

**IN THE CIRCUIT COURT OF THE ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA IN AND FOR
MIAMI-DADE COUNTY**

CRIMINAL DIVISION

**IN RE: REASSIGNMENT AND
CONSOLIDATION OF PUBLIC
DEFENDER'S MOTIONS TO APPOINT
OTHER COUNSEL IN UNAPPOINTED
NONCAPITAL FELONY CASES**

**JUDGE: Stanford Blake
SECTION: CF 61**

**CASE NO.: 08-1
ADMINISTRATIVE ORDER NO.: 08-14**

THE STATE OF FLORIDA

Plaintiff,

v.

HAROLD LOVERIDGE,
GANTT ADAMS,
TEDRICK MCINTYRE,
LONNIE CARSWELL,
REMIGIO CARRILLO,
RAUL RIVERO,
PABEL MIRANDA,
WILLIE KEELS,
EDWARD SHOEGREEN,
ALEXANDER ROBERTSON,
PATRICIA ANDUJAR,
WAYNE BROWN,
JOHN THREATS,
JOEL CHARLES,
OSCAR MUNOZ,
FRANCISCO FRAGA-MARTINEZ,
BONNIE LOWERY,
JED GRANT,
JOSE AROCHA,
NYLUS STANTON,
JEFFREY JAMES,

Case No. F08-14858 (CF01)
Case No. F08-12840 (CF02)
Case No. F08-5820A (CF03)
Case No. F08-8919 (CF04)
Case No. F08-17339 (CF05)
Case No. F08-13758 (CF06)
Case No. F08-16093 (CF07)
Case No. F08-22408 (CF08)
Case No. F08-18074 (CF09)
Case No. F08-2462 (CF10)
Case No. F08-5109 (CF11)
Case No. F08-11711 (CF12)
Case No. F08-17830 (CF13)
Case No. F08-17334 (CF14)
Case No. F08-2314 (CF15)
Case No. F08-10548 (CF16)
Case No. F08-19720 (CF17)
Case No. F08-16823 (CF18)
Case No. F08-7374 (CF19)
Case No. F08-11423 (CF20)
Case No. F08-13649 (CF21)

Defendants.

**PUBLIC DEFENDER'S REPLY MEMORANDUM IN SUPPORT OF MOTIONS TO
APPOINT OTHER COUNSEL IN UNAPPOINTED NONCAPITAL FELONY CASES
DUE TO CONFLICT OF INTEREST**

Bennett H. Brummer, the Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11" or the "Public Defender"), by and through undersigned counsel, hereby submits the following Reply Memorandum in Support of Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases Due to Conflict of Interest, and states:

INTRODUCTION

PD-11 has a serious conflict of interest. The dike has overflowed, and relief is needed immediately. Since the Motions were first filed, several assistant public defenders have left the office of PD-11, and PD-11 does not have the resources to hire additional lawyers. At present, the office is handling 9,659 noncapital felony cases. By August 15, 2008, there will be ninety-eight or less assistant public defenders handling felony cases.^{1/} PD-11 management is taking measures to try to alleviate the caseloads of the most overburdened lawyers. No management measures, however, would be sufficient to ensure that constitutional and professional standards are met under current caseload/workload levels.

When excessive caseload and workload prevent a public defender from providing effective assistance of counsel, the defender has a conflict of interest and a constitutional and ethical duty to decline accepting any more cases. The public defender's decision not only protects the constitutional rights of the indigent defendants entitled to effective assistance of counsel, but will also protect the fair administration of justice, the adversary system and the rule of law. The indigent defendants in need of counsel will be appointed an attorney without a conflict of interest, and victims will be protected because the defendant's counsel will be

^{1/} An attorney/investigator assignment report for the week of July 28, 2008 is attached to the Affidavit of Carlos J. Martinez as Ex. 1, which is being filed contemporaneously herewith.

conflict-free. Cases will be handled expeditiously and properly. This will help preserve the moral authority of the courts and the finality of the trial court proceedings.

Unfortunately, in the Response, the State Attorney, who is required to protect the fair administration of justice, resorts to ad hominem (and totally uncalled for) attacks on PD-11, ascribing bad motives to him, with no substantive basis whatsoever. The State Attorney attempts to diminish PD-11's claims by contending that PD-11's clients are the sole beneficiary of PD-11's Motions. In so doing, the State Attorney denigrates our system of justice and ignores the real-life implications of PD-11's current inability to assign defense attorneys who have time to provide prompt, quality representation.

PD-11 is a constitutional officer and a member of The Florida Bar. Unlike the State Attorney, the attorneys in the office of PD-11 have individual clients who are owed constitutional, professional and ethical duties, including the duties of diligence, competence, and the avoidance of conflicts of interest. PD-11's serious conflict jeopardizes clients' rights protected under the Sixth and Fourteenth Amendments of the U.S. Constitution and of Article I, Sections 9 and 16 of the Florida Constitution. The conflict places PD-11 and the lawyers in his office in jeopardy of breaching their professional responsibilities, and it threatens the integrity of the justice system by dramatically increasing the risk of unfair administration. These serious risks do not inure to the benefit of the victims, the prosecutors, the courts, the community, or our free society, all of which benefit by the protection of the individual rights in the U.S. and Florida Constitutions and by the fair administration of justice.

To say the criminal justice system will be dismantled if PD-11's Motions to Appoint Other Counsel are granted constitutes rank histrionics.^{2/} Response at 6-7. To the contrary, the

^{2/} Unfortunately, the State Attorney accused Mr. Brummer of being an unaccountable agent. Response at 7. This cannot be further from the truth. As his Affidavit filed contemporaneously herewith

criminal justice system will be dismantled if the mandate of *Gideon v. Wainwright*, 372 U.S. 335 (1963), and the rules of The Florida Bar are ignored and PD-11 is required to represent *all* indigent defendants, irrespective of PD-11's budget and capability. The State Attorney states that the granting of the Motions could lead to "the possible dismissal of very serious, including violent felony offenses or cases." Response at 3. The State Attorney has no factual or legal support for this proposition and, therefore, cites a newspaper article.

If the Motions are granted, PD-11 has been and continues to be willing to work with the State Attorney and the courts in any orderly transition, so that indigent defendants do not go unrepresented.^{3/} Once that orderly process is put in place by the Court, there is little likelihood of an increase in the number of cases discharged on speedy trial grounds. Therefore, the State Attorney's argument that defendants will be released on speedy trial grounds if PD-11's Motions to Appoint Other Counsel are granted is specious. Response at 4-5.

Moreover, PD-11 is not seeking to decline the representation of "the most dangerous defendants in the criminal justice system." Response at 6. Rather, PD-11 is not seeking to decline appointments involving the death penalty and capital sexual battery, which are the most complex, time-consuming and expensive cases and allegedly involve the most dangerous defendants.

exhibits, Public Defender-elect, Carlos J. Martinez, is fully accountable and fully supports Mr. Brummer's certification of conflicts of interest and the motion for relief.

^{3/} More often than not, the speedy trial rule is waived because the defenders cannot take discovery and investigate their clients' cases in a prompt fashion. Martinez Affidavit ¶ 11. Therefore, the State Attorney's argument that defendants will be released on speedy trial grounds if PD-11's Motions are granted is completely disingenuous.

PD-11 decided to seek permission not to accept appointments in future noncapital felony cases because this (followed by county court)^{4/} is where the heart of the emergency lies at present. PD-11's most significant attrition is with lawyers handling the noncapital felony cases. PD-11 does not have the resources to replace these lawyers with new hires. Further, PD-11 cannot move many lawyers from county court into felonies because of their lack of experience and because there is a crisis of excessive caseload and workload in that area as well. Martinez Affidavit ¶ 4. In addition, on a dollar basis, relief from appointments of future noncapital felony cases affects many fewer cases than declining cases in county court.^{5/}

Moreover, PD-11 is addressing the serious conflict in the most responsible and orderly way that is sanctioned by the ABA criminal justice standards, the Supreme Court of Florida and Florida Statutes. According to former Chief Justice England of the Supreme Court of Florida:

The problem of excessive caseload in the public defender's office should be resolved at the outset of representation, rather than at some later point in a trial proceeding. Public defenders, at the time of their appointment to a new case, are in the best position to know whether existing caseloads render unlikely their ability to continue to conclusion a new representation. If that prospect exists, they should so advise the trial court before undertaking new commitments.

Escambia County v. Behr, 384 So. 2d 147, 150 (Fla. 1980) (England, C.J., concurring). Further, Principle 5 of the ABA Principles of a Public Defense Delivery System requires that: "Defense counsel's workload is controlled to permit the rendering of quality representation." Standard 5-5.3 of the ABA Criminal Justice Section Standards – Providing Defense Services states:

(a) Neither defender organizations, assigned counsel nor contractors for services should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional

^{4/} In this reply, "county court" refers to cases in the misdemeanor and criminal traffic division, not cases in the domestic violence division of the County Court.

^{5/} In all likelihood, PD-11 will be forced to take similar action with regard to county court cases in the very near future.

obligations. Special consideration should be given to the workload created by representation in capital cases.

(b) Whenever defender organizations, individual defenders, assigned counsel or contractors for services determine, in the exercise of their best professional judgment, that the acceptance of additional cases or continued representation in previously accepted cases will lead to the furnishing of representation lacking in quality or to the breach of professional obligations, the defender organization, individual defender, assigned counsel or contractor for services must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments. **Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations.** (emphasis added) ^{6/}

Accordingly, PD-11 is seeking to not accept additional noncapital felony cases, in the manner suggested by for former Chief Justice England, in order to avoid breaching his professional obligations.

A. This Hearing May Not Involve the Management of PD-11

The key decision in determining many of the issues before the Court is *In re Certification of Conflict in Motions to Withdraw*, 636 So.2d 18 (Fla.1994). In this case, the Second District Court of Appeal determined that a hearing should be held to determine the facts underlying the decision of PD-10 to withdraw from 249 pending appeals. Despite a favorable ruling from the retired judge appointed as a commissioner and the acceptance of the commissioner's report by the Second District, PD-10 sought review by the Supreme Court "to resolve several issues that he felt compromised his autonomy as a constitutional officer." *Id.* at 21. The Court, speaking through Justice Shaw, acknowledged "the public defender's argument that the courts should not involve themselves in the management of public defender offices," but felt that an automatic acceptance of the public defender's certificate was also inappropriate. *Id.* at 21-22. The Court

^{6/} As the Supreme Court of Florida succinctly has stated: "[A]n inundated attorney may be only a little better than no attorney at all." *In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 636 So.2d 18, 19 (Fla. 1994)

approved the Second District's requiring a hearing, but was careful to note: "In conducting its inquiry, the district court made no attempt to 'micromanage' the affairs of the Public Defender's office", *id.* at 22, and, then, three paragraphs later, repeated that statement with elaboration, thus indicating how this hearing should be conducted:

In sum, we approve the procedure employed by the district court under the special circumstances of this case. We note that the court did not attempt to interfere in the management of the Public Defender's office, or attempt to instruct the Public Defender on how best to conduct his affairs. The court's inquiry was limited to an objective assessment of the Public Defender's practices in processing appeals in order to confirm that a factual bias existed for the Public Defender's motions.

Id. Three Justices, concurring through Justice Harding (and including then Chief Justice Barkett), said they "would have granted the public defender relief on the showing he made with his original position to withdraw," noting the "fact that the Attorney General's office [as here] took no position on the motions" as a factor in their belief that no hearing was necessary. *Id.* at 23. They made even more explicit the reasons why the courts should not interfere with the management of the Public Defender's office:

The public defender is a constitutional officer. Art. V, § 18, Fla. Const. The public defender is charged not only with representing indigent defendants, but also in managing an office, directing personnel, and administering a budget. Public defenders are subject to grand jury as well as media scrutiny if there is impropriety. They are also responsible to the electors at the polls. They should be accorded great independence in making the decisions to carry out their charge. . . . Thus, I would urge that a request to withdraw such as the one made by the petitioner, should come with a strong presumption of correctness and should require little evidence to support a ruling granting relief.

Id. The State Attorney waits until toward the end of the Response, and then suggests that issues of the PD-11's management of the office are before the Court (questioning whether "repetitive issues are handled effectively," whether training attorneys are carrying a caseload, etc). Response at 35 n.34. The Response also asserts there is no presumption of correctness to PD-

11's certification and PD-11 has the "burden of proof." *Id.* Suffice it to say that the Supreme Court of Florida does not agree and has so stated, as quoted.

As a constitutional officer of the State of Florida, PD-11's actions are "clothed with the presumption of correctness" and the burden of proof is on those challenging PD-11's determinations to show by proof that "every reasonable hypothesis has been excluded" which would support PD-11's determination. *Straughn v. Tuck*, 354 So. 2d 368, 371 (Fla. 1977). As demonstrated above, at the hearing, PD-11 must, and will, show that there is a substantial risk that the attorneys' will be unable to satisfy their professional and ethical obligations to their clients. Nor may the hearing be turned into an examination of the management of PD-11's office. As the Supreme Court of Florida has made clear, this is impermissible.

B The State Attorney Has No Standing to Oppose PD-11's Certification of Conflict and Any Participation by the State Attorney in the Conflict Determination Unnecessarily Creates a Due Process Problem.

The State Attorney has no standing to challenge PD-11's determination that he has a conflict of interest caused by under-funding and excessive caseloads. PD-11's ethical conflict concerns his obligations to his clients as a constitutional officer and a member of The Florida Bar. A public defender's service to his clients constitutes a private function. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *Kight v. Dugger*, 574 So. 2d 1066, 1069 (Fla. 1990). In this way, the state has a constitutional obligation not to interfere with the professional independence of the public defender. As the U.S. Supreme Court wrote in *Polk County*:

[I]t is the constitutional obligation of the State to respect the professional independence of the public defenders whom it engages. This Court's decision in *Gideon v. Wainright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799 (1963), established the right of state criminal defendants to the "guiding hand of counsel at every step in the proceedings against [them]." Implicit in the concept of a "guiding hand" is the assumption that counsel will be free of state control. There can be no fair trial unless the accused receives the services of an effective independent advocate.

Polk County, 454 U.S. at 321-22. Clearly, the public defender's adversary has no right to interfere with the constitutional and ethical obligations the public defender owes to his clients.

Further, former Chief Justice England recognized in his *Escambia County* concurrence that the only real parties in interest in a certification of conflict and motion for appointment of other counsel are the parties paying for the defense and not the state attorney. Chief Justice England wrote: "The office of the state attorney cannot realistically be placed in the position of challenging the public defender's caseload statistics and priorities due to their parallel yet competing interests." *Escambia County*, 384 So.2d at 150 n.1. ^{7/} Moreover, chapter 27, Florida Statutes, does not contemplate the State Attorney's right to oppose a public defender's certification of conflict. Section 27.5303(1)(a) provides: "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 communications." (emphasis supplied) The statute does not say the state attorney may oppose PD-11's certification of a conflict of interest. ^{8/}

The cases the State Attorney cites to support her argument about standing are not analogous to the circumstances here. Those cases deal with postconviction relief, state attorney motions to disqualify defense counsel, and defense attorneys' motions to withdraw on the eve of trial. Response at 8-9. With respect to the motions for postconviction relief and motions for disqualification, the state attorney has an interest in defense counsel's conduct which might be argued to impair the finality of a conviction. Here, however, PD-11 is seeking prospective relief, which is intended to avoid future harm and not the reversal of a conviction. *Luckey v. Harris*,

^{7/} The Office of the Attorney General has not appeared in these matters.

^{8/} Of course, the Court may desire to have the State Attorney to appear *amicus curiae*.

860 F.2d 1012, 1017 (11th Cir. 1988), *case subsequently dismissed on abstention grounds*, 976 F.2d 673 (11th Cir. 1992).

The State Attorney also posits the “right to challenge the PD-11 assertions that he can take a particular action regarding his representation of clients based on his professional judgment.” Response at 9 (citing *Mann v. State*, 937 So. 2d 722 (Fla. 3d DCA 2006)). However, the case cited in support of that proposition is inapposite. The issue in the *Mann* case was whether the public defender could represent a defendant in a collateral postconviction relief proceeding when not under a sentence of death without a separate appointment. The Third District Court of Appeal held that the public defender needed a separate appointment. *See Mann*, 937 So. 2d at 723 & 726-29. The court’s opinion did not discuss the state attorney’s role.

As argued in the Response, the State Attorney may oppose defense counsel’s motion to withdraw on the eve of or during trial as the State Attorney has a right to contest unreasonable delay. Response at 8 (citing *Rubin v. State*, 490 So. 2d 1001 (Fla. 3d DCA 1986)). PD-11 does not take issue with the State Attorney’s participation in a late motion to withdraw, a motion for disqualification, or in a motion for postconviction relief. But the State Attorney’s opposition to PD-11’s certification of conflict is puzzling because the State Attorney’s interest in finality and the fair administration of justice should mean that the State Attorney would not want an indigent defendant to be represented by counsel laboring under a conflict of interest. *See Florida Bar v. Cox*, 794 So. 2d 1278, 1285 (Fla. 2001) (“The United States Supreme Court observed over sixty years ago that a prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served”); ABA Criminal Justice Section Standards, Prosecution Function, Standard 3-1.2(c) (“The duty of the prosecutor is to seek justice, not merely to convict.”).

