IN THE SUPREME COURT OF FLORIDA

CASE NOS. SC09-1181 and SC10-1349

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA, ET AL.,

Petitioners,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON APPEAL FROM THE THIRD DISTRICT COURT OF APPEAL
L.T. CASE NOS. 3D08-2272 AND 3D08-2537 (Consolidated) AND
L.T. 3D09-3023

REPLY BRIEF OF PETITIONERS

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This case presents an issue of extraordinary importance for resolution by the Court. The question before this Court is whether a public defender owes the same ethical obligations to his indigent clients and to the Court as any other lawyer, criminal or civil, public or private. PD-11, joined by the American Bar Association, urges the Court to hold, as it always has, that the answer to this question is a clear "yes": The same Rules of Professional Conduct—the Rules promulgated by this Court—apply to all lawyers practicing in Florida courts. Accordingly, where, as here, a public defender believes there is a "substantial risk" that he has a conflict because accepting new appointments will materially limit his ability to represent his current clients, and the trial court agrees, the public defender should be permitted to decline future appointments until the condition causing the conflict no longer exists. This Court should do so.

SUMMARY OF ARGUMENT

In its Answer Brief, the State urges the Court to affirm the decisions of the Third District requiring trial courts to apply an "actual or imminent prejudice standard" to decide public defender motions for withdrawal based on conflict of interest where the putative conflict is engendered by excessive workload. The State also urges the Court to affirm the decisions of the Third District holding that PD-11 failed to meet this standard. The Court should reject the State's argument,

reverse the decisions of Third District, and remand *Public Defender* for further proceedings. There are four fundamental reasons.

First, the "actual or imminent prejudice" standard is based on *Strickland v. Washington*, 466 U.S. 668 (1984), and is intended to apply only to *post*-conviction constitutional challenges by defendants to the ineffective assistance of counsel, where different considerations apply. <u>The cases before the Court do not involve a defendant's Sixth Amendment challenge to the ineffective assistance of counsel, however, and the State and the Third District are wrong to treat them as if they do.</u> Rather, the cases before the Court concern motions by PD-11 to decline representation or to withdraw from representation due to a conflict engendered by excessive workload. The standard that should apply here is therefore the standard that applies whenever any lawyer is faced with a conflict of interest—this Court's Rules of Professional Conduct. These Rules provide that "a lawyer *shall* not represent a client if . . . there is a *substantial risk* that the representation . . . will be materially limited . . . ." R. Regulating Fla. Bar 4-1.7 (emphasis added).

Second, just-rendered decisions of the United States Supreme Court, *Missouri v. Frye,* --- S.Ct. ---, 2012 WL 932020 (March 21, 2012) ("*Frye*") and *Lafler v. Cooper*, --- S.Ct. ---, 2012 WL 932019 (March 21, 2012) ("*Lafler*"), highlight the danger inherent in the State's post-conviction approach to the evaluation of excessive workload conflicts. In *Frye* and *Lafler*, the Supreme Court

recognized that the criminal justice system today is "a system of pleas, not a system of trials." *Lafler*, 2012 WL 932019, at *1, *Frye*, 2012 WL 932020, at *6. As a consequence, the Court held that a lawyer's failure to timely convey a plea offer or a lawyer's incorrect advice regarding a plea offer could support an ineffective assistance of counsel claim under *Strickland*, even where the defendant later entered a voluntary plea or was convicted following a full and fair jury trial. Adoption of the Third District's approach, as the State urges, would open the floodgates to post-conviction *Frye/Lafler* challenges by defendants asserting that their lawyer's excessive workload negatively affected their ability to negotiate a favorable plea.

Third, section 27.5303, Florida Statutes, as interpreted by the Third District, violates the separation of powers and is unconstitutional. The "actual or imminent prejudice" standard is not contained within the statute. Moreover, as interpreted by the Third District, the statute precludes *any* consideration by the trial court of ethical conflicts engendered by excessive workload. In this regard, the statute represents an unprecedented invasion into this Court's exclusive jurisdiction to regulate the conduct of lawyers and safeguard the administration of justice.

Finally, the evidence presented to the trial courts amply supported the relief sought by PD-11, and the trial courts properly so concluded. The trial courts did not simply accept PD-11's certification of conflict at face value, nor did PD-11

argue that the trial courts should do so. Rather, PD-11 presented evidence from fact and expert witnesses to support its motions in *Public Defender* and *Bowens.* The trial courts in each case credited the evidence presented, and their factual findings are entitled to deference. The decisions of the Third District should be reversed and *Public Defender* should be ordered remanded to the trial court with instructions to determine whether "there is a *substantial risk* that the representation [of clients by PD-11] will be materially limited" if PD-11 is required to accept new, third-degree felony appointments, and to enter an appropriate remedy if the trial court determines that there is.

ARGUMENT

I. The "Actual or Imminent Prejudice" Standard Urged By The State And Adopted By The Third District Is Contrary To Law And This Court Should Reject It.

In *Public Defender,* the Third District held that an individual public defender may "move for withdrawal" only if her client "is, or will be, prejudiced or harmed by the attorney's ineffective representation." *State v. Public Defender, Eleventh Judicial Circuit*, 12 So.3d 798, 805 (Fla. 3d DCA 2009). The court went on to hold that "such a determination" requires "individualized proof of prejudice or conflict other than excessive caseload." *Id.* Similarly, in *Bowens*, the Third District held that an individual public defender must demonstrate "actual or imminent prejudice to [the defendant's] constitutional rights" to move for

withdrawal. *State v. Bowens*, 39 So.3d 479, 481 (Fla. 3d DCA 2010). The court further stated that "[p]rejudice means there must be a real potential for damage to a constitutional right." *Id.* To meet the standard, an individual public defender must make a "showing of individualized prejudice or conflict *separate from* that which arises out of an excessive caseload." *Id.* (emphasis in original).

In its Answer Brief, the State urges this Court to adopt the Third District's "actual or imminent prejudice" standard. Ans. Br. 22. This Court should reject the "actual or imminent prejudice" standard for withdrawal because it violates its own Rules of Professional Conduct and will likely burden Florida courts with endless after-the-fact ineffective assistance of counsel challenges.

First, the standard is drawn (if not explicitly, then at least implicitly) from *Strickland*, in which the Supreme Court established the test for determining when a defendant's conviction should be set aside because his Sixth Amendment right to the effective assistance of counsel was violated.[1] As the Eleventh Circuit aptly

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[1] The State asserts that "[t]he standard proposed by the State and adopted by the Third District is not identical to the ineffective assistance of counsel analysis in *Strickland*." Ans. Br. 52. But that is false. The State manages to avoid citing *Strickland*, but only by citing cases that rely on *Strickland*. *See* Ans. Br. 28, 45 (*citing United States v. Gonzalez-Lopez*, 548 U.S. 140, 146 (2006), and *Downs v. State,* 453 So.2d.1102, 1106-09 (Fla. 1984)). Moreover, in its Answer Brief, the State repeatedly reverts to the *Strickland* "actual prejudice" standard. *See, e.g.,* Ans. Br. 24, 25, 38 and 39.

The same is true of the Third District decisions under review. *See Bowens*, 39 So.3d at 482 (holding that conflict is "merely possible or speculative" absent "a

recognized in *Luckey v. Harris,* 860 F.2d 1012, 1017 (11th Cir. 1988), however, the *Strickland* test, which requires a defendant to show that he was prejudiced by his counsel's deficient performance, is intended to apply only *post*-conviction, where "powerful considerations" including "concerns for finality," apply. At the pre-conviction stage, these "powerful considerations" do not apply. Moreover, "prejudice" of the *Strickland* variety is impossible to show at the pre-conviction stage, precisely because the point of such a motion is to *avoid* prejudice accruing to the defendant.[2]

Second, the State's argument in favor of the application of the Third District's "actual or imminent prejudice" standard proves too much. According to the State, "the system has in place many structural and constitutional protections… 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." Ans. Br. 29. "Direct appellate review as well as post-conviction review exists for this important purpose." *Id.* In essence, the State's position is that the availability of post-

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factual showing that the defendant's interests are impaired or compromised"); *Public Defender*, 12 So.3d at 806 (holding that public defender may only withdraw after proof of "prejudice or conflict, separate from excessive caseload").

[2] Rule 4-1.7 mandates that a lawyer "shall not" represent a client when there is a "substantial *risk*" that the representation "*will be* materially limited." R. Regulating Fla. Bar 4-1.7 (emphasis added). That is, by definition, a *before*-the-fact determination.

conviction relief under *Strickland* is constitutionally sufficient to "cure" any putative conflict. Following the State's logic, there is *no* conflict that warrants a motion for withdrawal (or to decline appointment) by the public defender, because *any* conflict—whether it is engendered by excessive caseload or the simultaneous representation of co-defendants—is capable of being "cured" after the fact by "post-conviction review."[3]

Third, the "actual or imminent prejudice" standard urged by the State and adopted by the Third District, which would effectively postpone consideration of conflicts due to excessive caseload to post-conviction review, would likely result in a system-busting increase in the number of post-conviction challenges, given two just-rendered decisions of the United States Supreme Court. In a pair of decisions issued on March 21 of this year, *Missouri v. Frye* and *Lafler v. Cooper*, the Supreme Court recognized "the reality that criminal justice today is for the most part a system of pleas, not a system of trials." *Lafler*, 2012 WL 932019, at *9. "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id.* For this reason, the Supreme Court concluded, "it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process." *Id.*; *Frye*, 2012 WL

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[3] The effect of the State's logic is especially pernicious because indigent defendants have no Sixth Amendment right to counsel in post-conviction collateral review proceedings. *See, e.g., Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987).

932020, at *6. Thus, in *Frye,* the Supreme Court held that an attorney's failure to timely communicate a plea offer to a defendant resulting in the offer expiring could deny the defendant the effective assistance of counsel, even where the defendant subsequently entered a knowing and voluntary plea (albeit on less favorable terms). Likewise, in *Lafler,* the Supreme Court held that an attorney's incorrect legal advice regarding a plea offer resulting in the offer being turned down could deny the defendant the effective assistance of counsel, even where the defendant was subsequently convicted following a full and fair trial before a jury. In each case, the Supreme Court expressly rejected the State's argument that there could be no finding of *Strickland* prejudice because the defendant was later convicted— in *Frye*, after a knowing and voluntary plea, and, in *Lafler*, after a full and fair jury trial.

The Supreme Court's just-rendered decisions in *Frye* and *Lafler* radically alter the landscape of this case. If the State's position in this case is adopted, the number of post-conviction *Strickland* challenges based on *Frye* and *Lafler* can be expected to increase exponentially. Defendants will argue that the public defender's excessive caseload prevented the public defender from timely conveying plea offers or from negotiating the most advantageous plea with the State. And, based on the recent decisions in *Frye* and *Lafler,* the State will not be able to argue that the mere fact that the defendant ultimately accepted a plea or was

convicted after a full and fair jury trial means that the defendant was not prejudiced by the public defender's excessive caseload.

In short, *Frye* and *Lafler* turn the State's budgetary argument in favor of the "actual or imminent prejudice" standard on its head. Now, considerations of fiscal and judicial economy, as well as justice, militate in favor of addressing excessive workload conflicts on a timely basis, when there is a "substantial risk" of harm, as occurred in the cases before the Court. Waiting until the harm has actually occurred, as the State urges, will only increase the burden on the courts and the state's coffers.[4]

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[4] The State fails to address in any meaningful way the several cases from other states that are consistent with the position urged by PD-11 here. *Compare* Init. Br. 64-67 *with* Ans. Br. 40-42.

In addition, the cases from other states cited by the State are easily distinguished, because none involved a claim, supported by evidence, that the public defender's excessive workload resulted in a conflict of interest in violation of professional conduct rules. *Platt v. State,* 664 N.E.2d 357 (Ind. Ct. App. 1996), was a class action alleging that the Indiana public defender system was unconstitutional. The court dismissed the suit because there was no showing of ineffective assistance of counsel. In *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996), the public defender sought to have the public defender funding statute declared unconstitutional. *People v. Dist. Ct. of El Paso County,* 761 P.2d 206 (Colo. 1988), and *State ex rel. Stephan v. Smith,* 747 P.2d 816 (Kan. 1987), both involved constitutional challenges to statutes limiting the compensation paid to court-appointed counsel.

II. The State's Exclusive Focus On Whether The Public Defender Is Meeting The Constitutional Effective Assistance Of Counsel Standard Is Misplaced Because It Ignores The Fact That The Public Defender, Like Any Other Lawyer, Is Required To Comply With This Court's Rules Of Professional Conduct.

The State argues that "[i]n 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 or caseloads." Ans. Br. 46-47. In effect, the State argues that the only standard of conduct a public defender must meet is the constitutional effective assistance of counsel standard, and the only question a trial court need concern itself with is whether a criminal defendant's constitutional rights are being violated. Thus, the State argues that "[a]ctual . . . ethical violations" are only "the starting point . . . in analyzing whether counsel should be permitted to withdraw where overload conflicts are alleged." *Id.* at 47.

This Court should reject the State's argument. The effect of the public defender's excessive workload on the constitutional rights of indigent defendants, while undoubtedly important, is only one piece of the puzzle. Certainly, the public defender is required to provide effective representation that meets Sixth Amendment standards, but the professional obligations of the public defender do not end with the Constitution. The public defender—just like any other lawyer, criminal or civil, public or private—must also comply with this Court's Rules of

Professional Conduct. Public defenders do not get a "free pass" simply because they are public employees operating under budgetary constraints.

Notably, the American Bar Association took the unusual step of filing an *amicus* brief in support of PD-11's position to make the same point: "As required by both the Florida Rules and the ABA Model Rules, lawyers with an excessive caseload have an ethical duty not to undertake the representation or, if already underway, to terminate the representation, if the representation will result in violation of the rules of professional conduct." ABA *Amicus* Brief at 6. Remarkably, the State fails even to acknowledge the ABA's *amicus* brief.[5]

The Comment to Rule 4-1.3 states: "A lawyer's workload must be controlled such that each matter can be handled competently." R. Regulating Fla. Bar 4-1.3 Cmt. This admonition applies equally to public defenders. As Chief Justice England noted in *Escambia County v. Behr,* 384 So.2d 147, 151 n.2 (Fla. 1980) (England, C.J., concurring), "the acceptance of additional cases where an existing caseload precludes adequate representation may subject an attorney to disciplinary action."[6] Thus, where a public defender believes that there is a "substantial risk"

[5] The Rules Regulating the Florida Bar are largely derived from the ABA's model rules, although, as Justice Kennedy noted in *Frye*, the ABA's "rules" are only guidelines, whereas this Court's Rules are mandatory. *Frye*, 2012 WL 932020, at *8.

[6] Likewise, in Justice Scalia's recent dissenting opinion in *Frye*, he specifically suggested, as an alternative to reversing the defendant's conviction, that "the

that his representation of additional clients will "materially limit" his ability to represent his current clients, Rule 4-1.7, R. Regulating Fla. Bar, mandates that the public defender "shall not" undertake the representation. Likewise, Rule 4-1.16(a) requires that a public defender "shall not" represent a client if representation of the client "will result in violation of the Rules of Professional Conduct or the law," and that, if the public defender is already representing the client, he "shall withdraw." R. Regulating Fla. Bar 4-1.16(a).

The State attempts to skirt this very real problem by distinguishing between "workload conflicts" and "ethical conflicts." Ans. Br. 41. According to the State only "ethical conflicts" are presumed to be harmful. *See Scott v. State*, 991 So.2d 971, 972 (Fla. 1st DCA 2008). "Workload conflicts," the State argues, require an additional showing of "actual conflict, *i.e.*, that there is identifiable specific evidence in the record that suggests that the defendant's interests are impaired or compromised." Ans. Br. 41. The distinction drawn by the State is a false one, however. In point of fact, *all* conflicts are ethical conflicts, because all conflicts, by definition, violate the Rules of Professional Conduct. A wide variety of circumstances may give rise to a conflict of interest—from the representation of co-defendants to a workload so excessive an attorney is unable to meet her professional obligations to all of her clients. Nevertheless, it is the existence of the

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attorneys who made such grievous errors" could be "penaliz[ed]." *Frye*, 2012 WL 932020, at *14.

conflict of interest, whatever the source, that justifies a motion for withdrawal (or to decline appointment) and the trial court's consideration of it.

In effect, the State would create a different, lower standard of professional conduct applicable only to public defenders (and, by extension, their indigent clients), which would recognize conflict only where a public defender can demonstrate that there is "no possible way" he can meet his obligations. Ans. Br. 52. The State's "no possible way" standard stands in sharp contrast to the Rules of Professional Conduct applicable to all other lawyers. *See Hagopian v. Justice Administration Commission,* 18 So.3d 625, 643 (Fla. 2d DCA 2009) (holding that private attorney could properly decline court appointment where "undisputed evidence . . . established that the continued representation of [the court- appointed client] would *likely result* in the violation of several of the Rules of Professional Conduct") (emphasis added).

This Court has never considered adopting a different set of Rules of Professional Conduct for public defenders, and it should not do so now. Instead, the Court should follow the course it set almost forty years ago in *Nelson v. State*, 274 So.2d 256 (Fla. 1973). In *Nelson*, the Court set forth "the procedure which the trial court should follow for the purpose of protecting an indigent's Sixth Amendment right to counsel in a criminal prosecution where *before* the commencement of the trial the Defendant moves to discharge appointed counsel."

Id. at 258 (emphasis added). The Court held that "the trial judge should make a sufficient inquiry . . . to determine whether or not there is *reasonable cause to believe* that the court appointed counsel is not rendering effective assistance." *Id.* at 259 (emphasis added). Notably, the pretrial procedure contemplated, adopted by the Court in *Nelson* does *not* require a showing of "actual or imminent harm" or "prejudice" as the State urges here. Instead, the Court adopted a "reasonable cause" standard which, like the "substantial risk" standard in the Rules of Professional Conduct, serves to *avoid* prejudice. The Court should do the same here.

III. Section 27.5303, Florida Statutes, As Interpreted By The Third District, Violates The Separation Of Powers And Is Unconstitutional For That Reason.

In its Initial Brief, PD-11 argued that §27.5303, Florida Statutes, is unconstitutional because it violates the separation of powers. PD-11 argued that the statute, as construed by the Third District, improperly purports to restrict the inherent authority of the trial court, to invade the exclusive jurisdiction of this Court to regulate lawyer conduct, and to impose a different ethical standard on public defenders. In response, the State makes two arguments, neither of which is meritorious.

First, the State argues that the statute does not improperly impinge on the inherent authority of the court because "a trial court may permit withdrawal when

actual or imminent harm to the constitutional right of effective representation has been shown." Ans. Br. 60. According to the State, the statute permits the court "to rectify constitutional violations stemming from ineffective representation that is shown via various factors (that may include excessive workload)." *Id.*

The State's argument fails. The statute does *not* by its terms purport to preserve the authority of the court to grant a motion for withdrawal "when actual or imminent harm" to constitutional rights is shown, as the State asserts. The "actual or imminent harm" standard is the standard urged by the State in this case and adopted by the Third District, but it can be found absolutely nowhere in §27.5303, Florida Statutes. What the statute actually says is that "The court *shall* deny the motion to withdraw if the court finds the grounds for withdrawal are insufficient *or* the asserted conflict is not prejudicial," §27.5303(1)(a), Fla. Stat. (emphasis added), and that the court "*shall* [not] approve a withdrawal . . . based *solely* upon . . . excess workload." §27.5303(1)(d), Fla. Stat. (emphasis added). The statute thus interferes directly with the court's inherent authority, and core constitutional obligation, to decide motions for withdrawal where public defenders are involved.

The State's assertion that the statute preserves the court's authority to consider "excessive workload" as "a factor"—just not as the "sole basis"—for withdrawal is similarly specious. As interpreted by the Third District, the statute

requires a public defender to make a "showing of prejudice or conflict *separate from* that which arises out of an excessive caseload." *Bowens*, 39 So.3d at 481 (emphasis in original). Where the required showing must be "*separate from*" excessive workload, excessive workload is eliminated as "a factor" the court may consider in ruling on a motion for withdrawal. The addition of the word "solely" is not enough to save the statute. The legislature simply does not have the power to so circumscribe the court's inherent authority or to otherwise interfere with the court's performance of its core constitutional obligation.

Second, the State argues that the statute does not "conflict" with the Rules of Professional Conduct because the statute "does not directly alter how attorneys are to conduct themselves or how attorney discipline is handled." Ans. Br. 60. As "proof" of this proposition, the State points to the fact that there is no record of any Bar complaints having been filed against the public defender. Ans. Br. 61.

This argument also fails. The statute expressly directs trial courts to deny a motion for withdrawal based on excessive workload. When the motion is denied as required by the statute, the public defender who filed the motion because her excessive workload is preventing her from meeting her professional obligations, is then required to continue representing her indigent client, *despite the fact that she has a conflict under the Rules of Professional Conduct which requires her to withdraw.* There could be no more direct "conflict" with the Rules of Professional

Conduct. Budget issues or no budget issues, the legislature cannot dictate that a lawyer continue to represent a client in violation of this Court's Rules of Professional Conduct; the statute violates the separation of powers.[7]

IV. This Court Should Defer To The Trial Court And Remand The Actions For Further Proceedings.

The State asserts that the order entered by Judge Blake allowed PD-11 to "withdraw[] en masse from 60% of its cases," Ans Br. 28. The State describes this relief as "unprecedented and far-reaching," Ans. Br. 28, and asserts that "judicial relief must be a last resort upon a showing of urgent necessity," Ans. Br. 40. The State further characterizes the trial court's exercise of its authority in this case as "a momentous decision," Ans Br. 44.

The State's description of Judge Blake's order is flat wrong, however. Judge Blake did not allow PD-11 to withdraw from 60% of its cases; indeed, Judge

[7] The State also argues that the statute is constitutional because "the Legislature has constitutional authority over the control of public defenders and thereby their conflicts of interest and grounds for withdrawals." Ans. Br. 61. In support of this argument, the State cites *Babb v. Edwards,* 412 So.2d 859, 862 (Fla. 1982), in which the Court held that "two adverse defendants should not be represented by assistant public defenders in the same circuit once the public defender has determined that to do so would be a conflict of interest," and *Johnson v. State,* --- So.3d ---, 2012 WL 16692, *7 (Fla. January 5, 2012), in which the Court held that "section 27.5303(1)(a) governs all public defender motions to withdraw based on conflict, both at the trial and appellate level." Neither case supports the State's argument here, because neither case purports to address the issue presented by this case—that is, whether the legislature's authority to establish the Office of the Public Defender in the first instance also encompasses the authority to exempt public defenders from this Court's Rules of Professional Conduct. Clearly, it does not.

Blake did not allow PD-11 to withdraw from *any* of its cases. Rather, Judge Blake granted PD-11's motion to decline *new* third-degree felony cases for a sixty (60) day period only. (R18.2537). After sixty (60) days, the trial court would then re-evaluate the circumstances to determine if the public defender still had a conflict of interest or if the office was once again in a position to accept new third-degree felony cases. Thus, contrary to the State's alarmist rhetoric, there was nothing "momentous" about the measured relief afforded by the trial court.

Moreover, trial courts are called upon every day to weigh the evidence placed before them and to afford (or deny) relief based on asserted conflicts of interest. That is what courts do in the ordinary course and that is what the trial courts did in the cases now before this Court; it is not a threat to the separation of powers. First, Judge Blake, in *Public Defender*, and then Judge Thornton, in *Bowens*, heard testimony and considered the arguments of the parties. After days of fact and expert testimony, and bringing their own substantial experience in the criminal courts to bear, each judge determined that the bulk of the relief sought by PD-11 was warranted by the evidence presented, and that the motions should be granted in substantial part. Thus, contrary to the argument of the State, PD-11 did not demand that the trial courts simply accept their certifications of conflict at face value, and the trial courts did not do so. Moreover, the factual findings made by the trial courts are entitled to deference. *See, e.g., Jardines v. State,* 73 So.3d 34,

54 (Fla. 2011) (holding that "the reviewing court must defer to the trial court's factual findings if supported by competent, substantial evidence"). They are not subject to *de novo* review, as the State argues. Ans. Br. 28 n.14.

Much of the State's Answer Brief is devoted to ridiculing the evidence that PD-11presented to the trial courts, despite the fact that the trial courts credited this evidence. The State complains that "PD-11's evidence established no objective means of quantifying actual workloads." Ans. Br. 49. Yet, as Judge Blake noted, "SAO-11 . . . failed to present any alternative national or Florida caseload standard used by professionals in the field" (R18.2536)—a failure which continues to date. Moreover, the record shows that Judge Blake did not base his analysis solely on the number of appointments, as the State suggests; instead he ordered PD-11 to provide statistics showing the number of cases pled at arraignment, no actioned, bound down to misdemeanors, or referred to pretrial intervention. Using these statistics, Judge Blake was able to determine the "active caseload" of PD-11, which he still found to be "extremely high." (R18.2535). The State also bemoans "the lack of specifics" offered by PD-11. Ans. Br. 52. Yet, at the same time, the State dismisses the significance of testimony offered by an assistant public defender who neglected to convey a plea offer before it was withdrawn (as in *Frye*) as merely "anecdotal." Ans. Br. 53. The Court should not be swayed by the State's attack on the evidence. The bottom line is that PD-11 presented substantial

evidence, both statistical and specific, to support its claim of conflict; the trial courts agreed; and their factual conclusions are entitled to deference.

CONCLUSION

This Court should reverse the Third District's decisions in *Public Defender* and *Bowens* and order remand of the *Public Defender* case to the trial court to review PD-11's current noncapital felony caseload and the conditions in the office to determine whether it is still necessary for PD-11 to decline appointments of third-degree felony cases to permit PD-11 to meet its professional and constitutional obligations to its existing and future clients and to avoid "a *substantial risk* that the representation… will be materially limited" and, if it is, to enter an appropriate remedy.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Reply Brief of Petitioners is printed in 14-point New Times Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioners was served by U.S. Mail this 16th day of April, 2012 on counsel and parties of record on the attached service list.

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