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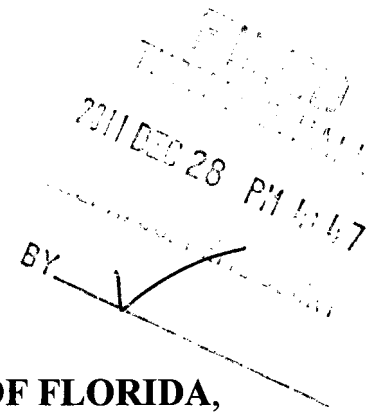

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-1181, SC10-1349

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,

Petitioner,

-vs-

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR REVIEW FROM
THE THIRD DISTRICT COURT OF APPEAL

BRIEF OF AMICUS CURIAE THE FLORIDA PUBLIC DEFENDER ASSOCIATION, INC. IN SUPPORT OF PETITIONER

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STATEMENT OF IDENTITY AND INTEREST

The Florida Public Defender Association, Inc., ("FPDA") consists of nineteen elected public defenders who supervise hundreds of assistant public defenders and support staff. As elected state constitutional officers, FPDA members have a fundamental interest in the process and procedures relating to excessive caseloads. More specifically, FPDA members have a strong interest that, in this process, the State Attorneys honor their obligation to seek justice and not seek to gain strategic or tactical advantages by using excessive caseloads to ensure that cases handled by assistant public defenders are unprepared or underprepared.

SUMMARY OF THE ARGUMENT

The Third District Court of Appeal erred in positing the question as whether the State of Florida has standing to address excessive Public Defender workloads. The proper question was whether the Attorney General or the State Attorney in the circuit is the correct attorney to represent the State as counsel. The answer to that question is that the Attorney General is better able to do so without a conflict of interest.

The State has multiple interests. On one hand, the State seeks to secure convictions for violations of criminal laws. The elected State Attorney heads the

agency charged with that duty and has an agency interest in securing convictions as efficiently and with as few impediments as possible. On the other hand, the State has a constitutional obligation to ensure individual rights, including effective representation of indigent defendants to ensure justice and avoid convictions of the innocent.

No attorney can, or should attempt to, represent conflicting interests. Here, it is unrealistic to expect the State Attorney to zealously represent the State's interest in effective assistance of counsel for indigent defendants, when such representation will make that same State's Attorney's task of prosecuting criminal cases more difficult. The statutes also allow the Attorney General to represent the State in all Florida courts, and the Attorney General does not have a conflict of interest because the Attorney General does not have a similar agency interest in the prosecution of criminal cases in the trial courts. The Attorney General also has a broader, less parochial, view of the situation. Alternatively, this Court could authorize the Justice Administrative Commission to represent the state. If the State Attorney needs to be heard, the State Attorney can testify as a witness.

Accordingly, the Court should hold that the State Attorney prosecuting criminal cases in a circuit should not represent the State as counsel in excessive workload litigation that will determine who defense counsel will be, or the quality of that defense, including defense counsel's workload.

ARGUMENT

THE PROSECUTING ATTORNEY SHOULD NOT REPRESENT THE STATE AS COUNSEL IN LITIGATION TO DETERMINE WHO DEFENSE COUNSEL WILL BE, OR WHAT DEFENSE COUNSEL'S WORKLOAD WILL BE.

The Third District's opinion posited and addressed the wrong question. That court defined the issue as "whether the State had standing to oppose PD11's motion" to decline appointments in new cases. *State v. Public Defender*, 12 So. 3d 798, 800-01 (Fla. 3d DCA 2009). The answer to the posited question is rather obviously "yes."

The proper question is not whether the State of Florida has standing, but which attorney is the proper attorney to represent the State of Florida in excessive workload litigation. Stated differently: Is the Attorney General in a better position to represent all of the State's interests in excessive workload litigation because the State Attorney has conflicting agency interests? The answer to that question should also be "yes."

In the excessive workload context, the State of Florida has multiple interests. On one hand, the State of Florida has an interest in enforcing the laws through securing criminal convictions. *See* § 775.012, Fla. Stat. (2011) (describing purposes of the criminal law). The State Attorneys are the primary agents for the

State in fulfilling this interest, and, as a practical matter, each State Attorney has an agency interest in accomplishing this objective with as little resistance as possible from defense counsel.

On the other hand, the State also has a constitutional obligation to ensure individual rights, including the right of effective assistance of counsel to indigent defendants, so that justice is upheld and innocents are not punished. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (A criminal defendant "requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." (quoting *Powell v. Alabama*, 287 U.S. 45, 69 (1932)). This is part of the State's obligation to ensure not just convictions, but that justice is done. This obligation requires the State to ensure that Public Defenders' workloads permit them to provide competent, diligent, professionally appropriate representation. *See* R. Regulating Fla. Bar 4-1.1, 4-1.3, 4-1.7, 4-5.2. Excessive workloads create violations of the professional conduct rules governing all lawyers. *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1135 (1990) ("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.").

It is too much to ask the State Attorney to zealously represent the State's

interest in providing effective representation when doing so will make the State Attorney's job of securing convictions more difficult. The Rules of Professional conduct prohibit attorneys representing a client when "there is a substantial risk that the representation . . . will be materially limited by . . . a personal interest of the lawyer." *See* R. Regulating Fla. Bar. 4-1.7(a). The State's interest in ensuring effective defense representation is limited by the State Attorney's agency interest in securing convictions. No attorney can or should be placed in the position of advocating for something that will make that attorney's job more difficult.

That conflict of interest played out in the trial court here. In *Public Defender v. State*, the evidence showed that clients who take pleas at arraignment do so without the Public Defender for the Eleventh Judicial Circuit being able to do any substantial investigation or work on most such cases pre-arraignment, especially for those clients who are not in custody. Those pleas are essentially uncounseled because the assistant public defender is unable to do anything other than convey the plea. (R. 2164-66, 2233-35, 2258, 2286-87, 2395-96).[1] By contrast, the time before arraignment is when private attorneys do much of their work on a case. (R. 2311-14, 2329-30).

The state interest in providing effective assistance of counsel would require the State Attorney to not make such plea offers until the assistant public defender

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[1] In this brief, the symbol "R." followed by a numeral represents the page number in the record on appeal in SC09-1181 unless otherwise noted.

had time to investigate the case. The State Attorney's agency interest, however, was to make such plea offers to secure as many plea convictions as possible before defense counsel could become effective. Not only did the State Attorney continue the practice, but the State Attorney took the position that pleas at arraignment should not count towards the attorneys' workload, because the assistant public defenders did little work on the cases. (R. 2093-98, 2107-08, 2191-92, 2427-34, 2493-97, 2508, 2523-24). Such a rationale assumes that any work defense counsel left undone, because there was no time to perform it, did not need to be done in the first place. Such an assumption ignores the importance of the adversarial system and can exist only in the mind of a prosecutor for whom the work of defense counsel is merely an impediment to the successful prosecution of criminal cases. *But see Wilson v. Wainwright*, 474 So. 2d 1162, 1164 (Fla. 1985) ("the basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law."). This argument reveals that the State Attorney chose its agency interest in securing convictions over the state's interest in effective assistance of counsel.

The issue of the State Attorney representing the State in motions to decline or withdraw due to ethical excessive caseload conflict did not arise prior to the recent amendments to Article V of the Florida Constitution. When the first of

many excessive public defender workload cases reached this Court, the County, not the State, had to provide monies to provide the special assistant public defenders necessary in cases of excessive workload. *Escambia County v. Behr* 384 So. 2d 147, 148 n.1 (Fla. 1980). Chief Justice England noted that situation was fortunate because of the conflict of interest that would be otherwise created: "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." *Id.* at 150 n.1 (England, C.J., in full concurrence). Challenging the public defender's caseload statistics and priorities is precisely what the State Attorney did in opposition to PD-11's motion to decline new appointments in *Public Defender v. State* and the motion to withdraw from the *Bowens* case. For instance, in *Bowens* the State Attorney cross-examined the Public Defender on why certain attorneys, by name, were assigned to certain divisions within the office. (Ex. 16, pp. 209-14; Ex. 13 p. 22).[2] The State Attorney for the Eleventh Judicial Circuit of Florida usurped for itself a micromanaging and auditing role of its opposing counsel's office.

The Third DCA's opinion correctly notes that, with the amendments to Article V, "the counties' obligation to fund replacement counsel has since shifted to the State of Florida." 12 So. 3d at 801. The Third DCA, however, did not

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[2] This citation is to the exhibits in the appendix to the state's petition for certiorari in the *Bowens* case, SC10-1349, which serves as the record on appeal.

address the issue of the State Attorney representing conflicting interests. Instead, the court merely quoted section 27.02, Florida Statutes, which states that the State Attorney will represent the State of Florida in circuit and county courts. *Id.*

That statute is not the only statute authorizing attorneys to represent the State in the trial courts, however. The Florida Statutes also provide that the Attorney General "[s]hall appear in and attend to" suits "in which the state may be a party, or in anywise interested" not only in this Court and the District Courts of Appeal, but also "in any other of the courts of this state." §16.01(4), (5), Fla. Stat. (2011). Thus, the Third DCA's resort to the statutes does not resolve the issue.

The Attorney General is in a much better position to litigate excessive caseload litigation in the circuit or county courts. First, the Attorney General does not have the same agency interest in securing convictions in the trial court.[3] Second, the Attorney General, as a statewide officer with broad law enforcement responsibilities, is able to take a much broader view of the situation than the State Attorney's more localized view, flavored by the internecine, daily competition

[3] The Attorney General would have this agency interest in appellate excessive caseload litigation. *See In re Certification of Conflict in Motions to Withdraw*, 636 So. 2d 18, 19-20 (Fla. 1994); *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1131 (Fla. 1990). Nevertheless, the Attorney General is the only attorney authorized to represent the State in this Court or the District Courts of Appeal, and therefore the issue of which attorney should represent the State does not arise. Additionally, the Attorney General's statewide jurisdiction somewhat attenuates the concerns because excessive caseload litigation generally arises in only one of the five District Courts of Appeal. *See In re Order on Prosecution of Criminal Appeals*, 561 So. 2d at 1132 (although problem existed in all districts, it became acute in only one district).

between the State Attorney's office and the Public Defender's office.

Those same advantages would be realized if lawyers from the Justice Administrative Commission ("JAC") represented the state in the excessive caseload litigation. The legislature initially provided that the JAC would represent the state "to contest any motion to withdraw due to a conflict of interest." Ch. 03-401, § 19, Laws of Fla. That provision was later deleted. Ch. 07-62, § 10, Laws of Fla.

Article V, section 2(a) of the Florida Constitution gives this Court the authority to "adopt rules for the practice and procedure in all courts." The classic definition of practice and procedure is Justice Adkins' concurring opinion in *In re Florida Rules of Criminal Procedure*, 272 So. 2d 65 (Fla. 1972):

> Practice and procedure encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. "Practice and procedure" may be described as the machinery of the judicial process as opposed to the product thereof.

Id. at 66 (*quoted in, e.g., Allen v. Butterworth*, 756 So. 2d 52, 60 (Fla. 2000)). Which attorney represents the state in excessive caseload litigation is part of the "machinery of the judicial process" and this Court could therefore promulgate a rule of procedure requiring lawyers from the JAC to represent the state in excessive caseload litigation.

If the State Attorney or his or her assistants have factual information

material to the resolution of the issue, they should be called as witnesses. But, given the conflict of interest, the State Attorney should not be the attorney representing the State of Florida in excessive workload litigation.[4]

From the perspective of Florida's citizens, the State Attorney's conflict of interest in these situations undermines confidence in the criminal justice system. If the prosecuting attorney is involved in selecting defense counsel or defining the quality of the defense, the perception is that the outcome is predetermined. After all, the Harlem Globetrotters' hand-picked opponents seldom win a game. Florida courts have acknowledged that tactical manipulations can occur when opposing counsel is involved in deciding who the other party's counsel will be. *See Alexander v. Tandem Staffing Solutions, Inc.*, 881 So. 2d 607, 608-09 (Fla. 4th DCA 2004) ("Motions for disqualification are generally viewed with skepticism because . . . such motions are often interposed for tactical purposes."); *Singer Island Ltd., Inc. v. Budget Construction Co., Inc.*, 714 So. 2d 651, 652 (Fla. 4th DCA 1998) ("We view motions to disqualify on this ground with some skepticism, because they are sometimes filed for tactical or harassing reasons, rather than the proper reason.").

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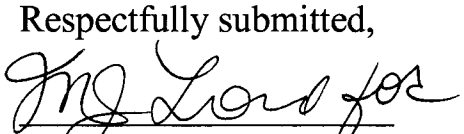
[4] The trial count in *Public Defender v. State* allowed the State Attorney to participate as *amicus curiae*, but that designation was a façade. (R. 2534). The State Attorney conducted discovery, called and cross-examined witnesses, and otherwise fully participated in the hearing. The Attorney General was noticed, but never entered an appearance. Thus, the trial court recognized the problem, but its solution was ineffective.

The State Attorney's representation of the State in excessive workload litigation also compromises the constitutional promise that "[a]ll natural persons are equal before the law." Art. I, § 2, Fla. Const.; *see also Traylor v. State*, 596 So. 2d 957, 969 (1992) ("We conclude that our clause means just what it says: Each Florida citizen—regardless of financial means—stands on equal footing with all others in every court of law throughout our state."). Justice is not equal when the State Attorney can overload defense counsel for indigent persons and then oppose judicial relief, while private defense counsel employed by more affluent defendants are not similarly burdened. As this Court has observed: "an inundated attorney may be only a little better than no attorney at all." *In re Certification of Conflict in Motions to Withdraw*, 636 So. 2d 18, 19 (Fla. 1994).

CONCLUSION

The FPDA therefore respectfully request that this Court's opinion address the question of whether the State Attorney, whose primary agency interest is prosecuting cases in a circuit, should represent the State in excessive caseload litigation arising from that circuit. The FPDA urges this Court to hold that because of the State Attorney's inherent conflict of interest, the Attorney General is the proper attorney to represent the State of Florida in excessive workload litigation arising from the trial courts. Alternatively, this Court could promulgate a rule requiring the JAC to represent the State in such litigation.

Respectfully submitted,



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