FROM THE EDITOR

In an effort to increase dialogue about state court jurisprudence, the Federalist Society presents *State Court Docket Watch*. This newsletter is one component of the State Courts Project, presenting original research on state court jurisprudence and illustrating new trends and ground-breaking decisions in the state courts. These articles are meant to focus debate on the role of state courts in developing the common law, interpreting state constitutions and statutes, and scrutinizing legislative and executive action. We hope this resource will increase the legal community's interest in tracking state jurisprudential trends.

Readers are strongly encouraged to write us about noteworthy cases in their states which ought to be covered in future issues. Please send news and responses to past issues to Maureen Wagner, at maureen.wagner@fed-soc.org.

CASE IN FOCUS

Florida Supreme Court Finds That the Sixth Amendment Right to Counsel Allows Withdrawal of Public Defenders from Criminal Cases

*By Caroline Johnson Levine**

A significant decision by the Florida Supreme Court ruled that requiring criminal defense attorneys, employed as public defenders, to represent excessive numbers of indigent clients is a violation of a client's right to effective legal representation under the Sixth Amendment of the United States Constitution. The case, *Public Defender, Eleventh Judicial Circuit of Florida, et al. v. State of Florida,*[1] also addressed the constitutionality of a Florida statute forbidding public defenders to withdraw from representation based solely upon inadequate funding or an excessive workload.

I. The Trial Courts

Two cases with substantially the same issues were presented to the trial courts in Florida's Eleventh Judicial Circuit.

In the first case, *Public Defender, Eleventh Judicial Circuit v. State*, the public defender filed motions to withdraw in several non-capital felony cases, claiming that "excessive caseloads caused by underfunding meant the office could not carry out its legal and ethical obligations to the defendants."[2] The trial court determined that the public defender's caseload was excessive and resulted in the public defender providing only "minimally competent representation" to criminal defendants. The court granted the withdrawal of the public defender from third degree felony cases after arraignment.[3]

In the second case, *Bowens v. State*, the public defender filed a motion to withdraw representation from criminal defendant Antoine Bowens, claiming that his excessive caseload created a conflict of interest. He argued that he was required to choose which cases would be considered important enough to receive adequate representation (e.g. murders) and which cases would have to be sacrificed (e.g. third degree felonies with reduced penalties). Further, the public defender challenged the constitutionality of Florida Statute § 27.5303(1)(d), which "excludes excessive caseload as a ground for withdrawal."[4] While the court found that the public defender had indeed "demonstrated adequate, individualized proof of prejudice to Bowens as a direct result of" an excessive caseload, however it still denied the constitutional challenge.[5]

II. The Appellate Court

The State of Florida appealed both decisions to Florida's Third District Court of Appeal.

In *State v. Public Defender, Eleventh Judicial Circuit*,[6] the appellate court reversed the trial court's order and concluded that a public defender's withdrawal and associated ethical implications must be made "on a case-by-case basis, and not in the aggregate."[7] The appellate court further found that an excessive caseload would not constitute a conflict of interest because the Legislature had allotted funds for the hiring of new attorneys in the public defender's office but the public defender had neglected to hire new attorneys since 2005.[8]

Similarly, in *Bowens v. State*,[9] the appellate court reversed the trial court's order and required an evidentiary

demonstration of client harm on a case-by-case basis. This decision also upheld the constitutionality of the statute.[10]

III. The Supreme Court

The Third District Court of Appeal submitted its findings to the Florida Supreme Court and certified these cases to contain issues of "great public importance," which provided the Florida Supreme Court with the jurisdiction to decide this matter under Florida's Constitution.[11]

The appellate court requested that the Florida Supreme Court specifically decide two separate issues related to the statute prohibiting a trial court from granting motions for withdrawal to public defenders due to conflicts arising from 'underfunding, excessive caseload or prospective inability to represent a client.' Namely, the appellate court asked whether this statute is:

1. an unconstitutional violation of an indigent client's right to effective assistance of counsel and access to courts, and

2. a violation of separation of powers mandated by Article II, section 3 of the Florida Constitution as legislative interference with the judiciary's inherent authority to provide counsel and the Florida Supreme Court's exclusive control over the relevant ethical rules for attorneys?[12]

The Florida Supreme Court consolidated the two appellate cases as both cases addressed the same issues regarding defense attorneys withdrawing from criminal representation and "directly affect[ed] a class of constitutional officers, namely public defenders."[13]

The weight of the issues presented and the potential impact on the criminal justice system involved in this case resulted in a large number of *Amicus Curiae* briefs by influential parties including the American Bar Association, and the Criminal Law Section of The Florida Bar, among others.[14] Many of the *Amicus* briefs "contend[ed] that systemic or aggregate prospective relief is ethically required by the Florida Rules of Professional Conduct [e.g. competence, diligence, and communication] and by the Sixth Amendment rights of indigent defendants."[15]

A. Majority Decision

The Florida Supreme Court first stated that pursuant to the U.S. Supreme Court decision *Gideon v.*

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New Jersey Supreme Court Strikes Down Reorganization of the Council on Affordable Housing

*By Alida Kass**

In a highly anticipated decision, the New Jersey Supreme Court rejected Governor Chris Christie's attempt to reform the Council on Affordable Housing ("COAH"), holding that the Reorganization Act did not authorize the Governor "to abolish independent agencies that were created by legislative action."[1] Since its creation in 1984, COAH has governed the state's housing policy and set the criteria for municipal compliance with the Fair Housing Act.[2]

The Supreme Court overturned the Governor's attempt to dissolve the agency, holding that COAH, as a quasi-independent agency created "in but not of" the executive branch, was beyond the scope of his authority under the Reorganization Act. Justice Anne Patterson dissented, concluding that "the Act was and is intended to authorize the abolition and reorganization of COAH and other agencies that are similarly treated by our laws."[3]

I. Council on Affordable Housing

Beginning in 1975, a series of cases known as the *Mount Laurel* decisions established a municipal constitutional obligation to provide for a "realistic opportunity for the construction of [their] fair share" of affordable housing.[4] In 1985 the New Jersey Legislature responded by passing the Fair Housing Act, which codified COAH as the agency tasked with ensuring municipal compliance with the *Mount Laurel* doctrine.[5]

In February 2010, the Governor issued an executive order creating a task force to study "the continued existence of COAH" among other questions. The Legislature similarly embarked on an effort to abolish COAH. The legislative solution broke down after a bill that would have eliminated COAH was conditionally vetoed by the Governor and the Legislature failed to pass a bill incorporating the proposed amendments.[6] In January 2011, the Governor issued a second executive order, dissolving the agency and placing its powers and responsibilities under the authority of the Department

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desirable product, attended with a known but apparently reasonable risk").

7 *See, e.g.*, Olivo v. Owens-Ill., Inc., 895 A.2d 1143, 1149 (N.J. 2006); Satterfield v. Breeding Insulation, Inc., 266 S.W.3d 347, 374 (Tenn. 2008).

8 *Farrar*, 2013 WL 3456573, at *13.

9 *Id.* at *10.

10 *See* Eagle-Picher Indus., Inc. v. Balbos, 604 A.2d 445, 469 (Md. 1992); Anchor Packing Co. v. Grimshaw, 692 A.2d 5, 35 (Md. Ct. Spec. App. 1997), *vacated on other grounds sub nom.* Porter Hayden Co. v. Bullinger, 713 A.2d 962 (Md. 1998).

11 Palsgraf v. Long Island R.R., 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting).

12 *Id.* at 101 (Cardozo, J.).

13 *See* Georgia-Pacific Br., *Farrar*, 2013 WL 3456573, at *33–34.

14 *Id.* at *3.

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Wainwright,[16] criminal defendants "are guaranteed the right to effective assistance of counsel under the Sixth Amendment to the United States Constitution."[17] Florida also guarantees this right under Article I, section 16 of the Florida Constitution.[18] The majority reaffirmed that the right to effective assistance of counsel "encompasses the right to representation free from actual conflict"[19] and that, furthermore, an "actual conflict of interest that adversely affects a lawyer's performance violates a defendant's Sixth Amendment right to effective assistance of counsel."[20]

To address the issue, the Court first reviewed the historical evidence of the public defender's budget reductions and increased caseload assignments. The Court noted that the Eleventh Judicial Circuit Office of the Public Defender routinely assigned approximately "400 cases per attorney for a number of years" and that third degree "felony attorneys often have as many as fifty cases set for trial in one week," and yet most professional legal organizations recommended caseloads of "200 to 300 [or] less."[21]

The Court found that excessive caseloads result in an inability "to interview clients, conduct investigations, take depositions, prepare mitigation, or counsel clients about pleas."[22]

The Court noted that the United States Supreme Court recently issued two decisions addressing ineffective assistance of counsel in pre-trial matters and plea agreements in *Lafler v. Cooper*[23] and *Missouri v. Frye*.[24] These cases determined that ineffective pre-trial representation was just as critically important as representation at trial, as most criminal cases conclude in plea agreements.[25]

Next, the court turned to the statutory language governing withdrawal by the public defender based on conflicts. The Florida Legislature enacted statutory language in 1999, which required a trial court to review motions to withdraw from the public defender and determine whether an asserted conflict is prejudicial to an indigent client.[26] In 2004, the Legislature added the Section 27.5303(1)(d) requirement (which was challenged constitutionally in *Bowens*) that "[i]n no case shall the court approve a withdrawal by the public defender based solely upon inadequacy of funding or excess workload of the public defender."[27]

Ultimately, the court decided that "section 27.5303 should not be interpreted to proscribe courts from considering or granting motions for prospective withdrawal when necessary to safeguard the constitutional rights of indigent defendants to have competent representation."[28] The Court concluded that the prejudice required for withdrawal under the statute, when it is based on an excessive caseload, is a 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'" under the relevant provisions of Florida Bar Rules.[29]

The Court found that the statute to be facially constitutional. However, the Court noted that the statute "should not be applied to preclude a public defender from filing a motion to withdraw based on excessive caseload or underfunding that would result in ineffective representation of indigent defendants nor to preclude a trial court from granting a motion to withdraw under those circumstances."[30] Significantly, the Court found that pursuant to the doctrine of inherent judicial power, it is the sole province of the judicial branch to regulate issues of ethical representation and conflicts of interest, and that this doctrine is most compelling when safeguarding fundamental rights.[31]

B. Dissent and Concurrence

Chief Justice Polston and Justice Canady dissented in part and concurred in part with the four justices in the majority. The two justices agreed with the majority in finding section the statute at issue to be constitutional.[32] They dissented in part because they did not agree that the "Public Defender's Office for the largest circuit in Florida should be permitted to withdraw from 60% of its cases by testifying that, due to its high caseload, attorneys *may possibly* end up violating individual ethical obligations."[33] They also noted, "there was no showing that individual attorneys were providing inadequate representation" and proof of actual harm to a criminal defendant cannot be established "in the aggregate, simply based on caseload averages and anecdotal testimony."[34]

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Endnotes

1 Public Defender, Eleventh Judicial Circuit of Florida, et al. v. State of Florida, Nos. SC09-1181 and SC10-1349, slip op. (Fla. May 23, 2013).

2 *Id*. at 2.

3 *Id*. at 3.

4 *Id*. at 5-6.

5 *Id*. at 6.

6 State v. Public Defender, Eleventh Judicial Circuit, 996 So.2d 213 (Fla. 3d DCA 2009).

7 *Id*. at 805-806; *see also* Nos. SC09-1181 and SC10-1349, slip op. at 4.

8 *Id*. at 803-805; *see also* Nos. SC09-1181 and SC10-1349, slip op. at 5.

9 Bowens v. State, 39 So.2d 479 (Fla. 3d DCA 2010).

10 *Id*. at 482; *see also* Nos. SC09-1181 and SC10-1349, slip op. at 6.

11 Nos. SC09-1181 and SC10-1349, slip op. at 6 (The court found jurisdiction under Florida's Constitution Article V, § 3(b)(3),(4)).

12 *Id*. at 2.

13 *Id.* at 2.

14 Additional *Amicus* briefs were submitted by the Criminal Conflict and Civil Regional Counsel, the Florida Association of Criminal Defense Lawyers, the Public Interest Law Section of The Florida Bar, the Brennan Center For Justice, the National Association of Criminal Defense Lawyers, the Florida Public Defender Association, and the Florida Prosecuting Attorneys Association.

15 *Id*. at 16.

16 Gideon v. Wainwright, 372 U.S. 335, 83 S.Ct. 792 (1963).

17 Nos. SC09-1181 and SC10-1349, slip op. at 6-7.

18 *Id*.

19 Hunter v. State, 817 So.2d 786, 791 (Fla. 2002).

20 Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708 (1980).

21 Nos. SC09-1181 and SC10-1349, slip op. at 23.

22 *Id*. at 24.

23 Lafler v. Cooper, ___ U.S. ___, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012).

24 Missouri v. Frye, ___U.S. ___, 132 S.Ct. 1399, 182 L.Ed.2d 379, *cert. denied,* ___U.S. ___, 132 S.Ct. 1789, 182 L.Ed.2d 615 (2012).

25 Nos. SC09-1181 and SC10-1349, slip op. at 34.

26 *Id.* at 8 (citing Ch. 99-282 § 1, at 3084, Laws of Fla.). The Florida Legislature amended the statute in response to the Florida Supreme Court's decision in *Guzman v. State*. Before its amendment in 1999, the statutory provision governing withdrawal by the public defender based on conflicts of interest required a trial court to grant a public defender's motion to withdraw based on conflict without conducting any factual determination. *Id.* at 8-9. In *Guzman*, the Florida Supreme Court held that once a public defender's motion to withdraw based on conflict due to adverse or hostile interests between two clients, the trial court must grant separate representation. *Id.* (citing Guzman v. State, 644 So. 2d 996, 999 (Fla. 1994)). The Legislature's response was to require that the court, once the public defender files a motion the withdraw,

> shall review and may 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 permit withdrawal unless the court determines that the asserted conflict is not prejudicial to the indigent client. If the court grants the motion to withdraw, it may appoint [a member of the Bar] … to represent those accused.

Nos. SC09-1181 and SC10-1349, slip op. at 9 (citing Ch. 99-282 § 1, at 3084, Laws of Fla.). Thus, under the amended statute, the court was "no longer required to automatically grant a public defender's motion to withdraw based upon an assertion of conflict" and was "specifically charged with reviewing the motion and making a determination of whether the asserted conflict is prejudicial to the client. *Id.* at 9-10.

27 Florida Statute § 27.5303(1)(d); *see also* Nos. SC09-1181 and SC10-1349, slip op. at 4 n.4.

28 Nos. SC09-1181 and SC10-1349, slip op. at 14 (internal quotations omitted).

29 *Id.* at 35. The relevant provision of the Florida Bar rule is 4–1.7(a)(2).

30 *Id*. at 42-43.

31 *Id*. at 41-42.

32 *Id*. at 46 (Polston, C.J., dissenting).

33 *Id*. (emphasis added).

34 *Id*. at 47.