

IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT IN AND FOR  
MIAMI-DADE COUNTY, FLORIDA

Criminal Division

**IN RE: REASSIGNMENT AND  
CONSOLIDATION OF PUBLIC  
DEFENDER'S MOTIONS TO APPOINT  
OTHER COUNSEL IN UNAPPOINTED  
NONCAPITAL FELONY CASES**

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Judge Blake  
Section CF61

Case No: 08-1  
Administrative Order No. 08-14

**THE STATE OF FLORIDA,**

*Plaintiff,*

v.

**HAROLD LOVERIDGE,  
GANTT ADAMS,  
TEDRICK MCINTYRE,  
LONNIE CARSWELL,  
REMIGIO CARRILLO,  
RAUL RIVERO,  
PABEL MIRANDA,  
LAZARO GONGORA,  
EDWARD SHOEGREEN,  
ALEXANDER ROBERTSON,  
PATRICIA ANDUJAR,  
WAYNE BROWN,  
JOHN THREATS,  
JOEL CHARLES,  
OSCAR MUNOZ,  
FRANCISCO FRAGA-MARTINEZ,  
BONNIE LOWERY,  
JED GRANT,  
JOSE AROCHA,  
NYLUS STANTON,  
JEFFREY JAMES,**

*Defendants.*

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Case No. F08-14858 (CF01)  
Case No. F08-12840 (CF02)  
Case No. F08-5820A (CF03)  
Case No. F08-8919 (CF04)  
Case No. F08-17339 (CF05)  
Case No. F08-13758 (CF06)  
Case No. F08-16093 (CF07)  
Case No. F08-15006 (CF08)  
Case No. F08-18074 (CF09)  
Case No. F08-2462 (CF10)  
Case No. F08-5109 (CF11)  
Case No. F08-11711 (CF12)  
Case No. F08-17830 (CF13)  
Case No. F08-17334 (CF14)  
Case No. F08-2314 (CF15)  
Case No. F08-10548 (CF16)  
Case No. F08-19720 (CF17)  
Case No. F08-16823 (CF18)  
Case No. F08-7374 (CF19)  
Case No. F08-11423 (CF20)  
Case No. F08-3649 (CF21)

**RESPONSE TO PUBLIC DEFENDER'S MOTION TO APPOINT OTHER COUNSEL IN  
UNAPPOINTED NONCAPITAL FELONY CASES**

The State of Florida, by and through the undersigned counsel, files this Response to Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases Due to Conflict of Interest<sup>1</sup> and states as follows:

**INTRODUCTION**

Some questions have been asked concerning what standing does the State Attorney's Office for the Eleventh Judicial Circuit (SAO-11) have in these proceedings, and assuming there is standing, why it is opposing this Motion by the Public Defender for the Eleventh Judicial Circuit (PD-11)? The issue of standing will be addressed below, but the reason for the SAO-11's opposition to the Motion will be addressed here. First, the roles of the State Attorney and the Public Defender in our criminal justice system are very different. The Public Defender has a limited role, in that his duties and obligations relate foremost to the needs and desires of his clients – those arrested and/or charged with committing crimes. The State Attorney's role, however, not only includes prosecuting those charged with committing crimes, but also specific duties related to the administration of justice, ensuring that the constitutional rights of victims of crime are protected, while also protecting an accused's right to a fair trial.

There can be no question that the courts, the SAO-11 and the PD-11 are of the same mind when it comes to the issue of budgets and adequate funding of the judicial system. All three of these entities have felt a severe reduction in their budgets.<sup>2</sup> In fact the State Attorney over the past two years has been actively mounting a comprehensive effort to garner support from

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<sup>1</sup> The PD-11 has filed substantially the same motion in all of the twenty-one felony divisions.

<sup>2</sup> A sample of some of the reported news stories include Gary Blankenship, *State Attorneys, PDs Also Struggle With Budget Hits*, THE FLORIDA BAR NEWS, May 15, 2008; Jan Pudlow, *Court Budget Cut, 299 Jobs Lost*, THE FLORIDA BAR NEWS, May 15, 2008.

numerous local chambers of commerce, business organizations, the Florida Bar membership and law enforcement for increases in budget for State Attorneys and Public Defenders offices statewide. In this effort she has addressed numerous organizations, written letters to a number of publications, including the Florida Bar News, and met with the Editorial Boards of the *Miami Herald* and *El Nuevo Herald* to seek support for increased funding. The wisdom of the funding decisions made by the Legislature is clearly the proper subject of political debate and efforts by all those affected by these budget cuts to lobby the Legislature for change. The SAO-11 acknowledges that the PD-11's feelings concerning the inadequate funding of his office are based on personally sincere convictions.<sup>3</sup> However, where the SAO-11 must part company with the PD-11 is the method the PD-11 has chosen to air his grievances.

In an unprecedented Motion, the PD-11 is seeking to certify conflict with the future appointment for representation of all indigent defendants charged with noncapital felonies. The obvious and unavoidable consequence of granting this Motion will be to create chaos in the system that will lead to a constitutional crisis that could result in either forcing the Legislature to submit to the PD-11's demands or the possible dismissal of very serious, including violent, felony offenses or cases.<sup>4</sup> This is clearly the PD-11's goal in this Motion.

The PD-11 knows that if this Motion is granted then pursuant to section 27.511(5), Florida Statutes (2007), the Office of the Criminal Conflict and Civil Regional Counsel (OCCCRC), will be initially appointed to these cases. The PD-11 is well aware that the OCCCRC has not been funded or staffed at the levels required to accept the appointments in all

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<sup>3</sup> See Bennett H. Brummer, *Independent, Professional Judgment: The Essence of Freedom*, 10 ST. THOMAS L. REV. 607 (Spring 1998).

<sup>4</sup> As indicated by Ninth Circuit Judge Belvin Perry, representing the Supreme Court's Trial Court Budget Commission, before the Legislature, "when things get lean, defense attorneys' imaginations tend to grow and they file demands for speedy trial." Jan Pudlow and Gary Blankenship, *Court Makes Its Case for Funding*, THE FLORIDA BAR NEWS, April 15, 2008.

of the noncapital felony cases.<sup>5</sup> It will take very little time for the OCCCRC to become overwhelmed by these cases. By allowing the PD-11 to refuse to accept new appointments, this Court will be setting the precedent to allow the OCCCRC to refuse to accept appointments based on the same grounds as the PD-11. The courts, under section 27.5303(1)(b), Florida Statutes (2007), would then have to appoint private attorneys as set forth in section 27.40, Florida Statutes (2007). Those private attorneys would be paid by the Judicial Administration Commission (JAC) as provided in section 27.5305, Florida Statutes (2007), at a considerably higher cost.<sup>6</sup> As with the OCCCRC, JAC has not been funded this budget cycle to pay for all remaining noncapital felony cases in which both the PD-11 and OCCCRC would be permitted to not accept appointments. With no lawyers to represent the indigent felony defendants, the consequences would be dire.

Although the PD-11 asserts throughout his Motion that this issue of excessive caseload or workload has already been determined by the courts in his favor on numerous occasions, what he fails to acknowledge is that what he is asking to do in this Motion – to not be appointed on **all noncapital felony cases**, is unprecedented. Such drastic relief has never been requested before by a public defender in a pending case and has never been reviewed by an appellate court. Furthermore, the landscape has changed since those opinions were rendered. Subsequent to these decisions referred to by the PD-11, the Legislature passed legislation that prohibits the public defender from withdrawing from cases based solely on under funding or workload. Usually, the SAO-11 would not take issue with the “numbers” underlying the PD-11’s argument.

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<sup>5</sup> Joseph George, the Regional Counsel for Miami-Dade and Monroe, said he would take as many as he could but that his staff of 21 lawyers could never take an additional 2000 cases a month. Susannah Nesmith, *Attorneys for Dade’s Poor to Vow to Spurn Most Felony Cases*, THE MIAMI HERALD, June 3, 2008.

<sup>6</sup> The purpose of the Legislature in creating the OCCCRCs was to provide effective representation to indigent persons in a fiscally sound manner. *See* § 27.511(1), Fla. Stat. (2007).

The PD-11 can certainly exercise discretion to use whatever numbers he chooses in his efforts to receive maximum funding from the Legislature as part of the annual budget process.<sup>7</sup> However, in the context of the Motion the PD-11 is not seeking to argue the mere inadequacy of his budget, but rather the competency of his Office's legal representation. Simply put, because the PD-11 has chosen this route, the SAO-11 has no choice but to ensure that these numbers, and what they reflect, are accurate for the purposes of this Motion.

In the end, who is really being served by this litigation method selected by the PD-11? Not the victims of crimes, who will certainly see their cases substantially delayed or even dismissed. Not the community, who will see violent criminals released back to their streets, some of whom were not prosecuted due to the expiration of speedy trial periods. Not the judiciary, who will be overwhelmed trying to execute their primary responsibility to provide counsel for indigent defendants when there are no attorneys to appoint. Not the prosecution or law enforcement, whose cases will be delayed or even dismissed without remedy. Not our criminal justice system, whose credibility, an asset so integral to its function within our society, will quickly be lost in the resulting chaos. The only beneficiaries of this litigation method, ironically, will be the defendants who happen to be indigent.

Finally, a question that this Court must ask the PD-11 is if as he has stated in his Motion at page 2, his goal is "minimizing disruption to the sound administration of justice," then why felonies and not misdemeanors? According to the affidavit of Professor Norman Lefstein (*See* App. to Motion, Tab 4), during the fiscal year 2006-07, the PD-11 was appointed to represent 40,651 indigent defendants in new and reopened (probation violations) noncapital felonies. At

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<sup>7</sup> See Office of Program Policy Analysis and Governmental Accountability (OPPAGA), Information Brief, Report No. 03-24, *Lack of Uniform Definitions Complicates Funding Article V Based on the Numbers of Cases Worked* (March 2003). [EXHIBIT A]

the same time the PD-11 was appointed to represent indigent defendants in 46,888 misdemeanor and criminal traffic offenses. Although only a small percentage of misdemeanors result in incarceration, the PD-11, unlike other Public Defenders in this State<sup>8</sup> and elsewhere,<sup>9</sup> has not sought to reject new appointments in misdemeanor cases as a preliminary step to address the budget cuts. Rather, in an effort to cause chaos to force this crisis, the PD-11 has chosen to reject future appointments to represent some of the most dangerous defendants in the criminal justice system, many who are designated as career criminals.

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<sup>8</sup> Fourth Circuit Public Defender Bill White, representing the Florida Public Defender Association (FPDA) when discussing the budget reductions this year stated “that Public defenders may have to stop representing defendants in misdemeanor cases...” Gary Blankenship, *Courts Foresee Staff Reductions – 30 Percent of the Workforce is at Risk*, THE FLORIDA BAR NEWS, April 1, 2008. Seventh Judicial Circuit Public Defender Jim Purdy said that his office was working on reducing the numbers of misdemeanor cases his attorneys handle, stating that it could reduce his office’s caseload by a third. Jay Stapleton, *Public Defenders Overloaded*, DAYTONA BEACH NEWS-JOURNAL, June 25, 2008. Eighth Circuit Public Defender Rick Parker, President of the FDPA said he would likely cope with cuts by reducing or ending staffing for specialty courts, such as drug and mental health courts. Gary Blankenship, *State Attorneys, PDs Also Struggle With Budget Hits*, THE FLORIDA BAR NEWS, May 15, 2008. Twelfth Circuit Public Defender Elliott Metcalfe, Jr. said his office could be forced to abandon misdemeanor units and reassign attorneys to felony cases where the sanction of prison exceeds the punishment in misdemeanor case. Joe Follick, *State Budget Cuts Weighing On Scales of Justice*, HERALD TRIBUNE, June 15, 2008. Thirteenth Circuit Public Defender Bob Dillinger said that budget cuts will force his office to turn away people arrested for minor crimes. Chris Tisch, *Public Defender Rejects Cases*, ST. PETERSBURG TIMES, June 3, 2008. In fact the Article V Indigent Services Advisory Board, Final Report, *Court Appointed Counsel Recommendations*, Appendix B, Uniform Standards for Use in Conflict of Interest Cases, IV (Jan. 2004), available at [http://www.justiceadmin.org/art\\_v/index.aspx](http://www.justiceadmin.org/art_v/index.aspx), states: “Once an attorney had decided there is a conflict which required withdrawal, the following guidelines should be followed: ... b. keep the most complex case or the one which will require the most time and expense.” [EXHIBIT B]

<sup>9</sup> The Public Defenders in Kentucky have indicated that budget cuts will force them to stop accepting appointments in some misdemeanor or involuntary psychiatric commitment cases. Deborah Yetter, *Budget Cuts Squeeze Public Defenders’ Offices*, COURIER-JOURNAL.COM, May 29, 2008. Cook County’s Public Defender stated that budget cuts could force him to pull attorneys from misdemeanor courtrooms. Mickey Ciokajlo, *Pubic Defender Meets Budget Cuts, Layoffs Could Be Required, Official Says*, CHICAGO TRIBUNE, December 28, 2006. Minnesota’s State Public Defender in determining how to handle budget cuts stated that its cuts were designed to preserve the public defenders’ resources for its priority cases, which are criminal defendants in custody. Barbara Jones, *Some Public Defenders to Lose Jobs; Others to Take Unpaid Leaves*, MINNESOTA LAWYER BLOG, June 5, 2008.

In the end, the SAO-11 is opposing the PD-11's Motion because the SAO-11 cannot sit idly by and allow the criminal justice system to crumble because one individual, the PD-11, who no longer has to face the people of Miami-Dade County, has determined that he will throw it into chaos.

### STANDING OF THE SAO-11

Article V, section 17 of the Florida Constitution states: "Except as otherwise provided in this constitution, the state attorney shall be the prosecuting officer of all trial courts in that circuit and shall perform other duties prescribed by general law...." Section 27.02(1), Florida Statutes (2007), sets forth the duties of the state attorney as follows:

The **state attorney** shall appear in the circuit and county courts within his or her judicial circuit and prosecute or defend on behalf of the state all suits, applications, or **motions**, civil or **criminal**, in which the **state is a party**, except as provided in chapters 39, 984 and 985....

(Emphasis added). This Motion was filed by the PD-11 on behalf of criminal defendants in twenty-one pending criminal cases in which the State of Florida is clearly a party. In fact, the SAO is without question the entity that represents the State in criminal prosecutions. *Dade County v. Strauss*, 246 So. 2d 137, 140 (Fla. 3d DCA 1971). *See also Carwise v. State*, 449 So. 2d 943 (Fla. 5th DCA 1984) (state attorney did not have authority to refuse to represent State's interest at probation violation hearing, although probation violation hearing was not prosecution for crime). Thus, under the plain language of section 27.02(1), the SAO-11 has the authority to represent the State in this Motion.

The PD-11 argues that the SAO-11 has no standing to challenge his "professional judgment that the acceptance of future appointments of noncapital felony cases would threaten the effective representation of existing and future clients." On the contrary, the SAO-11, in its

representation of the State in post conviction proceedings in which ineffective assistance of counsel is claimed by the defendant, frequently litigates the propriety of actions of defense counsel that are based on their professional judgment. Sometimes the SAO-11, when representing the interest of the State of Florida, must challenge the attorney's own assessment of his or her own professional judgment. As such, an attorney's admission that he was ineffective has been held to be of little persuasion to the courts. *See, e.g., Breedlove v. State*, 693 So. 2d 874, 877 n.3 (Fla. 1997); *Routley v. State*, 590 So. 2d 397, 401 n.4 (Fla. 1991); *Kelley v. State*, 569 So. 2d 754, 761 (Fla. 1990).

The SAO-11, as the representative of the State, has standing to challenge a motion to withdraw filed by a defense attorney if the granting of that motion is not in the public interest. In *Rubin v State*, 490 So. 2d 1001 (Fla. 3d DCA 1986), the defense attorney moved to withdraw at the beginning of trial when his client indicated that he would be testifying falsely at trial. The trial court denied the motion to withdraw and ordered the attorney to proceed with the trial. The attorney was subsequently held in contempt for refusing to proceed with the trial. On appeal from that contempt order the Third District stated, "[w]hile Sanborn may have agreed to Rubin's withdrawal and a further postponement of the trial, neither the State, the public, nor the court was bound by Sanborn's acquiescence." *Id.* at 1002 n.1. Thus, clearly the State has standing to challenge a motion to withdraw when the public interest is affected.

The SAO-11 also has standing to bring to the attention of the court potential conflicts when an attorney represents more than one defendant so that the defendant can be colloquied as to whether a conflict exists and whether they are willing to waive those conflicts. *See, e.g., Wheat v. United States*, 486 U.S. 153, 108 S.Ct. 1692, 1696-97 (1988); *Valdez v. State*, 847 So. 2d 602 (Fla. 5th DCA 2003); *Cotto v. State*, 829 So. 2d 959 (Fla. 4th DCA 2002); *Robinson v.*

*State*, 750 So. 2d 58, 59-60 (Fla. 2d DCA 1999); *Kolker v. State*, 649 So. 2d 250 (Fla. 3d DCA 1994). See also Fla. R. Crim. P. 3.150(c). In fact, the evidentiary hearing ordered by this Court on the Motion by the PD-11 could be considered as part of the Court's colloquy that determines if a conflict exists. Thus, the SAO-11 has standing to participate in that determination. If no conflict exists then there is no issue with the PD-11's ethical and professional judgment.

Furthermore, the SAO-11 has a right to challenge the PD-11 assertions that he can take a particular action regarding his representation of clients based on his professional judgment. For example, in *Mann v. State*, 937 So. 2d 722 (Fla. 3d DCA 2006), the SAO-11 was a party to the PD-11's attempt to represent a defendant in a post conviction proceeding where he had not been appointed by the trial court. The PD-11 had claimed that he could represent the defendant without prior court appointment "if in the exercise of [his] professional judgment, [he] concludes such representation is necessary to provide effective and complete representation of a defendant." *Id.* at 727. The trial court and subsequently the Third District rejected that argument.

In addition, this Court needs to not only consider the constitutional rights of the defendants who are affected by the PD-11's certification of conflict, but also the victims' rights to be heard under Article 1, Section 16(b) of the Florida Constitution, and to have their cases heard promptly. The SAO has standing under section 960.001(7), Florida Statutes (2007), "to assert the rights of a crime victim which are provided by law or s. 16(b), Art. 1 of the State Constitution." See *State v. Famiglietti*, 817 So. 2d 901, 903 (Fla. 3d DCA 2002). Under sections 960.0015 and 918.015(1), Florida Statutes (2007), the victim and the State have a right to a speedy trial. Thus, the SAO-11 has standing to assert those rights that will be adversely affected if this Court were to grant the PD-11's Motion.

The SAO-11 has no intention of impeding the independence of defense counsel or the fair administration of justice. The State Attorney is “the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” *Floyd v. State*, 902 So. 2d 775, 779 (Fla. 2005) (quoting *Berger v. U.S.*, 295 U.S. 78, 88, 55 S.Ct 629 (1935)). The SAO-11’s interest is in protecting the administration of justice, not only for defendants, but also for victims and the people of the State of Florida.

However, if this Court determines that the SAO-11 does not have standing as a matter of right, the SAO-11 requests that this Court allow the SAO-11 to continue to participate in any hearing as an amicus or “friend of the court.” This Court has already exercised its discretion and held that an evidentiary hearing would be had on the PD-11’s Motion. How meaningful would a hearing be if there was no one to represent the interests of the State? The hearing would be nothing more than an open *ex parte* hearing in which this Court would hear only one side of the issues. This Court has the discretion to allow the State the opportunity to be heard. *See In re Certification of Conflict in Motions to Withdraw Filed By Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18, 20 (Fla. 1994) (public defender, counties and attorney general presented witnesses at hearing before court appointed commissioner). Thus, the only way this Court can be fully informed on the issues presented in this Motion is to permit full and meaningful participation in any hearing by the SAO-11.<sup>10</sup>

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<sup>10</sup> The SAO-11 is not waiving its objection to the present scheduling of the evidentiary hearing as it believes that more time is needed to fully investigate the claims by the PD-11.

**THE PUBLIC DEFENDER IS NOT PERMITTED TO WITHDRAW BASED ON  
INADEQUACY OF FUNDING OR EXCESS WORKLOAD**

**Historical Background**

The PD-11 asserts in essence that for the last thirty years it has been established in the law that an excessive caseload can create a conflict that will allow him to decline to accept further appointments in noncapital felony cases. However, what the PD-11 has certified in this Motion is unprecedented and this Court must look closely at the prior law and how it has been affected by the passage of new legislation in 2004.

The history of the creation of the Office of the Public Defender is set forth in detail by the Supreme Court of Florida in *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 140-41 (Fla. 2008). The Court noted that the Office of the Public Defender was created in 1963, with the enactment of section 27.50, Florida Statutes (1963), by the Legislature in order to meet its responsibilities to provide counsel to indigent criminal defendants as set forth in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The duties of the Public Defender were set forth in section 27.51, Florida Statutes (1963). In 1972, the Florida Constitution was amended to elevate the Office of the Public Defender to the level of a constitutional officer. That amendment became Article V, Section 18, which provides as follows:

**Public Defenders.** – In each judicial circuit a public defender shall be elected for a term of four years, who shall perform duties prescribed by general law. A public defender shall be an elector of the state and reside in the territorial jurisdiction of the circuit and shall be and have been a member of the Bar of Florida for the preceding five years. Public defenders shall appoint such assistant public defenders as may be authorized by law.

In *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 141 (Fla. 2008), the Supreme Court of Florida extensively reviewed this constitutional provision, held that the plain language of the text of section 18 is clear, and found that this provision

“essentially sets forth the minimal qualifications for the position” of the elected public defender.

The Court stated:

Beyond these minimal qualifications, the constitution does not specify any additional details about how the public defender in each circuit is to operate or what duties are to be performed. In fact, section 18 clearly and unequivocally grants the Legislature the authority to control the duties to be performed, which naturally includes the types of cases for which public defenders are appointed.

*Id.* Thus, before and after the constitutional amendment, the Legislature has had the authority to control the duties to be performed by the public defenders.

Beginning in 1963, and continuing to today, it has always been the Legislature’s intent that the public body that would represent indigent defendants would be the Office of the Public Defender. The Legislature has provided in section 27.51(1) that “[t]he public defender **shall** represent, without additional compensation, any person determined to be indigent under s. 27.52 ...”(emphasis added). Even the Florida Supreme Court envisioned that the Public Defender would be the entity representing the indigent defendant by requiring under Florida Rule of Criminal Procedure 3.111(c), a booking officer who commits a defendant to custody to advise the defendant of his or her right to counsel and if the defendant requests counsel and appears to be indigent, the “officer shall immediately and effectively place the defendant in communication with the (office of) public defender of the circuit in which the arrest was made.”<sup>11</sup>

Since 1972 and the elevation of the Office of the Public Defender to a constitutional office, the Legislature has been well aware of the funding issues which have periodically provided a basis for the public defenders to either withdraw from cases or refuse to accept appointments. In the spring of 1977, the Public Defender for the First Judicial Circuit filed

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<sup>11</sup> Under article 1, section 16, of the Florida Constitution, this is when the right to counsel attaches. *See Traylor v. State*, 596 So. 2d 957, 970 n.38 (Fla. 1992).

motions to withdraw as counsel in a **limited number** of felony cases on the ground that his excessive caseload would preclude the effective representation on behalf of the indigent defendants. The trial court granted the motions and the county sought certiorari review in the First District. The First District held that under section 27.51, the Public Defender could withdraw from cases where its workloads “far exceed” the various recommended workloads and where the trial judge has the opportunity to observe directly the adequacy of representation by the public defender’s office to determine whether the workload is excessive. *State ex rel. Escambia County v. Behr*, 354 So. 2d 974, 975-76 (Fla. 1st DCA 1978).

Shortly thereafter, the Public Defender for the Eleventh Judicial Circuit (Mr. Brummer), filed a motion to withdraw as counsel in one indigent defendant’s appellate proceedings. *Dade County v. Baker*, 362 So. 2d 151 (Fla. 3d DCA 1978). The Public Defender alleged in his motion that excessive caseload would impede this particular defendant’s right to speedy access to the courts and effective assistance of counsel. The County replied that the Public Defender had filed the same motion in a number of other cases and that the Public Defender had stated that he intended to file other motions on the same ground as part of a plan to reduce his office’s caseload. The Public Defender responded that he was moving to withdraw because the excessive caseload affected his representation of this particular defendant. 362 So. 2d at 153. The trial court permitted the withdrawal, appointing a private attorney to represent, at County expense, the defendant on his appeal. The majority of the Third District held that the Public Defender could not move to withdraw because of excessive caseload, finding that it was not a “lawful ground” or a “special circumstance” to allow for withdrawal under section 27.53(2), Florida Statutes (1977).

Judge Hubbart dissented finding that section 27.53(2) could not be interpreted as requiring a showing of “a lawful ground” or “special circumstances” before a trial court could

appoint a special assistant public defender. To do so, would be to judicially amend the statute. Thus, Judge Hubbard specifically stated that it was not necessary to determine whether an excessive caseload constitutes a lawful ground for the appointment of a special assistant public defender, although he questioned whether the Public Defender had proven that such an excessive caseload existed:

In point of fact, Dade County makes a strong showing that the public defender herein is not so overworked that he has no lawyer on his staff who can represent this defendant on appeal without compromising the defendant's right to effective assistance of counsel. All agree, however, that the public defender has a heavy workload by any standard; and that factor was properly considered by the trial court in exercising its discretion to appoint the special assistant public defender in this case. Whether the court was [r]equired on this record to appoint the special assistant public defender herein is a question we need not decide and about which I have grave doubts.

362 So. 2d at 157 n.2 (Hubbart, J., dissenting).

The Florida Supreme Court reviewed *Behr* and *Baker* and adopted Judge Hubbard's rationale in *Baker* as its holding. The Court held that a court had the unfettered discretion to appoint special assistant public defenders and there was no requirement of a showing of a lawful ground or special circumstance. The Court further held that "[t]he court does not have to ... allow the county an opportunity to be heard before appointing private counsel." *Escambia County v. Behr*, 384 So. 2d 147, 150 (Fla. 1980).

Following *Behr*, in early 1981, the Attorney General's Office moved in the Florida Supreme Court to have the Public Defender of the Fifteenth Judicial Circuit removed from certain death penalty appeals because of the failure to timely file briefs. The Florida Supreme Court reviewed its capital appeals and determined that not only was the Public Defender of the Fifteenth Judicial Circuit delinquent in filing briefs, but also the Public Defenders of the

Eleventh Judicial Circuit and the Seventh Judicial Circuit. The Florida Supreme Court issued orders directing those three public defenders to decline to accept new capital appeals until they could represent that they would abide by the appellate time limitations. *See In re Directive to the Public Defender of the Eleventh Judicial Circuit of Florida*, Case no. 60,513, 6 Fla. L. Weekly 328 (Fla. April 28, 1981) (*See App. to Motion, Tab 12*).<sup>12</sup>

This trend in the appellate courts continued. The Public Defender for the Second Judicial Circuit moved to withdraw from eight appellate cases due to staffing shortages. The Public Defender also requested blanket authorization to withdraw from 100 other pending appellate cases. The First District granted the motion as to the eight cases, but denied the motion as to the 100 cases, stating that they had to be considered on a case-by-case basis. *Kiernan v. State*, 485 So. 2d 460 (Fla. 1st DCA 1986). Soon thereafter, the Public Defender for the Tenth Judicial Circuit followed the lead of the Public Defender for the Second Judicial Circuit and filed motions to withdraw in 247 pending criminal appeals. The Second District denied the motion stating that allowing the withdrawal from existing cases would be counter productive. The Second District stated that the public defender, if it deems necessary, should seek to be relieved from representation on newer appeals, and that the courts should do it on a case by case basis. *Haggins v. State*, 498 So. 2d 953 (Fla. 2d DCA 1986)(en banc).

During this same time period, the Public Defender for the Nineteenth Judicial Circuit sought to withdraw from certain pending juvenile and misdemeanor cases in Martin County, as

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<sup>12</sup> At the same time the PD-11 was ordered to not accept appointments for new capital appeals, the PD-11 was engaging in representation of persons he was not statutorily entitled to represent. *See State ex. rel. Smith v. Brummer*, 426 So. 2d 532 (Fla. 1982) (initiating federal class action); *State ex rel Smith v. Brummer*, 443 So. 2d 957 (Fla. 1984) (accepting federal habeas corpus appointment). This penchant for going beyond his statutory authority in representing persons continued into 2006. *See Mann v. State*, 937 So. 2d 722 (Fla. 3d DCA 2006) (representing defendants in noncapital post conviction proceeding without being appointed).

well as all future 1986 misdemeanor, juvenile and mental health cases in Martin County based on excessive caseloads. Martin County did not challenge any of the assertions by the Public Defender. The trial court denied the motions. The Fourth District granted the Public Defender's petition for writ of certiorari on the grounds that the record was "unrebutted." The Fourth District noted however that, "while the case law recognizes the authority of the trial court to relieve the public defender from representation because of excessive caseload, there is a lack of guidelines both for determining a reasonable caseload for a public defender and for determining appropriate action by the public defender in the face of excessive caseload." *Schwartz v. Cianca*, 495 So. 2d 1208, 1210 (Fla. 4th DCA 1986). The Fourth District certified the following question to the Florida Supreme Court:

IS A TRIAL COURT REQUIRED TO ALLOW THE PUBLIC DEFENDER'S OFFICE TO WITHDRAW WHENEVER THE PUBLIC DEFENDER PRESENTS **UNREBUTTED** EVIDENCE THAT HIS CASELOAD IS EXCESSIVE AND THAT, BY REASON THEREOF, HE IS UNABLE TO FURNISH EFFECTIVE COUNSEL? (Emphasis added)

(Emphasis added). However, the certified question was not pursued by the parties.

Excessive caseload issues continued to reappear in the appellate courts. See *Crow v. State*, 500 So. 2d 171 (Fla. 1st DCA 1986); *In re Order on Prosecution of Criminal Appeals By the Tenth Circuit Public Defender and by Other Public Defenders*, 504 So. 2d 1349 (Fla. 2d DCA 1987)(en banc); *In re Order on Prosecution of Criminal Appeals By the Tenth Circuit Public Defender*, 523 So. 2d 1149 (Fla. 2d DCA 1987)(en banc); *Grube v. State*, 529 So. 2d 789 (Fla. 1st DCA 1988); *Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender*, 1989 WL 142259 (Fla. 2d DCA May 12, 1989)(en banc); *Terry v. State*, 547 So. 2d 712 (Fla. 1st DCA 1989); *Day v. State*, 564 So. 2d 137 (Fla. 1st DCA 1990).

In 1990, the Florida Supreme Court reviewed these cases in *In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990) (hereinafter *In re Order*). In affirming the Second District's order, the Court recognized that the source of the problem was the inadequate funding of the public defenders' offices, which affected both trial and appellate caseloads. The Court found that there was a showing that the public defender clients had suffered prejudice in having appeals dismissed or having served their prison time before an appeal had been lodged. The Court reviewed section 27.53(3), Florida Statutes (1989), which provided the mechanism for the public defender to notify the court when he determines that he cannot counsel a client due to a conflict of interest. The Court noted that "when 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." *Id.* at 1135. The Court reaffirmed its prior holding in *Behr* that the county does not have to be granted an opportunity to be heard before the court appoints private counsel. *Id.* at 1134. The Court also noted that "it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function." *Id.* at 1136.

Following the Florida Supreme Court's opinion in *In re Order*, the public defenders continued moving to withdraw in appellate cases. Despite the fact that after that opinion the Legislature had appropriated more positions for the public defender, the Public Defender for the Tenth Judicial Circuit moved to withdraw from an additional twenty-nine cases. The Second District denied the motion and the public defender appealed to the Florida Supreme Court. Although the Florida Supreme Court reversed the Second District, it held that although courts should not involve themselves in the management of public defender offices, they are not

obligated to permit the withdrawal automatically upon the filing of a certificate by the public defender reflecting a backlog in the prosecution of appeals. *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991).

After *Skitka*, the motions to withdraw persisted in the appellate courts.<sup>13</sup> See *Woods v. State*, 595 So. 2d 264 (Fla. 1st DCA 1992). In *Order on Motions to Withdraw Filed By Tenth Circuit Public Defender*, 622 So. 2d 2 (Fla. 2d DCA 1993)(en banc), the Second District when confronted with more motions to withdraw by the public defender, found that it could no longer take the representations and conclusions of the public defender at face value and delegated the fact finding concerning the allegations of excessive caseloads to a commissioner. This delegation was upheld by the Florida Supreme Court 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). The requests to withdraw from appeals continued. See *Rodriguez v. State*, 700 So. 2d 79 (Fla. 2d DCA 1997); *In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Case Load and Motion for Writ of Mandamus*, 793 So. 2d 1 (Fla. 2d DCA 1998)(en banc), *aff'd*, 709 So. 2d 101 (Fla. 1998)(denying public defender's motions to withdraw, but ordering them not to accept any further appellate cases).<sup>14</sup>

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<sup>13</sup> Apparently on October 12, 1992, the PD-11 sent a letter to then Chief Judge Leonard Rifkin asserting that due to excessive caseload, the PD-11 would be unavailable to accept additional appointments for the foreseeable future and/or would withdraw from part of their existing caseload. See App. To Motion, Tab. 1, Exh. A - Affidavit of Bennett Brummer. The SAO-11 was not served with a copy of this letter. Apparently from Mr. Brummer's Affidavit, the Chief Judge was able to create some relief by assigning additional county-paid overload attorneys to PD-11. However, the fact that the PD-11 sent this letter which caused the then Chief Judge to act, without any input from the SAO-11, is certainly not any kind of precedential legal authority for the PD-11's present request to refuse appointments in all noncapital felony cases.

<sup>14</sup> It was not until late 1999-2000, that the Public Defender of the Tenth Judicial Circuit was able to become current with his caseload. *Miller v. State*, 751 So. 2d 131, 132 (Fla. 2d DCA 2000) (Altenbernd, J., concurring).

Parallel to these appellate cases were cases involving certification of conflicts in the trial court by the public defender on grounds other than excessive caseload. In *Babb v. Edwards*, 412 So. 2d 859, 862 (Fla. 1982), the Florida Supreme Court in interpreting section 27.53(3), Florida Statutes (1980), held that once the public defender certified a conflict, the trial court was required to appoint other counsel not affiliated with the public defender's office, without consideration of any other factors. See also *Nixon v. Siegel*, 626 So. 2d 1024 (Fla. 3d DCA 1993). This holding was affirmed by the Florida Supreme Court in *Guzman v. State*, 644 So. 2d 996 (Fla. 1994).

In order to address this issue, the Legislature in 1999 amended section 27.53(3) to provide:

The court shall review and 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 permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client.

This amendment abrogated *Guzman* and *Babb*. *Valle v. State*, 763 So. 2d 1175, 1177 (Fla. 4th DCA 2000). See also *Snelgrove v. State*, 921 So. 2d 560, 566 n.11 (Fla. 2005). A court was no longer required to accept the public defender's certification of conflict at face value.

After years of paying for the court system and not having a sufficient say in the costs of maintaining the system, the counties in 1998, successfully pushed for the passage of the amendment to Article V, section 14(c) of the Florida Constitution that would now require the State to pay for the costs of the court system. This provision, which became effective on July 1, 2004, states in the relevant part:

No county or municipality, except as provided in this subsection, shall be required to provide any funding for the state courts system, state attorneys' offices, public defenders' offices, court-appointed

counsel or the offices of the clerks of the circuit or county courts performing court-related functions.

Fla. Const. Art. V, s. 14(c). In addition subsection (d) provides that “[t]he judiciary shall have no power to fix appropriations.”

In response to the amendment, the Florida Legislature significantly amended the various provisions of chapter 27 involving the public defenders. The most important amendment and the one that is at issue here is that of the enactment of section 27.5303. Subsection (1)(a) provides as follows:

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. **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 information. 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, as provided in s. 27.40.

§ 27.5303(1)(a), Fla. Stat. (2004) (emphasis added).

Subsection (d) further provides:

**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...**

*Id.* (emphasis added). It is clear that the Legislature in passing this statute wanted to avoid what it had seen the counties experience over the prior thirty years with public defender withdrawals for excessive caseloads or workloads. Thus, the Legislature intended that the court not be

required to take the Public Defenders at their word on conflicts, and it did not want the court to allow the Public Defender to withdraw from cases simply because he or she could not appropriately manage the workload. The legislation has not changed in substance since 2004, other than in 2007 when it added the Office of the Criminal Conflict and Civil Regional Counsel (OCCCRC) to subsection (d).

### **Section 27.5303(d) Applies to PD-11's Motion**

There is no question that what the PD-11 is seeking to obtain in this Motion is unprecedented. In no prior cases in which the issue of excessive caseload had arisen did the Public Defender ask to not be appointed on an unlimited number of felony cases. The PD-11, in order to avoid the express language of the section 27.5303(d), states that he is not asking to “withdraw” from future felony cases, just that he not be appointed to represent those indigent defendants who are entitled to his representation. The PD-11's request not to be appointed clearly violates the Legislature's statutory scheme for the provision of required legal representation for indigent persons.

Section 27.51(1), Florida Statutes (2007), expressly provides that: “The public defender **shall** represent, without additional compensation, any person determined to be indigent under s. 27.52, and: (a) Under arrest for, or charged with, a felony....” (Emphasis added). Section 27.40(1), Florida Statutes (2007) provides: “Counsel shall be appointed to represent any individual in a criminal or civil proceeding entitled to court-appointed counsel under the Federal or State Constitution or as authorized by general law. The court **shall** appoint a public defender to represent indigent persons as authorized in s. 27.51.” (Emphasis added). Thus, the public defender in each circuit is primarily responsible for representing indigent defendants who have been arrested or charged with criminal offenses. It is only when the public defender determines

that a conflict of interest exists and the court agrees, that the OCCRC is appointed next. *See* §§ 27.40(1); 27.511(5), Fla. Stat. (2007); *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 138 (Fla. 2008).

Thus, the PD-11's argument that he is not "withdrawing," he is just not "accepting" new appointments, must be rejected by this Court, as it is an argument that is form over substance because in this context, the outcome is the same, i.e., the PD-11 will be able to avoid representing persons he is statutorily obligated to represent. Furthermore, to give the statute the interpretation that the PD-11 has urged would be to give the statute an absurd result clearly not intended by the Legislature. "[A] statutory provision should not be construed in such a way that it renders the statute meaningless or leads to absurd results." *Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 n.9 (Fla. 2004); *City of St. Petersburg v. Siebold*, 48 So. 2d 291, 294 (Fla. 1950) ("The courts will not ascribe to the Legislature an intent to create absurd ... consequences, and so an interpretation avoiding absurdity is always preferred."); *Haworth v. Chapman*, 113 Fla. 591, 152 So. 663, 665 (Fla. 1933) ("There is a strong presumption against absurdity in a statutory provision; it being unreasonable to suppose that the Legislature intended their own stultification...."). Section 27.5303 must be read *in para materia* with sections 27.40(1) and 27.51(1). *See State v. Fuchs*, 769 So. 2d 1006, 1009 (Fla. 2000) ("statutes which relate to the same or closely related subjects should be read in *pari materia*"). This Court should therefore reject the PD-11's assertion that because he is asking the Court to appoint counsel other than himself, rather than withdrawing, section 27.5303(d) does not apply to his actions.

#### **Section 27.5303(d) is Not Unconstitutional**

Acknowledging that if section 27.5303(d) does apply to him, PD-11 asserts that its enforcement will be unconstitutional as it would conflict with the right to counsel, the right of

access to courts, equal protection and due process, as well as violate the separation of powers clauses of the Florida and United States Constitutions. The Motion and Memorandum filed in this case by the PD-11 does nothing more than allege that withdrawal is necessary due to inadequacy of funding, causing an excess caseload or workload for the public defender, which violates the ethical obligations of the Public Defender under the Florida Bar rules because he would be providing ineffective assistance of counsel. However, in his Motion, the PD-11 does not allege any specific cases in which one of his clients was afforded relief on the basis of ineffective assistance of counsel due to under funding or excessive caseloads.<sup>15</sup> Furthermore, in the Offices of the Public Defender, Long Range Program Plan (LRPP) FY 2007-2008 through FY 2011-2012, at 9 (September 30, 2006), the PD-11 reported **zero** substantiated bar grievances. [EXHIBIT C].<sup>16</sup> By contrast in *In re Order*, 561 So. 2d at 1131-32 n.2 & n.3. (Fla. 1990), one of the leading Florida cases relied on by the Public Defender, there was a showing that the public defender clients had suffered prejudice in having appeals dismissed or having served their prison time before an appeal had been lodged.

There is no certification in this Motion from any of the felony assistant public defenders (“APDs”) that they believe that they have a caseload or workload that is so excessive that they cannot provide effective assistance of counsel. Neither of the affidavits from Mr. Brummer nor

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<sup>15</sup> Despite the PD-11’s concerns that neither he nor his assistants would have qualified immunity if sued in a civil rights action or malpractice action, he has not cited any action in which that has successfully occurred against him or his office. In *Rowe v. Schreiber*, 139 F. 3d 1381 (11th Cir. 1998), the Eleventh Circuit held that the Public Defender was entitled to qualified immunity for his administrative decisions allocating limited resources which allegedly resulted in the violation of the defendant’s Sixth Amendment right to counsel. Then in *Schreiber v. Rowe*, 814 So. 2d 396 (Fla. 2002), the Florida Supreme Court held that for a former client to be successful in a malpractice action, he or she must first obtain appellate or post conviction relief and must also present evidence of actual innocence.

<sup>16</sup> In fact, none of the Public Defender Offices reported any substantiated bar grievances. *Id.* at 10, 14, 26.

Mr. Weed indicates that any specific APD had informed their supervisor that he or she had an excessive caseload and because of that was not providing effective assistance of counsel. Mr. Rory S. Stein, General Counsel to PD-11, in his Memorandum to Prof. Lefstein, that is attached to Mr. Weed's affidavit (*See App. to Motion, Tab 2, Ex. A, p. 2*), does indicate that some "C" felony cases were reassigned to Senior Supervising Attorneys, Major Crimes Attorneys, and "A" and "B" felony attorneys. The affidavits are silent on whether these reassignments allowed those "C" attorneys to have a manageable caseload so that they could provide effective assistance of counsel.

The American Bar Association's Standing Committee on Ethics and Responsibility Formal Opinion 06-441, at 5 (2006) (*see App. to Motion, Tab 27*), clearly indicates that each individual lawyer must make a determination that his or her workload is or will become excessive, and after doing that the lawyer must ask his or her supervisor to transfer non-representative responsibilities to others, refuse cases and transfer current cases to another lawyer whose workload will allow for the transfer of the case(s). The supervising attorneys have an ethical responsibility to make reasonable efforts to ensure that the workload of each lawyer is appropriate. *Id.* at 7. The Motion is simply a statement by the PD-11 that all the felony APDs have an excessive caseload and/or workload. However, as of May 16, 2008, based on the caseload assignments prepared by Mr. Stein,<sup>17</sup> there are 73 "line" APDs in the felony divisions. 37 of those APDs have caseloads of 65 or less, and 19 have caseloads of 50 or less, which if extrapolated to the end of 2008, would be well below the standards set forth in the PD-11's Motion. In fact, only 2 "line APDs" have caseloads over 150 (159, 162). The Motion does not

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<sup>17</sup> The attorney assignments chart or "breakdown sheet" was attached to Mr. Stein's Memorandum to Prof. Lefstein, and is included as the last page appended to Prof. Lefstein's Affidavit (*See App. to Motion, Tab 2, Ex. A, p. 5; Tab 4, last 2 pages*).

set forth what the PD-11 has done or attempted to alleviate those two specific caseloads. Instead the PD-11 has stated that his remedy to this problem is to refuse any new noncapital felony appointments for all APDs regardless of their individual caseloads.

Similar claims of excessive caseload and/or workload have been rejected by other state courts on the basis that there was no showing that the public defender clients were actually receiving ineffective assistance of counsel. See *Kennedy v. Carlson*, 544 N.W. 2d 1 (Minn. 1996)(public defender who claimed that insufficiency of state funding for public defense services violated his clients' right to counsel did not establish "injury in fact" to support his allegations); *Platt v. State*, 664 N.E. 2d 357 (Ind. Ct. App. 1996)(court rejected action challenging public defender system on the grounds that claim that it provided ineffective assistance of counsel as issue was not ripe for judicial review absent showing that anyone was prejudiced by unfair trial).

In *Coleman v. State*, 703 N.E. 2d 1022, 1037 (Ind. 1998), the defendant alleged that "systemic defects and unfavorable conditions in the Lake County public defender system were so extreme at the time of his trial that he necessarily received ineffective assistance of counsel." One of the witnesses Coleman had wanted to call at a hearing was Prof. Lefstein. The Indiana Supreme Court in rejecting Coleman's claims stated that Prof. Lefstein's "general allegations in this case...do not demonstrate circumstances of either the character or magnitude that would give rise to a *per se* ineffective assistance of counsel claim." *Id.* at 1040-41.<sup>18</sup> In his Motion, the PD-11 does not allege any specific felony case in which one of his clients was afforded relief on the basis of ineffective assistance of counsel due to under funding or excessive caseloads. The PD-11 has failed to establish that his alleged excessive caseload or workload or under funding

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<sup>18</sup> The Court also rejected the testimony of Robert Spangenberg of The Spangenberg Group, stating that whether an attorney could have provided effective assistance of counsel under the surrounding circumstances is a question readily answerable by judges, regardless of what other legal scholars might think given a particular set of facts. *Id.* at 1040 n.20.

results in the provision of ineffective assistance of counsel and thus, section 27.5303(1)(d), Florida Statutes (2007), is not unconstitutional as applied.

### **PD-11 Has Failed to Establish In His Motion an Excessive Caseload or Workload**

The PD-11 has alleged that his felony assistants are presently working under excessive caseloads and/or workloads.<sup>19</sup> To determine the accuracy of that statement, this Court must resolve the following: 1) what is the definition of a “caseload;” 2) what is the definition of a “workload;” and 3) under what standard does the Court determine whether either is excessive?

#### **Caseload**

The claim of an excessive caseload in PD-11’s Motion is based primarily upon a comparison of various organizations’ aspirational caseload standards (discussed below), against a variety of average numbers of cases per attorney calculated in an affidavit submitted by Prof. Lefstein. (*See App. to Motion, Tab. 4, ¶ 21*). Prof. Lefstein asserts that the noncapital felony caseload of attorneys working for PD-11 is determined by taking the number of noncapital felony cases in which PD-11 is appointed in a fiscal year (FY), and dividing it by the number of APDs assigned to the felony divisions. (*See App. to Motion, Tab 4, ¶ 21, pp. 9-10*). Of course Prof. Lefstein’s conclusions are based on the figures provided to him by PD-11.

The data relied upon by Prof. Lefstein was relayed via an unsworn memorandum from Mr. Stein, and concerns numbers of noncapital felony cases to which PD-11 was appointed (40,651) and closed (36,805) in FY 2006-07 and calendar year 2007 (41,176 and 37,122), coupled with “spreadsheets” showing case loads of PD-11 attorneys as of May 16, 2008 and June

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<sup>19</sup> The PD-11 also argues that the low salaries for the APDs have made it difficult to attract and maintain quality attorneys. The concern for low salaries is not confined to the PD-11, but is shared by the SAO-11, as well as every other PDO and SAO in Florida. However, that is certainly not a reason to find that the PD-11 should be permitted to refuse to accept any further noncapital felony appointments.

7, 2006. (See App. to Motion, Tab. 4, ¶ 10, and last 2 pages of attached documents; Tab. 2, Ex. A, pp. 2-3, 6). Neither Mr. Stein's memorandum nor any other document located in PD-11's voluminous, 29 tab Appendix relates how the appointment statistics were compiled.<sup>20</sup> The State questions these statistics because the FY 2006-07 numbers relayed to Prof. Lefstein by PD-11 do not correlate to those reported in the Florida Office of the State Courts Administrator (OSCA), *FY 2006-07 Statistical Reference Guide*, Circuit Criminal, [EXHIBIT D], available at [http://www.flcourts.org/gen\\_public/stats/bin/reference\\_guide/2006\\_07Chapter4.pdf](http://www.flcourts.org/gen_public/stats/bin/reference_guide/2006_07Chapter4.pdf). According to OSCA's reported figures in FY 2006-07, there were 29,177 filed felony cases, 9 re-openings, 8,012 probation revocation hearings, and 12,137 "No Files" in Miami-Dade, for a total of 49,335 cases. (*Id.*, pp. 4-4, 4-7, 4-25). The PD-11, through the affidavit of Esther Lew, stated that during that same time period, PD-11 was appointed to 40,651 cases according to its own case-tracking database. (See App. to Motion, Tab 3, ¶ 4). If correct, this would mean that the PD-11 was appointed in 82% of all felony cases. However, the State's preliminary review of all felony cases in the Miami-Dade County Criminal Justice Information System (CJIS) for FY 2006-07

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<sup>20</sup> The Affidavits of Mr. Brummer and Mr. Weed reflect that the facts and figures relating to PD-11's caseload set forth therein are "consistent with [their] experience and the records of PD-11." (See App. to Motion, Tab 1, ¶ 2; Tab 2, ¶ 3). Mr. Weed's Affidavit also refers to a database maintained by PD-11 and states that caseload data incorporated into PD-11's caseload and attorney assignment reports "were entered into a database maintained by PD-11 at or around the time cases appeared in court by a person with knowledge of those events and conditions." (See App. to Motion, Tab 2, ¶ 5). However, Mr. Weed does not define what he refers to as a "case" and often alternatively refers to statistics based upon "appointments" rather than cases. Without further information concerning the PD-11 database, which is the subject of a partially disputed SAO-11 public records request, the source and accuracy of the PD-11 statistics cannot be determined. Accordingly, the SAO-11 will be filing a Motion to Compel Public Records and/or Motion for Discovery prior to the evidentiary hearing.

Moreover, both of these affidavits are flawed as the affiants only aver that information contained therein is true and correct "to the best of my knowledge and belief." (See App. to Motion, Tab 1, ¶ 1; App. Tab 2, ¶ 1 and final, unnumbered ¶). See, e.g., *Scott v. State*, 464 So. 2d 1171, 1172 (Fla. 1985); *Miller v. State*, 848 So. 2d 401, 402 (Fla. 2d DCA 2003). As such, further evidentiary support should be developed before this Court can objectively rely upon this data.

reflects that the PD-11 was appointed in an average of 65% of the filed cases.<sup>21</sup> Thus, if the 65% average is correct,<sup>22</sup> then the figures set forth by the Public Defender as to cases appointed may not be accurate.<sup>23</sup> As such, this Court must evaluate further evidence in order to make an objective and accurate finding regarding PD-11's reported appointment and case statistics.

What is a "caseload?" While the PD-11 apparently defines it as all cases in which his Office has been appointed,<sup>24</sup> that is in contrast to the definition set forth in the National Advisory Commission on Criminal Justice Standards and Goals, REPORT ON COURTS, Chapter 13, *The Defense*, Standard 13.12 (1973) (hereinafter NAC standards). [EXHIBIT E]. Standard 13.12 states: "The term case means a single **charge or set of charges** concerning a defendant (or other client) in one court in one proceeding." (Emphasis added).<sup>25</sup> Thus, caseload should not be defined as simply the number of appointments, which includes those at first appearance, but rather the number of appointments in filed cases, i.e., at arraignment or afterward. This is an important distinction because the PD-11 has dedicated 11 attorneys to his bond (3) and early representation units (8), the latter of which is funded by Miami-Dade County for approximately

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<sup>21</sup> The SAO-11 in its Motion for Continuance had incorrectly stated that the average was 60%.

<sup>22</sup> CJIS indicates that this percentage drops during the time the case is open. For example for cases closed within 30 days, the percentage drops to 55%, 45 days to 51%.

<sup>23</sup> Even the PD LRPP acknowledges at page 27 that "[e]ach Public Defender Office has a different method of collecting data and caseload numbers.... As of yet, there is no officially adopted methodology for the [FPDA] to review the accuracy of the data." [EXHIBIT C]. Thus, the validity of FPDA data is "[o]nly as good as the data is input in each office." *Id.*

<sup>24</sup> This is also how the FPDA defines a "new case" – "A case is to be counted in the appropriate type category upon the initial appointment of the Public Defender." Florida Public Defender Association, *Workload Reporting Manual*, 2 (effective July 1, 2005). [EXHIBIT F].

<sup>25</sup> The same definition was used by the Florida 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*, Standard 13.12, Workload of Public Defenders at 392-93 (1976) (*See App. to Motion*, Tab 6).

1.4 million dollars.<sup>26</sup> These attorneys should not be counted in the attorneys available to represent indigent defendants charged with noncapital felonies. The work that these attorneys do for PD-11 prior to charges being filed should not be counted towards the caseloads of the attorneys who begin their representation of these defendants after arraignment.

Furthermore, when “reopening” of cases for probation violations is to be factored into a caseload, it should be questioned as to whether a probation violation should be fully counted as a separate case when they are based solely on the allegation that the defendant violated his or her probation by committing a new felony, which is also charged substantively. Some jurisdictions count the substantive charge and the probation violation as a case and a half or a third. *See, e.g.* Scott Wallace & David Carroll, *Implementation and Impact of Indigent Defense Standards*, at 47, n 94 (Dec. 2003)(excerpt of NLADA report submitted to U.S. Dept. of Justice), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/205023.pdf> [EXHIBIT H]; Maricopa Public Defender's Office, *Productivity Improvement Study*, Final Report, Section IV, at 57 (October 2000)(prepared by Policy Studies Inc.), *available at* <http://www.pubdef.maricopa.gov/>. [EXHIBIT I].

### **Workload**

What is a “workload?” Sometimes “workload” is defined as “the sum of all the work performed by the individual attorney at any given time, which includes the number of cases to which the attorney is assigned, but also includes other tasks for which the attorney is responsible.” ABA STANDARDS FOR CRIMINAL JUSTICE: *Providing Defense Services*, Standard 5-5.3, p.68 (3d Ed. 1992); *see also In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of Tenth Judicial Circuit*, 636 So. 2d 18, 26 (Fla. 1994) (appended

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<sup>26</sup> The avowed purpose of the funding by the County is to keep the pretrial detention centers from becoming overcrowded.

commissioner's report). However, in TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, Principle 5 (Feb. 2002), the ABA acknowledged that the concept of "workload" is more accurately measured by adjusting a caseload "by factors such as case complexity, support services, and an attorney's nonrepresentational duties[.]" (See App. to Motion, Tab 5, p.2).<sup>27</sup>

According to the New Mexico Workload Assessment, cited in the PD-11's Motion, "[w]orkload is generated from two components: (1) the case weights, which are the average time spent on ... defense and administration; and (2) the annual number of cases filed, opened or disposed. Multiplying these two values produces the workload estimate expressed as FTE positions." *Id.* at 11. Case-related time for attorneys includes time devoted to: pre-trial activities and preparation (in and out of court), client contact, legal research, trial, sentencing/post-trial (in and out of court), staff duties, and waiting time (at court, jail, ASAs' offices, etc.). Non-case-related time for attorneys and staff includes time devoted to: training and conferences, travel, staff meetings, duty work, community outreach, administrative/personnel tasks, attorney (staff)

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<sup>27</sup> See also National Center for State Courts & National District Attorneys Association/American Prosecutors Research Institute, *A Workload Assessment Study For the New Mexico Trial Court Judiciary, New Mexico District Attorneys' Offices and New Mexico Public Defender Department*, Methodology Section, 9-13 (June 2007) (hereinafter "New Mexico Workload Assessment") [EXHIBIT G]. "Cases coming before state courts vary in complexity. Different types of cases require different amounts of time and attention from judges, lawyers and support staff. Focusing on raw case counts without allowing for differences in the amount of work associated with each case type creates an opportunity for the misperception that equal numbers of cases filed for two different case types result in an equivalent amount of work for those involved in the court process....The combination of the case-related time study data (representing current practices, or "what is") and the quality adjustment data (representing preferred practices, or "what should be") creates a "case weight" for each case type category. The case weights represent the average total in-court ... time (in minutes) required to provide effective ... defense (public defender), and case processing (staff) for each case-type category. By applying the case weights to the current or projected number of cases filed, opened or disposed, a measure of case-specific workload can be computed. Workload divided by the amount of time available per ... lawyer or staff member for case-related work provides an estimate of personnel resources required to resolve cases, expressed in terms of full-time equivalents (FTE) for these positions." *Id.* at 9-11.

supervision, general public relations, and workload assessments. *Id.* at 76. However these definitions do not address or consider such factors that may reduce or eliminate the workload of APDs that are associated with early resolution of cases such as diversionary programs, pleas at arraignment, bind-downs (felonies to misdemeanors), retaining of private counsel by the client, conflicts due to multiple or prior representation, etc.

The PD-11's Motion and Appendix does not relate any objective means of quantifying their attorneys' workload, as differentiated from either recently pending or historical caseload statistics. Mr. Stein's memorandum to Prof. Lefstein relates that in addition to handling caseloads, lawyers' responsibilities include time spent in the following: A) supervision of other attorneys; B) training and CLE education; C) traveling to correctional facilities; D) waiting at correctional facilities; E) waiting for interpreters; and F) serving on Florida or local bar committees or projects and attending professional organization functions (i.e. local bar or FPDA). (*See* App. to Motion, Tab. 2, Ex. A, pp. 6-7; Tab 4, ¶ 33).<sup>28</sup> Regardless of whether all or only some of these factors are considered in evaluating the necessary components of an APD's workload, it is clear that the mere numbers reflected by an attorney's caseload must be adjusted in some fashion to objectively evaluate an individual's workload.

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<sup>28</sup> Prof. Lefstein further notes that unlike prosecutors, who have assistance from law enforcement officers' investigations, public defenders usually have to locate and interview witnesses and personally perform other investigative work. (App. Tab 4, ¶ 34). The SAO-11 is in no way contesting the defense attorneys' right or duty to conduct independent investigations of the facts and circumstances of their clients' cases. However, in evaluating the PD-11 attorneys' work or caseload levels, Prof. Lefstein does not appear to account for the broad discovery afforded to criminal defendants and their counsel by Florida's rules. *Compare* Maricopa Public Defender's Office, *Productivity Improvement Study*, Final Report, Section II, 25 (October 2000)(prepared by Policy Studies, Inc.). [EXHIBIT I].

### **What Standard Should Be Used To Determine Excessive Caseload Or Workload?**

The PD-11 asserts that the FPDA has established a standard of 200 felony cases as the maximum caseload for an attorney per year. (See Motion at p. 8, ¶ 15 (citing Brummer Aff., App. to Motion, Tab 1, ¶ 3)). No source was provided for this information, which may be outdated. In 1981, the State of Florida promulgated a workload measurement system called the Florida Funding Formula, designed to determine staffing needs and budgetary requirements for public defenders and providing that an assistant public defender is assumed to be able to handle an annual caseload of 200 noncapital felonies. See *In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of Tenth Judicial Circuit*, 636 So. 2d 18, 27 (Fla. 1994)(citing OSCA, *State Attorney-Public Defender Workload Project: Descriptive Information and Circuit Profile* (Florida Supreme Court January 1981)). In 1993, a Florida Bench/Bar Commission adopted the FPDA's maximum annual caseload standards of 200 noncapital felonies in its recommendations to the Supreme Court of Florida. *Id.* (citing *The Necessities of the Times-Facing Challenges in the Legal System*; The Report of the Bench/Bar Commission, A Commission Created by the Supreme Court of Florida and The Florida Bar, January 1993). However, these historical standards are apparently not the benchmark currently used by the FPDA. The Florida Public Defenders' LRPPs for FY 2005-06 through 2009-10, FY 2007-2008 through FY 2011-2012, and FY 2008-2009 through FY 2012-2013, now reflect that their fourth goal or priority is to establish standard caseloads for felony attorneys at **250 per year**. [See EXHIBITS C, J AND K].

PD-11 also references several other organizations' caseload standards, all of which are based upon the 1973 recommendation from the NAC that public defenders' caseloads for felony cases should not exceed 150 per year. See NAC Standard 13.12, which has been adopted by

national defender organizations such as the American Council of Chief Defenders (ACCD). While the ACCD has recently reaffirmed the 1973 NAC standards, even ACCD “urges thorough assessment in each jurisdiction to determine the impact of local practices and laws on those levels....” ACCD Statement on Caseloads and Workloads, 12 (August 24, 2007), [EXHIBIT L] available at <http://www.nlada.org/DMS/Documents/1189179200.71/>.<sup>29</sup> In so doing, the ACCD noted that “[t]he NAC standards ... weigh all felonies the same, regardless of seriousness....” *Id.* at 4. Moreover, the ACCD recognized that the “addition of electronic legal research and modern computer equipment and communications has increased efficiency and reduced the time it takes to prepare complex legal motions and memoranda.” *Id.* at 6.<sup>30</sup> Thus, while “the NAC standards may remain helpful as a point of general reference, it has become widely recognized that the assumptions and estimates that formed the basis for them nearly 3[5] years ago may have little to do with the practice of criminal law in a particular jurisdiction today.” The State Bar of California, *Guidelines in Indigent Defense Services Delivery Systems*, 27 (2006). [EXHIBIT M]

The PD-11 does not urge that this Court apply any particular version of the published standards for maximum felony caseloads. (*See* Motion at p. 27). Perhaps this is because many have recognized that caseload standards by organizations including ABA, NLADA and NAC

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<sup>29</sup> MGT of America, a firm consulting for the Florida Legislature, also recommended that it conduct “studies to establish public defender workload standards and funding formula” and noted, “There are several reasons why new workload standards and funding formula should be developed. First, the results generated by the current methodology lack credibility. Second, public defender processes have changed significantly since 1973 when the original studies were conducted, particularly because of technology's impact. And third, the standards and formula should reflect Florida's laws, organization, policies and procedures rather than a set of assumptions that can generally apply across the country.” MGT of America, *Implementation of Revision 7 to Article V of the Florida Constitution, Phase Two Report*, Recommendation 2.1-3, 2-17 (March 11, 2003) (*See* App. to Motion, Tab 18).

<sup>30</sup> The ACCD discounts this increase in efficiency as it may be offset by “the tendency of courts to provide attorneys with less time to produce legal pleadings” or because the availability of computers may have “resulted in a decrease in the funding available to hire support staff.” *Id.*

should merely be the first step in evaluating an attorney's workload. "The second starting point is a case-weighting study, in which caseload/workload standards are developed to reflect the actual cases handled in a particular jurisdiction." See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, 7 (Jan. 2001)(prepared by The Spangenberg Group). [EXHIBIT N].

Instead of attempting an evaluation of its workload using case-weighting methods to account for the varying levels of time required by different types of felonies, the PD-11 emphasizes that Prof. Lefstein's calculations using the figures provided by PD-11, show that its overall numerical case loads are two or three times that of existing published standards. (See Memorandum of Law at p. 13). However, as stated *supra*, these figures may not be accurate.

#### **What Should Be Developed at the Evidentiary Hearing?**

This Court has ordered that it is going to have an evidentiary hearing to determine whether the PD-11's caseload or workload is so excessive that the PD-11 will be prospectively providing ineffective assistance of counsel to his present clients if he is forced to accept any more noncapital felony appointments. No Florida court has set forth specific guidelines for determining a reasonable caseload for a public defender. Whether the American Bar Association's, Florida Public Defenders Association, or the National Legal Aid and Defender Association's guidelines provides that guidance is an open question. This Court is not bound by them. See, e.g. *State v. Kilgore*, 976 So. 2d 1066 (Fla. 2007).

Some of the areas that this Court may want to review are similar to those set forth in *Order on Motions to Withdraw Filed By Tenth Circuit Public Defender*, 622 So. 2d 2, 4 (Fla. 2d DCA 1993)(en banc), and include whether the productivity of the public defender's office is within an acceptable range, whether all the attorneys assigned to the felony division are working

exclusively on division cases,<sup>31</sup> and whether the public defender has taken adequate steps to assure that repetitive issues are handled effectively.<sup>32</sup> In addition, this Court should look at what was the amount of money requested by the PD-11 from the Legislature for the 2008/09 budget, and what percentage of that request was appropriated; whether the PD-11 had the opportunity to use that money for full time equivalent positions, but chose to use it for salaries and benefits instead;<sup>33</sup> what is the total number of attorneys and their assignments, what is the number of full time equivalents and whether any of those positions could be converted to attorney positions, and how is the PD-11 determining caseloads. In addition, this Court should look at whether the time it takes for an assistant public defender to conclude his or her representation in a case is longer than for a person represented by conflict counsel, or private retained counsel. The PD-11 in his motion, although stating that an evidentiary hearing was not mandatory, “fully supports a hearing on both the merits and on any related logistical issues that may assist the public and the courts.” (Motion at p. 10).<sup>34</sup>

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<sup>31</sup> What are trial statistics for the 3 training attorneys and could they carry a minimal caseload?

<sup>32</sup> Justice England noted that “the public defenders’ offices can possibly alleviate their own caseload problems, and avoid declinations of representation, by a more careful screening of cases for which indigency representation is requested.” 384 So. 2d at 151.

<sup>33</sup> Hiring more assistant public defenders was one of the ways recognized to control an excessive caseload. See *The Spangenberg Group, A Study of the Florida Public Defender System, A Blueprint for Action as it Enters the 21st Century*, 89 (April 1996). [EXHIBIT O].


<sup>34</sup> The State would take issue with the PD-11’s statement at p. 25 of his Memorandum of Law that “[a]nyone challenging the presumption of the corrections of a public official’s actions bears the burden of proof” and that “[s]uch a presumption can only be overcome by clear and convincing evidence.” First, as stated *supra*, the PD-11 should have the burden of proof because what he is in effect asking for is a declaratory judgment that § 27.5303(1)(d), Fla. Stat. (2007), is unconstitutional. Statutes are presumed to be constitutional, and the burden is on the party challenging its constitutionality to prove the invalidity beyond a reasonable doubt. *Crist v. Florida Ass’n of Criminal Defense Lawyers*, 978 So. 2d 134, 139 (Fla. 2008). Second, the cases cited by the PD-11 do not involve the constitutionality of a statute, but decisions by state commissions. As such, they are inapplicable.

This Court needs to not only consider the constitutional rights of the defendants who are affected by the Public Defender's certification of conflict, but also the victims' rights to be heard under Article 1, Section 16(b) and to have their cases heard promptly. See § 960.0015, Fla. Stat. (victim's right to a speedy trial); § 918.015(1), Fla. Stat. (State's right to a speedy trial). The State, as represented by the SAO-11, has an interest in insuring that justice is done, for all parties, both victims and defendants.

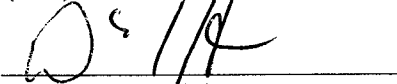
Wherefore, based on the foregoing, the State respectfully requests that this Court, after the hearing, deny the Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Cases Due to Conflict of Interest.

Respectfully submitted,

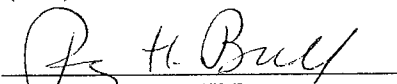
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### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to Parker D. Thomson, Esquire, Alvin F. Lindsey, Esquire, Julie E. Nevins, Esquire, and Matthew R. Bray, Esquire, Hogan & Hartson LLP, Attorneys for the Public Defender, 1111 Brickell Avenue, Suite 1900, Miami, FL 33131; Chief Judge Joseph P. Farina, Dade County Courthouse, 73 West Flagler Street, Miami, FL 33130; Administrative Judge Stanford Blake, Richard E. Gerstein Justice Building, 1351 N.W. 12th Street, Miami, FL 33125; Linda Kelly Kearson, General Counsel, Eleventh Judicial Circuit of Florida, Lawson E. Thomas Courthouse Center, 175 N.W. First Avenue, 30th Floor, Miami, FL 33128, Richard L. Polin, Bureau Chief, Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, FL 33131; Patricia Conners, Associate Deputy Attorney General, Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050; Cynthia M. Guerra, Regional Deputy Assistant Attorney General, 110 S.E. 6th Street, 10th Floor, Ft. Lauderdale, FL 33301; Joseph P. George, Jr., Regional Civil and Criminal Conflict Counsel, 1501 N.W. N. River Drive, Miami, FL 33125; Stephen Presnell, General Counsel, Justice Administration Commission, P.O. Box 1654, Tallahassee, FL 32302, on this 21st day of July, 2008.

By:   
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