

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT**

THE STATE OF FLORIDA,

Petitioner,

CASE NO. 3D09-3023

Lower Tribunal No. F09-019364

Judge John W. Thornton

vs.

ANTOINE BOWENS,

Respondent.

**REPLY IN SUPPORT OF CROSS-PETITION
FOR WRIT OF COMMON LAW CERTIORARI**

Assistant Public Defender (“APD”) Jay Kolsky and Carlos J. Martinez,
Public Defender for the Eleventh Judicial Circuit of Florida (“PD-11”),
respectfully submit this Reply in Support of Cross-Petition for Writ of Common
Law Certiorari, and state:

A. Introduction

Preliminarily, APD Kolsky and PD-11 must reply to two broad assertions in
the State’s Response:

1. We do not contest the State’s contention that legislative enactments
are to be upheld whenever possible. Presumably, the trial court followed that
rubric in deciding that section 27.5303, Florida Statutes, is constitutional. The
statute, as construed by the State, however, directly conflicts with Article II,

section 3 of the Florida Constitution by telling a lawyer he *may not* withdraw from a representation from which the Florida Supreme Court has told him he *must* withdraw. Additionally, the statute and the prejudice standard proposed by the State interferes with Article II, section 3, by prohibiting courts from using their inherent authority to remedy conflicts of interest caused by excessive caseload before harm to clients becomes irremediable.

2. The State asserts that several cases, led by the Florida Supreme Court's decision in *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134 (Fla. 2008), sanction the Legislature's determination of what does and does not constitute a conflict of interest for purposes of a court permitting a public defender to withdraw from representation. (State's Response to Cross-Petition at 20). PD-11 and APD Kolsky stated in the Cross-Petition that the Legislature has the absolute right to decide *what* types of cases the public defenders shall handle. It is up to the Legislature to determine how the State will fulfill its Sixth Amendment obligation to afford effective representation to criminal defendants. The Legislature may decide that public defenders will handle only certain criminal cases or all criminal cases, or something in between. The Legislature also may decide what alternative representation will be afforded in cases the public defender cannot handle. *Crist* states:

In fact, [Article V,] 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. at 141. But it is for the Florida Supreme Court to say *how* representation is carried out. And the Florida Supreme Court has said that when an attorney has a conflict of interest under Rule 4-1.7(a)(2) of the Rules of Professional Conduct exists (as the trial court found it did here), then counsel *must* withdraw pursuant to Rule 4-1.16.

B. The Statute Impermissibly Encroaches on the Court's Inherent Authority in Violation of Separation of Powers

We submit that, admirable as the trial court's effort to do so was, section 27.5303 *cannot* be construed to avoid its unconstitutionality. Article II, Section 3 of the Florida Constitution provides: "No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein." All of section 27.5303 pertains to conflicts of interest of public defenders and criminal conflict and civil regional counsel and the procedure for withdrawal. The statutory language encroaches upon a court's inherent authority to allow a public defender to withdraw if the attorney has a conflict of interest due to an excessive caseload. In *State v. Public Defender*, 12 So. 3d 798 (Fla. 3d DCA 2009), this Court did not address the constitutionality of the statute. This Court had instructed that the statute required motions to withdraw to be filed individually,

and there was no such motion before the Court for it to rule on the statute's constitutionality.

The State argues that the word "solely" saves the constitutionality of the statute. The State, however, fails to read subsection (d) regarding "solely" in conjunction with subsection (e) pertaining to what constitutes a cognizable conflict of interests for purposes of the statute and subsection (a) pertaining to when a court must deny a withdrawal motion. "A statute should be interpreted to give effect to every clause in it, and to accord meaning and harmony to all of its parts and is not to be read in isolation, but in the context of the entire section." *Florida Dep't of Env'tl. Protection v. Contractpoint Florida Parks, LLC*, 986 So. 2d 1260, 1265 (Fla. 2008) (citations and internal quotations omitted).

Section 27.5303(1)(a) provides: "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." Section 27.5303(d) provides: "In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon the inadequacy of funding or excess workload of the public defender or regional counsel."

Section 27.5303(e) provides: "In determining whether or not there is a conflict of interest, the public defender or regional counsel shall apply the standards contained in the Uniform Standards for Use in Conflict of Interest Cases

found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004.” As this Court’s opinion recognized: “The only conflicts addressed in appendix C are conflicts involving codefendants and certain kinds of witnesses or parties. Conspicuously absent are conflicts arising from underfunding, excessive caseload, or the prospective inability to adequately represent a client.” *Public Defender*, 12 So. 3d at 804. Thus, in adopting 27.5303, the Legislature intended to prohibit withdrawals based on excessive caseload. *Id.* at 804. The plain language of the statute tells us excessive caseloads are *never* a sufficient basis for withdrawal pursuant to subsection (d). Excessive caseloads do not give rise to a conflict of interest pursuant to subsection (e), and courts are precluded from granting withdrawal motions based on an asserted conflict of interest caused by excessive caseload.

Prior to the Legislature’s adoption of section 27.5303, the Florida Supreme Court held in multiple cases that excessive caseloads create a conflict of interest and a problem regarding effective representation. *See, e.g., Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980) (holding it is public defender’s responsibility to move to withdraw if he cannot handle appeals in a timely manner due to excessive caseloads and relying on trial court order that statute proscribing public defender duties “must be read in pari materia with other relevant statutes and standards,” including The Florida Bar ethical rules); *In re Order on Prosecution of Criminal*

Appeals by the Tenth Circuit Public Defender, 561 So. 2d 1130, 1135 (Fla. 1990) (replying on inherent authority to hold that private counsel would be appointed where the public defenders at issue had excessive caseloads); *In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload*, 709 So. 2d 101, 102-04 (Fla. 1998) (approving order for public defender not to accept appellate cases until caseloads returned to acceptable levels).

While it may well have been the Legislature's intent to overrule these holdings, this attempt to prohibit a court's exercise of its inherent authority is what makes the statute unconstitutional. By enacting section 27.5303, the Legislature overstepped its authority. Art. II, § 3, Fla. Const.

As we have repeatedly said, PD-11 and APD Kolsky acknowledge the Legislature's authority to define the types of cases the public defender will handle.¹

¹ None of the cases cited by the State stand for the proposition that Legislature can narrow the types of conflicts of interest applicable to only certain lawyers who are members of The Florida Bar. In *Babb v. Edwards*, 412 So. 2d 859, 862 (Fla. 1982), the Florida Supreme Court held that other counsel should be appointed when the public defender has a conflict of interest due to representing clients with adverse interests and that it is insufficient to have two different assistant public defenders in the same circuit represent these defendants. In *Valle v. State*, 763 So. 2d 1175 (Fla. 4th DCA 2000), the Fourth District upheld the amendment to former section 27.53, Florida Statutes, requiring courts to review and conduct a hearing into the adequacy of a public defender's representations about a conflict of interest. At the time these cases were decided, the statute did not include a limitation on the types of conflicts of interest applicable to public defenders that is currently in section 27.5303(1)(e). Accordingly, the statutes did not encroach on the Florida Supreme Court's rulemaking power over the practice of law in Florida. Art. V, § 15, Fla. Const.

Art. V, § 18, Fla. Const. The public defender, however, is not just a constitutional officer whose duties are defined by general law, the public defender is a lawyer with duties established by the Florida Supreme Court and set forth in the Rules of Professional Conduct. These rules are not “only guides.”² (State’s Response at 10

² Citing *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009), the State claims Bar Association standards are “only guides.” The State does not appear to understand the difference between the positions of a voluntary organization, as is the American Bar Association, and the mandates of the Florida Supreme Court to an integrated bar, subject to that Court’s obligatory Rules of Professional Conduct. In *Bobby*, the United States Supreme Court stated: “American Bar Association standards and the like’ are ‘only guides’ to what reasonableness means, not its definition.” *Id.* at 17 (quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)). Unlike the suggested professionalism standards from the American Bar Association in *Bobby*, the Florida Rules of Professional Conduct framed in terms of “shall” and “shall not” are not mere guides. “The Supreme Court of Florida has the inherent power and duty to prescribe standards of conduct for lawyers.” R. Regulating Fla. Bar 3-1.2. Notably, the Supreme Court in *Strickland* does not characterize the key duties in representing indigent defendants as guides for attorney conduct. The *Strickland* Court wrote:

Representation of a criminal defendant entails certain basic duties. Counsel’s function is to assist the defendant, and hence counsel owes the client a duty of loyalty, a duty to avoid conflicts of interest. From counsel’s function as assistant to the defendant derive the overarching duty to advocate the defendant’s cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution.

Strickland, 466 U.S. at 688 (citations omitted). In Florida, those basic duties are codified in the Rules of Professional Conduct, specifically Rule 4-1.1 pertaining to competence, Rule 4-1.3 pertaining to diligence, Rule 4-1.4 pertaining to communication, Rule 4-1.7 pertaining to conflicts of interest, and Rule 4-1.16 pertaining to withdrawing or terminating representation. The *Strickland* Court explained that these duties do not exhaustively define counsels’ obligations to their indigent clients and that norms of practice, as set forth in ABA standards, are guides for what additional steps constitute reasonable practice:

n.4). They are mandatory. Each rule at issue contains the words “shall” and requires APD Kolsky and PD-11, as both a lawyer and a “firm,”³ to follow the rules. Rule 4-1.7(a), regarding conflicts of interest, provides:

. . . a lawyer shall not represent a client if:

* * *

(2) there is a *substantial risk* that the representation of 1 or more clients will be *materially limited* by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

R. Regulating Fla. Bar 4-1.7(a)(2) (emphasis added). This is exactly the type of conflict the Florida Supreme Court was referring to when it stated: “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.” *In re Order on Prosecution of Criminal*, 561 So. 2d at 1135.

No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have making tactical decisions.

Id.

Notably, the trial court in Mr. Bowens’ case correctly found based on an undisputed record that APD Kolsky has been unable to do virtually anything on Mr. Bowens case and, therefore, has been unable to assist Mr. Bowens, much less make any tactical decisions.

³ See *Babb*, 412 So. 2d at 861 (public defender’s office treated as “firm”).

The record below demonstrated that APD Kolsky prioritized in-custody clients' cases over, and at the expense of, out-of-custody clients' cases to try to manage his excessive caseload. (9/29 Tr. 34; *see also* 9/29 Tr. 100, 237). Thus, a conflict of interest was inevitably created between APD Kolsky's in-custody clients and his out-of-custody clients, including Antoine Bowens. However, the plain language of section 27.5303 precludes a court from granting a motion to withdraw unless the conflict is between codefendants or certain kinds of witnesses. 12 So. 3d at 804. The plain language leaves no room for a court to exercise its inherent authority when it comes to excessive caseload – even if the caseload creates a substantial risk of impairing the indigent defendant's fundamental rights.⁴

According to the State, the fact that Mr. Kolsky has done no work on Mr. Bowens' case for more than three months, including interviewing Mr. Bowens and investigating the facts and the law, is merely a circumstance of delay that poses no substantial risk of prejudice to Mr. Bowens, ignoring the trial court's specific finding to the contrary.⁵ This position ignores the fact that the Sixth Amendment

⁴ The plain language also encroaches on the Florida Supreme Court's authority over the practice of law in Florida as set forth in subsection C of this Reply.

⁵ The State's insistence that APD Kolsky will be ready in Mr. Bowens' case after a short continuance is belied by the record. When APD Kolsky executed his July 31, 2009 affidavit (exhibit F to his motion), he hoped to be ready for trial in a few months. By the time of the evidentiary hearing, however, APD Kolsky testified that he could not be ready because of the cases he had received since a plea blitz held in August 2009. (9/29 Tr. 93).

requires an indigent defendant to have actual assistance of counsel from first appearance onward – and not just a warm body. See *In Re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18, 19 (Fla. 1994) (“[A]n inundated attorney may be only a little better than no attorney at all.”); see also *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977) (right to counsel attaches at first appearance following arrest).⁶ It also would make it nearly impossible for an overloaded assistant public defender to show prejudice.

The standard posited by the State would also create impossible preconditions for a court to prospectively protect the rights of indigent defendants by allowing an overloaded assistant public defender to withdraw. The State, without citation to any applicable authorities, would require an assistant public defender to show irreparable harm to the indigent client. The assistant public defender, according to the State, must show prospectively the precise effect the conflict of interest will have on counsel’s representation. By requiring a calculation of precise effects, the State is forcing the court’s review to occur at the end of the case – postconviction – when the harm caused by counsel’s conflicted loyalties will have already been done.

⁶ The Florida Constitution’s right to counsel is even broader than the federal right and attaches “at the earliest of the following points: when he or she is formally charged with a crime via the filing of an indictment or information, or as soon as feasible after custodial restraint, or at first appearance.” *Traylor v. State*, 596 So. 2d 957, 970 (Fla. 1992).

Even in a postconviction situation, the United States Supreme Court recognized that “it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests.” *Strickland v. Washington*, 466 U.S. 668, 692 (1984). The *Strickland* Court went on to describe avoiding a loyalty conflict as “perhaps the most basic of counsel’s duties” and hold that “[g]iven the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest.” *Id.* (citing *Cuyler v. Sullivan*, 446 U.S. 335, 345-50 (1980)) (citation omitted). *Strickland’s* actual prejudice standard – reasonable probability that the final outcome would be different – is a difficult standard to meet even retrospectively when all the facts are known; the State’s proposed standard is impossible to meet prospectively.

Courts have a duty and responsibility to ensure that the indigent defendant’s fundamental rights are protected. *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978) (“But where the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative branches of government.”). The standard proposed by the State would make this impossible prospectively. With the State’s irremediable prejudice standard, courts would have to pass on public defenders’ assertions of a conflict of

interest caused by excessive caseload unless irremediable harm is demonstrated. Indigent defendants, like Antoine Bowens, would then have to challenge their convictions based on an ineffective assistance of counsel claim after trial when they would have to prove a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Strickland*, 466 U.S. at 694. The inherent authority of the courts to prospectively act to remedy this situation before harm occurs is what is lost in section 27.5303 and the State’s proposed standard of prejudice.

Ultimately, the State is arguing that in these challenging fiscal times, the Sixth Amendment rights of indigent defendants should be sacrificed.⁷ That type of balancing is a violation of the indigent defendants’ Sixth Amendment rights. As the Supreme Court of Florida has cautioned:

[W]e must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute. In order to safeguard that

⁷ Neither PD-11 nor APD Kolsky are asking the judiciary to order the Legislature to appropriate more money for PD-11. Rather, they are asking the Court for caseload relief that is commensurate with the funds the Legislature has made available while meeting their constitutional obligation to afford effective representation. This relief would not infringe on the legislative branch, even if the relief requires funding. *See In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1135 (holding private counsel would be appointed where the public defenders had excessive caseloads, even if Legislature had to fund appointments); *In re Public Defender’s Certification of Conflict and Motion to Withdraw Due to Excessive Caseload*, 709 So. 2d 101, 102-04 (Fla. 1998) (approving order requiring the public defender not to accept additional appellate cases until caseloads returned to acceptable levels while recognizing that counties would have to pay for private counsel to handle those cases).

individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter.

Makemson v. Martin County, 491 So. 2d 1109, 1113 (Fla. 1991).

C. The Statute Impermissibly Encroaches on The Florida Supreme Court's Constitutional Authority Regarding the Practice of Law in Florida, Violating Separation of Powers.

The State's argument that section 27.5303 is merely an extension of the Legislature's authority to determine the duties of the public defender (State's Response at 20), flies in the face of the Florida Supreme Court's constitutional power over the practice of law in Florida. Article V, section 15 of the Florida Constitution gives the Florida Supreme Court "jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted." This gives the Florida Supreme Court exclusive authority to establish the ethical rules applicable to attorneys practicing in Florida. All lawyers practicing in Florida are prohibited by Rule 4-1.7 from representing a client "if there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client." R. Regulating Fla. Bar 4-1.7(a)(2). Yet, the Legislature has limited the types of conflicts of interest for which a public defender can withdraw from representation to conflicts between certain defendants and witnesses of the state. § 27.5303(1)(a), (e), Fla. Stat.; *Public Defender*, 12 So. 3d at 804.

Moreover, the Legislature has required public defenders to show that a conflict of interest is prejudicial – a precondition to withdrawal not required for other lawyers in Florida. § 27.5303(1)(a), Fla. Stat. By contrast, Rule 4-1.16 requires a lawyer to terminate or decline representation if “the representation will result in violation of the Rules of Professional Conduct or law” with no showing of prejudice. R. Regulating Fla. Bar 4-1.16(a)(1) (using the words “shall withdraw”). As a result, the Legislature is requiring public defenders to continue representation that the Florida Supreme Court forbids. This usurps the Florida Supreme Court’s powers. It prohibits courts from allowing public defenders to withdraw due to conflicts caused by excessive caseload, when the Florida Supreme Court has told them they must withdraw.

According to the Florida Supreme Court “[t]he legislature . . . is without any authority to directly or indirectly interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court.” *Times Publishing Co. v. Williams*, 222 So. 2d 470, 475 (Fla. 1969) (holding that sunshine law does not require a lawyer to violate ethical rules that the client did not waive by enactment of the statute, including confidential communications between attorney and client in connection with settlement and pending litigation so that attorney can render advice). The Florida Supreme Court continued: “This is not to say, of course, that it may not condemn unethical or criminal conduct, but the

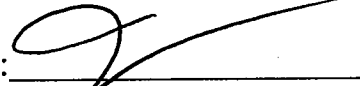
attorney has the right and duty to practice his profession in the manner required by the Canons unfettered by clearly conflicting legislation which renders the performance of his ethical duties impossible.” *Id.* The Rules are intended to protect clients and the public. *The Florida Bar v. Valentine-Miller*, 974 So. 2d 333, 338 (Fla. 2008) (“Lawyers are required to have high ethical standards because members of the public are asked to trust lawyers in their greatest hours of need. Without such standards, the entire legal profession would be in jeopardy as public trust would dissipate.”). The Legislature also cannot create different standards for public defenders as compared to all other lawyers in Florida. *See Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (“Held to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of the client.”) (citation omitted).

D. Conclusion

Based on the foregoing, this Court should determine that the statute violates the inherent authority of the judiciary and the Florida Supreme Court’s constitutional authority over the ethical rules governing the practice of law in Florida.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing was served this 4th day of December, 2009 on the following by U.S. Mail:

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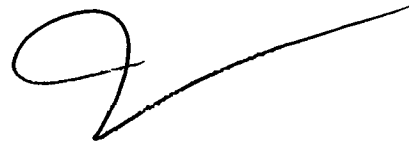
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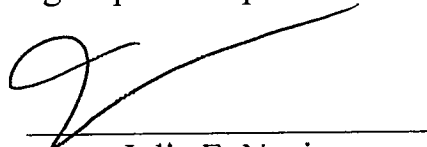
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A handwritten signature in black ink, appearing to read 'Julie E. Nevins', written over a horizontal line.

Julie E. Nevins

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that the foregoing response is printed in 14-point
New Times Roman.



Julie E. Nevins