

**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

**MOTION TO STAY ORDER GRANTING PUBLIC DEFENDER'S MOTION TO
WITHDRAW**

The State of Florida, by and through the undersigned counsel, files this Motion to Stay this Court's Order Granting Public Defender's Motion to Withdraw, and in support thereof states as follows:

1. On October 23, 2009, this Court denied the Public Defender's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional, but granted the Public Defender's Motion to Withdraw. This Court in its Order which permitted Assistant Public Defender Jay Kolsky and the Public Defender for the Eleventh Judicial Circuit (hereinafter "PD-11") to withdraw from the above case involving Mr. Bowens is based on Mr. Kolsky's testimony "that as a direct result of Mr. Kolsky's workload", he has done "virtually nothing in preparation of Bowens' defense." Coupled with Mr. Kolsky having to request a continuance at the last trial date which "resulted in a waiver of [Mr. Bowens'] right to a speedy trial," this Court found that this was the individualized proof of prejudice required by the Third District in *State v. Public Defender*, 12 So. 3d 798 (Fla. 3d DCA 2009). Order at p. 10.

2. Despite what this Court states in its Order, the effect of the Order is to render section 27.5303(1)(d) a nullity. This Court's Order provides precedent for PD-11 to withdraw

from as many cases that it chooses to, not only in this division, but in the other twenty divisions in the circuit court criminal division.¹ Following the road map set forth in this Court's Order, all assistant public defenders will have to do is allege that due to their workload, they did not have the time to prepare a defense and thus had to request a continuance. It is the State's position as previously set out, that the mere request for a continuance is not the type of prejudice to which the Third District was referring. If other trial courts follow this Court's order then the number of cases in which PD-11 presently would be permitted to withdraw could be between 836 cases to 1136 cases, and if multiplied five or six times as found by this Court, the figures would be between 4180 cases to 6816 cases for the whole year. This is in effect granting PD-11 the injunctive relief that they were denied by the Third District in *State v. Public Defender*, 12 So. 3d 798 (Fla. 3d DCA 2009). Withdrawal in all those cases would lead to major disruptions in the criminal justice system in Miami-Dade County.²

¹ This could likewise spread to the county court and juvenile divisions.

² If this Court's Order granting PD-11's Motion to Withdraw is followed in other cases and divisions, the trial courts will be required to appoint the RCC-3 to the cases which PD-11 has been allowed to withdraw. It will take very little time for the RCC-3 to become overwhelmed by these cases. By allowing PD-11 to withdraw based solely on excessive caseload, without any particularized prejudice shown other than a waiver of speedy trial rights under Fla. R. Crim. P. 3.191(a), this Court has set a precedent to allow RCC-3 to refuse to withdraw based solely on excessive caseload. The courts, under § 27.5303(1)(b), Fla. Stat. (2009), would then have to appoint private attorneys as set forth in § 27.40, Fla. Stat. (2009). Those private attorneys would be paid by the Judicial Administration Commission (JAC) as provided in § 27.5305, Fla. Stat. (2009), at a considerably higher cost. The purpose of the Legislature 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). As with the RCC-3, JAC has not been funded this budget cycle to pay for all the felony cases in which both PD-11 and RCC-3 would be permitted to withdraw. With no lawyers to represent the indigent felony defendants, the consequences would be dire. As these cases would not be able to go to trial without counsel, issues of speedy trial would forge to the forefront. Victims would not see their cases adjudicated. The only beneficiaries of this Court's Order, ironically, will be the defendants who happen to be indigent.

4. It is the intention of the State to seek review by the Third District in the most expedited manner which would allow the appellate court the ability to have all the issues fully briefed and argued. The State intends to seek review by filing a petition for writ of common law certiorari, as in *State v. Public Defender*. See also *State v. Gaiter*, 616 So. 2d 1132 (Fla. 3d DCA 1993). As such, this Court should grant a stay to allow the appellate courts to fully review its Order. See, e.g., *State v. Nelson*, 785 So. 2d 727 (Fla. 3d DCA 2001); *State v. Weber*, 466 So. 2d 345 (Fla. 3d DCA 1985).

5. It should be noted that in *State v. Public Defender*, Judge Blake denied the State's Motion for Stay, but the Third District reversed and granted the State's Motion for Stay and continually denied PD-11's Motions to Vacate the Stay. The failure of this Court to grant a stay will begin the descent into chaos. "C" felony cases, that have been the subject of the evidentiary hearing, are mostly third degree felonies. Third degree felonies make up 60% of the cases filed by the State. There are many third degree felony cases that involve violence or the potential for violence, such as aggravated assault, stalking, child abuse, and felony battery. In addition many defendants who are charged with third degree felonies are habitual offenders who face potentially longer sentences. The unavoidable consequence of this Court's granting the Motion is to lead to a constitutional crisis that could result in the possible dismissal of some serious, including violent, felony offenses or cases.

6. Despite PD-11's concerns that everyday is a crisis for its clients, in this case, this Court has already granted Mr. Kolsky's request for a continuance. Trial has been scheduled for January 19, 2010. Mr. Bowens remains out on bond while awaiting his trial. There is no reason why Mr. Kolsky cannot begin working on Mr. Bowens' case, just as he has done on other out of custody defendants in similar circumstances. Furthermore, even if RCC-3 is appointed to this

case, there is no guarantee that new counsel will be prepared by the time of the January trial date. If this Court believes that based on its Order that it can continue to take a plea from the defendants who are represented by Mr. Kolsky, be it at arraignment or some other point in time, then this Court is finding that Mr. Kolsky is still able to provide competent assistance to its clients. Thus, there is no prejudice at this time to PD-11 for this Court to grant this stay. This Court continually stated during the hearings that it was aware that no matter how the Court ruled, there would be an appeal. To not give the appellate court the opportunity to be fully advised of the issues in this case, while allowing the system to become chaotic, would be clearly an abuse of this Court's discretion.

WHEREFORE, based on the foregoing, the State respectfully requests that this Court grant the State's Motion to Stay its Order Granting Public Defender's Motion to Withdraw.

Respectfully submitted,

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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 26th day of October, 2009.

By: Penny H. Brill
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