IN THE SUPREME COURT OF FLORIDA
Case No. SC10-1349

ANTOINE BOWENS,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF RESPONDENT ON JURISDICTION

On Petition for Review from the Third District Court of Appeal
Case No. 3D09-3023

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STATEMENT OF THE CASE AND FACTS

The Third District granted the State's petition for writ of certiorari and reversed a trial court order that permitted Assistant Public Defender Jay Kolsky to withdraw from his representation of the Petitioner, Antoine Bowens, who was facing a first-degree felony charge. State v. Bowens, 35 Fla. L. Weekly D1475, D1475 (Fla. 3d DCA July 7, 2010). Kolsky, along with the Public Defender for the Eleventh Circuit ["PD11"], asserted that his caseload of 164 third-degree felony cases prevented him from providing diligent and competent representation to Bowens. Id. The trial court conducted a three-day evidentiary hearing and concluded that Kolsky had demonstrated sufficient prejudice to Bowens owing to Kolsky's workload to permit withdrawal consistent with the requirements of State v. Public Defender, Eleventh Circuit, 12 So. 3d 798 (Fla. 3d DCA 2009). Bowens, 35 Fla. L. Weekly at D1475.

The Third District found that the order granting the motion to withdraw departed from the essential requirements of the law, concluding that "there was no evidence of actual or imminent prejudice to Bowens' constitutional rights." Id. The court continued:

> Prejudice means that there must be a real potential for damage to a constitutional right, such as effective assistance of counsel or the right to call a witness, or that a witness might be lost if not immediately investigated. And this is the critical fact — the PD11 has not made any showing of individualized prejudice or conflict *separate from* that

> which arises out of an excessive caseload. Neither the PD11 nor the trial court has demonstrated that there was something substantial or material that Kolsky has or will be compelled to refrain from doing.

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

In a one-sentence statement, the Third District summarily denied Bowens's cross-petition for certiorari, in which he challenged the constitutionality of section 27.5303(1)(d), Florida Statutes. Bowens, 35 Fla. L. Weekly at D1475. The court stated, without further explanation, that it "agree[d] with the trial court's analysis of the constitutionality of the statute." Id. The Third District then certified the following question to this Court:

> Whether section 27.5303(1)(d), Florida Statutes (2007), which prohibits a trial court from granting a motion for withdrawal by a public defender based on "conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client," is unconstitutional as a violation of an indigent client's right to effective assistance of counsel and access to the courts, and a violation of the separation of powers mandated by Article II, section 3 of the Florida Constitution as legislative interference with the judiciary's inherent authority to provide counsel and the Supreme Court's exclusive control over the ethical rules governing lawyer conflicts of interests?

Id. at D1476.

SUMMARY OF ARGUMENT

The Third District's decision does not meet either of the jurisdictional thresholds Bowens asserts. First, the individualized determination that Assistant Public Defender Kolsky has not demonstrated sufficient proof to permit his withdrawal affects only Bowens's case. It cannot be contended that the decision affects public defenders as an entire class, any more so than does the disposition of any motion to withdraw by an assistant public defender. In making its determination, the Third District relied exclusively on its analysis in State v. Public Defender, Eleventh Circuit, 12 So. 3d 798 (Fla. 3d DCA 2009). The court announced no new legal principle that expressly alters the parameters already in place for a public defender's withdrawal. Second, the decision is entirely consistent with decisions of this Court, such that express and direct conflict does not exist. Therefore, because the decision does not expressly affect a class of constitutional officers and does not conflict with the decisions cited by Bowens, this Court does not have jurisdiction under article V, section 3(b)(3) of the Florida Constitution.

Even if this Court concludes that one of the constitutional bases for jurisdiction is met, it should not exercise its discretionary review. The decision below is limited only to the facts in this particular case. The Third District reviewed the evidence presented to the trial court and concluded that the assistant public defender could not show sufficient prejudice to Bowens to warrant

withdrawal solely on the basis of his high caseload under Public Defender. A decision affecting one criminal defendant, that simply applies existing precedent to the facts presented, is not the sort of case warranting this Court's review.

ARGUMENT

I. The Third District's Decision Does Not Create Constitutional Grounds for This Court's Discretionary Jurisdiction.

A. The decision does not affect a class of constitutional officers.

Public defenders are, without a doubt, constitutional officers. *See* art. V, § 18, Fla. Const. But jurisdiction should be denied because this case involves only one assistant public defender and his motion to withdraw from one of his cases. State v. Bowens, 35 Fla. L. Weekly D1475, D1475 (Fla. 3d DCA July 7, 2010). This Court has long interpreted its constitutional officer jurisdiction to mean that the decision for review must directly and exclusively affect the "duties, powers, validity, formation, termination, or regulation of a *particular class*" of constitutional officers. Spradley v. State, 293 So. 2d 697, 701 (Fla. 1974) (emphasis added). The court below rendered a factual determination that is specific to this case. Bowens, 35 Fla. L. Weekly at D1475 ("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."). Nothing in the Third District's opinion affects a class of public defenders. *See* School Bd. of Pinellas County v. Dist. Ct. App., 467 So. 2d 985, 986 (Fla. 1986) (rejecting argument that class of constitutional officer jurisdiction existed because "there is nothing in the instant district court decision that affects other school board members as

constitutional officers"). Therefore, as in Spradley, this case "affected only the rights of the parties directly involved," and does not implicate a class of parties or this Court's jurisdiction. Spradley, 293 So. 2d at 702.

This decision also did not make a broad determination of the "duties, powers, validity, formation, termination, or regulation" of public defenders generally as a class that would trigger this Court's jurisdiction. Id. at 701. The decision merely applied the Third District's own precedent and determined that Kolsky failed to provide sufficient evidence of prejudice to Bowens's constitutional rights to justify withdrawal. Bowens, 35 Fla. L. Weekly at D1475 ("This prejudice is not the type of prejudice that this Court referred to in State v. Public Defender."). No new legal principle applicable to public defenders was announced; instead, the court's decision was entirely consistent with State v. Public Defender, Eleventh Circuit, 12 So. 3d 798 (Fla. 3d DCA 2009), over which this Court has already accepted jurisdiction. (Indeed, much of Bowens's brief on jurisdiction reads as additional argument for the reversal of Public Defender.) If the Court concludes this to be the sort of decision that affects a class of constitutional officers, it would necessarily mean that this Court would have jurisdiction to review each and every district court decision that concludes that a trial court properly or improperly found that a single assistant public defender had, or did not have, a conflict of interest.

Bowens asserts that the decision "requires, for the first time, that a Public Defender show 'actual prejudice' " and that for the first time prejudice has been defined as something more than an excessive workload. [Pet'r Br. 7] But, in Public Defender, the Third District held that an individual attorney may "move for withdrawal when a client is, or will be, prejudiced or harmed by the attorney's ineffective representation." 12 So. 3d at 806. Therefore, the Third District merely applied an already existing principle from its caselaw to prohibit the withdrawal of one assistant public defender entirely on the basis of the record below.

B. The Third District's decision does not expressly and directly conflict with any decision of this Court.

The decision is consistent with the previous decisions of this Court upon which Bowens relies.[1] First, the cases cited in his jurisdictional brief are all distinguishable because each involved the presentation of specific evidence from public defenders seeking withdrawal of prejudice suffered by their clients due to the defenders' excessive workloads. For example, appellate briefs were being filed only after lengthy delays that prejudiced the respective defendants' constitutional

[1] In re: Pub. Defender's Certification of Conflict & Motion to Withdraw Due to Excessive Caseload & Motion for Writ of Mandamus, 709 So. 2d 101 (Fla. 1998) [hereinafter 1998 Public Defender]; In Re: Certification of Conflict in Motions to Withdraw Filed By Pub. Defender of the Tenth Judicial Circuit, 636 So. 2d 18 (Fla. 1994) [hereinafter 1994 Public Defender]; In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1131 (Fla. 1990) [hereinafter 1990 Public Defender].

rights. 1998 Pub. Defender, 709 So. 2d at 102 (640 briefs were delinquent); 1994 Pub. Defender, 636 So. 2d at 20 (briefs were more than 60 days overdue); 1990 Pub. Defender, 561 So. 2d at 1131 (noting that the office's average filing time was one year later than private defense attorneys' times). These delays resulted in ineffective representation, in some instances, because defendants were finishing their prison terms before an appellate brief was ever filed. 1998 Pub. Defender, 709 So. 2d at 102; 1990 Pub. Defender, 561 So. 2d at 1132.

By contrast, this case involves a motion by one assistant public defender who was unable to show any substantial or material prejudice. Bowens, 35 Fla. L. Weekly at D1475 ("Neither the PD11 nor the trial court has demonstrated that there was something substantial or material that Kolsky has or will be compelled to refrain from doing."). In this case, Kolsky's need to request a continuance of Bowens's trial date was not shown to have violated any of Bowens's constitutional rights. Id. In the three cases cited for conflict, the lower courts found the defendants' constitutional rights were violated due to the delayed appeals. Conflict does not exist because the facts here are entirely distinguishable from the cases cited by Bowens, and the decision is consistent with the holding of the Court in those cases.

Finally, it should be noted that section 27.5303, Florida Statutes, upon which the Third District relied for its holding that Kolsky could not withdraw, was not at

issue in this Court's previous caselaw because it did not exist then. *See* Pub. Defender, 12 So. 3d at 803 (noting that statute was promulgated in 2004). The advent of a new statute is a critical factual distinction in these cases that makes conflict lacking.

II. Should This Court Determine That It Has a Basis for Jurisdiction, It Still Should Not Review the Third District's Decision.

Even if this Court finds that one of the bases for its jurisdiction is met (including on the grounds that the Third District certified a question of great public importance), it still should not review the Third District's decision. The decision is limited to the facts of Bowens and Kolsky's circumstances, and will not have any greater effect on other cases than any other decision applying its decision in Public Defender. If Kolsky can present sufficient evidence that his representation prejudices the constitutional rights of Bowens or any other defendant, a trial court could grant a new motion for withdrawal. This case simply does not present an issue of statewide importance in the manner of cases that this Court typically reviews.

Bowens asserts that the decision addresses core criminal justice system values, constitutional and ethical requirements for public defenders, and separation of powers. [Pet'r Br. 9] But those issues are presented in Public Defender, which

will be considered by this Court. No reason exists necessitating additional review in this case, which merely applied the principle announced in Public Defender.

CONCLUSION

For the foregoing reasons, the Court should not review the decision below because jurisdiction is lacking and because this case does not present the type of circumstances necessitating this Court's review.

Respectfully Submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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