

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC10-1349

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

Petitioners,

-vs-

THE STATE OF FLORIDA

Respondent.

_____ /

**PD11’S RESPONSE TO THE STATE OF FLORIDA’S
SUGGESTION OF MOOTNESS**

The Public Defender for the Eleventh Judicial Circuit (“PD11”) and Assistant Public Defender Jay Kolsky (“Kolsky”) hereby file their response in opposition to the Suggestion of Mootness filed by the State of Florida and state as follows:

Introduction

This case grows out of and illustrates the consequences of another PD11 case, *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798 (Fla. 3d DCA 2009), as to which this Court has already granted review, No. SC09-1181 (Fla. May 19, 2010). In *State v. Public Defender*, the Third District Court of Appeal held, in part, that issues regarding excessive caseload cannot be raised by

the elected Public Defender on behalf of his entire office, but instead must be raised by individual assistant public defenders. *Id.* at 802, 806.

In conformance with this holding, PD11 and Kolsky sought to withdraw from an existing representation of a single defendant, Antoine Bowens, on the grounds that Kolsky's excessive caseload prevented him from diligently, competently, and effectively representing Bowens, who is facing a first-degree felony charge and is subject to a possible life sentence as a habitual offender. In seeking leave to withdraw, PD11 and Kolsky asserted that his excessive caseload created a conflict of interest because his representation of Bowens was materially limited by his responsibilities to the other clients of PD11 for which he had responsibility. After a three-day evidentiary hearing, the trial court granted leave to withdraw because it found that PD11 and Kolsky had demonstrated "adequate, individualized proof of prejudice to Bowens as a direct result of Kolsky's workload."

PD11 and Kolsky seek this Court's review of a decision by the Third District Court of Appeal (the "Third District") that reversed the trial court and held there was "no evidence of actual or imminent prejudice to Bowens' constitutional rights." The Third District's decision also certified a question of great public importance to this Court.

The court appointed PD11 to represent Bowens pursuant to § 27.40, Florida Statutes, as is the case for all criminal defendants determined to be indigent. On September 13, 2010, while this appellate proceeding was pending, PD11 transferred Kolsky to a different division within PD11 where PD11 believed the skills and experience of Kolsky, who has been practicing law for over 36 years, were more immediately needed. PD11 has now assigned assistant public defender Chanel Jefferson to represent Bowens going forward. Despite this transfer, PD11 continues to be the counsel appointed to represent Bowens.

A.

**This Case Is Not Moot Because PD11
Continues to be Bowens' Court-Appointed Counsel**

Based solely on Kolsky's transfer to a different division within PD11, the State has filed its Suggestion of Mootness, arguing that "because the issues before the Third District were dependent on the particular facts of Kolsky's workload and his representation of Bowens," then the "factual predicate for this case no longer exists, and Bowens' claims are moot." (State's Suggestion at ¶ 6.) The State's argument misses the point: While testimony before the trial court dealt, in part, with Kolsky's workload and his ability to represent Bowens, Kolsky was not appointed to represent Bowens in this case. Rather, PD11 is the constitutional officer appointed and required to represent Bowens. Kolsky's transfer does not change this fact. PD11 still represents Bowens in this case, the only change being

that PD11 has now assigned responsibility for Bowens' case to another assistant public defender. For this reason, Kolsky's transfer to a different division within PD11 does not make the issues raised by PD11 in this case moot.

Chanel Jefferson, the assistant public defender who replaced Kolsky, currently has 96 pending cases. (Affidavit of Carlos Martinez (Martinez Aff.) ¶ 4, attached hereto as Exhibit "A"). PD11's assistant public defenders assigned to handle the "C" felony cases typically turn over their pending caseloads five to six times per year.¹ For Jefferson, this means her annual caseload is currently in the approximate range of 480-580 cases. (*Id.* ¶ 6). This is slightly lower than the projected annual caseload of Kolsky for fiscal year 2009-2010 that the trial court considered at the evidentiary hearing (525-630 for fiscal year 2009-2010).² This fact raises serious questions regarding whether Jefferson can diligently and competently represent Bowens. Jefferson lacks Kolsky's more than 36-years of legal experience. She has been an attorney for only approximately eighteen

¹ See Judge Thornton's Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and Granting Public Defender's Motion to Withdraw at 2 (projecting that Kolsky would have an annual caseload for FY 2009-2010 of 525 to 630 felony cases based on an assumed pending caseload of 105 cases).

² When the motion to withdraw was filed, Kolsky had a pending caseload of 164 "C" felony cases. At an August 28, 2009 "plea blitz" prior to the evidentiary hearing on the motion to withdraw, Kolsky's caseload had been reduced to 105. Due to the changes in Kolsky's caseload, the State and PD11 stipulated that the caseload to be considered for purposes of Kolsky's motion to withdraw would be 105 cases, even though Kolsky's caseload had grown to 125 at the time of the hearing.

months. (Martinez Aff. ¶ 5) Just as for Kolsky, Jefferson's excessively high caseload presents, at minimum, serious doubts as to whether PD11 and its assistant public defenders are meeting their constitutional and ethical obligations to Bowens.

B.

Mootness Does Not Deprive This Court of Jurisdiction Because the Issues Raised In This Appellate Proceeding Are Of Great Public Importance, Are Likely to Recur, And Would Evade Review.

Even if the issues raised in this case were deemed moot because of Kolsky's transfer to another PD11 division, the Court still has jurisdiction to address Bowens' claims in this appellate proceeding. It is well settled (and the State acknowledges) that mootness does not deprive the Court of jurisdiction when the questions raised are of great public importance or are likely to recur and capable of evading review. *See Gregory v. Rice*, 727 So. 2d 251, 252 (Fla. 1999) (accepting case that had become moot because issues related to child support contempt proceedings were of great public importance that were very likely to recur); *Enterprise Leasing Co. v. Jones*, 789 So. 2d 964, 965 (Fla. 2001) ("Although the issues presented in this appeal may be moot as it relates to these parties, the mootness doctrine does not destroy our jurisdiction when the question before us is of great public importance or is likely to recur."); *In re Dubreuil*, 629 So. 2d 819, 822 (Fla. 1993) (accepting jurisdiction where case was moot because "the issue is

one of great public importance, is capable of repetition, and otherwise might evade review.”); *Dugger v. Grant*, 610 So. 2d 428, 433 n. 1 (Fla. 1992).

If, as the State argues, Kolsky’s transfer off of Bowens’ case makes the underlying factual issues in this case moot, which PD11 does not believe to be the case, the Court should still address the critically important constitutional issues raised by the Third District’s decision for two reasons. First, the Third District certified to this Court a question of great public importance implicated by its decision. Second, the constitutional issues created by the Third District’s decision are not only capable of repetition, but are, in fact, recurring every day for Public Defenders and assistant public defenders throughout Florida, and, as reflected in Jefferson’s current caseload, are continuing to occur as to Bowens.

(1) The Third District’s Decision Certified A Question Of Great Public Importance

The Third District “agree[d] with the trial court’s analysis of the constitutionality of the statute and den[ied] the Public Defender’s cross-petition for certiorari on that issue.” *State v. Bowens*, 39 So. 3d 479, 482 (Fla. 3d DCA 2010) The Third District then certified the following question to this Court as one of great public importance:³

³ The trial court devoted six paragraphs of its Order to its analysis of the constitutionality of § 27.5303, Florida Statutes. In stating that it agreed with the trial court’s analysis on the constitutionality of the statute, the Third District clearly ruled on the question it certified.

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

Id.

Because of this certified question, the decision for which PD11 and Kolsky seek review satisfies the “great public importance” exception to the mootness doctrine. This case involves pressing issues confronting Florida’s criminal justice system that directly impact both the constitutional rights of indigent criminal defendants and the ethical responsibilities of Public Defenders and assistant public defenders throughout Florida.

(2). The Issues In This Case Are Likely to Recur And Capable of Evading Review

This case also satisfies the second exception to the mootness doctrine because the issues presented are likely to recur and are capable of evading review. The State, in its Suggestion of Mootness, admits the issues raised by this appeal are capable of repetition. *See* State’s Suggestion at ¶ 6. Issues related to criminal defense are often capable of evading review because the case against a criminal

defendant may be dismissed or the defendant released from incarceration before the appeal can be resolved.

A number of Florida courts have held that appeals related to the processes and procedures of the criminal justice system raise the types of issues which are likely to recur and might otherwise evade review. In *N.W. v. State*, 767 So. 2d 446, 447 (Fla. 2000), this Court addressed issues related to juvenile detention, even though the case became moot when the defendant was released from community control, because the case presented a “controversy capable of repetition, yet evading review, which should be considered on its merits.” 767 So. 2d at 447 n. 2 (citing *Knight v. Dugger*, 574 So. 2d 1066, 1068 (Fla. 1990)).

In *Department of Children and Families v. Wehrwein*, 942 So. 2d 947 (Fla. 5th DCA 2006), a dispute over whether the Department of Children and Families could be forced to divert limited resources to defendants whose competency to stand trial may not be restored, the court addressed the appeal even though it was made moot when the criminal case against the defendant was dismissed. The Fifth District Court of Appeal held that because such a situation was likely to recur, the court would address the case. *Id.* at 949. Similarly, in *Gould v. State*, 974 So. 2d 441 (Fla. 2d DCA 2007), the defendant’s habeas corpus petition was made moot by his release from jail. The Second District Court of Appeal retained jurisdiction to hear the case because Gould’s claims based on improper admission of evidence

presented “a question capable of repetition yet evading review.” *Id.* at 444; *see also T.T. v. Esteves*, 828 So. 2d 449, 450 (Fla. 4th DCA 2002) (addressing juvenile defendant’s appeal based on violation of statute even though appeal had become moot).

Because of the excessively high caseloads of PD11’s assistant public defenders, the issues raised by PD11 in this appellate proceeding are likely to recur as Jefferson represents Bowens going forward and in numerous other criminal cases handled by PD11. Kolsky is a 36-year lawyer that found his caseload excessive enough to require that he move to withdraw from the representation of Bowens. Jefferson, a lawyer with a little over one-year’s experience, will be similarly impacted by the caseload in the “C” felony division to which she was recently transferred.

In addition, the testimony at the evidentiary hearing on the motion to withdraw from the Bowens’ case established that PD11’s clients are not typically represented by the same assistant public defender throughout the entire case. If the State’s assertion is correct, that an attorney transfer within PD11 makes issues related to that attorney’s representation of a criminal defendant moot, then issues related to PD11’s excessive caseloads for its attorneys will routinely evade review as a result of the length of time required for review and PD11’s necessary practice of balancing caseloads by transferring attorneys between divisions.

CONCLUSION

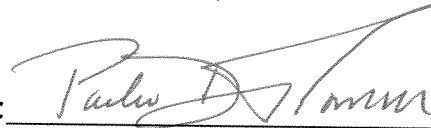
The issues presented in this case are of great public importance and are not moot. The Court has jurisdiction and should exercise that jurisdiction by granting review in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Response in Opposition to the State of Florida's Suggestion of Mootness was served by U.S. Mail this 20th day of November, 2010 on the following:

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A handwritten signature in black ink, appearing to read "Parker D. Thomson", written over a horizontal line.

Parker D. Thomson

EXHIBIT A

2. I am the elected Public Defender for the Eleventh Judicial Circuit of Florida.

3. PD11 was appointed to represent Antoine Bowens on June 11, 2009. Bowens' case had been assigned to Honorable John W. Thornton, Jr. in Felony Division 15 of the Circuit Court for the Eleventh Judicial Circuit of Florida. Assistant Public Defender ("APD") Jay Kolsky was the PD11 lawyer assigned to handle "C" felony cases in that division and, therefore, was assigned to Bowens' case. "C" felony cases are mostly third-degree felony cases.

4. On September 13, 2010, fifteen months after APD Kolsky began representing Mr. Bowens, PD11 transferred APD Kolsky from Felony Division 15 to Felony Division 04 and assigned him to handle "A" cases because his skill and experience as a lawyer practicing for over 36 years were greatly needed there. An "A" caseload requires more skill and experience because it includes first-degree felonies and felonies punishable by life imprisonment, which are more complex and difficult to prepare. "A" APDs may also handle capital or noncapital homicide cases as first or second chair. PD11 assigned APD Chanel Jefferson to handle the "C" felony cases in Felony Division 15. As a result, APD Jefferson assumed the representation of Bowens for PD11.

5. APD Jefferson has been licensed to practice law in Florida since April, 2009. She has been employed by PD11 as an APD since that date. She started in

the misdemeanor Domestic Representation Division, was transferred to the Juvenile Division in March, 2010, and was promoted to the Felony Division on September 13, 2010.

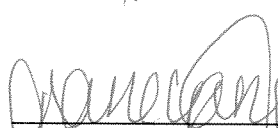
6. As of November 18, 2010, APD Jefferson had a pending caseload of 96 "C" felony cases. As the caseloads of APDs assigned to "C" felony cases typically turns over five or six times per year, I project that APD Jefferson will have an annualized caseload of approximately 480-580 cases.

FURTHER AFFIANT SAYETH NOT.



CARLOS J. MARTINEZ

SWORN TO AND SUBSCRIBED before me this 19th day of November, 2010 by Carlos J. Martinez who is personally known to me or who has produced n/a as identification, and who, after being duly sworn states that the statements contained herein are true and correct and based upon her personal knowledge and belief.



NOTARY PUBLIC
Name Diane Yanez
Title: _____
Commission No. DD973805
Commission expires: 4/3/14

NOTARY PUBLIC STATE OF FLORIDA
Diane Yanez
Commission # DD973805
Expires: APR. 03, 2014
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