

IN THE DISTRICT COURT OF APPEAL  
THIRD DISTRICT

THE STATE OF FLORIDA AND  
CIVIL REGIONAL COUNSEL, THIRD  
DISTRICT COURT OF APPEAL  
REGION,

Appellants/Petitioners,

v.

PUBLIC DEFENDER, ELEVENTH  
JUDICIAL CIRCUIT OF FLORIDA,

Appellee/Respondent.

Case Nos. 3D08-2272 and  
3D08-2537

**MOTION TO CERTIFY QUESTIONS OF  
GREAT PUBLIC IMPORTANCE**

Pursuant to Florida Rule of Appellate Procedure 9.330, Carlos J. Martinez, Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11"), respectfully requests this Honorable Court to certify this case and each of the following questions to the Supreme Court of Florida as issues of great public importance for its review under Article V, section 3(b)(4), of the Florida Constitution, and Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v). The grounds for this request are as follows:

1. On September 24, 2008, this Court previously certified this case to the Supreme Court as one that passes on questions of great public importance or will

have great effect on the administration of justice throughout the state. This Court explained this prior certification in its recent decision:

As this case implicates not only the manner in which the criminal justice system is structured and funded, but also constitutional separation of powers principles as well as the Sixth Amendment right to counsel in criminal cases, we...certified the order to the Supreme Court...

(Slip Opinion at 3). These grounds for certification have not changed. For this reason, a copy of the previous suggestion for certification is attached hereto as Exhibit 1.

2. The Supreme Court subsequently dismissed this Court's certification for lack of jurisdiction.

3. During oral argument in this case, Judge Cortiñas observed that the Supreme Court should ultimately decide this case because of its statewide significance and the issues posed.

4. The Supreme Court of Florida has decided all of the significant, previous public defender excessive workload cases. *See Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980); *Hatten v. State*, 561 So. 2d 562 (Fla. 1990); *In re Order on Prosecution of Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990); *Skitka v. State*, 579 So. 2d 102 (Fla. 1991); *In re Certification of Conflict*, 636 So. 2d 18 (Fla. 1994); *In re Public Defender's Certification*, 709 So. 2d 101 (Fla. 1998).

5. This Court's opinion ruled on several important issues that have enormous statewide impact, including: (a) constitutional separation of powers, (b) the Sixth Amendment, (c) a lawyer's ethical duty to not represent a client while operating under a conflict of interest, and (d) a supervisor's duty to ensure that the conduct of supervised lawyers conform to the Florida Rules of Professional Conduct.

6. The Supreme Court should review this Court's opinion because:

(a) This Court's construction of section 27.5303, Florida Statutes, involves the constitutional issue of separation of powers.

(b) This Court's ruling may impinge upon the Sixth Amendment right to effective assistance of counsel for indigent defendants represented by PD-11.

(c) This Court's opinion is the first to hold that excessive caseload concerns *must* be handled on a case-by-case basis, which will generate untold numbers of certificates of conflict in individual cases, with the need for a separate hearing and judicial factual determination in each case. This development directly implicates the Supreme Court's responsibility for "the administrative supervision of all courts." Art. V, § 2(a), Fla. Const.

(d) The Supreme Court, which has exclusive jurisdiction over the professional responsibilities of Florida lawyers, should be given the opportunity to

review this Court's opinion on the ethical responsibilities of public defenders, including the duties of managers and supervisors to take remedial action to avoid or mitigate a violation of the ethical rules by persons they supervise. *See* Art. V, § 15, Fla. Const.; R. Regulating Fla. Bar 4-5.1(c); *see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441, 8 (2006).

(e) This Court held that the State Attorney who is prosecuting a criminal case has standing in a judicial determination of who should represent the defendant in that very prosecution. A prosecutor helping to determine who will be the defense counsel in a case creates ethical and constitutional issues, which the Supreme Court should have the opportunity to resolve.

(f) The specially concurring opinion, relying on *Coalition for Adequacy & Fairness in School Funding, Inc. v. Chiles*, 680 So. 2d 400 (Fla. 1996), concludes that this matter is non-justiciable. To the best of PD-11's knowledge this is the first opinion ever to conclude that issues of legal representation and its adequacy are not justiciable, and likewise should be reviewed by the Supreme Court.

WHEREFORE, PD-11 respectfully requests that this Court certify the above issues in this case to the Supreme Court of Florida as being of great public importance. PD-11 respectfully suggests the following wording for the certified questions:

DOES SECTION 27.5303(1)(d), FLORIDA STATUTES, PROHIBIT PUBLIC DEFENDERS FROM DECLINING NEW CASES AS WELL AS WITHDRAWING FROM EXISTING CASES BECAUSE OF EXCESSIVE WORKLOAD?

IS A PUBLIC DEFENDER ALLOWED TO DECLINE APPOINTMENTS TO CASES IF THERE IS A JUDICIAL DETERMINATION THAT ITS WORKLOAD DOES NOT PERMIT THE PUBLIC DEFENDER TO PROFFER REPRESENTATION CONFORMING TO THE FLORIDA RULES OF PROFESSIONAL RESPONSIBILITY?

IF DECLINING NEW CASES IS CONSTRUED AS WITHDRAWING FROM EXISTING CASES, IS A PUBLIC DEFENDER ALLOWED TO WITHDRAW IF THERE IS A JUDICIAL DETERMINATION THAT ITS WORKLOAD DOES NOT PERMIT THE PUBLIC DEFENDER TO PROFFER REPRESENTATION CONFORMING TO THE FLORIDA RULES OF PROFESSIONAL RESPONSIBILITY?

MUST PUBLIC DEFENDERS CERTIFY AND LITIGATE CONFLICTS BASED ON EXCESSIVE WORKLOAD ONLY ON A CASE-BY-CASE BASIS?

DO THE RULES OF PROFESSIONAL CONDUCT PROHIBITING EXCESSIVE WORKLOAD APPLY ONLY TO INDIVIDUAL ASSISTANT PUBLIC DEFENDERS AND NOT THE PUBLIC DEFENDER ACTING AS SUPERVISOR OF SUCH ASSISTANT PUBLIC DEFENDERS?

MAY THE STATE ATTORNEY WHO IS PROSECUTING A CRIMINAL CASE HAVE STANDING IN A JUDICIAL DETERMINATION OF WHETHER A PUBLIC DEFENDER HAS AN ETHICAL CONFLICT IN DEFENDING AGAINST THAT PROSECUTION BY REASON OF EXCESSIVE CASELOAD?

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a copy of this motion was served via U.S. Mail  
this 19 day of May, 2009 upon all counsel of record on the attached service list.



Julie E. Nevins

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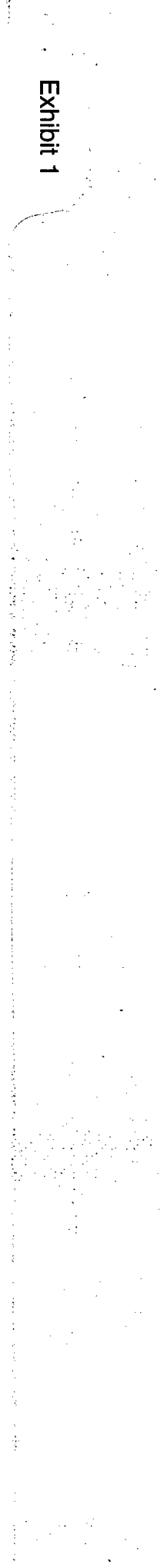
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**Exhibit 1**



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IN THE DISTRICT COURT OF APPEAL  
THIRD DISTRICT

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

CASE NO.: 3D08-2272  
L.T. CASE NO.: 08-1

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FILED  
DISTRICT COURT OF  
THIRD DISTRICT

SUGGESTION FOR CERTIFICATION

Pursuant to Article V, section 3(b)(5) of the Florida Constitution and Florida Rule of Appellate Procedure 9.125, Bennett H. Brummer, the Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11"), respectfully suggests that this Court certify for review by the Supreme Court of Florida the Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases issued by the Honorable Stanford Blake of the Eleventh Judicial Circuit on September 3, 2008 (the "Order") because it is of great public importance, could have a great effect on the proper administration of justice throughout the state, and deserves prompt resolution by the Supreme Court of Florida.<sup>1</sup> In support thereof, PD-11 states as follows:

1. The Order is of great public importance and could have a very significant impact on the proper administration of justice throughout Florida

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<sup>1</sup> The Order is attached as Appendix A. Citations to this appendix will be

because the Order ensures indigent defendants' right to assistance of counsel as required by the United States and Florida Constitutions and upholds the ethical and professional responsibilities of lawyers. The trial court found that "the evidence clearly establishes that PD-11 is in need of relief sufficient to ensure that the assistant public defenders are able to comply with the Florida Rules of Professional Conduct and carry out their constitutional duties." (App. A at 5). The trial court's ruling was based on its finding that PD-11 is operating under the impossible condition of having to handle a sharply increasing caseload under a sharply reduced budget. (App. A at 5). The trial court found that PD-11's noncapital felony "caseloads are excessive by any reasonable standard" and that "future appointments to noncapital felony cases will create a conflict of interest in the cases presently handled by PD-11." (App. A, at 6). On September 4, 2008, the State Attorney's Office for the Eleventh Judicial Circuit (SAO-11) filed a notice of appeal of the Order.

2. Public defenders across Florida (along with the courts and the state attorneys) also have suffered budgetary reductions while operating under similarly increasing caseloads. The Order, therefore, if affirmed on appeal, will certainly have a substantial impact not only on PD-11, its indigent clients, and the criminal division of the Eleventh Judicial Circuit, but all other public defender offices in

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abbreviated as "App." herein.

