

IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER JOHNSON,	)	
	)	
Petitioner,	)	
	)	
vs.	)	CASE NO. SC09-1045
	)	
STATE OF FLORIDA,	)	
	)	
Respondent.	)	
	)	
_____	)	

ANSWER BRIEF

On Review from the District Court of Appeal, Fourth District, State of Florida

CAREY HAUGHWOUT  
Public Defender  
15th Judicial Circuit of Florida  
Criminal Justice Building/6th Floor  
421 3rd Street  
West Palm Beach, Florida 33401  
(561) 355-7600

Paul E. Petillo  
Assistant Public Defender  
Florida Bar No. 508438  
ppetillo@pd15.state.fl.us

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## STATEMENT OF THE CASE AND FACTS

The public defender omits the statement of the case and facts. See Fla. R. App. P. 9.210(c).

## SUMMARY OF THE ARGUMENT

### POINT I

In 2008, the Legislature addressed appellate public defender conflicts for the first time. If the appellate public defender certifies a conflict, the Office of Criminal Conflict and Civil Regional Counsel (RCC) will handle the appeal. This simplified procedure avoids considerable expense to the taxpayers and burdens on the trial court system. RCC's argument that this statute applies only when RCC was trial counsel makes little sense. RCC's theory is that in that case the trial court has already reviewed the trial public defender's motion to withdraw. But a trial court's determination that the *trial* public defender has a conflict has little or no bearing on whether the *appellate* public defender has a conflict on appeal. The Fourth District correctly held that the 2008 statute applies to all public defender appeals.

Although the Fourth District's opinion is entirely correct and should be approved, this Court may want to address whether the conflict statutes infringe on this Court's authority to adopt procedural rules under article V, section 2(a), Florida Constitution. The mechanism for deciding whether a public defender is constitutionally and ethically capable of representing a client—the formal requirements of a motion to withdraw, the nature of any hearing held, etc.—is procedural, and this Court should adopt the rules in this regard.

## POINT II

At one time, the Justice Administrative Commission (JAC) had standing to contest public defender motions to withdraw. When RCC was created the Legislature eliminated JAC's standing and it did not give standing to RCC. This was probably intentional. Trial court review of the trial public defender's motion to withdraw together, with the good faith of the public defender as an officer of the court, was probably all the scrutiny the Legislature intended. Anything further—the adversarial hearings that RCC envisions—would be a waste of state resources. Accordingly, RCC has no statutory standing to contest public defender motions to withdraw. Nor does RCC have standing as a party—RCC is not a party. The parties in a criminal case are the accused and the State.



## ARGUMENT

### POINT I

THE FOURTH DISTRICT CORRECTLY HELD THAT IF THE APPELLATE PUBLIC DEFENDER CERTIFIES CONFLICT THEN REGIONAL CONFLICT COUNSEL SHALL HANDLE THE APPEAL

#### *A. Some History*

In 1963, shortly after *Gideon v. Wainwright*, 372 U.S. 335 (1963), was decided, the Legislature established Florida's Public Defender system. Ch. 63-409, Laws Of Fla. Four years later the Legislature first addressed public defender conflicts when it enacted section 27.53(3), Florida Statutes (1967)(*see* ch. 67-539, § 1, Laws of Fla.):

If at any time during the representation of two (2) or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff, it shall be his duty to move the court to appoint one (1) or more members of The Florida Bar who are in no way affiliated with the public defender in his capacity as such, or in his private practice, to represent those accused. Provided that the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict and said attorney may, in the discretion of the court, be paid a fee and costs and expenses as is provided in subsection (2).

This statute changed little until 1980 when the Legislature provided that “the court shall” appoint separate counsel when the public defender “certif[ies]” a

conflict. Ch. 80-376, § 4, Laws of Fla. (amending section 27.53(3), Florida Statutes). In *Guzman v. State*, 644 So. 2d 996 (Fla. 1994), this Court held that once the public defender certifies conflict, the motion to withdraw must be granted, and “the trial court is not permitted to reweigh the facts considered by the public defender in determining that a conflict exists.” *Id.* at 999.

The Legislature responded to *Guzman* in 1999. See H.R. Comm. on Crime and Punishment, CS for HB 327 (1999) Staff Analysis 2 (June 14, 1999). Section 27.53(3), Florida Statute (1999), was amended to require the trial court to review the motion to withdraw:

If, at any time during the representation of two or more indigents, the public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of conflict of interest, the public defender shall file a motion to withdraw and move the court to appoint other counsel. **The court 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 one or more members of The Florida Bar, who are in no way affiliated with the public defender, in his or her capacity as such, or in his or her private practice, to represent those accused. However, the trial court shall appoint such other counsel upon its own motion when the facts developed upon the face of the record and files in the cause disclose such conflict. The court shall advise the appropriate public defender and clerk of court, in writing, when making such appointment and state the conflict prompting the

appointment. The appointed attorney shall be compensated as provided in s. 925.036.

§ 27.53(3), Fla. Stat. (1999) (emphasis added); *see* ch. 99-282, § 1, Laws of Fla.

In 2003, the statute was changed to implement Revision 7 to Article V of the Florida Constitution. *See* H.R. Comm. on Appropriations, HB 113A (2003) Staff Analysis 1 (May 14, 2003). Among other things, the Legislature moved section 27.53(3), Florida Statutes, to newly created section 27.5303(1)(a), Florida Statutes (2003); it gave the Justice Administrative Commission (JAC) standing to contest a public defender's motion to withdraw (§27.5303(1)(a), Fla. Stat. (2003)); it provided that the court may not approve a public defender's motion to withdraw based solely on excess workload (§ 27.5303(1)(c), Fla. Stat. (2003)); and it required that the public defender, in determining whether a conflict exists, "shall apply the standards adopted by the Legislature after receiving recommendations from Article V Indigent Services Advisory Board"<sup>1</sup> (§ 27.5303(1)(d), Fla. Stat. (2003)). Ch. 2003-402, § 18, Laws of Fla.

In 2007, the Legislature created the Offices of Criminal Conflict and Civil Regional Counsel (RCC). Ch. 2007-61, Laws of Fla. The Legislature added RCC

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<sup>1</sup> In 2004, the Legislature adopted "the standards contained in Uniform Standards for Use in Conflict of Interest Cases found in appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004." *See* ch. 2004-265, § 10, Laws of Fla. (amending section 27.5303(1)(d), Florida Statutes (2003)).

to the conflict statute and provided that it may move to withdraw based on conflict in the same way as the public defender (§ 27.5303(1)(b), Fla. Stat. (2007)), and it eliminated from section 27.5303(1)(a), Florida Statutes (2007), JAC's standing to contest motions to withdraw. *See* Ch. 2007-61, § 10, Laws of Fla. Section 27.5303(1)(a), Florida Statute, which pertains to the public defender, now provides:

If, at any time during the representation of two or more defendants, a public defender determines that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his or her staff without conflict of interest, or that none can be counseled by the public defender or his or her staff because of a conflict of interest, then the public defender shall file a motion to withdraw and move the court to appoint other counsel. The court 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 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. If the court grants the motion to withdraw, the court shall appoint one or more attorneys to represent the accused, as provided in s. 27.40. The public defender shall submit to the Justice Administrative Commission a copy of the order granting the motion to withdraw within 30 days after the motion is granted. The commission shall report quarterly to the Governor, the President of the Senate, and the Speaker of the House of Representatives on the number of orders granting motions to withdraw for each circuit.

In 2008, the Legislature addressed public defender appellate conflicts for the first time. It amended section 27.511, Florida Statutes, and added the paragraph at issue here (*see* ch. 2008-111, § 3, Laws of Fla.):

The public defender for the judicial circuit specified in s. 27.51(4) shall, after the record on appeal is transmitted to the appellate court by the office of criminal conflict and civil regional counsel which handled the trial and if requested by the regional counsel for the indicated appellate district, handle all circuit court appeals authorized pursuant to paragraph (5)(f) within the state courts system and any authorized appeals to the federal courts required of the official making the request. **If the public defender certifies to the court that the public defender has a conflict consistent with the criteria prescribed in s. 27.5303 and moves to withdraw, the regional counsel shall handle the appeal, unless the regional counsel has a conflict, in which case the court shall appoint private counsel pursuant to s. 27.40.**

§ 27.511(8), Fla. Stat. (2008) (emphasis supplied).

*B. Issue.*

Given this statutory backdrop, what procedure applies when the *appellate* public defender asserts a conflict of interest? The Fourth District held that section 27.511(8), Florida Statute (2008), is specific, clear, and plain: when the appellate public defender certifies conflict, RCC will handle the appeal. RCC argues that this statute only applies when it handled the trial; in all other cases the appellate public defender's motions to withdraw are governed by section 27.5303(1)(a), Florida Statute (2008).

*C. Argument.*

As just stated, RCC argues that the language in section 27.511(8), Florida Statutes (2008), emphasized above—that when the public defender certifies a conflict, then RCC will handle the appeal—applies only when RCC also handled

the trial. *Initial Brief* at p. 8. RCC's theory is that since the public defender moved to withdraw at the trial level (resulting in RCC's appointment), the trial court has already reviewed the public defender's (or, more accurately, *a* public defender's) motion to withdraw under the criteria set forth in section 27.5303(1)(a), Florida Statutes.

As a preliminary matter, under that theory, the Fourth District was correct to rely solely on the appellate public defender's assertion of conflict in this case. Here the Broward public defender moved to withdraw from representing Johnson (and Mayfield, for that matter), and the trial court granted the motion. Presumably, the trial court, before granting the motion, reviewed the adequacy of the public defender's representations regarding the conflict of interest as required by section 27.5303(1)(a), Florida Statutes.<sup>2</sup> Thus, under RCC's theory, the appellate public defender's assertion of conflict in Johnson's case was sufficient given that the trial court once reviewed the motion to withdraw; RCC should not have contested the motion to withdraw. (Indeed, under RCC's theory, the appellate public defender could have withdrawn from Mayfield's case: the trial court granted the Broward public defender's motion to withdraw in that case as well.)

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<sup>2</sup> As noted above, trial courts have been required to review the adequacy of a public defender's representations regarding a conflict of interest since 1999. *See* ch. 99-282, § 1, Laws of Fla.

Moreover, RCC's theory conflicts with its (correct) argument that a public defender's conflict at the trial level does not always continue on appeal. *Initial Brief* at pp. 11-12. If, for example, RCC handled a trial because a public defender was a victim or witness, or represented a victim or witness, that conflict would not continue on an appeal handled by the public defender in another circuit. But under RCC's theory, the trial public defender's motion to withdraw and appointment of RCC would be enough to allow the (unscrupulous) appellate public defender to certify conflict and withdraw.

It is unlikely the Legislature intended section 27.511(8), Florida Statutes, to apply only when RCC was trial counsel on the theory that a trial judge has already considered a motion to withdraw because, as the example above shows, a trial court's determination that the *trial* public defender has a conflict has little or no bearing on whether the *appellate* public defender has a conflict on appeal. Instead, the Legislature must have recognized that the procedures it requires judges to employ when ruling on public defender motions to withdraw at the trial level—procedures now codified in section 27.5303(1)(a), Florida Statutes (2008), and little changed since 1967—are ill-suited to appeals for at least two reasons.

First, it is clear, as the Fourth District indicated, section 27.5303(1)(a), Florida Statutes (2008), was aimed at trial courts, not appellate courts. The statute provides that “[t]he court shall review and may inquire or conduct a hearing into

the adequacy of the public defender's representations regarding a conflict of interest." Appellate courts do not generally conduct hearings; and cases are not decided by a single judge but must be decided by three district court judges. Art. V, § 4(a), Fla. Const.; Fla. R. Jud. Admin. 2.210(a)(1).

Second, even if section 27.5303(1)(a), Florida Statutes (2008), could be read to authorize appellate courts to relinquish jurisdiction to the trial court to conduct a hearing,<sup>3</sup> this presents its own set of difficulties the Legislature likely sought to avoid. The five public defender offices that handle appeals cover wide geographic areas. *See* § 27.51(4), Fla. Stat. (2008). Thus, the public defender of the Fifteenth Judicial Circuit could be required to defend a motion to withdraw in Vero Beach, Okeechobee, or Fort Lauderdale. The public defender of the Second Judicial Circuit could be required to defend a motion to withdraw in Pensacola to the west or Jacksonville to the east or Gainesville to the south. The Legislature likely thought this was a waste of state resources. Further, if there is a trial court hearing, the appellate defendant will have a right to attend; and yet the appellate defendant will likely be in a prison far from the site of the hearing, increasing the cost and

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<sup>3</sup> As the Fourth District noted, RCC was routinely demanding evidentiary hearings whenever the public defender moved to withdraw, and initially motion panels were relinquishing jurisdiction to the trial court to hold hearings into the basis of the motions. *Johnson v. State*, 6 So. 3d 1262, 1263-64 (Fla. 4th DCA 2009).



general hassle involved in trying to have the matter heard by the busy trial court. In sum, the certification procedure provides a highly simplified procedure avoiding considerable expense to the taxpayers and burdens on the trial court system.

RCC's theory that section 27.511(8), Florida Statutes (2008), applies only when it tried the case makes little sense for another reason. Section 27.511(8), Florida Statutes (2008), provides that if the public defender certifies a conflict, RCC is appointed **"unless the regional counsel has a conflict, in which case the court shall appoint private counsel pursuant to s. 27.40."** But it is unlikely that RCC—having just represented the client at trial—will have a conflict of interest while representing the client on appeal. Although an appeal may present an issue of ineffective assistance of trial counsel (and so RCC would have a conflict in presenting that argument on appeal if RCC was trial counsel), this Court has repeatedly stated that the issue of trial counsel's effectiveness is generally not cognizable on direct appeal, and that such claims are rare. *Smith v. State*, 998 So. 2d 516, 522-23 (Fla. 2008). It is highly unlikely that the Legislature had these rare cases in mind when drafting section 27.511(8), Florida Statute (2008).

In short, the Legislature intended section 27.511(8), Florida Statute (2008), to apply whenever the appellate public defender moves to withdraw, not just when RCC tried the case. As noted above, the Legislature first addressed the issue of appellate conflicts with the passage of section 27.511(8), Florida Statute (2008),

and it is a basic tenet of statutory construction that “specific statutes covering a particular subject area will control over a statute covering the same subject in general terms.” *School Bd. of Palm Beach County v. Survivors Charter Schools, Inc.*, 3 So. 3d 1220, 1233 (Fla.2009)(citing *Maggio v. Fla. Dep’t of Labor & Empl. Sec.*, 899 So. 2d 1074, 1079 (Fla.2005)).

The Fourth District was correct to follow the plain meaning of section 27.511(8), Florida Statutes (2008). “This Court has repeatedly held that the plain meaning of statutory language is the first consideration of statutory construction.” *State v. Bradford*, 787 So. 2d 811, 817 (Fla. 2001). And although “[a] departure from a literal interpretation of the statute may be merited when there are ‘cogent reasons’ for believing that the letter of the law does not accurately disclose the legislative intent,” *Doe v. Department of Health*, 948 So.2d 803, 808 (Fla. 2d DCA 2006), RCC has not supplied cogent reasons for that departure.

Finally, *Johnson* was decided in March 2009. The Legislature certainly knows how to change a statute in response to case law it disagrees with: consider its response to *Guzman*. But there were no legislative changes to the conflict provisions in 2010. “[O]nce a court has construed a statutory provision, subsequent reenactment of that provision may be considered legislative approval of the judicial interpretation.” *Remington v. City of Ocala/United Self Insured*, 940 So.2d 1207, 1210 (Fla. 1st DCA 2006)(citations and quotation marks omitted).

*D. The motion to withdraw in this case.*

RCC expends considerable effort explaining why RCC would have liked to participate in a hearing on the motion to withdraw filed in Mr. Johnson's case. Initial Brief at pp. 14-17. For example, RCC argues that at a hearing RCC would have pointed out that the Broward public defender withdrew from representing both Mayfield and Johnson. First, that the Broward public defender had a conflict in representing both defendants does not call into question the appellate public defender's motion to withdraw from *one* of them. In fact, that the Broward public defender could not represent either client tends to show that the appellate public defender could not simultaneously represent both. Second, that the Broward public defender withdrew from representing both defendants just illustrates the danger of representing codefendants for any length of time, and the efficacy of withdrawing from one codefendant as soon as possible. As the Uniform Standards for Use in Conflict of Interest Cases (Appendix C to the Final Report of the Article V Indigent Services Advisory Board dated January 6, 2004), paragraph I. A., states:

Early withdrawal from joint representation conserves public defender resources, avoids delay, and better serves the client. Moreover, persisting in the joint representation until both clients are interviewed, and an actual conflict is discovered, is likely to result in the public defender having to withdraw from not one, but both defendants' cases. Additionally, joint representation is likely to result in a greater number of post conviction challenges to counsel's effectiveness; thus, it is counterproductive to the goal of reducing state expenditures.

RCC argues that there is not always a conflict in representing codefendants on appeal. The public defender agrees and has represented codefendants on appeal. *See e.g. Lawyer v. State*, 28 So. 3d 220 (Fla. 4th DCA 2010); *Williams v. State*, 982 So. 2d 1190 (Fla. 4th DCA 2008). But in each case the public defender has to assess the *risk* that dual representation will impair the effective and ethical functioning of counsel.<sup>4</sup> As the comment to Rule Regulating Florida Bar 4-1.7 states:

A possible conflict does not itself preclude the representation. The critical questions are the likelihood that a conflict will eventuate and, if it does, whether it will materially interfere with the lawyer's independent professional judgment in considering alternatives or foreclose courses of action that reasonably should be pursued on behalf of the client.

A public defender's motion to withdraw need not show an actual conflict of interest, just some likelihood of one. Representing both codefendants on appeal is one such showing.

The public defender disagrees with RCC's argument that appellate representation is little more than a dry exercise in selecting and presenting issues from a cold, public record. *Initial Brief* at pp. 15-17. First, appellate lawyers represent *clients*, not cases or records. *See* Preamble, Chapter 4, Rules Regulating

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<sup>4</sup> *See generally* Kevin McMunigal, *Rethinking Attorney Conflict of Interest Doctrine*, 5 Geo. J. Legal Ethics 823 (1992).

the Florida Bar (“A lawyer is ... a representative of clients, an officer of the legal system, and a public citizen having special responsibility for the quality of justice.”). And like all lawyers, appellate lawyers are advisors. *See* R. Regulating Fla. Bar. 4-2.1. The ABA Standards for Criminal Justice provide that appellate counsel “should consider all issues that might affect the validity of the judgment of conviction and sentence, including any that might require initial presentation in a post-conviction proceeding.” ABA Standards for Criminal Justice: Counsel on Appeal, 4-8.3(b) (3d ed.1993). Advising codefendants on possible postconviction issues or grounds to mitigate sentence under Florida Rule of Criminal Procedure 3.800(c) may divide the appellate lawyer’s loyalty. *See* ABA Standards for Criminal Justice: Conflicts of Interest, 4-3.5, commentary, at 166 (3d ed. 1993)(“If defense counsel does somehow manage to survive the pretrial, trial, and plea stages without confronting either an implicit or explicit conflict in the representation of multiple defendants, conflict problems are still likely to be encountered at sentencing.”).

Second, although there is no constitutional right to an appeal, *Jones v. Barnes*, 463 U.S. 745, 751 (1983), once a state grants the defendant that right, the appeal becomes part of the state’s adjudicatory process, and in this respect it *is* a continuation of the proceedings below. *Cf. Evitts v. Lucey*, 469 U.S. 387, 403-04 (1985)(“But having decided that this determination was so important—having

made the appeal the final step in the adjudication of guilt or innocence of the individual, *see Griffin*, 351 U.S., at 18, 76 S.Ct., at 590—the State could not in effect make it available only to the wealthy.”).

The public defender also disagrees with RCC’s claim that “competing or conflicting arguments on appeal will not detrimentally affect a co-defendant on appeal even if argued by different attorneys in the same office.” *Initial Brief* at p. 17. In fact, conflicting arguments could harm both clients and may subject the appellate lawyer to discipline. Comment to Rule Regulating Florida Bar 4-1.7 states:

A lawyer may represent parties having antagonistic positions on a legal question that has arisen in different cases, unless representation of either client would be adversely affected. **Thus it is ordinarily not improper to assert such positions in cases pending in different trial courts, but it may be improper to do so in cases pending at the same time in an appellate court.** [Emphasis supplied.]

This comment describes a “positional” conflict of interest; such a conflict “arises when two or more clients have opposing interests in unrelated matters.” *Williams v. State*, 805 A.2d 880, 881 (Del. 2002); *see generally* Douglas R. Richmond, *Choosing Sides: Issue or Positional Conflicts of Interest*, 51 Fla. L. Rev. 383 (1999).

As noted above, motions to withdraw are based on the lawyer’s assessment of the risk that there will be a conflict of interest. In this regard, the Fourth District

was correct to note that in *Holloway v. Arkansas*, 435 U.S. 475 (1978), the court stated:

[M]ost courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. In so holding, the courts have acknowledged and given effect to several interrelated considerations. **An 'attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.'** Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. Finally, attorneys are officers of the court, and 'when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.'"

*Holloway*, 435 U.S. at 485-86 (emphasis supplied).

*E. Whether the conflict statutes infringe on this Court's authority to adopt procedural rules?*

As noted above, the certification procedure of section 27.511(8), Florida Statutes (2008), is highly simplified and avoids considerable expense to the taxpayers and burdens on the trial court system. This was the plain reading given to the statute by the Fourth District, and the Legislature, at least through its silence, appears to approve the Fourth District's interpretation. The Legislature could, of course, amend the statute and change the procedure. Therefore, this Court should address whether these statutes violate this Court's exclusive authority under article V, section 2(a), Florida Constitution, to "adopt rules for the practice and procedure

in all courts....” Any attempt to create rules of practice and procedure on the part of the legislative branch is a violation of the separation of powers doctrine. Art. II, § 3, Fla. Const.; *Allen v. Butterworth*, 756 So. 2d 52, 64 (Fla. 2000).

This Court explained the difference between substance and procedure in *State v. Raymond*, 906 So. 2d 1045, 1048-49 (Fla. 2005):

The terms practice and procedure “encompass the course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion. “‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof.” *In re Fla. Rules of Criminal Procedure*, 272 So.2d 65, 66 (Fla.1972) (Adkins, J., concurring). In other words, practice and procedure is the method of conducting litigation involving rights and corresponding defenses. *Skinner v. City of Eustis*, 147 Fla. 22, 2 So.2d 116 (1941).

On the other hand, matters of substantive law are within the Legislature’s domain. Substantive law has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *State v. Garcia*, 229 So.2d 236 (Fla.1969). It includes those rules and principles which fix and declare the primary rights of individuals with respect to their persons and property. *Adams v. Wright*, 403 So.2d 391 (Fla.1981).

The Legislature wants public defenders to represent all clients they are constitutionally and ethically capable of representing. This is the substantive law.<sup>5</sup> But the mechanism for deciding whether a public defender is constitutionally and

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<sup>5</sup> It is worth noting that this substantive law is closely tied to areas over which this Court has exclusive control: this Court regulates lawyers, article V, section 15, Florida Constitution, and it decides what is and isn’t constitutional. *Richman v. Shevin*, 354 So. 2d 1200, 1205 (Fla. 1977).



ethically capable of representing a client—the formal requirements of a motion to withdraw, the nature of any hearing held, etc.—is procedural. As noted in *Raymond*, above, “‘Practice and procedure’ may be described as the machinery of the judicial process as opposed to the product thereof.”

In *Valle v. State*, 763 So. 2d 1175 (Fla. 4th DCA 2000), the public defender argued that the *Anti-Guzman* statute<sup>6</sup> was unconstitutional under article V, section 2(a), Florida Constitution. The Fourth District rejected this argument, stating:

The public defender argues that the amendment is unconstitutional because it violates Article V, section 2 of the Florida Constitution providing that the “supreme court shall adopt rules for the practice and procedure in all courts.” We do not agree. Section 18 of the same article provides that public defenders “shall perform duties prescribed by general law.” The legislature thus had the authority to adopt the amendment.

*Valle*, 763 So. 2d at 1177(footnote omitted).

The public defender respectfully submits that the Fourth District missed the mark here. While it is certainly true that under article V, section 18, the Legislature prescribes the public defender’s duties, it does not follow that the Legislature may prescribe the procedures for determining whether the public defender has a conflict of interest. Under article V, section 2(a), Florida Constitution, that is this Court’s task.

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<sup>6</sup> § 27.53(3), Fla. Stat. (1999); ch. 99-282, § 1, Laws of Fla.

## POINT II

THE FOURTH DISTRICT CORRECTLY HELD THAT REGIONAL CONFLICT COUNSEL HAS NO STANDING TO CHALLENGE A PUBLIC DEFENDER'S MOTION TO WITHDRAW

The Fourth District correctly held that legislative history shows that the Legislature did not intend to give RCC standing to contest public defender motions to withdraw. *Johnson v. State*, 6 So. 3d. 1262, 1267-68 (Fla. 4th DCA 2010). As noted above, in 2003, the Legislature gave the JAC standing to contest a public defender's motion to withdraw. § 27.5303(1)(a), Fla. Stat. (2003). When RCC was created in 2007, the JAC's standing to contest public defender motions was removed; and it would have been a simple matter for the Legislature to substitute RCC's standing for the JAC's. The Legislature did not, however, and so it is clear that the Legislature did not intend to give RCC standing. This makes sense fiscally because it does not matter which of two state agencies represents the accused—the bill to the state will be the same.

RCC argues that he has standing to contest public defender motions to withdraw because, unlike JAC, he is a party. *Initial Brief* at pp. 19-20. The simple answer to this argument is that RCC is not a party. The parties to a criminal proceeding are the State of Florida and the defendant. *Kilpatrick v. Oliff*, 519 So. 2d 9, 10 (Fla. 1st DCA 1987). Indeed, in this regard, RCC has even less standing

than the JAC and, before that, the counties. Yet in *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980), and *In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1133-34 (Fla. 1990), this Court held that the counties had no standing to contest public defender motions to withdraw:

Moreover, this Court has already considered whether in cases where the public defender seeks to withdraw because of conflict the counties must be allowed to respond to the motions to withdraw because of their substantial financial interest in the outcome. In *Escambia County v. Behr*, 384 So.2d 147 (Fla.1980), although Chief Justice England in his concurrence argued that “the counties are the only real parties in interest in such a proceeding, and they should be able to challenge the evidence offered to support a claim of excess caseload,” *id.* at 150 (England, C.J., concurring), this Court held that “[t]he court does not have to ... allow the county an opportunity to be heard before appointing private counsel.” *Id.* at 150. We reaffirm this statement from *Behr*.

*In re Order on Prosecution of Criminal Appeals*, 561 So.2d at 1133-34.

RCC argues that “[t]he effect of the 4th DCA’s opinion precludes lower courts from making this inquiry on any meaningful adversarial basis.” *Initial Brief* at p. 22. But this is probably precisely what the Legislature intended. If a trial public defender files a motion to withdraw, the trial court is required to:

. . . 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 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.

§ 27.5303(1)(a), Fla. Stat. (2008). It is quite likely that this trial court review, together with the good faith of the public defender as an officer of the court, was all the scrutiny the Legislature intended. Anything further—the adversarial hearings that RCC envisions—would be a waste of state resources. And it could lead to what happened below: RCC “routinely demanding evidentiary hearings whenever the PD asserts a conflict in this court and moves to withdraw.”<sup>7</sup> *Johnson*, 6 So. 3d at 1263.

Finally, RCC would like to infer from language in *State v. Public Defender, Eleventh Judicial Circuit*, 12 So.3d 798, 800 n.2 (Fla. 3d DCA 2009), *rev. granted*, No. SC09-1181 (Fla. May 19, 2010), and *State v. Bowens*, 35 Fla. L. Weekly D1475, D1476 n.3 (Fla. 3d DCA July 7, 2010), *rev. granted*, No. SC10-1349 (Fla. July 12, 2010), that had RCC timely intervened in *Eleventh Judicial Circuit*, or intervened at all in *Bowens*, such an intervention might have been entertained. At best this language is dicta, and probably not even that. *Cf. Federal Election Commission v. NRA Political Victory Fund*, 513 U.S. 88, 97 (1994) (“Nor are we impressed by the FEC’s argument that it has represented itself before this Court on several occasions in the past without any question having been raised regarding its

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<sup>7</sup> It should be stressed that Melanie Casper, the Assistant Regional Counsel who filed the initial brief in this case, was not the lawyer who routinely demanded evidentiary hearings.

authority to do so under § 437d(a)(6). [Citing cases.] The jurisdiction of this Court was challenged in none of these actions, and therefore the question is an open one before us.”).

RCC has no standing.

## CONCLUSION

This Court should approve the Fourth District's decision.

Respectfully submitted,

CAREY HAUGHWOUT  
Public Defender  
15th Judicial Circuit of Florida  
Criminal Justice Building  
421 3rd Street/6th Floor  
West Palm Beach, Florida 33401  
(561) 355-7600

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Paul E. Petillo  
Assistant Public Defender  
Florida Bar No. 508438

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished by mail to Melanie Casper, Assistant Regional Counsel, 605 N. Olive Avenue, Second Floor, West Palm Beach, FL 33401, and by courier to Diane Medley, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, this 23rd day of August, 2010.

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Of Counsel

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY the instant brief has been prepared with 14 point Times New Roman type, in compliance with a R. App. P. 9.210(a)(2).

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Paul E. Petillo  
Assistant Public Defender