

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT, STATE OF FLORIDA**

THE STATE OF FLORIDA & OFFICE OF
CRIMINAL CONFLICT and REGIONAL
COUNSEL, THIRD DISTRICT COURT
OF APPEAL REGION,

Appellants,

v.

No. 3D08-2272

3D08-2537 (Consolidated)

PUBLIC DEFENDER, ELEVENTH
JUDICIAL CIRCUIT,

Appellee.

**STATE OF FLORIDA'S RESPONSE
TO MOTION TO CERTIFY**

The State of Florida responds to the Motion to Certify Questions of Great Public Importance of the Public Defender, Eleventh Circuit (PD-11), which should be denied for three reasons.

First, certification is unnecessary in light of this Court's application of Florida Supreme Court precedents¹ that require evidence of sufficient prejudice to a criminal defendant's constitutional rights to warrant a public defender's

¹ See, e.g., 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 (Fla. 1998); In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990).

withdrawal from representation. As this Court noted,² no such evidence (other than anecdotal evidence)³ exists in this record thereby justifying no further appellate review in this matter. Given this Court's indication that PD-11 is free to make such an evidentiary showing below anew, the better course is for PD-11 to follow the path this Court has set and avoid presenting the Florida Supreme Court with numerous questions that need not be addressed at this time.

Second, five of the six questions posed are phrased in terms of PD-11's *workload*, a concept that the evidence below did not address. PD-11 did not present workload analysis; instead, it relied solely upon caseload analysis.⁴ Given the lack of the development of requisite workload analysis below, PD-11 is asking the Court to certify questions related to workload it has not ruled upon directly, which is not a basis for invoking the Supreme Court's jurisdiction. *See, e.g., Gee v. Seidman & Seidman*, 653 So. 2d 384, 385 (Fla. 1995) (Court lacks jurisdiction to review certified questions the district court did not address).

² *See State v. Pub. Defender, Eleventh Judicial Circuit*, No. 3D08-2272, slip op. at 15 (Fla. 3d DCA May 13, 2009) ("Only after an assistant public defender proves prejudice or conflict, separate from excessive caseload, may that attorney withdraw from a particular case.").

³ *Id.* at 8 ("... there was no showing that individual attorneys were providing inadequate representation, nor do we believe this could have been proven in the aggregate, simply based on caseload averages and anecdotal testimony.").

⁴ *Id.* ("... PD11 presented evidence of excessive caseload and no more.").

Finally, PD-11 relies, in part, on this Court's prior pass-through certification, stating that nothing has changed. But the prior certification occurred without the benefit of full briefing and argument, which has now occurred and given this Court a fuller appreciation of the issues that it has resolved. Presumably, this Court would have certified questions if it deemed them warranted. In addition, the State has previously noted that this case involves issues of great importance "to the functioning of the criminal justice system *in the Eleventh Circuit*" but not necessarily on a statewide basis. *See* State's Resp. to Suggestion for Certification 4 (emphasis added). This point is evident in PD-11's unique two-tiered structure⁵ of felony defense, a one-of-a-kind system that makes this case a poor vehicle for further appellate review. The State also noted that other public defenders might pursue relief resulting in appellate decisions from which the Florida Supreme Court would likely benefit due to the input of other district courts, as has occurred in the past. *See, e.g., Escambia County v. Behr*, 384 So. 2d 147, 150 (Fla. 1980) (consolidated cases from two districts); *Fla. Dep't of Agric. & Consumer Serv. v. Haire*, 824 So. 2d 167 (Fla. 2002) (declining jurisdiction). Given these considerations, and that this Court has established legal parameters that need to be

⁵ Pub. Defender, Eleventh Judicial Circuit, No. 3D08-2272 slip op. at 13 n.6. ("PD11 has created a system whereby one set of PD11 attorneys, the Early Representation Unit ('ERU'), represents defendants from first appearance until arraignment, at which time representation shifts to a different set of PD11 attorneys.").

first addressed via factual development in a trial court, certification is not warranted.

For the foregoing reasons, the State of Florida respectfully requests that certification be denied.

Respectfully Submitted,
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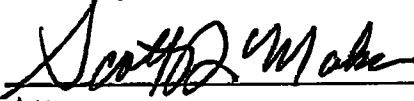
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