

IN THE SUPREME COURT OF FLORIDA
Case No. SC09-1181

FILED
2010 JUL 14 PM 3:24
BY _____

PUBLIC DEFENDER, ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,
Petitioner,

v.

THE STATE OF FLORIDA,
Respondent.

_____ /

**STATE OF FLORIDA'S RESPONSE OPPOSING
EXPEDITED MOTION TO CONSOLIDATE CASES**

Respondent, the State of Florida, opposes the consolidation of this case with Bowens v. State of Florida, Case No. SC10-1349, for the following reasons:

1. First, the motion for consolidation is premature because the issue of whether the Court has jurisdiction in Bowens is unsettled. Bowens filed a notice to invoke this Court's discretionary jurisdiction on July 12, 2010, at the same time the consolidation motions in the respective cases were filed. As a basis for this Court's jurisdiction, the notice in Bowens asserts that the decision below passes upon a certified question of great public importance, expressly declares a state statute valid, and expressly affects a class of constitutional officers. Until this Court determines whether it has jurisdiction in Bowens, it cannot consider whether consolidation with this case is warranted.

2. Moreover, the orderly presentation of jurisdictional briefs and sufficient time to reflect on whether jurisdiction exists and should be exercised, as was done in this case, are warranted in Bowens. Notably, the arguments made as to the propriety of the Court's jurisdiction over Bowens on the basis of the certified question are not permitted. Fla. R. App. P. 9.120(d). While the notice to invoke in Bowens offers alternative grounds for jurisdiction, the motion to consolidate asserts that Bowens is before this Court by reference only to the certified question. This Court must make its own jurisdictional decision on that issue without argument from the parties, or after the parties have an opportunity to brief the other possible grounds for jurisdiction in this Court. In either case, the question of consolidation is premature until a jurisdictional decision is made.

3. In the alternative, if this Court considers the consolidation motion and the movant's assertions on the basis of the certified question, the Court should consider whether the Third District actually "passed upon" a question of great public importance in Bowens, as required for jurisdiction. Fla. R. App. P. 9.030(a)(2)(v). The Third District summarily stated that it agreed with the trial court's analysis on the statute's constitutionality, but it is not entirely clear that it considered specifically the issue it put to this Court in its certified question: "Whether section 27.5303(1)(d), Florida Statutes, ... is unconstitutional as a violation of an indigent client's right to effective assistance of counsel and access

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 interest?" Because the Third District did not mention, discuss, or analyze the issues within the certified question, it is questionable whether it passed upon them. *See* Pirelli Armstrong Tire Corp. v. Jensen, 777 So. 2d 973, 974 (Fla. 2001) ("Because in rendering its decision, the Second District did not pass upon the question certified to this Court, we are without jurisdiction to review this case."); Gee v. Seidman & Seidman, 653 So. 2d 384 (Fla. 1995); *but see* Weiland v. State, 732 So. 2d 1044, 1047 (Fla. 1999).¹

4. Next, turning to the motion's substantive arguments, consolidating these cases for briefing and oral argument will not necessarily promote judicial

¹ The fact that Bowens is an appeal from a decision regarding a petition for writ of certiorari (on this issue, denying Bowens' cross-petition), the certified question basis for this Court's jurisdiction is further complicated. Because the writ is discretionary and denial is not construed as an opinion on the merits of a case, the Third District's brief approval of the trial court's resolution of the constitutionality of the statute could mean that it found no departure from the essential requirements of law; it could mean that the Third District concluded that there was an adequate remedy by way of appeal at the conclusion of the trial court proceedings; it could mean that the petitioner did not demonstrate the requisite degree of material harm throughout the remainder of the proceedings (a decision which does not necessarily entail findings regarding the constitutionality of the statute). Therefore, unlike the appeal in Weiland, the Third District's summary disposition of the constitutionality issue is not alone grounds for concluding that it passed on the question it certified.

economy or efficiency because these cases do not involve identical or substantially the same issues. *See J.M.B. v. State*, 776 So. 2d 353, 354 (Fla. 1st DCA 2001) (“cases with ... identical issues may be consolidated ... for briefing.”). The petitioners in the two cases are different and a brief description of them and their arguments below exemplify why they should remain on separate tracks in this Court. In this case, the petitioner is the office of the Public Defender of the Eleventh Judicial Circuit, appealing a decision in which the Third District determined that the entire public defender’s office could not withdraw from an entire class of felony cases, representing approximately 11,693 cases at that time, solely on the basis of the office’s average caseload. *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798, 805 (Fla. 3d DCA 2009). In contrast, the Third District’s decision in *Bowens* reversed the trial court’s order permitting the withdrawal of one public defender from representing Mr. Bowens (and only Mr. Bowens) because counsel had failed to show that his limitations actually prejudiced Mr. Bowens. *State v. Bowens*, No. 3D09-3023, at 4 (Fla. 3d DCA July 7, 2010). The Third District specifically cited its review of the record in that case as leading it “to conclude that there was no evidence of actual or imminent prejudice to Bowens’ constitutional rights.” *Id.*

5. Thus, one case involves a system-wide attempt to withdraw from an entire class of cases based on aggregate caseload numbers, while the other involves

an individual presentation of the particularities of Mr. Bowens' representation by his public defender. The Third District explicitly drew this distinction in this case in addressing the aggregate withdrawal sought: "The conclusion in the aggregate, that a conflict of interest exists, inherently lacks the meaningful individualized information required by such a determination." Public Defender, 12 So. 3d at 802. The distinction between individual and aggregate withdrawal being critical to the decision below, it cannot be contended that the issues in these two cases are identical or sufficiently similar to warrant consolidation.

6. Consolidating these cases would lead to the type of conflation of issues that consolidation typically seeks to avoid. The issue of the constitutionality of the statute was not at issue here, but might be present in Bowens, if the Court concludes that the Third District passed upon this issue.² In this case, the Third District considered whether the public defender's office could withdraw in the aggregate based on its caseload burden, an issue that simply could not be considered in Bowens. The particular circumstances of Mr. Bowens' public defender were not at issue here, and were nearly the entire basis for the lower court's decision in Bowens. Likewise, the issue of whether declining representation is equivalent to withdrawal presented here is not present in Bowens. Given the distinct issues in each case, consolidation is unwarranted.

² At page 2 of its motion to consolidate, petitioner admits that the decision here only implicitly addresses the statute's constitutionality.

7. While the issues undoubtedly relate to the same subject matter, this relation is not grounds for consolidation. Bowens relates to this case in the same way that any withdrawal by any individual public defender in Florida on the basis of a high caseload would relate. And the resolution of the permissibility of aggregate withdrawal by this Court has the potential to entirely moot Bowens or change the relevant analysis. Judicial efficiency will be better served by allowing Bowens to operate on a separate track.

8. Finally, consolidation would not promote the timely disposition of this case, which already has a briefing schedule. That schedule necessarily would be extended significantly were consolidation of the cases ordered. Given the different factual circumstances presented, and the separate issues in each case, it makes little sense to consolidate the briefing and disposition of these cases.

For the foregoing reasons, the State respectfully requests that the Court deny the petitioner's motions for consolidation.

Respectfully Submitted,

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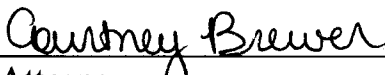
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