SUPREME COURT
STATE OF LOUISIANA

DOCKET NUMBER: 2020-KK-000447

STATE OF LOUISIANA

VERSUS

RODERICK L. COVINGTON, SAMANTHA KELLY, and KIFFANY SPEARS

ON GRANTED WRIT FROM THE FIRST CIRCUIT COURT OF APPEAL,
DOCKET NO. 2019-KW-1494 and
NINETEENTH JUDICIAL DISTRICT COURT, CRIMINAL DIVISION
HONORABLE DONALD JOHNSON PRESIDING
DOCKET NOS. 07-18-0409, 07-18-0422, and 10-18-0529

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BRIEF OF DISTINGUISHED MEMBERS OF THE LOUISIANA BAR AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT MICHAEL MITCHELL, CHIEF DEFENDER, 19TH JUDICIAL DISTRICT COURT

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On Behalf of Distinguished Members of the Louisiana Bar

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INTEREST OF *AMICI CURIAE*

Amici curiae are members of the Louisiana Bar with significant experience in litigation (criminal or civil), in supervising junior lawyers, or both. Amici have an interest in preserving and protecting the integrity and ethical standards of the Bar as reflected in the Louisiana Rules of Professional Conduct.[1] Amici believe that a Chief District Defender such as Respondent Michael Mitchell can reach a point, due to excessive workloads and insufficient funding, where he cannot meet his ethical obligations as a supervising attorney to prevent the assistant public defenders working with him from violating their professional and ethical obligations. Amici believe that this Court's prior opinion in State v. Peart, 621 So.2d 780 (La. 1993), is insufficient to meet the ethical, professional, and constitutional crisis in which Mr. Mitchell is currently trapped. For these reasons, Amici request that this Court accept this brief in support of Respondent, Michael Mitchell.

SUMMARY OF THE ARGUMENT

The Louisiana Rules of Professional Conduct require an attorney to decline a potential new engagement when the lawyer's existing commitments would suffer as a result.[2] These rules apply with equal force to lawyers representing indigent defendants in criminal cases.[3] Thus, when a public defender receives appointments directly from the Court, and that attorney's current workload is already excessive, A.B.A. Formal Op. 06-441 counsels the attorney to request to be relieved from future appointments and, if necessary to withdraw from some current appointments.[4]

A supervising attorney such as Chief Defender Mitchell is ethically required to take measures to ensure that subordinate attorneys follow their ethical obligations.[5] This included, in the current case, filing a motion to preclude new assignments to the Section VI public defenders "until such time as [they] can adequately fulfill [their] ethical responsibilities to [their] existing clients."[6]

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[1] Amici are listed in the Appendix.

[2] La. Rules of Prof'l Conduct r. 1.7(a)(2); La. Rules of Prof'l Conduct r. 1.16(1); A.B.A. Model Rules of Prof'l Conduct r.1.16, cmt. [1].

[3] In re Vix, 2008-2290 (La. 5/15/09); 11 So. 3d 1090, 1096; A.B.A. Formal Op. 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (2006) at 3 & n. 9 ("The [Model Rules of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes.") (collecting prior ethics opinions).

[4] Id. at 5.

[5] La. Rules of Prof'l Conduct r. 5.1(a)

[6] A.B.A. Formal Op. 06-441 at 8.

The District Court denied Mr. Mitchell's motion because it did not seek relief on a case-by-case basis as directed by this Court's precedent in State v. Peart, 621 So.2d 780 (La. 1993). The individual-case focus of Peart fails to address the ethical dilemma of a supervising attorney such as Mr. Mitchell. This Court should adopt the approach of the Florida Supreme Court allowing aggregate motions to decline new cases or withdraw from some current cases "where there is an office-wide or wide-spread problem as to effective representation."[7]

Also, Peart failed to state a specific standard for the lower courts to apply to motions to temporarily cease assignment of new cases to the public defender. Amici support the risk-based standard that derives from the Rule 1.7(a)(2) of the Rules of Professional Conduct, as explicated by the Florida Supreme Court: "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."[8]

Because the record before the Court in this case demonstrates a state-wide crisis in the ability of public defenders to meet their ethical obligations to their clients (and the Sixth Amendment rights of their clients to the effective assistance of counsel), Amici support the state-wide relief requested by Mr. Mitchell in his brief.

STATEMENT OF THE CASE

Respondents' Brief sets forth in detail the procedural history of the matter currently before this Court.

ARGUMENT

I. The Public Defenders in the 19th JDC, Like All Members of the Bar, Must Be Permitted to Decline New Engagements Where Acceptance Would Prejudice Their Efforts on Behalf of Existing Clients.

A. An attorney must decline a new engagement where the work required in that matter would compromise the attorney's ability to discharge their duties of diligence, competence, and communication to existing clients.

One of the subtler obligations imposed by the Louisiana Rules of Professional Conduct is the lawyer's duty to decline a potential new engagement when the lawyer's existing commitments would suffer as a result. This ethical requirement derives from multiple rules, but principally from La. Rules of Prof'l Conduct r. 1.7(a)(2), which provides that "a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest

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[7] Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261, 273 (Fla. 2013).

[8] Id. at 275, citing R. Regulating Fla. Bar 4-1.7(a)(2), wording identical to La. Rules of Prof'l Conduct r. 1.7(a)(2). See also State ex rel. Missouri Public Defender Com'n v. Waters, 370 S.W.3d 592, 607-08 (Mo. 2012) (en banc).

exists if: . . . (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."

The official commentary to the identical ABA Model Rule states that "[a] conflict of interest may exist before representation is undertaken, in which event the representation must be denied, ..."[9]. Conversely, "[i]f a conflict arises after representation has been undertaken, the lawyer ordinarily must withdraw from the representation, ..."[10]

This is reinforced by La. Rules of Prof'l Conduct r. 1.16(a)(1), which commands that a lawyer "shall not represent a client, or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct or other law." The first comment to ABA Model Rule 1.16(a)(1) states, "[a] lawyer should not accept representation in a matter unless it can be performed competently, promptly, without improper conflict of interest and to completion."[11]

The comment incorporates the interdependent duties of competence[12], diligence[13], and communication[14]. The duty of diligence requires that "[a] lawyer's work load must be controlled so that each matter can be handled competently."[15] The leading treatise on the Louisiana Rules of Professional Conduct explains further that "[a] lawyer commits infractions of this rule when they negligently or intentionally ignore matters that warrant attention."[16]

The duty of competence includes the necessity of sufficient preparation to represent the client in the matter:

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[9] ABA Model Rules of Prof'l Conduct r. 1.7, cmt [3] (emphasis added).

[10] Id., Comment 4.

[11] ABA Model Rules of Prof'l Conduct r.1.16, cmt. [1].

[12] "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." La. Rules of Prof'l Conduct r. 1.1(a).

[13] "A lawyer shall act with reasonable diligence and promptness in representing a client." La. Rules of Prof'l Conduct r. 1.3.

[14] "A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information, . . ." La. Rules of Prof'l Conduct r. 1.4(a). Additionally, "[t]he lawyer shall give the client sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued." Id., Rule 1.4(b).

[15] ABA Model Rules of Prof'l Conduct r. 1.3 cmt. [2].

[16] D. Ciolino, Louisiana Legal Ethics: Standards and Commentary (2020) commentary to Rule 1.16.

> Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation.[17]

The duty of communication is essential to the delivery of legal services. The ABA Model Rules commentary notes that "[r]easonable communication between the lawyer and the client is necessary for the client effectively to participate in the representation."[18] This Court agrees: "Proper communication is essential to maintain public confidence in the profession."[19] Professor Ciolino points to multiple disciplinary cases where lawyers were sanctioned for failing to keep their clients informed about their case. [20]

B. The duties of diligence, competence, and communication are imposed on attorneys practicing criminal defense law.

This is no less true where the attorney is practicing criminal law. In that area of practice, as in all others, the duties of diligence, competence, and communication are paramount. Professor Ciolino states that "[b]oth prosecutors and defense counsel have an obligation to promptly and diligently resolve criminal matters."[21]

In re Vix, 2008-2290 (La. 5/15/09); 11 So. 3d 1090, is instructive. In that case, a criminal defense lawyer in private practice by failing to file appellate briefs or post-conviction petitions in four separate cases. The Office of Disciplinary Counsel also alleged that the attorney failed to communicate with each of these clients and failed to withdraw from their cases. The Louisiana Supreme Court, in accepting the disciplinary board's findings, noted:

> [W]e agree with the board that respondent's misconduct stemmed from poor management of her private practice while she was dealing with an excessive case load at the indigent defender's office and her mother's health problems. These issues appear to have been resolved. Moreover, no misconduct was reported stemming from respondent's duties as an indigent defender, and she has made full restitution to her clients, including interest.[22]

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[17] ABA Model Rules of Prof'l Conduct r. 1.1 cmt. [5]. The comment goes on to say that the "required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more extensive treatment than matters of lesser complexity and consequence." These factors were considered in The Louisiana Project study that was the basis for much of the testimony in the district court.

[18] ABA Model Rules of Prof'l Conduct r. 1.4 cmt. [1].

[19] Louisiana State Bar Ass'n v. St. Romain, 560 So. 2d 820, 824 (La. 1990).

[20] Ciolino, supra, commentary to Rule 1.4, citing In re Landry, 98-2767 (La. 1/8/99); 728 So. 2d 833, 834 (disciplining a lawyer for failure to communicate and other infractions); In re Bivins, 98-2513 (La. 12/11/98); 724 So. 2d 198 (same); In re Lawrence, 2006-2860 (La. 4/11/07); 954 So. 2d 113, 120 (clients testified they were forced to call respondent from different telephone numbers in order to get him to answer their calls); In re Broussard, 2009-1814 (La. 1/8/10); 26 So. 3d 131, 134.

[21] Ciolino, supra, commentary to Rule 1.3.

[22] Vix, 11 So. 3d at 1096 (emphasis added). The reference to attorney Vix's indigent defense practice reflects this Court's view that lack of competence, diligence, and communication may be considered more

The ABA's Standards Relating to the Administration of Criminal Justice – Defense Function[23] further adapts these principles to the practice of criminal law.[24] Overlapping these ethical duties, of course, is the requirement that the State of Louisiana provide the accused with the effective assistance of counsel. Even in the plea negotiation process, counsel must perform an adequate investigation of the charges against the client and the full consequences of either choice – to plead guilty and waive trial, or reject a plea offer and stand trial.[25]

Nothing in either the Louisiana Rules of Professional Conduct or the ABA Model Rules of Professional Conduct exempts attorneys in public defender offices from their commands.[26] Despite this, it has long been recognized that, because indigent defense services have been underfunded, assistant public defenders are required, on a regular basis, to "cut corners" on their duties of diligence, competence, and communication to their clients:

> [T]he under-funding of indigent defense also raises a serious and inadequately recognized problem of professional ethics: the systemic neglect of indigent defendants by their appointed lawyers. The legal profession's ethics rules establish standards for representation. However, many lawyers for indigent defendants engage in a practice that systematically violates these professional norms. They do not serve all their clients with "diligence" and "thoroughness," conduct "adequate preparation," or give matters the "required attention." Such criminal defense lawyers do not keep clients "reasonably informed," do not "comply with [their clients'] reasonable requests for information," do not consult with clients about how the lawyer will pursue their objectives, and do not explain matters to clients so that they can make "informed decisions."[27]

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egregious where the client could not afford counsel and therefore was required to accept the lawyer assigned by the public defender.

[23] The Standards were accepted as authority by this Court in State v. Peart, 621 So.2d 780, 789 (La. 1993).

[24] See A.B.A. Standards Rel. Admin. of Crim. J. – Defense Stand. 4-1.9(a) (diligence) ("Defense counsel should act with diligence and promptness in representing a client . . . publically-funded defense entities should be organized and supported with adequate staff and facilities to enable them to represent clients effectively and efficiently"); Stand. 4-4.1(c) (preparation) ("Defense counsel's investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation"); Stand. 4.3.9(a) (communication) ("Defense counsel should keep the client reasonably and currently informed about developments in and the progress of the lawyer's services, including developments in pretrial investigation, discovery, disposition negotiations, and preparing a defense. Information should be sufficiently detailed so that the client can meaningfully participate in the representation.").

[25] Hill v. Lockhart, 474 U.S. 52 (1985); Padilla v. Kentucky, 559 U.S. 356 (2010); Missouri v. Frye, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012).

[26] See A.B.A. Formal Op. 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation (2006) at 3 & n. 9 ("The [Model Rules of Professional Conduct] provide no exception for lawyers who represent indigent persons charged with crimes.") (collecting prior ethics opinions).

[27] B. Green, Criminal Neglect: Indigent Defense From a Legal Ethics Perspective, 52 Emory L.J. 1169, 1169-70 (2003) (emphasis added; citations omitted).

The American Bar Association's Formal Opinion 06-441 expressly connects the duty to decline representation to the context in which public defenders have such excessive caseloads that they cannot fulfill their duties of competence, diligence, and communication to their existing clients: 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.[28]

Opinion 06-441 goes on to say that when a public defender receives appointments directly from the Court (as is true in this case), and that attorney believes that her workload will become, or already is, excessive, the public defender "should take appropriate action," including "requesting that the court refrain from assigning the lawyer any new cases until such time as the lawyer's existing caseload has been reduced to a level [where the lawyer is ethically able to accept new cases]," and "if the excessive workload cannot be resolved simply through the court's not assigning new cases," filing a motion to withdraw from existing cases.[29]

C. Supervising attorneys such as Respondent Mitchell have an independent duty to ensure that attorneys working under him are not so overburdened with assignments that they cannot render the duties of diligence, competence, and communication to their existing clients.

Supervising attorneys such as Michael Mitchell have their own ethical obligations related to the workload of the attorneys they supervise. To comply with La. Rules of Prof'l Conduct r. 5.1(a)'s admonition that an attorney with managerial responsibility "shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct," Amici and their firms impress on newer attorneys the importance of determining whether they have capacity to accept a new assignment, evaluate subordinate lawyers on their performance in discerning when to decline a new assignment, and, when necessary, override decisions of well-meaning subordinates who have taken on more work than they can competently perform.[30]

But Chief Defender Mitchell has limited recourse to the standard means by which supervising attorneys such as Amici can ensure their subordinates do not have ethically impermissible workloads. Mr. Mitchell does not control the volume of incoming clients of the 19th

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[28] A.B.A. Formal Op. 06-441.

[29] Id. at 5.

[30] As Professor Ciolino observes, to discharge the duty under Rule 5.1, a supervising attorney or firm should have policies that insure that subordinate attorneys "are handling all matters competently and diligently, and are not perilously overburdened with work." Ciolino, supra, commentary to Rule 5.1.

JDC PDO; rather, the district judges in each of the criminal sections of that Court have the power to appoint "the public defender" to represent an indigent defendant in a new case.

Mr. Mitchell's office had been chronically underfunded since at least June 2016, when he adopted a "Restriction of Services" ("ROS") plan that was accepted by the Louisiana State Public Defender Board ("LPDB").[31] Two years later, an on-site review by then-State Public Defender James Dixon found that, notwithstanding the professionalism and efforts of the leadership, attorneys, and staff of the 19th JDC PDO, "[l]ine defenders in your office have excessive workloads that cannot be maintained," that "[a]ttorneys cannot maintain sufficient contact with clients," that the office's investigative capacity (one full-time investigator for 12,167 cases in 2017) was woefully insufficient, and that the ROS would have to be maintained.[32] The review concluded that "this is an instance of a management staff struggling to maintain service levels while facing inexorably depleting funding sources beyond its control."[33]

Mr. Mitchell was thus confronted with the specific scenario discussed in A.B.A. Formal Opinion 06-441, and, having exhausted efforts to distribute resources within his office, was acting consistent with that opinion in determining "to assign no additional cases to the lawyer, and, if the lawyer's cases come by assignment from the court, to support the lawyer's efforts to have no new cases assigned to her by the court until such time as she can adequately fulfill her ethical responsibilities to her existing clients."[34]

II. The Remedies of State v. Peart Are Grossly Insufficient to Address the Ethical Dilemma Facing the 19th JDC Public Defenders and Their Chief.

A. The Peart approach must be revisited to address the systemic problems presented to the district court.

The District Court denied Mr. Mitchell's motion on grounds that the relief requested – an across-the-board moratorium on new appointments to assistant public defenders in Section VI – was broader than allowed by this Court's decision in State v. Peart, 621 So.2d 780 (La. 1993).

Peart was a groundbreaking decision that began a process of significant improvement of Louisiana's system for providing counsel to indigent defenders. But the question presented in this writ is whether Peart's procedure and remedies are sufficient to address the system-wide problems presented to district defenders such as Michael Mitchell over a quarter-century later.

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[31] Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 52:3-30, R-348.

[32] Exhibit 15, Petitioner's Exhibit 5, R-668-669.

[33] Id.

[34] A.B.A. Formal Op. 06-441 at 8. Failure to take such action is arguably a violation of Rule 5.1 (a). Id.

Peart was correct that addressing, before trial, the effect of an indigent defender's caseload on the lawyer's ability to provide effective assistance of counsel furthers the interests of judicial economy, protect defendants' constitutional rights, and preserve the integrity of the trial process.[35] Peart was also on the right track in adopting the Eleventh Circuit's reasoning that "[i]t matters not that the ineffective assistance rendered may or may not affect the outcome of the trial to the defendant's detriment."[36] But the procedure adopted in Peart is too narrow to serve judicial economy, and the adoption of a Strickland[37]-type standard is incompatible with the need for a prospective remedy.

B. Peart's focus on individual cases is not sufficient to remedy a district-wide problem.

The case before the Court illustrates the narrowness of the analysis required by Peart. Chief Defender Mitchell was faced with an increasingly untenable situation in attempting to meet his and his office's ethical obligations, and Louisiana's Sixth Amendment obligation. In his testimony, former State Public Defender Dixon applied the results of The Louisiana Project statewide workload study to LPDB's comprehensive database. He testified that it would have taken the three Section VI public defenders 7,020 hours, 6,366 hours, and 9,732 hours, respectively, to represent their 2018 clients under the prevailing professional norms as established by The Louisiana Project.[38] Projecting the three defenders' assignments from the beginning of 2019 until the June 2019 hearing into yearly figures, Mr. Dixon estimated that, in order to represent their 2019 clients under prevailing professional norms, they would have to work 5,141 hours, 5,614 hours and 6,652 hours, respectively.[39]

That would certainly trigger the rebuttable presumption of the ineffective assistance of counsel. But how would adjudication of motions in each of the three attorneys' individual cases serve judicial economy? Either it would be a repetitive exercise over scores, if not hundreds, of cases, or it would require lengthy in camera presentation of the specific work required in each of

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[35] Id. at 787.

[36] Id., citing Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir.1988) (constitutional provisions securing assistance of counsel for defendants protect process rights "that do not affect the outcome of a trial").

[37] Strickland v. Washington, 466 U.S. 668 (1984).

[38] Exhibit 24, Petitioner's Exhibit 14, R-961; Exhibit 9, Testimony of Mr. Dixon, 6/14/2019 at 111:7-27, R-585.

[39] Exhibit 25, Petitioner's Exhibit 15, R-963.

these cases.[40] Moreover, the issue is not the work required in any one case; it is the cumulative effect of the massive amount of work required of these three lawyers, which impacts each case as it goes forward.

From Amici's standpoint, the individual-case focus of Peart fails to address the ethical dilemma of a supervising attorney such as Chief Defender Mitchell. His concern is not just for any particular client; it is for the entire client group assigned to the assistant public defenders in Section VI of the 19th JDC. How is Mr. Mitchell to discharge the ethical duty presented that his subordinates in Section VI, through no fault of their own, have insufficient time to investigate their clients' cases, communicate with their clients, or be prepared to fully litigate their clients' defenses?

The Supreme Court of Florida reviewed the question of whether a motion to decline appointment should be considered from an individual or aggregate perspective in a 2013 opinion that is worthy of imitation by this Court.[41] In that case, a district public defender moved to be relieved of the obligations to represent indigent defendants in non-capital felony cases, arguing that excessive caseloads caused by underfunding meant the office could not carry out its legal and ethical obligations to the defendants. The trial court ruled in favor of the district defender, but the intermediate appellate court reversed.

The Florida Supreme Court reversed the appellate court. After determining that the motions of the district defender were not statutorily prohibited, it discarded the State's argument that "aggregate relief cannot be afforded," "such motions are not intended to address systemic relief," and that "each incidence of conflict must be addressed on a case-by-case basis."[42] The Court noted that it had approved "aggregate or systemic relief in a number of cases where public defenders were experiencing excessive caseloads or where the offices were underfunded." That was the appropriate focus where the underlying problem affected an entire office rather than just a single attorney.[43] Thus, in Hatten v. State, the Florida Supreme Court "described the public defender's

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[40] Obviously, the information would have to be presented ex parte, given that the defender would be revealing work product and strategic considerations that would violate the attorney-client privilege if conducted in open court. Compare State v. Touchet, 93-2839, (La. 9/6/94); 642 So.2d 1213, 1220 (information needed to permit district court to authorize funding for expert services be presented ex parte).

[41] Public Defender, Eleventh Judicial Circuit of Fla. v. State, 115 So.3d 261 (Fla. 2013)

[42] Id. at 271.

[43] Id. at 272-73, citing In re Public Defender's Certification of Conflict & Motion to Withdraw Due to Excessive Caseload & Motion for Writ of Mandamus, 709 So.2d 101, 104 (Fla. 1998); In Re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit, 636 So.2d 18, 19 (Fla. 1994); In Re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public

failure to prepare and timely file Hatten's appellate brief as 'not merely an isolated incident, but ... symptomatic of a larger problem' and recognized that excessive caseload in the public defender's office 'precludes effective representation of indigent clients.'"[44]

Applying this precedent, the Florida Court was "struck by the breadth and depth of the evidence of how the excessive caseload has impacted the Public Defender's representation of indigent defendants," and was "a damning indictment of the poor quality of trial representation that is being afforded indigent defendants by the Public Defender in the Eleventh Circuit."[45] The Court concluded:

> In extreme circumstances where a problem is system-wide, the courts should not address the problem on a piecemeal case-by-case basis. This approach wastes judicial resources on redundant inquiries. If this Court had not approved systemic aggregate relief in the appellate cases cited above, the courts would have been clogged with hundreds of individual motions to withdraw. This is tantamount to applying a band aid to an open head wound.
>
> Thus, we reaffirm that aggregate/systemic motions to withdraw are appropriate in circumstances where there is an office-wide or wide-spread problem as to effective representation.[46]

Given the evidence before the district court in Mr. Mitchell's case, the problem in the 19th Judicial District is "office-wide," a "widespread problem as to effective representation." The district court's piecemeal approach, while understandable in light of Peart, is inapposite to the systemic funding problems demonstrated to that court.

C. Because Respondent's motion sought to prevent ethical and constitutional violations in the future, a prospective, risk-based analysis must be used in place of a backward-looking performance/prejudice analysis.

The analysis required by Peart is a poor fit for prospective remedies. As stated above, Peart cited the Eleventh Circuit case of Luckey v. Harris with approval for the point that, because Mr. Peart sought prospective relief, "it matters not whether the ineffective assistance rendered may or may not affect the outcome of the trial to the defendant's detriment." [47]

Luckey was a class action case for injunctive relief under 42 U.S.C. § 1983. In the part of the opinion relied upon by this Court in Peart, the Luckey Court contrasted the standards applicable

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Defender, 561 So.2d 1130, 1132, 1138 (Fla. 1990); Escambia Cnty. v. Behr, 384 So.2d 147, 148-49 (Fla. 1980).

[44] Public Defender, Eleventh Circuit Court, 115 So.3d at 273, quoting Hatten v. State, 561 So.2d 562, 563 (Fla. 1990).

[45] Id. at 274.

[46] Id.

[47] Id., citing Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988).

to a claim that ineffective assistance had prejudiced the defendant's case in the past from those applicable to a claim that the defendant's attorney is likely to provide ineffective assistance in his upcoming case:

> Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights, even if the violation of these rights would not affect the outcome of the trial ....
>
> In a suit for prospective relief the plaintiff's burden is to show "the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law." ... This is the standard to which appellants, as a class, should have been held.[48]

Although the theoretical basis for this "risk-based" standard[49] (whether the movant has shown the likelihood that the public defenders will deprive their clients of ethical, effective counsel) was accepted in Peart, the Court did not go on to explicitly instruct district courts to employ it. The risk-based, forward-looking standard, however, is entirely compatible with Peart, and applied to this case, compels that the relief sought by Mr. Mitchell be granted.

Relying on the Florida equivalent of La. Rules of Prof'l Conduct r. 1.7(a)(2), the Florida Court held that the standard appropriate to a motion for prospective relief 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."[50]

A similar standard was applied in State ex rel. Missouri Public Defender Com'n v. Waters, 370 S.W.3d 592 (Mo. 2012) (en banc). In that case, a district public defender office had caseloads far in excess of those required by the Missouri State Public Defender. A motion similar to Mr. Mitchell's was denied by the trial court. On appeal, the Missouri Supreme Court held that the right to effective assistance of counsel was "affirmative and prospective."[51] The Court explained:

> The constitutional right to effective counsel applies to all critical stages of the proceeding; it is a prospective right to have counsel's advice during the proceeding and is not merely a retrospective right to have a verdict or plea set aside if one can prove that the absence of competent counsel affected the proceeding.[52]

Turning to the Rules of Professional Conduct claim, the court applied the Rule 1.7 test to determine whether excessive caseloads produce a "significant risk that the representation of one

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[48] Luckey, 860 F.2d at 1017-18, quoting O'Shea v. Littleton, 414 U.S. 488, 502 (1974) (emphasis added).

[49] S. Hanlon, The Appropriate Legal Standard Required To Prevail In A Systemic Challenge To An Indigent Defense System, 61 St. Louis U. L.J. 625, 631 (2017).

[50] Id. at 275, citing R. Regulating Fla. Bar 4-1.7(a)(2), wording identical to La. Rules of Prof'l Conduct r. 1.7(a)(2).

[51] Waters, 370 S.W. 3d at 606.

[52] Id. at 607.

or more clients will be materially limited by the lawyer's responsibilities to another client."[53] The Waters Court held that "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing."[54]

D. Adverse consequences to criminal defendants must be minimized.

In Peart, as in many of this Court's cases involving indigent defense funding, the remedy for insufficiently-funded public defenders includes a stay of the prosecution.[55] In a capital case, where the defendant may not be eligible for bond, a stay without more may be adequate to maintain the status quo until constitutionally effective, conflict-free counsel can be appointed and paid.[56] But in other felony offenses and all misdemeanors, where the defendant has not bonded out, the client will bear the brunt of the inadequate resources provided to his defense. Therefore, where an order allowing public defenders to decline appointment as requested in this case is granted, the order must provide that the defendants will be released, either without bond or on a bond affordable by the defendant, in the absence of an express finding, by clear and convincing evidence, that the risk of immanent harm to a member of the public or the risk of flight is substantial enough to justify holding the defendant without bond.[57]

E. Summary

Amici believe that, given the systemic issues presented in the evidence before the district court, the Peart remedy should be updated. Where the facts indicate that a district or section wide deficiency exists, a district court should be permitted to consider one aggregate motion and address a systemic problem in a systemic matter. And because the focus in a pre-trial motion to suspend assignment to the public defender is necessarily prospective, the two-prong Strickland test should be replaced with the risk-based standard set forth above: where the movant has proved "a

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[53] Id.

[54] Id. at 607-08.

[55] See State v. Citizen, 2004-1841 (La. 4/1/05); 898 So. 2d 325, 338-39.

[56] The State has suggested that the private bar may be appointed pro bono to make up for the loss of overburdened public defenders. That is hardly a remedy: not only is the Louisiana Bar not responsible for the State of Louisiana's Sixth Amendment obligations, but the appointment of private lawyers, without compensation or adequate resources such as investigators and experts (where appropriate) would pose the very same risk of constitutional and ethical violations as documented in the district court in this case. And in any event, without funding, appointment of private counsel would merely result in a stay of prosecution under Citizen.

[57] See, e.g., O'Donnell v. Harris County, Tex., 842 F.3d 147, 157 (5th Cir. 2018) ("the incarceration of those who cannot pay money bail, without meaningful consideration of other possible alternatives, infringes on both due process and equal protection requirements"), quoting Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc).

significant risk of prejudice due to systemic inability to perform the ethical and constitutional duties of counsel,"[58] the public defenders should be allowed to decline future assignments, and, where necessary, move to withdraw from current cases.

Applying that standard to the evidence before the district court, the relief requested by Mr. Mitchell in this Court should be granted.

III. Because the Excessive Workload of Public Defenders is a Statewide Problem, this Court Must Adopt and Implement a Statewide Remedy.

Amici believe, however, that a remedy applied only in Section VI of the 19th Judicial District Court, or even in the entire 19th JDC, is insufficient to address the statewide crisis in criminal defense representation. Although the Legislature enacted the Public Defender Act in 2007, creating the LPDB, it remains the case that funding for district defenders such as Mr. Mitchell is overly dependent on revenues from misdemeanor convictions, and that legislative funding has been far short of the amount needed to employ enough defenders to provide their clients with the effective assistance of counsel.

Peart provides sufficient authority for this Court to exercise its inherent powers to impose a state-wide remedy for what the evidence in this case demonstrates is a state-wide problem:

> By virtue of this Court's constitutional position as "the final arbiter of the meaning of the state constitution and laws," St. Paul Fire & Marine Ins. Co. v. Smith, 609 So.2d 809, 822 (La. 1992) (Dennis, J., concurring), we have a duty to interpret and apply the constitution. See La. Const. art. 5 sec. 1. In addition, the constitution endows this Court with "general supervisory jurisdiction over all other courts. La. Const. art. 5 sec. 5. This Court also possesses inherent powers "to do all things reasonably necessary for the exercise of [its] functions...." Konrad v. Jefferson Parish Council, 520 So.2d 393, 397 (La. 1988). This inherent authority includes the authority "to fashion a remedy which will promote the orderly and expeditious administration of justice." State v. Mims, 329 So.2d 686, 688 (La. 1976).[59]

Pursuant to this power, this Court in Peart gave notice that, if needed by legislative inaction or insufficient action, it could fashion a comprehensive remedy to ensure that indigent defense was

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[58] Hanlon, Appropriate Legal Standard, supra, 61 St. Louis U.L.J. at 649.

[59] Peart, 621 So. 2d at 790-91. As in Peart, failure to address, before trial, the lack of funding for indigent criminal defense inevitably invites countless post-conviction petitions that will not only compound the drain on the public defender office's limited resources (because of the duty of the attorney who represented the post-conviction petitioner to respond), but will burden the tripartite judicial system in this State, including this Court, with never-ending writ applications, appeals and post-conviction applications based upon inadequate representation of counsel. It is surely clear by now that foisting the defense of indigent clients upon attorneys not financially able to provide adequate defenses or lacking basic resources over their representations to the courts is a "pass the buck" solution that this Court should avoid.

provided in an ethical and constitutional manner.[60] Amici submit that by failing to adequately fund LPDB, and continuing the district defenders' reliance on fees assessed in misdemeanor convictions, the Legislature has failed to fully heed this Court's Peart warning. We therefore endorse, as appropriate relief, entry of an order such as that proposed by Mr. Mitchell:

> 1. Subject to paragraph 2 of this order, the state immediately shall take such action as is necessary to dismiss without prejudice sufficient pending criminal prosecutions to eliminate 79% of average public defender workloads, as measured on a state-wide basis in accordance with The Louisiana Project; and release all incarcerated defendants whose cases are so dismissed by triaging cases so that the cases of those defendants charged with the most serious offenses are dismissed last.
>
> 2. The effectiveness of the relief granted under paragraph 1 of this order shall be suspended until 90 calendar days after adjournment of the next regular session of the Louisiana Legislature, or one year, whichever occurs first; thereafter, the effectiveness of the relief granted under paragraph 1 of this order shall remain suspended provided that average public defender workloads, measured on a statewide basis in accordance with The Louisiana Project criteria, are reduced by at least 20% annually for a period of four years.
>
> 3. The Court appoints James Austin to serve as Special Master, and he is directed to (a) receive reports from the Louisiana Public Defender Board regarding the State's compliance with the annual average workload reductions set forth in paragraph 2 of this order, and (b) to confer with interested persons from time to time as he deems necessary and to report to the Court on an annual basis regarding such compliance.
>
> 4. If, during the four-year period during which the State must reduce average public defender workloads as set forth in paragraph 2 of this order, the Special Master determines and reports to the Court that the State has failed to comply with any required annual workload reduction, the Court will schedule a hearing within 60 days following such report to consider whether the suspension of the effectiveness of the relief granted under paragraph 1 of this order should be terminated and/or other remedial action should be taken.
>
> 5. The Court encourages Louisiana policymakers and the Louisiana Legislature to implement policies and legislation as will allow the annual average workload reductions set forth in paragraph 2 of this order to be achieved, such as (a) statutory decriminalization of misdemeanors and low-level felonies that do not present significant risk to public safety, (b) sentencing reductions as appropriate for crimes remaining in the Louisiana Criminal Code, and (c) increased funding for public defense.
>
> 6. The Louisiana Public Defender Board shall provide to the Special Master such reports as he deems appropriate to keep the Special Master advised of the State's progress in achieving the annual workload reductions set forth in paragraph 2 of this order.
>
> 7. The Court shall retain jurisdiction of this proceeding to enforce or amend the terms of this order, and to appoint a successor Special Master, as and if necessary.

[60] Id. at 791.

Adoption of Mr. Mitchell's proposed relief would be a huge step forward in ensuring that Louisiana lawyers representing indigent persons accused of crime meet their ethical obligations to their clients, and that the State of Louisiana meets its constitutional obligations to these defendants.[61]

CONCLUSION

The American Bar Association has poignantly stated that there is an "implicit premise that governments, which establish and fund providers of public defense, never intended that the lawyers who furnish the representation would be asked to do so if it meant violating their ethical duties pursuant to professional conduct rules."[62] That promise to Mr. Mitchell and his assistants has been broken. We request this Court take decisive action to address this crisis.

Respectfully Submitted,

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On Behalf of Distinguished Members of the Louisiana Bar

[61] Implementation of Mr. Mitchell's proposed relief could also trigger Federal supplemental funding for the LPDB if the proposed Equal Defense Act ("EDA") is enacted into law in the next Congress. The EDA would provide $1.25 billion at $250 million a year, distributed over a five-year period, for direct federal funding for state public defender systems with effective case management systems. Because the Louisiana Public Defender Board, unique among public defender organizations in this nation, has developed a highly effective case management system over the course of the last seven years, Louisiana would be well positioned to be the first public defender system to receive the EDA funds.

[62] A.B.A., Eight Guidelines of Public Defense Related to Excessive Workloads (August 2009) at 11, cited in Waters, 370 S.W. 3d at 608.

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing pleading upon the persons listed below by first class mail and electronic mail on this, the 4th day of September, 2020:

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