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 IN OPPOSITION TO PUBLIC DEFENDER'S MOTION TO DISSOLVE TEMPORARY STAY

The Public Defender for the Eleventh Judicial Circuit ("PD-11"), appellee/respondent, has moved for an order of this Court dissolving the temporary stay entered by the Third District Court of Appeal. The motion argues that the stay should be dissolved essentially for two reasons. First, PD-11 contends that the State has failed to show either the likelihood of success on the merits or irreparable harm. And second, on the basis of a post-trial affidavit filed in the Third District Court of Appeal, PD-11 argues that conditions in its office have worsened to the point that criminal defendants' constitutional rights are now in jeopardy, a finding that the trial court did not make.

Although at this point the Court has not accepted this case for review, and indeed has asked the parties to address whether it has jurisdiction, the State, in an

abundance of caution, submits this response to the motion to dissolve the temporary stay. The motion should be denied for the following reasons:

1. Following a two-day hearing, the trial court entered Administrative Order 08-14 (Exhibit "A", attached), entitled "Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases." ("Order"). The Order had no real and apparent connection with the administration of the "court's affairs." See Rule 2.120(c), Fla. R. Jud. Admin. (defining administrative order 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."). Rather, the Order effectively relieved PD-11 of an entire category of felony cases (called class "C" felonies by the trial court), all of which had yet to be filed.

2. An administrative order is reviewable only by common law certiorari. 1-888-Traffic Schools v. Chief Circuit Judge, Fourth Judicial, 734 So. 2d 413 (Fla. 1999). PD-11 has cited no exception to that general rule. Accordingly, if the trial court's Order is an administrative order, or an order of any type reviewable only by certiorari, this Court is without jurisdiction either to review this case or dissolve the stay. Only appeals may be certified pursuant to Rule 9.125, Fla. R. App. P., for immediate resolution. State v. Matute-Chirinos, 713 So. 2d 1006 (Fla. 1998).

3. The effect of the Order, however, is to grant declaratory and injunctive relief to PD-11. This is so even though this action was initiated by the filing of

motions in some 21 pending criminal cases requesting appointment of other counsel.[1]

4. If the Order is considered a final order granting declaratory and injunctive relief, or any other order that is final, then the State was entitled to an automatic stay under Rule 9.310(b)(2), Fla. R. App. P., upon the filing of its notice of appeal. In that event, the State had no obligation to demonstrate the likelihood of success on the merits or irreparable harm, and the premise of PD-11's motion to dissolve the stay fails.

5. Assuming that PD-11's motion may be construed as a motion to vacate the automatic stay, it should be denied forthwith. First, although the trial court found that PD-11 suffered under excessive caseloads, it did not find that any criminal defendant's constitutional rights had been violated or were about to be violated. Not a word was said in the Order about ineffective assistance of counsel. What the trial court found was that PD-11 attorneys were in danger of experiencing conflicts of interest under the Florida Rules of Professional Conduct that might pose harm to defendants' rights.

6. This Court is not the proper forum for adjudicating the "new facts" contained in the post-trial affidavit of Carlos Martinez, the chief assistant public

[1] PD-11 clearly did not intend to seek relief under the declaratory judgment act. It filed no complaint and, in fact, opposed the State's participation as a party in the trial court proceedings. The trial court ruled the State lacked standing but permitted the State to participate as amicus curiae. This ruling was not reduced to writing until the trial court entered the Order. It is an issue on appeal.

defender and public defender-elect. In any event, these "new facts" do not warrant vacating the stay. The affidavit represents that when PD-11 filed its certificates of conflict and motions in the trial court in late June 2008, it had 105 attorneys handling noncapital felony cases. It further represents that at the July 2008 evidentiary hearing, "PD-11 projected it would soon have 98 attorneys handling noncapital felony cases," and now "[s]ince the evidentiary hearing, additional attorneys have resigned, and PD-11 currently anticipates that it will have only 94 attorneys to handle noncapital felony cases by the beginning of October 2008." See Motion to Dissolve Temporary Stay, pp. 8-9 (emphasis added). How many attorneys PD-11 does have is unclear.

7. Although PD-11's budget for the new fiscal year would appear to be sufficient to allow it to hire replacements -- the affidavit does not say otherwise -- PD-11 claims it cannot be certain that funds will remain available through the year because of the declining economic climate. Motion, p. 10. Thus, PD-11 concludes it would be "irresponsible" to hire replacements "without any assurance that funds will be available to pay them in the future." Id. By its own admission, therefore, PD-11 is not precluded from hiring replacements.

8. The remainder of PD-11's argument assumes that the trial court's finding that PD-11 attorneys have "excessive caseloads" is conclusive as to the issue presented and warrants the relief granted. The trial court, however, looked only at raw case numbers and concluded that caseloads were "excessive by any reasonable

standard." Its Order, however, does not describe what standard it was applying and how it justified the conclusion that defendants' constitutional rights might be prejudiced. Nor did the trial court examine the caseloads of the individual assistant public defenders and how cases are distributed. For example, an assistant public defender handling only arraignments might have hundreds more cases than an assistant doing felony trials. If only gross numbers are considered and not individual caseloads, the average caseload statistics for the entire PD-11 office do not necessarily predict excessiveness, conflicts of interest, or actual prejudice to the rights of criminal defendants. But that was the methodology followed by the trial court.

9. This Court, if it accepts review, will have the opportunity to articulate an acceptable methodology and standards for addressing the complex issue presented, perhaps enlisting the assistance of interested parties to develop those standards. In the short term, this Court should not lift the stay and permit the transfer of thousands of cases to the Regional Conflict Counsel and private attorneys until these important questions are addressed and decided.

The motion to dissolve the stay should be denied.

Respectfully submitted,

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