

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

THE STATE OF FLORIDA,

Case No. 3D09-_____

Petitioner,

Lower Case No. F09-019364

v.

Judge John W. Thornton, Jr.

ANTOINE BOWENS,

Respondent.

PETITION FOR WRIT OF COMMON LAW CERTIORARI

The State of Florida, by and through the undersigned counsel, hereby petitions this Court for the issuance of a Writ of Common Law Certiorari quashing the Order Granting the Public Defender's Motion to Withdraw, rendered by the Honorable John W. Thornton, Jr., Circuit Court Judge for the Eleventh Judicial Circuit of Florida on October 23, 2009. Appendix, Exhibit 1.¹

¹ Attached to this Petition is the Appendix which includes the transcripts of the proceedings, the exhibits introduced at the evidentiary hearing, and documents which are part of the trial court file. Most of the evidentiary hearing exhibits were documents already filed with the court. In order to avoid duplication, the State has not copied those documents that were already part of the court file. Those exhibits which were introduced at the hearing will be referred to by the party and letter or number as given by the clerk without a reference to the Appendix. The symbol T1. denotes pages in the transcript of the proceedings on September 29, 2009, which is Exhibit 16, in the Appendix. The symbol T2. denotes pages in the transcript of the proceedings on September 30, 2009, which is Exhibit 17, in the Appendix. The State has ordered the transcripts for the proceedings on August 7, 2009, August 28,

I.

JURISDICTION

The jurisdiction of this Court is being invoked pursuant to Article V, Section 4(b)(3) of the Florida Constitution and rules 9.030(b)(3) and 9.100, Florida Rules of Appellate Procedure. The Respondent, Bowens, is represented by the Public Defender for the Eleventh Judicial Circuit (“PD-11”), which filed the Motion to Withdraw and Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional. PD-11 is represented by the same private counsel that represented it in *State v. Public Defender*, 12 So. 3d 798 (Fla. 3d DCA 2009). Although the Motion was filed by PD-11 in only the Respondent’s pending criminal case, it is clear that PD-11 will be looking to file the same Motion in many other criminal cases in that division² and in other criminal divisions as well until each “C” attorney, i.e., those who handle most of the third degree felonies, reaches a present caseload of somewhere in the sixties or seventies.³ (T1. 79-80,

2009, September 23, 2009, October 1, 2009, and October 29, 2009, and will be filing a supplemental appendix with those transcripts when they are received.

² According to PD-11, they may be requesting to withdraw in up to 66 of Mr. Kolsky’s present cases. Appendix, Exhibit 27, p. 3 fn.2.

³ If it was PD-11’s intent to just file the Motion in one case, then why does PD-11 have the same outside counsel that represented it in *State v. Public Defender*, and why did it feel the need to serve its Motion to Withdraw on same persons who were served in *State v. Public Defender*. Furthermore, why did PD-11 believe it again needed to present the testimony of two experts, Fredrick Freedman and Norman Lefstein, who both testified at the hearing in *State v. Public Defender*, on

158, 192, 206-08, 222-23, 229-29). According to PD-11's "C" Attorney Weekly Audit,⁴ that figure could be between 836 cases to 1136 cases, and if multiplied five or six times as found by the trial court in its Order, the figures would be between 4180 cases to 6816 cases for the whole year. Withdrawal in all those cases would lead to major disruptions in the criminal justice system in Miami-Dade County.

As such, the pretrial order that the State is requesting this Court to review emerges from and directly affects a class of pending criminal cases. The right of the State to petition for certiorari from pretrial orders in pending criminal cases was upheld in *State v. Pettis*, 520 So. 2d 250 (Fla. 1988). This Order is in effect a continuation of the withdrawal litigation that was before this Court last year in *State v. Public Defender*, which this Court reviewed by certiorari. The trial court's order in this case granting the Motion to Withdraw was based on insufficient evidence to satisfy the requirements set out by this Court in *State v. Public Defender*, essentially nullifying the applicability of section 27.5303(1)(d), and returning the status of criminal cases in the Eleventh Judicial Circuit to where they

the issue of caseloads. It is clear that PD-11 wanted Mr. Bowens' case to be the "test" case to determine what this Court meant when it held that an individual assistant public defender could move for withdrawal when a client is, or will be, prejudiced or harmed by the attorney's ineffective representation, i.e., a showing of individualized proof of prejudice or conflict other than excessive caseload. *Id.* at 805, as well determining the constitutionality of § 27.5303(1)(d), Florida Statutes (2009).

⁴ This was introduced at the evidentiary hearing as part of Defendant's Exhibit H.

were last year after the issuance of the order that was the subject of *State v. Public Defender*. The trial court's order represents a drastic remedy that is a departure from the essential requirements of the law that causes material injury for which there is no adequate remedy by appeal.⁵

II.

INTRODUCTION

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 appointments 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 Stanford Blake, Administrative Judge of the Criminal Division, 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.

On appeal, this Court in *State v. Public Defender*, reversed and held that determinations of excessive caseloads must consider the varying education and

⁵ In that the trial court denied PD-11's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional, the State is not addressing the constitutionality of the statute in this Petition. If this Court orders a response from the Respondent and that Response discusses the constitutionality of the statute, the State, if permitted by this Court, will file a Reply to those arguments.

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. 12 So. 3d at 803.

This Court addressed section 27.5303(1)(d), Florida Statutes, which states:

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). This Court found that this section was applicable to PD-11's Motion, and held, "[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.

During the fiscal year 2008/09, i.e., the time that Judge Blake's order was pending in this Court in *State v. Public Defender*, Assistant Public Defender Jay Kolsky handled a total of seven hundred and thirty-six (736) felony cases, both trial and probation violation cases, involving six hundred and thirty-seven (637) separate clients. Four hundred and eighteen (418) of the trial cases were closed by pretrial diversion or intervention, plea, nolle prosequere (other than diversion), and

court dismissal. Only two cases when to trial.⁶ Sixty-five (65) cases were taken over by other counsel. One hundred and thirty six (136) of the probation violation cases were closed by plea, withdrawal or dismissal of the affidavit, or termination of probation. Thirteen (13) cases were taken over by other counsel. Appendix, Exhibit 11. During that time, not one client complained before, during or after a plea colloquy, in a post conviction motion or to the Florida Bar that they were not satisfied with Mr. Kolsky's representation. (T1. 74).⁷

In an attempt to follow the holding of this Court, but to also challenge the constitutionality of section 27.5303(1)(d), Florida Statutes (2009), on August 3, 2009, PD-11 had Assistant Public Defender Jay Kolsky, who had been assigned by PD-11 to the Respondent's case, file a Motion to Withdraw and to Declare Section 27.5303(1)(d), Florida Statutes (2009), Unconstitutional, along with a separate memorandum of law. Appendix, Exhibits 2, 3.⁸ In the affidavits attached to the

⁶ One client was convicted and another was acquitted. (T2. 96-97).

⁷ One client who did file a Bar complaint withdrew it once he received a better plea deal. (T1. 74).

⁸ In order to insure that this Court has all relevant trial court pleadings, the State is also including in its Appendix, the following pleadings: PD-11's Request for Judicial Notice (Exhibit 19); State's Response to the Request for Judicial Notice, (Exhibit 20,); State's Motion to Take the Depositions of Jay Kolsky and Carlos Martinez (Exhibit 21); State Motion in Limine Re: Exclusion of Expert Testimony. (Exhibit 22); and Supplemental Affidavit of Norman Lefstein (Exhibit 23).

Motion, Mr. Kolsky swore in effect that he was not providing effective assistance of counsel due to his excessive workload. Appendix, Exhibits 2, 4.⁹

Status hearings were held on August 7, 2009, and on August 28, 2009, during which time the trial court scheduled an evidentiary hearing on the Motion to Withdraw. On September 11, 2009, the State filed its Response to the motion. Appendix, Exhibit 5.

On that same day, Mr. Kolsky filed a form Notice of Inadequate Resources and Inability to Adequately and Thoroughly Prepare and Provide Diligent Representation in this case. Appendix, Exhibit 6. PD-11 also filed on behalf of Mr. Bowens an affidavit, that it had prepared, in which Mr. Bowens stated that he had spoken to Mr. Kolsky about the Motion to Withdraw and although he was “impressed and like[d] Mr. Kolsky,” he was asking the trial court to provide him with another attorney “solely because Mr. Kolsky has too many cases to represent [him] properly.” Mr. Bowens then went on to state that he believed that he has “significant defenses to the charge filed” against him, and that “the truth of the statements from the prosecution’s witnesses should be tested immediately” and that they should have already been tested, and that further delay would

⁹ On August 12, 2009, an Amended Affidavit of Jay Kolsky was filed to correct a typographical error. Appendix, Exhibit 4.

“significantly prejudice” his case. See Appendix, Exhibit 7, at par. 6. There was nothing in the affidavit which indicated that Mr. Bowens wanted a speedy trial.

Due to the fact that Mr. Bowens requested that PD-11 be discharged as his counsel, on September 14, 2009, the trial court held a hearing under *Nelson v. State*, 274 So. 2d 256 (Fla. 4th DCA 1973), to determine if ineffective assistance of counsel existed that required the appointment of new counsel. Appendix, Exhibit 8. A hearing was held *ex parte* with the trial court, the defendant, and Carlos Martinez, the Public Defender, as the defendant’s counsel.¹⁰ After the hearing, the State inquired of the Court whether it was going to grant the motion to discharge. The trial court stated that “based on what I have seen so far. [sic] I don’t think there is you know sufficient grounds.” Appendix, Exhibit 8, at p. 12.¹¹

On September 21, 2009, PD-11 filed a Supplemental Affidavit of Carlos Martinez. Appendix, Exhibit 9. On September 25, 2009, PD-11 filed a Reply to the State’s Response. Appendix, Exhibit 10.

¹⁰ The trial court has ordered that the *ex parte* hearing be transcribed, filed with the Clerk and sealed. Once that occurs, the State by separate Motion will be asking that this Court order either that the transcript of the *ex parte* hearing be unsealed, or order the Clerk of the Circuit Court to provide this Court with a sealed copy of the transcript.

¹¹ Although the State believes that this portion of the transcript is accurate, a review of the transcript of this proceeding by both the State and PD-11 reveals that it is so inaccurate in so many other portions that the parties have asked the court reporter to review her notes and to redo this transcript.

The evidentiary hearing began on September 29, 2009, and concluded on October 1, 2009. On September 29, 2009, the parties filed a Stipulation with the court concerning Mr. Kolsky's caseloads. Appendix, Exhibit 11. After the evidentiary hearing, the parties filed Post Hearing Memoranda, Appendix, Exhibits 12, 13, and Proposed Orders. Appendix, Exhibits 14, 15. On October 23, 2009, the trial court rendered its Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Florida Statutes Unconstitutional and Granting Public Defender's Motion to Withdraw. Appendix, Exhibit 1. The State filed a Motion to Stay, Appendix, Exhibit 26, which PD-11 opposed, Appendix, Exhibit 27. On October 29, 2009, the trial court denied the Motion to Stay, but stayed the denial until December 1, 2009 to allow the State to file this Petition and to obtain a stay from this Court. Appendix, Exhibit 28.¹²

III.

STANDARD OF REVIEW

The trial court's Order, which misapprehends and essentially nullifies this Court's opinion in *State v. Public Defender* as to what an individual public defender must show in order to withdraw from a criminal case, is a departure from the essential requirements of the law, which, if allowed to remain as precedent for

¹² The State is filing a separate Emergency Motion to Stay with this Petition for Writ of Certiorari.

the trial court and other courts within the Eleventh Judicial Circuit, will result in material injury which cannot be remedied on appeal. *State v. Pettis*.

IV.

THE EVIDENTIARY HEARING

Mr. Bowens' Pending Case

Mr. Bowens 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.

¹³At his first appearance hearing on June 11, 2009, Mr. Bowens was declared indigent and PD-11 was appointed to represent him. A written plea of not guilty was entered. Mr. Bowens was released on a bond of \$7500. Appendix, Exhibit 29.

At arraignment, on July 1, 2009, the State filed an information charging Mr. Bowens with one count of sale of cocaine within 1000 feet of a public park, a first degree felony, which carries a three year minimum mandatory sentence. Defendant's Exhibit P. At that time PD-11 assigned the case to Assistant Public Defender Jay Kolsky. The State also filed a Notice of Enhancement because Mr. Bowens qualified as a habitual felony offender, which would make him eligible for a maximum sentence of life in prison. Based on the Notice, the State requested an

¹³The arrest form indicates that a registered Hialeah Police Department confidential informant was the purchaser of the cocaine and that the arrest occurred two months after the purchase. Defendant's Exhibit P.

increase of the bond. At Mr. Kolsky's request, the State provided discovery which listed five witnesses¹⁴ and included an offense incident report which reaffirmed that a confidential informant had been the purchaser of the cocaine. (T1. 40).

On July 13, 2009, a bond of \$7500 was reinstated and Mr. Bowens has remained free on bond pending the disposition of the charges. Mr. Kolsky had an opportunity to talk with Mr. Bowens at that time, who declared his innocence, and from that discussion Mr. Kolsky knew that the case was complicated. This engendered a whole different mindset in Mr. Kolsky. (T1. 95). Mr. Kolsky sent out a letter to the Hialeah Police Department to not destroy any tapes. (T1. 40). Trial was scheduled for November 2, 2009, about thirty days before the expiration of the 175 day speedy trial period under rule 3.191(a), Florida Rules of Criminal Procedure.

On August 3, 2009, Mr. Kolsky filed the present Motion to Withdraw. Mr. Bowens' case was chosen by PD-11 because of the severity of the charge and the punishment. (T1. 78). Mr. Kolsky did not speak to Mr. Bowens prior to filing the Motion. He first talked to Mr. Bowens about the Motion at the initial hearing on the Motion on August 7, 2009. (T1. 78-79). Other than the Motion to Withdraw, the only pleading filed by Mr. Kolsky was a Notice of Inadequate Resources and

¹⁴ Those witnesses included three police officers, the chemist and the person who would testify about the public park. Appendix, Exhibit 5, p. 14.

Inability to Adequately and Thoroughly Prepare and Provide Diligent Representation, filed on September 11, 2009. Once it was decided by PD-11 that Mr. Kolsky would be filing the Motion to Withdraw in this case, he engaged in no other work on Mr. Bowens' case. (T1. 98).

As testified to by Mr. Kolsky, he and Mr. Bowens have not had an adequate face to face interview. (T1. 117-18). Mr. Kolsky has not taken the opportunity to speak to the Mr. Bowens about his case on the days Mr. Bowens came to court on the status hearings for this Motion. (T1. 79). Mr. Kolsky has not visited the crime scene or interviewed any witnesses, although Mr. Kolsky could have had an investigator go and speak to Mr. Bowens about the case and find potential witnesses. (T1. 95-98). The investigator who went to obtain Mr. Bowens' signature on the affidavit did not speak to him about the case. (T1. 97). The use of the investigator would have assisted Mr. Kolsky in providing competent representation. (T1. 99-101). Mr. Kolsky has not consulted with experts, taken depositions, or drafted any motions, although he thought about filing a motion to disclose the confidential informant. (T1. 40-41). He also has thought about mitigation. (T1. 42). Although he generally does not request a continuance as a trial strategy, sometimes Mr. Kolsky has to if he cannot provide the nature of the representation that he wants. (T1. 93). In this case, at the sounding on October 22,

2009, after the evidentiary hearing, both the State and Mr. Kolsky moved for a continuance which was granted. Trial is now scheduled for January 19, 2010.

Jay Kolsky's Present Caseload

At the time of the filing of his Motion to Withdraw on August 3, 2009, Mr. Kolsky indicated that he had a present caseload of 164 pending "C" felony cases¹⁵ (T1. 92, 120), which had dropped to 155. Defendant's Exhibit A. Due to a plea blitz initiated by the trial court, on August 28, 2009, the cutoff date that the parties agreed to use for determining caseload for purposes of the evidentiary hearing, Mr. Kolsky's caseload had dropped to 105 cases, which involve 87 different clients according to the Stipulation entered into by both the State and PD-11. On September 25, 2009, Mr. Kolsky's caseload was 119.¹⁶ At the evidentiary hearing Mr. Kolsky guessed that his present caseload was about 125. (T1. 18). On March 2, 2009, Mr. Kolsky's caseload was 103; on April 6, 2009, 127 cases; on June 1, 2009, it was 148, and on June 29, 2009, it was 177 cases. Defendant's Composite Exhibit F.

Testimony of Assistant Public Defender Jay Kolsky

Jay Kolsky is an Assistant Public Defender in the Eleventh Judicial Circuit. He has been a member of the Florida Bar since 1973. He is also a member of the

¹⁵ On July 15, 2009, Mr. Kolsky's caseload was 164. (T1. 157).

¹⁶ It is unknown how many different clients are included in that number other than 29 clients who were listed as in custody. Defendant's Exhibit G.

Pennsylvania and Washington, D.C. Bars. (T1. 15-16). Mr. Kolsky has practiced in Miami-Dade County as an assistant state attorney, assistant public defender and as a private criminal defense attorney. (T1. 16-17). Mr. Kolsky is presently assigned to Division 15 and is the only “C” assistant public defender in the division. (T1. 15). Mr. Kolsky testified that he had spoken to former Public Defender, Bennett Brummer, on more than one occasion in either late 2007 or early 2008 about his excessive caseload. (T1. 17). On July 28, 2008, while Mr. Kolsky was sharing the “C” caseload with another assistant public defender, David Dean, his caseload was ninety (Mr. Dean’s caseload was ninety-one). (T1. 50). State’s Exhibit 1. When Mr. Dean left the division in August of 2008, Mr. Kolsky assumed all of the “C” caseload.¹⁷ (T1. 53).

Mr. Kolsky filed the Motion to Withdraw in this case because he stated that his excessive caseload led to his inability to measure up to the standards set forth in the Rules Regulating the Florida Bar, as well as the Florida Rules of Criminal Procedure. (T1. 17). Mr. Kolsky stated that with the exception of a few cases, his clients did not receive the assistance of counsel as provided in the Sixth Amendment, which was not “ineffective,” but “less effective” because the clients

¹⁷ It is unknown what Mr. Kolsky’s caseload was at that time. However, according to the testimony of Assistant State Attorney Dennis Wouters, who was the “C” Assistant State Attorney at that time, on November 17-19, 2008, a plea blitz was conducted at the request of the trial court resulting in a significant reduction to Mr. Kolsky’s caseload. (T2. 92).

were not getting 100% of his effort. (T1. 19, 46). Mr. Kolsky opined that based on his experience he should handle sixty-five to seventy cases at a time, and that seventy-five would be pushing it. (T1. 18).

Mr. Kolsky is assigned to “C” felony cases at arraignment. (T1. 19). Prior to arraignment, the Early Representation Unit (“ERU”) interviews and represents in-custody defendants and the Felony Intake Unit (“FIU”) represents those defendants out of custody. When a client enters into a plea at arraignment, Mr. Kolsky has the State’s discovery which consists of the arrest form, a witness list, and the defendant’s prior record. Usually there are no other police reports. His first contact with a client in custody is in the jury box when they are handcuffed to other defendants, or occasionally in the jury room, where there may be other lawyers and defendants. If the client is out of custody, he will speak to the client outside the courtroom, whispering in the hallway. (T1. 21). These conversations are usually not more than five minutes. (T1. 22). Mr. Kolsky stated that he knows nothing about the case at arraignment and cannot effectively advise his client whether the plea offer is good or bad. (T1. 23). He tells the clients that he does not know enough of the facts of the case to advise them if they should take the

plea. (T1. 65). Mr. Kolsky recognized that many times the clients just want to get out of jail or coming to court. (T1. 24-25).¹⁸

Mr. Kolsky testified as to what generally occurs with his cases after arraignment from thirty to ninety days. (T1. 25-36). He testified that his opportunity to meet with out-of-custody clients is extremely limited, due in part to the office priority given to in-custody clients, who he cannot schedule meetings with until approximately two months after arraignment and for only thirty minutes. (T1. 34). Mr. Kolsky has eight to ten depositions set every day during his non-trial weeks, which is two out of every three weeks. (T1. 30). Mr. Kolsky testified about the recent plea blitz. Of the fifty cases that pled, he felt that he had complied with his obligations 60-65% of the time. (T1. 38-39). The other clients were willing to accept the plea offers because they did not want to come back to court again. (T1. 39).

If PD-11 were to assign another attorney to his division, Mr. Kolsky would have no problems with his caseload. (T1. 52). His thirty-six years of experience allows him to better spot the issues and possible defenses and helps him manage

¹⁸ An example is the case involving a defendant named Lazaro Clemente, in which Mr. Kolsky discussed with Mr. Clemente possible specific defenses to the habitual traffic offender charge, but that Clemente took the plea because he did not want to come back to court again. (T1. 66-67).

his large caseload, which does not necessarily equate to a large workload. (T1. 60-68).¹⁹

Mr. Kolsky, in addition to his caseload, has training and other responsibilities. (T1. 44, 49, 52). Mr. Kolsky participated as a second attorney in a murder trial in another division that went to trial twice in March and April of 2009 and lasted four or five days, at a time he believed he was not providing competent counsel to his clients in this division.²⁰ (T1. 83-87). Mr. Kolsky was confronted with various statements sworn to in his affidavit, Defendant's Exhibit B. (T1. 80 *et seq.*). In his affidavit Mr. Kolsky stated that he “**never** has time to work on out-of-custody clients” and that he “can **never** set a deposition in out-of-custody cases.” (Emphasis added). (T1. 104). However, as set forth in Defendant's Exhibit G, there were eleven cases involving out-of-custody defendants in which Mr. Kolsky took depositions. When shown a number of out-

¹⁹ That workload includes substantial numbers of probation violation hearings, which are “tag alongs,” in that they resolve themselves. (T1. 77). With certain minor third degree felonies the defendants were better off in taking the plea, even if Mr. Kolsky could not counsel the defendants in the way he would want. (T1. 68). Only one time during a plea colloquy, when asked by the court, did a client say he was not satisfied with his representation. That client filed a Bar complaint, which was withdrawn when he was able to get the client a better plea deal. (T1. 74).

²⁰ This was during the time when Mr. Kolsky's caseload was between 103 and 127 cases, a number which Mr. Kolsky asserted was too high for him to provide effective assistance of counsel to his clients.

of-custody cases²¹ in which he did work during the relevant times addressed in this Motion, including taking depositions, Mr. Kolsky stated that the reason for that was that these clients had all claimed to not be guilty. (T1. 105-14). Mr. Kolsky did not explain why similar work was not done for defendant Bowens, who also claimed to not be guilty. (T1. 114-15).

²¹ This included the following cases where the client was arraigned after the defendant and trial is either scheduled on the same day or after Mr. Bowens:

1.) F09-27532, *State v. Raul Cuenca*, charged with felony DUI, looking at a 30 day minimum mandatory sentence, who was arraigned on 8/25/09, trial is scheduled for 11/23/09, and where 2 Notices of Taking of Deposition were filed on 9/2/09, and also on 9/8/09 and 9/16/09, and a Notice of Inadequate Resources was filed on 9/9/09.

2.) F09-19635, *State v. Jose Navarro*, charged with Aggravated Assault with a Firearm, and misdemeanor Battery, carrying at a 3 year minimum mandatory, who was arraigned and discovery provided on 7/13/09, trial is scheduled for 12/21/09 after a State continuance on 9/21/09, a Notice of Inadequate Resources filed 7/15/09, and a Notice of Taking Deposition filed on 8/3/09.

3.) F09-20125, *State v. Cleveland Johnson*, charged with Aggravated Assault with a Firearm and False Imprisonment, carrying a 3 year minimum mandatory sentence, who was arraigned and discovery provided on 7/23/09, trial is scheduled for 11/02/09, where 2 Notices of Taking of Deposition were filed on 7/27/09 and also on 7/29/09, and a Notice of Inadequate Resources was filed on 9/11/09.

4.) F09-27491, *State v. Troy Dinardo*, charged with Aggravated Assault with a Deadly Weapon (no minimum mandatory sentence), who was arraigned and discovery provided on 9/9/09, trial is scheduled for 11/23/09, a Notice of Inadequate Resources was filed on 9/10/09 and a Notice of Taking of Deposition was filed 9/17/09.

The Criminal Justice Information System (“CJIS”) printouts on all of these cases were introduced at the evidentiary hearing as State’s Exhibit 2 Composite.

Testimony of Public Defender Carlos Martinez

Carlos Martinez, the Public Defender for the Eleventh Judicial Circuit, testified that he has constitutional and ethical duties to protect the rights of his clients. (T1. 153-54). The decision to file the Motion to Withdraw in Division 15 was made because Mr. Kolsky had the highest single “C” caseload and he was the most experienced “C” attorney. (T1. 157). Mr. Martinez did not know why Mr. Bowens’ case was chosen other than it was one of forty-nine cases in which the client was out of custody and Mr. Kolsky had not done any work on, i.e., there was no client interview or depositions taken. (T1. 157-158).

Mr. Martinez testified that PD-11 operates under the Rules Regulating the Florida Bar, the American Bar Association (“ABA”) standards, and the guidelines from the National Legal Aid and Defender Association (“NLADA”). (T1. 158). It was his responsibility as manager of PD-11, a law firm, to make sure that his lawyers did not violate the Florida Rules of Professional Responsibility. (T1. 168-69). Mr. Martinez uses the ABA’s August 2009 “Eight Guidelines of Public Defense Related to Excessive Workloads” as ethical guidance for PD-11. Defendant’s Exhibit D. (T1. 171-81). Mr. Martinez believed that a number of the Rules Regulating the Florida Bar were being violated when his attorneys have to work with excessive caseloads and that PD-11 does not meet the ABA standards due to excessive caseloads. (T1. 169-80).

Mr. Martinez reviewed Mr. Kolsky's caseload, looking at the number of depositions taken, the amount of work done on his cases, the number of trials and the number of cases carried over from the prior fiscal year. (T1. 184-88). He found that Mr. Kolsky did not adequately communicate with his clients, do the work needed or provide due diligence in his representation (T1. 160-63) and thus had no choice but to move to withdraw from his cases, (T1. 190-91), even though there was no policy within PD-11 that prohibited an attorney from requesting continuances. (T1. 242).

Mr. Martinez testified about what he has done as Public Defender to try to ease the excessive caseloads. (T1. 172-76). The attrition of attorneys has slowed down and the number of arrests have gone down. (T1. 215). He has hired twenty new attorneys, which gives him more options of where to promote attorneys (T1. 215-16). He has rehired former felony assistant public defenders (T1. 208-09), but did not place them in the felony divisions, such as Division 15, which had the highest caseload at that time. (T1. 210-15, 229). Mr. Martinez will not shift resources to assist Mr. Kolsky even though it would solve the problem in Division 15, because it would hurt other parts of the Office. (T1. 204-05).

From April to June 2009, Mr. Martinez gave out exemplary merit raises to attorneys that totaled \$65,000, which is more than the approximately \$54,000 (in salary and benefits) it costs to hire a new attorney. (T1. 230-31). Mr. Martinez

took exception to this Court's opinion in which it stated that his predecessor, Mr. Brummer, had turned down sixteen positions from 2005 to 2008, in order to give salary increases to his lawyers. (T1. 226).²² If PD-11 had those sixteen attorneys it could get back to having double "C" attorneys in the divisions, including Division 15. (T1. 228).

Testimony of Fredrick "Rick" Freedman²³

Rick Freedman, an attorney in Florida since 1984, and the past President of Miami-Dade County Chapter of the Florida Association of Criminal Defense Lawyers ("FACDL") testified that the average number of criminal cases that an attorney should handle is between fifty to a hundred per year, and should be around seventy to eighty. (T1. 135), He added that an attorney should handle only forty to fifty cases at a time. (T1. 136). Accepting all of Mr. Kolsky's representations as true, Mr. Freedman did not believe that Mr. Kolsky was being effective and that his representation of Mr. Bowens was not adequate. (T1. 139-40, 151).

²² See *State v. Public Defender*, 12 So. 3d at 805. PD-11 never brought this alleged factual error to this Court's attention by filing a motion for clarification as it certainly could have done so. Instead PD-11 filed a Clarification in the trial court, Appendix, Exhibit 24, which the State objected to. Appendix, Exhibit 25. There is no indication that the trial court considered the clarification.

²³ The State filed a Motion in Limine to exclude the expert testimony of both Mr. Freedman and Prof. Lefstein as being irrelevant and not of assistance to the trial court. Appendix, Exhibit 22. The motion was denied by the trial court.

Testimony of Norman Lefstein

The last witness presented by PD-11 at the hearing was Norman Lefstein, Professor and Dean Emeritus of the Indiana University School of Law-Indianapolis. (T2. 4-5). The trial court allowed him to testify in this case as an expert on “the necessity for withdrawal of counsel based on the impact of caseload and/or workload on the ability to represent a client in accordance with counsel’s duty to render effective representation.” (T2. 13). Prof. Lefstein opined that based upon his review of Jay Kolsky’s caseload numbers provided to him by PD-11, it was virtually certain that Mr. Kolsky’s caseload for the year would far exceed the National Advisory Commission (“NAC”) recommendation of 150 cases because of the multiplier of five or six that is applied to a current caseload to get to the yearly number.²⁴ (T2. 36-40).

In discussing whether there were viable alternatives to withdrawal in Mr. Bowens’ case, Prof. Lefstein conceded that adding another attorney to the division could be one. (T2. 66-68). A request for a continuance would also be a viable alternative, especially if the client wanted to waive his speedy trial in order to stay out of jail pending trial. (T2. 76-80). Prof. Lefstein acknowledged that there is always a settling of priorities, and that if an attorney has more than one client, there

²⁴ Using Prof. Lefstein’s calculations and standards no assistant public defender would handle more than twenty-five to thirty felony cases at a time.

will always be a shifting of attention to one at the expense of the other. (T2. 49-50).

Testimony of Dennis Wouters

The State presented the testimony of former Assistant State Attorney Dennis Wouters, who had been the “C” assistant state attorney in Division 15 from July 2008 until May 2009. (T2. 88-89, 98, 134). Mr. Wouters would try to close out as many cases as he could at arraignment, about ten to twelve cases a day. (T2. 93). He would offer pleas in the morning, and Mr. Kolsky would always come back with a counter offer after talking to his clients. (T2. 93). If there was no plea, then the case would be set for sounding and trial, about two to two and a half months later. (T2. 93). He stated that at the sounding, Mr. Kolsky would announce ready 99% of the time. (T2. 94). Mr. Kolsky would never waive speedy trial unless absolutely necessary. (T2. 94-95). At the trial setting, most of the cases would plead out. (T2. 94-96). During the ten months he was in Division 15, he had only two jury trials with Mr. Kolsky, winning one and losing one. (T2. 96-97).

Mr. Wouters opined that Mr. Kolsky was one of the best defense attorneys that he had seen. (T2. 99). There was no case in which he felt that Mr. Kolsky was not knowledgeable, prepared, or did not know what his clients needed and their circumstances. (T2. 100). Mr. Kolsky challenged and tested the cases, and got the best pleas for his clients (T2. 100-01). Although Mr. Kolsky filed Notices

of Inadequate Resources in cases, no client ever came in and asked for another attorney. (T2. 101-02). Mr. Kolsky, although complaining about the caseload in June of 2009, never complained that he did not have enough time or that his caseload was to the point that he said he could not handle it. (T2. 128-30). Mr. Wouters did know what Mr. Kolsky had not done for his clients. (T2. 130).

Testimony of Julie Holsinger

Julie Holsinger, the present “C” assistant state attorney in Division 15, stated that she became a “C” in the division on May 26, 2009. (T2. 132-34). Before that she had shadowed Dennis Wouters for about two months. She had been warned more than once about Mr. Kolsky’s experience and that he was an excellent lawyer, not only by Mr. Wouters, but by the trial court itself. (T2. 139-40). Ms. Holsinger has not yet had a trial against Mr. Kolsky. (T2. 144).

When Ms. Holsinger took over as the “C,” her audit of her trial caseload was about 170-180 cases. (T2. 134). Due to her inexperience in offering pleas, her caseload went up to 215 by the end of June. (T2. 135). The trial court brought up the idea for the plea blitz to which both she and Mr. Kolsky agreed. (T2. 135). The list of included cases came from Ms. Holsinger, Mr. Kolsky and the trial court. (T2. 137). Ms. Holsinger testified that she observed Mr. Kolsky discuss the pleas with his clients. (T2. 141-43, 172). The result of the plea blitz was a decrease in the division of eighty-two cases. (T2. 139).

Ms. Holsinger observed Mr. Kolsky in and out of court. She saw Mr. Kolsky interact with his clients, and take an interest in them. (T2. 141-42). When Mr. Kolsky would come back to her with a counter plea offer, he would know about the client's personal history, employment, support network, and any mental illnesses or drug problems. Mr. Kolsky could look at an arrest form at arraignment and talk to his clients and could see possible motions to suppress or problems with the charges. (T2. 142). At soundings, Mr. Kolsky knew even more about his clients and could give her more detailed information. (T2. 143). Mr. Kolsky acted the same with both in-custody and out-of-custody clients. (T2. 143). Ms. Holsinger did not know what Mr. Kolsky had not done for his clients. (T2. 150-151).

Before the Motion to Withdraw was filed on August 3, 2009, Mr. Kolsky never complained about the size of his caseload. (T2. 148). After he filed the motion, Mr. Kolsky complained about his caseload. (T2. 148). He said that he had so many cases he could not keep up. (T2. 150). Ms. Holsinger asked Mr. Kolsky what the Motion was about and he stated that he thought he had too many cases, but that he "doesn't believe that he is ineffective and thinks he is pretty good." (T2. 148).

Factual Findings By the Trial Court

The trial court cited the Florida Public Defender's Association standard of 200 felony cases for an individual attorney per year, the NAC on Criminal Justice Standards and Goals of 150 felony cases, which may be on the high side as suggested by the American Council of Chief Defenders ("ACCD") in a Statement on Caseloads and Workloads dated August 24, 2007. Defendant's Exhibit O. Appendix, Exhibit 1, p. 2.²⁵ The trial court found that Mr. Kolsky's caseload, even at the low of 105 pending cases, would translate into him having handled at least 525 to 630 felony cases at the end of this fiscal year, not including pleas at arraignment. Appendix, Exhibit 1, p. 2.

The trial court found based on Mr. Kolsky's testimony, that the "number of cases assigned to Kolsky has had a detrimental effect on his ability to competently and diligently represent and communicate with all of his clients on an individual basis." The trial court found that this "detrimental effect begins at arraignment and

²⁵ As stated by this Court 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 had no relevance, because the numbers by themselves have no meaning without considering whether Mr. Kolsky is capable of providing effective representation to his clients.

extends to Kolsky's competence, diligence and communication after arraignment." Appendix, Exhibit 1, p. 3.

The trial court found that the "status and progress of Bowens' case is a symptom of Kolsky's excessive caseload." The "unrebutted testimony is that Kolsky has been able to do virtually nothing on this case." Appendix, Exhibit 1, p. 4. The trial court had to grant a continuance at the October 22, 2009, calendar call, which resulted in the waiving of speedy trial. Appendix, Exhibit 1, pp. 4-5. The trial court did not find this to be the result of any intentional effort to avoid representation of Mr. Bowens. Appendix, Exhibit 1, p. 10. The trial court also found that Public Defender Carlos Martinez' testimony as to the choices he has made concerning the management of PD-11 to be credible "amid a challenging and difficult fiscal environment." Appendix, Exhibit 1, p. 5.

Conclusions of Law By the Trial Court

The trial court found that under *State v. Public Defender*, a court can grant a motion to withdraw if the individual attorney shows that the client "will be" prejudiced or harmed by the attorney's ineffective representation. The trial court found this allowed it to consider whether there is a "substantial risk" that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. Thus using a "forward looking" approach, the trial court found that "if an assistant public defender requests permission to

withdraw from representation of a client based on considerations of excessive caseload, there must be an individualized showing of a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client." Appendix, Exhibit 1, p. 9.

Applying that interpretation of *State v. Public Defender* to the facts as found by the trial court, the trial court determined that "[t]he uncontroverted evidence and testimony of Kolsky shows that he has been able to do virtually nothing in preparation of Bowens' defense," "which resulted in a waiver of [Bowens'] right to a speedy trial," "and demonstrates the requisite prejudice to ... Bowens as a result of Kolsky's to-date ineffective representation." This prejudice was "a direct result of Kolsky's workload." Appendix, Exhibit 1, p. 10. The trial court further stated that it "should not, and [would] not, involve itself in the management of the public defender's office," and recommended that the legislature adequately fund both the Public Defender and the State Attorney's Offices. Appendix, Exhibit 1, p. 10-11.

V.

ARGUMENT

THE TRIAL COURT DEPARTED FROM THE ESSENTIAL REQUIREMENTS OF THE LAW IN GRANTING THE PUBLIC DEFENDER'S MOTION TO WITHDRAW WHERE THERE WAS NO EVIDENCE OF ACTUAL OR IMMINENT PREJUDICE TO THE CONSTITUTIONAL RIGHTS OF THE CLIENT, AND THE ONLY EVIDENCE OF "PREJUDICE" PRESENTED BY THE PUBLIC DEFENDER WAS THAT BECAUSE OF THE ASSISTANT PUBLIC DEFENDER'S WORKLOAD, HE HAD TO REQUEST A CONTINUANCE OF THE TRIAL.

Section 27.5303(1)(a), Florida Statutes (2009), provides 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 provides:

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).

In *State v. Public Defender*, 12 So. 3d at 805-06, this Court interpreted section 27.5303(1)(d), as follows:

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. §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.”).

The trial court recognized this Court's holding, but its interpretation of what this Court meant by requiring individualized proof of prejudice or conflict, separate from excessive workload, has in fact eviscerated the statute and this Court's holding, so as to render them meaningless.

The individualized proof of prejudice which the trial court found to be sufficient is the simple request for a continuance. The trial court's Order has set

forth a road map for any assistant public defender to move to withdraw from any case based solely on excessive workload which is contrary to section 27.5303(1)(d). All the assistant public defender has to do is swear in an affidavit or hearing, if the trial court chooses to hold one, that he or she has too many cases or that his or her workload is too high, that he or she cannot work on that defendant's case prior to the scheduled trial date, and as such will be forced to request a continuance, thereby waiving the defendant's speedy trial rights.

As a preliminary matter, the State asserts that before prejudice should even be determined, the assistant public defender should have to demonstrate that he or she has done all that can reasonably be done to minimize or lessen the problem of a burdensome case load by requesting assistance from supervisory personnel within the office. If such avenues of relief have not been pursued, determining prejudice in the individual case is premature. Although testimony was presented by Mr. Kolsky in the instant case, the State raises this point with future cases in mind, as such motions to withdraw and efforts to have orders granting or denying them reviewed by this Court are likely to recur.

Once an assistant public defender has met the burden of demonstrating that he or she has exhausted efforts to obtain relief from supervisors within the office, the question of prejudice can then be addressed. The "prejudice" which the trial court found – i.e., the simple request for a continuance, is not the type of

“prejudice” that this Court was referring to in *State v. Public Defender*. If it was, this Court would have affirmed the order in that case allowing PD-11 the relief it requested, i.e., the ability to refuse future appointments due to excessive workload because that is the effect of the trial court’s Order in this case.

Rather, the type of prejudice that this Court referred to was something that showed either that the client had suffered some actual prejudice or was in danger of suffering imminent prejudice to their constitutional rights. For example, this Court referred to *In re Pub. Defender’s Certification of Conflict & Mot. for Writ of Mandamus*, 709 So. 2d 101, 103 (Fla. 1988) (“*In re Certification 1998*”) where the harm that the Florida Supreme Court was trying to prevent was the tide of delayed appeals which resulted in defendants having served their prison sentences or completed probation before they received their right to appellate review. *State v. Public Defender*, 12 So. 3d at 802. This Court also referenced the anecdotal claims of prejudice by an assistant public defender in that hearing as an example of what might be an important part of an individualized determination that a particular assistant public defender was providing inadequate representation. *Id.* at 803 n. 5. There was no such anecdotal testimony by Mr. Kolsky as to what he did or did not do which specifically prejudiced Mr. Bowens or any client’s constitutional rights.

At the evidentiary hearing, PD-11 attempted to prove that not only in this case involving Mr. Bowens, but in all of his cases involving out-of-custody

defendants, Mr. Kolsky has been unable to perform various functions that will lead to the defendant being prejudiced by his inability to be ready for trial and need 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. Indeed, the evidence presented at the hearing reflected that thus far Mr. Kolsky had not provided the type of assistance of counsel to Mr. Bowens in this case as he had to other clients. Although the trial court found that this failure was not deliberate on the part of Mr. Kolsky and PD-11, there is no substantial competent evidence to support that finding in light of the uncontradicted testimony that Mr. Kolsky, without explanation, chose to work on cases of other out-of-custody clients who were arraigned after Mr. Bowens and who were facing less serious charges and consequences than Mr. Bowens. (T1. 114-15).

However, even accepting that factual finding, the Motion to Withdraw should not have been granted because whatever undefined potential harm that may exist due to Mr. Kolsky's actions or lack thereof could be remedied by Mr. Kolsky simply working on the case, as he would have normally done, by prioritizing Mr. Bowens because he falls into the type of client that Mr. Kolsky testified should have been prioritized. The granting of the continuance so Mr. Kolsky could have sufficient time to work on Mr. Bowens' defense should alleviate that problem.

The mere asking for a continuance which results in the waiver of the defendant's 175 day procedural speedy trial period under rule 3.191(a), Florida Rules of Criminal Procedure, cannot be the kind of individualized prejudice that this Court was referring to in *State v. Public Defender*. First, there was no evidence that either Mr. Bowens or any of Mr. Kolsky's clients wanted to exercise that procedural right or wanted a trial sooner than when Mr. Kolsky could have been prepared. Second, it is Mr. Kolsky's strategy to avoid continuances in order to not waive the speedy trial time period under the rule. (T1. 93). However, there is no policy at PD-11 which discourages the taking of continuances. (T1. 242). Prof. Lefstein testified that taking continuances was an acceptable alternative to withdrawal. (T2. 76-80).²⁶

²⁶ Although, the courts should not involve themselves in the management of the public defenders' offices, this does not mean that the courts must automatically permit the withdrawal upon the filing of a motion which reflects an excessive caseload. *See Skitka v. State*, 579 So.2d 102, 104 (Fla. 1991). In determining whether the public defender has presented sufficient reasons and evidence to permit the withdrawal based on excessive caseload, the courts are not prohibited from determining whether there are or were alternatives to withdrawal available to the public defender. The trial court refused to consider whether Mr. Kolsky's excessive caseload resulted from the management of PD-11. Appendix, Exhibit 1, p. 10. This was error. This Court in *State v. Public Defender*, in determining whether PD-11 had presented sufficient evidence to support its request to not be appointed to all of its noncapital felony cases, noted that PD-11 had not filled at least sixteen full-time attorney positions that were funded by the legislature, opting instead to increase employee salaries. 12 So. 3d at 805. During the last budget cycle, PD-11 continued the same path, using money for raises rather than filling positions. (T2. 230-31).

Most importantly, it is well settled that “the right to speedy trial provided in rule 3.191 is not coextensive with the broader *constitutional* right to a speedy trial. No constitutional right exists to a trial within 175 days of arrest.” *State v. Naveira*, 873 So. 2d 300, 308 (Fla. 2004). (Emphasis original). As such, a defendant’s consent or waiver is not required when defense counsel waives speedy trial for whatever purpose. *State v. Earnest*, 265 So. 2d 397 (Fla. 1st DCA 1972). As recognized by this Court in *State v. Guzman*, 697 So. 2d 1263, 1265 n.1 (Fla. 3d DCA 1997), “[b]ecause it is usually favorable to the defense, delay (although second best to outright dismissal) is, ironically enough, what the defendant is often really after in her claims to a ‘speedy trial.’” Requesting a continuance may be the most advantageous decision for his clients that Mr. Kolsky could make, because it may make the State’s case weaker, and it may allow his out-of-custody clients to remain free for a longer period of time.

Contrary to the trial court’s finding, the asking for a continuance would not inevitably create a conflict under Rule 4-1.7, Florida Rules of Professional Responsibility. That rule states that an attorney “shall not represent a client if...there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer’s responsibilities to another client....” The key to this obligation are both the words “substantial” and “materially.” PD-11 did not show that Mr. Kolsky’s continued representation of either Mr. Bowens or his

existing clients would result in a substantial risk that these representations would be materially limited. In this particular case, Mr. Bowens did not state in his affidavit that he wanted a speedy trial. In fact, a continuance and remaining out of custody may be beneficial to him. However, even if Mr. Bowens wanted a speedy trial, he could still receive one. Mr. Bowens, through Mr. Kolsky, can always demand a speedy trial pursuant to rule 3.191(b), Florida Rules of Criminal Procedure, once he has become ready. As such, any potential harm to Mr. Bowens can be remedied. As with Mr. Bowens' case, if Mr. Kolsky needs to request a continuance in his other cases in order to better represent his clients he is free to do so.

The trial court mischaracterized the State's argument as to what PD-11's burden was, stating that "the State argues that there must be proof of current actual prejudice to the defendant's constitutional rights before withdrawal is allowed." (Emphasis added). Appendix, Exhibit 1, p. 9. As set forth in the State's Post Hearing Memoranda, Appendix, Exhibit 13, pp. 39-40, the State did not argue that there had to be only current actual prejudice shown, recognizing that for the purposes of this Motion,²⁷ the standard for showing prejudice was not the standard under *Strickland v. Washington*, 466 U.S. 668 (1984), because there has not been a

²⁷ The State had argued that if the Motion to Withdraw was in reality a declaratory judgment action, then the *Strickland* standard, as found by other courts would be the appropriate standard for review. Appendix, Exhibit 13, p. 65-66.

final outcome. However, it was and is the State's position that there must be a real potential for prejudice to a constitutional right, such as effective assistance of counsel or the right to call witnesses. Something tangible has to be shown that will affect that constitutional right, for example, where there is the real possibility that a defense witness might be lost if counsel did not investigate immediately. As explained above, the circumstances presented here, including the need to file for a continuance, do not arise to even a threshold level of prejudice.

The State submitted that the case law concerning conflicts of interest was instructive. With any alleged conflict of interest, a defendant must first show that there is an **actual conflict**, i.e., that there is identifiable specific evidence in the record that suggests that the defendant's interests are impaired or compromised for the benefit of the lawyer or another party. Appendix, Exhibit 13, pp. 39-40. (Emphasis added). Without this factual showing, the conflict is merely possible or speculative. *Herring v. State*, 730 So. 2d 1264, 1267 (Fla. 1999) (citing *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980)). Furthermore, the prejudice that a defendant is required to show is that the actual conflict adversely affected counsel's performance. This means what did the attorney find himself or will find himself be "**compelled** to refrain from doing." *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). (Emphasis added). This is the standard which this Court should apply. PD-11 did not demonstrate and the trial court did not find that there was something

substantial or material that Mr. Kolsky has been or will be “compelled to refrain from doing.”

The evidence showed that all but two of Mr. Kolsky’s clients had pled, rather than gone to trial. Rule 4-1.2(a), Rules Regulating the Florida Bar, is instructive. Under that rule “[a] lawyer *shall* abide by the client’s decisions whether to settle a matter.” “In a criminal case, the lawyer *shall* abide by the client’s decision, after consultation with the lawyer, as to a plea to be entered.” (Emphasis added). Thus, once Mr. Kolsky or any assistant public defender has explained to the client at arraignment or whenever a plea is offered, that he has not had the time yet to fully investigate (if that is the circumstances), and the client decides that it is in his or her best interest to accept the plea, then Mr. Kolsky has no choice but to abide by the client’s interest. If Mr. Kolsky does that, he has not violated any ethical rules and has provided effective assistance of counsel.

PD-11 also 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 Rules of Professional Conduct. The State agrees. However, all attorneys must prioritize their workloads. Accordingly, how attorneys juggle their clients on a daily basis, and the need to do such, does not automatically render an attorney in violation of the ethics rules or ineffective,

absent a demonstration that any client's interest has been materially limited thereby.

The evidence was uncontradicted that no client had complained about the quality of Mr. Kolsky's work.²⁸ The proper focus of the trial court is to ensure that indigent defendants receive a fair trial under the constitution, and not whether Mr. Kolsky and PD-11 theoretically risk 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 testimony was general in nature and entirely devoid of any factual basis for the trial court's finding that he has provided or is providing ineffective assistance of counsel. It was not the required "meaningful and individualized information" or showing that would provide sufficient legal grounds for the trial court to grant his Motion to Withdraw under section 27.5303(1), Florida Statutes, (2009). *See State v. Public Defender*, 12 So. 3d at 802. The trial court should have reaffirmed its prior finding after the *Nelson* inquiry that there are insufficient grounds to discharge Mr. Kolsky and PD-11 and

²⁸ The evidence showed that the trial court had taken hundreds of pleas from Mr. Kolsky's clients, and extensively colloquied them, both at arraignment and at other time periods prior to trial, including soundings.

denied the Motion to Withdraw. Mr. Kolsky and PD-11 did not establish that he can not adequately represent Mr. Bowens.

With respect to the trial court's concluding recommendation "that the legislature adequately fund both Public Defender and State Attorney Offices," the State notes that issues regarding the appropriation of funds for the operation of government are solely the function of the legislature. *In re Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1136 (Fla. 1990). If the lower court's order is permitted to stand, the *de minimis* concept of prejudice which it embodies will make it likely that identical rulings will be made in large numbers of other cases, effectively resulting in the judiciary compelling the legislature to make additional appropriations.

In the context of the limited funding available to the Public Defender's Office and the entirety of the criminal justice system, the nature of the proceedings which were conducted in the lower court should also be viewed in terms of the precedent that they might set for future cases, both within this District and elsewhere. This is what was clearly contemplated by the trial court, PD-11, and the State during the initial status hearings.²⁹ Countless hours of labor on the part of the trial court, the State Attorney's Office, the Public Defender's Office, and

²⁹ However, it was also recognized that the trial court's ruling, although precedential in nature, was not binding on other trial courts either in the Eleventh Judicial Circuit or in other judicial circuits in Florida.

others, went into the litigation of a single motion to withdraw in a single pending criminal case. This is reflected through the extensive evidentiary hearing, the massive nature of the pleadings which were filed by all parties in conjunction with the Motion to Withdraw, and the expenditure of substantial sums for expert witnesses.

Given the limits of resources available to all parties within the criminal justice system, the prospect of repetitious hearings of such a magnitude is daunting, as it effectively redirects substantial resources away from the actual criminal cases themselves. The time that went into the single motion to withdraw in a single case undoubtedly represents the time that could have been expended in completing investigations and pleas in dozens of cases, or in conducting a few jury trials in third degree felony cases.

Whatever the outcome of the instant case may be, the State believes that steps need to be taken by this Court to establish parameters for such hearings in the future, to ensure that they are limited, modest in scope, and expeditious, and to further ensure that the limited resources which are available to all parties are effectively used for the purpose of the appropriation – i.e., the actual litigation of the underlying criminal case itself.

VI

CONCLUSION

The trial court's Order represents a departure from the essential requirements of the law that will cause material injury for which there is no adequate remedy by appeal. Wherefore, based on the foregoing, the State respectfully requests that this Court grant its Petition for Writ of Common Law Certiorari and reverse the trial court's Order Granting the Public Defender's Motion to Withdraw.

Respectfully submitted,

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail and e-mail on this _____ day of November, 2009 to:

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CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that this Petition is typed in 14 point (proportionately spaced) Times New Roman.

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