IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT

Case No. 3D08-2272

Lower Tribunal Case No.: 08-1

THE STATE OF FLORIDA

Appellant/Petitioner,

v.

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,

Appellee/Respondent.

PUBLIC DEFENDER'S MOTION TO DISSOLVE STAY AND FURTHER EXPEDITE THE APPEAL

On Review From an Order of the Eleventh Judicial Circuit

Pursuant to Florida Rule of Appellate Procedure 9.310, Bennett H. Brummer, the Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11"), files this Motion to Dissolve the Stay and Further Expedite the Appeal.

I. INTRODUCTION

By Order dated November 10, 2008, this Court incidentally continued a stay that has been in effect in this case's travel from this Court to the Supreme Court of Florida and back. The stay was initially granted on the basis of an *ex parte* motion and does not appear to have been considered on the basis of a full articulation of the issues by all parties. Here PD-11 asks for that consideration, including immediate oral argument, if the Court will grant it.

The stay at issue is from the Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases ("Order") entered by the Honorable Stanford Blake on September 3, 2008, after a two-day evidentiary hearing.[1] The Order decided an emergency motion filed last June by PD-11 in conjunction with PD-11's certification of a conflict of interest. The motion and Order detailed the excessive caseloads that have imperiled (and continue to imperil) the ability of PD-11 and the assistant

[1] The Order is attached to PD-11's Appendix at Tab A. In this Motion, the abbreviation "App." followed by a letter and a number refer to a tabbed section of the Appendix. References to the record on appeal will be by "R" followed by the

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public defenders to fulfill their responsibilities under the Florida Rules of Professional Conduct and their responsibilities to provide indigent defendants the effective representation required by the Sixth and Fourteenth Amendments to the United States Constitution. After a two-day adversarial, evidentiary hearing, the trial court found that serious ethical and constitutional violations were occurring and entered an order granting part of the relief requested. The Order allowed PD-11 "to decline future appointments to "C" (third-degree) felony cases until such time as this Court determines that PD-11 is able to resume its constitutional duties with respect to these cases." (App. A at 6). The State appealed. PD-11 did not. The Office of Criminal Conflict and Civil Regional Counsel, Third District Court of Appeal Region of Florida ("RCC-3"), belatedly also appealed.[2]

Unclear whether an automatic stay would be effected by its appeal, the State moved to stay the Order pending appeal, and on September 11, 2008, the trial court denied the State's motion. (9/11/08 Hrg. Tr. at 6-15, attached as App. B). On the same day, the State filed an Emergency Motion for Stay with this Court. Prior to PD-11 having an opportunity to respond, this Court entered a stay as a temporary measure while the parties briefed the merits of a stay. On September

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volume number and the appropriate page numbers.

[2] RCC-3 attended all aspects of the proceedings in the trial court, but made no attempt to intervene until after entry of the Order, then appealed the denial of its belated motion, presumably attacking the Order as well as the intervention denial.

15, 2008, PD-11 expeditiously filed a Response to the Emergency Motion and a Suggestion for Certification. On September 24, 2008, the Court certified the appeal to the Supreme Court of Florida. Without reaching the merits of the stay motion, this Court ordered the stay to continue until the Supreme Court could have an opportunity to consider the merits of a stay.

On October 1, 2008, PD-11 filed a Motion to Dissolve the Temporary Stay with the Supreme Court. On November 7, 2008, the Supreme Court dismissed the case for lack of jurisdiction and denied as moot all pending motions, including the dissolution motion. Deciding it had no jurisdiction, the Supreme Court, of course, could not rule on the merits of the stay either.

On November 10, 2008, upon the Supreme Court's dismissal, this Court ordered that the stay "shall remain in effect" and set an "expedited" schedule with oral argument on March 30, 2009 – ten months *after* PD-11 filed its certification of a conflict of interest and seven months *after* the entry of the Order under review. Once again, the merits of the stay were not addressed.

A continuation of the stay and the protracted appellate schedule will place PD-11 and its lawyers in the untenable position of being forced to continue representing clients while under a serious conflict of interest in violation of Rule 4-1.7 of the Rules of Professional Conduct and in violation of their (and ultimately the State's) constitutional responsibility to provide indigent defendants with their

constitutional right to effective assistance of counsel – all while under the judicial system's watch.

A dissolution of the stay is warranted because the State failed to show in the Emergency Motion a likelihood of success on the merits or of irreparable harm if a stay were not granted. The critical need for dissolution of the stay is shown by the detailed findings made by the trial court in the Order and by three affidavits of the Chief Assistant Public Defender and Public Defender-Elect, Carlos Martinez, which were not before this Court when it initially entered the emergency, temporary stay.[3]

These affidavits make clear that the extraordinary conditions of PD-11 have significantly *worsened* since the trial court's entry of the order, creating an undeniable emergency that can only be relieved by dissolution of the stay. The individual caseloads of the noncapital felony attorneys have increased on average by 29 percent, in the period of four months since PD-11 filed the motion and certification of conflict last June.

A decision on maintaining the stay must be made with knowledge that the conditions, creating the serious ethical and constitutional violations have

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[3] These are the Affidavit of Carlos J. Martinez dated September 15, 2008, the Supplemental Affidavit of Carlos J. Martinez dated November 7, 2008, and the Second Supplemental Affidavit of Carlos J. Martinez dated November 14, 2008, which are attached to the Appendix at Tabs C, D, and E, respectively.

worsened. (*See* App. C, D & E). The situation is not simply that the probability of actual violations will grow as a result, but that it will soon become impossible to ethically and constitutionally staff all of the required courtrooms. (*See* App. E at ¶ 7). PD-11, therefore, respectfully requests that the Court vacate the stay and modify the appellate schedule to maximize expedition of the appeal to the extent this Court's schedule will permit.

II.
ARGUMENT

In the State's Emergency Motion for Stay, the State conceded it did not know whether it was entitled to an automatic stay upon filing a notice of appeal or whether it needed to move for a stay. (Emergency Motion at 6-7).[4] To the extent that a motion was necessary, the State failed to make the showing necessary for entitlement to a stay. This is because the factors the State had to show – success on the merits and irreparable harm – favor PD-11 and not the State. *Mitchell v. State*, 911 So. 2d 1211, 1219 (Fla. 2005) (explaining that in ruling on a motion to vacate a stay, courts consider the likelihood of the irreparable harm if the stay is vacated and the likelihood of success by the party seeking the stay).

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[4] The Supreme Court's dismissal on jurisdictional grounds would indicate that there was no automatic stay because what the State denominated an "appeal," as a matter of fact and law, was not one.

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A. Maintaining The Stay Will Cause Irreparable Harm To PD-11 And Little Or No Harm To The State.

In the Order, the trial court made extensive factual findings regarding the dire conditions in the office of PD-11 that are causing violations of ethical responsibilities and constitutional rights. The trial court found that:

- "[T]he assistant public defenders of the Eleventh Judicial Circuit function under extreme and excessive caseloads," and "the caseload of the felony public defenders in the Eleventh Judicial Circuit . . . far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually." (App. A at 3- 4 (internal citations omitted)).
- "[T]he number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused," (*id.* at 4), and that "'C' felony cases are clogging the system and negatively impacting PD-11's felony attorneys' caseload." (*Id.* at 4-5).
- "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." (*Id.* at 5).

The conditions cited in the Order were emergency enough. Since the hearing, the conditions at PD-11 have *deteriorated* at an accelerated rate, the specifics of which are set forth in the attached Martinez Affidavit and two Supplemental Affidavits. (App. C, D, & E).

The number of attorneys available to handle noncapital felony cases has been declining steadily, resulting in ever-increasing caseloads for the remaining attorneys. When PD-11 filed the certificates of conflict and motions in late June 2008, PD-11 had 105 attorneys (including all supervising and training attorneys)

handling noncapital felony cases and average individual caseloads of 387 per year. (R. 1 at 83 (Motion to Appoint Other Counsel)). With the resignation of 29 trial attorneys since the Florida Legislature finalized the FY08-09 budget in early May 2008, there are now only 96 attorneys handling noncapital felony cases, and they are averaging individual caseloads of 502 noncapital felony cases per year. (App. E at ¶¶ 4, 5, 8). This is a 29 percent increase in caseload since PD-11 filed the certification of conflict and the motions to appoint other counsel in late June 2008. The rate of attorney attrition in PD-11's office is roughly double PD-11's historical rate. (App. C at ¶ 11).

To deal with the caseload pressures, PD-11 has had to reduce the number of attorneys in some felony criminal court divisions and may have to abandon representation in some divisions. (App. C at ¶ 5; App. E at ¶ 7). Three felony trial divisions now only have two attorneys assigned to each of them. (App. C at ¶ 5). Before this crisis and with the exception of newly created divisions, the only felony division PD-11 previously staffed with less than three attorneys was drug court, and drug court is not a trial division. (*Id.*).

For a variety of reasons, PD-11 cannot hire sufficient replacement attorneys to maintain the already reduced staffing levels. PD-11 does not have access to its entire fiscal year budget at the beginning of the year because the State disburses

that money in quarterly installments.[5] (*Id.* at ¶ 7). In addition, PD-11 had to reduce its salary base to make up the one percent quarterly holdbacks imposed on this fiscal year's budget.[6] (*Id.*). Further, a Revenue Estimating Conference is scheduled in November, a report from which will be used at legislative budget meetings in December. If the revenue estimates are reduced, as they are projected to be, the Florida Legislature will likely hold a special session and further reduce PD-11's budget. Lastly, PD-11 cannot draw any more attorneys from its already overloaded county court or juvenile court divisions for the felony divisions. (App. C at ¶ 8; App. D at ¶¶ 7 & 9). The caseload per attorney in the county court division is 2,000 and in the juvenile division is 382, which exceeds by multiple times any recognized maximum caseload standard. (App. D at ¶ 7).

Other than the relief granted by the Order, no reduction in caseloads appears likely in the felony division. (App. C at ¶ 9; App. D at ¶ 8). The number of

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[5] PD-11 cannot responsibly hire attorneys and support staff to meet present needs without assurance that funds will be available to pay them in the future, and PD-11 is prohibited from overspending its budget. *See* § 216.311, Fla. Stat. (2007).

[6] PD-11 applied to the Governor for an exemption to these holdbacks. The Governor denied any exemption, and PD-11's budget already has been subjected to holdbacks for the first two fiscal quarters. (App. C at ¶ 7).

At present, the attorneys in the count court division each handle over 2,000 cases annually, (App. D at ¶ 7), an amount more than five times the prevailing standard. (R. 2 at 184, ¶ 25 (Affidavit of Norman Lefstein)). Given the worsening conditions and the inability of PD-11 to realize the relief requested in its motion filed nearly five months ago, it is likely that PD-11 will be unable to

felony cases assigned at first appearance and that PD-11 handles post-arraignment has remained the same or has slightly increased since the July 2008 hearing. (App. C at ¶ 9; App. D at ¶ 8).

At every level in PD-11, attorneys are extremely concerned that, due to the high caseloads, they are not performing professionally. (App. C at ¶ 10). Defendants are also complaining much more frequently that PD-11 attorneys are too busy to help them or even provide basic information. (*Id.*).

A continuation of the stay of the trial court's Order will continue to be devastating to PD-11's efforts to retain qualified attorneys who can be assigned to felony cases. (*Id.* at ¶ 13). A continued stay could even raise questions about the finality of any criminal judgment issued where the defendant was represented by PD-11 at a time when the trial court found that PD-11 has a conflict of interest because of excessive workloads.

Any harm to the State is financial and certainly not irreparable as detailed below. But if there is any such harm, it will be minimized by further expediting the schedule to hear this appeal as much as this Court's docket permits, so that the number of cases affected by the Order will be minimized.

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avoid having to seek similar relief in the county court divisions.

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B. The State's Claim Of Harm Is Financial And Not Irreparable.

There would be little or no irreparable harm to the State if the stay were vacated. RCC-3 would be appointed to handle the third-degree felonies pursuant to the Order,[7] and if RCC-3 is found to have a conflict, the cases would be handled by private registry attorneys. Increased cost, if there were to be any, is not a proper factor in considering irreparable harm. *See Palenzuela v. Dade County,* 486 So. 2d 12, 13 (Fla. 3d DCA 1986) (allegations of financial or economic loss do not establish irreparable harm necessary for injunctive relief). Moreover, increased cost pales in contrast to the fundamental constitutional rights and ethical obligations at stake here.

In the Emergency Motion, the State claimed the Order would result in over 2,000 cases per month being assigned to the RCC-3, that "many" of these cases "will involve violent offenders," and that these cases "will not be tried for lack of counsel" and "violent offenders will be returned to the streets." (Emergency Motion at 10-11). There is no evidence in the record to support *any* of these assertions, and none of them are true.

Based on the record before it, the Order represents a workable, partial solution to PD-11's dire conditions based on an uncontroverted record with

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[7] *See* App. A at 6-7; Order Granting Motion for Clarification and/or Notice Pertaining to Case Status at 2 (attached as App. F).

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recurring 60-day review of conditions. The Order requires the appointment of RCC-3 only to third-degree felonies, (App. A at 6; App. F at 2), which involve the least violent or dangerous felonies, such as grand theft and drug possession cases.

Neither the State nor RCC-3 presented any evidence at the hearing that PD-11's declining appointments to noncapital felony cases would result in cases not being tried and violent offenders running free in the streets.[8] The testimony showed that in a worst-case scenario, private criminal attorneys would end up accepting the cases (and possibly litigating with the State for attorney's fees). (R. 17 at 2349:7-2350:4 (7/31/2008 Hrg. Tr.)).

Finally, the State's "over 2,000" cases per month is an exaggeration based on the high end of the assertion made by Richard Joyce, Executive Assistant Regional Counsel, in the affidavit attached to the Emergency Motion, that RCC-3 would receive "fifty (50) to one hundred (100)" cases per month in each of the 21 criminal divisions. (Joyce Aff. at ¶ 12). Rather, the evidence at the hearing established that the actual number is about 975 cases per month in all twenty-one criminal divisions combined, which is an average of approximately 46 cases per division per month.[9] Further, based on Judge Blake's clarification that the Order

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8 Not only did RCC-3 sit through the entire hearing in the trial court without seeking to appear, it made no effort even to express its views to the trial court.

9 In FY 2007-08, PD-11 represented clients in 20,388 felony cases after arraignment, excluding all private attorney, conflict, and pleas at arraignment

permitting PD-11 to decline appointment to "C" felonies pertained only to third-degree felonies, the actual number would be less. (App. C at ¶ 16; App. F at 2).[10]

Even in the State's doomsday scenario—where RCC-3 also becomes overloaded—the statute provides an orderly process by which cases are then assigned to registry attorneys. *See* § 27.40, Fla. Stat.; *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 147 (Fla. 2008).

In the Emergency Motion, the State also claimed that the Judicial Administration Commission ("JAC"), which pays for these attorneys, is inadequately funded. As a historical matter, since Revision 7 to Article V, the funding for conflict counsel has fallen short every year except FY 2004-05. (App. C at ¶ 17). In every instance, the JAC has gone to the Legislative Budget Commission ("LBC") to make up for these shortfalls, sometimes two or three times a year. (*Id.*). In the past, the LBC and the Legislature always have provided the necessary funding. (*Id.*).

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cases. (App. C at ¶ 16 & Ex. 1; *see also* R. 11 at 1295-96 (PD-11 Ex. 16); R. 16 at 2170:21-2176:3 (7/30/2008 Hrg. Tr.)). Approximately 900 of those cases were drug court cases that are unaffected by the Order. (R. 16 at 2172:18-2207:24). Further, 60% of those cases were third-degree felonies. (R. 16 at 2209:8-11). Sixty percent of 19,488 is 11,693, or approximately 974 cases per month.

[10] The data in Mr. Joyce's affidavit about RCC-3's felony case assignments are significantly higher than the number of cases in which PD-11 has filed conflicts of interest. (App. C at ¶ 15).

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This point is important because, in the final analysis, the State's alleged "irreparable harm" is financial, based on the concern that the private registry attorneys can be provided only at "higher cost" and with the possibility of litigation to secure their fees. According to the State, higher costs—which must legitimately be borne by the State as a cost of the State Attorney's decision to prosecute crimes on behalf of the State—trump indigent defendants' constitutional rights, and the ethical duties and responsibilities of PD-11's attorneys. The Supreme Court of Florida, however, has already rejected this approach. As that Court has explained:

> [W]e must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute [involving budgets and financial support for attorneys representing indigent defendants]. In order to safeguard that 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 State Is Unlikely To Achieve Success On The Merits.

The State does not and cannot dispute the trial court's factual findings in the Order. Instead, the State argued in the Emergency Motion that the Order does not follow Florida law. (Emergency Motion at 2, 8). The State's application of Florida law, however, is erroneous.

(1). Section 27.5303(1)(d), Florida Statutes, is Inapplicable to PD-11's Motion to Appoint Other Counsel.

In its Emergency Motion, the State insisted that the Order violates section 27.5303(1)(d), Florida Statutes, which prohibits *withdrawals* by a public defender from cases, after accepting representation, based on underfunding or excessive caseloads.[11] The Florida Legislature (and clearly Judge Blake) knew the difference between not accepting new appointments and withdrawal from existing representation. Florida R. Crim. P. 3.130(c)(1) provides: "If necessary, counsel may be appointed for the limited purpose of representing the defendant only at first appearance or at subsequent proceedings before the judge." Judge Blake stated that this rule was the basis for requiring PD-11 to provide limited representation of all indigent defendants from first appearance to arraignment. (App. B at 6:14-23; 4:11-5:25; 10:2-12:5 (9/11/08 Hrg. Tr.)). This type of limited appointment is not contemplated by Chapter 27, and no withdrawal from such a limited appointment is required.

At best, the State's contention creates a dispute about remedy, not the underlying findings on the merits. Even if this Court were to accept the State's argument, the remedy would be to delete the requirement that PD-11 represent indigent clients beginning at first appearance until arraignment. Deleting this

[11] At the same time, the State acknowledged that the Order does not

requirement would further complicate an already complicated situation, but certainly is no basis for a stay.

(2). The Trial Court's Order Does Not Violate *Crist v. FACDL.*

In the Emergency Motion, the State argued that the Order "effectively treats regional conflict counsel as quasi-public defenders." (Emergency Motion at 9). This type of quasi-public defender argument was rejected by *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 147 (Fla. 2008):

> What is critical to our decision is that the OCCCRC are appointed in criminal cases *only* where the public defender must withdraw due to a conflict of interest. *See* § 27.511(5), Fla. Stat. Therefore, the OCCCRC do not compete or otherwise act concurrently with the public defender—it is only when the public defender steps aside that a regional counsel steps in.

Id. at 145 (emphasis in original). The Order preserves the relationship between public defenders and conflict counsel by appointing RCC-3 only in cases where PD-11 has a conflict of interest and "steps aside." Nothing in this argument suggests a likelihood of success on the merits sufficient to justify a stay.

(3) PD-11 Proved Actual Prejudice to Clients Even Though Such a Demonstration is Not Required to Sustain a Public Defender's Decision to Decline Future Cases.

In the Emergency Motion, the State argued that PD-11 was required to prove prejudice to its clients to obtain the relief and failed to do so. (Emergency

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"technically" violate the statute. (Emergency Motion at 8).

Motion at 9-10). PD-11, however, proved actual harm to its clients, even though not required to do so by law. At the evidentiary hearing, PD-11 presented the testimony of Amy Weber, an assistant public defender, and Stephen Kramer, a senior supervising assistant public defender. They testified that the lawyers handling non-capital felony cases cannot, among other things, adequately interview or consult with their clients, adequately investigate their cases, adequately file motions in all instances where there is a viable basis for relief, or adequately prepare their cases for trial. (R. 16 at 2285:18-23, 2287:25-2288:7, 2294:14-24, 2295:2-11, 2296:2-9, 2299:10-19) (7/30/08 Hrg. Tr.)). Ms. Weber even recounted a recent and deeply troubling incident reflecting the negative consequences of handling an excessive caseload. (R. 16 at 2299:23-2302:5).

Most importantly, PD-11 was not required to show prejudice to obtain the relief granted. The State's argument recalls the second or "prejudice" prong of the familiar test from *Strickland v. Washington*, 466 U.S. 668, 690 (1984), which was created to protect the finality of criminal convictions, not to protect indigent defendants' Sixth Amendment rights *prior* to trial. *See Witt v. State*, 387 So. 2d. 922, 925 (Fla. 1980) (reaffirmed in *Hughes v. State*, 901 So. 2d. 837, 839-40 (Fla. 2005)). Courts have long-rejected the State's implication that *Strickland*'s prejudice prong applies in cases challenging the overloading of public defenders. *See Luckey v. Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988), *case subsequently*

dismissed on abstention grounds, 976 F.2d 673 (11th Cir. 1992). In *Luckey*, the Eleventh Circuit wrote:

> This [*Strickland*] standard is ***inappropriate*** for a civil suit seeking prospective relief. The sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief—whether the defendant is entitled to have his or her conviction overturned—rather than to the question of whether such a right exists and can be protected prospectively.

Luckey, 860 F.2d at 1017 (emphasis added). PD-11 briefed this issue in the proceeding below. (R. 9 at 1057-63).

D. The Expedited Briefing Schedule Is Not Sufficiently Expedited And Is Not A Substitute For A Stay.

The "expedited" briefing schedule is not an adequate substitute for dissolving the stay. This case already has been pending for over four months, during which time the already excessive caseloads have increased and the conditions went from terrible to significantly worse. (*Compare* R. 1 (Motion to Appoint other Counsel) at 77-91 (filed June 24, 2008), *with* App. A, C, D & E (Order & Martinez affidavits)). The pendency of appellate review, in and of itself, does nothing to deal with the immediate needs of indigent defendants for effective counsel in the cases commencing today and each day thereafter, or the

similarly immediate needs of assistant public defenders to comply with the Florida Rules of Professional Conduct – especially when the current schedule has set oral argument for seven months *after* the entry of the Order. It would be far more just to vacate the stay and permit the Order to operate until this Court can act.

Further, even with a dissolution of the stay, the appeal of the Order should be expedited even more than the expedited schedule set forth in the Court's November 10 Order. On September 12, 2008, prior to certifying the appeal to the Supreme Court of Florida, this Court entered a briefing schedule which required the State's brief to be filed no later that October 1, 2008 (less than 20 days after entry of the scheduling order), the appellee's brief on October 20, 2008, and the reply brief on October 27, 2008. Oral argument was set for November 17, 2008, which was approximately four months from the entry of the Order and six weeks from the deadline for the State's initial brief. At the time, this Court clearly viewed the case to require expedited review.

The only thing that has changed between September 2008 and now is that many more attorneys have resigned and the caseloads in the felony and county court divisions are much higher. As the trial court found and the Martinez affidavits show, the conditions in PD-11 are dire. The attorneys are being forced to represent clients even though the representation has created a conflict of interest with other clients. As the caseloads have worsened and the attorneys'

representation is compromised, the virtual certainty of these lawyers sometimes actually violating the Rules of Professional Conduct has increased. Now, however, this Court has set oral argument almost four months after the deadline for the initial brief.

PD-11 respectfully requests that the Court vacate the stay until the Court reviews the order on appeal and modify the appellate schedule to further expedite the appeal.

CONCLUSION

PD-11 respectfully requests that this Court forthwith dissolve the temporary stay of the trial court's Order and further expedite the appeal.

Dated this 14 th day of November, 2008.

Respectfully submitted,

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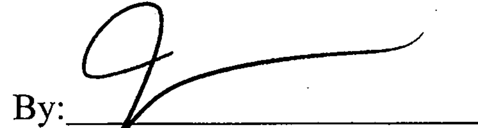

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served by the method indicated below to those indicated this 14th day of November 2008.

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