

**IN THE SUPREME COURT OF FLORIDA**

CASE NO. SC10-1349

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

Petitioners,

-vs-

**THE STATE OF FLORIDA**

Respondent.

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ON PETITION FOR REVIEW  
FROM THE THIRD DISTRICT COURT OF APPEAL  
L.T. CASE NO. 3D09-3023

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**BRIEF OF PETITIONERS ON JURISDICTION**

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## INTRODUCTION

This petition by the Public Defender for the Eleventh Judicial Circuit (“PD11”) and Assistant Public Defender Jay Kolsky (“Kolsky”) seeks this Court’s review of a decision (the “Decision”) of the Third District Court of Appeal (the “Third District”). A copy of the Decision is attached as an Appendix (“App. \_\_”). The Third District has already certified the following question to this Court 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?

App. 6-7. The Third District passed directly on this constitutional question, upholding the constitutionality of § 27.5303(1)(d), Fla. Stat. (App. 6). To support a motion for leave to withdraw, the Third District held, a public defender must make a “showing of individualized prejudice or conflict *separate from* that which arises out of an excessive caseload” and concluded: “[T]he plain language of the statute defeats this particular case.” (App. 5). Consistent with the instruction of Fla. R. App. P. 9.120(d), which provides that no jurisdictional briefs shall be filed where

jurisdiction is premised on certification of a question of great public importance, this brief is *not* directed to this certification.

Rather, and in accordance with this Court’s Manual of Internal Operating Procedures Section II.B.5 (“Notice to Invoke Discretionary Jurisdiction Citing Dual Basis for Jurisdiction”), this brief is limited to a discussion of the two alternative jurisdictional bases – that the Decision (i) expressly affects a class of constitutional officers and (ii) expressly and directly conflicts with prior decisions of this Court.

This case grows out of another case involving PD11, *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798 (Fla. 3d DCA 2009), as to which this Court has already granted review, No. SC09-1181 (Fla. May 19, 2010). In that case, PD11 sought to decline new representations because excessive caseloads rendered the attorneys in his office unable to provide effective representation to existing clients (and new clients, if accepted) and thus unable to comply with the Florida Rules of Professional Conduct. R. Regulating Fla. Bar, Chap. 4. On appeal, the Third District held, among other things, that (i) PD11 could not seek systemic relief on behalf of his office, but, rather, individual assistant public defenders must make a case-by-case showing; and (ii) the statute prohibiting *withdrawal* from existing representation due to excessive caseloads (§ 27.5303(1)(d), Fla. Stat.) also applied to PD11’s request to *decline* new representations. This case, in which PD11 sought to withdraw from an existing representation of a single defendant, Antoine

Bowens, and sought to examine the application of the statute as so interpreted, followed.

The Decision's *sole* cited authority was the prior decision of the Third District, *State v. Public Defender*. This Court, having recently accepted discretionary jurisdiction in that case, should do likewise here, for the reasons set forth in greater detail below. <sup>1/</sup>

### **STATEMENT OF THE CASE AND FACTS**

In August 2009, PD11 and Kolsky sought leave to withdraw from Bowens' representation on the grounds that Kolsky's excessive caseload (971 felony cases in the prior year) prevented him from diligently, competently, and effectively representing Bowens, who is facing a first-degree felony charge and is eligible for a life sentence as a habitual offender. App. 2. In seeking leave to withdraw, PD11 and Kolsky asserted that his excessive caseload created a conflict of interest because his representation of Bowens was materially limited by his responsibilities to the other clients of PD11 for which he had responsibility. App. 2-3. PD11 and Kolsky also moved to declare § 27.5303(1)(d), Fla. Stat. prohibiting the trial court from granting leave to withdraw "based solely on the inadequacy of funding or excess workload of the public defender," unconstitutional as applied to Kolsky. App. 3.

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<sup>1/</sup> Because of the close relationship between this case and *State v. Public Defender*, as expressly recognized by the Third District, App. 6, PD11 has filed a motion requesting that the Court consolidate the two cases for briefing and argument.

After a three-day evidentiary hearing, the trial court denied the motion to declare § 27.5303(1)(d), Fla. Stat., unconstitutional, but granted leave to withdraw because it found that PD11 and Kolsky had demonstrated “adequate, individualized proof of prejudice to Bowens as a direct result of Kolsky’s workload.” App. 3. <sup>2/</sup>

The State petitioned for issuance of a writ of certiorari quashing that part of the trial court’s order granting leave to withdraw, and PD11 and Kolsky cross-petitioned as to that part of the trial court’s order declining to hold § 27.5303(1)(d), Fla. Stat., unconstitutional. App. 2.

On July 7, 2010, the Third District granted the State’s petition and denied the cross-petition. The court held that § 27.5303(1)(d), Fla. Stat., allowed “judicial relief upon determination of *actual prejudice* to a defendant’s constitutional rights,”

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<sup>2/</sup> This is a cursory excerpt of the trial court’s actual holding:

In the instant case, the evidence and testimony presented demonstrates the requisite prejudice to Defendant Bowens as a result of Kolsky’s to-date ineffective representation. The uncontroverted evidence and testimony of Kolsky shows that he has been able to do virtually nothing in preparation of Bowens’ defense. Kolsky has not obtained a list of defense witnesses from Defendant Bowens, nor has he taken depositions. He has not visited the scene of the alleged crime, looked for defense witnesses, or interviewed them. He has not prepared a mitigation package nor has he filed any motions. Additionally, Kolsky had to request a continuance of the trial date at the calendar call of Defendant Bowens held on October 22, 2009, which resulted in a waiver of the defendant’s right to a speedy trial. Based on the evidence presented, this Court finds that Kolsky has met his burden of demonstrating adequate, individualized proof of prejudice to Defendant Bowens as a result of his ineffective representation.

App. 4 (emphasis in original); but held, in this *certiorari* review, that there was “no evidence of actual or imminent prejudice to Bowens’ constitutional rights.” App. 4.

In so holding, the court rejected the proposition that prejudice could be demonstrated by a showing that a public defender “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, or that he or she will be forced to file for continuance, thereby waiving the client’s speedy trial rights.” App. 4-5. Rather, the court held, “[p]rejudice 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.” App. 5. The court concluded: “The plain language of the statute defeats this particular case.”

On July 7, 2010, PD11 filed a notice to invoke this Court’s discretionary jurisdiction, based on the certified question set forth above and the additional grounds addressed herein.

### **SUMMARY OF ARGUMENT**

In addition to the Third District’s certification of the issue of the constitutionality of § 27.5303(1)(d), Fla. Stat., this Court has jurisdiction to review the Decision because it expressly affects a class of constitutional officers, namely Public Defenders, and because it expressly and directly conflicts with this Court’s prior decisions.



The Decision directly and expressly affects Public Defenders because it bars them from withdrawing from cases in which they have a conflict of interest due to excessive caseloads that prevent them from “properly represent[ing]” their clients.

The Decision also expressly and directly conflicts with the holdings of this Court in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1132 (Fla. 1990) (“*In re Order 1990*”), *In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18 (Fla. 1994) (“*In re Certification 1994*”), and *In re Public Defender’s Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus*, 709 So. 2d 101 (Fla. 1998) (“*In re PD’s Certification 1998*”). These decisions recognize that excessive caseloads which force public defenders to choose between their clients “inevitably” create an unacceptable conflict of interest. In contrast, the Decision would require Public Defenders to make an *additional* demonstration of “actual prejudice” before a trial court could grant leave to withdraw.

This Court should exercise its discretion to review this case for the same reasons it recently determined to exercise its discretion to review *State v. Public Defender*. Like *State v. Public Defender*, this case involves a pressing issue confronting Florida’s criminal justice system which directly impacts both the constitutional rights of indigent criminal defendants and the ethical responsibilities of Public Defenders and assistant public defenders throughout Florida.

## ARGUMENT

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

### A. The Decision Expressly Affects a Class of Constitutional Officers

Public Defenders are a class of constitutional officers. Art. V, §§ 17, 18, Fla. Const. The Decision expressly affects Public Defenders because it requires, for the first time, that a Public Defender show “actual prejudice” to a defendant’s constitutional rights before the trial court can grant the Public Defender leave to withdraw from representation, where “actual prejudice” is defined as something *more* than a workload that is “so excessive as to prevent him from working on the client’s case prior to the scheduled trial.” App. 4. Prior decisions of this Court have clearly held that “[w]hen excessive caseload forces the public defender to choose between the rights of various indigent criminal defendants he represents, a conflict of interest is inevitably created.” *In re Order 1990*, 561 So. 2d at 1135. This Court has not required an additional showing of “actual prejudice” (as defined by the Third District) because the Court has recognized that “prejudice” is “inevitable” when the Public Defender is forced by excessive caseload to make an unacceptable choice between the rights of his clients. *Id.* (“The rights of defendants . . . cannot be subjected to the fate of choice no matter how rational that choice may be.”). Here, by requiring a showing of “actual prejudice,” the Decision expressly affects Public

Defenders' ability to secure judicial relief for their clients where excessive caseloads impair their ability to provide those clients with constitutional and effective representation.

The Decision also holds Public Defenders to a different ethical standard than private attorneys, contrary to the obligations imposed by the Rules of Professional Conduct. Rule 4-1.7(a)(2) of the Rules Regulating the Florida Bar provides that an attorney “shall *not* represent a client if . . . there is a *substantial risk* that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” (emphasis added). In contrast, the Decision would require Public Defenders to continue representing clients, contrary to Rule 4-1.7(a)(2), unless they could demonstrate “actual prejudice” – in effect, forcing public defenders to continue to represent clients despite the fact that their continuing representation is contrary to the ethical rules governing all Florida attorneys.

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

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

**REASONS WHY THE COURT SHOULD GRANT REVIEW**

In addition to the Third District’s certification of the issue of the constitutionality of § 27.5303(1)(d), Fla. Stat., this Court should exercise its

discretion to grant review for the same reasons it recently exercised its discretion to grant review in *State v. Public Defender*. This case addresses core values of the Florida criminal justice system; the authority and responsibility of the judiciary to manage the judicial system generally, and the indigent criminal justice system in particular; the constitutional separation of powers guaranteed by Article II, Section 3, of the Florida Constitution; the conduct of criminal defense legal practice under the Rules of Professional Conduct created by this Court, and the constitutional and ethical requirements as to effective representation of indigent defendants. The Decision, if permitted to stand, would leave Florida trial courts with no effective remedy for excessive caseloads that prevent Public Defenders' from complying with their ethical obligations, as imposed by this Court, no matter how serious the excess and no matter how scarce the Public Defenders' resources.

The Decision effectively holds the Legislature can dictate to the judiciary what constitutes a conflict of interest. This construction violates the separation of powers guaranteed by Article II, Section 3, of the Florida Constitution, curtails the judiciary's inherent authority to ensure adequate representation of indigent defendants and the constitutional right to effective assistance of counsel. It also imposes different ethical standards on Public Defenders from those applicable to private law firms and forces them to provide representation to one client at the expense of others.

## CONCLUSION

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

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief of Petitioners on Jurisdiction was served by U.S. Mail this \_\_\_ day of August, 2010 on the following:

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## **CERTIFICATE OF COMPLIANCE**

I HEREBY CERTIFY that the foregoing Brief of Petitioners on Jurisdiction is  
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