

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.

REPLY 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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REPLY ARGUMENT

PD-11 largely ignores the current statutory law that governs this case, focusing almost exclusively on caselaw that predates the Legislature's restructuring of the provision of counsel for indigents in criminal cases. In doing so, it downplays the role of the Legislature in structuring and funding indigent criminal defense and misreads the prior caselaw by concluding that no prejudice to constitutional rights must be established for the expansive relief granted below. Moreover, PD-11 places substantial, if not overwhelming, reliance on the Florida rules governing attorney conduct as the definitive and objective basis for the relief the trial court's order compels. But the rules provide only generally guidance and principles, none focusing squarely on the unique situation presented; none establish objective standards for concluding that the constitutional rights of indigent defendants are prejudiced to such a degree that the transfer of thousands of cases from a public defender's office is warranted. In short, PD-11 presents a view of the law that is outmoded, which posits that a public defender can merely file a certification of conflict that is deemed presumptively valid, that requires little objective evidence, and that is not subject to critical or adversarial examination.¹

¹ Florida courts have held that certification motions are no longer accepted at face value. [IB20] As the First District recently noted, trials courts are "no longer bound to accept the public defender's factual representations at face value." Scott v. State, 991 So. 2d 971, 973 (Fla. 1st DCA 2008).

I. PD-11 Ignores the Governing Statutes.

From the outset, PD-11 glosses over the substantial legislative changes that have altered and now govern the conflict process, claiming that the inherent authority of the courts governs and that the caselaw since the Behr decision in 1980 provides all that is needed to answer the difficult issues presented. [AB 22-26, 26 n. 17] By isolating and placing such great weight on judicial branch authority, PD-11 pays little heed to the principle that although courts have a central role in protecting constitutional liberties, including the right to counsel, the judicial branch has always taken care to ensure that its actions are necessary, narrowly drawn, and incrementally applied when enactments of the legislative branch are implicated.

Turning to the applicable statutory law, it is not until page 41 of PD-11's brief that it addresses why section 27.5303 is not relevant, claiming that the term "withdrawal" does not apply to the situation below. Both the trial court² and PD-11 view the statute as inapplicable, drawing the distinction that PD-11 is not seeking to withdraw from existing cases; instead, it is merely not accepting new cases. This

² PD-11's statement that the trial court did not mention section 27.5303 in its order [AB 41] overlooks the court's clarification order, which held the statute was inapplicable because no "withdrawal" from existing cases was ordered. Trial Court Order, Sept. 11, 2008, at 2-3. In addition, PD-11 incorrectly states that the Office of the Attorney General allowed a public defender to withdraw from an appeal based on excessive workload. [AB 41 n.28] Nothing in the record on appeal, or in the record of that case, supports PD-11's statement.

distinction is both semantic and unpersuasive, particularly given the Legislature's constitutional authority over the duties of public defenders and its intent that public defenders not avoid their responsibilities based solely on claims of excessive workload or underfunding as expressed in section 27.5303(1)(d).

The Legislature's authority comes from article V, section 18 of the Florida Constitution, which provides that public defenders "shall perform duties prescribed by general law." As the Florida Supreme Court recently stated, "section 18 clearly and unequivocally grants the Legislature the authority to control the duties to be performed, which naturally includes the types of cases for which public defenders are appointed." Crist v. Fla. Ass'n of Crim. Defense Lawyers, Inc., 978 So. 2d 134, 141 (Fla. 2008). Under this constitutional authority, the Legislature has established by general law the mandatory statutory responsibility of each public defender office to "represent" indigents in section 27.51, Florida Statutes, aptly entitled "Duties of public defender." Indeed, section 27.40 provides that public defenders "shall" be appointed to fulfill their duties under section 27.51 thereby establishing that public defenders are statutorily appointed to represent indigents arrested for felony, misdemeanor and other charges set out in section 27.51. Relieving PD-11 from a class of cases for which it is statutorily required to provide representation, as was done below, effectively allows PD-11 to withdraw from its legislatively mandated duties. It is implausible that the Legislature intended that public

defenders can so easily sidestep the statutory mandate that they provide indigent criminal representation based solely on allegations of excessive workload and underfunding.

Even if PD-11's argument is correct, section 27.5303(1)(d) still applies. As PD-11 acknowledges [AB 44-45], its attorneys are actually appointed at first appearance ("temporarily" in PD-11's view) and must thereafter transfer their cases to conflict counsel under the order.³ The suggestion that this process of initial appointment followed by actual withdrawal and transfer does not implicate section 27.5303 is not well taken. [AB 44] It seems evident that the statute's clear

³ PD-11 claims that its "temporary" appointment at first appearance for all new third-degree felonies is "necessary" under Rule 3.130(c)(1)'s narrow exception. [AB 44 & n.31] Its position is insupportable under the rule, applicable statutes, and this Court's caselaw. As this Court noted in Office of the Public Defender v. State, 714 So. 2d 1083 (Fla. 3d DCA 1998), Rule 3.130(c)(1) and section 27.52(1)(a), Florida Statutes (which states that a "court may not appoint the public defender to represent, even on a temporary basis, any person who is not indigent") make "clear that the indigency determination must be made at the first appearance." Id. at 1084. As this Court held, presumptively appointing a public defender to *all* cases at first appearance violates these provisions. Id. But, that is what was done below. The exception is where it is "necessary" to appoint a public defender to facilitate the initial determination of whether a defendant is indigent (e.g., defendant cannot fill out indigency affidavit or speaks a foreign language). Id. at 1085. The temporary appointment of PD-11, however, was not done to fulfill the narrow task of determining indigency; instead, it was done on an across-the-board basis for expedience and to finesse around and thereby avoid the "withdrawal" language of section 27.5303(1)(d), which plainly is not what the Legislature envisioned. Moreover, the suggestion that an appropriate remedy is to "delete" the requirement that PD-11 be appointed at all to third-degree felonies wholly ignores section 27.40's mandate that PD-11 "shall" be appointed to such cases involving indigent defendants.

language applies to a “withdrawal” of PD-11’s attorneys from this type of representation. It is not semantics when what actually occurs in the trial courts is what the statute addresses and prohibits. In any event, the Legislature’s enactments must be given effect; the perceived or potential convenience of structuring indigent representation to avoid the statute’s application in the first instance should not.

II. PD-11’s Caselaw Does Not Support the Expansive Relief Granted.

Consistent with its theme of lessening the importance of legislative enactments, PD-11 claims that caselaw, beginning with the decision in Escambia County v. Behr, 384 So. 2d 147, 150 (Fla. 1980), supports the relief imposed below. It begins its initial discussion with a recitation of what the Florida Supreme Court “held” in that case, inexplicably quoting at length from a concurring opinion joined by only one other justice. [AB22] *See Behr*, 384 So. 2d at 150-51 (England, C.J., concurring; joined by Alderman, J.). Justice England’s concurrence is not the law. *See* Art. V, § 3(a) (decision of Florida Supreme Court requires concurrence of four justices). That aside, as developed in the State’s initial brief [IB 17-20], none of the cases involved the current statutory structure nor the unprecedented scope of relief sought. For instance, Behr involved a public defender’s withdrawal from a small number of non-felony cases. That case, however, was under a different statutory structure with different operative language [IB 17] and involved only *six* non-felony defendants versus the *thousands* of cases at issue here. The more

important point is that the State has not contested the principle of Behr and its progeny that withdrawal based on excessive caseload or underfunding may occur if, on a case-by-case basis, a court determines that prejudice to the constitutional rights of indigent defendants exists. Broad prospective claims of harm due to excessive caseloads or underfunding do not suffice under section 27.5303; instead, as the applicable Florida Supreme Court decisions suggest, a demonstration of some actual harm to constitutional rights must be proven.

In this regard, PD-11 acknowledges that no binding caseload standards exist; instead, it points out that various “non-binding standards” were offered, acknowledging that workload rather than caseload is the more appropriate and accurate measure. [AB 11] As to caseload versus workload, PD-11’s expert calculated a single global average caseload statistic (dividing total cases by total lawyers) that made no distinctions between pre- and post-arraignment data [R17 2433 (“I don’t know any way to do this than to look at the totality of the number of cases being sought.”) and that did not utilize a case-weighting type of workload methodology. [R17 2440] He acknowledged that the National Caseload Standards from 1973 as well as the Florida Public Defender Association standards had no empirical basis [R17 2438, 2440] and that the standards, though of some use as a general reference point, had become of lesser value over the past three decades because they “may have little to do with the practice of criminal law in a particular

jurisdiction today.” [R17 2439 (quoting 2006 California Proposed Guidelines on Indigent Defense Services Delivery System)] In the end, he acknowledged that he “never gave an appropriate standard for PD-11”; instead, he merely testified that “I thought the caseloads were excessive, but I never said what I thought they should be.” [R17 2445]

This lack of standards hampered the trial court, which made no explicit finding of actual caseloads or workloads or the applicable standard. PD-11 posits that the trial court was not required to choose or apply any particular standard because PD-11’s caseload is extreme [AB 15], which begs the question of what standard must first be met before public defenders may withdraw from their statutory responsibilities to provide indigent defense. The State does not contend that an expensive or expansive workload study is necessary; it does contend, however, that some meaningful and objective data on actual workloads are necessary including hours worked per attorney, the extent of evening and weekend work, the use of case-weighting methodologies, and other indicia of managerial and operational efficiencies, before a judicial finding of constitutionally inadequate representation can be reached. That type of analysis did not occur.

Likewise, the State contends that some meaningful evidence of actual or imminent prejudice to constitutional rights must be shown, a key difference with PD-11’s position. PD-11 provides no rebuttal to the point that Florida Supreme

Court cases permitting withdrawal based on excessive caseload have involved situations where proof of actual prejudice to constitutional rights existed. As to some evidence of actual prejudice, PD-11's expert merely opined it was "obvious" that PD-11's attorneys are not competent in "many, many instances." [R17 2417] But, he acknowledged that no investigation was done to determine whether any PD-11 attorney provided substandard representation to a client [R17 2417], noting that Assistant Public Defender Amy Weber (who said she was in trial and unable to convey a plea deal timely to a client [R16 2300-01]) was "the only one we really have any specifics about." [R17 2416] As recounted in the initial brief, this one example of allegedly deficient representation is the type of happenstance that can happen to any busy trial lawyer. It is simply not enough to justify a conclusion that prejudice to constitutional rights permeates PD-11's operations.

Contrary to PD-11's assertion [AB 36-40], the State has not urged that the standards in Strickland v. Washington, 466 U.S. 668 (1984), be applied in this context. The only citation to Strickland in the State's initial brief is for the proposition that professional standards regarding what constitutes a reasonable number of cases "are only guides" and that the purpose of the constitutional guarantee of effective counsel "is not to improve the quality of legal representation. ... The purpose is simply to ensure that criminal defendants receive a fair trial." [IB 31-32 (quoting Strickland, 466 U.S. 688-89)] PD-11 ignores both of