

Summer 2010

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## Recommended Citation

Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 *Mo. L. Rev.* 885 (2010),

Available at: <http://ir.law.fsu.edu/articles/175>

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# Litigating the Ghost of *Gideon* in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform

Wayne A. Logan\*

Today, the promise long ago heralded by Clarence Gideon's successful appeal<sup>1</sup> goes unfulfilled, as public indigent defense systems nationwide operate in perpetual crisis mode.<sup>2</sup> A key difficulty has been that *Gideon*, while surely deserving of landmark status for its recognition that "lawyers in criminal courts are necessities, not luxuries,"<sup>3</sup> failed to provide any guidance on how states should afford such assistance.<sup>4</sup> This deficit has only worsened over time, as the right to counsel has been extended to less serious criminal offenders,<sup>5</sup> resulting in the infusion of yet more indigent clients, magnifying the importance of what Anthony Lewis justly termed an "enormous social task."<sup>6</sup>

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1. See *Gideon v. Wainwright*, 372 U.S. 335 (1963).

2. See generally Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases: A National Crisis*, 57 HASTINGS L.J. 1031 (2006).

3. *Gideon*, 372 U.S. at 344.

4. See Kim Taylor-Thompson, *Tuning Up Gideon's Trumpet*, 71 FORDHAM L. REV. 1461, 1462 (2003) (noting same).

5. See *Alabama v. Shelton*, 535 U.S. 654 (2002) (extending counsel right to misdemeanants receiving suspended sentences); *Argersinger v. Hamlin*, 407 U.S. 25 (1972) (extending counsel right to misdemeanants receiving sentence of actual imprisonment).

6. ANTHONY LEWIS, *GIDEON'S TRUMPET* 205 (1964); see also PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, *THE CHALLENGE OF CRIME IN A FREE SOCIETY* 151 (1967) ("The shortage of criminal lawyers, which is already severe, is likely to become more acute in the immediate future."). A few years later, the reality was plainly on the minds of members of the Court. See *Argersinger*, 407 U.S. at 52 (Powell, J., concurring) (noting that the Court's decision to extend the right of appointed counsel to misdemeanants "could have a seriously adverse impact upon the day-to-day functioning of the criminal justice system"); *id.* at 44 (Burger, C.J., concurring) (offering that "[t]he holding of the Court today may well add large new burdens [to] a profession already overtaxed"). For a comprehensive overview of the system's current deficiencies, see generally AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE* (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf>.

In Florida, the difficulty has been in evidence since *Gideon* was decided,<sup>7</sup> prompting the state's supreme court almost thirty years later to condemn the "woefully inadequate funding of the public defenders' offices, despite repeated appeals to the legislature for assistance."<sup>8</sup> In the Sunshine State, however, the standard saga of underfunding and case overloads has come with a twist. Dating back to the 1970s, Florida courts, including its supreme court, have repeatedly sought to remedy the situation. After condoning *Gideon*'s plight,<sup>9</sup> only to have its position repudiated in *Gideon* and rejected by twenty-two other states that filed an opposing amicus brief with the Court,<sup>10</sup> the Florida judiciary subsequently distinguished itself, forcefully insisting upon the representational rights of accused indigents in the face of chronic public defender underfunding and case overloads.<sup>11</sup>

This judicial assertiveness did not go unnoticed by the Florida Legislature, which in 2004, without fanfare or notice, took the unusual step of expressly prohibiting courts from granting public defender motions to withdraw on the basis of a conflict of interest deriving from excessive caseload or underfunding.<sup>12</sup> The legislative shot across the judiciary's bow, while not unprecedented in the recent annals of Florida lawmaking,<sup>13</sup> constituted a provocative challenge to the inherent authority of Florida courts to regulate attorney conduct and ensure satisfaction of the Sixth Amendment right to effective assistance of counsel.

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7. See *Public Defenders Form Association*, FLA. TIMES UNION, July 3, 1963.

8. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1132 (Fla. 1990) (per curiam).

9. See *Gideon v. Cochran*, 135 So. 2d 746 (Fla. 1961), *rev'd sub. nom.* *Gideon v. Wainwright*, 372 U.S. 335 (1963).

10. See Yale Kamisar et al., *Gideon at 40: Facing the Crisis, Fulfilling the Future*, 41 AM. CRIM. L. REV. 135, 139 (2004) (citing amicus and quoting Abe Krash, who assisted in representation of *Gideon*, describing Florida as one of five "laggard" states, all in the South); see also MELVIN I. UROFSKY, *THE WARREN COURT: JUSTICES, RULINGS, AND LEGACY* 171 (2001) (noting that 45 states at the time afforded indigent accused felons the right to counsel).

11. See *infra* notes 24-32 and accompanying text.

12. See FLA. STAT. § 27.5303(1)(d) (2009) (providing that "[i]n no case shall the court approve a withdrawal by the public defender . . . based solely upon inadequacy of funding or excess workload").

13. See, e.g., FLA. STAT. § 775.24(1) (2010) (stating that courts have a "duty" to uphold the constitutionality of sex offender registration and community notification laws and that a court refusing to do so "unlawfully encroaches on the Legislature's exclusive power to make laws and places at risk significant public interests of the state."); see also Wayne A. Logan, *Liberty Interests in the Preventive State: Procedural Due Process and Sex Offender Community Notification Laws*, 89 J. CRIM. L. & CRIMINOLOGY 1167, 1229-30 (1999) (discussing separation of powers implications of the law).

The provocation went unchallenged until 2008, when public defenders in Miami-Dade County filed suit in state court.<sup>14</sup> The litigation, emboldened by a 2006 ABA Formal Opinion advising defenders to refuse or withdraw from cases when excessive caseloads interfere with their capacity for effective representation,<sup>15</sup> was pursued on a pro bono basis by the Miami office of the law firm Hogan and Hartson and has justifiably attracted national media attention.<sup>16</sup> In this Article, I will discuss the Miami-Dade “excessive caseload” litigation, which continues to unfold in Florida’s appellate courts. In doing so, I will offer some thoughts on the separation of powers implications of the aforementioned statute, which, other than a similar provision adopted in Colorado<sup>17</sup> that has gone unchallenged, stands alone in the nation.

## I. FLORIDA JUDGES AND LEGISLATORS CLASH

The Florida Legislature created the Office of the Public Defender in 1963 to comply with the mandate of *Gideon*.<sup>18</sup> In 1972, the office assumed constitutional status as a result of an amendment to the Florida Constitution,<sup>19</sup> and today public defender offices are located in each of Florida’s twenty judicial circuits.<sup>20</sup>

The issue of insufficient public defender funding and excess workload has been litigated in Florida courts for decades. In 1980, the Florida Supreme Court consolidated two court of appeals cases reaching divergent results on the authority of trial courts to grant public defender motions to withdraw, based on assertions that excessive caseload precluded their capacity to pro-

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14. See *State v. Munoz*, No. F08-2314 (Fla. Cir. Ct. Sept. 23, 2008).

15. See ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-411 (2006).

16. See, e.g., Maureen Dimino, *Confronting a National Constitutional Crisis: Miami-Dade Chief Public Defender Stands His Ground*, CHAMPION, Oct. 2008, at 24, 24 (describing case as involving “a landmark legal challenge”).

17. See COLO. REV. STAT. § 21-2-103(1.5)(b), (c) (2009):

(b) Upon review of the motion, the court shall determine whether a conflict of interest exists that would require withdrawal of the state public defender and appointment of alternate defense counsel.

(c) For purposes of this article, a “conflict of interest” may include, but need not be limited to [citing permissible bases] . . . Case overload, lack of resources, and other similar circumstances shall not constitute a “conflict of interest.”

18. See FLA. STAT. § 27.50 (1963); see also *State ex rel. Smith v. Brummer*, 443 So. 2d 957, 959 (Fla. 1984) (“The State of Florida, in order to meet its responsibility to provide the assistance of counsel guaranteed to defendants against state action by the sixth amendment of the United States Constitution . . . has created this office . . .”).

19. See FLA. CONST. art. V, § 18.

20. See Florida’s 20 Judicial Circuits, <http://www.jud10.org/circuits.htm> (last visited July 14, 2010).

vide effective client representation.<sup>21</sup> In *Escambia County v. Behr*, the court held that trial courts faced with such motions enjoyed the unfettered discretion to appoint substitute private counsel at the county's expense, without having to specify a lawful ground or special circumstance.<sup>22</sup>

Thereafter, Florida public defenders filed motions to withdraw in capital and non-capital cases alike, focusing on appellate clients in particular, and achieving varied degrees of success.<sup>23</sup> The matter came to a head in 1990 with the Florida Supreme Court's decision in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*.<sup>24</sup> The court stated that "[w]hen [an] excessive caseload forces the public defender to choose between the rights of various indigent criminal defendants he represents, a conflict of interest is inevitably created."<sup>25</sup> The court, however, hastened to add that,

while it is true that the legislature's failure to adequately fund the public defender's offices is at the heart of this problem, and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function.<sup>26</sup>

Eight years later, in 1998, with excessive caseloads unabated, the Florida Supreme Court referred to the situation as a "major crisis" and ordered "on

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21. See *Dade County v. Baker*, 362 So. 2d 151, 152-53 (Fla. Dist. Ct. App. 1978) (denying motion and stating that judges "do not have authority to appoint special assistant public defenders upon the motion of a public defender that he is overworked and, therefore, not able to do his job"); *State ex rel. Escambia County v. Behr*, 354 So. 2d 974, 975-76 (Fla. Dist. Ct. App. 1978) (upholding withdrawal and substitution of counsel because the office's caseload "far exceed[ed]" recommended caseloads and deference was due to trial court's assessment of the "adequacy of representation" and "whether the workload is excessive").

22. 384 So. 2d 147 (Fla. 1980).

23. See, e.g., *Terry v. State*, 547 So. 2d 712 (Fla. Dist. Ct. App. 1989); *Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 1989 WL 142259 (Fla. Dist. Ct. App. 1989); *Grube v. State*, 529 So. 2d 789 (Fla. Dist. Ct. App. 1988); *In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Pub. Defender and by Other Pub. Defenders*, 523 So. 2d 1149 (Fla. Dist. Ct. App. 1987); *In re Order on Prosecution of Criminal Appeals by the Tenth Circuit Pub. Defender and by Other Pub. Defenders*, 504 So. 2d 1349 (Fla. Dist. Ct. App. 1987); *Crow v. State*, 500 So. 2d 171 (Fla. Dist. Ct. App. 1986); *Haggins v. State*, 498 So. 2d 953 (Fla. Dist. Ct. App. 1986) (en banc); *Schwartz v. Cianca*, 495 So. 2d 1208 (Fla. Dist. Ct. App. 1986); *Kiernan v. State*, 485 So. 2d 460 (Fla. Dist. Ct. App. 1986).

24. 561 So. 2d 1130 (Fla. 1990).

25. *Id.* at 1135.

26. *Id.* at 1136.

an emergency basis” that the Tenth Judicial Circuit’s public defender accept no additional appellate cases, pending further direction from the trial court and the appointment of substitute counsel.<sup>27</sup> The court observed that the “problem of substantial delays [was] . . . not a new issue,” but rather that it had come before the court on “multiple occasions” over the last eighteen years.<sup>28</sup> The record of delay (more than 640 cases at the time of oral argument) represented “a significant problem of constitutional magnitude that must be immediately addressed.”<sup>29</sup>

The court recognized that its order, combined with a request that the legislature allocate an emergency fund to pay for such counsel, only represented an “immediate short-term solution” to the crisis.<sup>30</sup> As a long-term solution, the court “encourage[d] . . . creation of a special committee or commission by the legislature to examine the structure and funding of indigent representation in criminal cases.”<sup>31</sup> The court concluded by offering that it “firmly believe[d] that this type of delay in the criminal justice process . . . can be eliminated by a joint effort of all interested parties” and expressed its willingness to help “develop a viable solution to this ongoing problem.”<sup>32</sup>

The Florida Legislature, however, made clear its disinclination to work with the courts. Only one year later, in 1999, legislators abrogated existing caselaw to provide that courts need not accept public defender certifications of conflict at face value.<sup>33</sup> More importantly, in 2004, the legislature significantly altered provisions controlling motions to withdraw, enacting Florida Statutes section 27.5303(1)(d) in the wake of a voter-approved state constitutional amendment that both transferred the obligation of funding indigent defense from Florida counties to the state,<sup>34</sup> and expressly denied Florida courts authority “to fix appropriations.”<sup>35</sup> The new law specified that “[i]n no

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27. *In re Pub. Defender’s Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus*, 709 So. 2d 101, 102-03 (Fla. 1998) (per curiam).

28. *Id.* at 103.

29. *Id.* at 102-03.

30. *Id.* at 103.

31. *Id.* at 104.

32. *Id.*

33. See FLA. STAT. § 27.5303(1)(a) (2009):

The court shall review and 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.

See also *Snelgrove v. State*, 921 So. 2d 560, 567 n.11 (Fla. 2005) (noting statutory abrogation of *Guzman v. State*, 644 So. 2d 996 (Fla. 1994)).

34. FLA. CONST. art. V, § 14(c), Historical Notes.

35. *Id.* §14(d). An effort by the Missouri Legislature to put a similar amendment before Missouri voters was recently stymied. See Justine Finney Guyer, Note, *Saving*

case shall the court approve a withdrawal by the public defender . . . based solely upon inadequacy of funding or excess workload of the public defender . . . .”<sup>36</sup> The only permissible bases for finding a conflict of interest are those contained in the Uniform Standards for Use in Conflict of Interest Cases, which themselves do not mention overload-based conflicts stemming from underfunding or workload.<sup>37</sup>

The legislature also revamped the state’s system for handling indigent defense appointments in instances of public defender conflicts. In May 2007, Florida legislators created five Offices of Criminal Conflict and Civil Regional Counsel (OCCCRC) to be located within the geographic boundaries of the five Florida district courts of appeal,<sup>38</sup> authorized to hire lawyers under the auspices of the Judicial Administration Commission (JAC) in instances of conflict.<sup>39</sup> The law further provided that if the OCCCRC itself had a conflict, the trial court would appoint counsel from a registry of eligible private attorneys.<sup>40</sup>

The change in approach was in part motivated by the July 2004 constitutional amendment noted earlier, which shifted the burden of funding indigent defense from Florida counties to the state.<sup>41</sup> If public defenders were to prevail on a withdrawal motion, OCCCRC counsel would be appointed to the cases.<sup>42</sup> Because the OCCCRC lacks sufficient funding to accept appointments on a mass scale,<sup>43</sup> however, the courts would need to appoint private attorneys at significantly greater cost. From the state’s perspective, the upshot of a successful motion by a public defender office very possibly would be that the public indigent defense system would grind to a halt, with the individual public defender office, OCCCRC, and JAC (also due to insufficient funding) all potentially being in a position to decline cases.

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*Missouri’s Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335, 357 (2009) (describing a “‘jurisdiction-stripping’ resolution” that would have forbidden state courts from ordering legislature to “‘expend public funds except as expressly approved by legislation or the vote of the people’”).

36. FLA. STAT. § 27.5303(1)(d) (2009).

37. § 27.5303(1)(e).

38. § 27.511(1), (5).

39. §§ 27.53(4), 27.40(1).

40. § 27.40(2).

41. *Crist v. Fla. Ass’n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 138 (Fla. 2008).

42. §§ 27.511(1), 27.40(1).

43. See Susannah A. Nesmith, *Attorneys for Poor Vow to Spurn Most Felony Cases*, MIAMI HERALD, June 3, 2008, at 1A (quoting Joseph George, Regional Counsel for Miami-Dade and Monroe Counties, to the effect that his office could not accommodate an additional 2000 cases a month), available at <http://www.nacdl.org/public.nsf/defenseupdates/Florida084>.

## II. MIAMI-DADE EXCESSIVE CASELOAD LITIGATION

The modern era of Florida's excessive caseload litigation dawned in late June 2008 when the public defender for the state's Eleventh Judicial Circuit (PD-11), encompassing Miami-Dade County, sought to decline appointment in all non-capital felony cases due to a conflict of interest between previously and newly appointed clients, arising out of excessive caseload created by chronic underfunding.<sup>44</sup> After an evidentiary hearing, the trial court granted the PD-11's motion as to individuals accused of third-degree felonies, based on its finding that the office's excessive caseload provided only minimally competent representation.<sup>45</sup> The court concluded that the evidence clearly established that the PD-11 was in need of relief in order for its lawyers to satisfy their constitutional duties and state rules of professional conduct.<sup>46</sup>

Thereafter, the state secured a temporary stay of the trial court's order,<sup>47</sup> and the PD-11 asked that the order be certified to the Florida Supreme Court as a matter having great public importance that could have a great effect on the administration of justice throughout the state.<sup>48</sup> The Third District Court of Appeal accepted the certification request on September 24, 2008, explaining that the "case implicates not only the manner in which the criminal justice system is structured and funded, but also constitutional separation of powers principles as well as the Sixth Amendment right to counsel in criminal cases."<sup>49</sup> The Florida Supreme Court, however, dismissed the case for lack of

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44. See Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases Due to Conflict of Interest, *State v. Munoz*, No. F08-2314 (Fla. Cir. Ct. Sept. 23, 2008), available at [http://www.pdmiami.com/ExcessiveWorkload/Motion\\_to\\_Appoint\\_Other\\_Counsel\\_Certificate\\_of\\_Conflict-Oscar\\_Munoz.pdf](http://www.pdmiami.com/ExcessiveWorkload/Motion_to_Appoint_Other_Counsel_Certificate_of_Conflict-Oscar_Munoz.pdf). For a compilation of pleadings and rulings in the protracted litigation, see Excessive Workload Litigation, [http://www.pdmiami.com/ExcessiveWorkload/Excessive\\_Workload\\_Pleadings.htm](http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm) (last visited July 19, 2010).

45. See Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases at 6-7, *State v. Loveridge*, No. 08-1 (Fla. Cir. Ct. Sept. 3, 2008), available at [http://www.pdmiami.com/Order\\_on\\_motion\\_to\\_appoint\\_other\\_counsel.pdf](http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf).

46. *Id.* at 5.

47. See Public Defender's Response to State of Florida's Emergency Motion for Stay, *In re Reassignment and Consolidation of Pub. Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases*, No. 3D08-2272, (Fla. Dist. Ct. App. Sept. 15, 2008), available at [http://www.pdmiami.com/ExcessiveWorkload/PDs\\_Response\\_to\\_States\\_Emergency\\_Motion\\_for\\_Stay.pdf](http://www.pdmiami.com/ExcessiveWorkload/PDs_Response_to_States_Emergency_Motion_for_Stay.pdf).

48. Suggestion for Certification, *In re Reassignment and Consolidation of Pub. Defender's Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases* at 1, No. 3D08-2272, (Fla. Dist. Ct. App. Sept. 15, 2008), available at [http://www.pdmiami.com/ExcessiveWorkload/Suggestion\\_for\\_Certification.pdf](http://www.pdmiami.com/ExcessiveWorkload/Suggestion_for_Certification.pdf).

49. *State v. Pub. Defender, Eleventh Judicial Circuit*, 12 So. 3d 798, 800 (Fla. Dist. Ct. App. 2009) (per curiam).



jurisdiction.<sup>50</sup> The Third District, re-vested with jurisdiction, then addressed the matter and issued its opinion on May 13, 2009.<sup>51</sup>

After reversing the trial court's ruling that the state lacked standing to oppose the public defender's motion,<sup>52</sup> the Third District Court of Appeal considered the baseline standard by which excessive caseload could be determined. The court concluded that there exists no "magic number of cases . . . where an attorney handling fewer than that number is automatically providing reasonably competent representation while the representation of an attorney handling more than that number is necessarily incompetent."<sup>53</sup> Furthermore, "even if such a number could be divined, it would certainly only have meaning when applied to an individual attorney and not an office as a whole."<sup>54</sup> Against this backdrop, the court rejected the public defenders' request for permission to decline cases based on the assertion that PD-11 was so overloaded with cases that it could not provide effective representation. What was lacking, the Third District held, was evidence that individual attorneys were providing inadequate representation to their clients, which could not be "proven in the aggregate, simply based on caseload averages and anecdotal testimony."<sup>55</sup>

The Third District next focused its attention on Florida Statutes section 27.5303(1)(d), which precludes withdrawal "solely upon inadequacy of funding or excess workload of the public defender."<sup>56</sup> The court denied relief, noting that any conflicts stemming from underfunding, excessive workload, or the prospective inability to represent a client were non-cognizable because the bases were absent from those deemed permissible by the legislature.<sup>57</sup> The court also rejected the distinction drawn by the trial court that counsel sought to decline new appointments rather than "withdraw" from existing cases, thereby falling outside the textual scope of section 27.5303(1)(d). Drawing the distinction, the Third District reasoned, would be an "an exercise in semantics" and "undo the clear intent of the statute."<sup>58</sup>

The court concluded that a conflict in an individual case could be established. However, again invoking section 27.5303(1)(d), the court declared that "such a determination, absent individualized proof of prejudice or conflict other than excessive caseload, is defeated by the plain language of the

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50. *State v. Pub. Defender*, Eleventh Judicial Circuit, 996 So. 2d 213 (Fla. 2008).

51. *See Pub. Defender*, 12 So. 3d 798.

52. *Id.* at 801.

53. *Id.* at 801-02.

54. *Id.* at 802.

55. *Id.* at 802-03. The court added in a footnote what has come to be a Catch-22 for public defenders. *See id.* at 802 n.4 (noting that "as recently as 2007 . . . PD11 has received national recognition for its representation of indigent defendants").

56. FLA. STAT. § 27.5303(1)(a) (2009).

57. *See Pub. Defender*, 12 So. 3d at 804 (citing FLA. STAT. § 27.5303(1)(e)).

58. *Id.*

statute.”<sup>59</sup> According to the court, “[o]nly after an assistant public defender proves prejudice or conflict, separate from excessive caseload, may that attorney withdraw from a particular case.”<sup>60</sup>

Less than a week after the Third District’s ruling, the PD-11 moved pursuant to the Florida Rules of Appellate Procedure and the Florida Constitution to certify the case to the Florida Supreme Court,<sup>61</sup> highlighting six questions of great public importance:

Does section 27.5303(1)(d), Florida statutes, prohibit public defenders from declining new cases as well as withdrawing from existing cases because of excessive workload?

Is a public defender allowed to decline appointments to cases if there is a judicial determination that its workload does not permit the public defender to proffer representation conforming to the Florida Rules of Professional Responsibility?

If declining new cases is construed as withdrawing from existing cases, is a public defender allowed to withdraw if there is a judicial determination that its workload does not permit the public defender to proffer representation conforming to the Florida Rules of Professional Responsibility?

Must public defenders certify and litigate conflicts based on excessive workload only on a case-by-case basis?

Do the Rules of Professional Conduct prohibiting excessive workload apply only to individual assistant public defenders and not the public defender acting as supervisor of such assistant public defenders?

May the State Attorney who is prosecuting a criminal case have standing in a judicial determination of whether a public defender has an ethical conflict in defending against that prosecution by reason of excessive caseload?<sup>62</sup>

The state thereafter moved to reject the PD-11’s certification motion, arguing that the Third District’s ruling was justified, offering several rea-

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59. *Id.* at 805.

60. *Id.* at 806.

61. See FLA. CONST. art. V, § 3(b)(4); FLA. R. APP. P. 9.030(a)(2)(A)(v).

62. Motion to Certify Questions of Great Public Importance at 5, *State v. Pub. Defender*, Eleventh Judicial Circuit, Nos. 3D08-2272, 3D08-2537 (Fla. Dist. Ct. App. May 19, 2009), available at [http://www.pdmiami.com/ExcessiveWorkload/Motion\\_to\\_Certify\\_Questions.pdf](http://www.pdmiami.com/ExcessiveWorkload/Motion_to_Certify_Questions.pdf).

sons.<sup>63</sup> First, Florida Supreme Court precedent required actual evidence of prejudice to justify withdrawal, which was lacking in the instant case.<sup>64</sup> Next, the PD-11 phrased its questions in terms of “workload,” yet relied solely upon caseload analysis, raising an evidentiary issue unaddressed by the district court.<sup>65</sup> Finally, the case implicated issues unique to the PD-11 felony management system, which were distinct from those of public defenders elsewhere in the state.<sup>66</sup>

On July 1, 2009, the PD-11 filed notice of intent to invoke discretionary jurisdiction from the Florida Supreme Court to review the Third District’s ruling.<sup>67</sup> After considering the petition for over ten months, the Supreme Court, after adjournment of the legislative session, accepted jurisdiction over the case.<sup>68</sup> As of late summer 2010, however, the court had not calendared the matter for oral argument.

While the petition for jurisdiction was pending, the PD-11 filed a new action on August 3, 2009, this time moving to withdraw from (not decline) a particular case – that of Antoine Bowens, who faced felony prosecution for allegedly selling cocaine near a school.<sup>69</sup> The motion alleged that Bowens’ appointed counsel faced a conflict of interest created by an excessive caseload and sought a declaration of the unconstitutionality of section 27.5303.<sup>70</sup>

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63. State of Florida’s Response to Motion to Certify, State v. Pub. Defender, Eleventh Judicial Circuit, Nos. 3D08-2272, 3D08-2537 (Fla. Dist. Ct. App. May 22, 2009), *available at* [http://www.pdmiami.com/ExcessiveWorkload/State\\_of\\_Floridas\\_Response\\_to\\_Motion\\_to\\_Certify.pdf](http://www.pdmiami.com/ExcessiveWorkload/State_of_Floridas_Response_to_Motion_to_Certify.pdf).

64. *Id.* at 1-2.

65. *Id.* at 2.

66. *Id.* at 3-4.

67. Notice of Intent to Invoke Discretionary Jurisdiction, State v. Pub. Defender, Eleventh Judicial Circuit, Nos. 3D08-2272, 3D08-2537, (Fla. Dist. Ct. App. July 1, 2009) (asserting as jurisdictional bases that “(1) this Court’s decision expressly affects classes of constitutional officers; and (2) this Court’s decision expressly and directly conflicts with prior decisions of the Supreme Court of Florida on the same question of law.”), *available at* [http://www.pdmiami.com/ExcessiveWorkload/Notice\\_of\\_Intent\\_to\\_Invoke\\_Discretionary\\_Jurisdiction.pdf](http://www.pdmiami.com/ExcessiveWorkload/Notice_of_Intent_to_Invoke_Discretionary_Jurisdiction.pdf).

68. Pub. Defender, Eleventh Judicial Circuit v. State, No. SC09-1181, (Fla. May 19, 2010), *available at* [http://www.pdmiami.com/ExcessiveWorkload/Order\\_Accepting\\_Jurisdiction.pdf](http://www.pdmiami.com/ExcessiveWorkload/Order_Accepting_Jurisdiction.pdf).

69. Assistant Public Defender’s Motion to Withdraw and to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional, State v. Bowens, No. F09-019364 (Fla. Cir. Ct. Aug. 3, 2009) *available at* [http://www.pdmiami.com/ExcessiveWorkload/Filed\\_08-03-09\\_Motion\\_to\\_Withdraw.pdf](http://www.pdmiami.com/ExcessiveWorkload/Filed_08-03-09_Motion_to_Withdraw.pdf); *see also id.* at 2 (noting that “PD-11 is seeking discretionary review of the appellate court’s decision in the Supreme Court of Florida. In the meantime, [the] undersigned counsel and his clients require immediate relief from a crushing caseload.”).

70. *Id.* at 9 (“[T]he undersigned is uncertain about his ability to withdraw from this case and seeks a declaration that [the statute] is unconstitutional. The Third District Court of Appeal did not pass on the constitutionality of the statute as it interpreted it.”).

The motion was filed by Assistant Public Defender Jay Kolsky, a respected litigator with thirty-six years of experience prosecuting and defending cases.<sup>71</sup> According to evidence put before the court, Kolsky had between 105 and 164 pending “C” felony (mostly third degree) cases at a time, resulting in him handling 525-630 felonies at the end of fiscal year 2009, exclusive of pleas at arraignment.<sup>72</sup> According to a stipulation of the parties, Kolsky handled a total of 736 felonies and 235 pleas at arraignment in fiscal year 2008-2009.<sup>73</sup> Kolsky also had training and other administrative responsibilities, adding to his daily work beyond representing clients.<sup>74</sup> Kolsky’s caseload, it was asserted, exceeded recommended standards by several orders of magnitude.<sup>75</sup>

After hearing evidence and arguments, the trial court issued its decision on October 23, 2009.<sup>76</sup> The court found that, while state and national caseload standards are not alone determinative of whether an excessive caseload exists, they serve as “factors to consider in evaluating the genuineness and sufficiency” of a claim.<sup>77</sup> Kolsky’s caseload, the judge found, “had a detrimental effect on his ability to competently and diligently represent and communicate with all his clients on an individual basis” from initial arraignment onward.<sup>78</sup> With regard to petitioner Bowens in particular, Kolsky lacked time to meet with Bowens after arraignment to discuss his case or the discovery provided by the state, undertake factual investigation, develop mitigation information, or file motions, even though Bowens faced potential life imprisonment due to a sentence enhancement.<sup>79</sup>

Turning to the constitutional challenge of section 27.5303(1)(d), the trial court, like the Third District a few months before, avoided a direct assessment. Invoking Florida’s canon of constitutional avoidance,<sup>80</sup> the court sin-

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71. *Id.* at 10.

72. Denying Public Defender’s Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and Granting Public Defender’s Motion to Withdraw at 2, *State v. Bowens*, No. F09-19364, (Fla. Cir. Ct. Oct. 23, 2009) [hereinafter *Order Denying Motion*].

73. *Id.* at 2-3.

74. *Id.* at 3.

75. Memorandum of Law in Support of Motion to Withdraw, at 8, *State v. Bowens*, No. F09-19364, (Fla. Cir. Ct. Aug. 3, 2009 (citing National Advisory Commission on Criminal Justice Standards and Goals recommending a maximum of 150 felony cases per year).

76. *Order Denying Motion*, *supra* note 72.

77. *Id.* at 3.

78. *Id.*

79. *Id.* at 4.

80. *Id.* at 6 (noting that it was “mindful that statutes ‘come clothed with a presumption of constitutionality and must be construed, whenever possible, to effect a constitutional outcome.’” (quoting *Crist v. Fla. Ass’n of Criminal Defense Lawyers*, 978 So. 2d 134, 139 (Fla. 2008)); *see also id.* at 6-7 (“Further, it is a ‘settled principle of constitutional law that courts should not pass on the constitutionality of statutes if

gled out for significance the legislature's use of the term "solely." According to the court, the term "is not a prohibition on consideration of excessive caseload as a factor in an attorney's motion to withdraw; rather[,] the statute intends that other considerations be present."<sup>81</sup> The trial court's reading of the statute, combined with the Third District's requirement that individualized prejudice or conflict independent of excessive caseload be shown, allowed the court to find the statute constitutionally sound. There exists, the court concluded,

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 may be prejudiced as a result of workload. This distinction allows for judicial relief where prejudice to constitutional rights is adequately demonstrated. Thus subsection (d) is not constitutionally infirm.<sup>82</sup>

Having found the statute to permit withdrawal on the basis of individualized proof of prejudice, including that resulting from excessive workload, the court proceeded to assess whether its standard was satisfied. Focusing on the Third District's conclusion that withdrawal is appropriate "when a client is, *or will be*, prejudiced or harmed by the attorney's ineffective representation,"<sup>83</sup> and referring to the Florida Bar Rules prohibiting a "substantial risk" of prejudicial conflict in representation,<sup>84</sup> the court agreed with the PD-11 that prejudice can be demonstrated by the possibility of future harm accruing as a result of excessive caseload. According to the court:

[I]f an assistant public defender requests permission to withdraw from representation of a client based on considerations of excessive caseload, there must be an individualized showing of a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client.<sup>85</sup>

Applying the standard to the record, the court found sufficient evidence that the caseload demands experienced by public defender Kolsky met the

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the case in which the question arises may be effectively disposed of on other grounds.'" (quoting *Singletary v. State*, 322 So. 2d 551, 552 (Fla. 1975)).

81. *Id.* at 7.

82. *Id.* at 8.

83. *Id.* at 9 (emphasis added) (quoting *State v. Pub. Defender*, Eleventh Judicial Circuit, 12 So. 3d 798, 805 (Fla. Dist. Ct. App. 2009) (per curiam)).

84. *Id.* at 8-9 (citing FLA. R. PROF'L CONDUCT 4-1.7(a)(2)).

85. *Id.* at 9.

burden of showing adequate, individualized proof of prejudice to his representation of Bowens.<sup>86</sup>

The trial court's Solomonic decision to uphold the constitutionality of section 27.5303(1)(d) yet allow Kolsky's motion to withdraw was cross-appealed by the parties to the Third District Court of Appeal.<sup>87</sup> The Third District heard arguments on the matter in mid-December 2009 and on July 7, 2010 issued its opinion reversing the trial court's decision permitting Kolsky's withdrawal.<sup>88</sup> According to the Third District, Bowens failed to demonstrate "individualized prejudice or conflict *separate from* that which arises out of an excessive caseload," and thus withdrawal of counsel was prohibited by section 27.5303(1)(d).<sup>89</sup> Without addressing the trial court's factual findings of prejudice, the Third District concluded that the record lacked evidence of "something substantial or material that Kolsky has or will be compelled to refrain from doing."<sup>90</sup> As a result, any prejudice was "speculative" and the withdrawal thus fell within the plain language of the statutory prohibition.<sup>91</sup> With respect to the statute's constitutionality, the Third Circuit summarily agreed with the trial court's construction of the statute, yet deemed the issue of great public importance, warranting certification of the question of its constitutionality to the Florida Supreme Court.<sup>92</sup>

### III. W(H)ITHER THE ROLE OF THE JUDICIARY

The Miami-Dade excessive caseload litigation raises basic questions over the institutional authority of the judiciary to address the chronic underfunding and excessive caseload problems facing public defenders. Florida courts now face motions from public defenders to decline third-degree felony cases ("PD-11 Case No. 1") and to withdraw from the case of an individual accused felon ("PD-11 Case No. 2"), turning on alleged excessive caseloads and underfunding. Unlike earlier litigation seeking to give effect to the promise of *Gideon*, the excessive caseload litigation is occurring amid an aggressive effort by the Florida Legislature to limit the judiciary's constitutional oversight and remedial authority, manifest in Florida Statutes section

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86. *Id.* at 10.

87. State's Petition for Writ of Common Law Certiorari, *State v. Bowens*, No. 3D09-3023, (Fla. Dist. Ct. App. Nov. 2009), *available at* [http://www.pdmiami.com/ExcessiveWorkload/States\\_Petition\\_for\\_Writ\\_of\\_Common\\_Law\\_Certiorari\\_11-6-09.pdf](http://www.pdmiami.com/ExcessiveWorkload/States_Petition_for_Writ_of_Common_Law_Certiorari_11-6-09.pdf); Reply in Support of Cross-Petition for Writ of Common Law Certiorari, *State v. Bowens*, No. 3D09-3023, (Fla. Dist. Ct. App. Dec. 4, 2009), *available at* [http://www.pdmiami.com/ExcessiveWorkload/PD11\\_Repl-y\\_in\\_Support\\_of\\_Cross-Petition\\_for\\_Writ\\_of\\_Certiorari.pdf](http://www.pdmiami.com/ExcessiveWorkload/PD11_Repl-y_in_Support_of_Cross-Petition_for_Writ_of_Certiorari.pdf).

88. *See State v. Bowens*, 35 Fla. L. Weekly D1475 (Fla. Dist. Ct. App. 2010).

89. *Id.* at \*2.

90. *Id.*

91. *Id.*

92. *Id.* at \*3.

27.5303(1)(d), which explicitly prohibits courts from finding a conflict of interest “solely upon inadequacy of funding or excess workload.”<sup>93</sup> To date, Florida courts have shown a distinct reluctance to directly question the legislature’s capacity to infringe upon their institutional role. Indeed, in the litigation’s most significant appellate opinion to date, the Third District Court of Appeal made clear its reluctance to intervene, stating that the “solution . . . lies with the legislature or the internal administration of PD11, not with the courts.”<sup>94</sup>

Such judicial reluctance is especially notable in Florida, where the state constitution expressly ensures co-equal tripartite separation of powers, providing that “[n]o person belonging to one branch shall exercise any powers appertaining to either of the other branches . . . .”<sup>95</sup> The legislature’s overt effort to prohibit withdrawals based on excessive workload and inadequate funding plainly infringes on the long-recognized “inherent authority” of Florida courts to ensure the ethical administration of justice<sup>96</sup> and to protect the fundamental rights of the criminally accused.<sup>97</sup> In the past, the Florida Supreme Court has steadfastly defended this zone of judicial authority,<sup>98</sup> including in the context of excessive caseloads brought on by inadequate funding, proclaiming that “courts have the inherent authority to issue orders addressing problems such as this”<sup>99</sup> – a matter “of constitutional magnitude.”<sup>100</sup> With its

93. FLA. STAT. § 27.5303(1)(d) (2009).

94. *State v. Public Defender*, Eleventh Judicial Circuit, 12 So. 3d 798, 806 (Fla. Dist. Ct. App. 2008). A concurring opinion was even more vociferous in its aversion, calling the PD-11’s action “nothing more than a political question masquerading as a lawsuit, and should be dispatched on that basis.” *Id.* (Shepherd, J., concurring).

95. FLA. CONST. art. II, § 3; *see also* *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2009) (“In Florida, the constitutional doctrine [of separation of powers] has been expressly codified in article II, section 3 of the Florida Constitution, which not only divides state government into three branches but also expressly prohibits one branch from exercising the powers of the two other branches.”).

96. *See* *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978) (“Every court has the inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction . . .”).

97. *Id.* (“[W]here the fundamental rights of individuals are concerned, the judiciary may not abdicate its responsibility and defer to legislative or administrative arrangements . . . . The invocation of the doctrine [of inherent judicial power] is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.”).

98. *See id.* at 136 n.3 (“‘Inherent powers’ of courts have been described as ‘all powers reasonably required to enable a court to perform efficiently its judicial functions, to protect its dignity, independence and integrity, and to make its lawful actions effective. These powers are inherent in the sense they exist because the court exists . . . .’”) (citation omitted).

99. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1133 (Fla. 1990).

100. *In re Pub. Defender’s Certification of Conflict*, 709 So. 2d 101, 103 (Fla. 1998).

enactment of section 27.5303(1)(d), the Florida Legislature aggressively sought to undercut this authority.

Excessive caseloads negatively affect the daily work of public defenders and the administration of justice, directly implicating the constitutional oversight authority of Florida courts.<sup>101</sup> The cases allege that PD-11 lawyers are unable to provide their indigent clients basic services necessary for the preparation of their cases, which clearly raises concern relative to the ethical command of effective representation.<sup>102</sup> The cases further allege incapacity to provide effective client communication<sup>103</sup> and diligent representation,<sup>104</sup> and Commentary of the Florida Rules of Professional Responsibility expressly acknowledges the need of counsel to avoid an excessive caseload.<sup>105</sup> Finally, excessive caseloads threaten a systematic violation of the basic tenet of client loyalty and capacity for independent judgment, namely that a lawyer “shall not represent a client if . . . there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer’s responsibilities to another client . . . .”<sup>106</sup>

The legislature’s effort to limit the ability of courts to regulate the ethical behavior of public defenders thus unavoidably conflicts with basic separation of powers principles. The legislative branch lacks the constitutional authority “to interfere with or impair an attorney in the exercise of his ethical duties as an attorney and officer of the court.”<sup>107</sup>

Excessive caseloads equally implicate the judiciary’s duty to ensure that the fundamental Sixth Amendment right of indigents to effective assistance of counsel is satisfied. The Florida Supreme Court has long recognized the con-

101. See FLA. CONST. art. V, § 15 (providing Florida Supreme Court the “jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted”); see also *State ex rel. Fla. Bar v. Evans*, 94 So. 2d 730, 733 (Fla. 1957) (noting that “the prescription of ethical standards . . . and the exercise of supervisory jurisdiction are . . . peculiarly judicial functions”).

102. FLA. R. OF PROF’L CONDUCT 4-1.1 (2006).

103. *Id.* at R.4-1.4.

104. *Id.* at R.4-1.3.

105. See *id.* at R.4-1.3, cmt (“A lawyer’s workload must be controlled so that each matter can be handled competently.”).

106. *Id.* at R.4-1.7. The Rule’s Comment elaborates:

Loyalty and independent judgment are essential elements in the lawyer’s relationship to a client. Conflicts of interest can arise from the lawyer’s responsibilities to another client . . .

Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for a client because of the lawyer’s other responsibilities or interests.

*Id.* at cmt.

107. *Times Publ’g Co. v. Williams*, 222 So. 2d 470, 475 (Fla. Dist. Ct. App. 1969); see also *id.* (stating that an “attorney has the right and duty to practice his profession in the manner required by the Canons unfettered by clearly conflicting legislation which renders the performance of his ethical duties impossible”).



nection between excessive caseloads and conflict. As the court observed in 1990:

[w]hen 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. . . . “The rights of defendants in criminal proceedings brought by the state cannot be subjected to the fate of choice no matter how rational that choice may be because of the circumstances of the situation.”<sup>108</sup>

The court hastened to add that “where the backlog of cases in the public defender’s office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw.”<sup>109</sup>

The court’s position parallels those taken by the ABA Formal Opinion 06-441<sup>110</sup> and the ABA’s *Ten Principles of a Public Defense Delivery System*.<sup>111</sup>

The obviously strained effort by the trial court and Third District Court of Appeal in *Bowens* to find a saving construction based on the legislature’s use of the term “solely” fails to constitutionally redeem the statute. In construing the law on withdrawals based on conflict of interest, the entirety of the

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108. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1135 (Fla. 1990) (citation omitted).

109. *Id.* at 1138; *see also* *Wood v. Georgia*, 450 U.S. 261, 271 (1981) (“Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest.”); *Foster v. State*, 387 So. 2d 344, 345 (Fla. 1980) (“The sixth amendment right to the assistance of counsel contemplates legal representation that is effective and unimpaired by the existence of conflicting interests . . . .”); *Johnson v. State*, 6 So. 3d 1262, 1267 (Fla. Dist. Ct. App. 2009) (“[C]onflict-free counsel is part of the constitutional provision for effective assistance of appellate counsel.”).

110. *See* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006) (recommending that counsel withdraw from existing cases or seek relief from new appointments when workload prevents provision of competent and diligent representation).

111. *See* AM. BAR ASS’N STANDING COMM. ON LEGAL & INDIGENT DEFENDANTS, REPORT TO THE HOUSE OF DELEGATES: THE TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM Prin. 5 (2002), *available at* <http://www.abanet.org/legal-services/downloads/sclaid/10principles.pdf> (“Counsel’s workload . . . should never be so large as to interfere with the rendering of quality representation or lead to a breach of ethical obligations, and counsel is obligated to decline appointments above such levels.”); *see also* AM. BAR ASS’N, STANDARDS FOR CRIMINAL JUSTICE Std. 5-5.3 (1992) (“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.”), *available at* [http://www.abanet.org/crimjust/standards/defsvcs\\_blk.html](http://www.abanet.org/crimjust/standards/defsvcs_blk.html).

statute must be read in *pari materia*.<sup>112</sup> Section 27.5303(1)(a) speaks generally to the issue of withdrawal, providing that “[t]he 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.”<sup>113</sup> In turn, section 27.5303(3) provides that “[i]n determining whether or not there is a conflict of interest, the public defender . . . shall apply the standards contained in the Uniform Standards for Use in Conflict of Interest Cases . . . .”<sup>114</sup> These standards, however, make no mention of the potential conflict arising out of excessive caseload or underfunding. As the Third District correctly observed in PD-11 Case No. 1, “the only conflicts addressed [in the Standards] are conflicts involving codefendants and certain kinds of witnesses or parties. Conspicuously absent are conflicts arising from underfunding, excessive caseload, or the prospective inability to adequately represent a client.”<sup>115</sup> In short, the Florida Legislature impermissibly sought to deny courts the power to allow withdrawal of counsel as a result of excessive caseload, the adverse effects of which serve as a judicially recognized basis for conflict.<sup>116</sup>

Furthermore, the Third District’s insistence that prejudice be shown on a retrospective “case-by-case” basis lacks merit. As the U.S. Supreme Court made clear in *United States v. Cronin*,<sup>117</sup> the companion case to the Court’s landmark decision in *Strickland v. Washington*,<sup>118</sup> criminal defendants need not wait until they suffer actual prejudice in order to raise a Sixth Amend-

112. See Fla. Dep’t of Envtl. Prot. v. Contractpoint Fla. Parks, LLC, 986 So. 2d 1260, 1265-66 (Fla. 2008).

113. FLA. STAT. § 27.5303(1)(a) (2009).

114. § 27.5303(1)(c).

115. State v. Pub. Defender, Eleventh Judicial Circuit, 12 So. 3d 798, 804 (Fla. Dist. App. 2009).

116. See *supra* note 25 and accompanying text.

117. 466 U.S. 648 (1984).

118. 466 U.S. 668 (1984). It is worth noting that the *Strickland* two-prong requirement of deficient performance and actual prejudice to an individual defendant is itself an inapt standard. The standard is applicable in the post-conviction context and seeks to protect the finality of judgments. *Id.* at 690. See also Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988):

[The *Strickland*] standard is inappropriate for a civil suit seeking prospective relief. The sixth amendment protects rights that not affect the outcome of a trial. Thus, deficiencies that do not meet the “ineffectiveness” standard may nonetheless violate a defendant’s rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively.

ment claim of ineffective assistance of counsel.<sup>119</sup> Nor should counsel be placed in the ethically and professionally untenable position of essentially having to admit to an ethical or constitutional violation.<sup>120</sup> Rather, some factual scenarios raise such obvious concern that a presumption of prejudice rightfully attaches, such as the PD-11's representations in the excessive caseload litigation.

In Florida, use of a prospective, not retrospective, approach to assessing prejudice enjoys particular support. In 1990, the Florida Supreme Court concluded that case backlog warrants withdrawal when it "is so excessive that there is no possible way" that matters can be handled effectively.<sup>121</sup> This conclusion, along with the Florida Rules of Professional Conduct, suggests use of the approach in which counsel must decline or end representation when compliance with the rules is not possible and not wait until harm to a client occurs.<sup>122</sup>

Finally, the Third District's conclusion that the PD-11's effort to decline, not withdraw from, cases is an impermissible circumvention of the plain language of section 27.5303(1)(d) is unfounded. By its terms, the statute speaks only to "withdrawal," not declination,<sup>123</sup> and Florida courts have long recognized the difference between attorney withdrawal and declinations, urging declinations as preferable. Concurring in *Escambia County v. Behr*, for instance, then-Florida Supreme Court Chief Justice England stated that:

[b]y requiring public defenders to decline new representation on the basis of excess caseload, rather than to withdraw from pending proceedings on that ground, the trial courts of this state will not on-

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119. *Cronic*, 466 U.S. at 667. For a helpful discussion of the inappropriateness of *Strickland's* ex post standard in the context of claims challenging the constitutional effects of chronic underfunding, see Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1732-33 (2005).

120. See THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 143 n.179 (2009).

121. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1138 (Fla. 1990).

122. See FLA. R. OF PROF'L CONDUCT 4-1.16; *Hagopian v. Justice Admin. Comm'n*, 18 So. 3d 625, 643 (Fla. Dist. Ct. App. 2008) ("[A] lawyer may seek to avoid appointment by a court to represent a person when 'representing the client is likely to result in violation of the Rules of Professional Conduct or of the law.'") (citation omitted); see, e.g., *Scott v. State*, 991 So. 2d 971, 972 (Fla. Dist. Ct. App. 2008) ("Conflicts of interest are best addressed before a lawyer laboring under such a conflict does any harm to his or her client(s)'s interests. Any prejudicial effect on the adequacy of counsel's representation is presumed harmful.").

123. See *Daniels v. Fla. Dep't of Health*, 898 So. 2d 61, 65 (Fla. 2005) ("In attempting to discern legislative intent, we first look to the actual language used in the statute.").

ly prevent delays in the administration of the criminal justice system, but will also avoid the creation of a different standard of representation in public defender offices than among private attorneys.<sup>124</sup>

Indeed, “the acceptance of additional cases where an existing caseload precludes adequate representation may subject an attorney to disciplinary action.”<sup>125</sup> The ABA has also endorsed this approach.<sup>126</sup>

If and when the Florida Supreme Court addresses the constitutionality of section 27.5303(1)(d), the justices can be bolstered by their own precedent defying legislative overreach with respect to the delivery of indigent defense. In *Makemson v. Martin County*, for instance, the Florida Supreme Court struck down a statute capping attorneys’ fees for indigent defense, deeming the statute unconstitutional because it “curtail[ed] the court’s inherent power to ensure adequate representation of the criminally accused.”<sup>127</sup> Today, however, the accumulating institutional reluctance of the Florida judiciary to forthrightly address the constitutionality of Florida Statutes section 27.5303(1)(d) underscores that we live in different times.

124. 384 So. 2d 147, 150-51 (Fla. 1980) (England, C.J., concurring).

125. *Id.* at 151 n.2.

126. See ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 06-441 (2006) (“A lawyer’s primary ethical duty is owed to existing clients. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive.”).

127. 491 So. 2d 1109, 1112 (Fla. 1986). The court added: “[W]e must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute. In order to safeguard that individual’s rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter.” *Id.* at 1113. A similarly stalwart expression of judicial resolve is found in the New York Court of Appeals’ recent decision awarding class-wide relief based on deficient funding, where the majority offered that:

[i]t is, of course, possible that a remedy in this action would necessitate the appropriation of funds and perhaps, particularly in a time of scarcity, some reordering of legislative priorities. But this does not amount to an argument upon which a court might be relieved of its essential obligation to provide a remedy for violation of a fundamental constitutional right.

We have consistently held that enforcement of a clear constitutional or statutory mandate is the proper work of the courts, and it would be odd if we made an exception in the case of a mandate as well-established and as essential to our constitutional integrity as the one requiring the State to provide legal representation to indigent criminal defendants . . .

*Hurrell-Harring v. State*, 930 N.E.2d 217, 227 (N.Y. 2010) (citations omitted).

## IV. CONCLUSION

Today, it is widely recognized that insufficient funding by state legislatures is a root cause of the ongoing indigent defense crisis.<sup>128</sup> In Florida, anxiety over the possibility that courts might intervene and seek to ensure adequate funding themselves has been so pronounced as to inspire a state constitutional amendment expressly denying the judiciary the “power to fix appropriations.”<sup>129</sup> Of course, the amendment merely states a separation of powers truism, itself lacking in practical effect given the consistent respect Florida’s courts have shown the legislature’s power of the purse.<sup>130</sup>

The PD-11 excessive caseload litigation itself respects the distinction and asks that the Florida judiciary step up, as it has in past decades, to assert its inherent institutional authority, which the Florida Supreme Court has recognized as “crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government.”<sup>131</sup> Although technically bereft of spending power, Florida courts possess the capacity to effectuate their constitutional authority indirectly. “The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds,” the Florida Supreme Court offered in 1978, “has developed as a way of responding to inaction or inadequate action that amounts to a threat of the court’s ability to make effective their jurisdiction. . . . The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.”<sup>132</sup>

In the past, the Florida Supreme Court did not flinch from expressing its concern over the indigent defense crisis, signaling that it stood ready to enforce its authority even at the cost of releasing indigent defendants.<sup>133</sup> While resorting to the drastic measure would “not alleviate the [underfunding] situa-

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128. See Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Indigent Criminal Defense Services*, 63 U. PITT. L. REV. 293, 309 (2002) (“Lack of funding for the defense function is certainly the single greatest factor adversely affecting quality.”); Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816 (“The most fundamental reason for the poor quality or absence of legal services for the poor in the criminal justice system is the refusal of governments to allocate sufficient funds for indigent defense programs.”).

129. See FLA. CONST. art. V, § 14(d).

130. See, e.g., *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1136 (Fla. 1990) (“[I]t is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount. Appropriation of funds for the operation of government is a legislative function.”).

131. *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978).

132. *Id.*

133. See, e.g., *Order on Prosecution*, 561 So. 2d at 1138-39 (noting that, while it lacked the power to allocate funds for criminal defense, if funds were not provided, that court would order immediate release pending appeal of certain bondable felons).

tion,” the court observed two decades ago that “it will ameliorate the hardship on [indigents]. There can be no justification for their continued incarceration during the time that their constitutional rights are being ignored or violated.”<sup>134</sup> Allowing potentially dangerous indigent criminal defendants to roam free would also most assuredly get the attention of Floridians and their legislators. Whether this same judicial fortitude and capacity for brinkmanship will be shown today, a time when the Florida Legislature struggles with unprecedented budgetary deficits and evinces not only an apparent lack of concern for the judiciary<sup>135</sup> but also an amenability to underfund public defender offices that borders on the politically vindictive,<sup>136</sup> remains to be seen.

The reasons underlying the legislative political process failure accounting for the sustained indigent defense crisis are no secret.<sup>137</sup> Less apparent, yet more troubling for Florida, the one-time home of Clarence Gideon,<sup>138</sup> is the prospect that the judiciary will ignore an undisguised usurpation by legislators of its duty to help ensure satisfaction of the state’s constitutional obligation to provide adequate criminal defense for the state’s indigents. Whereas in the past, separation of powers protected legislative prerogative against

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134. *Id.* at 1139; *see also* Hatten v. State, 561 So. 2d 562, 565 n.3 (Fla. 1990) (expressing its hope that “the legislature will be prompted to . . . alleviate a situation which has become intolerable. Should this situation continue, there remains open to this Court the option of releasing pending appeal any indigent convicted felons otherwise bondable. While this would not solve the problem, it would at least ameliorate the hardship caused.”).

135. *See, e.g.*, Gary Blankenship & Jan Pudlow, *State Attorneys, PDs Also Struggle with Budget Hits*, FLA. B. NEWS, May 15, 2008.

136. *See, e.g.*, Richard Hersch et al., *Court Funding*, FLA. B. NEWS, Sept. 1, 2008 (quoting State Senator Victor Crist, Chair of Criminal and Civil Justice Appropriations Committee, that “most [public defender clients] are guilty” and therefore “should not skate” as a result of appointed counsel).

137. *See* Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 252 (1997) (“Legislatures, responding to voters fearful of crime, have no incentive to devote scarce resources to the defense function rather than to additional police or prison space. Public choice theory clearly predicts what scholars have consistently observed: the defense function is starved for resources.”); Note, *Gideon’s Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062, 2062 (2000) (“The political process failure in this area is unsurprising, for indigent defendants, by definition, lack the financial and political capital necessary to pursue effective reform efforts.”).

138. Gideon died in 1972 in Ft. Lauderdale, Florida, and his remains were returned to his hometown, Hannibal, Missouri. He was initially interred in an unmarked grave but a marker was eventually placed at the site as a result of efforts by the American Civil Liberties Union. Janice Kalmar, *Man Who Changed Justice System Called “No-Good Punk,” “Hero” is Without Honor in Hometown*, L.A. TIMES, Feb. 24, 1985, available at [http://articles.latimes.com/1985-02-24/news/mn-24495\\_1\\_justice-system](http://articles.latimes.com/1985-02-24/news/mn-24495_1_justice-system).

judicial reform efforts,<sup>139</sup> today it holds promise in Florida as a sword for the judiciary, as what Charles Sabel and William Simon extol as an “accountability-enforcing” measure<sup>140</sup> to affirmatively preserve the courts’ institutional role in Florida’s tripartite system of governance.

While the outcome of the Miami-Dade excessive caseload litigation is most anxiously awaited by Floridians, it will doubtlessly also figure in the national debate. After a period of nationwide inaction,<sup>141</sup> the litigation marks the first instance in which overburdened and underfunded public defenders have heeded ABA Formal Opinion 06-441 by seeking to withdraw from or decline additional cases, opening the door to future potential litigation. As a consequence, much as with *Gideon* itself, the future of indigent reform litigation may well bear connection to the Sunshine State.

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139. See, e.g., *Mandel v. Meyers*, 629 P.2d 935, 948 (Cal. 1981); *State v. Peart*, 621 So. 2d 780, 786-87 (La. 1993).

140. See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1090 (2004).

141. See Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: ABA Ethics Committee Requires Action*, CHAMPION, Dec. 30, 2006, at 10, 18 (noting that the Opinion “created barely a ripple among defenders throughout the country”).