

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

CASE NO. 3D08-2272

IN RE: REASSIGNMENT AND CONSOLIDATION
OF PUBLIC DEFENDER'S MOTIONS TO APPOINT OTHER
COUNSEL IN UNAPPOINTED NON-CAPITAL FELONY CASES

THE STATE OF FLORIDA,
Appellant/Petitioner,

v.

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT,
Appellee/Respondent.

INITIAL BRIEF OF STATE OF FLORIDA

On Appeal from an Order of the Eleventh
Judicial Circuit, in and for Dade County, Florida

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STATEMENT OF THE CASE AND FACTS

A. Background.

During late June 2008, the Public Defender for the Eleventh Judicial Circuit (“PD-11”) filed a motion in one designated case in each of the twenty-one criminal divisions within its circuit, seeking prospectively to relieve PD-11 of its responsibility for representing indigent defendants and to appoint other counsel.

[R1 77, 92]¹ Its “Certificate of Conflict of Interest” certified:

that accepting further appointments of noncapital felony cases at this time would create a conflict of interest with previously appointed clients and newly appointed clients in cases other than noncapital felonies. *The underfunding of the Public Defender’s office has created excessive caseloads such that PD-11 cannot ethically or legally accept additional noncapital felony cases at this time until the noncapital felony caseload reaches an appropriate level such that PD-11 can carry out his duties in accordance with the Florida Constitution and the United States Constitution ... and the Rules Regulating The Florida Bar.*

[R1 91 (emphasis added)] As highlighted, PD-11’s sole grounds for declining future representation were “underfunding” and “excessive caseloads” that make additional representation problematic under Bar rules and constitutional protections. By administrative order, the twenty-one cases were consolidated for a hearing before the circuit administrative judge.

¹ Citations to the Record on Appeal are [R*#], where * is the volume number and # is the page number.

B. The Evidence: Caseload, Funding, and Anecdotes.

On July 30-31, 2008, the trial court held an evidentiary hearing on PD-11's motions. [R15-17 2030-2499] PD-11 presented the testimony of seven witnesses: (a) the current public defender, Bennett Brummer; (b) the public defender-elect, Carlos Martinez; (c) Rory Stein, PD-11's general counsel, training director and chief recruiter; (d) Stephen Kramer, a senior supervising attorney for PD-11; (e) Amy Weber, a five-year assistant public defender; (f) Rick Freedman, president of the Miami-Dade County Chapter of the Florida Association of Criminal Defense Lawyers ("FACDL"); and (g) Norman Lefstein, Professor and Dean Emeritus of the Indiana University School of Law-Indianapolis. These witnesses testified about the average caseload of PD-11's attorneys as well as the lack of funds or the difficulties in hiring new attorneys for existing PD-11 openings.

1. Caseload Evidence

Brummer testified that PD-11 is the nation's fourth largest public defender office and has won numerous awards for its work. [R15 2033-34] He stated that underfunding of PD-11 had resulted in caseloads that are excessive, thereby justifying the relief sought. [R15 2072] He identified a number of aspirational felony caseload standards developed as far back as 1973, none of which are approved for use in Florida courts. These include: (a) Florida Bench/Bar Commission (200 cases/year) (1993); (b) Florida Governor's Commission (100

cases per attorney) (1976); (c) Florida Public Defenders' Association (200/250 cases/year)² (2007); and (e) National Advisory Commission on Criminal Justice Standards and Goals (150 cases/year) (1973). Brummer testified that PD-11's caseload "far exceed[s]" national and local caseload standards in each of the twenty-one criminal divisions. [R15 2065]

As to annual caseload standards, Martinez opined that the standard should be less than 150 cases due to more enhanced sentencing statutes, delays with foreign language interpretation, and the need for more time for attorneys to talk to their clients. [R16 2155-56] He stated that defendants are not getting proper representation because they are simply given attractive plea offers that they accept at first appearance to avoid returning to court. [R16 2164]

The average annual caseload statistic upon which PD-11 relied is simply the ratio of the total number of cases assigned to PD-11 in a given year (numerator) divided by the number of attorneys handling the cases (denominator). Under PD-11's approach, the total number of cases includes all cases from first appearance forward, even though the assistant public defenders who ultimately handle non-capital felonies have no involvement prior to arraignment. [R15 2066] Assistant public defenders in the Early Representation Unit ("ERU"), which is funded by

² Over the past three years, the Florida Public Defenders Association Long Range Program Plan stated a felony caseload of 250, which Brummer and Martinez asserted was a typographical error and should be 200. [R15 2086-87; R16 2138]

Miami-Dade County to decrease the jail population, are responsible for representing defendants prior to arraignment, resulting in the early resolution of thousands of cases. [R16 2163-64] Additionally, each charging document is counted as a separate case. [R15 2103] If multiple defendants are on a charging document, each defendant is counted separately. [R15 2104]

Under its methodology, PD-11 determined it was appointed to 45,395 cases in fiscal year 2007-08. [Ex.16, R11 1295] Stein testified that presently the caseload per attorney is 436. [R16 2246] Based on its own data, however, the total number of cases handled by PD-11 *post-arraignment* was only 20,388 in 2007-08. [See Ex. 16, R11 1296] The reason is that thousands of cases were resolved during the initial time period: 7,234 cases were pled at arraignment; 8,171 cases were “no-actioned”; 1,916 cases were bound down to misdemeanors; 1,118 cases were referred to pretrial intervention; 2,586 conflict cases were transferred out; and 3,982 cases were transferred to private attorneys. *Id.* But, taking into account only the 20,388 cases that survive post-arraignment, and the 85³ attorneys that handle these cases post-arraignment, the average annual caseload is around 240.

SAO-11 presented the testimony of Hamilton Davies, Information Systems Director for SAO-11, who did an analysis of database excerpts supplied by PD-11 for fiscal year 2006-07. He found that the total number of PD-11 cases was 35,110.

³ This number does not include the bond and ERU attorneys. [R16 2272]

[R17 2461] Of this total, 27,124 remained with PD-11, and 15,025 (55% of those cases) closed in less than 45 days. [St. Ex. E R15 1991] Moreover, 960 cases closed the same day the public defender was appointed. [R17 2462]

Finally, Professor Lefstein, an expert on ethical issues involving caseloads, testified in support of PD-11. He testified that PD-11's current caseload is "inordinately excessive" for both felonies and misdemeanors. [R17 2399] The numbers were provided to Professor Lefstein by PD-11, and he did not weigh cases differently depending on the amount of work they required. [R17 2423] His professional opinion is that a lawyer should handle no more than 100 felony cases per year. [R17 2405] He did not dispute that national caseload standards are outdated, and that local jurisdictions should adjust those numbers depending upon local practice and technological advances. [R17 79, 141]⁴

2. Funding, Unfilled/Unaccepted Positions, and Anecdotes

Brummer testified generally that he unsuccessfully has sought increased funding from the Legislature a number of times over the years. [R15 2044] He has also sought withdrawal of his attorneys based on underfunding and caseload issues over his tenure. [R15 2080-81] He did not dispute, however, that since 2004, he

⁴ Rick Freedman, President of the Miami-Dade Chapter of FACDL, noted the organization's adoption of a resolution supporting PD-11's motion to withdraw. [R17 2323] He believed that private attorneys would accept overflow cases, but they would sue the state if they were not paid. [R17 2349]

has turned down sixteen full-time attorney positions the Legislature offered to PD-11 because he felt the salaries were insufficient to attract applicants. [R15 2119]

Beyond caseload and funding matters, testimony was given on anecdotes and personal views regarding whether PD-11 was meeting constitutional and ethical standards. Stein, PD-11's general counsel, opined that PD-11 lacks the resources necessary to render effective assistance under the Sixth Amendment. [R16 2233] He stated generally that PD-11 attorneys have second jobs to make ends meet. [R16 2242] Kramer, a senior supervisor, stated that he did not have enough time to fully investigate all of his cases and see all clients. [R16 2285]

Weber, an assistant public defender with five years experience, stated that she currently has 62 felony cases and does not have enough time to discuss all issues with her clients. [R16 2293-95] She would like to do more of her own investigation of her cases, such as going to crime scenes. [R16 2295] She asserted that she is not always able to meet speedy trial demands or file appropriate motions. [R16 2297] She claimed that she does not provide competent representation, giving the example of a defendant to whom she did not convey a plea offer timely because she was in trial on another case. [R16 2300-01]

D. The Trial Court's Order and the Appeal.

On September 3, 2008, the trial court issued its "Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in

Unappointed Noncapital Felony Cases.” [R18 2532] As an initial matter, the court denied SAO-11’s standing. [R18 2534] The court reasoned that it had discretion to deny standing to SAO-11 to challenge claims of conflict of interest. [R18 2533-34] The court allowed SAO-11’s participation as an amicus. [R18 2534]

On the merits, the court held that PD-11 functions “under extreme and excessive caseloads” that conflict with its attorneys’ duties under Florida ethical rules. [R18 2534-35] The court did not explicitly determine what PD-11’s caseload was or what standard applied. The court held that under any standard, PD-11’s caseloads exceed the level that allows for competent representation. [R18 2537] The court found that C-class felony cases, which are third degree felonies and about 60% of all felony filings, are now “clogging the system and negatively impacting PD-11’s felony attorneys’ caseload.” [R18 2535-36]

The court concluded that future appointments to noncapital felony cases “will create a conflict of interest in the cases presently handled by PD-11.” [R18 2537] The court permitted “PD-11 to decline to accept appointments to ‘C’ felony cases until such time as [it] determines that PD-11 is able to resume its constitutional duties with respect to these cases.” [R18 2537] The court further ordered the Office of Criminal Conflict and Civil Regional Counsel for the Third District (“RCC-3”) to accept all C-class felony cases for indigent persons. [R18

2537-38] The court held that if RCC-3 determines that it has a conflict of interest, it can move to withdraw and ask the court to appoint other counsel. [R18 2538]

Under the order, trial judges in the Eleventh Circuit will be required at arraignment of C-class felony cases, pursuant to section 27.511(5), Florida Statutes (2008), to appoint RCC-3 to these cases. [R18 2537-38] The Legislature's purpose in creating the Offices of Criminal Conflict and Civil Regional Counsel was to provide effective representation to indigent persons in a fiscally sound manner. *See* § 27.511(1), Fla. Stat. (2007). RCC-3 has a staff of 22 attorneys assigned to the criminal felony division; a number of attorneys are part-time employees. [R18 2557] If RCC-3 has a conflict with accepting C-class felony cases, a trial judge would then have to appoint private attorneys under section 27.40(2)(a), Florida Statutes (2008). Appointed private counsel would presumably be paid by the Judicial Administration Commission ("JAC") under section 27.5304, Florida Statutes (2007), at additional cost to the state.

The court reviewed PD-11's motion ostensibly under section 27.5303(1), which limits a trial court's authority to allow the public defender to move to withdraw from a pending case. Subsection (1)(d) of that section provides that "[i]n 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."

Nonetheless, the court's order permits PD-11 to be appointed to C-class felonies and then withdraw, shifting the cases to RCC-3. [R18 2537-38]

On September 5, 2008, SAO-11 filed a notice of appeal. [R18 2539-41] PD-11 then filed a Motion for Clarification and/or Notice Pertaining to Case Status, to which SAO-11 responded. [R18 2542-54] RCC-3 moved to intervene and to stay the trial court's order. [R18 2555-60] On September 11, 2008, the trial court granted PD-11's motion, explaining that its definition of "C-felony cases" means only third-degree felony cases. Trial Court Order, Sept. 11, 2008, at 2. The court further explained that it did not consider its prior order as allowing PD-11 to "withdraw" from C-class felonies, but instead considered its order as a temporary appointment of PD-11 to such cases only for first appearance, after which time the cases are to be transferred to RCC-3. Id. at 3.

On September 11, 2008, the State filed an emergency motion to stay the trial court's order, contending that it was either entitled to an automatic stay or, alternatively, that the balance of equities favored a stay. [R18 2554] This Court granted the stay, established a briefing and argument schedule, but later certified this case as presenting issues of great public importance for the Florida Supreme Court's consideration. [R19 2565-67; Case No. 3D08-2272, Sept. 24, 2008 Order] On November 7, 2008, that court dismissed the action for lack of jurisdiction.

SUMMARY OF THE ARGUMENT

The order below, which relieves the fourth largest public defender office in the nation (the largest in Florida) of approximately 60% of its non-capital felony cases due to allegations of underfunding and high caseloads, is erroneous. The issue is not whether public defenders handle a large number of cases (they do) or whether budget constraints have caused increasing workloads in the criminal justice system (they have). Rather, the question to be resolved is by what objective standards and burdens of proof is a trial court to determine when the constitutional rights of indigent criminal defendants to an adequate defense and fair trial are imperiled to such a degree that judicial intervention is warranted. No objective or official standards exist in Florida, leaving trial courts with little guidance in determining when intervention is necessary and what remedy is appropriate.

Given this lack of standards, the order below errs in three ways. First, it failed to follow the legislative structure for the provision of indigent defense by overriding section 27.5303(1)(d), Florida Statutes, which specifically states that courts must not allow public defenders and regional conflict counsel to withdraw from cases “based *solely* upon inadequacy of funding or excess workload of the public defender or regional counsel.” (Emphasis added.) That is precisely what occurred. The court transferred responsibility for 60% of PD-11’s felonies to the regional conflict counsel office when the Legislature did not intend nor fund that

office to handle conflicts arising from claims of underfunding or excessive workload. Courts must give great deference to the Legislature's judgment, and override it only as a last resort upon a conclusive finding that constitutional rights of indigent criminal defendants are being prejudiced. That did not occur below.

Second, the trial court erred in granting relief when the record below contains no evidence (beyond underfunding and caseload data) that PD-11: (a) has fully exhausted every possible avenue of relief including all operating, organizational, and managerial efficiencies including cost-reductions; and (b) has ever provided ineffective representation to its clients, that the Bar has disciplined PD-11 attorneys for ineffectiveness, or that some other indicators exist of actual or imminent Sixth Amendment violations. The caselaw generally requires a showing of actual prejudice to real clients to support withdrawal or transfers of cases from a public defender. Anecdotal beliefs about the quality of indigent representation and speculation about Bar rule violations are inadequate substitutes for a showing of actual or imminent prejudice to the constitutional rights of specific indigent criminal defendants.

Notably, this case differs both qualitatively and quantitatively from those previously addressed in Florida's court system, almost all involving excessive *appellate* caseloads. It is one thing, as the Florida Supreme Court has allowed, to transfer a large number of appellate cases where a public defender failed to file

briefs for over a year, thereby prejudicing the constitutional rights of indigents who had already completed their sentences during this delay. It is another to transfer an estimated 12,000 felony cases yearly from the largest public defender's office in Florida without evidence of any demonstrable prejudice to the constitutional rights of any indigent defendant. If objective evidence shows that an otherwise well-managed and efficiently-run public defender's office has nonetheless resulted in demonstrable prejudice to indigent clients' constitutional rights, a proportionate, narrow, and well-crafted judicial remedy may be warranted. Here, no such evidence was presented and the remedy was exceptionally overbroad.

Third, the trial court erred in relying entirely on the average caseload methodology, which is an inadequate measure for determining whether the Sixth Amendment rights of indigent defendants are being prejudiced. Average caseloads, by themselves, provide little meaningful guidance in resolving the complex trial-level problems presented in this case. Like many statistics, they can be one-dimensional measurements that lack meaning or depth. Moreover, no objective guidepost exists for what average caseload level triggers a constitutional problem. The trial court was left to guesswork, not knowing whether 100, 200, 250, or some other number was the correct standard. Indeed, the court made no finding on the average caseload statistic for PD-11, concluding only that it is "excessive" and beyond recognized standards. The malleability of this standard is itself

problematic, particularly when it cannot explain or predict whether constitutional rights are actually prejudiced. Evidence of actual workloads or weighted caseload data provide greater evidence and explanatory power, and should be considered (along with many other factors) to establish greater objectivity and accountability in this process. Indeed, the adoption of meaningful standards, much like those developed for determining the need for additional judges, provide useful benchmarks and methodologies.

In conclusion, confidence in the indigent criminal defense system is enhanced when the protection sought for constitutional liberties is objectively justified and based on accepted standards of accuracy and accountability, particularly given the Legislature's recent overhaul of the indigent criminal defense system. Any remedy must be both incremental and proportionate to the magnitude of the problem. The lack of objective standards and the lack of a showing of actual prejudice to indigents' constitutional rights undermine this confidence, as does the ruling that the state attorney lacked standing to participate in the process. Because the order conflicts with Florida law and fails to demonstrate actual prejudice to the constitutional rights of indigent criminal defendants, this Court should vacate the order below.

ARGUMENT⁵

This case is unprecedented. It involves the judicial branch relieving the state's largest public defender office of 60% of its felony cases due solely to high caseloads and underfunding. The order results in: (a) the massive transfer of thousands of cases annually to regional conflict counsel whom the Legislature specifically did not intend (and did not fund or staff) to handle them; (b) the inevitable transfer of such cases to private counsel (who likewise were not intended to handle such cases on this basis); and (c) questions of how, when government budgets are so extraordinarily tight, public funds will be obtained to pay for the domino effects of the transfer.

The legal issues presented lie at the intersection of a number of critical legal principles: separation of powers, the constitutional rights of indigents in criminal cases, and the structure and funding of the criminal justice system. To be meaningful and gain acceptance, the judicial balancing and accommodation of

⁵ **Standard of Review:** Although it is uncertain whether this proceeding is governed by the standard of review for appeals versus certiorari (de novo versus departure from the essential requirements of law), under either standard a failure to follow the dictates of a statute is sufficient for reversal. *See, e.g., In re Asbestos Litigation*, 933 So. 2d 613, 616 (Fla. 3d DCA 2006) (“Certiorari review is proper when it is alleged that the circuit court’s interpretation of a statute violates clearly established law or when it fails to follow the dictates of a statute, and the error is sufficiently egregious as to result in a miscarriage of justice.”). A legal error that is sufficiently egregious or fundamental, thereby resulting in a miscarriage of justice, merits relief, particularly where a statutory standard is challenged that affects hundreds of persons, *id.* at 620-21, or involves substantial state funds.

these oftentimes conflicting principles requires that the process leading to the judiciary's actions, as well as its remedies, be subject to sufficiently objective standards, data and methodologies to ensure that a true constitutional "tipping point" has been reached that justifies action intruding upon legislative enactments and prerogatives. It also requires that any remedy be incremental, carefully drawn, and as limited as possible so that the intent of the Legislature is preserved, the structure of the criminal justice system is not fragmented, and the rights of indigent criminal defendants are respected.

Here, however, the trial court ordered an unprecedented transfer of thousands of cases based on evidence, much of it anecdotal or incomplete, that did not justify this expansive and precipitous action. This action was due, in large part, to the lack of objective standards, an overbroad remedy, as well as the limitations on who has standing to participate in the process. As Section I explains, the trial court's order departs from the statutory structure established by the Legislature; and, as Section II explains, it departs from the caselaw that requires a showing of actual prejudice to indigents' constitutional rights, which cannot be demonstrated solely based on the average annual caseload methodology that was utilized. Finally, Section III addresses the standing of state attorneys to represent the State's important interests in this type of proceeding.

I. The Order Conflicts with the Legislature’s Restructured System for the Provisions of Counsel for Indigents in Criminal Cases.

The trial court’s order conflicts with the Legislature’s recent statutory revisions, which were designed to provide an improved structure for the provision of counsel for indigents in criminal cases. The order relieved PD-11 of its statutorily assigned workload by shifting 60% of its felony cases to regional conflict counsel despite: (a) a statute stating that public defenders may not be relieved of their workload due solely to allegations of underfunding or excessive workloads; and (b) a statutory structure reflecting that regional conflict counsel were not intended or funded to handle mass transfers of cases due to underfunding or caseload. The trial court also applied the methodology used prior to these statutory revisions where courts had broad discretion to appoint private counsel and the public defender’s own certification was virtually unassailable. [*See* R18 2536 (citing Escambia County v. Behr, 384 So. 2d 147, 150 (Fla. 1980))] In doing so, its approach conflicts with the recently established statutory structure (discussed in this section) and fails to adequately demonstrate circumstances under which this structure may be overridden to the extent the order requires (discussed in section II).

A. The order violates section 27.5303(1)(d), which forbids appointment of conflict counsel based solely on underfunding or excessive workload.

The order conflicts with section 27.5303(1)(d), Florida Statutes, which is part of the current legislative response to the structure and funding of the public defender system. This statute is part of legislative reforms arising in the late 1990s and later in 2003 (effective in 2004), which responded in part to Florida Supreme Court cases involving the public defender system and claims of high caseloads or underfunding, primarily in the appellate context.

In 1980, the Florida Supreme Court first considered whether public defenders could be relieved of heavy trial and appellate caseloads after two district courts had split on the issue.⁶ The court concluded that trial courts had broad discretion under the then-applicable statute, section 27.53(2), Florida Statutes, to appoint private counsel to relieve a public defender's excessive caseload under appropriate circumstances. *See Behr*, 384 So. 2d at 149.

In 1990, the Court again addressed the topic in In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1138 (Fla. 1990), concluding that judicial action was warranted where a massive

⁶ *See State ex. rel. Escambia County v. Behr*, 354 So. 2d 974, 975-76 (Fla. 1st DCA 1978) (involving withdrawal from six non-capital felony cases); Dade County v. Baker, 362 So. 2d 151 (Fla. 3d DCA 1978) (involving withdrawal from appellate proceedings in a single case).

backlog of criminal appeals were languishing due to excessive public defender caseloads, resulting in constitutional rights “being ignored or violated.” Id. at 1139. It held that the “legislature has provided an appropriate mechanism to handle the problem of excessive caseload” in section 27.53(3), which allowed for the appointment of a private attorney or a public defender from another circuit. Id. at 1135. The Court held that when an appellate backlog “is so excessive that there is no possible way” the cases can be handled timely, withdrawal is warranted. Id. at 1138.⁷ *See also* Hatten v. State, 561 So. 2d 562, 563 & 565 (Fla. 1990) (ordering filing of appellate brief within 30 days, or withdrawal, where all parties agreed that defendant’s rights were being violated due to untimely appeal).

Similarly, in 1994 the Court in In Re Certification of Conflicts in Motion to Withdraw Filed By Public Defender of the Tenth Judicial Circuit, 636 So. 2d 18 (Fla. 1994), upheld the Second District’s methodology, which involved the appointment of a retired judge to oversee an evidentiary hearing and submit findings and conclusions on a range of detailed issues involving the operations of the public defender’s office (including productivity, briefing and staffing efficiencies, etc.). This detailed inquiry into these operations and practices was

⁷ The Court noted it would be helpful to study whether the funding formula for public defenders and state attorneys accurately assesses those offices’ needs. Id. at 1138 n.7.

warranted and objective, and not an interference with the operations of the public defender's management of his office. Id. at 22-23.

The Court's most recent case again involved excessive caseloads in the appellate context. 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 (Fla. 1998), the Court considered on an emergency basis the "major crisis" involving hundreds of criminal defendants who had served their prison time or completed their probation before the public defender's office had filed appellate briefs on their behalf. Noting that the problem of delays in timely representing indigents in the criminal appellate system had been ongoing "for the last eighteen years" and backlogs in the Tenth Circuit had existed for years, the Court affirmed the Second District's remedy of appointing private attorneys to alleviate the situation, and requested that the Legislature "immediately consider providing an emergency fund to assist the fourteen counties affected by this order." Id. at 104.

This case history, along with the Florida Supreme Court's exhortation for a long-term solution to the structure and funding of indigent representation in criminal cases, *see* In re Public Defenders Certif., 709 So. 2d at 104, resulted in the Legislature studying⁸ and substantially changing the structure and funding of

⁸ The Florida Senate spent considerable effort studying the cost-effectiveness of public defender systems and the old conflict system/appellate overload. *See* Fla. S. (Continued ...)

Florida’s criminal defense system in 1998. Concurrently, the electorate passed a constitutional revision that shifted funding for public defenders from counties to the state. *See* Art. V, §14(c), Fla. Const. To implement its changes, the Legislature passed new laws that explicitly addressed public defender conflicts of interest.

In 1999 the Legislature amended section 27.53(3) to provide that 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....” Ch. 99-282, § 1, Laws of Fla. This change abrogated Guzman v. State, 644 So. 2d 996 (Fla. 1994), which held that once the public defender certified a conflict, the trial court was required to appoint other counsel. *See* Sneedgrove v. State, 921 So. 2d 560, 567 n.11 (Fla. 2005) (finding that Guzman is no longer good law).

In 2003, this portion of section 27.53 was eliminated and language was established in new subsection 27.5303. *See* Ch. 2003-402, § 19, Laws of Fla. Effective July 1, 2004, subsection 27.5303 established procedures for when and how a public defender may address conflicts of interest. It distinguishes conflicts stemming from common ethical concerns from those stemming from inadequate funding or excessive workloads, the latter being prohibited grounds for withdrawal

Committees on Crim. Justice, Judiciary, & Gov’t Reform & Oversight, How to Promote Cost-Efficiencies in the Public Defender System Through Legislation (Dec. 1996); Fla. S. Comm. on Crim. Justice, Review of the Public Defender Conflict System & Appellate Overload (Nov. 1998).

under subsection (e).⁹ As to ethics-based conflicts, subsection (1)(a) permits a public defender to withdraw, but only upon the court’s inquiry into the adequacy of the public defender’s representations about a conflict of interest. § 27.5303(1)(a), Fla. Stat. As to “overload” conflicts, new subsection (1)(c), which is now renumbered as (1)(d), stated: “In no case shall the court approve a withdrawal by the public defender [or criminal conflict and civil regional counsel]¹⁰ *based solely upon inadequacy of funding or excess workload* of the public defender or regional counsel.” § 27.5303(1)(c), Fla. Stat. (2004) (emphasis added). This language reflects a legislative intent that neither public defenders nor regional conflict counsel may withdraw from their obligations based *solely* on claims of underfunding or excessive workloads. Instead, they must base withdrawal on grounds other than or in addition to claims of underfunding or excessive caseloads.

⁹ In addition, section 27.5303(1)(e) provides that “[i]n 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.” § 27.5303(1)(e), Fla. Stat. The Uniform Standards address only ethics-based conflicts and do not mention “overload” conflicts based on funding or workload issues. In addition, they provide that a public defender who withdraws should “keep the most complex case or the one which will require the most time and expense.” Final Report, Article V Indigent Services Advisory Board (Jan. 6, 2004) (Appendix B to Appendix C at § IV).

¹⁰ The bracketed phrase was added in 2007 when the criminal conflict and civil regional counsel offices were established. Ch. 2007-62, § 10, Laws of Fla. Subsection 27.5303(1)(c) was renumbered to 27.5303(1)(d).

The order below, which fails to address section 27.5303(1)(d), does precisely what the statute forbids. It allows the transfer of thousands of cases based *solely* on underfunding and an excessive caseload. After the State appealed, the trial court clarified its order, stating that section 27.5303(1)(d) is inapplicable because the relief ordered is not based on “withdrawal” within the meaning of the statute. Trial Court Order, Sept. 11, 2008, at 2-3.

The order, even as clarified, fails to explain persuasively why the statute’s language and purpose can be so easily avoided via this semantic distinction. To avoid section 27.5303(1)(d), PD-11 characterized its twenty-one motions not as withdrawals from those cases, but as requests for relief from prospective cases to which they had not yet been assigned. [R1 113] This distinction is invalid for two reasons. First, the intent of the Legislature was that neither public defenders (nor regional conflict counsel) may be relieved of their statutory responsibilities based solely on underfunding or workload. The statute’s intent can easily be circumvented by motions couched in terms of relief from future appointments when, in fact, the public defender is effectively withdrawing from its statutory responsibilities. Courts do not allow statutes to be circumvented based on these types of semantics. Gannett Co., Inc. v. Anderson, 947 So. 2d 1, 8 (Fla. 1st DCA 2006) (noting that statutory protections “cannot be undone by engaging in a semantic exercise.”).

Second, PD-11 must actually withdraw from assigned cases. The trial court's order requires that PD-11 accept appointments at first appearances, and to continue representation until arraignment, a time period that can extend from 21 to 40 days. *See Fla. R. Crim. P. 3.134*. Because PD-11 accepts appointments at first appearance, it must actually withdraw from those cases, thereby falling within the statute's language. Ignoring or redefining "withdrawal" does not resuscitate the order's fatal defect of contravening the statute's intent. *See Warner v. City of Boca Raton*, 887 So. 2d 1023, 1033 n.9 (Fla. 2004) ("[a] statutory provision should not be construed in such a way that it renders [it] meaningless").

The order below departs from the plain language, meaning, and purpose of section 27.5303, which prohibits precisely what the order requires. Because PD-11's sole ground for seeking withdrawal is based on claims of excessive workload and lack of funding, the order allowing withdrawal on this basis is legal error.

B. The order errs by assigning cases to regional conflict counsel, which is neither intended nor funded to provide representation for conflicts based solely on underfunding or excessive workloads.

The order also conflicts with the legislative intent underlying the establishment of regional conflict counsel, who are neither intended to nor funded to provide representation in situations involving allegations of conflict based solely on excessive workload or underfunding. The regional conflict council offices are not intended to be "second-tier" appointed public defender offices. *See Crist v. Fla.*

Ass'n of Crim. Defense Lawyers, Inc., 978 So. 2d 134, 148 (Fla. 2008). Instead, they are a “backup system to handle those cases in which a public defender has a conflict and to do so in a fiscally sound manner in accordance with constitutional principles of due process.” Id.

In establishing regional conflict counsel, the Legislature made clear – as it did with “overload” conflicts generally – that neither the public defender nor the regional conflict counsel may withdraw from cases based solely on underfunding or excessive workloads. § 27.5303(1)(d), Fla. Stat. For this reason, regional conflict counsel do not have the statutory authority to accept cases from public defenders where the grounds for withdrawal are solely underfunding or excessive workloads. The system the Legislature has established would be frustrated if section 27.5303(1)(d)’s prohibitions were not followed and overload conflicts permitted in violation of the statute.

Indeed, the order, if implemented, would result in RCC-3 having a workload within a month that exceeds its annual capacity as established by the Legislature.¹¹ Furthermore, while RCC-3 may by law seek withdrawal in cases where an ethical conflict arises, the order again violates section 27.5303(1)(d) by allowing the regional conflict counsel to withdraw based on its workload. [R18 2537] The

¹¹ See Aff. of R. Joyce ¶ 16, filed Sept. 12, 2008 in State’s Supplemental Appendix to Emergency Motion for Stay (Exec. Ass’t Regional Counsel for RCC-3).

overflow from RCC-3 will flow to private counsel, whose availability and cost-effectiveness to the state are uncertain. Thus, a complete turn of the wheel will have occurred, returning the system to its pre-2004 status and thwarting the Legislature's intended purpose for the regional conflict counsel. For these reasons, the order violates section 27.5303, which does not permit RCC-3 to accept or withdraw from cases based solely on underfunding or excessive workloads.

II. The Order Is Erroneous Due to a Lack of Evidence Showing Prejudice to the Constitutional Rights of Indigent Criminal Defendants and a Lack of Objective Standards.

Section 27.5303(1)(d)'s prohibition on withdrawal based solely on allegations of underfunding and excessive caseload is consistent with the principle that judicial relief based on "overload" conflicts is permissible only when some actual prejudice is shown to the constitutional rights of actual indigent defendants.¹² If claims were permitted solely on underfunding and excessive caseloads, an incentive would exist to make generalized "overload" conflict claims without the necessity of showing an actual or imminent constitutional violation. The Legislature has prohibited such claims, but it 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

¹² The trial court did not address the constitutionality section 27.5303(1)(d)'s prohibition of withdrawals based solely on underfunding and excessive workload. PD-11 argued that if the statute applies, it is unconstitutional. [R1 113]

judicial relief, in the proper case, where actual prejudice to constitutional rights is adequately demonstrated.

Here, the order is based on two errors that result in a failure to make this demonstration of prejudice. First, the order is premised on purported violations of or imminent threats to the constitutional rights of the indigent criminal defendants PD-11 represents. The record, however, has no evidence that any indigent defendant has suffered or will suffer any actual prejudice due to PD-11's caseload. Florida Supreme Court caselaw reflects that withdrawal or relief from excessive caseloads is impermissible absent a showing of actual prejudice to the constitutional rights of actual clients. Moreover, the standard for relief must focus on constitutional norms, not Bar ethical norms, as the United States Supreme Court has made clear.

Second, the order relieves PD-11 of 60% of its felony caseload based almost exclusively on a single statistic: *average annual caseload*. This lone statistic is an inadequate measure for concluding that the constitutional rights of indigent defendants are being prejudiced. A *caseload* statistic has little meaning in determining the actual *workload* of a public defender office, the term the Legislature has used and a concept that is more useful in analyzing the operation of a public defender's office. Moreover, no objective standard exists for what average caseload level triggers a constitutional problem, leaving trial courts to guess

whether it is 100, 200, 250 or some other number. Compounding the problem is that the trial court made no finding on the average caseload statistic for PD-11, concluding only that it is “excessive” and beyond any recognized standards.

A. No record evidence shows actual prejudice to any indigent defendant’s constitutional rights, and the order’s relief must be based on constitutional standards, not Bar ethical rules.

The court erred by ordering expansive relief despite no evidence of actual prejudice to the constitutional rights of PD-11’s indigent clients. The trial court concluded that excessive caseloads are causing PD-11’s attorneys “to provide, at best, minimally competent representation in their assigned cases.” [R18 2537] It concluded 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.” [R18 2536]

Despite these conclusions, the record contains no evidence of actual prejudice to any indigent criminal defendant represented by PD-11. A uniform commonality in the Florida Supreme Court cases that have allowed withdrawal based on claims of excessive workload is a demonstration of actual prejudice to constitutional rights. For example, in In re Order on Prosecution of Criminal Appeals By the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130 (Fla. 1990), the Court held that judicial intervention was warranted due to a massive backlog of criminal appeals that resulted in constitutional rights “being ignored or

violated.” Id. at 1138. The standard it set was a stringent one: withdrawal is permissible where an appellate backlog “is so excessive that *there is no possible way*” cases can be handled in a timely way. Id. (emphasis added). *See also Hatten v. State*, 561 So. 2d 562, 563 (Fla. 1990) (defendant’s rights were being violated due to untimely appeal). Similarly, 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 (Fla. 1998), the Court faced a “major crisis” involving hundreds of appeals by criminal defendants who had already served their prison time or completed their probation before their appellate briefs had been filed. The prejudice in these cases was palpable and proven: the appeals of these indigent defendants bordered on becoming meaningless exercises due to the lack of any representation whatsoever.

These cases, along with others, reflect the separation of powers principle that judicial relief must be a last resort upon a showing of urgent necessity. In each case, the Court was presented with evidence of real injury to indigent defendants, and did not allow withdrawal based on speculation that constitutional violations may occur. This approach is consistent with other states that require a showing of specific harm before permitting withdrawal based on excessive caseloads.

For example, in Platt v. State, 664 N.E.2d 357 (Ind. Ct. App. 1996), the court rejected a claim that an entire public defender system essentially denied indigents

the effective assistance of counsel. The court reasoned that because no showing was made that the outcome of any criminal proceeding was unreliable, and thus no Sixth Amendment violation was shown, the claim was not ripe. *Id.* at 363. The court further noted the absence of irreparable injury because the defendant had an adequate remedy at law via various post-conviction options for ineffective assistance of counsel. *Id.* at 363-64. The reasoning in these cases and others¹³ is consistent with the standards for injunctive relief, which require that actual or imminent injury be demonstrated, along with the unavailability of legal remedies.¹⁴

¹³ See also *Kennedy v. Carlson*, 544 N.W.2d 1, 8 (Minn. 1996) (no justiciable claim absent actual or imminent injury showing of “injury in fact” to client’s constitutional rights based on underfunding); *People v. Dist. Ct. of El Paso County*, 761 P.2d 206, 207, 210 (Colo. 1988) (counsel not inherently ineffective pre-trial because Sixth Amendment requires showing that performance was so substandard that it prejudiced the outcome of trial); *State ex rel. 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, 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”).

¹⁴ See *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988) (plaintiffs did not have to show prejudice under *Strickland* in class action challenge to Georgia’s indigent defense system, but had burden to show “the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law”).

PD-11 did not meet its burden due to the absence of a showing of actual injury or prejudice to the constitutional rights of indigent criminal defendants. No record evidence shows that any of PD-11's attorneys has faced a substantiated claim of professional misconduct or malpractice. PD-11 presented no objective evidence that any client received ineffective assistance of counsel. Indeed, at the hearing it was established that PD-11 has been recognized as recently as 2007 as being one of the best public defender offices in the country.

The only attempt at showing actual client prejudice was the testimony of Assistant Public Defender Amy Weber. She stated that while she was in the middle of a trial she neglected to convey a plea offer to another client and that the offer was withdrawn before she was able to do so. [R16 2300-02] Far from proof of actual constitutional injury, this isolated incident reflects what could happen to any defense attorney at any time. The opinions of Martinez, Stein and Kramer that PD-11 is not providing competent representation are generally considered to lack persuasive value. *See, e.g., Routley v. State*, 590 So. 2d 397, 401 n.4 (Fla. 1991) (attorney's admission of ineffectiveness lacks persuasive value).

During the hearing, PD-11 repeatedly emphasized that its attorneys owe the same duties of competence, diligence and communication to their clients as all members of the Florida Bar, pursuant to the Florida Rules of Professional Conduct. The fact that attorneys may be overworked and have to juggle their clients on a

daily basis, however, does not automatically render an attorney ineffective or in violation of the ethics rules. There must instead be a specific demonstration that defendants have been prejudiced due to the excessive workload and underfunding. Absent proof that a constitutional “tipping point” has been reached, and that prejudice is proven or imminent, no basis exists for a court to allow withdrawal based on claims of excessive caseloads.

The order permits PD-11 to decline future appointments based exclusively on the conclusion that PD-11 could not continue to represent indigent defendants under its caseloads without violating the Florida Rules of Professional Conduct. [R18 2536] The order relies on various Bar rules, including those requiring “that a lawyer provide competent representation to a client, act with reasonable diligence and promptness in representing a client, and decline or terminate representation if the representation will result in a violation of the rules.” Id. The order states that “[m]ost importantly here, the rule on conflict of interest requires an attorney to decline a case if there is substantial risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client.” Id. The order cites to no other standards or norms of professional competence.

In its analysis of ineffective assistance of counsel claims, the United States Supreme Court has noted that the prevailing professional standards for determining what is a reasonable amount of cases “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. A few years later, the Court stated 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 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.

Here, the proper focus of the trial court is to ensure that indigent defendants receive a fair trial under the constitution, and not whether PD-11 risked 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 or decline representation in overload conflicts. Because no proof of actual prejudice was made, the order is erroneous and should be reversed.

B. The average annual caseload methodology alone provides no meaningful basis or official standards for proving that constitutional rights of indigent defendants are prejudiced.

The methodology used and the lack of official standards for the average annual caseload statistic renders the order's conclusions faulty. The trial court concluded that PD-11 had established that it is presently working under excessive caseloads thereby justifying the expansive relief at issue. [R18 2537] The court, however, made no finding of PD-11's actual caseload (or workload); instead, it held that whatever the average annual caseload number might be "far exceeds any recognized standard for maximum number of felony cases a criminal defense attorney should handle annually." [R18 2535] The court was handicapped by the lack of any official, objective Florida standards by which to exercise its judgment.¹⁵ Indeed, the average annual caseload methodology it employed is antiquated in today's world of contemporary workload methodologies.

¹⁵ The lack of guidelines has been a concern for over twenty years. For example, in Schwartz v. Cianca, 495 So. 2d 1208, 1210 (Fla. 4th DCA 1986), a public defender (Continued ...)

This latter point is reflected in the fact that the caseload method has been eclipsed by workload or weighted case methodologies. Indeed, the Florida Supreme Court recently adopted a workload-based methodology in its rule for determining the need for additional judges. The reason was its dissatisfaction with a single one-dimensional 350-case-filings-per-judge threshold adopted in 2004. *See In re Report of the Comm'n on Dist. Ct. App. Performance & Accountability-Rule of Judicial Administration 2.035*, 933 So. 2d 1136, 1143 (Fla. 2006). The Court specifically adopted the conclusion that “*a single case filing threshold is insufficient to capture the intricacies that make up judicial workload in the district courts.*” *Id.* at 1143 (emphasis added). Rather than an annual caseload statistic, the Court adopted a multi-factored, weighted caseload approach, which “accommodates the important distinction between the number of cases filed and the judicial effort required to dispose of those cases.” *Id.* Virtually every study done in the last ten to fifteen years, and there are dozens,¹⁶ relies upon a

sought to withdraw from pending and future juvenile and misdemeanor cases based on excessive caseloads. The court noted that “there is a lack of guidelines both for determining a reasonable caseload for a public defender and for determining appropriate action by the public defender in the face of excessive caseload.” *Id.*

¹⁶ Major workload or weighted caseload studies have been done in Illinois, Nevada, Nebraska, New Mexico, Tennessee, among others, often under a consulting group that conducts indigent defense studies. *See* The Spangenberg Group, Indigent Defense Studies, http://www.spangenberggroup.com/-work_indig.html (last visited Dec. 16, 2008).

workload/weighted caseload methodology, each going beyond the outdated single statistic caseload model.

Much like the Florida Supreme Court's recent rejection of a one-dimensional approach for assessing the need for more judges, a single case filing threshold is insufficient to capture the intricacies that are involved in the workload of the almost 100 attorneys in Florida's largest public defender office. Yet that was the method used below. Moreover, its usefulness was further undermined by the definition used. The single caseload statistic was determined by taking the number of noncapital felony cases in which PD-11 is appointed in a fiscal year, and dividing it by the number of assistants assigned to the felony divisions. [R17 2436] Using this method, *but applying it only to the cases post-arraignment* (where the noncapital felony assistant public defenders do the overwhelming majority of their work),¹⁷ the caseload numbers become quite different. The annual caseload statistic goes down from over 400 (under PD-11's approach) to approximately 240 cases

¹⁷ PD-11's witnesses claimed that the starting point for counting cases must be the time of appointment at first appearance, which resulted in a larger number of cases in the numerator of the average caseload statistic. The appropriate starting point for the caseloads of assistant public defenders who handle noncapital felonies, however, is after arraignment. Indeed, Brummer's own testimony supports this position, [R15 2093-94], as do the ABA standards PD-11 used in their initial motion, which defined caseload as "the number of cases *assigned* to an attorney at any given time." ABA Standards for Criminal Justice: Providing Defense Services 5-5.3 (3d Ed. 1992) (emphasis added). PD-11 does not assign its noncapital felony cases to the felony assistants until after arraignment. [R15 2097-98]

per attorney, a more manageable level that within the upper range of some of the proposed caseload standards. Moreover, this more reasonable approach does not include all 95 PD-11 attorneys, only 85 (removing the bond hearing and the ERU attorneys from the equation) thereby showing the malleability of the statistic and its unreliability.

Here, PD-11's evidence established no objective means of quantifying actual workloads, the concept that the Legislature has set forth in section 27.5303(1)(d). Only Davies of SAO-11 addressed workload, testifying about the significant reduction in the public defender's workload after 45 days due to case closings. [R17 2464] Regardless of what factors are considered in evaluating the components of a felony attorney's workload, the single annual average caseload statistic is insufficient and must be replaced or adjusted in some empirically acceptable fashion to evaluate workloads objectively, which PD-11 did not do.

Some attempts have been made in Florida to establish standards, but none has gained acceptance; none is based on contemporary workload analysis such as that underlying the recent amendments to Florida's rule for certification of the need for new judges. *See Fla. R. Jud. Admin. 2.240*. For example, the Florida Funding Formula was designed in 1981 to determine staffing needs and budgetary requirements for public defenders; it provided that an assistant public defender is presumed to be able to handle an annual caseload of 200 noncapital felonies, but

did not set an official standard. *See In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of Tenth Judicial Circuit*, 636 So. 2d 18, 27 (Fla. 1994) (citing OSCA, State Attorney-Public Defender Workload Project: Descriptive Information and Circuit Profile (Florida Supreme Court January 1981)). In 1993, a Florida Bench/Bar Commission adopted the Florida Public Defender's Association (FDPA) maximum annual caseload standards of 200 noncapital felonies in its recommendations to the Florida Supreme Court. *Id.* Neither the Court nor the Florida Bar, however, adopted these standards. For three years, the Florida Public Defenders' Long Range Program Plan reflected a goal of 250 case dispositions per year for felony attorneys (200 according to PD-11).

PD-11 referenced other organizations' caseload standards, all of which are based on the recommendation of the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") in 1973 that public defenders' caseloads for felonies should not exceed 150 dispositions per year. *See* NAC Standard 13.12. While the American Council of Chief Defenders ("ACCD") recently reaffirmed the 1973 NAC standards, it urged "thorough assessment in each jurisdiction to determine the impact of local practices and laws on those levels..."¹⁸ Additionally, it has been recognized that caseload standards by organizations including the ABA

¹⁸ *See* ACCD Statement on Caseloads and Workloads 12 (Aug. 24, 2007), available at <http://www.nlada.org/DMS/Documents/1189179200.71/> (last visited Dec. 16, 2008).

and NAC 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. Dep't of Justice, Office of Justice Programs, Bureau of Justice Assistance, Keeping Defender Workloads Manageable 7 (Jan. 2001) (Spangenberg Group project).

Putting aside the question of whether any of the existing guidelines are applicable in Florida, the empirical ability of the average annual caseload statistic – one that is severely overbroad by PD-11's inclusion of first appearance cases – to predict or prove prejudice to the constitutional rights of the tens of thousands of indigent clients that PD-11 represents annually is dubious. It must be remembered that what occurred below is essentially a declaration that constitutional rights are being violated due to high caseloads, resulting in an unprecedented remedy and additional costs that the Legislature did not approve. The methodology below was insufficient for this task, and the evidence well short of proving that a constitutional violation exists or is imminent.

III. The State Has Standing to Participate As a Party.

The trial court also erred by denying standing to SAO-11, as a representative of the state. Standing “requires a would-be litigant to demonstrate that he or she reasonably expects to be affected by the outcome of the proceedings, either directly or indirectly.” Hayes v. Guardianship of Thompson, 952 So. 2d 498, 505 (Fla. 2006). The state is affected when, as here, a court orders relief that dramatically affects state resources, involves the application or constitutionality of a Florida statute, and involves a methodology for calculating an excessive caseload for a state-funded public defender’s office. The state has an interest in the potential transfer of thousands of cases to the legislatively-created RCC-3 and potentially from that office to private attorneys. Moreover, section 27.01(2) and article I, section 16(b), of the Florida Constitution confer standing on SAO-11 in these types of situations as the representative of crime victims. For these same reasons, if the lower court had discretion to deny standing, it abused that discretion. Contrary to what PD-11 has contended, its assertion of a conflict of interest is not unassailable or taken at face value in every case; instead, it is subject to review and critique, as the Florida Supreme Court and the Florida Legislature have mandated.

In In Re Certification of Conflicts in Motion to Withdraw Filed By Public Defender of the Tenth Judicial Circuit, 636 So. 2d 18 (Fla. 1994), the Court – over the objection of the public defender – made clear that a detailed inquiry into the

operations and practices of a public defender's office is permissible (provided confidential information is not compromised). *Id.* at 22-23. Further, section 27.5303(1)(a) allows a court to hold a hearing on the adequacy of a public defender's representations. The lower court acknowledged that participation by the state attorney was important to a meaningful hearing in this case by conferring it *amicus curiae* status. [R18 2534] Allowing the cross-examination of witnesses and presentation of some evidence while denying party status is illogical and could thwart the state's ability to seek appellate review.

The standing issue is exceptionally important because the trial court criticized the state's failure to "present any alternative national or Florida caseload standard" or to demonstrate that the management techniques used by public defenders in other circuits to alleviate workloads might apply. [R18 2536] With adequate time (the court denied SAO-11's requests for a longer continuance) and relevant data (PD-11 did not initially provide all necessary data sought in SAO-11's public records requests), SAO-11 might have been able to address concerns the court raised. [R4 369-373; R9 1021-39] Given that the proceedings affect the interests of the State, the lower court abused its discretion in denying the State standing.

CONCLUSION

Because the order conflicts with Florida law and fails to demonstrate actual prejudice to the constitutional rights of indigent criminal defendants, this Court should vacate the order below.

Respectfully Submitted,

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