

**IN THE  
SUPREME COURT OF FLORIDA**

STATE OF FLORIDA,

Appellant/Petitioner,

v.

Case No. SC08-1827

PUBLIC DEFENDER, ELEVENTH  
JUDICIAL CIRCUIT OF FLORIDA,

Appellee/Respondent.

---

**STATE OF FLORIDA’S RESPONSE  
TO ORDER TO SHOW CAUSE**

At issue is whether discretionary pass-through jurisdiction exists in this case under article V, section 3(b)(5), Florida Constitution, which applies only to a trial court order or judgment certified by a district court “in which an appeal is pending,”<sup>1</sup> and if so whether it should be exercised. The order at issue arises from motions of a public defender office, filed in twenty-one pending criminal cases, seeking relief from future assignment in all noncapital felony cases based on claims of conflicts due to underfunding and an excessive caseload. For jurisdiction to exist the order must be a final or non-final order that is *appealable* to a district court; if it is pending in the district court on *certiorari* review, jurisdiction does not

---

<sup>1</sup> Subsection 5 states that this Court “[m]ay review any order or judgment of a trial court certified by the district court of appeal in which an appeal is pending to be of great public importance, or to have a great effect on the proper administration of justice throughout the state, and certified to require immediate resolution by the supreme court.” Art. V, § 3(b)(5), Fla. Const.

exist. State v. Matute-Chirinos, 713 So. 2d 1006, 1007 (Fla. 1998). Jurisdiction depends on how the order is characterized. If it is an administrative order, or an order reviewable only by certiorari, this Court lacks jurisdiction. If the order is an appealable final or non-final order, it is reviewable under this Court's discretionary jurisdiction. It is a close question as to which characterization is the correct one, a question the State suggests this Court need not address. As discussed below, even assuming discretionary jurisdiction exists, it should not be exercised, allowing the Third District to review the matter first.

## **I. Background**

This case began when the Public Defender for the Eleventh Judicial Circuit ("PD-11") filed a motion in one case in each of the twenty-one criminal divisions in the circuit court. Each motion sought prospectively to relieve PD-11 of its responsibilities for representing defendants and to appoint other counsel in future criminal cases. PD-11 asserted that due to lack of funding and excessive caseloads, its representation of criminal defendants in the twenty-one cases would ethically be compromised. PD-11's "Certificate of Conflict Interest" stated that:

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

the United States Constitution ... and the Rules Regulating The Florida Bar.

In a June 26, 2008 order, the circuit court treated the motions as a matter for court administration, entering Administrative Order No. 08-14, which consolidated the motions and assigned them to the criminal division administrative judge. [App. B] The trial court set the consolidated motions for an evidentiary hearing as required under section 27.5303(1)(a), Florida Statutes.<sup>2</sup> The hearing lasted two days, July 30-31, 2008, and the trial court heard testimony from eight witnesses, including one presented by the State Attorney's Office (SAO-11) on behalf of the State.<sup>3</sup>

---

<sup>2</sup> Subsection (1)(a) states, in pertinent part:

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 communications. 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.

<sup>3</sup> Based upon PD-11's objection to SAO-11's participation in the hearing, the trial court ultimately ruled that SAO-11 had no standing to participate as a party, but allowed it to be heard as amicus curiae. [App. A 3]

On September 3, 2008, the trial court entered an order, denoted as “Administrative Order No. 08-14” and entitled an “Order Granting in Part and Denying in Part Public Defender’s Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases” (“Order”). [App. A] The Order states that PD-11 operates “under extreme and excessive caseloads” and authorizes “PD-11 to decline to accept appointments to ‘C’ felony cases until such time as [the trial court] determines that PD-11 is able to resume its constitutional duties with respect to these cases.” Id. at 6. The Order requires the Office of Criminal Conflict and Civil Regional Counsel for the Third District (“RCC-3”) to accept all of PD-11’s “C” felony cases for indigent persons, which are mostly third degree felonies and make up approximately 60% of the felony cases that PD-11 handles. Id. at 4, 6. The Order provides that if RCC-3 determines it has a conflict of interest (presumably, an excessive caseload) it can separately move to withdraw and ask the court to appoint other counsel. Id. at 6.

On September 5, 2008, the State filed a notice of appeal. [App. C] On September 10, 2008, PD-11 filed a “Motion for Clarification and/or Notice Pertaining to Case Status” in the trial court, which granted relief. The trial court clarified that its definition of “C-felony cases” means only third-degree felony cases. [App. D] The court further clarified that its Order was not allowing PD-11 to “withdraw” from C-class cases, but rather that PD-11 is appointed to such cases only for first appearance, after which the cases are to be transferred to RCC-3 for

representation. The State filed an amended notice of appeal from the clarification order. [App. E]

Neither the Order, nor the trial court's clarification, directly addressed the constitutionality of section 27.5303(1)(d), which states: "In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel *based solely upon inadequacy of funding or excess workload* of the public defender or regional counsel."§ 27.5303(1)(d), Fla. Stat. (emphasis added). SAO-11 took the position that the statute prohibited the trial court from granting relief; PD-11 took the position that the statute was unconstitutional if it were to prohibit the relief sought.

On September 11, 2008, the State filed an emergency motion in the Third District to stay the trial court's order, contending that it was either entitled to an automatic stay or, alternatively, that the balance of equities favored a stay. The Third District granted the stay, established an expedited briefing and oral argument schedule, but subsequently certified this case as presenting issues of great public importance for this Court's possible consideration.

## **II. Analysis**

### **A. Jurisdiction Under Article V, Section 3(b)(5).**

Article V, section 3(b)(5) "does not provide this Court with jurisdiction to accept a case certified by the district court and pending in the district court, not on appeal but rather on a petition for a writ of certiorari." State v. Matute-Chirinos,

713 So. 2d 1006, 1007 (Fla. 1998) (discharging jurisdiction in a capital felony case because it “was pending in the district court on petition for writ of certiorari, not on appeal, at the time it was certified by the district court.”). The initial question, therefore, is whether the Order is an appealable final or non-final order or, alternatively, an order reviewable via writ of certiorari. If it is the former, discretionary jurisdiction exists; if it is the latter, jurisdiction is lacking. The next sections review the possibilities in reverse order.

### **1. Administrative or other non-appealable order?**

On its face, the Order is characterized as an administrative order, which means it is non-appealable and that jurisdiction under section 3(b)(5) is lacking. As this Court held in 1-888-Traffic Schools v Chief Circuit Judge, Fourth Judicial, 734 So. 2d 413 (Fla. 1999), administrative orders are reviewable only by common law certiorari.

Indeed, the trial court treated PD-11’s twenty-one motions as an administrative matter. Each of these motions was filed under the authority of section 27.5303(1)(a), Florida Statutes, which was amended in 1999 to allow trial courts to “conduct a hearing into the adequacy of a public defender’s representations regarding a conflict of interest....” Ch. 99-282, § 1, Laws of Fla.<sup>4</sup>

---

<sup>4</sup> Chapter 99-282 amended section 27.53(3), Florida Statutes, which is now section 27.5303(1)(a).

The court held the hearing under that statute's authority, and it purported to deny the standing to SAO-11 under the authority of that statute.

An administrative order is defined as “[a] directive necessary to administer properly *the court's affairs* but not inconsistent with the constitution or with court rules and administrative orders entered by the supreme court.” Rule 2.120(c), Fla. R. Jud. Admin. (emphasis added). The proceedings below concern the affairs of the public defender's office, rather than those of the trial court. The Order, however, might implicate the effective administration of the circuit court's docket, thereby placing the Order within the definition of an “administrative order” for which review under section 3(b)(5) is lacking.

As next discussed, the Order does not neatly fit within the parameters of either an appealable non-final order or an appealable final order. For this reason, it may constitute a non-final order that is reviewable only via certiorari, in which case this Court lacks jurisdiction under section 3(b)(5).

## **2. Appealable Non-Final Order?**

The Order does not appear to be an appealable non-final criminal or civil order. Rule 9.130(a)(2) provides that “appeals of non-final orders in *criminal* cases shall be as prescribed” in Rule 9.140. (Emphasis added.) Subsection (c) of Rule 9.140 (entitled “Appeals by the State”) sets forth sixteen categories of appeals, none of which apply to the type of order at issue. Subsection (c)(1)(P) of the rule provides that the State may appeal in a criminal matter “as otherwise provided by

general law for final orders.” No authority under general law appears to exist for appellate jurisdiction for the type of order at issue. Instead, the general rule is that non-final orders entered against the State in criminal cases are subject to review by certiorari. State v. Coyle, 181 So. 2d 671 (Fla. 2d DCA 1966). For these reasons, the Order does not appear to be an appealable non-final order in a *criminal* case.

If the Order were deemed a *civil* matter rather than criminal in nature, it might possibly fall under Rule 9.130(a)(3), which provides for district court review via appeal of specific non-final orders. The only possible category within that rule, however, relates to orders granting, continuing, modifying, denying or dissolving injunctions. PD-11, however, did not style its relief as injunctive, and did not attempt to establish the requirements for either temporary or permanent injunctive relief. It may be argued that the Order is, in effect, a type of mandatory injunction that compels that certain actions be taken. But the more natural interpretation is that the Order was intended to be an administrative action over which the trial court retained ongoing control, and for which certiorari review only exists.

### **3. Final appealable order?**

An order is considered final when it “constitutes an end to the judicial labor in the cause, and nothing further remains to be done by the court to effectuate a termination of the cause as between the parties directly affected.” S.L.T. Warehouse Co. v. Webb, 304 So. 2d 97, 99 (Fla. 1974). An order or judgment



should contain “unequivocal language of finality.” Hoffman v. Hall, 817 So. 2d 1057, 1058 (Fla. 1st DCA 2002).

The granting of a motion to withdraw due to a conflict of interest is *not* a final order in the typical criminal case. *See Remeta v. State*, 707 So. 2d 719, 719 (Fla. 1998) (affirming denial of counsel’s motion to withdraw, but noting that the Court accepted “jurisdiction only because Remeta is under an active death warrant .... Otherwise, we would dismiss this cause for want of jurisdiction as an unauthorized attempt to appeal a non-appealable order.”).

The Order has some characteristics of a final order when its effect, rather than its title, is considered. Although not a “final order” in any of the twenty-one criminal case themselves, it is a final decision on the merits of the issue presented, was contingent on the showing made at the hearing, granted sweeping injunctive relief, affected interests of the State as well as PD-11, left some periodic action to be done in the trial court, and therefore could be considered a final, appealable order under Rule 9.030(b)(1)(A), Florida Rules of Appellate Procedure. But, PD-11 clearly did not intend to seek relief under the declaratory judgment act, chapter 86, Florida Statutes. It filed no complaint after consolidation of the motions, and, as stated, opposed SAO-11’s participation as a party on behalf of the State.

Thus, the effect of the order can be viewed differently. On the one hand, the order disposes of the immediate issue presented. The order grants PD-11’s request to appoint other counsel in future noncapital felony cases based on underfunding

and a high average caseload. On the other hand, the Order establishes a schedule of ongoing review of the matter, thereby retaining jurisdiction over its implementation. The Order states that PD-11 is to decline appointments “until such time as th[e] Court determines that PD-11 is able to resume its constitutional duties with respect to these cases.” [App. A 6] The Order continues: “This matter will be set for a recurring 60 day review with weekly [attorney assignment sheets] to be submitted to the Court to allow it to monitor the status of PD-11’s caseload.” *Id.* at 6-7. The effect of the order is not to finally resolve whether the PD-11 may refuse appointments in all Class-C felony cases, but rather to set up a system by which the caseload and resulting potential conflict may be reviewed at 60-day intervals.

This reservation of jurisdiction does not, in and of itself, affect finality where it is reserved to resolve collateral, and not substantive, matters. *See McGurn v. Scott*, 596 So. 2d 1042 (Fla. 1992) (reservation of jurisdiction over an issue “directly related to the cause at issue” and “not incidental to the main adjudication” renders the order non-final). In this case, judicial labor at the trial level will be ongoing and substantial, whether it be review of PD-11’s caseload under the Order, the transfer of cases from RCC-3 to private counsel as RCC-3’s capacity to accept transfers is depleted quickly, or other such matters. This ongoing exercise of jurisdiction undercuts the order’s finality to some degree.

Notably, it was PD-11, not the State, that moved the Third District to certify this case pursuant to Rule 9.125. In doing so, PD-11 apparently viewed the Order

as a final, appealable order. For this reason, it must necessarily concede that the trial court erred in denying the SAO-11's standing in the proceedings below. *See Orange County v. Game & Fresh Water Comm'n*, 397 So. 2d 411, 413 (Fla. 5th DCA 1981) ("It is a fundamental principle of appellate law that appeal jurisdiction is only available to parties."); *see also Smith v. Chepolis*, 896 So. 2d 934 (Fla. 1st DCA 2005) (nonparty whose rights are *adjudicated* in a final order has a right to a plenary appeal). Non-parties whose interests are *affected* by a trial court have may seek *certiorari* review in the appellate court. *Dep't of Children & Families v. Harter*, 861 So. 2d 1274, 1275 (Fla. 5th DCA 2003). As such, if PD-11's position on the State's standing is correct, the review sought in the Third District is best characterized as *certiorari* and the Order would not be subject to pass-through jurisdiction.

Similarly, PD-11's position conflicts with the requirements of pass-through jurisdiction, which is available only for appeals that affect the administration of justice statewide or that involve issues of great public importance. The argument that this case will have a statewide impact and that it is of great public importance is inconsistent with PD-11's assertion that the State has no interest at stake and lacks standing. Cases of such great importance are precisely those in which the State has standing to assert and protect its interests.

The Order is chimerical because it has attributes of appealable orders (for which jurisdiction under section 3(b)(5) exists) as well as non-appealable orders

reviewable via certiorari (for which jurisdiction under section 3(b)(5) is lacking).

The analysis above leads to no clear answer. Given the closeness of the jurisdictional question presented, it is respectfully suggested that the Court avoid deciding it. Rather, it is suggested that the Court assume that jurisdiction exists, but decline to exercise it for the reasons set forth below.

B. The Court Should Decline to Review this Case.

Even if discretionary jurisdiction exists under section 3(b)(5), it should not be exercised in this case. This case is important to the functioning of the criminal justice system in the Eleventh Circuit, but it is questionable at this time whether it will “have a great effect on the proper administration of justice throughout the state.” Many public defenders and state attorneys throughout the state are aware of the Order, but that awareness alone does not warrant acceptance of this case. Nor does the possibility that some other public defender offices may pursue similar relief on similar grounds warrant the Court’s review at this time.

Instead, declining jurisdiction will allow this Court to benefit from the district court’s initial review of the issues presented. Indeed, prior cases of a similar nature began or proceeded through the district courts.<sup>5</sup> As members of this

---

<sup>5</sup> See In re Public Defender’s Certification of Conflict, 709 So. 2d 101 (Fla. 1998) (order of Second District on motions of public defender to withdraw from 248 cases due to excessive caseload); In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of Tenth Judicial Circuit, 636 So. 2d 18, 19 (Fla. 1994) (same); In re Order on Prosecution of Criminal Appeals by Tenth (Continued ...)

Court have noted, “our decision will be a more informed one because of that intermediate appellate review.” Fla. Dep’t of Agric. & Consumer Servs., v. Haire, 824 So. 2d 167, 169 (Fla. 2002) (Pariente, J., joined by Lewis, J., concurring).

While the issues are clearly important and in need of reasonable, expedited review, the Third District is fully capable of providing such review and indeed had set this case for expedited briefing and argument. That court is capable of examining the record below and addressing the important issues in the first instance, even though the issues are challenging or may require future resolution by this Court. *See* Carawan v. State, 515 So. 2d 161, 162 n.1 (Fla. 1987) (“section 3(b)(5) is not to be used as a device for avoiding difficult issues by passing them through to this Court. The constitution confines this provision to those matters that ‘require immediate resolution by the supreme court.’”).

Moreover, the issues regarding the manner by which PD-11 and SAO-11 process cases involve matters with which the Third District has direct working knowledge. The issues to be presented will likely require further factual development at the trial court level, which is something the Third District is well suited to direct and analyze before the case comes to this Court. It is this type of knowledge (possessed by other district courts as to the operations of circuit courts

---

Judicial Circuit Public Defender, 561 So. 2d 1130, 1131 (Fla. 1990) (same); Escambia County v. Behr, 384 So. 2d 147 (Fla. 1980) (consolidated cases from First and Third Districts).

in their jurisdictions) that the Florida Supreme Court, as an institution, does not necessarily have.

## **Conclusion**

For the foregoing reasons, the State of Florida respectfully requests that the Court decline to accept jurisdiction.

Respectfully submitted,

**BILL McCOLLUM  
ATTORNEY GENERAL**

/s/ Scott D. Makar

Scott D. Makar (FBN 709697)

Solicitor General

Louis F. Hubener (FBN 0140084)

Chief Deputy Solicitor General

Courtney Brewer (FBN 890901)

Deputy Solicitor General

Office of the Attorney General

The Capitol – PL-01

Tallahassee, Florida 32399-1050

(850) 414-3681

(850) 410-2672 facsimile

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 13th day of October, 2008 to:

PARKER D. THOMSON  
ALVIN F. LINDSAY  
JULIE E. NEVINS  
MATTHEW R. BRAY  
Hogan & Hartson LLP  
Mellon Financial Center  
1111 Brickell Avenue, Ste. 1900  
Miami, Florida 33131

CHIEF JUDGE JOSEPH P. FARINA  
Dade County Courthouse  
73 West Flagler Street  
Miami, Florida 33130

JUDGE STANFORD BLAKE  
Richard E. Gerstein Justice Bldg.  
1351 N.W. 12<sup>th</sup> Street  
Miami, Florida 33125

LINDA KELLY KEARSON  
General Counsel  
Eleventh Judicial Circuit  
Lawson E. Thomas Courthouse Ctr.  
175 N.W. First Avenue, 30<sup>th</sup> Floor  
Miami, Florida 33128

ARTHUR J. JACOBS  
Jacobs & Associates, P.A.  
961687 Gateway Blvd., Ste. 201-1  
Fernandina Beach, Florida 32034

PENNY BRILL/ DON HORN  
Office of the State Attorney  
E.R. Graham Building  
1350 N.W. 12<sup>th</sup> Avenue  
Miami, Florida 33136

JOSEPH P. GEORGE, JR.  
Regional Civil and Criminal  
Conflict Counsel  
1501 N.W. N. River Drive  
Miami, Florida 33125

STEPHEN PRESNELL  
General Counsel  
Justice Administration Commission  
P. O. Box 1654  
Tallahassee, Florida 32302

/s/ Scott D. Makar  
Attorney