

**IN THE CIRCUIT COURT OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR MIAMI-DADE COUNTY, FLORIDA**

THE STATE OF FLORIDA,

Plaintiff,

v.

ANTOINE BOWENS,

Defendant.

Case No. F09-019364

Division F15

Judge Thornton

**RESPONSE TO ASSISTANT PUBLIC DEFENDER'S MOTION TO WITHDRAW AND
MOTION TO DECLARE SECTION 27.5303(1)(d), FLORIDA STATUTES,
UNCONSTITUTIONAL**

The State of Florida, by and through the undersigned counsel, files this Response to Assistant Public Defender's Motion to Withdraw and Motion to Declare Section 27.503(1)(d), Florida Statutes, Unconstitutional and states as follows:

Assistant Public Defender, Jay Kolsky, who has been assigned by the Office of the Public Defender for the Eleventh Judicial Circuit (hereinafter PD-11), to the above referenced case, has filed a Motion to Withdraw and to Declare Section 27.5303(1)(d), Florida Statutes (2009), unconstitutional. As this Court is aware from the initial status hearing in this case, Mr. Kolsky intends on seeking to withdraw, not only in this case, but in approximately 48 other cases alleging the same grounds, thus, PD-11 clearly intends to continue litigation of the issues raised in this Motion. The pleadings and affidavits that have been filed are insufficient to establish entitlement to relief, and further under facts that will be established at an evidentiary hearing, the State will show that Mr. Kolsky has not provided sufficient legal grounds to require this Court to grant his Motion to Withdraw under the statute. As such, this Court will not have to and should not pass upon the constitutionality of section 27.5303(1)(d). *See Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975) (settled principle of constitutional law is that courts should not pass upon

constitutionality of statutes if case in which question arises may be effectively disposed of on other grounds). However, if this Court determines that it must review the constitutionality of the statute, this Court will find that section 27.5303(1)(d) is constitutional.

INTRODUCTION

1. Historical Background

Since the Office of the Public Defender was created as a governmental agency, the courts have recognized that it is the function of the Legislature to fund and to determine its duties and responsibilities. The authority to fund the Office of the Public Defender includes the power to review how the offices are managed in order to determine the proper funding levels. Concomitant with the function of determining when the public defender can represent indigent persons on which particular cases, is regulating when it is appropriate for the public defender to withdraw from the its legally required representation.

The history of the creation of the Office of the Public Defender is set forth in detail by the Supreme Court of Florida in *Crist v. Florida Association of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 140-41 (Fla. 2008) [hereinafter "*FACDL*"]. The Court noted that the Office of the Public Defender was created in 1963, with the enactment by the Legislature of section 27.50, Florida Statutes (1963), in order to meet its responsibilities to provide counsel to indigent criminal defendants as set forth in *Gideon v. Wainwright*, 372 U.S. 335 (1963). The duties of the Public defender were set forth in section 27.51, Florida Statutes (1963). In 1972, the Florida Constitution was amended to elevate the Office of the Public Defender to the level of a constitutional officer. That amendment became Article V, Section 18, which provides as follows:

Public Defenders. – In each judicial circuit a public defender shall be elected for a term of four years, who shall perform duties

prescribed by general law. A public defender shall be an elector of the state and reside in the territorial jurisdiction of the circuit and shall be and have been a member of the Bar of Florida for the preceding five years. Public defenders shall appoint such assistant public defenders as may be authorized by law.

In *FACDL*, 978 So. 2d at 141, the Supreme Court of Florida extensively reviewed this constitutional provision, held that the plain language of the text of section 18 is clear, and found that this provision “essentially sets forth the minimal qualifications for the position” of the elected public defender. The Court stated:

Beyond these minimal qualifications, **the constitution** does not specify any additional details about how the public defender in each circuit is to operate or what duties are to be performed. In fact, 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. (Emphasis added). The Court further stated that “we defer to the Legislature in cases involving the constitutionality of laws and weigh any doubts as to a law’s validity in favor of constitutionality.” *Id.* at 148. Thus, before and after the constitutional amendment, the Legislature has had the authority to control the duties to be performed by the public defenders.

Beginning in 1963, and continuing to today, it has always been the Legislature’s intent that the public body that would represent indigent defendants would be the Office of the Public Defender. The Legislature has provided in section 27.51(1) that “[t]he public defender **shall** represent, without additional compensation, any person determined to be indigent under s. 27.52”(Emphasis added). Since 1972 and the elevation of the Public defender to a constitutional officer, the Legislature has been well aware of the funding issues which have periodically provided a basis for the public defenders to either withdraw from cases or refuse to accept appointments. *See State v. Public Defender*, 12 So. 3d 798, 804 (Fla. 3d DCA 2009). In

determining whether the public defender could withdraw on cases due to alleged excessive caseloads, the courts have inevitably looked at the statutes which govern the duties of the public defender.

In 1977, the Public Defender for the First Judicial Circuit filed motions to withdraw as counsel in a limited number of felony cases on the ground that his excessive caseload would preclude the effective representation on behalf of indigent defendants. The trial court granted the motions and the county sought certiorari review in the First District. The county argued that under section 27.53(3), Florida Statutes (1977), the public defender could only withdraw for a conflict of interest when it is among the clients of the office.¹ The First District did not address that subsection of the statute, but rather agreed with the public defender that under section 27.53(2), Florida Statutes (1977),² the trial court had the discretion to appoint as a special assistant public defender any member of the Bar where the trial court found that the public defender's workloads "far exceeds" the various recommended workloads and where the trial judge had the opportunity to observe directly the adequacy of representation by the public defender's office to determine whether the workload is excessive. *State ex rel. Escambia County v. Behr*, 354 So. 2d 974, 975-76 (Fla. 1st DCA 1978).

¹ § 27.53(3), Fla. Stat. (1977), provided: "If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff, it shall be his duty to move the court to appoint one or more members of the Florida Bar who are in no way affiliated with the public defender in his capacity as such, or in his private practice, to represent the accused."

² § 27.53(2), Fla. Stat. (1977), provided: "In addition, any member of the bar in good standing may be appointed by the court to, or may register his or her availability to the public defender of each judicial circuit for acceptance of, special assignments without salary to represent insolvent defendants."

Relying on the First District's opinion in *State ex rel. Escambia County v. Behr*, the Public Defender for the Eleventh Judicial Circuit, filed a motion to withdraw as counsel in one indigent defendant's appellate proceedings. *Dade County v. Baker*, 362 So. 2d 151 (Fla. 3d DCA 1978). The public defender alleged in his motion that an excessive caseload would impede this particular defendant's right to speedy access to the courts and effective assistance of counsel. The County replied that the public defender had filed the same motion in a number of other cases and that the public defender had stated that he intended to file other motions on the same ground as part of a plan to reduce his office's caseload. The public defender responded that he was moving to withdraw because the excessive caseload affected his representation of this particular defendant.³ *Id.* at 153. The trial court permitted the withdrawal, appointing a private attorney to represent, at County expense, the defendant on his appeal. The majority of the Third District held that the public defender could not move to withdraw because of excessive caseload, finding that it was not a "lawful ground" or a "special circumstance" to allow for withdrawal under section 27.53(2), Florida Statutes (1977).

Judge Hubbard dissented, looked to the wording of section 27.53(2) and found that the statute could not be interpreted as requiring a showing of "a lawful ground" or "special circumstances" before a trial court could appoint a special assistant public defender. To do so, would be to judicially amend the statute. Thus, Judge Hubbard specifically stated that it was not necessary to determine whether an excessive caseload constitutes a lawful ground for the appointment of a special assistant public defender, although he questioned whether the public defender had proven that such an excessive caseload existed:

In point of fact, Dade County makes a strong showing that the **public defender herein is not so overworked that he has no**

³ This is the same tactic that the PD-11 is following in this case.

lawyer on his staff who can represent this defendant on appeal without compromising the defendant's right to effective assistance of counsel. All agree, however, that the public defender has a heavy workload by any standard; and that factor was properly considered by the trial court in exercising its discretion to appoint the special assistant public defender in this case. Whether the court was [r]equired on this record to appoint the special assistant public defender herein is a question we need not decide and about which I have grave doubts.

362 So. 2d at 157 n.2 (Hubbart, J., dissenting). (Emphasis added).

The Florida Supreme Court reviewed *Behr* and *Baker* and adopted Judge Hubbart's rationale in *Baker* as its holding. The Court held that a court had the unfettered discretion to appoint special assistant public defenders because there was no requirement in section 27.53(2) of a showing of a lawful ground or special circumstance. *Escambia County v. Behr*, 384 So. 2d 147, 150 (Fla. 1980).

Excessive caseload issues continued to reappear in the trial, see *Schwartz v. Cianca*, 495 So. 2d 1208 (Fla. 4th DCA 1986), and the appellate courts. See *Kiernan v. State*, 485 So. 2d 460 (Fla. 1st DCA 1986); *Haggins v. State*, 498 So. 2d 953 (Fla. 2d DCA 1986)(en banc); *Crow v. State*, 500 So. 2d 171 (Fla. 1st DCA 1986); *In re Order on Prosecution of Criminal Appeals By the Tenth Circuit Public Defender and by Other Public Defenders*, 504 So. 2d 1349 (Fla. 2d DCA 1987)(en banc); *In re Order on Prosecution of Criminal Appeals By the Tenth Circuit Public Defender*, 523 So. 2d 1149 (Fla. 2d DCA 1987)(en banc); *Grube v. State*, 529 So. 2d 789 (Fla. 1st DCA 1988); *Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender*, 1989 WL 142259 (Fla. 2d DCA May 12, 1989)(en banc); *Terry v. State*, 547 So. 2d 712 (Fla. 1st DCA 1989); *Day v. State*, 564 So. 2d 137 (Fla. 1st DCA 1990).

In 1990, the Florida Supreme Court reviewed these cases in *In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990)

[hereinafter *In re Order*]. In affirming the Second District's order, the Court recognized that the source of the problem was the inadequate funding of the public defenders' offices, which affected both trial and appellate caseloads. The Court found that there was a showing that the public defender clients had suffered prejudice in having appeals dismissed or having served their prison time before an appeal had been lodged. The Court noted that "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." *Id.* at 1135. The Court after reviewing section 27.53(3), Florida Statutes (1989), held that "the legislature has provided an appropriate mechanism to handle the problem of excessive caseloads of the public defender." *Id.* The Court further stated that "it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function." *Id.* at 1136.⁴

In *Order on Motions to Withdraw Filed By Tenth Circuit Public Defender*, 622 So. 2d 2 (Fla. 2d DCA 1993)(en banc), the Second District found that it could no longer take the representations and conclusions of the public defender at face value and delegated the fact finding to a commissioner. This delegation was upheld by the Florida Supreme Court in *In re Certification of Conflict in Motions to Withdraw Filed By Public Defender of the Tenth Judicial*

⁴ Following the Florida Supreme Court's opinion in *In re Order*, the public defenders continued moving to withdraw in appellate cases. Despite the fact that after that opinion the Legislature had appropriated more positions for the public defender, the Public Defender for the Tenth Judicial Circuit moved to withdraw from an additional twenty-nine cases. The Second District denied the motion and the public defender appealed to the Florida Supreme Court. Although the Florida Supreme Court reversed the Second District, it held that although courts should not involve themselves in the management of public defender offices, they are not obligated to permit withdrawal automatically upon the filing of a certificate by the public defender reflecting a backlog in the prosecution of appeals. *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991). After *Skitka*, the motions to withdraw persisted in the appellate courts. See *Woods v. State*, 595 So. 2d 264 (Fla. 1st DCA 1992).

Circuit, 636 So. 2d 18 (Fla. 1994). Over the years the request to withdraw from appeals continued. See *Rodriguez v. State*, 700 So. 2d 79 (Fla. 2d DCA 1997). In *In re Public Defender's Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus*, 709 So. 2d 101, 102-03 (Fla. 1998), affirming 793 So. 2d 1 (Fla. 2d DCA 1998)(en banc), after determining that prejudice existed due to defendants having served their prison sentences or completed probation before any appellate briefs were filed, the Court denied the public defender's motions to withdraw, but ordered them not to accept any further appellate cases. In so doing, the Court again recognized the Legislature's authority in reviewing the manner in which the public defenders' offices are managed when it stated:

We strongly believe that there needs to be a long-term as well as a short-term solution, and, in this regard, **we would encourage the creation of a special committee or commission by the legislature to examine the structure and funding of indigent representation in criminal cases.** We firmly believe that this type of delay in the criminal justice process, as illustrated in this case, can be eliminated by a joint effort of all interested parties. This Court is very willing to participate. . . .

709 So. 2d at 104. (Emphasis added).

Parallel to these appellate cases were cases involving certification of conflicts in the trial court by the public defender on grounds other than excessive caseload. In *Babb v. Edwards*, 412 So. 2d 859 (Fla. 1982), the Court had the opportunity to review section 27.53(3), Florida Statutes (1980), which read in the pertinent part:

If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it shall be his duty to certify such fact to the court, and the court shall appoint one or more members of the Florida Bar, who are in no way affiliated with the public defender, to represent those accused.

The Florida Supreme Court stated that under Article V, section 18 of the Florida Constitution, which provided that the duties of the public defender were prescribed by the general law, the Legislature had acted in accordance with this provision when it addressed conflicts of interest arising within a public defender's office in section 27.53(3). *Id.* at 861. The Court then looked at the legislative intent when it determined that the statute required the trial court to appoint other counsel upon a public defender's certification of a conflict of interest without any inquiry by the court on the reasons for the certification. *Id.* at 862. The holding in *Babb v. Edwards* was reaffirmed by the Florida Supreme Court in *Guzman v. State*, 644 So. 2d 996 (Fla. 1994). *See also Nixon v. Siegel*, 626 So. 2d 1024 (Fla. 3d DCA 1993).

In order to address this issue, the Legislature in 1999 amended section 27.53(3), to allow the courts to go behind the public defender's certification of conflict. That amendment provided:

The court shall review and inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential communications. The court shall permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client.

The courts then recognized the Legislature's authority to pass an amendment to the statute which abrogated *Guzman* and *Babb*. *Valle v. State*, 763 So. 2d 1175, 1177 (Fla. 4th DCA 2000). *See also Snelgrove v. State*, 921 So. 2d 560, 566 n.11 (Fla. 2005). Thus, the Legislature had the authority to say that a court was no longer required to accept the public defender's certification of conflict at face value.

After years of paying for the court system and not having a sufficient say in the costs of maintaining the system, in 1998 the counties successfully pushed for the passage of the amendment to Article V, section 14(c) of the Florida Constitution that now requires the State to

pay for the costs of the court system. This provision, which became effective on July 1, 2004, states in the relevant part:

No county or municipality, except as provided in this subsection, shall be required to provide any funding for the state courts system, state attorneys' offices, public defenders' offices, court-appointed counsel or the offices of the clerks of the circuit or county courts performing court-related functions.

Fla. Const. Art. V, s. 14(c). In addition subsection (d) provides that "[t]he judiciary shall have no power to fix appropriations."

In response to the amendment, the Florida Legislature again amended the various provisions of chapter 27 involving the public defenders. Section 27.5303(1)(a), Florida Statutes (2004), provided as follows:

If, at any time, during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. **The court shall review and may inquire or conduct a hearing into the adequacy of the public defender's representations regarding a conflict of interest without requiring the disclosure of any confidential information. 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.** If the court grants the motion to withdraw, the court shall appoint one or more attorneys to represent the accused, as provided in s. 27.40.

(Emphasis added).

Section 27.5303(1)(d) further provided:

In no case shall the court approve a withdrawal by the public defender based *solely* upon inadequacy of funding or excess workload of the public defender....

(Emphasis added). It is clear that the Legislature in passing this statute wanted to avoid what it had seen the counties experience over the prior thirty years with public defender withdrawals for excessive workloads. Thus, the Legislature intended that the court not be required to take the public defenders at their word on conflicts, and it did not want the court to allow a public defender to withdraw from cases only because he or she could not appropriately manage the workload. Other than in 2007 when it added the Office of the Criminal Conflict and Civil Regional Counsel (OCCCRC) to subsection (d), the legislation has not changed in substance.

Beginning in late June 2008, PD-11 filed a Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases Due to Conflict of Interest in all twenty-one criminal divisions, requesting permission to decline appointment in all indigent noncapital felony cases based on a certificate of conflict alleging underfunding which led to excessive caseloads. After an evidentiary hearing before Judge Blake, Administrative Judge of the Criminal Division, in which the State was denied standing (but allowed to participate as *amicus curiae*), an order was entered which found that PD-11's excessive caseload permitted only minimally competent representation and allowed PD-11 to decline all future representation of indigent defendants charged with third degree felonies.

The State appealed. During the time that the appeal in *State v. Public Defender* was pending, the Third District granted the State's request for a stay of Judge Blake's order. After the Third District denied PD-11's request to lift the stay, beginning on or around January of 2009, the PD-11 announced that it was going to be filing Notices of Inadequate Resources and Inability to Adequately and Thoroughly Prepare and Provide Diligent Representation in all of its third degree felony cases where the defendant was not in custody. See Jan Purlow, *11th Circuit PD says his office is at "the breaking point,"* THE FLORIDA BAR NEWS, January 15, 2009. A

copy of a Notice filed by Mr. Kolsky in an unrelated case is attached as Ex. 1. To the State's knowledge, out of the twenty-one criminal divisions in the Eleventh Judicial Circuit, only two PD-11 clients have requested that the public defender's office be discharged because of what was in the Notice. Both of those cases arose before the Third District's opinion in *State v. Public Defender*, and in both cases the motions were granted after the trial courts found, based on the testimony of the defendants and the assistant public defenders, that discharge was necessary because the assistant public defenders were providing ineffective assistance to those two particular clients.⁵

On appeal, the Third District found that not only did the State have standing to oppose the PD-11's motions, but that the trial court erred in granting the relief. *State v. Public Defender*, 12 So. 3d 798 (Fla. 3d DCA 2009). The Third District held that it did not believe that "a magic number of cases exists where an attorney handling fewer than that number is automatically providing reasonable competent representation while the representation of an attorney handling more than that number is necessarily incompetent." *Id.* at 801-02. The Court further held that "determining conflicts of interest for an entire Public Defender's Office based on aggregated

⁵ In the first case, *State v. Annette Vadi*, F08-42459B, under very leading questions by the court, the defendant asserted under oath before the court that she felt that the assistant public defender was not doing what she needed to be doing on her case and that she would not get good enough advice to make any decisions about her case. (Ex. 3, at p. 7). The court granted the Motion based on the assistant public defender's inability to work on the case as requested by the defendant in conjunction with Judge Blake's order. (Ex. 3 at pp. 8-9). In the second case, *State v. Mario Escoto*, F09-2454, also under extremely leading questions by the court, the defendant testified that he wanted another attorney because the assistant public defender did not have the time to research his case for trial, had not taken depositions, and had not interviewed witnesses that he had. Based on all of that, along with the assistant public defender's statements that she had not investigated the case at all, the court granted the Motion finding that the public defender was not rendering effective assistance. (Ex. 4 at pp. 6-9). The State did not "appeal" these orders because they were limited in scope, and the State was awaiting the Third District's opinion in *State v. Public Defender*. It is questionable as to whether the vague testimony as adduced in these cases would meet the requirements of a showing of prejudice or conflict as is now required by *State v. Public Defender*.

calculations is extremely difficult without first having considered individual requests for withdrawal in particular cases.” *Id.* at 802. The Third District, in addressing the PD-11’s claims concerning their ethical obligations under the Rules Regulating the Florida Bar, held that this claim of an aggregate excessive caseload fails to consider the varying education and experience that enables each attorney to handle different caseloads, as well as the disparity of time demanded depending on the type and complexity of a particular case. As such, the determination of whether or not a conflict exists under the Bar Rules must be made on an individual basis. *Id.* at 803.

Finally, the Third District addressed section 27.5303(1)(d), Florida Statutes and found that it was applicable to the PD-11’s Motion, holding that the Motion had to be treated as a motion to withdraw despite its wording as a motion to decline future appointments. The Court held that “[t]hat is not to say that an individual attorney cannot move for withdrawal when a client is, or will be, prejudiced or harmed by the attorney’s ineffective representation. However, such a determination, absent individualized proof of prejudice or conflict other than excessive caseload, **is defeated by the plain language of the statute.**” *Id.* at 805. (Emphasis added).

Despite the clear and consistent appellate opinions looking to the express language of the statute and the guidance provided by the Legislature in determining the duties of the public defender including conflicts, the PD-11 continued to file Notices of Inadequate Resources and Inability to Adequately and Thoroughly Prepare and Provide Diligent Representation in both this division and other divisions in the circuit court. Again, the State is aware of only two cases in the criminal divisions in which their clients have requested that the PD-11 be removed from representation. With this backdrop, the PD-11, through Mr. Kolsky, has filed the pending motions.

2. Facts of the Present Case

The defendant in this case was arrested on June 10, 2009, and charged with sale of cocaine within 1000 feet of a school and possession of cocaine with intent to sell or deliver. At his first appearance hearing on June 11, 2009, he was declared indigent and the PD-11 was appointed to represent him. A written plea of not guilty was entered for the defendant by the public defender. The defendant was released on a bond of \$7500. On July 1, 2009, at arraignment, the State filed an information charging the defendant with one count of sale of cocaine within 1000 feet of a public park. At that time the PD-11 assigned the case to Assistant Public Defender Jay Kolsky. The State also filed a Notice of Enhancement because the defendant qualified as a habitual felony offender, and requested an increase of the bond. At Mr. Kolsky's request, the State provided discovery which listed five witnesses and a confidential informant.⁶ On July 13, 2009, a bond of \$7500 was reinstated and the defendant has remained free on bond pending the disposition of the charges. A sounding has been scheduled for October 22, 2009, and trial has been scheduled for November 2, 2009, about thirty days before the expiration of the 175 day speedy trial period under Fla.R.Crim.P. 3.191. Other than the present Motion to Withdraw, the court file does not reflect Mr. Kolsky having filed any pleadings. The pleadings and court file are silent on whether the defendant wants Mr. Kolsky and/or PD-11 discharged as his attorney.⁷

⁶ Those witnesses included three police officers, the chemist and the person who would testify about the public park.

⁷ At the last status hearing on this case on August 28, 2009, PD-11 indicated that Rory Stein, the Executive Assistant Public Defender, had contacted the defendant who indicated that he did want the PD-11 discharged as his counsel, and that he would be filing an affidavit to that effect. The State submits that if such occurs, which has not at the time of the preparation of this Response, then this Court must have a hearing under *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973), to determine if the alleged ineffective assistance of counsel stems from a "conflict" due solely to the alleged excessive workload. If that is the case, the State submits that the Court must deny the

At the time of the filing of his Motion to Withdraw, Mr. Kolsky indicated that he had a caseload of 164 pending "C" felony cases. As this Court is aware from the initial status hearing in this case, PD-11 indicated that Mr. Kolsky intended on seeking to withdraw, not only in this case, but in approximately 48 other cases alleging the same grounds. However, since the Motion to Withdraw was filed, as of August 28, 2009 (the cutoff date which the parties agreed to use for determining caseload), Mr. Kolsky's caseload had dropped to 105 cases, which involve 86 different clients according to the documents sent by PD-11 to the State. See Ex. 2.

ARGUMENT

A.

Withdrawal Should Not Be Permitted Where Mr. Kolsky Has Not Shown that His Alleged Excessive Caseloads Are Infringing Upon His Clients' Sixth Amendment Right to Effective Assistance of Counsel.

PD-11, through Mr. Kolsky, asserts that due to his excessive caseloads, he will be providing ineffective assistance to his clients in that he will be violating various Rules Regulating the Florida Bar, i.e., Rules 4-1.1, 4-1.3, and 4-1.4, which generally concern providing competent representation, exercising diligence and communicating with the client. The PD-11 also asserts that the excessive caseloads also create a conflict under Rule 4-1.7 which states that an attorney "shall not represent a client if...there is a substantial risk that the

Motion to Discharge the Public Defender unless the defendant and/or public defender 1) can provide specific instances in which he has not been able to prepare the defendant's case, and 2) will not be able to do so within a reasonable time. This Court must also inform the defendant at a minimum that the granting of this Motion does not guarantee that he will receive a new attorney who is as experienced as Mr. Kolsky or who would be able to provide the assistance that the defendant requests in a timelier manner. One wonders what would happen if all the efforts that PD-11 has put into this Motion to Withdraw had been applied to its representation of the defendant in this case.

representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client....” PD-11 asserts that these violations of the bar rules will inevitably lead to Mr. Kolsky providing assistance of counsel which falls below an objective standard of reasonableness required by the Sixth Amendment.

Due to the language used in this Motion to Withdraw it appears that PD-11, through Mr. Kolsky, is attempting to withdraw, not just from this one case, but from a significant number of his cases. In support of its Motion, the PD-11 cites to various “recognized maximum caseload standards.” However, as stated by the Third District in *State v. Public Defender*, “[w]e acknowledge the difficulty in selecting a single ‘correct’ standard and do not believe that a magic number of cases exists where an attorney handling fewer than that number is automatically providing reasonably competent representation while the representation of an attorney handling more than that number is necessarily incompetent.” 12 So. 3d at 801-02. Thus, whether Mr. Kolsky’s caseload exceeded some recognized standards has little relevance, because the numbers by themselves have no meaning without considering whether Mr. Kolsky is capable of providing effective representation to his clients.⁸

⁸ It has been recognized that the assumptions and estimates that formed the basis for these standards nearly 35 years ago may have little to do with the practice of criminal law in a particular jurisdiction today. The State Bar of California, *Guidelines in Indigent Defense Services Delivery Systems*, 27 (2006). (Ex. 5). Caseload standards by organizations should merely be the first step in evaluating an attorney’s workload. “The second starting point is a case-weighting study, in which caseload/workload standards are developed to reflect the actual cases handled in a particular jurisdiction.” See U.S. Department of Justice, Office of Justice Programs, Bureau of Justice Assistance, *Keeping Defender Workloads Manageable*, 7 (Jan. 2001) (Ex. 6). Examples of studies from other jurisdictions show ranges in the numbers of from 241 in Colorado and 302 in Tennessee to 120 in Minnesota. MGT of America, a firm consulting for the Florida Legislature, also recommended that it conduct “studies to establish public defender workload standards and funding formula” and noted, “[t]here are several reasons why new workload standards and funding formula should be developed. First, the results generated by the current methodology lack credibility. Second, public defender processes have changed significantly since 1973 when the original studies were conducted, particularly because of

Similarly, a determination of whether Mr. Kolsky's continued representation of his clients violates various Rules Regulating The Florida Bar must be made on an individual basis. *State v. Public Defender*, 12 So. 3d at 803.⁹ In its analysis of ineffective assistance of counsel claims, the United States Supreme Court has noted that the prevailing professional standards for determining whether counsel has provided reasonable assistance to his or her client "are only guides," and that no unified set of rules can account for the myriad situations that might arise. *Strickland v. Washington*, 466 U.S. 668, 688-89 (1984) (citation omitted). The Court also noted that the purpose of the effective assistance guarantee "is not to improve the quality of legal representation. . . . The purpose is simply to ensure that criminal defendants receive a fair trial." *Id.* Just a few years later, the Court elaborated that "the breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel." *Nix v. Whiteside*, 475 U.S. 157, 165 (1986). Thus, even when defense counsel has actually violated ethics rules, courts have generally required evidence of prejudice before concluding that these violations rendered counsel's assistance ineffective. The Florida Supreme Court, in holding that a contingent fee contract in a criminal case was "improper and unethical," concluded nonetheless that "it does not alone establish denial of effective assistance of counsel." *Downs v. State*, 453

technology's impact. And third, the standards and formula should reflect Florida's laws, organization, policies and procedures rather than a set of assumptions that can generally apply across the country." MGT of America, *Implementation of Revision 7 to Article V of the Florida Constitution, Phase Two Report*, Recommendation 2.1-3, p. 2-17 (March 11, 2003) (Ex. 7). The State submits that the mere numbers reflected by an attorney's caseload must be adjusted in some fashion to objectively evaluate an individual's workload. Without a true workload study, the PD-11 cannot establish that there is an "excessive workload" that requires the trial court to relieve Mr. Kolsky/PD-11 of its representation in these cases. Notwithstanding the cites to the various recognized maximum caseload standards, the PD-11 had not recommended a specific standard that it believes this Court should adopt in evaluating the workload issues in this case.

⁹ If a conflict does exist under the Bar Rules, the individual attorney could move to withdraw when the client is, or will be, prejudiced or harmed by the attorney's ineffective representation. *Id.* at 805-06.

So. 2d 1102, 1109 (Fla. 1984). Rather, counsel's unprofessional conduct was "one factor to be considered by the trial court under the totality of the circumstances" and the defendant must prove "that this agreement affected trial counsel's representation" to establish a claim of ineffective assistance. *Id.*

The Motion to Withdraw, and the Affidavits attached to the Motion as Appendix F, assert that in this case involving the defendant, Antoine Bowens, Mr. Kolsky has been unable to perform an enumerated list of actions. See Appendix F, paragraph 5, items a through m. Mr. Kolsky then asserts that the defendant will be prejudiced by his inability to be ready for trial as he may have to seek a continuance, his inability to demand a speedy trial, and his inability to effectively counsel the defendant about the case or any plea offer the State makes.¹⁰

The Motion to Withdraw should be denied because Mr. Kolsky's Affidavit on its face demonstrates that he will be able to provide effective assistance of counsel to the defendant prior to the sounding and trial in this case. Paragraph 9 of the Affidavit states "I do not foresee being ready for trial on this case or to have the ability to provide effective assistance of counsel regarding a plea offer for three to four months, depending on how many other cases I am handling and clients I am representing." At the time of the execution of the Affidavit, Mr. Kolsky's caseload was 164 cases. As of August 29, 2009, (the cutoff date agreed to be used for the purposes of this motion), his caseload was 105 cases. Sounding in this case is scheduled for October 22, 2009, and trial for November 2, 2009, a time within the three to four months that Mr. Kolsky has stated he would be ready to either counsel his client on a plea or go to trial. Due to the fact that Mr. Kolsky's caseload has been drastically reduced, and that the trial date is not

¹⁰ This affidavit is clearly a form affidavit drafted to apply to all public defender clients whose cases PD-11 wishes to withdraw from due to the alleged excessive caseloads in that in paragraph 7 of the affidavit, the defendant is described as "him/her."

scheduled until a time period in which Mr. Kolsky has stated he can prepare for the trial without even having to request a continuance, and that the defendant still would get the benefit of a speedy trial as set forth in rule 3.191, Mr. Kolsky cannot establish prejudice to his client. The vague reference to “depending on how many other cases” Mr. Kolsky is handling and clients he is representing is not the required “meaningful and individualized information” or showing that would provide sufficient legal grounds to require this Court to grant his Motion to Withdraw under section 27.5303(1), Florida Statutes, (2009).¹¹ See *State v. Public Defender*, 12 So. 3d 798, 802 (Fla. 3d DCA 2009). In fact, PD-11 admits as much when it states in its Memorandum of Law at page 9, that “but for the language of section 27.5303(1)(d),” Florida Statutes, which limits withdrawal based “solely” on excessive workload, “the granting of the Motion to Withdraw would be automatic.” The facts as set forth in Mr. Kolsky’s affidavit, if true, are nothing but general workload issues. They do not show that any conflict that may be present due to Mr. Kolsky’s present caseload would prejudice the defendant in this case.

As previously stated, Mr. Kolsky did not file a Notice of Inadequate Resources and Inability to Adequately and Thoroughly Prepare and Provide Diligent Representation in this case as he had done in other cases. There is no affidavit or any request by the defendant in this case

¹¹ Under the facts as alleged in the Motion to Withdraw, the PD-11 apparently felt that Mr. Kolsky could handle a caseload of approximately 115 cases. His present caseload is 105 cases (involving 86 different clients), which is less than 115. Despite this drastic reduction in caseload, at the status hearing on August 28, 2009, the PD-11 stated that its new “magic number” for caseload was somewhere in the sixties and seventies. At this time it is unknown how PD-11’s position will vacillate again depending on the facts. With this substantially reduced caseload why could not PD-11 find other attorneys to be assigned to those allegedly excessive number of cases?

This Court has indicated that the evidentiary hearing to be conducted will be limited to Mr. Kolsky’s workload as it relates solely to Mr. Bowens’ representation. If this Court determines that relief is warranted on more than this individual case, then the state submits that a broader evidentiary hearing will be required to evaluate “the internal administration of PD11” and any efforts to alleviate the concerns regarding Mr. Kolsky’s workload. See *State v. Public Defender*, 12 So. 3d at 806.

in which he asserts that he is unhappy with Mr. Kolsky's representation of him, or that he wants a speedy trial in his case. It may very well be in the defendant's best interest, due to the amount of prison time he is facing if he is convicted in this case, that he remain free on bond for as long as possible. Thus, without any indication from the defendant that he wants a trial sooner than when Mr. Kolsky can be prepared, Mr. Kolsky/PD-11 has failed to assert any prejudice that the defendant would suffer due to the asserted conflict presented by the asserted excessive caseload. Furthermore, the State would note that in the Motion to Withdraw and Affidavit, neither Mr. Kolsky or PD-11 allege any specific felony cases in which one of Mr. Kolsky's clients was afforded relief on the basis of ineffective assistance of counsel due to excessive caseloads.

The proper focus of this Court is to ensure that indigent defendants receive a fair trial under the constitution, and not whether Mr. Kolsky/PD-11 risks violating the Rules of Professional Conduct due to high caseloads. Potential ethical violations that are shown to be attributable to excessive caseloads or workload are the starting point, and not the ending point, in analyzing whether counsel should be permitted to withdraw in overload conflicts. Mr. Kolsky's affidavits are general in nature and entirely devoid of any factual basis that he has provided or is providing ineffective assistance of counsel. Mr. Kolsky/PD-11 must establish on a case by case basis that he is not and cannot adequately represent his clients.¹² He has not established that in

¹² Examples of the type of prejudice that can be shown on an individual basis are those found in *Scott v. State*, 991 So. 2d 971 (Fla. 1st DCA 2008) and in *Hagopian v. Justice Administrative Commission*, 34 Fla.L.Weekly D1625 (Fla. 2d DCA Aug. 12, 2009) which the court termed an extraordinary case. In *Scott*, the public defender had a clear and recognized conflict of interest because the public defender's office represented the confidential informant whose sentence was reduced based on the substantial assistance provided which led to the gathering of evidence against Scott. In *Hagopian*, Hagopian was a private attorney who was involuntarily appointed to represent a defendant in a large and complicated RICO prosecution. He moved to withdraw and was joined by the defendant in that request who had been awaiting the appointment of counsel for three months. The testimony, which was uncontradicted at the hearing on the motion to withdraw, established that the involuntary appointment would have a devastating impact on

this case. Without that showing, this Court should deny Mr. Kolsky/PD-11's Motion to Withdraw, without the need to address the constitutionality of section 27.5303(1)(d), Florida Statutes.

B.

Section 27.5303(1)(d), Florida Statutes, is Constitutional

1. Section 27.5303(1)(d) Does Not Violate the Separation of Powers By Interfering With the Inherent Authority of Courts.

PD-11 asserts that section 27.5303(1)(d) is unconstitutional as applied to Mr. Kolsky's Motion because it interferes with the inherent authority of courts to enter orders necessary to carry out their constitutional authority. Section 27.5303(1)(d) states that a court shall not approve a withdrawal by the public defender "based *solely* upon inadequacy of funding or excessive workload of the public defender." (Emphasis added). PD-11 although quoting the statute, in its arguments, totally ignores the word "solely." That word cannot be ignored because the Legislature clearly intended to give that word meaning when it included it in the statute. In primarily determining the effect and purpose of a statute, the courts must first examine the actual words used in the statute and determine the plain meaning of the words. *Calabro v. State*, 995 So. 2d 307, 314 (Fla. 2008). When a word is not specifically defined in a statute, it is appropriate to refer to dictionary definitions for the plain meaning of the word. *School Board of*

Hagopian's law practice, and that he would not be able to provide his existing clients with competent representation if he was forced to represent the defendant in this RICO case. The Court in reversing the trial court's order denying Hagopian's motion to withdraw, stated that its decision was based on the unusual complexity of the RICO prosecution combined with the ruinous effect the involuntary appointment would have on Hagopian's solo law practice. These factors are clearly not present in this case involving the defendant and Mr. Kolsky. In fact, far from a solo law practice, there are numerous lawyers employed by the PD-11 who could assist in handling the cases of the eighty-six (86) defendants, Mr. Kolsky represents as of August 28, 2009. Furthermore, these third degree felony cases that are the subject of this Motion to Withdraw are generally routine and not the complicated RICO case as was present in *Hagopian*.

Palm Beach County v. Survivor Charter Schools, Inc. 3 So. 3d 1220, 1233 (Fla. 2009). “Solely” is defined in *The American Heritage Dictionary* 1163 (2d College Ed. 1985), as: “1. Alone, singly: *solely responsible*. 2. Entirely; exclusively: *did it solely for love*.” (Emphasis original).

When the word “solely” is given its proper meaning, it is clear that section 27.5303(1)(d) is consistent with the preservation of a court’s inherent authority because the Legislature has not foreclosed claims based on an actual showing of prejudice in conjunction with workload data. In other words, the constitutionality of the statute is preserved because it does not foreclose judicial relief, in the proper case, where actual prejudice to constitutional rights is adequately demonstrated. This is precisely how the Third District interpreted the statute in *State v. Public Defender*, 12 So. 3d at 805-06, when it stated:

That is not to say that an individual attorney cannot move for withdrawal when a client is, or will be, prejudiced or harmed by the attorney’s ineffective representation. However, such determination, absent individualized proof of prejudice or conflict other than excessive caseload, is defeated by the plain language of the statute.

* * *

“We believe that within the existing statutory framework there exists a method for resolving the problem of excessive caseload.” [citation omitted] Only after an assistant public defender proves prejudice or conflict, separate from excessive caseload, may that attorney withdraw from a particular case. [S.] 27.5303(1)(a), Fla. Stat. (2007) (“The court shall deny the [assistant public defender’s] motion to withdraw if the court finds the grounds for withdrawal are insufficient or the asserted conflict is not prejudicial to the indigent client.”).

Thus, the statute as interpreted by the Third District does not intrude on the judiciary’s inherent ability to do all things that are reasonably necessary for the administration of justice, including ensuring adequate representation by competent counsel. In this case, the statute is not

unconstitutional as applied because Mr. Kolsky has not shown that his workload has caused prejudice or a conflict¹³ to the defendant in this case.

Although, the Motion purports to apply to the individual defendant in this case, it is clear that the PD-11 is applying it across the board to a significant number of Mr. Kolsky's assigned clients because the Motion makes no attempt to explain how the defendant here has been prejudiced. Even in Mr. Kolsky's affidavit he discussed generally how his caseload affects his allocation of time as to all of his clients and not what he has or has not been able to do for the defendant in this case and how that has prejudiced the defendant. This case can be contrasted with what occurred in *State v. Escoto*. In that case, Mr. Escoto specifically requested that the assistant public defender be removed as his counsel because of her inability to work on the case, including, speaking to witnesses who Mr. Escoto had. In that case there was at least an attempt by the PD-11 (although they did not move to withdraw, but rather had the client move to discharge them), to demonstrate some kind of tangible prejudice to the client. Here, the Motion is premised on purported violations of or imminent threats to the constitutional rights of the indigent criminal defendants that the PD-11, through Mr. Kolsky, represents. The Motion however is devoid of any allegations that any indigent defendant has suffered or will suffer any

¹³ The Legislature, within section 27.5303, gave guidance as to what constitutes a conflict of interest, when in subsection (1)(e) it provided that: "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 found by the Third District in *State v. Public Defender*, "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. 12 So. 3d at 804. These are the types of conflicts which the United States Supreme Court found in *Holloway v. Arkansas*, 435 U.S. 475, 486 (1978), that indicated the courts should give deference to an attorney statement of conflict. However, even the Court in *Holloway* stated that the courts had the authority to look into and "explore the adequacy of the basis for defense counsel's representation regarding a conflict of interest." *Id.* at 487. This is consistent with section 27.5303(1)(a).

specific prejudice due to Mr. Kolsky's caseload. As such, the statute is not unconstitutional as applied.

2. Section 27.5303(1)(d) Does Not Violate Separation of Powers By Impermissibly Legislating Upon Matters of Practice and Procedure.

The State submits that section 27.5303(1)(d)'s prohibition on withdrawal based *solely* on allegations of excessive workload does not violate the separation of powers by impermissibly legislating upon matters of practice and procedure. It is the Legislature which has the authority to determine whether the public defender can represent an indigent person in a particular action. In *FACDL*, 978 So. 2d at 141, the Florida Supreme Court stated that the Florida Constitution "clearly and unequivocally grants the Legislature the authority to control the duties to be performed [by the public defenders], which naturally includes the types of cases for which public defenders are appointed." The State submits that the authority to control the duties of the public defender includes the authority to delineate the circumstances under which a public defender may withdraw.

As demonstrated at pages 2-8 of this Response, the Florida Supreme Court has consistently looked at the language of the statutes governing the public defenders to determine whether the court had the authority to allow the public defender to withdraw. See *Babb v. Edwards*, 412 So. 2d 859, 861-862 (Fla. 1982), where the Florida Supreme Court found that within the Legislature's authority to prescribe the duties of the public defender is the authority to prescribe when there is a conflict presented that would allow the public defender to withdraw from a case.

Subsequently, in *Valle v. State*, 763 So. 2d 1175 (Fla. 4th DCA 2000), the public defender argued that the 1999 amendment to former s. 27.53(3) which allowed a court to review and conduct an inquiry into the adequacy of the public defender's motion to withdraw was

unconstitutional as it violated Article V, Section 2 of the Florida Constitution providing that the “supreme court shall adopt rules for the practice and procedure in all courts.” The Fourth District held that because the Florida Constitution also provided that the public defenders “shall perform duties prescribed by general law,” the legislature had the authority to adopt the amendment. *Id.* at 1177. Thus, the Legislature does not violate the separation of powers clause by simply setting forth under what circumstances a court should permit the public defender to withdraw from its legally required representation.

3. Section 27.5303(1)(d) Does Not Violate Mr. Kolsky’s Client’s Sixth Amendment Right to Effective Assistance of Counsel.

For the reasons set forth above, the statute does not violate Mr. Kolsky’s clients’ right to effective assistance of counsel.

4. Section 27.5303(1)(d) Does Not Violate Mr. Kolsky’s Clients’ Right of Access to Courts.

PD-11 asserts that if Mr. Kolsky is not permitted to withdraw based on excessive workload, then his clients will have their rights to access of the courts significantly limited. PD-11 bases that conclusion on its statement that “Indigent defendants must rely on their assistant public defenders to represent them in court. Courts will not consider pro se pleadings of a represented defendant.” See Memorandum of Law at p. 13. Although that is a generally correct statement of the law, there is an exception, i.e., if the client is not satisfied with the representation which he or she is receiving from his or her court appointed counsel, including the public defender, the client can ask the court to discharge counsel. Once that occurs, the court must conduct a *Nelson*¹⁴

¹⁴ *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973). In fact, the defendant does not always have to specifically request that his counsel be discharged. In *Sheppard v. State*, 34 Fla. L. Weekly S477 (Fla. Aug. 27, 2009), the Florida Supreme Court held that a pro se motion to withdraw a plea under Fla. R. Crim. P. 3.170 (1) filed by a represented defendant should not be stricken as a nullity regardless of whether the defendant has requested that counsel be discharged

inquiry to determine what the basis for the request is, and whether counsel is providing effective assistance.

In some of Mr. Kolsky's pending cases he has filed Notices of Inadequate Resources and Inability to Adequately and Thoroughly Prepare and Provide Diligent Representation. In that Notice Mr. Kolsky informs the client that "[d]ue to inadequate resources and an excessive workload and competing obligation in other cases, [he] will not be able to timely and effectively investigate this case, locate and interview witnesses, take depositions, and otherwise prepare this third degree felony case in a timely manner, thereby necessitating a continuance request, which would result in a waiver of the client's right to a speedy trial." What is interesting is that he **did not** file such a Notice in the present case. There is no affidavit or any request by the defendant in this case in which he asserts that he is unhappy with Mr. Kolsky's representation of him, or that he wants a speedy trial in his case. It may very well be in the defendant's best interest, due to the amount of prison time he is facing if he is convicted in this case, that he remain free on bond for as long as possible. Thus, without any indication from the defendant or any other client, that he or they want a trial sooner than when Mr. Kolsky can be prepared, then PD-11 has failed to allege or show how section 27.5303(1)(d) violates this defendant or any of Mr. Kolsky's other clients' right to access to the court.

if the motion alleges grounds giving rise to an adversarial relationship between himself and counsel. "[T]he trial court in these circumstances is required to conduct a limited inquiry to determine whether an adversarial relationship exists such that defense counsel can no longer continue to represent his or her client at a hearing in which counsel will likely be an adverse witness." *Id.*

5. PD-11 Has Not Established Entitlement to a Declaratory Judgment.

The PD-11 is in effect asking that this Court enter a declaratory judgment that the statute, section 27.5303(1)(d) be held unconstitutional.¹⁵ PD-11 has not met the standard for testing the sufficiency of a declaratory judgment. Statutes are presumed to be constitutional, and it is the burden of the party challenging its constitutionality to prove the invalidity beyond a reasonable doubt. *FACDL*, 978 So. 2d at 139. Furthermore to obtain a declaratory judgment, PD-11 must meet the requirements set forth in *May v. Holley*, 59 So. 2d 636, 639 (Fla. 1952):

Before any proceeding for declaratory relief should be entertained it should be clearly made to appear that there is a bona fide, actual, present practical need for the declaration; that the declaration should deal with a present, ascertained or ascertainable state of facts or present controversy as to a state of facts; that some immunity, power, privilege or right of the complaining party is dependent upon the facts or the law applicable to the facts; that there is some person or persons who have, or reasonably may have an actual, present, adverse and antagonistic interest in the subject matter, either in fact or law; that the antagonistic and adverse interest are all before the court by proper process or class representation and that the relief sought is not merely the giving of legal advice by the courts or the answer to questions propounded from curiosity.

“The question raised must be ‘real and not theoretical’ and the party raising it must have ‘a bona fide and direct interest in the result. The party raising the question must have an “actual, present and practical need for the declaration.” *East Naples Water Syst., Inc. v. Board of County Comm’rs of Collier County*, 457 So. 2d 1057, 1059 (Fla. 2d DCA 1984). The question of

¹⁵ If this is in fact a declaratory judgment action in which the PD-11 is the actual party challenging the statute on its behalf as a governmental entity, then there is a question as to whether PD-11 can challenge the constitutionality of section 27.5303(1)(d). Although generally a public official does not have standing to sue for the purpose of determining whether or not a law that delineates his duties is valid, there is an exception to this rule when the law requires an expenditure of public funds. *Branca v. Miramar*, 634 So. 2d 604, 605-06 (Fla. 1994). The statute itself does not require the expenditure of public funds. The expenditure of public funds has already occurred by the initial legislative appropriations to the public defender.

whether section 27.5303(1)(d) is unconstitutional because prohibiting the public defender from withdrawing from cases solely based on claims of lack of funding or excessive workload would result in ineffective assistance of counsel, is not a “real” question, is clearly one that is “theoretical” or as Judge Shepherd stated in *State v. Public Defender*, “it’s a political question masquerading as a lawsuit.” 12 So. 3d at 806 (Shepherd, J., concurring). As such it is not proper for a declaratory judgment.

Mr. Kolsky asserts in his Motion to Withdraw that he has an excessive caseload that infringes on his clients’ Sixth Amendment right to effective assistance of counsel. The Motion and Memorandum filed in this case by the PD-11 does nothing more than allege that withdrawal is necessary due solely to an excessive workload for the assistant public defender, which violates the ethical obligations of the assistant public defender under the Florida Bar rules because he would be providing ineffective assistance of counsel to his clients.

Similar declaratory actions have been rejected by other state courts on the basis that there was no justiciable controversy, but rather merely possible or hypothetical injuries, because there was no showing that the public defender clients were actually receiving ineffective assistance of counsel. In *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996), the public defender sought declaratory relief on the grounds that the statute establishing the funding system for the state’s public defenders violated the constitutional rights of indigent criminal defendants to the effective assistance of counsel. The Minnesota Supreme Court held that the public defender did not establish “injury in fact,” i.e. that the public defender’s clients were actually receiving ineffective assistance of counsel and that their Sixth Amendment rights had been violated in any identifiable way. The Court stated that to the contrary, the evidence showed that the public defender’s office was well respected, that it was well-funded compared to other public defender offices, and its

attorneys had faced no claims of professional misconduct or malpractice. 544 N.W.2d at 6-7. See also *Platt v. State*, 664 N.E. 2d 357 (Ind. Ct. App. 1996)(court rejected action challenging public defender system on grounds that claim that it provided ineffective assistance of counsel as issue was not ripe for judicial review absent showing that anyone was prejudiced by unfair trial); *Whatley v. Terry*, 668 S.E. 2d 651 (Ga. 2008); *Osborne v. Terry*, 466 F.3d 1298, 1315 n.3 (11th Cir. 2006); *Coleman v. State*, 703 N.E. 2d 1022, 1040-41 (Ind. 1998) (vague statistics or general allegations relating to attorney's caseload has been held to be insufficient to establish that attorney provided ineffective representation).¹⁶

In his Motion, Mr. Kolsky does not allege any specific felony cases in which one of his clients was afforded relief on the basis of ineffective assistance of counsel due to excessive caseloads. By contrast in *In re order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1131-32 n.2 & 3 (Fla. 1990), there was a showing that

¹⁶ Other cases include *Stephan v. Smith*, 747 P.2d 816, 831 (Kan. 1987) (“Simply because the system could result in the appointment of ineffective counsel is not sufficient reason to declare the system unconstitutional; those rare cases where counsel has been ineffective may be handled and determined individually. . .”). Even in states where courts have found system-wide violations of the Sixth Amendment right to counsel, using a *Strickland* analysis, the courts have required individualized examinations of each case before permitting withdrawal or determining counsel ineffective. See, e.g., *State v. Peart*, 621 So. 2d 780, 788, 791 (La. 1993) (although system did not always provide constitutionally-guaranteed effective assistance of counsel, trial courts must examine indigent defendants’ claims case by case, because “any inquiry into the effectiveness of counsel must necessarily be individualized and fact-driven”).


The PD-11 relies on the case of *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), for the proposition that the determination of whether there is effective assistance of counsel due to excessive caseload is independent of the analysis for effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). However this case was a civil suit seeking injunctive relief. PD-11 has never agreed to the proposition that this litigation is in fact a civil lawsuit. Thus, even if the standard set forth in *Luckey* was the correct standard to be applied in civil actions, it is not the standard to be applied in this criminal case. Furthermore, *Luckey* involved allegations that the systematic delay in the appointment of counsel left defendants with the complete denial of counsel at critical stages of the proceedings, as well as a claim that there was a systematic denial of the right to assistance of necessary expert witnesses, a far cry from the facts alleged in this case.

numerous public defender clients had suffered prejudice in having appeals dismissed or having served their prison time before an appeal had been lodged. Thus, the PD-11 has not met its burden to establish its entitlement to a declaratory judgment and this Court should reject the PD-11's attempt to obtain a declaratory judgment regarding the constitutionality of section 27.5303(d).

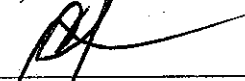
Wherefore, based on the foregoing, the State respectfully requests that this Court, after the hearing, deny the Assistant Public Defender's Motion to Withdraw and Declare Section. 27.503(1)(d), Florida Statutes Unconstitutional.

Respectfully submitted,

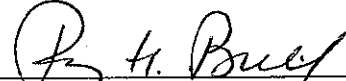
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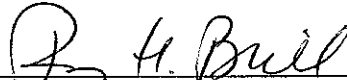
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was sent to Parker D. Thomson, Esquire, Julie E. Nevins, Esquire, and Matthew R. Bray, Esquire, Hogan & Hartson LLP, Attorneys for the Public Defender, 1111 Brickell Avenue, Suite 1900, Miami, FL 33131; Scott D. Makar, Solicitor General, Office of the Attorney General, The Capitol PL-01, Tallahassee, FL 32399-1050; Richard L. Polin, Bureau Chief, Office of the Attorney General, 444 Brickell Avenue, Suite 650, Miami, FL 33131; Chief Judge Joel Brown, Miami-Dade County Courthouse, 73 West Flagler Street, Miami, FL 33130; Administrative Judge Stanford Blake, Richard E. Gerstein Justice Building, 1351 N.W. 12th Street, Miami, FL 33125; The Honorable John Thornton, Richard E. Gerstein Justice Building, 1351 N.W. 12th Street, Miami, FL 33125; Linda Kelly Kearson, General Counsel, Eleventh Judicial Circuit of Florida, Lawson E. Thomas Courthouse Center, 175 N.W. First Avenue, 30th Floor, Miami, FL 33128; Joseph P. George, Jr., Regional Civil and Criminal Conflict Counsel, 1501 N.W. N. River Drive, Miami, FL 33125; Stephen Presnell, General Counsel, Justice Administration Commission, P.O. Box 1654, Tallahassee, FL 32302, and Carlos Martinez, Public Defender and Jay Kolsky, Assistant Public Defender, 1320 N.W. 14th Street, Miami, FL 33125, on this 11th day of September, 2009.



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Assistant State Attorney