

**IN THE DISTRICT COURT OF APPEAL
THIRD DISTRICT**

THE STATE OF FLORIDA,

CASE NO. 3D09-3023
Lower Tribunal No. F09-019364
Judge John W. Thornton

Petitioner,

vs.

PUBLIC DEFENDER,

Respondent.

**RESPONSE TO STATE'S PETITION
FOR WRIT OF COMMON LAW CERTIORARI
AND CROSS-PETITION FOR COMMON LAW CERTIORARI**

Assistant Public Defender ("APD") Jay Kolsky and Carlos J. Martinez,
Public Defender for the Eleventh Judicial Circuit of Florida ("PD-11"),
respectfully submit this Response to the State of Florida's Petition for Writ of
Common Law Certiorari and Cross-Petition for Common Law Certiorari.

The State seeks review of the Order Denying Public Defender's Motion to
Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and Granting
Public Defender's Motion to Withdraw (the "Order").¹ Based on the

¹ The Order is attached to PD-11's Appendix as Exhibit 1. Through this brief, the symbols "9/29 Tr." and "9/30 Tr." denote the transcript of the evidentiary hearing held on September 29 and 30, 2009, which are attached as Exhibits 16 and 17, respectively, to the State's Appendix. It does not appear that the State attached

uncontroverted evidence, the trial court had no choice but to grant APD Kolsky's Motion to Withdraw. Even though the trial court's construction of section 27.5303 has case law support, PD-11 believes that the statute is unconstitutional. This is because the statute violates the Florida Constitution's separation of powers clause by narrowing the types of conflicts of interest justifying withdrawal by lawyers providing indigent defense, in contravention of the Florida Rules of Professional Conduct. PD-11 brings a cross-petition to challenge the portion of the Order denying PD-11's Motion to Declare 27.5303(1)(d), Florida Statutes, Unconstitutional.

I. JURISDICTION

This Court has jurisdiction to issue writs of certiorari pursuant to Article V, Section 4(b)(3), Florida Constitution, and Florida Rules of Appellate Procedure 9.030(b)(3) and 9.100. Cross-petitions for certiorari are permitted. *See Greenberg Traurig P.A. v. Bolton*, 706 So. 2d 97, 99 (Fla. 3d DCA 1998) (denying petition for certiorari but granting cross-petition for certiorari).

to its Appendix all of PD-11's exhibits admitted into evidence at the evidentiary hearing. These exhibits are Defendant's Exhibits D, E, F, G, J, and M, which PD-11 has attached to its Appendix as Exhibits 2 through 7, respectively.

II. PROCEDURAL HISTORY

On May 13, 2009, this Court reversed a trial court order permitting PD-11 to decline representation in all future third-degree felony cases by reason of PD-11's excessive caseload. *See State v. Public Defender*, 12 So. 3d 798 (Fla. 3d DCA 2009) (the "Third District Opinion"). This Court held that "[d]etermining conflicts for an entire Public Defender's Office based on aggregate calculations is extremely difficult without first having considered individual requests for withdrawal in particular cases" and that "this determination must occur on a case-by-case basis." *Id.* at 802.² The Third District Opinion also held that section 27.5303(1)(d) prohibited the trial court from granting a motion for withdrawal by a public defender based on "conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client." *Id.* at 804. The Third District Opinion concluded:

That is not to say that an individual attorney cannot move for withdrawal when a client is, or will be, prejudiced or harmed by the attorney's ineffective representation. However, such a determination, absent individualized proof of prejudice or conflict other than excessive caseload, is defeated by the plain language of the statute. § 27.5303(1)(a) and (d), Fla. Stat. (2007).

12 So. 3d at 805.

² PD-11 disagrees with the Third District Opinion and timely filed a petition for discretionary review in the Supreme Court of Florida. That petition remains pending.

As soon as practical after that decision was final, APD Kolsky moved to withdraw from the case of Antoine Bowens under the procedure outlined in the Third District Opinion and to declare section 27.5303(1)(d) unconstitutional. APD Kolsky also contended the statute is unconstitutional as a violation of the indigent defendant's rights to effective assistance of counsel and access to the courts, and a violation of the separation of powers mandated by Article II, section 3 of the Florida Constitution. APD Kolsky's motion contended the State violated the separation of powers clause by interfering with the judiciary's inherent authority to provide counsel and the Supreme Court's exclusive control over the ethical rules governing lawyer conflicts of interest. (APD Kolsky's Motion to Withdraw at 9; Memo in Support 9-12).³ The State Attorney opposed the motion.

PD-11 and the State entered into a stipulation pertaining to APD Kolsky's caseload as of August 28, 2009 and his caseload for the prior fiscal year (2008-09).⁴ The trial court held an evidentiary hearing over a three-day period and received argument of the parties, both oral and written.⁵ The parties submitted

³ APD Kolsky's Motion to Withdraw and the Memorandum in Support are attached as Exhibits 2 and 3, respectively, to the State's Appendix .

⁴ The Stipulation is attached as Exhibit 11 to the State's Appendix.

⁵ Office of Criminal Conflict and Civil Regional Counsel (CCCRC), although present in the courtroom for the entire evidentiary hearing, made no formal appearance until after the trial court issued its Order and never sought to enter any evidence. CCCRC advised the trial court it could handle any cases from which APD Kolsky should withdraw. (Transcript of August 28, 2009 hearing at 43-44, which is attached as Exhibit 31 to the State's Supplemental Appendix).

post-trial memoranda and proposed orders that included findings of fact and conclusions of law.⁶ The trial court then entered the Order. The State seeks certiorari review on the portion of the Order granting the motion to withdraw. APD Kolsky and PD-11 hereby respond to the State's petition and also seek certiorari review on the portion of the Order regarding the constitutionality of the statute.

III. TRIAL COURT'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Order contains detailed findings of fact, including citations to the record, and conclusions of law. All of the trial court's factual and credibility findings were favorable to PD-11. The central finding of fact is "the unrebutted testimony is that Kolsky has been able to do virtually nothing on [Mr. Bowens'] case." (Order at 4).

The trial court's Order explained that Mr. Bowens' case, which at first seems like a standard sale of cocaine, is complicated both because Mr. Bowens is facing a possible life sentence and because the alleged transaction was with a confidential informant outside the presence of any police officers.⁷ (Order at 4). Mr. Bowens was not even arrested until months later. (9/29 Tr. 39-40, 43).

⁶ The parties' post-trial memoranda are attached Exhibits 12 and 13 to the State's Appendix.

⁷ To date, the State has not disclosed the name of the confidential informant or his/her criminal record, if any.

The trial court then made findings on responsibilities APD Kolsky has not been able to fulfill to represent Mr. Bowens:

. . . Kolsky has not had time to meet with his client other than for a very brief, non-confidential discussion when Bowens was first arraigned.^[8] Kolsky has not obtained a list of defense witnesses from Bowens. Kolsky has not had time to take depositions. Kolsky has not visited the scene of the alleged crime. He has not determined the existence of, nor interviewed, any potential defense witnesses. He has not consulted with any experts. He has not prepared a mitigation package. He has not filed any defense motions, including a motion to disclose the confidential informant (who, according to the arrest affidavit, allegedly bought the cocaine from Bowens outside the presence of the police officers).

Order at 4 (citations to transcript omitted). The trial court also found: “Kolsky did not have time to meet with Bowens, who is not in custody, after arraignment, nor has he communicated with him regarding the discovery the State provided.” *Id.* (citing 9/29 Tr. 132-34). Only after these findings did the trial court additionally mention that APD Kolsky had to take a continuance, thereby waiving Mr. Bowens’ speedy trial rights. (Order at 4-5).

The trial court found that APD Kolsky’s inability to defend Mr. Bowen’s case is “a symptom of Kolsky’s excessive caseload.” (Order at 4). It found that APD Kolsky’s caseload as of mid-July 2009 was 164 pending “C” felony cases

⁸ Thus, when the State writes that APD Kolsky “had an opportunity to talk with Mr. Bowens” on July 13 when his \$7,500 bond was reinstated, (Petition at 11), it must have been referring to what APD Kolsky testified was “two minutes in a jury box.” (9/29 Tr. 118). As APD Kolsky noted, that type of communication is “not what I consider adequate; and I have not established the client/attorney relationship with him. He doesn’t trust me at all right now.” (9/29 Tr. 118).

and that this caseload was reduced to 105 cases as of August 28, 2009. (Order at 2) (citing 9/29 Tr. 157). Both APD Kolsky and a state witness, Assistant State Attorney Holsinger, testified that this reduction was due to a “plea blitz.” (9/29 Tr. 36, 44; 9/30 Tr. 135-39). The trial court found that APD Kolsky’s caseload had climbed back up to 125 pending cases by the end of September, 2009, and that his caseload turns over approximately five or six times per year. (Order at 2) (citing 9/29 Tr. 245).

The trial court found that even if the lowest caseload of 105 cases were to hold constant throughout the year, and applying the annual multiple, APD Kolsky will have handled at least 525 to 630 felony cases by the end of this fiscal year, not including pleas at arraignment. (Order at 2) (citing 9/29 Tr. 137). It found that APD Kolsky handled a total of 736 felony cases, in addition to 235 pleas at arraignment, during the 2008-09 fiscal year.⁹ (Order at 2-3) (citing Stipulation). The trial court also found that APD Kolsky has training and other responsibilities for the office of PD-11 that increase his overall workload. (Order at 3) (citing 9/29 Tr. 44, 49, 52).¹⁰

⁹ In its Petition, the State quotes only the lower 736 number, omitting pleas at arraignment. (Petition at 5).

¹⁰ The State claims that APD Kolsky’s experience helps him to “manage his large caseload, which does not necessarily equate to a large workload.” (Petition at 17). In fact, the trial court found APD Kolsky’s workload to be *greater* than his caseload. In a footnote, the State suggests that some probation violation cases “are ‘tag alongs,’ in that they resolve themselves.” Petition at 17. Mr. Martinez

In contrast, the trial court found that the Florida Public Defender Association “determined that the maximum number of felony cases an individual attorney should handle per year is 200 and that the National Advisory Commission on Criminal Justice Standard and Goals (“NAC”) set the annual maximum at 150. (Order at 1). It also found that the American Council of Chief Defenders confirmed the NAC standard but suggested it might be on the high side. (Order at 1). Thus, APD Kolsky’s *currently pending* caseload is close to the total number of felony cases an attorney should handle for a whole year. “Meanwhile, Kolsky continues to receive additional cases.” (Order at 3).

The trial court cited the Third District Opinion for the proposition that “[s]tate and national caseload standards and actual caseload figures are not, alone, determinative of whether an excessive caseload exists.” (Order at 3) (citing *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798, 801 (Fla. 3d DCA 2009)). It did, however, recognize that caseload standards and actual figures “do serve as factors to consider in evaluating the genuineness and sufficiency of Kolsky’s testimony that he cannot effectively handle, even with his 36 years of experience in the criminal justice system as both a prosecutor and defense attorney, Defendant Bowens’ case.” (Order at 3) (citing 9/29 Tr. 18).

Based on the uncontroverted evidence, the trial court found that:

testified that APDs should be more fully defending probation violation cases, but do not do so because of excessive caseloads. (9/29 Tr. 188).

[T]he number of cases assigned to Kolsky has had a detrimental effect on his ability to competently and diligently represent and communicate with all his clients on an individual basis. This detrimental effect begins at arraignment where Kolsky holds very brief conversations with clients he is meeting for the first time. Usually, these conversations are not confidential because of other persons within earshot. As a result, these conversations generally do not include a discussion of the facts of the case, possible defense witnesses, and preservation of evidence, making it very difficult to provide meaningful assistance or begin establishing the trust necessary for an attorney-client relationship.

(Order at 3) (citations to transcript omitted).

Unfortunately, the problems caused by excessive caseload are not confined to pleas at arraignment:

The detrimental effect extends to Kolsky's competence, diligence and communication after arraignment. Kolsky's opportunity to meet with out-of-custody clients is extremely limited, due in part to the office priority understandably given to in-custody defendants. Even then, Kolsky cannot schedule meetings with in-custody defendants until approximately two months after arraignment, and those sessions only last a maximum of thirty minutes each. Based on the sheer number of clients he represents, Kolsky has eight to ten depositions set every day during his non-trial weeks (two out of every three weeks).

(Order at 3-4) (citations to transcript omitted).

Although the Third District Opinion limits analysis to the individual attorney, "the state also raised the issue of management of PD-11's resources."

(Order at 5). The trial court found that "Public Defender Carlos Martinez's testimony as to the choices he has made to be credible and further finds that he is managing PD-11 amid a most challenging and difficult fiscal environment."

(Order at 5). It concluded it should not, and would not, involve itself in the management of the public defender's office. (Order at 10) (citing *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991)).¹¹

The trial court also found that "APD Kolsky, Eleventh Judicial Circuit Public Defender Carlos Martinez and other experts presented ample credible testimony and evidence to support the conclusion that the prejudice to Defendant Bowens is a direct result of Kolsky's workload. The prejudice is not the result of any intentional effort to avoid representation of Bowens." (Order at 10).

The State contests this finding (and *only* this finding), saying that "Mr. Kolsky, *without explanation*, chose to work on cases of other out-of-custody clients." (Petition at 33). But this finding, as all others, is clearly supported by the evidence, and the weighing of evidence is for the trial court. APD Kolsky explained that he will take depositions in out-of-custody cases when he has time, (9/29 Tr. at 114), especially for clients who proactively contact him and with

¹¹ In its Petition, the State questions the past management decisions of the former elected public defender and whether he should have accepted additional attorney positions in the past. (Petition at 21). There is no factual basis for this challenge. (*See Clarification*, attached as Exhibit 24 to the State's Appendix). In addition to the lack of factual merit, no evidence suggests the Legislature is currently offering PD-11 any additional attorneys. To the contrary it has cut PD-11's budget by 14% since the start of FY 2007-08 and additional cuts are planned for this next fiscal year.

whom he establishes an attorney-client relationship. (9/29 Tr. 115).¹² The trial court credited the testimony of APD Kolsky and the other PD-11 witnesses that no attorney, even with all his experience, can handle all the cases he has been assigned. (9/29 Tr. 18, 137, 192; 9/30 Tr. 36).

The State also misrepresents the testimony of one of PD-11's expert witnesses, Professor Norman Lefstein, a national expert on indigent defense and a prime source of the American Bar Association's proclamations in this field. The State claims that "Prof. Lefstein testified that taking continuances was an acceptable alternative to withdrawal." (Petition at 34; *see also id.* at 22). When the state initially cross-examined Professor Lefstein, it asked a general question of whether continuances were valid in unspecified "circumstances," without mentioning excessive caseloads, and Professor Lefstein agreed that they were. (9/30 Tr. 76). When the State asked the specific question about continuances as a solution for excessive caseloads, Professor Lefstein rejected the State's proposition. (9/30 Tr. 78-80). Professor Lefstein noted this argument requires someone to "suspend your knowledge of everything that transpired up until the time [the attorney] continues [the case]; up until the time that [the attorney] now finally

¹² Not coincidentally, such proactive clients are also the ones most likely to file bar complaints, which APD Kolsky has been able to avoid thus far. (9/29 Tr. 74, 124).

provides competent representation.” (9/30 Tr. 80).¹³ No record evidence suggests that APD Kolsky is any more able to work on Mr. Bowens’ case after taking the continuance than before.

Based on its findings, the trial court granted APD Kolsky’s motion to withdraw, stating “the evidence and testimony presented demonstrates the requisite prejudice to Defendant Bowens as a result of Kolsky’s to-date ineffective representation. The uncontroverted evidence and testimony of Kolsky shows that he had been able to do virtually nothing in preparation of Bowens’ defense.” (Order at 9-10). The trial court concluded based on the “ample credible testimony” of APD Kolsky, PD-11, Professor Lefstein, and private defense attorney Freedman that “the prejudice to Defendant Bowens is a direct result of Kolsky’s workload” and “not the result of any intentional effort to avoid representation of Bowens.” (Order at 10). It acknowledged that the prejudice is not the result of any lack of legal knowledge or legal skills” because “APD Kolsky is one of the best and most experienced lawyers in PD-11’s office.” (Order at 10).

In analyzing the constitutionality of section 27.5303, the trial court wrote:

When examining the plain language of the statute, as interpreted by the Third District in *State v. Public Defender*, there exists a cognizable difference between a withdrawal based solely on workload, and a withdrawal where an individualized showing is made that there is a substantial risk that a defendant’s constitutional rights

¹³ The first word of this quotation was poorly transcribed as “spend” rather than “suspend” by the court reporter.

