defender's caseload statistics and priorities, due to their parallel yet competing interests." The applicable sentence (the first) of section 27.02, Fla. Stat., read substantively the same in 1980 as today.

## **REASONS WHY THE COURT SHOULD GRANT REVIEW**

This Court should exercise its discretion to grant review because, as the Third District acknowledged in its pre-Decision certification, this case addresses core values of the Florida criminal justice system, constitutional and ethical requirements as to effective representation of indigent defendants, and constitutional separation of power principles. The Decision, if permitted to stand, would prevent Public Defenders from effectively dealing with excessive caseloads and from complying with their ethical obligations, no matter how serious the excess and no matter how scarce their resources. It effectively holds the Legislature can dictate to the judiciary what constitutes a conflict of interest. This construction violates the constitutional right to effective assistance of counsel and the separation of powers guaranteed by Article II, Section 3, of the Florida Constitution, and curtails the judiciary's inherent authority to ensure adequate representation of indigent defendants. It also imposes different ethical standards on Public Defenders from those applicable to private law firms and forces them to provide representation to one client at the expense of others.

## **CONCLUSION**

This Court has jurisdiction and should exercise that jurisdiction by granting review.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioner on Jurisdiction was served by U.S. Mail this \_\_\_ day of July 2009 on the following:

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### **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing Brief of Petitioner on Jurisdiction  
is printed in 14-point New Times Roman.

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