PUBLIC DEFENDER EXCESSIVE CASELOAD LITIGATION IN MIAMI-DADE COUNTY, FLORIDA

Parker D. Thomson
Julie E. Nevins
Hogan & Hartson LLP

I. INTRODUCTION

1. In the past 18 months, the Public Defender for the Eleventh Judicial Circuit (the "11th Circuit PD") applied to the courts in two separate proceedings to seek relief from the office's excessive caseload. The following is a summary of: (a) the state of events which caused the 11th Circuit PD to apply to the courts for relief; (b) the ethical rules, standards, guidance and law that supported the applications for relief; and (c) the posture and results of the court proceedings.

II. BACKGROUND

2. The United States Constitution's Sixth Amendment imposes a duty on each State to provide defense counsel to indigent criminal defendants. Florida has elected to do so principally through the creation in each of the State's twenty judicial circuits of a public defender's office. Each of the public defenders is a constitutional officer (Art. V, §18, Fla. Const.). 1/ In 2003, the Florida Legislature added in each of the five appellate regions of the State an office of criminal conflict and civil regional counsel ("Regional Counsel") to handle cases which the

1/ The appointment of Regional Counsel occurs whenever "the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender…without a conflict of interest, or that none can be counseled the public defender…because of a conflict of interest…"

public defender cannot handle because of a conflict of interest. In case of Regional Counsel conflict, private counsel may be appointed.

3. In July 2008, for the first time in 16 years, the 11th Circuit PD urgently needed relief from excessive caseload. The enormous number of pending cases to which the office had been appointed, and the rate of new appointments, had reached a breaking point and was jeopardizing the ability of the 11th Circuit PD to satisfy the State's obligation of providing effective assistance of counsel pursuant to the Sixth Amendment.

4. The growing caseload in the office of the 11th Circuit PD was related to a 1998 revision to the Florida Constitution which made funding of public defenders in Florida the sole responsibility of the State by the year 2004. Before this change, counties had provided some funding to public defenders. Miami-Dade County had funded 82 lawyer positions for the 11th Circuit PD. As a result of the constitutional revision funding shift, over 30 attorney positions were cut from the office of the 11th Circuit PD. Then, between fiscal years 2007-08 and 2008-09, the 11th Circuit PD's budget was cut by approximately 9 percent. Attorneys in the office started resigning at unprecedented levels, and their vacated positions could not be filled due to the retracting budget and budget holdbacks which prevented management from knowing what funding the office actually had for salaries. At

the same time, arrests were increasing. The overall result was extraordinary high caseloads for most of the attorneys in the office.

5. The 11th Circuit PD decided to address the caseloads of the noncapital felony lawyers first. While the whole office had a caseload problem, the lower degree felony cases (largely 3d degree and some 2d degree felony cases) were growing rapidly and were burdening all the assistant public defenders practicing in the felony courts.

6. In the prior fiscal year (July 1-June 30), the 11th Circuit PD had been appointed to represent indigent defendants on 40,651 new and reopened noncapital felony cases and had less than 100 lawyers to handle them.2/ Doing simple math, this meant that each lawyer, on average, had a total annual caseload of 406 noncapital felony cases, which was more than double the recognized caseload standards, which are discussed below. In reality, however, the average annual caseloads at the time were between 500 to 600 cases.3/ These caseloads grossly exceeded recognized caseload standards.

2/ Cases are defined as those cases to which the public defender is appointed to represent a client shortly after arrest and includes all matters, no matter when the case is resolved, whether it is pled at arraignment, just before trial, or is tried.

3/ In fiscal year 2008-09, one noncapital felony lawyer had 971 cases, including pleas at arraignment.

III. CASELOAD STANDARDS, ETHICAL RULES AND GUIDANCE, AND THE LAW

7. Caseload Standards: In 1973, the National Advisory Commission on Criminal Justice Standards and Goals ("NAC") determined that the *maximum* annual caseload a lawyer representing indigent defendants should handle is 150 cases. Over the years this *maximum* has been iterated and reiterated. 4/ The Florida Public Defender Association ("FPDA") has stated that 200 is an appropriate maximum number of cases per year.5/ Even that figure was essentially 1/3 of the average annual caseloads in the 11th Circuit PD at the time.6/

8. Ethical Rules: The 11th Circuit PD recognized that excessive caseloads impair the ability of the PD and the assistant public defenders to meet their ethical duties. The Florida Rules of Professional Conduct, as concerns duties

---

4/ *See In re Certification of Conflict in Motions to Withdraw*, 636 So. 2d 18, 19 (Fla. 1994). A commissioner appointed to make findings and a report and recommendation on a motion to withdraw filed by a public defender in Florida used the NAC and other similar standards in determining the public defender had an excessive caseload and recommending that he should be allowed to withdraw from hundreds of cases. The Florida Supreme Court cited the NAC standards in affirming the appellate court's adoption of the commissioner's report and recommendation.

5/ The Florida Bench/Bar Commission adopted the FPDA's maximum caseload standards. In addition, the Florida Governor's Commission recommended an annual limit of 100 felony cases.

6/ Over the years, suggestions have been made that any appropriate standard pertaining to "maximums" should be one of "workload" instead of "caseload." This suggestion was made in the context of technological developments, which some assumed would permit lawyers to handle more cases. But even if things had worked out this way – which they have not – the fact is that when non-caseload factors are taken into consideration, the resultant "workload" indicates that lawyer can handle *less*, not *more*, cases. These non-caseload factors include waits in courtrooms for judicial priority afforded private-lawyer cases, training functions required of senior lawyers to junior lawyers, physical location of jails and prisons, and non-English speaking clients.

owed to clients, generally follow the American Bar Association's Model Rules. They are written in mandatory terms, and apply to *all* Florida lawyers, whether they are private or public. The 11th Circuit PD recognized that the breach of ethical duties means the lawyers in the office could not satisfy the State's obligation to provide effective assistance of counsel to indigent defendants. The applicable ethical rules are these:

- **Rule 4-1.1**, requiring competent representation.

- **Rule 4-1.3**, requiring "reasonable diligence and promptness" in representation 7/

- **Rule 4-1.4** requiring effective communications with the client. 8/

- **Rule4-1.7(a)(2)** providing: [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, a former client or a third person…" 9/

- **Rule 4-1.16**, requiring a lawyer to "withdraw from the representation of a client if…the representation will result in violation of the Rules of Professional Conduct or law."

- **Rule 4-5.1.** imposing on a "firm" the obligation to see that individual lawyers in the firm abide by the Rules of Professional Conduct. Florida

---

7/ The commentary on Rule 4-1.3 says: "A lawyer's workload must be controlled so that each matter can be handled competently."

8/ The commentary on Rule 4-1.4 says: "Reasonable communications between the lawyer and the client is necessary for the client to effectively participate in the representation."

9/ The commentary on Rule 4-1.7 says: "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, a former client or a third person…" and "Loyalty to a client is also impaired when a lawyer cannot consider, recommend, or carry out an appropriate course of action for the client because of the lawyer's other responsibilities or interests."

courts have held the public defender's office is a "firm" for these purposes.

9. **ABA Guidance:** The 11th Circuit PD closely follows the guidance of the American Bar Association ("ABA") on caseload and workload. Before 2008, the ABA had spoken thus to this issue.

- **Principle 5 of ABA, The Ten Principles of a Public Defense Delivery System (Feb. 2002)**: *Defense counsel's workload is controlled to permit the rendering of quality representation*. The commentary states: "Counsel's workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney's nonrepresentational duties) is a more accurate measurement."

- **ABA Formal Opinion 06-441: Ethical Obligations of Lawyers Who Represent Indigent Defendants When Excessive Caseload Interferes with Competent and Diligent Representation (May 13, 2006)** echoes the requirements of *The Ten Principles* and the Model Rules of Professional Responsibility: "If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients."

10. At its 2009 annual meeting, the American Bar Association adopted The Eight Guidelines of Public Defense Related to Excessive Workloads, which provided a framework for public defenders to follow when faced with an excessive workload. The Eight Principles provide, in part:

> 1. The Public Defense Provider avoids excessive lawyer workloads and the adverse impact that such workloads have on providing quality legal representation to all clients. . . .

2. The Public Defense Provider has a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients . . . are performed.

3. The Public Defense Provider trains its lawyers in the professional and ethical responsibilities of representing clients, including the duty of lawyers to inform appropriate persons within the Public Defense Provider program when they believe their workload is unreasonable.

4. Persons in Public Defense Provider programs who have management responsibilities determine, either on their own initiative or in response to workload concerns expressed by their lawyers, whether excessive lawyer workloads are present.

5. Public Defense Providers consider taking prompt actions . . . to avoid workloads that either are or are about to become excessive . . . .

6. Public Defense Providers or lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate when workloads are excessive and other adequate alternatives are unavailable.

7. When motions to stop the assignment of new cases and to withdraw from cases are filed, Public Defense Providers and lawyers resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients.

8. Public Defense Providers or lawyers appeal a court's refusal to stop the assignment of new cases or a court's rejection of a motion to withdraw from cases of current clients.

11. The 11th Circuit PD followed the steps of The Eight Principles in 2008 and 2009 prior to applying to the court for caseload relief.

12. **Decisional Law:** In 1980, for the first time, the Florida Supreme Court approved withdrawals from representation by the public defender because of excessive caseload. In the 1990s, the Florida Supreme Court decided three times in favor of public defender withdrawal by reason of excessive caseload, and the Florida appellate courts followed this lead in many decisions.

13. Presumably in light of these judicial decisions, in 2003, the Florida Legislature adopted a statute, which is unlike those in most, if not all, other States:

> In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon inadequacy of funding or excess workload of the public defender or regional counsel.

§ 27.5303(1)(d), Fla. Stat. The 11th Circuit PD believed that this statute applied only to withdrawals, and, rather than challenge its constitutionality, it was best to seek to reduce caseload to a more constitutionally appropriate level by moving to decline any new non-felony appointments.

IV. THE MOTIONS FOR CASELOAD RELIEF

Phase I – Motions to Decline Appointments to All Noncapital Felony Cases

14. In June 2008, the 11th Circuit PD filed a motion to decline appointments to unappointed noncapital felony cases in each of the 21 criminal divisions in the circuit court. Before filing, the 11th Circuit PD notified the chief judge of the 11th Judicial Circuit of its intent to file these motions. The chief judge

consolidated the motions before the administrative judge of the circuit court criminal division. The motions contended that the 11th Circuit PD's caseload requires the PD to decline new noncapital felony appointments so long as its docket remained so grossly unbalanced as to prohibit the PD from providing conflict-free and ethical representation to indigent defendants. The motions also contended that, unless granted, the State would be denying indigent defendants effective representation of counsel in violation of the Sixth Amendment.

15. The motions did not question the amount of money the Florida Legislature had appropriated for the 11th Circuit PD. In fact, the 11th Circuit PD's budget has been reduced further in recent years. Nevertheless, the motions were directed in no way to budgetary issues – they merely sought to reduce caseload to a level which reasonably could be handled within the budget it received.

16. The 11th Circuit prosecutor appeared on behalf of the State to oppose the motions, which appearance the 11th Circuit PD opposed. The judge denied the prosecutor party status but permitted her appearance *amicus curiae*. But the judge, being practical, effectively afforded the prosecutor party status. Specifically, the prosecutor was permitted to take document discovery and fully participate in all court proceedings, including the evidentiary hearing.

17. At a two-day evidentiary hearing, the 11th Circuit PD presented the testimony of the public defender, the chief assistant public defender, the PD's

general counsel, two assistant public defenders, expert-witness Dean Emeritus Norman Lefstein, and a practicing private lawyer/former assistant public defender, all of whom the prosecutor cross-examined.

18. After hearing the evidence, the judge granted the motions in September 2008, but only as to third-degree felonies and some second degree felonies (collectively referred to as "C" felonies. The judge required the 11th Circuit PD to report on caseload status every 60 days. The State appealed and the appellate court stayed the trial court's order.

19. The appellate court initially agreed with the 11th Circuit PD that the case belonged in the Florida Supreme Court, and attempted to "pass it through." The Supreme Court rejected the attempted "pass-through" on the ground that the "appeal" was really a petition for certiorari and "pass throughs" were limited to genuine appeals. The appellate court then proceeded with the appeal and rendered its opinion, reversing the trial court, and concluding:

a. The prosecutor had standing to participate as a party in the proceeding;

b. The statute prohibiting withdrawals from representation based on caseload and budget applied equally to declining new appointments;

c. Motions to withdraw could not be considered on an office-wide basis but only by an individual assistant public defender in an individual case

based on her/his individual caseload. The appellate court ignored the fact that all appointments are to the 11th Circuit PD, not an individual assistant public defender; and

d. The individual assistant public defender must show "prejudice" in order to justify withdrawal, but the appellate court did not define "prejudice." This issue was left for determination by trial courts. The State had asked the appellate court to conclude that the "prejudice" a public defender must show to decline to be appointed to handle a case she/he would otherwise accept (or withdraw from existing representation) was the type of "actual prejudice" required by the U. S. Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), which dealt with post-conviction relief based on ineffective assistance of counsel. This prejudice standard requires the defendant to show that, but for counsel's errors, there is a reasonable probability that the outcome would have been different. This prejudice standard, which looks back, is wholly unworkable when a public defender seeks relief prospectively.

20. In July 2009, after the appellate court both refused to certify its decision to the Florida Supreme Court as being of great public interest (one method of securing review in that court), the 11th Circuit PD sought Florida Supreme Court review of the appellate court's decision on other bases – that it affects a class of constitutional officers and there is conflict between the appellate court's decision

and the 1990s decisions of the Supreme Court. That jurisdictional petition remains pending as of this writing.

Phase II – One APD's Motion to Withdraw from One Case

21. In August 2009, the 11th Circuit PD and Assistant Public Defender Jay Kolsky decided to file a motion to withdraw in a single case, while advising the trial court that the conditions recited in the motion equally applied to many of Kolsky's cases. At the time Kolsky's motion to withdraw was filed, his caseload was the most severe of any assistant public defender, although before the hearing on the motion was completed, other assistant public defenders had higher caseloads than Kolsky. In the prior fiscal year, Kolsky had been assigned to handle 971 cases, which included 766 felony trial cases and 205 probation violation cases. His pending caseload for purposes of the motion to withdraw was stipulated to be 105 cases – a reduced caseload resulting from a plea blitz the court held in order to reduce the caseloads of Kolsky and the prosecutor.10/ Since a C-felony assistant public defender's cases typically turn-over five to six times per

10/ The 11th Judicial Circuit's criminal bench regularly hold plea blitzes when the overall calendar of a particular criminal division becomes clearly beyond the ability of any court to handle. When a plea blitz occurs the prosecutor notifies the cases which will be considered shortly before the date on which the plea blitz is scheduled. It is anticipated that the trial judge at the plea blitz will pressure the prosecutor to offer a lesser sentence than the prosecutor might otherwise have offered. On the scheduled date of the plea blitz, the assistant public defender normally will have had no effective contact with the indigent defendant. She/he will normally have some five minutes per case to advise the indigent defendant on the appropriateness of the proposed sentence. The 11th Circuit PD's expert witness, Professor Lefstein, testified that the pleas entered by the assistant public defenders at arraignment and during a "plea blitz" were effectively uncounseled and thereby constitute a denial of effective representation.

year, Kolsky's pending caseload of 105 translated into an annual caseload of 525 to 630 cases.

22. The case from which Kolsky sought to withdraw was one in which the indigent defendant had been bonded out. The 11th Circuit PD had adopted a policy that each assistant public defender would give priority to in-custody clients over out-of-custody clients. This meant that Kolsky could not prioritize this client's case, and Kolsky testified that he did not know when he could get to this indigent defendant's case.

23. The underlying case involved a June 2009 arrest for an alleged drug sale in April 2009 based on information supplied by a confidential informant. The informant was not identified in the police arrest form. Nor was the existence of any witness. Because of prior convictions, the indigent defendant could receive a life sentence. At the time the motion to withdraw was filed, Kolsky had met with his client for only five minutes. He had done *no* workup on the case, had taken *no* discovery and had taken *no* depositions. Depositions by criminal defendants are permitted in Florida, and Kolsky always takes depositions (limited to 30 minutes by reason of his caseload). At the time of the hearing on the motion to withdraw (two months after the motion was filed), Kolsky's caseload was increasing, and work conditions remained the same.

24. In connection with the motion to withdraw, the 11th Circuit PD argued the statute denying withdrawal on the grounds of caseload was unconstitutional "as applied" to Kolsky because it violated the separation of powers clause of the Florida Constitution (Art. II,§ 3, Fla. Const.). The PD asserted the statute interfered with the Florida Supreme Court's exclusive control over the ethical rules governing lawyer conflicts of interest by prohibiting public defenders from withdrawing from representation when the Rules of Professional Conduct (as promulgated by the Florida Supreme Court) tell those lawyers they must withdraw. The PD also contended that the statute violated the Sixth Amendment by preventing effective representation of indigent defendants.

25. The prosecutor again opposed the motion, this time fully as a party. The court allowed the prosecutor to take depositions of Kolsky and the PD, despite the PD's opposition to such discovery. The 11th Circuit PD and the prosecutor stipulated to certain caseload figures for Kolsky. The key disputed issue for the evidentiary hearing was what those numbers meant.

26. The court held an evidentiary hearing over three days, at which the 11th Circuit PD presented the testimony of Kolsky, the 11th Circuit PD, and Professor Lefstein. The prosecutor cross-examined each of these witnesses, and took direct testimony from two prosecutors who had worked on cases with Kolsky.

27. The trial court then granted the motion to withdraw, ruling that prejudice to the indigent defendant's constitutional rights had in fact occurred. The trial court concluded that the 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, including the client in the case at issue, and that the prejudice to this specific client is a direct result of Kolsky's caseload/workload.

28. Having found prejudice, the trial court found that the withdrawal was not *solely* by reason of caseload, and therefore the statute had not been violated. So the Florida constitutional issue was not reached. The appellate court once again stayed the trial court's order. Oral argument was held in December, 2009, but as of this writing, there is no published decision.

29. The 11th Circuit PD will make every effort to place the matter before the Florida Supreme Court. Several additional routes to accomplish this are being currently evaluated. Meanwhile, the 11th Circuit PD remains hopeful that the pending request to that Court to accept jurisdiction of the first proceeding will be granted.