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

INITIAL BRIEF ON THE MERITS

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TABLE OF CONTENTS

PAGE(s)

PAGE(s)

PAGE(s)

PAGE(s)

TABLE OF CITATIONS

CASES **PAGE(s)**

CASES **PAGE(s)**

CASES **PAGE(s)**

CASES **PAGE(s)**

CASES **PAGE(s)**

OTHER AUTHORITIES

CASES **PAGE(s)**

CASES **PAGE(s)**

CASES **PAGE(s)**

I. STATEMENT OF THE CASE AND OF THE FACTS

A. NATURE OF THE CASE

This is a consolidated appeal of two decisions of the Third District Court of Appeal ("Third District"): *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798 (Fla. 3d DCA 2009) ("*Public Defender*"), and *State v. Bowens*, 39 So. 3d 479 (Fla. 3d DCA 2010) ("*Bowens*").

In *Public Defender*, the Third District quashed an order entered by Judge Stanford Blake ("Judge Blake's Order") that acknowledged and accepted a determination made by the Public Defender for the Eleventh Judicial Circuit ("PD11") that existing case overload office-wide required refusal of certain additional indigent representations until the office-wide caseload could be handled in a professionally responsible manner. The trial court credited the evidence proffered by PD11, determined that acceptance of additional cases would create conflicts of interest with representations in existing cases, and granted partial systemic relief, concluding PD11 could temporarily decline appointments to new third-degree felony cases, subject to caseload review every 60 days. The Third District quashed the trial court's order without disagreeing with any of the trial court's factual determinations about PD11's caseload, held that systemic relief was not available to PD11 because this Court's Rules of Professional Conduct only applied to individual lawyers, and held that § 27.5303(1)(d), Fla. Stat., purporting

to prohibit "withdrawal" from existing representation "solely" by reason of excessive caseload ("Statutory Prohibition"), applied equally to declination of new case appointments. The Third District concluded that an individual lawyer only may withdraw from an individual case after she proves "prejudice" or "conflict," even though § 27.5303 does not require proof of prejudice.

In *Bowens*, the Third District reversed a subsequent trial court order by Judge John Thornton ("Judge Thornton's Order"), entered in a case brought by PD11 *and* an individual assistant public defender in response to the Third District's determination in *Public Defender* that only individual attorneys could seek relief from excessive caseload. This case did involve withdrawal from an existing representation. Judge Thornton approved the withdrawal from a single representation, in order to comply with PD11's and the individual attorney's obligations under the Rules. He determined that PD11's inaction (it had done "virtually nothing") in its representation had prejudiced the client, concluded that the withdrawal was thus not "solely" by reason of excessive caseload, and therefore the prohibition of § 27.5303(1)(d) did not apply and the constitutionality of the Statutory Prohibition was not implicated. The Third District quashed Judge Thornton's Order as well, again without disagreeing with any of the trial court's factual determinations. It principally did so because it believed that the individual public defender had failed to show "actual or imminent" prejudice to his indigent

client's constitutional rights, and therefore could not withdraw due to the prohibition set forth in the Statutory Prohibition. The Third District certified the issue of the constitutionality of § 27.5303(1)(d) to this Court.

This Court has jurisdiction pursuant to this Court's Orders dated May 19, 2010 and October 11, 2011.

B. INTRODUCTION

The Third District's decisions in *Public Defender* and *Bowens*, taken together, mandate that the Legislature's Statutory Prohibition trumps this Court' s Rules of Professional Conduct. The Third District has effectively prohibited the Public Defender, both office-wide and individually, from *ever* withdrawing from the representation of its indigent clients under the Rules of Professional Conduct due to conflicts caused by excessive caseload unless and until such counsel has proved he has already actually prejudiced and harmed his own client. Such a result is not only unacceptable; it is also unconstitutional.

The State of Florida has a constitutional obligation to provide representation to all indigent persons charged with felonies and serious misdemeanors. The Legislature determined that this constitutional obligation should principally be satisfied by creation of an Office of the Public Defender in each judicial circuit. *See* Ch. 63-409, § 1, Laws of Fla. A Public Defender must be a member of The Florida Bar. *See id*. In 1972, the electorate constitutionalized the Public Defender.

See Art. V, § 18, Fla. Const. PD11, now a constitutional officer, continues to have the principal responsibility to satisfy the State's constitutional obligation. The Legislature in 2007 expanded public representation by creating the Office of Criminal Conflict and Civil Regional Counsel ("Regional Counsel"), one for each of the territory of the five district courts of appeal. *See* Ch. 2007-62, § 1, Laws of Fla. These counsel are intended to handle the cases which the public defenders are unable to handle by reason of conflicts of interest. The Legislature provided for appointment of private counsel if the Regional Counsel is also unable to act. *See, e.g.*, § 27.5303.

In initially deciding that the Public Defender would take the lead in providing representation to indigent defendants, the Legislature set bounds on what matters the Public Defender should handle. *See* § 27.51(1), Fla. Stat. This Court has required strict compliance by the Public Defenders with these bounds. *State ex rel. Smith v. Brummer,* 426 So. 2d 532, 533 (Fla. 1982) (holding public defender lacks the authority to represent a class of indigent defendants for violation of constitutional rights); *State ex rel. Smith v. Brummer*, 443 So. 2d 957, 958-59 (Fla. 1984) (holding public defender lacks the authority to accept appointments from the federal court).

In this consolidated appeal, we are *not* dealing with the decision as to who will satisfy the State's constitutional obligation of indigent representation. Rather,

the issue here is whether this Court's instructions to *all* lawyers—public or private—may be overruled by the Legislature.1/

This Court, in exercise of its constitutional duties, has instructed all lawyers they may not represent any client—paying or indigent—if by doing so, that lawyer would have a conflict of interest with another client. Such conflict may arise when a lawyer's acceptance of additional representation would create a conflict with an existing representation. And this Court has said that such a conflict can be created by an excessive caseload. According to this Court, the lawyer presented with the conflict is the person who must make the determination whether a conflict does or will exist, and if that person is a manager and/or supervisor of other lawyers, as is PD11, that person must make that determination.

As officers of this Court, all lawyers must do what this Court says. Under Florida's Constitution, under this Court's integration of The Florida Bar, and under the time-honored course of Anglo-American law, it is for this Court—not the Legislature—to tell lawyers under what conditions they may and may not represent clients.

We submit that the Third District's two decisions failed to apply these propositions and must be reversed. To the extent the Legislature concluded the

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1/ PD11 contends that, properly construed, the Statutory Prohibition in question does not overrule the actions approved by the two trial courts, but the Third District construed the statute to preclude these actions, and held that the legislative mandate controls.

issue of lawyer conduct was for it to consider, the Legislature acted beyond its bounds under Florida's Constitution. This consolidated appeal requests that this Court reverse *both* decisions, with directions to remand to the trial courts to act in accordance with the standards this Court may put in place. The effect of this in the *Public Defender* case would be for the trial court to receive PD11's status report which it required every 60 days and to declare whether, and to what extent, its prior remedy remains in effect under present conditions and whatever standards are set forth in its opinion. The effect of this in the *Bowens* case would be for the trial court to determine the individual indigent defendant's present posture and whether the Regional Counsel must assume his defense.

C. FACTUAL BACKGROUND, COURSE OF PROCEEDINGS AND DISPOSITION IN THE LOWER TRIBUNAL

1. The Office-Wide Public Defender Case—PD11's Motion To Decline Future Appointments Of Noncapital Felony Cases.

PD11, faced with attrition and a very high caseload, filed a certificate of conflict of interest in all felony sections of the criminal division of the Circuit Court of the Eleventh Judicial Circuit and motions to appoint other counsel to unappointed noncapital felony cases. R1.77-91. 2/ PD11 certified "that accepting further appointments of noncapital felony cases at this time would create a conflict

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2/ Citations to the Record on Appeal in L.T. Case Nos. 3D08-2272 and 3D08-2537 will be by the record volume no. and the page(s) as follows: "R[volume].[page(s)]."

of interest with previously appointed clients and newly appointed clients in cases other than noncapital felonies." R1.91. All the motions were reassigned and consolidated before the administrative judge of the criminal division, the Honorable Stanford Blake. The State Attorney for the Eleventh Judicial Circuit ("SAO11") opposed the motions. R4.378-414. The trial court found that SAO11 had no standing to oppose the motions. R18. 2534, but "allowed SAO-11 great latitude in its participation in th[e] hearing." R18.2534. SAO11 "responded to all PD-11s pleadings and documentary evidence, cross-examined PD-11's witnesses, and presented its own witness in opposition of the evidence presented by PD-11's witnesses." R18.2534.

During a two-day evidentiary hearing, PD11 presented testimony about the operation of the office and the impact PD11's excessive caseloads had on its ability to represent its clients. The parties submitted post-trial memoranda. R15.2030-131, R18.2500-31. The trial court then entered Judge Blake's Order granting in part and denying in part PD11's motions. R18.2532-38. All evidence relating to PD11's actual conditions was unrebutted, and all was credited, directly or inferentially. The unrebutted testimony showed: 3/

3/ PD11's principal fact witnesses were: Bennett Brummer, former PD11; Carlos Martinez, PD11; Rory Stein, General Counsel, PD11; Stephen Kramer, Assistant Public Defender, PD11; and Amy Weber, Assistant Public Defender, PD11.

- PD11 failed to meet its responsibilities to its clients prior to arraignment. R15.2108 (Brummer).

- The only representation PD11 provided to clients prior to arraignment was through an "Early Representation Unit" which *only* handled cases of in-custody clients. R16.2163-64 (Martinez).

- Out-of-custody clients do not speak with a lawyer or have any investigation done on their cases prior to arraignment, making it impossible for PD11 to counsel clients regarding early plea offers. R16.2164-65 (Martinez); R16.2234-35 (Stein).

- Representing a client at arraignment *without* an in-depth interview or investigation is unprofessional. 4/ R17.2396 (Professor Lefstein).

4/ Professor Lefstein is a former reporter on the subject of appropriate public defender workloads for the American Bar Association ("ABA") Standing Committee on Criminal Justice Standards. R17.2370. Regarding PD11's representation of its out-of-custody clients prior to arraignment, Professor Lefstein testified that it was "just the opposite of diligent representation under 1.3." R17.2395. He testified that: "There was the use of a term by [PD11]. . . .that we operate as greet and plead lawyers at the arraignment, and he amplifies that by stating what they end up doing, because they have not really talked to the client at any length, they have not investigated the case, they don't know what the case is about, they know only what the State's Attorney's Office is allowing the defendant to plead to, and in a sizeable number of cases they will tell the defendant, "Here is what the State is offering. I really can't, in effect, advise you what you ought to do, but if you want to plead to it, you can plead to it. . . .That's not defense representation. That's not legal representation. That's a warm body repeating the State's offer." R17.2395-96.

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- ”[A]ssistant public defenders assigned to handle “A and B” felony cases (life, 1st and 2d degree) are now being appointed to “C” felony cases (3d degree)”, which “encompass sixty percent (60%) of all felony filings.” R18.2535. So are supervising attorneys. *Id*. (Kramer). One lawyer stated “she is in court two out of three weeks because she has “C” felony cases.” *Id*. (Weber).

- “C” felony cases are clogging the system and negatively impacting PD-11’s felony attorneys’ caseload.” R18.2535-36. Work was delayed or never completed because of PD11’s caseload. R16.2285, 2288 (Kramer) ; R16.2299 (Weber); *see also id.* at 2262 (Stein). Lawyers had no time to diligently investigate their cases, or schedule *Arthur* hearings or other adversarial preliminary hearings. R16.2285 (Kramer). Lawyers only had on average one hour to interview a client through the duration of a noncapital felony case, including cases with the prospect of 20 to 40 years in prison. R16.2287-89 (Kramer); R16.2294 (Weber). Often there was no time to file motions and the lawyer was often unavailable to take depositions in her cases. R16.2296-97, R16.2299 (Weber).

- Investigation could not be performed on most cases, the lawyers instead relying on non-lawyer investigators. R16.2295-96 (Weber).

- One assistant public defender recounted an example of the impact her caseload had on her representation of one her clients. With 13 trials set on one day, the lawyer failed to convey a plea offer to her client of 364 days in jail with 7-

years probation. As a result, SAO11 revoked the offer, and the client eventually accepted a subsequent offer of five years in prison. R16.2299-302 (Weber).

- Due to the excessive workloads, lawyers often asked for continuances, waiving their clients' rights to a speedy trial within 175 days, which could cause a client's case to linger for years. R16.2283-84 (Kramer); R16.2297-99 (Weber).

- PD11 declined new noncapital felony cases because those are the cases that have the highest impact on workload in the office. R15.2068 (Brummer). Misdemeanor cases were not declined because obtaining comparable relief there would require declining new cases *and* withdrawing from existing cases. R15.2070-71 (Brummer). Further, without a strong misdemeanor caseload, PD11 would be unable to train new attorneys. R15.2125-26 (Brummer).

Judge Blake's Order recognized the judiciary's role is to protect fundamental rights. He noted, "While the court is concerned that there not be chaos in the criminal justice system, the court must also serve as the protector of due process and meaningful representation of the accused." R18.2534. The trial court also observed that, "[p]ublic defenders, like all attorneys, are bound by professional ethical obligations." *Id.* The trial court pointed to the Rules of Professional Conduct as requiring lawyers to "provide competent representation to a client, act with reasonable diligence and promptness in representing a client, and decline or terminate representation if the representation will result in a violation of

the rules." R18.2534 (citing R. Regulating Fla. Bar 4-1.1, 4-1.3, 4-1.16). The trial court also recognized that "the rule on conflict of interest requires an attorney to decline a case if there is substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." *Id.* (citing R. Regulating Fla. Bar 4-1.7(a)(2)). Significantly, the court confirmed that the "Public Defender, Bennett Brummer, as manager and supervisor of other lawyers, has a *duty* to ensure that all lawyers in his office conform to the Rules of Professional Conduct." *Id.* (citing R. Regulating Fla. Bar 4-5.1) (emphasis added).

Judge Blake's Order concluded that "the assistant public defenders of the Eleventh Judicial Circuit function under extreme and excessive caseloads. R18.2534-35. He credited the testimony of PD11's General Counsel that, in fiscal year 2007-08, PD11 was appointed to represent indigent defendants in 45,055 new and reopened cases, and PD11 lawyers were handling–office-wide– an average of over 436 noncapital felony cases per year. R10.1231; R15.2049; R16.2139, 2246.

Judge Blake's Order determined that "the caseload of the felony public defenders in the Eleventh Judicial Circuit . . . far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually." R18. 2535. It cited to published standards, including "the National Advisory Commission on Criminal Justice Standards and Goals limit of 150 cases; Florida Governor's Commission Standard limit of 100 cases; Florida

Public Defender's Association limit of 200 cases; and Florida Bench and Bar's limit of 200 cases." R18.2535. It did *not* suggest any of these caseload standards was controlling. Nor did it choose among them, or indicate how "workload" might reduce them. 5/ Rather, it found, based on the evidence in *this* case, "that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused." R18.2535. The Order, therefore, concluded that, at that point of time, the office could not handle new cases and still provide "minimal competent representation" to both old and new clients. "[T]he evidence clearly establishes PD-11 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." R18.2536. "[F]uture appointments to noncapital felony cases [would] create a conflict of interest in cases presently handled by PD-11." R18.2537. 6/

5/ "Workload" is distinguished from "caseload" in that caseload is the number of cases assigned to a given lawyer while "workload" is the total of all work performed by that lawyer, including without limitation administrative and supervisory responsibilities. ABA Standards for Criminal Justice, Standard 5-5.3, at 68. Workload usually adjusts caseload downward. R15.2123; R17.2386.

6/ Mr. Stein testified that there is a substantial risk, due to current workloads, that PD11 is making decisions that benefit one client at the expense of another. R16.2262. Professor Lefstein, hearing *all* the testimony, concluded that PD11 is not able to provide competent or diligent representation due to the excessive caseloads and concurred with Mr. Brummer's judgment in certifying a conflict of interest and moving to have other counsel appointed. R17.2394, 2395, 2406, 2407. According to Professor Lefstein, "whether you take 144 or you take 200 or you

Judge Blake's Order denied PD11 the complete relief requested, holding that "PD-11 must continue to perform its full duties in all 'A' and 'B' felony cases…." R18.2537. Rather, it ordered "PD-11 to decline to accept appointments to 'C' felony cases until such time as the Court determines PD-11 is able to resume its constitutional duties with respect to these cases." *Id*. 7/ Declining new cases is an "incremental approach" because it only gradually lowers caseloads as older cases are resolved. R15.2068. Judge Blake's Order mandated a review of PD11's caseload every 60 days to determine when additional cases may be assigned. R18.2537-38.

Judge Blake's Order shows a clear understanding of the judiciary's role. On the record, he recognized the separation of powers mandated by the Florida Constitution, but he confirmed his role was not to order the Legislature to fund PD11 or Regional Counsel. R19.2636. Nor did he mention §27.5303(1)(d),

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take 150 [referring to various standards in evidence], PD-11 is way over the top." R17.2442.

7/ Judge Blake ruled that PD11 would be temporarily appointed to third-degree felony cases up to arraignment, at which time the Regional Counsel, Third District Court of Appeal Region ("RC-3") would be appointed to those cases. R18.2537. On September 11, 2008, the trial court clarified that this was based on Fla. R. Crim. P. 3.130(c)(1), which says: "When the judge determines that the defendant is entitled to court-appointed counsel and desires counsel, the judge shall immediately appoint counsel. This determination must be made and, if required, counsel appointed no later than the time of the first appearance and before any other proceedings at the first appearance." R19.2629-42.

although the Third District stated he construed it not to apply. *See Public Defender*, 12 So. 3d at 804.

2. The Third District Quashed The Trial Court's Order.

The State appealed Judge Blake's Order (R18.2539-41), 8/ and on May 13, 2009, the Third District reversed. The Third District held that "[d]etermining conflicts for an entire Public Defender's Office based on aggregate calculations is extremely difficult without first having considered individual requests for withdrawal in particular cases" and that "this determination must occur on a case-by-case basis." *Public Defender*, 12 So. 3d at 802. The court also held that the "rules of professional conduct . . . are only meant to apply to attorneys, individually, and not the office of the Public Defender as a whole." *Id*. at 803. It did not cite Rule 4-5.1, regarding the duty of managers and supervisors of other lawyers to ensure that the other lawyers conform to the Rules of Professional Conduct, although the trial court had done so. The Third District also held that § 27.5303(1)(d), the Legislature's Statutory Prohibition, prohibited the 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

8/ The Third District sought to invoke this Court' jurisdiction under Article V, § 3(b)(5) of the Florida Constitution. By Order dated November 7, 2008, this Court dismissed the cause for lack of jurisdiction, presumably because it was a petition for certiorari.

adequately represent a client." *Id.* at 804. The words "or the prospective inability to adequately represent a client" do *not* appear anywhere in §27.5303(1)(d).

The Third District acknowledged an individual attorney could withdraw (*id*. at 805), but reasoned that the "office-wide solution to the problem . . . lies with the legislature or the internal administration of PD11, not with the courts." *Id.* at 806. 9/ Thus, it concluded:

> "We believe that within the existing statutory framework there exists a method for resolving the problem of excessive caseload." *In re Prosecution*, 561 So. 2d at 1134. Only after an assistant public defender *proves* prejudice or conflict, separate from excessive caseload may that attorney withdraw from a particular case.
> § 27.5303(1)(a), Fla. Stat. (2007).

Id. (emphasis added). The Third District upheld § 27.5303(1)(d), and held that this Statutory Prohibition extended to declinations of new appointments in addition to the "withdrawals" it referenced, characterizing this as a necessary result to follow the legislative intent. *See id.* at 804. The Third District rewrote the statute to say what it believed the Legislature intended. No legislative history or case law was offered in support of this "intent."

9/ The Third District noted that "PD11 has not filled at least 16 full-time attorney positions that were funded by the legislature" and that Brummer "opted to increase employee salaries rather than hire additional staff." *Id.* at 805. Brummer testified that PD11 always accepted the Legislature's funding, but PD11 did not accept additional positions because they were unfunded and PD11 already had unfilled positions due to a lack of adequate funding. R15.2119-20; R16.2201-02.

Despite the courts and PD11 being part of the judicial system under Article V of the Florida Constitution, Judge Shepherd, concurring, wrote that "this action is nothing more than a political question masquerading as a lawsuit, and should be dispatched on that basis." *Id.* He concluded there was no "judicially discoverable and manageable standard to establish what is an 'excessive caseload.'" *Id.* at 806.

3. The *Bowens* Case—Assistant Public Defender Jay Kolsky Moves To Withdraw From The Antoine Bowens Case.

After the Third District's Opinion in *Public Defender* was final, Assistant Public Defender Jay Kolsky ("Kolsky") and PD11 moved to withdraw from representation of indigent defendant Antoine Bowens under the procedure outlined in the Third District's Opinion and asked the court to declare § 27.5303(1)(d), Fla. Stat., unconstitutional. R1.App. Ex. 2; R1.App.Ex. 3. 10/ Kolsky's motion contended the Statutory Prohibition violated the Florida Constitution's separation of powers clause by interfering with the judiciary's inherent authority to provide effective representation by counsel and this Court's exclusive control over the professional rules governing lawyer conflicts of interest. R1.App.Ex.2 at 9; R1.App.Ex.3 at 9-12. SAO11 again opposed the motion.

10/ Citations to the Record on Appeal in L.T. Case No. 3D09-3023, will be to the record volume no. and the page(s) as follows: "R1.[volume].[page(s)]. References to the three volume appendix of exhibits filed with the Petition for Writ of Common Law Certiorari on November 6, 2009, and the Supplemental Appendix filed on November 20, 2009, will be as follows: "R1.App. Ex.__ at [page(s)]."

Bowens was charged with a first-degree felony and faced a possible sentence of between 60 years and life because SAO11 filed a notice of intent to seek an enhanced sentence. R1.App.Ex.16 at 39. PD11 was appointed to represent Bowens on June 11, 2009. 11/ He was arraigned on July 1, 2009. By the time of the hearing on Kolsky's motion to withdraw (Sept. 29-30, 2009), virtually nothing had been done on Bowens' case. R1.App.Ex.16 at 40.

The Honorable John Thornton, Jr. held an evidentiary hearing over a three-day period, beginning on September 29, 2009. He received evidence, both oral and written. The parties submitted a stipulation pertaining to Kolsky's caseload in fiscal year 2008-09 and as of August 28, 2009, R1.App.Ex.11, and post-trial memoranda. R1.App.Exs. 12, 13.

Judge Thornton thereafter entered his Order Denying Public Defender's Motion to Declare Section 27.530391)(d) , Florida Statutes, Unconstitutional and Granting Public Defender's Motion to Withdraw. R1.App.Ex.1. His Order contained detailed findings of fact, including citations to the record, and conclusions of law. *Id*. All the trial court's factual and credibility findings credited PD11's witnesses. *Id*. The central finding of fact, based on "the unrebutted testimony" was that "Kolsky has been able to do virtually nothing on [Bowens'] case." R1.App.Ex.1 at 4.

11/ *See* Clerk's Determination, Affidavit of Criminal Indigent Status, *State v. Bowens*, F09-019364 (attached as Appendix C).

Judge Thornton's Order detailed the professional responsibilities Kolsky had not been able to fulfill to represent Bowens:

> Kolsky has not had time to meet with his client other than for a very brief, non-confidential discussion when Bowens was first arraigned. Kolsky has not obtained a list of defense witnesses from Bowens. Kolsky has not had time to take depositions. Kolsky has not visited the scene of the alleged crime. He has not determined the existence of, nor interviewed, any potential defense witnesses. He has not consulted with any experts. He has not prepared a mitigation package. He has not filed any defense motions, including a motion to disclose the confidential informant (who, according to the arrest affidavit, allegedly bought the cocaine from Bowens outside the presence of the police officers).

R1.App.Ex.1 at 4 (citations to transcript omitted). The trial court also found: "Kolsky did not have time to meet with Bowens, who is not in custody, after arraignment, nor has he communicated with him regarding the discovery the State provided." *Id*. (citing 9/29 Tr., R1.App.Ex.16 at 132-34). Only after these findings did the trial court mention that Kolsky had to take a continuance, thereby waiving Bowens' speedy trial rights. R1.App.Ex.1 at 4-5.

Judge Thornton's Order found that Kolsky's inability to defend Bowens' case was "a symptom of Kolsky's excessive caseload." R1.App.Ex.1 at 4. It found that Kolsky's annual caseload, even if taken at his lowest monthly number, meant that he would have handled at least 525 to 630 felony cases by the end of that fiscal year, not including pleas at arraignment. R.App.Ex.1 at 2 (citing 9/29 Tr., R1.App.Ex.16 at 137). Judge Thornton found that Kolsky handled a total of

736 felony cases, in addition to 235 pleas at arraignment, during the 2008-09 fiscal year. R1.App.Ex.1 at 2-3 (citing R1.App.Ex.11). The trial court also found that Kolsky has training and other responsibilities for the office of PD-11 in addition to client representation, which increase his overall workload. R.App.Ex.1 at 3 (citing 9/29 Tr., R1.App.Ex.16 at 44, 49, 52).

In contrast, Judge Thornton acknowledged the maximum annual caseload standards ranged from 200, as established by the Florida Public Defender Association, to 150, as set by the National Advisory Commission on Criminal Justice Standards and Goals ("NAC"). R1.App.Ex.1 at 1.

The trial court cited the Third District Opinion in *Public Defender* for the proposition that "[s]tate and national caseload standards and actual caseload figures are not, alone, determinative of whether an excessive caseload exists." R1.App.Ex.1 at 3 (citing *Public Defender*,12 So. 3d at 801). It did, however, recognize that caseload standards and actual figures "do serve as factors to consider in evaluating the genuineness and sufficiency of Kolsky's testimony that he cannot effectively handle, even with his 36 years of experience in the criminal justice system as both a prosecutor and defense attorney, Defendant Bowens' case." R1.App.Ex.1 at 3 (citing 9/29 Tr., R1.App.Ex.16 at 18).

The trial court then found:

> [T]he number of cases assigned to Kolsky has had a detrimental effect on his ability to competently and diligently represent and

> communicate with all his clients on an individual basis. This detrimenta1 effect begins at arraignment where Kolsky holds very brief conversations with clients he is meeting for the first time. Usually, these conversations are not confidential because of other persons within earshot. As a result, these conversations generally do not include a discussion of the facts of the case, possible defense witnesses, and preservation of evidence, making it very difficult to provide meaningful assistance or begin establishing the trust necessary for an attorney-client relationship.

R1.App.Ex.1 at 3 (citations to transcript omitted).

Noting that "the state also raised the issue of management of PD-11's resources, " (R1.App.Ex.1 at 5), Judge Thornton's Order found that "Public Defender Carlos Martinez's testimony as to the choices he has made to be credible and further finds that he is managing PD-11 amid a most challenging and difficult fiscal environment." *Id*. The trial court concluded it should not, and would not, involve itself in the management of the public defender's office. *Id*. at 10 (citing *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991)).

4. Third District Quashed The Trial Court's Order Granting Kolsky's Motion To Withdraw.

The State sought certiorari review of Judge Thornton's Order. R1.1.1-44. The Third District quashed the Order granting Kolsky's motion to withdraw and affirmed that part of the Order denying his motion to declare § 27.5303(1)(d) unconstitutional. *State v. Bowens*, 39 So. 3d 479 (Fla. 3d DCA 2010). The Third District held that withdrawal under the Statutory Prohibition required a showing of

"actual or imminent prejudice"12/ to be made, and further held that neither PD11 nor Kolsky had made a sufficient showing of such actual prejudice. The Third District wrote:

> Our analysis of the record in this case, however leads us to conclude that there was no evidence of actual or imminent prejudice to Bowens' constitutional rights. If the trial court's order stands, all that the PD11 must do to show prejudice is swear that he or she has too many cases or that the workload is so excessive as to prevent him or her from working on the client's case prior to the scheduled trial, and that he or she will be forced to file for continuance, thereby waiving the client's speedy trial rights.

Id. at 481. The Third District defined prejudice as "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." *Id.*

At the time the Third District issued its decision in *Bowens*, this Court had granted review in *Public Defender*. *See id.* at 482. As a result, the Third District certified the following question to this Court as being one of great public importance:

> 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

12/ As discussed below, "actual or imminent prejudice" is a term taken from the U.S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), establishing the standard for post-conviction attempts to set aside a conviction for ineffective assistance of counsel. The Third District did not cite to *Strickland* or any other authority.

> 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 interest?

Id. at 482. The text of the Third District's question suggests the quoted words are those of §27.5303(1)(d). They are not. The statute refers to conflicts arising from "inadequacy of funding or excess workload." § 27.5303(1)(d), Fla. Stat. It nowhere refers to "the prospective inability to adequately represent a client."

II. SUMMARY OF THE ARGUMENT

The Third District erred in reversing the trial court in both the *Public Defender* case and the *Bowens* case.

In *Public Defender*, the Third District held that systemic relief from a conflict of interest caused by excessive caseload could not be granted, but, rather each overloaded assistant public defender would have to seek relief in individual cases. PD11 is a lawyer subject to mandatory obligations proscribed by this Court's Rules of Professional Conduct. PD11 is the executive manager of the office of PD11, a "law firm," and as such is charged by this Court with the "duty" of ensuring that the conduct of the lawyers in his office conform to those Rules. *See* R. Regulating Fla. Bar 4-5.1. This Court has, in at least five separate decisions, approved of systemic relief to a public defender from excessive caseload.

The Third District construed § 27.5303(1)(d), Fla. Stat., which prohibits a court from approving the "withdrawal" of a public defender based "solely" upon excess workload, to narrow the types of conflicts of interest that publicly-funded lawyers must address as compared to private lawyers, in violation of the Rules of Professional Conduct and this Court's precedent that excessive caseload creates a conflict of interest. The Third District's individualized approach would effectively preclude any relief from excessive caseload, even on an individual basis, because the time it would take to litigate the individual motions in the individual cases would far exceed the amount of time assistant public defenders have to defend the underlying cases of their indigent clients.

The Third District also erred in holding that § 27.5303(1)(d) applies to declining new additional appointments, equally with withdrawals from existing representations, saying that "permitting PD11 to withdraw by merely couching its requests as motions to decline future appointments, would circumvent the plain language of § 27.5303(1)(d)." *Public Defender*, 12 So. 3d at 804. The plain language of this statute applies to withdrawals and only those withdrawals based "solely" on excess workload. The word "appoint" is used throughout the public defender statutes, § 27.40, *et seq.*, so the Legislature was totally aware of the meaning of that term and when to use—and when not to use—it.

In *Public Defender*, the Third District erred in concluding the trial court must affirmatively find "prejudice" to permit withdrawal (or declining an appointment). This is contrary to the explicit terms of Rule 4-1.7(a)(2). It is also contrary to § 27.5303(1)(a), which permits denial of a motion to withdraw only if the trial court affirmatively finds *lack* of prejudice. In *Bowens*, the Third District, rejecting the trial court's explicit finding of "prejudice," decided the public defender must prove "actual or imminent" prejudice to the indigent defendant's constitutional rights before she/he can decline new appointments or withdraw from existing representation. The Third District seems to have drawn this requirement of proving "actual or imminent" prejudice from a post-conviction test, established in *Strickland*, for reviewing a convicted indigent defendant's claim of ineffective assistance of counsel to overturn his conviction. This test is designed to protect the finality of judgments and is inapposite on a certification of conflict made pre-trial to prospectively protect an indigent defendant's constitutional rights.

If this Court should determine that § 27.5303(1)(d) *does* apply to declining additional appointments, then the Court should hold this Statutory Prohibition unconstitutional. The statute is unconstitutional on its face because, by narrowing the types of conflict applicable to public defenders, the statute encroaches on pure judicial functions, and violates the Constitution's mandated separation of powers and this Court's inherent authority to administer justice and protect constitutional

rights, and to establish and enforce the Rules of Professional Conduct, including rules pertaining to conflicts of interest. The Legislature cannot narrow this Court's determination as to what constitutes a conflict. Nor can it create a special conflict rule for publicly-funded lawyers.

Lastly, the state attorney—the public defender's adversary in criminal prosecutions—should not be the State entity designated to oppose any future public defender certifications of conflict. It should be the Attorney General or some other "non-partisan" entity, so as not to undermine the fair administration of justice.

III. STANDARD OF REVIEW

Judicial interpretations of statutes and determinations regarding the constitutionality of statutes are pure questions of law subject to a de novo standard of review. *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 139 (Fla. 2008); *State v. Sigler*, 967 So. 2d 835, 841 (Fla. 2007). Further, on certiorari review, as is the case here, the scope of review is whether the trial court departed from the essential requirements of the law. *See Allstate Ins. Co. v. Kaklamanos*, 843 So. 2d 885, 890 (Fla. 2003). A departure from the essential requirements of the law requires more than legal error. *See id.* There must be a violation of a clearly established principle of law resulting in a miscarriage of justice. *See id.*

IV. ARGUMENT

A. THE RESPONSE TO *GIDEON V. WAINWRIGHT* BY THE FLORIDA LEGISLATURE AND THE JUDICIARY.

In 1963, *Gideon v. Wainwright* held that the Sixth Amendment of the U.S. Constitution, as applied to the States through the Fourteenth Amendment, obligates all states to provide trial counsel to indigents accused of felonies. 372 U.S. 335 (1963). The Supreme Court has since expanded the *Gideon* right to appeals, every stage of prosecution, juvenile delinquency proceedings, and misdemeanor proceedings in which imprisonment or a suspended jail sentence is imposed. 13/ The fundamental right has been clarified to guarantee "effective representation." *Wood v. Georgia*, 450 U.S. 261, 272 (1981).

The Florida Legislature responded to *Gideon* by establishing a public defender office in each judicial circuit. *See* Ch. 63-409, § 1, Laws of Fla. Although the State delegated to the public defender the primary responsibility for representing indigent defendants, the statute also permitted the courts alternatively to appoint private counsel when the public defender was conflicted. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1134 (Fla. 1990) (quoting Fla. Stat. § 27.53(2)) (hereinafter

13/ *Douglas v. California*, 372 U.S. 353 (1963); *United States v. Wade*, 388 U.S. 218 (1967); *In re Gault*, 387 U.S. 1 (1967); *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *Alabama v. Shelton*, 535 U.S. 654 (2002).

"*Order on Prosecution*"). The Public Defender was constitutionalized in 1972. Art. V, § 18, Fla. Const. 14/

As this Court is well aware, the State's attempt to satisfy the *Gideon* obligation has historically been undermined by insufficient funding and excess caseloads. In five major decisions commencing in 1980, this Court has faced the issue of the proper course of action for a public defender faced with an excessive caseload limiting or negating its ability to represent indigent clients. These cases will be discussed *seriatim*.

The first was *Escambia County. v. Behr,* 384 So. 2d 147 (Fla. 1980) (hereinafter "*Behr*"), being two consolidated cases from Escambia and Dade Counties, where two public defenders with excessive caseloads in trial and appellate cases, sought to withdraw from the representation of certain of their respective clients. This Court held that the judiciary has discretion to appoint private counsel in lieu of the public defender when excessive caseload impairs the public defender's ability to provide effective representation. This rule applies to both trial and appellate matters. *Id.* at 149-50.

At the time of *Behr,* the Florida Legislature had not sought to dictate how the judiciary should address a public defender's conflict of interest, much less excessive caseload. Rather, the Legislature recognized the authority of the courts

14/ The Florida Constitution provides that: "Public defenders shall appoint such assistant public defenders as may be authorized by law." Art. V, § 18, Fla. Const.

to decide whether alternate counsel should be appointed when a public defender certifies a conflict of interest. 15

The Escambia County court in *Behr* had granted the Public Defender's motion to withdraw from trial proceedings in six capital felony cases, notwithstanding the county's argument that § 27.51, Fla. Stat., obligated the public defender to represent *all* indigent defendants. The Dade County court involved an appellate proceeding. The Third District quashed the trial court's ruling, holding that the public defender was obligated to represent *all* indigent accuseds under § 27.51 and the motion failed to assert a "lawful ground" for appointment of alternate counsel. *Id.* at 149. Judge Hubbart dissented, reasoning that the statute did not create an exclusive duty on the public defender to represent all indigent defendants and the trial court's appointment of alternate counsel need not be based on a "lawful ground" or "special circumstances." *Id.*

15/ Specifically, § 27.53(3) provided: "If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff, it shall be his duty to move the court to appoint one or more members of The Florida Bar who are in no way affiliated with the public defender in his capacity as such, or in his private practice, to represent those accused. However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict . . . ." § 27.53(3), Fla. Stat. (1978), quoted in *Behr*, 384 So. 2d at 148 n.3.

This Court adopted Judge Hubbart's dissent as "the rationale" for its holding, and allowed public defender withdrawal in both cases. *Id.* In a concurring opinion, Chief Justice England explained that excessive caseload should be addressed at the *outset* of representation:

> 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. Public 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. If that prospect exists, they should so advise the trial court before undertaking new commitments.
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> By requiring public defenders to decline new representation on the basis of excess caseload, rather than to withdraw from pending proceedings on that ground, the trial courts of this state will not only prevent delays in the administration of the criminal justice system, but will also avoid the creation of a different standard of professional representation in public defender offices than among private attorneys.

Id. at 150-51 (England, C.J., concurring). He stated: "[T]he acceptance of additional cases where an existing caseload precludes adequate representation may subject an attorney to disciplinary action." *Id*. at 151 n.2 (citing Fla. Bar Code Prof. Resp. D.R. 7-1-1(A)(1), (2)).

After *Behr*, the Legislature amended the statutory scheme and deleted from § 27.53(2) "the all important words 'in addition, [any member] of the bar *may be appointed by the court* to . . . special assignments without salary to represent

insolvent defendants.'" *Order on Prosecution*, 561 So. 2d at 1134-35 (emphasis in original).

In 1990, this Court again faced this issue in considering an order of the Second District prohibiting the public defender from accepting appeals from a portion of his geographical reach because of excessive backlog. 16/ *See* id. at 1132. This Court acknowledged that excessive caseload raises issues under the Rules of Professional Conduct, in addition to the Sixth Amendment, because excessive caseload creates a conflict of interest among the public defender's clients. In holding that the court had inherent authority to act as it did, this Court wrote:

> *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*. . . . "The rights of defendants in criminal proceedings brought by the state cannot be subjected to the fate of choice no matter how rational that choice may be because of the circumstances of the situation."

Id. at 1135 (quoting the district court's order) (emphasis added). This Court also recognized that excessive caseload is a *systemic* problem in the public defender office before it. Recognizing the distinct powers of the legislature and the judiciary, this Court recognized that "it is not the function of this Court to decide

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16/ The Public Defender of the Tenth Judicial Circuit was responsible for handling all appeals within the Second District. *See Order on Prosecution*, 561 So. 2d at 1132 n.1. At the time the public defender briefed the appeal, he estimated that his office had approximately 1,700 appeals in which briefs had not been filed. *Id*. at 1131.

what constitutes adequate funding and then order the legislature to appropriate such an amount," and it did not do so. *Id.* at 1136. But this Court did state that "it would be helpful for the legislature to fund a commission to examine the funding formula for the public defenders and state attorneys to determine if it accurately reflects the needs of these offices." *Id.* at 1138 n.7. The Legislature has not done so.

This Court then articulated the process to be followed:

> We believe the proper course to be followed in such a situation is for the appellate public defender to continue to be appointed as appellate counsel under section 27.51. However, where the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw. If the court finds that the public defender's *caseload is so excessive as to create a conflict, other counsel for the indigent defendant should be appointed* pursuant to subsection 27.53(3).

Id. at 1138 (emphasis added).

In 1991, this Court decided another case involving the same public defender, who sought to withdraw from representation in 29 appeals involving non-bondable indigent defendants whose briefs were over sixty days late. *Skitka v. State*, 579 So. 2d 102, 103 (Fla. 1991). Recognizing that caseload may jeopardize the constitutional right to effective assistance of counsel, the Court quashed the Second District's order denying the public defender's motion. *See id.* at 103-04. While a balance must be struck between the judiciary avoiding management of

public defender offices, on the one hand, and the Court's belief that courts should not simply rubberstamp a public defender's certification of conflict when made, it granted the motion. *See id* at 104.

The excessive appellate backlog in *Order on Prosecution* and *Skitka* continued, resulting in this Court's decision 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) (hereinafter "*Certification of Conflict*"). This time the public defender moved to withdraw from over 380 appeals. The Second District decided fact-finding was necessary and required an evidentiary hearing before a commissioner. After hearing, the commissioner reported that "[t]he public defender of the Tenth Circuit functions under excessive caseloads and relief should be granted." *Id*. at 21. 17/ The commissioner reiterated the suggestion for legislative "[a]ppointment and funding of the study commission recommended by the Florida Supreme Court in *In re: Order on Prosecution of Criminal Appeals.*" *Id*. at 21. This new suggestion secured no greater legislative notice.

Certification of Conflict recognized that "an inundated attorney may be only a little better than no attorney at all" and approved the public defender's withdrawal. *Id.* at 19. Concurring, Justice Harding noted:

17/ The commissioner recognized the maximum caseload standards issued by the National Advisory Commission on Criminal Justice Standards and Goals ("NAC"). *See id.* at 20.

> The public defender is a constitutional officer. . . .The public defender is charged not only with representing indigent defendants, but also in managing an office, directing personnel, and administering a budget. Public defenders are subject to grand jury as well as media scrutiny if there is impropriety. They are also responsible to the electors at the polls. They should be accorded great independence in making the decisions to carry out their charge. It is only when the decision of a public defender impacts significantly upon the court that any inquiry should be made.

Id. at 23 (internal citations omitted).

In 1998, this Court once against addressed excessive caseload. Here, the public defender moved to withdraw from 248 delinquent appeals, which by the time of oral argument, had grown to more than 640. *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, 102 (Fla. 1998) (hereinafter "*Public Defender's Certification*"). Recognizing that the problem was of "constitutional magnitude," the Court ordered the public defender *not* to accept further appeals and that status reports regarding caseloads be filed periodically. *Id.* at 103-04.

In deciding public defenders' motions to withdraw, this Court interpreted then § 27.53 as requiring withdrawal once the public defender certified a conflict of interest. *Guzman v. State,* 644 So. 2d 996, 999 (Fla. 1994) ("[A] trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists."); *Babb v. Edwards*, 412 So. 2d 859, 862 (Fla. 1982) ("We

find the language in section 27.53(3) clearly and unambiguously requires the trial court to appoint other counsel not affiliated with the public defender's office upon certification by the public defender that adverse defendants cannot be represented by him or his staff without conflict of interest.").

In 1998, the voters approved Revision 7 to Article V of the Constitution, changing the funding of the state's court system. Pursuant to Revision 7, court-appointed counsel was to be funded by the State and not the counties. Art. V, § 14(c), Fla. Const. Subsequently, the Legislature amended the public defender and related statutes, in what appears to have been an effort to control costs. In 1999, the Legislature amended § 27.53(3) to expressly direct the courts to review the adequacy of a public defender's assertion of a conflict of interest and to define when a court must deny a public defender's motion to withdraw. Ch. 99-282, § 1, Laws of Fla. This followed this Court's decisions in *Certification of Conflict* and *Public Defender's Certification* that judicial review of the public defender's decision was necessary because of its potential fiscal impact. Staff analysis stated the statutory change was meant to overrule *Guzman*. Fla. Jud. Comm., CS/SB (1999), Staff Analysis 5 (Mar. 30, 1999).

In 2003, the Legislature established a separate conflict statute, § 27.5303, with two significant changes. First, the Legislature expressly directed the courts to deny a public defender's motion to withdraw if the grounds are insufficient or

unless the court found, despite the existence of conflict, the client was *not* prejudiced by it. Second, notwithstanding this Court's repeated holdings that excessive caseload may create a conflict of interest, the Legislature prohibited courts from permitting a public defender to withdraw based on excessive caseload. The new conflict statute provided:

> (a) . . . .The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. *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 to the indigent client.* If the court grants the motion to withdraw, the court shall appoint one or more attorneys to represent the accused.
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> (c) *In 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.*
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> (d) In determining whether or not there is a conflict of interest, the public defender and the court shall apply the standards adopted by the Legislature after receiving recommendations from the Article V Indigent Services Advisory Board.

§ 27.5303(1)(a), (c) and (d), Fla. Stat. (2003) (emphasis added). The Legislature also granted the Justice Administrative Commission standing to object to a public

defender's motion to withdraw and the authority to contract with public or private entities to oppose a public defender's motion to withdraw. § 27.5303(1)(a). 18/

In 2007, the Legislature amended subsection (d) (now subsection (e)) of § 27.5303 relating to the conflict of interest the Legislature would honor:

> In determining whether or not there is a conflict of interest, the public defender or 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. 19/

§ 27.5303, Fla. Stat. (2007) (renumbering former § 27.5303(c) as (d), and (d) as (e)). The conflicts referenced in the Final Report are titled *Conflict Guidelines* and address conflicts of interest when (i) the public defender represents co-defendants, (ii) the public defender represents or previously represented a witness for the state against a current public defender client, (iii) investigation reveals that the actual perpetrator of the alleged crime may be another public defender client; (iv) a public defender employee is a victim in the case; and (v) a public defender employee is a witness for the State in the case. *See* Final Report of the Article V Indigent

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18/ In 2007, the Legislature deleted this provision pertaining to the Judicial Administrative Commission, but did not purport to afford standing to the State Attorney or anyone else. Ch. 2007-62, Laws of Fla.; § 27.5303(1)(a), Fla. Stat. (2007).

19/ The Article V Indigent Services Advisory Board was a board created by the Legislature. Ch. 2003-402, § 48, Laws of Fla.

Services Advisory Board, at App. B (1994). 20/ The Legislature's Advisory Board offered no suggestion that conflicts of interest could arise from an excessive caseload. The "*Conflict Guidelines*" are *non-binding*, and state that conflicts of interest are based on the facts and circumstances of each case. 21/

The Legislature's 2003 and 2007 definitions of conflicts of interest of public counsel (public defenders and regional counsel) are much narrower than rules established by this Court for *all* attorneys licensed to practice in Florida. The Legislature's definitions are *directly contrary* to this Court's much more general mandate in Rule 4-1.7(a)(2) ("Except as provided in subdivision (b), a lawyer shall not represent a client if: . . . (2) 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.")

The two cases in this consolidated appeal are the first before this Court to address the issue of excessive caseload since the Legislature's 2003 express

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20/ It appears that there is a typographical error in the statute, as the "Uniform Standards for Use in Conflict of Interest Cases" is Appendix B to the Final Report and not Appendix C.

21/ *See* Final Report of the Article V Indigent Services Advisory Board, at App. B (1994) ("Finally, these guidelines are not binding and each potential conflict must be evaluated in light of the particular facts and circumstances of a given case and individual client.").

prohibitions of a public defender "withdrawing" based "solely" on excessive caseload.

B. THESE CONSOLIDATED CASES PRESENT JUSTICIABLE ISSUES THE FLORIDA SUPREME COURT HAS THE AUTHORITY TO DECIDE.

Article II, § 3 of the Florida Constitution divides the state government into the legislative, executive and judicial branches and provides that "[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." The Florida Constitution's separation of powers clause is *explicit* and "embodies one of the fundamental principles of government in our federal and state constitutions and prohibits the unlawful encroachment by one branch upon the powers of another." *State v. Palmer*, 791 So. 2d 1181, 1183 (Fla. 2001). A branch of government cannot exercise a power that has been "constitutionally assigned exclusively to another branch." *Id.*

Article V proscribes the portion which is the responsibility of this Court. It deals with this Court, the judicial system as a whole, and the principal effectors of the criminal law—State Attorneys and Public Defenders.

1. This Court Has Clear Authority To Regulate Lawyers.

Article V vests the judicial power in this Court, the intermediate appellate courts and the trial courts. *See* Art. V, § 1, Fla. Const. The Constitution assigns to

this Court the "*exclusive* jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, § 15, Fla. Const. (emphasis added). It cannot be exercised by either the legislative or the executive branch (including administrative agencies). *See The Florida Bar v. Massfeller*, 170 So. 2d 834, 838 (Fla. 1964) ("The independence of the Courts of the other two coordinate and equal branches of our state government does not permit of any interference by either of said branches in the exercise by the Courts of this state of their inherent and constitutional power to discipline members of the Bar. *Any statute enacted by the Legislature which attempted to do so would of necessity be stricken down as unconstitutional"*) (emphasis added). "Even without this specific constitutional authority, this Court and courts in other jurisdictions have uniformly held that the legislature has no power to control members of the Bar." *In re The Florida Bar, In re Petition for Advisory Opinion Concerning Applicability of Chapter 74-177*, 316 So. 2d 45, 48 (Fla. 1975).

This Court has observed that the authority to discipline attorneys "includes the *exclusive* province to proscribe rules of professional conduct, the breaching of which renders an attorney amenable to such discipline." *Times Publ'g Co. v. Williams*, 222 So. 2d 470, 475 (Fla. 1969) (emphasis added). This means the Legislature is "without authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the

court… This is not to say, of course, that [the Legislature] may not condemn unethical or criminal conduct, but the attorney has the right and duty to practice his profession in the manner required by the Canons unfettered by clearly conflicting legislation which renders the performance of his ethical duties impossible." *Id*.

The authority in this Court to regulate lawyers includes the power to promulgate the Rules, as a corollary to regulation and discipline, of *all* lawyers, public or private, R. Regulating Fla. Bar Ch. 4, Preamble ("Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities. . . . Supervision by an independent judiciary, and conformity with the rules the judiciary adopts for the profession, assures both independence and responsibility. Thus, every lawyer is responsible for observance of the Rules. . . . Failure to comply with an obligation or prohibition imposed by a rule is a basis for invoking the disciplinary process. . . . the rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies."); *id.* § 1-10.1. As this Court stated in integrating The Florida Bar:

> Attorneys are not, under the law, State or County Officers, but they are officers of the Court and as such constitute an important part of the judicial system. . . . the law practice is so intimately connected with the exercise of judicial power in the administration of justice that the right to define and regulate the practice naturally and logically belongs to the judicial department of the government.

Petition of Fla. State Bar Ass'n, 40 So. 2d 902, 907 (Fla. 1949).

2. This Court Has Clear Authority Over The Administration Of Justice.

This Court has inherent power to ensure the administration of justice by determining when, and in what circumstances, a lawyer must decline new representation or withdraw from existing representation so as to effect justice in a client's case. *See Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1986). This Court confirmed this inherent authority in the same 1990 case in which it held that case overload impairing representation required declination or withdrawal, *Order on Prosecution*. Quoting its prior decision in *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978), this Court observed:

> "[W[here the fundamental right of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangement…Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions…The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights."

Order on Prosecution, 561 So. 2d at 1133. *Rose* fully describes this inherent authority:

> The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounted to a threat to the courts' ability to make effective their jurisdiction.
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> The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government.

Rose, 361 So. 2d at 137 (footnotes omitted).

3. This Court Has Clear Authority Over Rules Of Practice And Procedure.

Article V, § 2(a) provides that "The supreme court shall adopt rules for the *practice and procedure in all courts*…" (emphasis added). As this Court has observed:

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as *machinery of the judicial process* as opposed to the product thereof.

Avila South Condo. Ass'n v. Kappa Corp., 347 So. 2d 599, 608 (Fla. 1977) (emphasis added) (statute regulating class actions violated separation of powers, because that was properly a judicial procedure).

C. THE PROFESSIONAL RULES AND STANDARDS GOVERNING LAWYERS' CONDUCT MANDATE RELIEF FROM CONFLICT CAUSED BY EXCESSIVE CASELOAD.

The concurring opinion of Judge Shepard in the *Public Defender* decision contended there are no judicially discoverable and manageable standards for deciding whether a public defender should be permitted to decline appointment to, or withdraw from, one or more cases. See *Public Defender*, 12 So. 3d at 806. This is not true. Of course, as this Court has twice suggested, fruitlessly, the Legislature could fund, for review and adoption by this Court, a study similar to those of many

other states to determine appropriate caseloads for public defenders. 22/ That might create the most definitive standard. Meanwhile, these are alternatives:

- The Rules Regulating the Florida Bar, which set the standard for the conduct of *all* lawyers licensed to practice law in Florida.
- Policy statements, opinions and guidelines from the American Bar Association regarding representation of indigent criminal defendants.
- Standards for the maximum number of cases a lawyer providing indigent defense should handle annually, developed by many groups which included prosecutors as well as defense counsel. These standards are *guidelines* and not in themselves *controlling*.
- The common sense and intelligence of trial judges. The two trial court judges handling these consolidated cases are good examples.

1. The Rules Of Professional Conduct Mandated PD11 To Decline Appointments.

Rules 4-1.1, 4-1.2(a), 4-1.3, and 4-1.4 of the Rules of Professional Conduct obligate *all* lawyers licensed to practice in Florida to provide competent

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22/ Some states have conducted studies establishing maximum caseload limits lower than the NAC standard of 150 cases per year per attorney. The record contains one such study, that of New Mexico, which concluded that the maximum number of felony cases an attorney providing indigent defense should handle per year is 144. *See Final Report: A Workload Assessment Study for the New Mexico Trial Court Judiciary, New Mexico District Attorneys' Offices and New Mexico Public Defender Department*, at 87, Fig. 3.13 (June 2007), R11.1437 ; *see also* R11.1419 (Lefstein testimony).

representation, to abide by client decisions, to exercise diligence in the representation, and to communicate with their clients regarding the representation. R. Regulating Fla. Bar. §§ 4-1.1, 4-1.2(a), 4-1.3, and 4-1.4; *see also* ABA Formal Opinion 06-441, at 3. The Comment to Rule 4.1.3 pertaining to diligence, provides: "A lawyer's workload must be controlled so that each matter can be handled competently." Further, the Rules provide that:

> "[A] lawyer *shall* not represent a client if . . . there is a *substantial risk* that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

R. Regulating Fla. Bar § 4-1.7(a)(2) (emphasis added). The Comment to Rule 4-1.7 recommends declining representation if the conflict is apparent prior to assuming the representation and withdrawal if the conflict arises after the representation commences. R. Regulating Fla. Bar 4-1.7, Comment (citing R. Regulating Fla. Bar 4-1.16).

The Rules provide that "a lawyer *shall* not represent a client or, where representation has commenced, *shall* withdraw from the representation of a client if . . . the representation will result in violation of the Rules of Professional Conduct or law." *Id.* § 4-1.16(a)(1) (emphasis added). Moreover, the Rules provide that partners in law firms and lawyers who manage and/or supervise other lawyers "*shall* make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct." *See id.* § 4-5.1 (emphasis added). In

addition, a partner or lawyer with managerial authority over other lawyers "*shall* be responsible for another lawyer's [Rule] violations," if he/she "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." *Id*. § 4-5.1(c) (emphasis added). 23/ The Rules also provide that a "lawyer *shall* not seek to avoid appointment by a tribunal to represent a person except for good cause, such as when . . . representing the client is likely to result in violation of the Rules of Professional Conduct or the law." *Id.* § 4-6.2(a) (emphasis added). These Rules are mandatory and "define proper conduct for purposes of professional discipline." *Id*., Ch. 4, Preamble.

The Rules require that conflicts of interest be addressed prospectively before they cause harm to the client. *See Scott v. State*, 991 So. 2d 971 (Fla. 1st DCA 2008), where a public defender moved to withdraw because the public defender had advised a confidential informant who helped the state procure the evidence to be used against an indigent client.

The trial court denied the motion, but the First District reversed:

> Conflicts of interest are best addressed before a lawyer laboring under such a conflict does any harm to his or her client(s)'s interests. Any prejudicial effect on the adequacy of counsel's representation is presumed harmful.

23/ The Public Defender has been held by this Court to be a "law firm," so PD11 is such a person. *Bouie v. State*, 559 So. 2d 1113, 1115 (Fla. 1990).

Id. at 972 (citing *Cuyler v. Sullivan*, 446 U.S. 335, 349-50 (1980)). The First District continued: "*Viewed prospectively, any substantial risk of harm is deemed prejudicial*." *Id.* at 972-73 (emphasis added). 24/

The First District's approach is directly contrary to that of the Third District here. The Third District seems to presume *lack of prejudice* and requires PD11 to bear the burden of proving prejudice. How can anyone prove prejudice *before* it occurs? Rule 4-1.7(a)(2) says lawyers must avoid the *risk* of prejudice by raising the conflict in advance. The U.S. Supreme Court explained, where a conflict of interest exists, "the evil . . . is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (emphasis in original). Case overload is the paradigm for *Holloway's* teaching.

2. ABA Standards Required PD11 To Decline Appointments.

The ABA has issued numerous standards and opinions on the provision of indigent defense. The most extensive policy statement addressing the provision of defense services is contained in the ABA, Standards for Criminal Justice,

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24/ The First District also cited Restatement (Third) of Law Governing Lawyers § 121 (2000), which says the same thing as Rule 4-1.7: "[A] lawyer may not represent a client if the representation would involve a conflict of interest" and a "conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person." *Scott*, 991 So. 2d at 973.

Providing Defense Services (3d ed. 1992). Standard 5-5.3 (a) specifically cautions against accepting workloads that interfere with the public defender's ability to provide effective representation: "Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations. . . . "

Ten years later, the ABA issued a policy statement on excessive workload in *Ten Principles of a Public Defense Delivery System*. Principle 5 provides: "*Defense counsel's workload is controlled to permit the rendering of quality representation*." ABA, *Ten Principles of a Public Defense Delivery System*, Principle 5, at p.1-2 (Feb. 2002) (emphasis added).

Another four years later, the ABA Standing Committee on Ethics and Professional Responsibility issued an ethics opinion on the subject. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 06-441 (2006). The Formal Opinion reiterated that all lawyers providing indigent defense services must meet their professional duties of providing competent and diligent representation to their clients, as required by the rules of professional conduct, and that this cannot be done without a controlled workload. *See id.* The Formal Opinion also states that a "lawyer's primary ethical duty is owed to existing clients." *Id.* at 4. Therefore, a lawyer providing indigent defense should decline

appointment to new cases before moving to withdraw from existing ones. *Id.* at 4-5.

Then, in 2009, the ABA House of Delegates approved the *Eight Guidelines of Public Defense Related to Excessive Workloads*. The first guideline urges the management of public defense programs to assess whether excessive workload is preventing their lawyers from fulfilling their professional duties to their clients. *Id.* at 3, 4-6. Guidelines 2 through 4 provide that continuous supervision and monitoring programs must be in place to identify when there is an excessive workload. *Id.* at 3, 6-12.

3. PD11's Caseloads Far Exceeded The Published National And Florida Standards.

The trial court in the *Public Defender* case listed the various standards on excessive caseload which have been developed. Most prominent are those of the NAC, adopted in 1973, being the only recommended national standard on the subject. Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, at 43-49 (ABA 2011). The NAC standard said a lawyer providing indigent defense should not handle more than the following number of cases annually: 150 felonies; 400 misdemeanors (excluding traffic); 200 juvenile cases; 200 Mental Health Act cases; and 25 appeals. National Advisory Commission on

Criminal Justice Standards and Goals, Courts, Standard 13.12 (1973). 25/ In 2007, the American Council of Chief Defenders ("ACCD"), which is a part of the National Legal Aid & Defenders Association, confirmed that the NAC standards should be followed. ACCD Statement on Caseload and Workloads, at 1 (Aug. 24, 2007). A caseload standard has also been established for Florida. The Florida Governor's Commission decided the maximum number of felony cases an attorney should handle per year is 100. *See* Governor's Commission on Criminal Justice Standards and Goals, Bureau of Criminal Justice Planning and Assistance, Final Report, Standards and Goals for Florida's Criminal Justice System, at 392-93 (1976) (Standard CT 10.12).

D. THE TRIAL COURTS' ORDERS WERE AN APPROPRIATE RESPONSE TO AN EXTRAORDINARY PROBLEM AND DID NOT DEPART FROM THE ESSENTIAL REQUIREMENTS OF THE LAW.

1. ***State v. Public Defender***

In the *Public Defender* proceeding, PD11 sought systemic relief for excessive caseload by requesting permission to decline all future appointments of

25/ The term "case" has been interpreted as "a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding." *Id.* The NAC and other authorities have noted that differences exist in each jurisdiction that may impact the recommended caseload limit, including without limitation physical factors and geography that increase travel time, the different types of cases that can be in a given classification, and prosecution practices. Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, at 44.

non-capital felony cases. The trial court granted partial and measured relief. The trial court permitted PD11 to decline appointments to "C" felony cases, conditioned on recurring 60-day reviews to determine if the caseload was sufficiently reduced to permit future appointments. R18.2537-38.

Judge Blake's Order followed the essential requirements of the law. The trial court, after hearing all the evidence, found that "future appointments to noncapital felony cases will create a conflict of interest in the cases presently handled by PD-11." R18.2537. The Order recognized that deference to the Public Defender's management of his office and determining how best to deal with excessive caseload was important, but so was measured relief, following this Court's teachings in *Order on Prosecution* and *Public Defender's Certification.* It found that PD11 acted reasonably in concluding that declining to handle misdemeanors would not adequately deal with the systemic problem, but that PD11 was not entitled to decline all felony cases, only "C" cases. R18.2537.

In entering relief, subject to review every 60 days, the trial court recognized:

- The Public Defender, as all other attorneys, is bound by the Rules of Professional Conduct. R18.2534.
- The courts have inherent authority to protect indigent defendants' constitutional rights and ensure compliance with the Rules; exercise of this authority does not encroach on legislative authority. R18.2636.

- The Public Defender, as manager and supervisor of other lawyers, is required by the specific terms of the Rules to ensure that all lawyers in his office conform to those Rules. R18.2534.
- PD11's office-wide caseload "far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually." R18.2535. 26/
- PD11's excess caseload is a systemic, office-wide, problem, requiring a systemic and measured solution, including regular review. R18.2537-38.

The Third District reversed because it believed that: (i) systemic relief was not available and that any relief would have to be sought individually by each overloaded assistant public defender in individual cases; 27/ (ii) § 27.5303(1)(d), prohibiting a court from approving a "withdrawal" based "solely" upon excessive workload applies equally to declining new appointments; 28/ (iii) the Legislature had defined the conflicts of interest applicable to public defenders, which did not include "conflicts arising from underfunding, excessive caseload, or the

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26/ Although it is clear that this Court has not formally adopted any particular standard as to the maximum number of felony cases, the published standards are relevant in determining whether PD11 correctly certified inability to accept new cases. They are informative, not controlling.
27/ *Public Defender*, 12 So. 3d at 802-03.
28/ *Id*. at 804.

prospective inability to represent a client;" 29/ and (iv) the public defender must show prejudice to the indigent accused for a court to allow withdrawal from existing representation or declining new appointments. None of these conclusions are supported by applicable law—the Florida Constitution, § 27.5303(1)(d), or this Court's precedent.

(a) Systemic Case Overload Is Justiciable.

The Third District committed error in reversing Judge Blake's Order. In concluding that systemic relief could not be granted, the Third District ignored PD11's duty, pursuant to Rule 4-5.1, to ensure that all its assistants are in compliance with the Rules of Professional Conduct. The Third District wrote:

> Determining conflicts of interest for an entire Public Defender's Office based on aggregate calculations is extremely difficult without first having considered individual requests for withdrawal in particular cases. 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 (citations omitted). But Rule 4-5.1, not cited by the Third District, makes Rule compliance PD11's *duty*. And PD11 determined that only an office-wide remedy would attain compliance. The Constitution provides that "Public defenders shall appoint such assistant public defenders as may be authorized by law." *See* Art. V, § 18, Fla. Const. The Constitution thus

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29/ *Public Defender*, 12 So. 3d at 804. The words "or the prospective inability to represent a client" are *not* found in § 27.5303(1)(d).

tells us that the Public Defender is the elected constitutional official, not any assistant public defender. Further, it is the Public Defender who receives the appointment to represent, not any particular assistant.

Second, the statute invoked in the motion that initiated this proceeding provides:

> If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. 30/

(§ 27.5303(1)(a), Fla. Stat.). This statute shows legislative recognition that: (i) the representation of an accused is representation by the Public Defender, not any assistant; and (ii) the determination of a conflict of interest is to be made by the Public Defender, not by any assistant. If a particular assistant is overloaded, it is up to the Public Defender to manage the caseload by assigning another assistant to the representation, unless all assistants are overloaded. When all are overloaded, the overload is systemic, as is the case here. Only the Public Defender has the authority to make the determination of systemic overload.

30/ Because PD11 sought to decline future appointments, and not to withdraw from pending cases, this statute that's (d), not (a) does not facially apply. However, by commencing this proceeding, PD11 followed this Court's teaching that judicial review of systematic changes may well be necessary.

Third, Rule 4-5.1 is directly relevant. *See* R18.2534. ("The Public Defender . . . as manager and supervisor of other lawyers, has a *duty* to ensure that all lawyers in his office conform to the Rules of Professional Conduct.") (emphasis added).

Fourth, this Court has ruled that systematic relief of overload is appropriate. *See Behr*, 384 So. 2d at 147; *Order on Prosecution*, 561 So. 2d at 1130; *Skitka*, 579 So. 2d at 103-04; *Certification of Conflict*, 636 So. 2d at 21; *Public Defender's Certification*, 709 So. 2d at 102. The Third District's ruling that relief can only be granted on a case-by-case basis is error. 31/ Moreover, the Third District's ruling would preclude relief from systemic overload because, as demonstrated in the *Bowens*, the amount of time and effort an individual lawyer must devote to litigate that motion far exceeds the work required to defend the individual criminal case.

31/ The Third District claimed its determination was based on *Order on Prosecution*. *See Public Defender*, 12 So. 3d at 802. It was wrong. In *Order on Prosecution*, this Court held that, instead of a district court *sua sponte* prohibiting a public defender from accepting new appointments, the better practice was for a public defender to file a motion to withdraw and that '[i]f the court finds that the public defender's caseload is so excessive as to create a conflict [as Judge Blake found], other counsel for the indigent defendant should be appointed," consistent with the statute. 561 So. 2d at 1139. This Court has never required a public defender's request for caseload relief to be determined on a case-by-case basis.

(b) The Third District Erred In Holding That The Statute's Prohibition Of Court's Approving Certain Withdrawals Does Not Apply To Motions To Decline Appointments.

In *Public Defender*, PD11 did not withdraw from any existing representation and thus did not cite § 27.5303(1)(d). By definition, a withdrawal can only be from an existing representation and cannot be the declination of a new appointment. Accordingly, the Order did not mention § 27.5303(1)(d), much less determine its application. Nevertheless, the Third District concluded that the trial court had made such determination, 32/ then rejected that presumed determination in strong terms:

> First, permitting PD11 to withdraw by merely couching its request as motions to decline future appointments, would circumvent the plain language of section 27.5303(1)(d). We cannot allow such an exercise in semantics to undo the clear intent of the statute. If we did, section 27.5303(1)(d) would be rendered meaningless.

Public Defender, 12 So. 3d at 804 (citations omitted).

But, the "plain language" of the Statutory Prohibition applies its prohibition to *withdrawals* from existing representations. PD11 does not even represent an indigent client until *appointed* to represent her/him when the determination of indigency is made by the clerk. *See* § 27.52(c)(1), Fla. Stat. The Third District did

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32/ *Public Defender*, 12 So. 3d at 804 ("The trial court did not reach the question of whether PD11 has presented evidence sufficient to prove a statutory conflict of interest, determining instead that § 27.5303(1)(d) did not apply because it addressed withdrawal from representation, rather than what PD11 sought, which was to have other counsel appointed in the first instance.").

not explain why a construction of the statute that plainly states it applies to withdrawals and not to new appointments "renders the statute meaningless." The Legislature fully understood the meaning of the word "appoint." The entire statute impacting the Public Defender and Regional Counsel, § 27.40 *et seq*., is replete with the word. *See* §§ 27.40(1), (2)(a), 27.52(1), (3), 27.5303(1)(a), (c); 27.5303(2), Fla. Stat. The Legislature knows PD11 must represent someone before "withdrawing" from that representation, but the Legislature chose not to refer to declining new appointments, despite the obvious fact that such declinations could have economic impact. 33/

The Third District purported in its *Public Defender* decision to divine the Legislature's intent and to conclude that the Legislature would never have left such a "hole" in its manifest intent. To reach this remarkable conclusion, the District Court did not look to legislative history. To the best of PD11's knowledge, there is none relevant, and the Third District cited to none. The District Court just speculated. But this Court has taught that such speculation is inappropriate. There is no ambiguity to the word "withdrawal." As such, the statute's plain and

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33/ Withdrawals raise difficult issues under the Rules of Professional Conduct: from which of two or more cases should the Public Defender seek to withdraw? Declining new appointments protects all existing clients and does not differentiate among them. *See* ABA, *Ten Principles of a Public Defense Delivery System*, at Principle 5 with commentary, at p. 2 (Feb. 2002); ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Opinion 06-441 (2006).

ordinary meaning must control. *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 64 (Fla. 2005). 34/

The Third District also said that a "withdrawal" occurred because the trial court had ordered that "PD11's county-funded early representation unit (ERU) is to continue with their customary responsibilities to time of arraignment." *Public Defender*, 12 So. 3d at 804. This refers, as the Third District summarized, to the fact that "PD11 has created a system whereby one set of PD11 attorneys, the Early Representation Unit ("ERU"), represents defendants from first appearance until arraignment, at which time representation shifts to a different set of PD11 attorneys." *Id.* at 804 n.6. The Third District concluded:

> …given that the trial court's order requires PD11 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 a withdrawal.

Id. at 804. It is the Third District that engaged in flights of fancy. This Court's Rules of Criminal Procedure specifically provide for limited appointments. Fla. R. Crim. P. 3.130(c)(1) ("If necessary, counsel may be appointed for the limited purpose of representing the defendant only at first appearance or at subsequent proceedings before the judge."). Judge Blake explained that his Order provided for this limited appointment to minimize, to the extent possible, the Order's impact on

34/ The term "withdrawal" is defined as "[the] act of taking back or away; removal." *Black's Law Dictionary* 1632 (8th Ed, 2004); *see also Merriam Webster's Ninth New Collegiate Dictionary* 1355 (9th ed. 1989).

the trial courts. (R19.2634). 35/ The Third District said: "We must assume that when the Legislature drafted section 27.5303, it was aware of the prior state of the law." *Public* Defender, 12 So. 3d at 804 (citations omitted). But application of this black-letter proposition mandates exactly the opposite conclusion. When it created § 27.5303(1)(d) in 2003, and amended it in 2007, the Legislature was "presumed to be acquainted" with this Court's prior excessive caseload opinions.

Which brings us to the word "solely" in the Statutory Prohibition. No legislative history to assist in its interpretation exists. One could assume that it requires, as to a "withdrawal," that there be *something more* than PD11's assertion that a case overload or underfunding is present. But, if that assumption is correct, then PD11 offered far more and Judge Blake's Order found far more, including significant injury which new clients would suffer if representation of them were accepted. Thus, even if a declination of an appointment were a "withdrawal," the Legislature's mandated that, if it not be "solely" by reason of number count, the Statutory Prohibition did not apply. So it does not.

35/ It should be noted that the Legislature in § 27.52(3), Fla. Stat., dealt with "Appointment of Counsel on Interim Basis," thus recognizing the existence of "interim appointments" of public defenders.

(c) The Third District Erred In Concluding Courts Are Prohibited By § 27.5303(1)(d) From Approving A Motion To Withdraw (Or To Decline New Appointments) Due To A Conflict Caused By Excessive Caseload.

Having erred in applying §27.5303(1)(d) to declination of new appointments and having further erred by applying it when the trial court had found that excessive caseload was prejudicing effective client representation office-wide, the Third District further erred in holding that the Judiciary is obligated to follow the Legislature's Statutory Prohibition. *Public Defender*, 12 So. 3d at 804. For the Third District concluded that the trial court lacked authority to enter its order because the statute said that "excess workload" was no ground for determination of conflict, whether or not "solely" the ground. *See id.*

> The only conflicts addressed [by the Legislature in section. . . .are conflicts involving codefendants and certain kinds of witnesses or parties. Conspicuously absent are conflicts arising from underfunding, excessive caseload, or the prospective inability to adequately represent a client.

Id. The Third District continued: "Thus, when the Legislature promulgated a law, which prohibited withdrawal based on excessive caseload and which stated that the 'conflict of interest' contemplated by section 27.5303 included only the traditional conflicts arising from the representation of co-defendants, we must assume that the Legislature understood the existing law and intended to modify it." *Id*. The Third District thus concluded both that the Legislature intentionally endorsed narrowed conflicts justifying the exclusion of withdrawal (or declining appointments) from

those authorized by this Court's Rules of Professional Conduct and decisional law, *and* that the Legislature had the constitutional power to so circumscribe this Court's rules as to how *all* lawyers *shall* act.

This Third District position was further developed in *Bowens*, as will be discussed below. There the Third District upheld the constitutionality of the statute (which it misquoted). *Bowens*, 39 So. 3d at 482. It did so despite this Court's explicit 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." *See Order On Prosecution*, 561 So. 2d at 1135 (emphasis added). The Third District was without power to ignore this Court's ruling.

(d) The Third District Erred In Requiring A Public Defender To Prove Prejudice As A Condition of Withdrawal Or The Declination of Appointments.

Finally, ignoring the specific language of Rule 4-1.7(a)(2) of the Rules Regulating the Florida Bar, the Third District held in *Public Defender* that PD11 had to must show prejudice (referred to as "actual or imminent prejudice" in *Bowens*) to the indigent defendant before a court could permit a public defender either to decline to represent a new client or withdraw from existing representation. *Public Defender*, 12 So. 3d at 802-03.

> To be sure, whenever an attorney is burdened with an excessive caseload, there exists the possibility of inadequate representation. The possibility of these harms was discussed at the hearing below. However, there was no showing that individual attorneys were providing inadequate representation, nor do we believe this could have been proven in the aggregate simply based on caseload averages and anecdotal testimony.

Id. According to the Third District, the problem of excessive caseload only can be resolved in "the existing statutory framework….after an assistant public defender proves *prejudice* or conflict, separate from excessive caseload." *Id.* at 806 (emphasis added). Although not citing any other case or authority, the requirement of proving "prejudice" appears to be a standard similar to what *Strickland* established for evaluating post-conviction claims of ineffective assistance of counsel, and is discussed in some detail in Section D.2. below.

2.
<u>*State v. Bowens*: The Third District Erred</u>
<u>In Requiring Proof Of Prejudice</u>

While review of *Public Defender* was being sought in this Court, *Bowens* was filed to fulfill the requirement, set forth in that Third District Opinion, for an individualized showing of conflict by an individual assistant public defender. *Bowens did* involve, incontestably, a "withdrawal" from existing representation, although: "The uncontroverted evidence and testimony of assistant public defender, Jay Kolsky shows that he has been able to do virtually nothing in preparation of Bowens' defense." R1.App.Ex. 1 at 10. Judge Thornton's Order

found that Bowens' defense had been prejudiced, applying the "substantial risk" standard found in Rule 4-1.7 of the Rules Regulating the Florida Bar. R1.App.Ex.1 at 9. Following the requirements of the Third District's Opinion in *Public Defender*, Judge Thornton's Order said: "Based on the foregoing, this Court finds that if an assistant public defender requests permission to withdraw from representation of a client based on considerations of excessive caseload, there must be an individualized showing of a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." *Id*. The trial court further found: "The uncontroverted evidence and testimony of Kolsky shows that he has been able to do virtually nothing in preparation of Bowens' defense." R1.App.Ex.1 at 10. The court concluded that, although a "withdrawal" had certainly occurred, § 27.5303(1)(d) did not prohibit the court from reviewing, or from granting, Kolsky's motion where "there is a substantial risk that a defendant's constitutional rights may be prejudiced as a result of the workload." The court concluded the statute was not "constitutionally infirm" because the withdrawal was not "solely" because of case overload, but also was because of "prejudice," as that term had been used by the Third District in *Public Defender*. R1.App.Ex.1 at 8.

The Third District reversed Judge Thornton's Order's permission to withdraw, while affirming is refusal to declare § 27.5303(1)(d) unconstitutional

(while certifying the issue of its constitutionality to this Court). The Third District reversed because it held that the trial court's finding of "prejudice" did not constitute a showing of "actual or imminent prejudice," which is now clearly found necessary to warrant withdrawal. This was error.

The Third District's decision in *Bowens* clarified what the Third District apparently meant by the word "prejudice" in *Public Defender*:

> Our analysis of the record in this case…leads us to conclude there was no evidence of actual or imminent prejudice to Bowens' constitutional rights. If the trial court's order stands, all that the PD11 must do to show prejudice is swear that he or she has too many cases or that the workload is so excessive as to prevent him or her from working on the client's case prior to the scheduled trial, and that he or she will be forced to file for continuance, thereby waiving the client's speedy trial rights. This "prejudice" is not the type of prejudice that this Court referred to in *State v. Public Defender*. Prejudice means 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.

Bowens, 39 So. 3d at 481 (emphasis in original).

The Third District did not cite *Strickland* (or any other authority), but the term "actual or imminent prejudice" seems to be taken from *Strickland.* The *Strickland* test requires the indigent defendant to show both that (1) the performance of counsel was deficient; and (2) the deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 687. Thus, in an ineffective assistance of

counsel claim, the court looks at the impact of counsel's alleged deficient performance on the verdict and requires a convicted defendant to show that that there is a reasonable probability that the result of the proceeding would have been different but for the deficient performance of counsel. *Id.* at 694. This test is designed to preserve the finality of judgments, to protect trials from being followed by second trials about counsel's conduct, and to prevent a rule from developing that will discourage lawyers from representing indigent defendants. *Id.* at 690. The test is inapposite where the goal is to prevent harm to the indigent defendant.

Suffice it here to say that a post-conviction standard for setting aside convictions for inadequate counsel has no place in determining whether an attorney may undertake new representations which would create an overload conflict as to existing clients. This Court has already so ruled. *See, e.g., in re Order on Prosecution*, 561 So. 2d at 1135.

Several courts have rejected an actual prejudice standard where some form of relief from excessive caseload is sought pre-trial. *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1998), *case subsequently dismissed on abstention grounds, Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992); *Hurrell-Harring v. State*, 15 N.Y.3d 8 (N.Y. 2010); *New York County Lawyers' Ass'n v. State of New York*, 763 N.Y.S.2d 397, 412 (N.Y. Supp. 2003); *Lavallee v. Justices in the Hampden Superior Court*, 812 N.E.2d 895 (Mass. 2004) (upholding a claim of denial of counsel because of

low fees where the violation may likely result in irremediable harm if not corrected); *State* v. *Peart*, 621 So. 2d 780, 787 (La. 1993) (holding claim that counsel's representation is ineffective can be asserted pretrial). 36/

In *Luckey v. Harris*, plaintiffs brought a putative class civil rights action against state officials for injunctive relief to order the state to provide indigent defense services meeting constitutional requirements. 860 F.2d at 1018. The Eleventh Circuit held that the trial court erred in dismissing their complaint for failure to state a claim, on the basis of *Strickland* and *United States v. Cronic*, 466 U.S. 648 (1984). *Luckey*, 860 F.2d at 1016. The Eleventh Circuit held:

> This standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate defendant's rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the

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36/ *See Duncan v. State*, 774 N.W. 2d 89, 123-24 (Mich. App. 2008)(reinstating the trial court order denying the motion to dismiss the complaint seeking prospective relief). *See Duncan v. State*, 780 N.W.2d 843 (Mich. 2010), and *Duncan v. State*, Docket Nos. 139345, 139346, 139347, 2010 WL 5186037 (Dec. 22, 2010); *In re Petition of Knox County Public Defender*, General Sessions Court for Knox County, Tennessee, Misdemeanor Division, Docket No. Not Assigned (holding public defender could not decline appointments to misdemeanor cases due to excessive caseload because caseloads were not high enough to violate the indigent defendants' constitutional rights); *In re Petition re Knox County Public Defender*, Chancery Court for Knox County, Tennessee (holding that "there could not be a determination in the aggregate of excessive caseloads for an entire public defender's office), discussed in Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, at 168-72 & n. 46 & 47.

> trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively. . . .
>
> Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only where that defendant has been prejudiced. The *Strickland* court noted the following factors in favor of deferential scrutiny of a counsel's performance in the post-trial context: concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel. These considerations do not apply when only prospective relief is sought.
>
> *Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights even if the violation of these rights would not affect the outcome of a trial.*

Id. at 1017 (citations omitted) (emphasis added). 37/

Similarly, in *Hurrell-Harring v. State*, the New York Court of Appeals upheld a claim for constructive denial of Sixth Amendment right to counsel where plaintiffs sought "prospectively to assure the provision of what the Constitution undoubtedly guarantees—representation at all critical stages of criminal proceedings." 15 N.Y.3d at 21. *New York County Lawyers' Association v. State of New York* held, on a motion for preliminary injunction, that the "two-prong *Strickland* standard used to vacate criminal convictions [is] inappropriate in a civil action that seeks prospective relief premised on evidence . . . [of] a severe and unacceptable risk of ineffective assistance of counsel." 763 N.Y.S.2d at 384.

37/ *Luckey* was subsequently dismissed on abstention grounds. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

Moreover, a requirement of "actual or imminent prejudice" is especially inapposite to an individualized case, as *Bowens*, where both some limited discovery was allowed and an evidentiary hearing extended over three days. Kolsky filed his motion on August 3, 2009, but the trial court did not enter its order until October 23. If an individualized, case-by-case approach were deemed proper, then "actual or imminent prejudice" is very likely to occur before the issue is addressed. Moreover, Kolsky's deposition and attendance at the hearing, took substantially more time than he would have been able to spend on several of his third degree felony cases. *See* Affidavit of Carlos Martinez (filed in support of Kolsky's Motion to Withdraw), R1.App.Ex.2, Ex. B at ¶ 16. Martinez estimated that, if Kolsky never missed work for a sick day or holiday, he would have had only 2.8 hours to work on each of his "C" cases. *Id.* The time demanded to pass on Kolsky's withdrawal request shows why a case-by-case approach is unworkable.

E. IF SECTION 27.5303, FLORIDA STATUTES, IS FOUND TO APPLY TO EITHER *PUBLIC DEFENDER* OR *BOWENS*, THE STATUTE IS UNCONSTITUTIONAL.

The *Bowens* decision certified to this Court this question "as one of great public importance:"

> 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 interest?

Bowens, 39 So. 3d at 482. 38/

As this Court has repeatedly said, the constitutionality of a statute should not be addressed unless it is clear it controls, so its constitutionality is clearly at issue. 39/ We contend that *Public Defender* does not implicate § 27.5303(1)(d) because no withdrawals from representation were sought, much less one *solely* by reason of "inadequacy of funding" or "excess workload." Therefore, the constitutionality of the Statutory Prohibition is not there involved.

Unlike *Public Defender*, *Bowens* did involve a "withdrawal" from an existing representation. Section 27.5303(1)(d), therefore, would purport to prohibit this withdrawal if the withdrawal were *solely* by reason of case overload or

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38/ It must again be pointed out that, in appearing to quote § 27.5303(1)(d), the Third District added the words "or the prospective inability to adequately represent a client." These words do not appear in this statute (or anywhere else in §§ 27.40 through 27.61, dealing with the Public Defender).

39/ *B.C. v. Fla. Dep't. of Children & Families*, 887 So. 2d 1046, 1055 (Fla. 2004) ("[C]ourts should not pass upon the constitutionality of statutes if the case in which the question arises may be effectively disposed of on other grounds") (citations omitted); *Griffis v. State*, 356 So. 2d 297, 298 (Fla. 1978) ("[I]f a particular matter in litigation can be determined by statutory construction, this Court will avoid considering the constitutional questions raised).

underfunding. But, Judge Thornton's Order found the representation was virtually non-existent, causing prejudice. The withdrawal was not "solely" by reason of caseload count, so the constitutionality of the Statutory Prohibition should again not have been at issue.

The Third District reversed Judge Thornton's Order because it concluded that not only was "prejudice," a word not used by the Legislature anywhere within the four corners of § 27.5303(1)(d), required, but that "prejudice" had to be "actual or imminent," which we believe to be the formulation of *Strickland*, and inapplicable in the pre-trial context of *Bowens*. But if the Court should conclude that the Statutory Prohibition *does* apply, then this Court (after correcting the certified question to reflect the actual language of the statute), must face its constitutionality. If it must do that, then the statute must be declared facially unconstitutional, for four reasons:

First, the statute intrudes into the clear constitutional directive that the legislative branch of Florida's government may not intrude on the domain of the Judiciary and the Rules of Professional Conduct. The mandate of separation of powers of Article II, § 3 of Florida's Constitution is discussed above. Article V proscribes that the Judiciary has *exclusive* authority to regulate all lawyer conduct, including handling of conflicts (as the Rules and this Court's decisions—and not the Legislature—define them.)

Second, it intrudes on the inherent authority of this Court to establish and enforce the rules by which lawyers *must* conduct themselves, such as Rule of Criminal Procedure 3.171, pertaining to plea agreements, with which Kolsky testified he did not comply. 40/ The Statutory Prohibition purports to limit or cancel this Court's inherent power to ensure the administration of justice by determining when, and in what circumstances, a lawyer must decline from new representation or withdraw from existing representation so as to affect justice in a client's case. *See Makemson*, 41 So. 2d at 1112. The inherent authority of the Judiciary was confirmed in the same 1990 case which held that case overload impairing representation required declination or withdrawal. *In re Order on Prosecution*. It has been reconfirmed since. *See, e.g.*, White *v. Bd. of County Comm'rs of Pinellas County*, 537 So.2d 1376 (1989); *Maas v. Olive*, 992 So. 2d 196 (Fla. 2008); *see also Hagopian v. Justice Admin. Comm'n*, 18 So. 3d 625 (Fla. 2d DCA 2009).

Third, it sets a different standard for publicly-funded lawyers than that set by this Court for *all* lawyers. The Legislature may not create different standards of competence, integrity, and responsibility for publicly-funded lawyers. All lawyers

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40/ Kolsky testified that he did not have sufficient information to counsel his clients on 35 percent of the cases that were closed as a result of the plea blitz, due to his excessive caseload, in violation of Florida Rule of Criminal Procedure 3.171(c)(2)(B), requiring counsel to advise defendants of "all pertinent matters bearing" on plea offers. 9/29 Tr., R1.App.Ex.16 at 36-39.

are subject to the same Rules and decisional law as to conduct. *See Polk County v. Dodson*, 454 U.S. 312, 321 (1981); *Behr*, 384 So. 2d at 150-51; *see also Scott v. State*, 991 So. 2d 971 (Fla. 1st DCA 2008); ABA Formal Opinion 06-441, at 3 (2006) ("The [Model Rules of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes.").

Fourth, it purports to overrule this Court's decisions that a lawyer, a public defender, who is so overloaded with his representational responsibilities that he cannot fulfill the Rules of Professional Conduct, must withdraw from some representations or, better, decline new appointments. The Rules of Professional Conduct adopted by this Court relevant to this proceeding (including Rule 4-5.1 as to the Public Defender personally) are *mandatory*, and the decisions of this Court that, if case overload prevents an attorney from adequately performing her/his representational duties, the attorney *must* decline new representations (preferable) or withdraw from existing ones, are controlling.

In *Hagopian v. Justice Administration Commission*, *supra*, decided two years ago, the Second District quashed a trial court's order denying a motion to withdraw made at the outset of the case by a private lawyer who was involuntarily appointed to represent an indigent defendant in a complicated commercial case. The appointment would have impaired the private lawyer's ability to competently and ethically represent his existing clients and would have bankrupted his law

practice. *Hagopian*, 18 So. 3d at 645. Quoting this Court, the Second District wrote:

> It must be remembered that an indigent defendant's right to competent and effective representation, not the attorney's right to reasonable compensation, gives rise to the necessity of exceeding the statutory maximum fee cap. . . . As a result, there is a risk that the attorney may spend fewer hours than required representing the defendant or may prematurely accept a negotiated plea that is not in the best interests of the defendant. A spectre is then raised that the defendant received less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy.

Id. at 638 (quoting *White v. Bd. of County Comm'rs of Pinellas County*, 537 So. 2d at 1379-80). The rule for private lawyers, such as Hagopian, is equally the rule for PD11 and other publicly-funded lawyers.

Even if the Statutory Prohibition were deemed facially constitutional, the Court should deem the statute unconstitutional as applied. The prohibition on courts approving the withdrawal from representation or the declination of new appointments when "based solely upon inadequacy of funding or excess workload" should be deemed, as this Court did in *Makemson*, 41 So. 2d at 1112, a *guideline* rather than a *mandate* so as not to restrict the courts' inherent authority to protect fundamental rights of indigents.

F. THE STATE ATTORNEY SHOULD NOT BE THE ENTITY PERMITTED TO OPPOSE A PUBLIC DEFENDER'S CERTIFICATION OF CONFLICT.

It is inappropriate for the state attorney to have any role in the determination of a public defender's certification of a conflict because a public defender's professional and ethical obligations to her clients require her to act independently of, and adverse to, the State, which is represented by the state attorney. *See Polk County*, 454 U.S. at 321-22 ("[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages."); *Kight v. Dugger*, 574 So. 2d 1066, 1069 (Fla. 1990) ("While representing a client, CCR, like the public defender, performs essentially a private function by "advancing 'the undivided interests of [the] client."). In *Behr*, Chief Justice England recognized that "[t]he 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." 384 So. 2d at 150 n.1.

Although the State, which funds the public defender, may well have a right to be heard on a motion to decline appointments or a motion to withdraw that may have financial implications for the State, that right should be delegated to an entity not involved in the prosecution of accused indigents in the same courts and the same proceedings as the public defender, who is seeking relief. The Attorney General could appear on behalf of the State instead of the state attorney. *See*

§16.01(4), (5), Fla. Stat. (providing that the Attorney General shall appear in cases on behalf of the State where the State is a party). Further, in 2003, the Legislature granted the Justice Administrative Commission standing to object to a public defender's motion to withdraw. This grant was later deleted without substitution, but is certainly a better approach for making sure the State's interests are heard in a proceeding on a certification of conflict, rather than having the state attorney bring the opposition.

CONCLUSION

For the foregoing reasons, the Court should reverse the Third District's decisions in both *Public Defender* and *Bowens* and remand the office-wide *Public Defender* case to the trial court to review PD11's current noncapital felony caseload and the conditions in the office to determine whether the declination of appointments of "C" cases remains necessary for PD11 to meet its professional and constitutional obligations to existing and future clients.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing Initial 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 Initial Brief of Petitioners was served by U.S. Mail this 21st day of December, 2011 on the following:

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