

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

THE STATE OF FLORIDA,

CASE NO.: 3D08-2272

L.T. CASE NO.: 08-1

Appellant/Petitioner,

v.

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

Appellee/Respondent.

**PUBLIC DEFENDER'S RESPONSE TO STATE OF FLORIDA'S
EMERGENCY MOTION FOR STAY**

Pursuant to Florida Rule of Appellate Procedure 9.310, Bennett H. Brummer, the Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11"), responds to the Emergency Motion for Stay filed by the State of Florida ("State"). As will be demonstrated below, the Court should vacate the temporary stay imposed on September 11, 2008, as the State has shown neither the likelihood of success on the merits nor the irreparable harm necessary for a stay by this Court. If the Court desires oral argument on the State's motion for stay, PD-11 requests it be expedited to the earliest practical date.

**I.
INTRODUCTION**

The State has appealed 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, 2008.¹ The Order resolved a motion filed last June by Bennett H. Brummer, the Public Defender for the Eleventh Judicial Circuit of Florida (“PD-11”) detailing the emergency nature of conditions in PD-11 that imperiled the ability of PD-11’s assistant public defenders to fulfill their responsibilities to the Florida judicial system and the public under the Florida Rules of Professional Conduct and, of equal importance, their responsibilities to meet the State’s obligation to provide indigent defendants the effective representation required by the Sixth and Fourteenth Amendments to the United States Constitution and a host of decisions of the United States Supreme Court. The Order granted PD-11’s motion in part and denied it in part, affording partial relief from the existing, crippling conditions and scheduling recurring 60-day reviews of those conditions.

Last Thursday, September 11, 2008, this Court received an Emergency Motion for Stay from the State and temporarily stayed the Order. PD-11 respectfully suggests that, as shown by the Order, and, even more critically, the affidavit of Carlos Martinez, the Chief Assistant Public Defender and Public Defender-Elect (the “Martinez Affidavit”), the emergency condition is that of PD-11, not the State.²

PD-11 appreciates the Court’s prompt setting of an expedited schedule designed to reach an early appellate resolution, quite possibly, before the Office of Criminal Conflict and Civil Regional Counsel for the Third Region of Florida (“RCC-3”) would feel the need to seek any relief from the additional cases passing to it under the Order appealed, according to the affidavit attached to the State’s motion. The Order, however, reflects that PD-11 is already under

1 The Order is attached to PD-11’s Appendix at tab A. In this Response, the abbreviation “App.” followed by a letter and a number will refer to a tabbed section of the Appendix and the page number of the document therein.

2 The Martinez Affidavit is attached to the Appendix at tab B.

caseload pressure that prevents its lawyers from fulfilling their ethical and constitutional responsibilities. What the Order cannot reflect is that circumstances have significantly *worsened*, as detailed by the Martinez Affidavit. Since entry of the Order, PD-11's conditions have become intolerable, and therefore PD-11 must request vacation of the stay imposed by this Court on September 11, 2008, until this Court is able to act on an expedited basis.

Further, the State has shown neither the likelihood of success on the merits nor the irreparable harm necessary for a stay by this Court. The likelihood of harm cited by the State in its motion pertains to a concern about the higher cost of furnishing indigent defendants with private attorneys pursuant to section 27.40, Florida Statutes, if the Order is affirmed on appeal. The State's concern about funding, however, pales in comparison to the fundamental constitutional rights and ethical obligations at stake here. As the Supreme Court of Florida 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).

Additionally, the trial court agreed with PD-11's certification that a conflict of interest exists between PD-11's existing clients and future clients if PD-11 were required to accept new appointments to noncapital felony cases. In the Order, the trial court wrote 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). If the Court were to grant the State's motion for stay, not only would the indigent defendants' Sixth Amendment right to assistance of counsel be at risk,

the assistant public defenders handling third degree felonies would still be faced with a conflict of interest and the requirement under Rule 4-1.7 of the Florida Rules of Professional Conduct that they not represent a client if there is a substantial risk that representation will be materially limited by the lawyer's responsibilities to another client. A stay would effectively require PD-11 to continue representing clients and to accept new appointments in noncapital felony cases despite the existence of a conflict. This harm cannot be quantified in dollars; it is truly irreparable.

II.
**MAINTAINING A STAY WOULD CAUSE IRREPARABLE HARM
BECAUSE THE CASELOAD OF PD-11'S NONCAPITAL FELONY
ATTORNEYS IS INCREASING. INDIGENT DEFENDANTS' RIGHTS
TO DUE PROCESS AND TO ASSISTANCE OF COUNSEL ARE AT
STAKE, AS IS THE ATTORNEYS' OBLIGATION TO PROVIDE
ETHICAL REPRESENTATION.**

The Order was entered after a two-day evidentiary hearing on July 30 and 31, 2008.³ The trial court made extensive factual findings and conclusions of law based on well-settled precedent.

The court found that "the assistant public defenders of the Eleventh Judicial Circuit function under extreme and excessive caseloads," (App. A at 3-4), and that "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," (*id.* at 4 (citations omitted)).⁴ The trial court also found that "the number of active cases is so

³ The July 30 and 31, 2008 Hearing Transcripts are attached to the Appendix at tab F. Citations to the transcript of the evidentiary hearing held on June 30 and 31, 2008 in Appendix F will be abbreviated with the date, "Hrg. Tr." and a page number, followed by line numbers.

⁴ The evidence revealed the existence of several national and state caseload standards. (7/30/2008 Hrg. Tr. at 34:7-36:21 & 52:20-54:1). The task force chair and reporter of the ABA's standards testified on behalf of PD-11 as an expert witness. (7/31/2008 Hrg. Tr. at

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). The trial court held 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.” (*Id.* at 5).

The court also wrote:

Additionally, there is no dispute that PD-11’s trial budget has been cut by 9.2% in the past two fiscal years. With the additional holdbacks imposed for Fiscal Year 2008-09, PD-11 is operating under a 12.6 % budget reduction. As a result of the reduced budget, the number of noncapital felony public defenders has declined in the last two fiscal years, and this downward trend is continuing. PD-11 is unable to raise salaries, and a number of assistant public defenders hold second jobs on nights and weekends simply to make ends meet. As noted in Rory Stein’s testimony, General Counsel for PD-11, two main reasons for leaving PD-11 were financial (low salaries and lack of raises) and burnout from the excessive workload. At the same time that resources have dwindled, the number of noncapital felony cases assigned to PD-11 has explosively increased by approximately 29% since Fiscal Year 2003-04.

(*Id.* at 5).

The conditions cited in the Order were emergency enough. Since the hearing, however, the conditions at PD-11 have *deteriorated* at an accelerated rate, the specifics of which are set forth in the attached Martinez Affidavit. The number of felony 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. (App. C at 7 (PD-11’s Motion to Appoint Other Counsel and Memorandum)). At the July 2008 evidentiary hearing, PD-11 projected it would soon have 98

68:20-69:4).

attorneys handling noncapital felony cases. (App. G; 7/30/2008 Hrg. Tr. at 210:4-17). Since the evidentiary hearing, additional attorneys have resigned, and PD-11 currently anticipates that it will have only 94 attorneys to handle noncapital felony cases by the beginning of October 2008. (App. B. at ¶ 4). As a result, PD-11 had to reduce the number of attorneys in some felony criminal court divisions. Three divisions now only have two attorneys assigned to each of them. (*Id.* at ¶ 5). Other than when divisions are newly created, in the last twenty years, before this crisis, the only felony division PD-11 staffed with less than three attorneys was drug court, which is not a trial division. (*Id.*).

Since the Florida Legislature finalized the budget on May 2, 2008, twenty-four trial attorneys have resigned, including eighteen noncapital felony attorneys. (App. B at ¶ 3). In addition, four appellate attorneys have resigned. (*Id.* at ¶ 3). Four of the attorneys who resigned are, or will be, working for the Office of Criminal Conflict and Civil Regional Counsel for the Third District (“RCC-3”), which is hiring attorneys with a pay structure that makes PD-11’s salaries noncompetitive. (*Id.* at ¶ 6). This rate of attorney attrition is roughly double PD-11’s historical rate. (*Id.* at ¶ 11).

PD-11 cannot hire sufficient replacement attorneys to maintain even the already reduced staffing levels. (*Id.* at ¶ 7). First, PD-11 does not have access to its entire fiscal year budget at the beginning of the year. (*Id.* at ¶ 7). Instead, the State disburses that money in quarterly installments. (*Id.* at ¶ 7). It would be irresponsible to hire attorneys and support staff to meet present needs without any 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). Second, PD-11 had to reduce its salary base to make up the one percent quarterly holdbacks imposed on

this fiscal year's budget.⁵ (App. B at ¶ 7). Third, news accounts indicate the likelihood of a special legislative session in November 2008 that could further reduce PD-11's budget. (*Id.* at ¶ 7). Fourth, PD-11 cannot draw attorneys for the felony divisions from its already overloaded county court or juvenile court divisions. (*Id.* at ¶ 8).

Other than the partial relief granted by the Order, no reduction in caseloads appears likely in the felony division. (*Id.* at ¶ 9). Both the number of felony cases assigned to PD-11 at first appearance, and the number of cases handled post-arraignment have remained the same or slightly increased since the July 2008 hearing. (*Id.*)⁶

The situation is dire. At every level in PD-11, attorneys are worrying that, due to the high caseloads, they are not performing professionally. (*Id.* 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.*). Consequently, PD-11 is experiencing the lowest morale ever. (*Id.*). Attorneys are also concerned with rapidly increasing cost of living, no raises for two out of the last five years, no future raises in sight, and the expiration of student loan deferrals. (*Id.* at ¶ 11). The result is that many attorneys are actively seeking employment outside PD-11. (*Id.*).

Further, a chain reaction has started. Every attorney who leaves and cannot be replaced increases the workload and inefficiency of the remaining attorneys. (*Id.* at ¶ 12). Those remaining attorneys then also begin looking for other employment. (*Id.*). This Court's stay of the trial court's Order will likely be devastating to PD-11's attempt to retain qualified and

⁵ 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. B at ¶ 7).

⁶ Of course, the Order provides for recurring 60-day reviews of conditions. (App. A at

experienced attorneys who can be assigned to felony cases. (*Id.* at ¶ 13). The stay could even raise serious 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.

This Court's order expediting the briefing schedule in this case, although appreciated, is not an adequate substitute for lifting the stay. This case already has already been pending two-and-a-half months in the trial court, during which time the situation went from terrible to significantly worse. (*Compare* App. C (filed June 24, 2008), *with* App. A (entered Sept. 3, 2008)). The prospect of relief being delayed at least an additional two months in this Court is unnecessary and very harmful. Awaiting at least one, and probably two, levels of appellate review does not deal with the immediate need 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. Justice delayed is justice denied, especially given the magnitude of existing conditions.

Given the expedited briefing and oral argument this Court has ordered, it would be far better—and far more cognizant of the professional ethical and Sixth Amendment constitutional responsibilities of PD-11's attorneys—to vacate the stay and permit the Order to operate until this Court can act in accordance with the expedited schedule.

6-7).

III.
**THE STATE'S CLAIM OF IRREPARABLE HARM IS
ERRONEOUS AND ONLY A FINANCIAL ISSUE, WHICH
MUST BE OUTWEIGHED BY THE CONSTITUTIONAL
RIGHTS OF INDIGENT DEFENDANTS.**

The State presented a number of alarmist claims in its motion, all of which are contrary to, or unsubstantiated by, the evidence in this case. The State claims that the Order would result in over 2000 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.” (State’s motion at 10-11). None of these assertions is true.

The State failed to present or proffer any evidence to the trial court that substantiates a motion for stay. As Judge Blake noted, at a hearing conducted on September 11, 2008 with the consent of all parties to clarify the Order, RCC-3 was present in the courtroom throughout the evidentiary hearing and declined to appear in any capacity, even as *amicus curiae*. (9/11/08 Hrg. Tr. at 12:23-25, 13:10-14 (attached as App. H)).⁷ Based on the record before it, the lower court’s Order represents a workable, balanced, partial solution to PD-11’s dire conditions based on an uncontroverted record with recurring 60-day reviews of conditions. The Order requires the appointment of RCC-3 only to third-degree felonies, (App. A at 6; 9/11/2008 Hrg. Tr. at 4:22-5:25), which, as the State well knows, involve the least violent or dangerous felonies, such as grand theft and drug possession cases.

The State presented no 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. The testimony showed that, in a worse-case scenario, private criminal attorneys

would end up accepting the cases (and possibly litigating with the State for attorneys fees). (7/31/2008 Hrg. Tr. at 45:7-46:4).

Finally, the State's "over 2000" cases per month is an exaggeration based on the high end of Mr. Joyce's assertion 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.⁸ Further, based on Judge Blake's clarification that the Order permitting PD-11 to decline appointment to "C" felonies pertained only to third-degree felonies, the actual number would be less. (App. B at ¶ 16; 9/11/08 Hrg. Tr. at 4:22-5:25).⁹

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. (2007); *Crist v. Florida Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 147 (Fla. 2008). The State claims 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.

7 Hereinafter referred to as "9/11/2008 Hrg. Tr.," followed by page and line numbers.

8 In FY 2007-08, PD-11 represented clients in 20,388 felony cases after arraignment, excluding all private attorney, conflict, and pleas at arraignment cases. (App. B at ¶ 16 & Ex. 1; App. I; 7/30/2008 Hrg. Tr. at 141:21-147:3). Approximately 900 of those cases were drug court cases that the Order does not affect. (7/30/2008 Hrg. Tr. at 143:18 & 178:24). Further, 60% of those cases were third-degree felonies. (7/30/2008 Hrg. Tr. at 180:8-11). Sixty percent of 19,488 is 11,693, or approximately 974 cases per month.

9 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. B at ¶ 15). The State presented neither Mr. Joyce's affidavit nor any other evidence pertaining to RCC-3's caseloads prior to attaching his affidavit as an exhibit to the State's motion for stay filed with this Court.

(App. B at ¶ 17). In every instance, the JAC has gone to a 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.*)

This point is important because, in the final analysis, the State’s “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 decision to prosecute crimes—trump indigent defendants’ constitutional rights, and the ethical duties and responsibilities of PD-11’s attorneys. The Supreme Court, however, has already rejected this approach. *See Makemson*, 491 So. 2d at 1113 (quoted above in the Introduction).

IV. 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 argues that the Order does not follow Florida law. As will be demonstrated below, however, it is the State’s application of Florida law that is erroneous.

First, the State argues that the trial court implicitly violated section 27.5303(1)(d), Florida Statutes, by requiring PD-11 bond-hearing and early-representation lawyers to handle “C” felonies (third-degree felonies) up to arraignment. In so arguing, the State ignores the fact that the Florida Rules of Criminal Procedure expressly permit limited appointments of a public defender and the fact that PD-11 would not be withdrawing from any cases in adhering to the relief granted in the Order. *See Fla. R. Crim. P. 3.130(c)(1)*. Second, the State argues that the Order effectively makes RCC-3 a de facto public defender. Again, the State ignores the fact

that RCC-3 will only be required to handle those cases in which PD-11 has a conflict, as required by section 27.40(1), Florida Statutes. Third, the State argues that PD-11 failed to prove prejudice to its clients. The law is well established that a public defender is not required to show prejudice as a condition of seeking pre-trial relief to protect an indigent defendant's right to assistance of counsel. *Luckey v. Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988).

A.

Section 27.5305(1)(d), Florida Statutes, is Inapplicable to PD-11's
Motions to Appoint Other Counsel.

The State insists 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.¹⁰ (State's motion at 7-8). This appears to be a matter for briefing on the merits, but surely the Florida Legislature (and clearly Judge Blake) knew the difference between non-acceptance of new representation, which is the relief PD-11 requested, and withdrawal from existing representation.

Florida Rule of Criminal Procedure 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." At the September 11th hearing, 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. (9/11/08 Hrg. Tr. at 6:14-23; 4:11-5:25; 10:2-12:5). This type of limited appointment is not contemplated by chapter 27, Florida Statutes, and the Order does not require a "withdrawal" from such a limited appointment.

¹⁰ At the same time, the State acknowledges that the Order does not "technically" violate the statute. (State's motion at 8).

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 that the limited appointments until arraignment violated the statute, the remedy would be to delete the requirement that PD-11 represent indigent clients beginning at first appearance until arraignment. Judge Blake noted at the September 11th clarification hearing that he had ordered this limited appointment "so that there is not chaos and so that people do not go unrepresented for their first appearance before a judge within 24 hours." (9/11/08 Hrg. Tr. at 6:21-23). Deleting this requirement would be a very messy result, but certainly is no basis for a stay.

The Supreme Court of Florida has recognized that the issue of excessive workloads is "of constitutional magnitude." *In re Public Defender's Certification*, 709 So. 2d 101, 103 (Fla. 1998); *see also In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1138 (Fla. 1990) ("[T]he constitutional rights of these indigent appellants are being violated."). This right includes the right to the assistance of conflict-free counsel. *See Wood v. Georgia*, 450 U.S. 261, 271 (1981). The Supreme Court of Florida wrote, "[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created." *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1135.¹¹ The indigent defendants' constitutional rights are sufficient reasons to vacate the stay if the stay is predicated in any way on the statute the State believes applicable, even though "technically" complied with.

¹¹ Further discussion of this point is available in the motion to appoint other counsel filed by PD-11. (App. C at 5-6, 9-10).

B.

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

The State argues that the Order “effectively treats regional conflict counsel as quasi-public defenders.” (State’s motion at 9). This type of quasi-public defender argument is precisely the argument 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 OCCRC 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 OCCRC 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.

C.

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

The State argues that PD-11 was required to prove prejudice to its clients to obtain the relief and failed to do so. (State’s motion at 9-10). PD-11, however, proved harm to its clients, even though not required to do so by law. At the evidentiary hearing, PD-11 presented 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. (7/30/08 Hrg. Tr. at 256:18-23, 258:25-259:7, 265:14-24, 266:2-11, 267:2-9, & 270:10-19). Ms. Weber even recounted a recent and deeply troubling incident reflecting the danger of handling an excessive caseload. (7/30/08 Hrg. Tr. at 270:23-273:5).

The fact is that PD-11 attorneys handling “C” felony cases now can have forty to fifty cases set for trial in a week. (7/30/08 Hrg. Tr. at 222:20-22). Additional testimony of a similar nature was presented and is detailed in PD-11’s closing memorandum. (App. E at 4-8). The Court credited the foregoing testimony and found “the evidence shows that the number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused.” (App. A at 4).

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 in its Reply Memorandum in Support of Motion to Appoint Other Counsel. (See App. D at 9-15).

* * *

The State has failed to show a likelihood of success on the merits. Instead, the State relies on arguments and principles not applicable here, and these cannot support a stay that will cause irreparable to PD-11 and its clients. Section 27.5305(1)(d), Florida Statutes, has no place in the motion for a stay, as it had no place in the Order.

CONCLUSION

PD-11 respectfully requests that this Court either lift its stay of the trial court's Order or set an expedited oral argument with respect to it.

Dated this 15th day of September, 2008.

Respectfully submitted,

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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 15th day of September 2008.

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