SUPREME COURT
STATE OF LOUISIANA

NO. 2020-KK-00447

STATE OF LOUISIANA

VS.

KIFFANY SPEARS c/w SAMANTHA KELLY c/w RODERICK COVINGTON

ON WRITS FROM THE FIRST CIRCUIT COURT OF APPEAL
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA
19TH JUDICIAL DISTRICT COURT, CRIMINAL DIVISION
HONORABLE DONALD JOHNSON, JUDGE PRESIDING
DOCKET NOS. 07-18-0409, 07-18-0422, 08-18-0486, & 10-18-0529
COURT OF APPEAL, FIRST CIRCUIT DOCKET NO. 2019-KW-1494

ORIGINAL BRIEF FILED
ON BEHALF OF THE STATE OF LOUISIANA

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the present matter by the virtue of Article V, Section 5 of the Louisiana Constitution of 1974.

STATEMENT OF THE CASE

On October 29, 2018, the Chief Public Defender in East Baton Rouge Parish, Mr. Mike Mitchell, filed a motion to withdraw the Public Defender's Office (PDO) from current appointments and decline future appointments in Section VI of the 19th Judicial District Court (JDC). The PDO sought to withdraw from three pending cases: Kiffany Spears, Samantha Kelly, and Roderick Covington. Spears was represented by Section VI public defender Steve Sterling, Kelly was represented by Section VI public defender Harry Landry, and Covington was represented by Section VI public defender Quincy Richard. The motion to withdraw from these cases and decline future appointments urged that the PDO's caseload was too large, it was overworked, and that a potential future risk of conflict and ineffective assistance of counsel existed. The motion sought to use the Louisiana Project, a study conducted using a theory known as the Delphi Method, to establish that its caseload was too heavy and support its withdrawal. No public defender practicing in Section VI joined in the motion.

The state filed an answer urging that the Delphi Method was an inappropriate tool to determine appropriate caseloads and that no actual proof existed that the Section VI public defenders were compromised and/or ineffective in representing their clients. The state also filed an objection to the Delphi Method of caseload determination and a motion to dismiss based on lack of jurisdiction.

The trial court conducted a hearing on June 13, 14, and 17, 2019. At the outset, the court summarized the issue as to whether the public defenders in Section VI could continue with their ethical obligations given their current caseload. June 13th Tr. p. 25. During openings, the prosecutor explained why the Delphi Method was inappropriate. He also concluded that ineffective assistance claims are unique to each individual situation, each defendant, and that no "global answer to ineffectiveness existed." June 13th Tr. p. 34-39.

At the hearing, Mike Mitchell, Stephen Hanlon, Madison Field, Christie Smith, James Dixon, and Cristopher Murrell testified for the defense. Mike Mitchell testified that he was seeking to withdraw from the Spears and Kelly cases despite the fact he had no knowledge whether the public defenders had been ineffective. June 13th Tr. p. 64. Mitchell admitted that during a period of chronic underfunding he had been able to increase his workforce by 100% and that the public defender's caseloads had decreased by 25%. June 13th Tr. p. 69. Mitchell admitted the motion to withdraw was seeking prospective relief, merely to avoid the possibility of an ineffective assistance claim. June 13th Tr. p. 71. Mitchell further admitted he was relying upon the Louisiana Project's results, and not the ABA standards, to determine what he considered appropriate caseloads. June 13th R. p. 79. Mitchell was unable explain the "startling" discrepancies between the Louisiana Project, the Texas Project and the Missouri Project, all of which used the Delphi Method to make caseload determinations for their respective states. June 13th Tr. p. 84. Mitchell had never witnessed ineffective assistance occur in Section VI. He recognized that he, the prosecutor, or the court could always step in to stop potential ineffectiveness from occurring. June 13th Tr. p. 86. He also recognized that post-conviction relief was always available as a remedy but that no attorney in Section VI had ever been deemed ineffective to his knowledge. Most striking, Mitchell stated that although his public defenders were full-time attorneys, they were allowed to maintain a private practice. Despite their allegedly being overworked and potentially ineffective, the public defenders in Section VI were still allowed to represent non-indigent people in a private capacity. June 13th Tr. p. 94.

Stephen Hanlon was offered as an expert in caselaw studies using the Delphi Method. Hanlon read the Louisiana Study to conclude the caseloads for the public defenders in Louisiana were too high based on a 2080 hour workyear. He suggested that the public defenders in Section VI should withdraw from 67% of their caseload. Yet Hanlon's conclusion was based on results that used the Delphi Method, a process he admittedly did not understand. Hanlon repeatedly admitted Madison Field was the expert who could shed light on the Delphi Method. Hanlon advanced that the public defenders in Section VI should be able to withdraw because they ran a "substantial risk" of possibly committing ineffective assistance. Hanlon admitted that while it was his theory that people with excessive caseloads run a "substantial risk" of providing ineffective assistance of counsel, this theory was not the law. June 13th Tr. p. 135. Hanlon advocated public defender organizations pursue systemic challenges to support his specific remedy. June 13th Tr. p. 139. Hanlon acknowledged that the treatise of Norm Leifstein, an aficionado on caseload study, stated it was preferable to determine appropriate caseloads based on an empirical time-based study rather than use the Delphi Method. June 13th Tr. p. 145. Hanlon discovered that the Delphi Method was developed as a forecasting tool to determine the ability of the Soviet Union to produce mass atomic bombs and cripple American industry. When asked if the Delphi Method was reliable, Hanlon responded, "that's not my field." June 13th Tr. p. 158. Not surprisingly, Hanlon admitted he had never worked as a public defender. June 13th Tr. p. 169. He believed the absurd premise that every public defender possesses a continuous concurrent conflict; while they work on one case, they could be working on another. June 13th Tr. p. 171.

Madison Field was offered as an expert in application of the Delphi Method. Field stated that the Delphi Method was a survey that integrated opinions from individuals on a specific topic into a consensus. June 14th Tr. p. 35. He stated that the panel entrusted in implementing the survey were all high-ranking, pro-defense persons. June 14th Tr. pp. 38. Field admitted that the Delphi Method was a forecasting tool that tried to identify what might occur in the future, not what has actually happened. June 14th Tr. p. 47. He conceded that the Delphi Method was a funnel that drove people to a consensus and was not susceptible to precise measurement. June 14th Tr. pp. 48-49. He further conceded the Method was not a hard science and was human behavioral science. June 14th Tr. p. 50. He admitted that in compiling the Louisiana Project the participants were not provided with reliable empirical data before questioning. June 14th Tr. p.

53. Field could cite no study wherein the Delphi Method was said to have given a reliable prediction in relation to actual numbers. June 14th Tr. p. 55. It did not concern Field that the Delphi Method yielded strikingly different results regarding the same topic in the Texas, Missouri, and Louisiana Projects.[1] June 14th Tr. p. 62. According to Field one could reproduce the method, just not the outcomes. June 14th Tr. pp. 65-66.

Private attorneys Christie Smith and Christopher Murrell testified that they participated in the study and opined as to how they would approach their cases. Murrell admitted that in his experience, the consensus of the group was not always the right answer. June 17th Tr. p. 20. State Public Defender Scott Dixon testified that the State of Louisiana was at the 63rd percentile when it came to federal/state funding of public defenders. June 14th Tr. pp. 124-125.

None of the four practicing public defender's in Section VI testified. No testimony was adduced that the Section VI public defenders suffered from an actual conflict on their pending cases or that they believed they posed a substantial risk of committing ineffective assistance to their current or future clients. During the pendency of the motion to withdraw proceedings, defense counsel for Covington negotiated a plea for his client, apparently unfazed that he was overworked and needed relief from representing Covington.

At the conclusion of the hearing the trial court requested proposed judgements from the parties regarding whether the Delphi Method satisfied *Daubert* and how it should rule on the motion to withdraw. The state's proposed written reasons for judgment urged effective assistance claims must be made on a case-by-case basis and that each ineffective assistance claim demands an individual, fact specific inquiry. The state's written reasons for judgment also urged the Delphi Method was unreliable and did not satisfy *Daubert*. As the state noted, "The Delphi Method is a human behavior tool, not a scientific method. It attempts to force consensus from a divergence in expert opinion, nothing more."

The trial court subsequently issued oral reasons for judgment and a *per curiam* on September 12, 2019. It denied the PDO's motion to withdraw from current and future cases and granted the state's motion to dismiss. The trial court further ruled the expert methodology used by the PDO to attempt to establish its justification for withdrawal was unreliable and did not satisfy *Daubert*. It signed the written judgments supplied by the state.

[1] The Louisiana Project suggested a high felony caseload value of 30 cases. The Missouri Project suggested 43. The Texas Project's suggestion was 104.

In its oral reasons, the trial court stated it was sympathetic to the plight of the public defenders of East Baton Rouge and did feel they were overworked. September 12th Tr. p. 4. The Court continued:

> However, based upon the case that's been presented to me, I can only remain sympathetic with this exception, the remedy that the public defender is seeking is outside the scope of what this court can grant within the parameters of the law.

The court concluded by stating it would continue to address motions to withdraw on a case-by-case basis. September 12th Tr. p. 5.

The PDO sought writs with the First Circuit Court of Appeal. The state was not ordered to respond. The First Circuit, in a 2-1 decision, granted the PDO's writ application and reversed the trial court's denial of the motion to withdraw. *State v. Kiffany Spears et al.*, 19/KW/1494 (La. App. 1 Cir. 3/13/20). Without finding the trial court abused its discretion in finding the PDO's *Daubert* evidence unreliable, that court simply ruled the PDO had shown Section VI's constitutional and ethical obligations could be compromised due to excessive caseload. Unpersuaded by Louisiana law, the majority looked to a Missouri case, *State ex rel. Missouri Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592 (Mo. 2012), for guidance. The majority asked the trial court, prosecution and defense to work in tandem to triage cases. In dissent, Judge Theriot stated that motions to withdraw should continue be governed as they always have, on a case-by-case basis. Judge Theriot cited Louisiana law to arrive at his conclusion.

On March 16th, the state sought a stay of execution of the *Spears* ruling with the First Circuit so it could apply for rehearing. On March 17th the First Circuit denied the state's request for emergency stay. The same panel of judges who considered *Spears* ruled on the stay motion. The two judges who granted the writ in *Spears* (McDonald, Chutz) denied the stay. In dissent, Judge Theriot would have granted the stay.

The state next sought an emergency stay with this Court pending outcome of the writ application process. This Court granted the state's request, staying the matter until April 13, 2020. The state submitted a writ application, to which the PDO filed a response. This court granted writs and ordered briefing. The state files the instant brief.

ARGUMENT SUMMARY

The trial court did not abuse its discretion in finding the Louisiana Project's caseload study, generated using the Delphi Method, was unreliable. The Delphi Method did not satisfy *Daubert*, and Madison Field and Stephen Hanlon based their conclusions on an unreliable

methodology. Further, the question of whether a public defender may withdraw must be made on a case-by-case basis. The speculative possibility of potential conflict or ineffective assistance is insufficient to warrant a blanket withdrawal from future cases. Even if speculation were the standard, the PDO did not prove any possibility of conflict or ineffective assistance existed in Section VI.

ARGUMENT

Is the Delphi Method sufficiently reliable so as to determine a public defenders caseload?

The initial question asks whether it was appropriate for the First Circuit to disregard the highly deferential abuse of discretion standard afforded to the trial court's decision regarding Madison Fields, Stephen Hanlon,[2] and the Delphi Method. It was not. The trial court did not abuse its discretion when it acted as gatekeeper and rejected both Fields' and Hanlon's testimony, as well as the Delphi Method, under *Daubert*. The appellate court altogether failed to acknowledge the trial court's vast discretion in accepting experts and scientific methodology under *Daubert*.

Louisiana Code of Evidence Article 702 provides in pertinent part:

> A. A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (1) The expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (2) The testimony is based on sufficient facts or data;
> (3) The testimony is the product of reliable principles and methods; and
> (4) The expert has reliably applied the principles and methods to the facts of the case.

In State v. Lee, 14-2374 (La. 9/18/15); 181 So.3d 631, 637, this Court reminded:

> Under the standard set in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993), which this Court adopted in *State v. Foret*, 628 So.2d 1116, 1121 (La.1993) (La.C.E. art. 702 "virtually identical to its source provision in the Federal Rules of Evidence ... [Rule] 702"), the District Court is required to perform a "gatekeeping" function to "ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable." *Daubert*, 509 U.S. at 589, 113 S.Ct. at 2795. Acting as gatekeeper, the District Court has considerable leeway to determine whether expert testimony is reliable. *Kumho Tire Company, Ltd., v. Carmichael*, 526 U.S. 137, 152, 119 S.Ct. 1167, 1176, 143 L.Ed.2d 238 (1999). In the end, "the trial judge must determine whether the testimony has 'a reliable basis in the knowledge and experience of [the relevant] discipline.' " *Id.* at 149, 119 S.Ct. at 1174 (quoting *Daubert*, 509 U.S. at 592, 113 S.Ct. at 2796). "Whether *Daubert* 's specific

[2] Hanlon had no understanding of the Delphi Method. The state is still at a loss as to Hanlon's expertise.

> factors are, or are not, reasonable measures of reliability ... is a matter that ... the trial judge [has] broad latitude to determine," and therefore a decision to admit or exclude is reviewed under an abuse of discretion standard. *Id.*, 526 U.S. at 153, 119 S.Ct. at 1176; *State v. Edwards*, 97–1797, pp. 24–25 (La.7/2/99), 750 So.2d 893, 908–09.

Daubert addresses the reliability of the methodology used by the expert, not the adequacy of the expert's qualifications. In *Cheairs v. State ex rel. Dep't of Transp. & Dev.*, 03–0680 (La.12/3/03), 861 So.2d 536, 541–42, this Court adopted a broader three-prong inquiry to govern the admission of expert testimony, requiring proper admission only if all three of the following are true: (1) the expert is qualified to testify competently regarding the matters he intends to address; (2) the methodology by which the expert reaches his conclusions is sufficiently reliable as determined by the sort of inquiry mandated in *Daubert;* and (3) the testimony assists the trier of fact, through the application of scientific, technical, or specialized expertise, to understand the evidence or to determine a fact in issue. *Cheairs*, 861 So.2d at 542. In reviewing the decision of a trial court in qualifying a witness as an expert, courts typically place the burden on the party offering the witness as an expert and consider that the decision to accept or reject the offer rests within the sound discretion of the trial court. *State v. Craig*, 95–2499 (La.5/20/97), 699 So.2d 865, 870, *cert. denied*, 522 U.S. 935, 118 S.Ct. 343, 139 L.Ed.2d 266 (1997). Therefore, a trial court's decision on what weight to give an expert witness will not be overturned absent an abuse of discretion. *Johnson v. E.I. DuPont deNemours & Co., Inc.*, 08–628 (La.App. 5 Cir. 1/13/09), 7 So.3d 734, 743. *See also State v. Francois*, 13-616 (La.App. 5 Cir. 1/31/14, 27–28); 134 So.3d 42, 59–60, *writ denied*, 2014-0431 (La. 9/26/14); 149 So.3d 261; *State v. Farris*, 51,094 (La. App. 2 Cir. 12/14/16), 210 So.3d 877, *writ denied*, 17-0070 (La. 10/9/17), 227 So.3d 828. (Trial courts are vested with great discretion in determining the competence of an expert witness, and rulings on the qualification of a witness as an expert will not be disturbed unless there was a clear abuse of that discretion.); *State v. Lutz*, 17-0425 (La.App. 1 Cir. 11/1/17, 29); 235 So.3d 1114, 1132–33, *writ denied*, 2017-2011 (La. 8/31/18); 251 So.3d 41 (recognizing that the law grants the district court the same "broad latitude" when deciding how to determine reliability as it enjoys in respect to its ultimate reliability determinations).

In the instant case, the defense attempted to use Madison Field as an expert in the Delphi Method. The trial court ultimately refused to accept Field, finding he "did not even come close to meeting the *Daubert* requirement for experts." Likewise, the trial court found the Delphi

Method itself "not worthy of admissibility as a reliable science," as "it is an exercise in human behavior."[3] (Written Reasons for Granting the State's Daubert Objection.) Neither finding is a clear abuse of discretion.

At the hearing it was established that the Delphi Method was an unreliable resource to support the motion to withdraw. The Method, an admitted "soft science," was entirely subjective and incapable of producing consistent metrics. A quick comparison of the "appropriate" felony caseloads for Louisiana, Texas, and Missouri established the unreliability of the exercise. Under the Method, Texas concluded it could handle sixty-four more serious felonies per attorney than Louisiana. A Texas attorney can handle two and a half times the load of a Louisiana attorney. No witness offered any rational explanation for the discrepancy.

Another example of the absurd was the Delphi Method's result for time allotted to defense counsel in a life sentence felony case. By virtue of the Delphi Method, it was suggested that a public defender devote 200+ hours to every life sentence felony case. June 14th Tr. p. 44. 200 hours in a 2,080 hour work year (that assumed no vacations). Quick math reveals that a public defender would need twenty-five eight-hour work days to properly defend the case. Five full-time weeks. One-tenth of the work year on one case. Only truly incompetent counsel would devote this much time to a case. The untenable time component created by the Delphi Method did not go unnoticed by the trial court.

A caseload cannot be measured in a vacuum. No two armed robberies are factually alike. A single-witness case where the offender wore a mask does not parallel a multi-witness, caught-on-video, DNA-on-the-gun case. And no two armed robbers are the same. One robber may be a first-offender who is willing to go to trial. Another robber may need a plea simply to avoid being a fourth felony offender and receive a life sentence. Yet another might be somewhere in between, amenable to a plea but equally willing to contest the case if the plea is not favorable. The point is, no one can classify a crime or a defendant with a hard and fast time rule. All cases

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[3] Bogdan Dziurzynski, *FDA Regulatory Review and Approval Processes: A Delphi Inquiry*, 51 Food & Drug L.J. 143, 146 (1996).
The structure of the Delphi process is relatively straightforward, involving the following major steps:
• identifying the issue(s) (writing the problem(s) down);
• selecting and contacting the respondents (based on interest and expertise);
• selecting the sample size (three to over one hundred, depending on the objectives);
• developing, testing, distributing, and analyzing the results of several rounds of iterative questionnaires (beginning typically with open-ended questionnaires, then reducing broad issues to careful summarizations, and evolving to a level of detail that allows issues to be ranked by respondents to obtain convergence and a final consensus opinion); and
• preparing and distributing a final report.

turn on their own facts. **A methodology that attempts to pigeonhole cases by time spent is fundamentally inconsistent with the principle of providing effective assistance to a client**. It is why evaluations of withdrawal have always been made on an individualized, case-by-case basis.

The Delphi Method does not work to determine caseload. And Field and Hanlon were no experts. A review of their testimony shows they simply divided the Delphi results into a 2080-hour work year to arrive at the conclusion the public defenders were overworked. Experts do more than conduct elementary math, and it was clearly within the trial court's province to discount how little, if any, expertise they actually possessed.

In its opposition writ, the PDO briefly suggested that the trial court's ruling not be entitled to deference and that a *de novo* standard of review be employed. The PDO argued because the trial court adopted the states reasons for judgment it did not make its own factual determinations. The state is left to wonder whether the PDO would be requesting the same *de novo* review had the trial court adopted its proffered reasons for judgment. The PDO also discounts that the trial court did more than adopt the state's judgments. It gave oral reasons supporting its judgment. Regardless, it is clear the trial court's factual determinations, whether written by its own hand or otherwise, were entitled to the great deference known as the abuse of discretion standard.

The PDO's writ also places immense focus on the fact that the testimony of their witnesses was "unrebutted" and the state offered no expert to contradict their testimony. However, the PDO's testimony was "rebutted." Effective cross-examination is rebuttal evidence. That the PDO's experts were unpersuasive and often times appeared incompetent stands as a testament to the power of poignant questioning by the prosecutor. And it was because these experts appeared so hapless that the state did not feel the need to call any witnesses. The PDO did not establish any legitimate basis for declining future appointments. It is not coincidental that the PDO's writ response to this Court now (1) alternatively argues that its non-expert witnesses provided sufficient evidence to support its withdrawal and (2) concludes by asking this Court to equitably invoke its extraordinary powers to grant relief despite having prevailed at the first circuit. PDO writ, pp. 14-19, 24.

The trial court was entrusted with listening to the evidence and making a determination on whether it should believe the Delphi Method was sufficiently reliable so that it could be used

to measure the appropriate caseload for a public defender. Given the evidence presented, it clearly was not an abuse of discretion to discredit the Delphi results (and hence the Louisiana Project) as a means to quantify appropriate caseloads for public defenders. The First Circuit's disregard for the trial court's finding was error.

Should motions to withdraw be analyzed under State v. Peart or a "significant risk" analysis? Does it matter which analysis this Court uses?

In its reasons for judgment, the court sympathized with the public defenders and did state they were generally overworked. The court, however, never found that their being overworked resulted in a substantial likelihood they could not ethically or properly perform their duties. The court properly concluded that any potential difficulty the public defenders had with a case could be addressed on a case-by-case basis.

Under Louisiana law, the court's ruling is correct. A "significant risk" of potential ineffectiveness or conflict is not the standard. The standard is actual ineffectiveness and actual conflict, both of which are made on a case-by-case basis.[4] Further, even if this Court were inclined to entertain the PDO's position and modify existing law, the PDO did not establish any "significant risk" of ineffectiveness or conflict at the motion hearing.

This Court need look no further than *State v. Peart*, 621 So. 2d 780, 783 (La. 1993), to reject the PDO's wholesale motion to withdraw. In *Peart*, an indigent defendant (Leonard Peart) was charged with armed robbery, aggravated rape, aggravated burglary, attempted armed robbery, and first degree murder. The trial court appointed Rick Tessier, one of the two Orleans Indigent Defender Program (OIDP) attorneys assigned to Section E, to defend Peart against all the charges except first degree murder. Tessier filed a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources." The trial court held a series of hearings on the defense services being provided Peart and other defendants in Section E of Criminal District Court. The court found that Tessier was not able to provide his clients with reasonably effective assistance of counsel because of the conditions affecting his work, primarily the large number of cases assigned to him. The court further ruled that the system of securing and compensating qualified counsel for indigents was unconstitutional.

The trial judge ordered short-term and long-term relief. In the short term, he ordered Tessier's caseload reduced and announced his intention to appoint members of the bar to

[4] By way of example, if on the day of trial a defense counsel both states and proves that he is not prepared to proceed to trial, he has arguably established their right to a continuance. Even in this situation withdrawal would be an inappropriate remedy. Withdrawal would be proper only for an actual conflict, which generally becomes apparent well in advance of trial.

represent indigents in his court. For the long term, he ordered that the legislature provide funds to OIDP. The state appealed the ruling.

Peart addressed five questions. Most relevant to the instant case were questions III and IV. In question III Peart considered whether a court can address an ineffective assistance of counsel claim pre-trial. While noting that ineffective assistance of counsel claims are generally raised in applications for post conviction relief, the general practice of deferring ineffective assistance of counsel claims to post-conviction proceedings was not without exception. *Peart* cited ineffective assistance of counsel claims based on allegations of conflict of interest as those routinely brought to the attention of the trial court and considered before trial. *Peart* concluded that if the judge has an adequate record before him and a defendant has claimed that he is receiving ineffective assistance of counsel before trial, the judge may rule on the ineffective assistance of counsel claim at that time. *Peart*, at 787.

Having decided that pre-trial claims of ineffective assistance were viable, *Peart* next addressed whether a trial court could consolidate motions filed on behalf of multiple defendants charged with unrelated crimes, when the defendants are represented by a single attorney and allege that they are receiving ineffective assistance of counsel (IV). Addressing this contention,

Peart stated:

> We begin with the proposition that because there is no precise definition of reasonably effective assistance of counsel, any **inquiry into the effectiveness of counsel must necessarily be individualized and fact-driven**. […] In different contexts, Louisiana courts have found a wide variety of attorneys' failings to constitute ineffective assistance. These courts, in evaluating the ineffective assistance claim, have undertaken a detailed examination of the specific facts and circumstances of the case. This is necessary precisely because **effectiveness of counsel cannot be defined in a vacuum, but rather requires an individual, fact-specific inquiry**. *Peart*, at 788.

Peart continued:

> The trial judge's decision to consolidate the motions was no doubt prompted by his desire to have a better understanding of the effect Tessier's work load had on the defense being provided indigent defendants, including Peart, in Section E. The hearings held on the consolidated motions created a substantial body of evidence invaluable in assessing the claims. **However, the true inquiry is whether an *individual* defendant has been provided with reasonably effective assistance, and no general finding** by the trial court **regarding** a given lawyer's handling of other cases, or **workload generally**, **can answer that very specific question as to an individual defendant and the defense being furnished him**.
> **We find that a determination of effectiveness of counsel requires that the trial court examine each case individually.**

> Each defendant who raises a serious question regarding the effectiveness of his representation is entitled to a ruling. The trial judge who conducts the pre-trial hearing may consolidate proceedings and take some general evidence, but he must make a particularized finding about and issue an independent judgment regarding each defendant. *Peart*, at 788. Original emphasis.

After finding that the trial court erred by basing its decision on cumulative workload and funding, *Peart* provided a specific remedy: Hold individual hearings for any defendant that moves for relief based on ineffective assistance of counsel. If a defendant is not receiving the reasonably effective assistance of counsel and the court is unable to order any other relief which would remedy the situation (i.e. a continuance), then the court should halt the prosecution until the defendant is provided with reasonably effective assistance of counsel. *Peart*, at 791–92.

Subsequent to *Peart*, this Court has consistently reaffirmed the legal principle that funding or caseload based claims of ineffectiveness will be judged on an individualized, case-by-case basis. *State v. Reeves*, 06-2419 (La. 5/5/09), 11 So. 3d 1031, 1076; *State v. Citizen*, 04-1841 (La. 4/1/05), 898 So.2d 325. Moreover, ineffective assistance claims based on conflict may arise only when there is a "bona fide" conflict of interest, not merely a possibility. *State v. Leger*, 05-0011 (La. 7/10/06), 936 So.2d 108, 147.

In its motion to withdraw, the PDO relied heavily on *State v. Singleton*, 15-1099 (La. App. 4 Cir. 5/25/16), 216 So.3d 985, a 2016 Fourth Circuit case, to support its argument that it need only show a "significant risk" of ineffectiveness and/or conflict to warrant withdrawal. *Singleton*, however, helps the state.

In *Singleton*, Sherman Singleton was convicted of second degree murder. He filed for post-conviction relief and was granted a hearing. Singleton initially had Dwight Doskey as counsel for the hearing. The hearing was then recessed and Doskey subsequently withdrew as counsel. The district judge appointed the Louisiana Appellate Project to represent Singleton. The Louisiana Appellate Project took no action on its appointment and Kevin Christianson was appointed. Christianson was later allowed to withdraw without objection from Singleton. On that same date, the Orleans Public Defenders Office (PDO) was appointed. The PDO filed a motion to withdraw. The district judge denied the motion to withdraw and appointed Derwyn Bunton of the PDO to represent Singleton. The appointment of Bunton as counsel was unrelated to his public defender responsibilities and was made solely as a member of the bar personally eligible for *pro bono* appointment. Bunton filed a motion to avoid the appointment for "good cause."

Singleton first ruled that the district judge was without authority to appoint the PDO to represent Singleton in his post-conviction proceedings. Singleton was not tried in a capital case, nor was the death penalty imposed. His post-conviction case did not fall into a category for which the Louisiana Public Defender Act provided for public defender services. Thus, Bunton could not have been appointed in his PDO capacity.

Singleton next addressed whether Bunton was eligible for *pro bono* appointment in a private capacity. *Singleton* found Bunton was eligible. Nonetheless, *Singleton* found find that the district judge abused her discretion and Bunton demonstrated "good cause" to avoid the appointment.

At the hearing to avoid the appointment James Thomas Dixon, the chief public defender for the state, testified that Bunton, as District Defender for Orleans Parish, was a full-time employee and not allowed to have a private practice. Dixon expressed the unchallenged observation that if Bunton maintained a caseload of private clients and performed his duties as District Defender, he would not be able to do either "effectively." Bunton testified as well. He testified that he worked full-time as the District Defender and maintained a staff of approximately 100 people. He stated that he did not maintain a private practice nor possess any resources apart from those at the PDO, such as personal malpractice insurance.

Singleton found under the particular and specific circumstances Bunton demonstrated "good cause" under Professional Conduct Rule 6.2[5] to decline the appointment as a member of the bar eligible for *pro bono* service. The appointment in a personal capacity violated the terms of Bunton's employment with the Louisiana Public Defender Board. Bunton had no resources to defend Singleton. And Bunton had extensive duties as head of an office facing increasing caseloads amid a shrinking budget:

> Put simply, we find that maintaining Mr. Bunton's appointment would constitute a severe personal and professional hardship and imposition upon him which would likely adversely affect his ability to render attentive representation to Mr. Singleton at this time. And we this find that the district judge abused her discretion in denying his motion to withdraw.
> **We do emphasize, however, that our opinion should not be read to give public defenders *carte blanche* to decline any and all appointments in their personal capacity, simply because of**

[5] Professional Conduct Rule 6.2-Accepting Appointments:
A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
(a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law;
(b) representing the client is likely to result in an unreasonable financial burden on the lawyer; or
(c) the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer relationship or the lawyer's ability to represent the client.

> **their status as public employees; declining a *pro bono* appointment should only be done for the gravest of reasons.** *Singleton*, at 996. Original emphasis.

Singleton is largely inapposite because it deals exclusively with the appointment of a public defender in a *pro bono*, private capacity. Nonetheless, to the extent *Singleton* would have any applicability, it reaffirms *Peart's* principle that the question of withdrawal from a case must be made on a case-by-case basis. In *Singleton* a single person, one who oversaw more a hundred employees and was not allowed to practice privately, was removed from a single post-conviction case due to hardship. Conversely, in the instant case the PDO sought to have an entire Section of public defenders removed from multiple current and future cases despite the fact that these public defenders (1) do not oversee a sizable staff, (2) have enough time to practice privately, (3) have the resources to defend their clients, and (4) have shown no inability to competently represent their current indigent clients. In fact, *Singleton* suggests that if the public defenders of Section VI were appointed to represent indigent defendants in a private capacity, they must generally accept that appointment.

In reversing the trial court, the first circuit majority ignored Louisiana's jurisprudence and traveled to Missouri to support its decision, citing *Missouri Public Defender*. *Missouri Public Defender* is likewise distinguishable. *Missouri Public Defender* did analyze the propriety of a public defender's withdrawal of a case. But in Missouri, administrative law (18 CSR 10-4.010) allows a Commission to adopt a "case protocol," defining an appropriate caseload for public defenders. Once the caseload protocol was met withdrawal was allowed. The issue in *Missouri Public Defender* was whether the trial court erred in failing to abide by the promulgated rule. Finding that a properly promulgated rule had to be followed unless invalidated, *Missouri Public Defender* determined it was improper for the court to appoint a public defender. Notably, *Missouri Public Defender* went on to hold and reaffirm that "the Sixth Amendment and this Court's ethics rules require that a court consider the issue of counsel's competency, **and that counsel consider whether accepting the appointment will cause counsel to violate the Sixth Amendment and ethical rules, before determining whether to accept or challenge an appointment**." *Missouri Public Defender*, at p. 610. Original emphasis. Unlike Missouri, Louisiana does not have a "case protocol" rule allowing for immediate withdrawal. And ultimately *Missouri Public Defender* reaffirmed that declining appointment should be made on a

case-by-case basis, only when the public defender actually involved in the case believes it impossible to accept the appointment.

The PDO largely abandoned *Singleton* in its opposition to this Court, opting instead to cite out-of-state jurisprudence. The non-binding authority cited by the PDO is inapposite. *Carrasquillo v. Hampden Cty. Dist. Courts*, 484 Mass. 367, 142 N.E.3d 28 (2020), involved the propriety of a court order that made the Public Defender Division (PDD) accept assignments. In *Carrasquillo*, the Committee for Public Counsel Services (CPCS), who supervised the PDD and Bar Advocates, possessed legislative authority to "control assignments and limit caseloads" under G.L.c. 211D, Sec. 9(c). The CPCS determined the PDD had reached its caseload capacity and sought withdrawal. There were no factual findings to the contrary. *Carrasquillo* found that the trial judge erred in disregarding the CPSC's legal determination that it had exceeded its effective caseload. Nonetheless, *Carrasquillo* opined that it retained the power to review the CPSC's caseload determinations to ensure no abuse was being committed.

Lozano v. Circuit Court of Sixth Judicial Dist., 2020 WY 44, 460 P.3d 721, 724 (Wyo. 2020) involved a question of statutory interpretation. In *Lozano*, the issue was whether Wyoming law, W.S. sec. 7-6-105(b), allowed the public defender the discretion to decline appointments. *Lozano* ruled that sec. 105(b) did allow such discretion to the public defender in declining appointments. *Lozano* pointed out that ***actual, not speculative***, conflict was the standard: "[j]ust as the public defender has an ethical obligation to decline representation when it will result in a violation of the rules of professional conduct, **it also has a countervailing obligation not to avoid an appointment except for good cause**." *Lozano*, at 735.

In *Pub. Def., Eleventh Judicial Circuit of Fla. v. State*, 115 So. 3d 261 (Fla. 2013) the public defender filed a motion to withdraw from certain representation, alleging an excessive caseload created a conflict of interest. It also challenged the constitutionality of a statute that excluded withdrawal solely on the basis of excessive caseload. The Public Defender sought to withdraw from 21 cases and **certified a conflict of interest in each case**, claiming that excessive caseloads caused by underfunding meant the office could not carry out its legal and ethical obligations to the defendants. While granting the withdrawal based on the certified conflict, *Pub. Def.* also upheld the constitutionality of the Florida statute (27.5303(1)(d)) that disallowed withdrawal based solely on the inadequacy of funding or excess workload. *Pub. Def*., at. 279-80. And the dissent in *Pub. Def.* did not believe self-certification was sufficient, demanding that

there be proof in the record of either an actual conflict or a substantial risk thereof. It cited Louisiana's *Peart* for the sound proposition withdrawal would only be appropriate when there is **individualized** proof of prejudice or conflict due to excessive caseload and a judicial determination regarding **individual** defendants. *Id.*, at 285.[6]

The state understands the importance of a public defender's ethical and constitutional obligations. So did this Court in *Peart*. *Peart* was very clear that if a public defender was facing actual ethical and constitutional obstacles, not merely speculative, hypothetical theories about caseloads, action would be taken. This case involves the latter, which is why the PDO seeks to avoid *Peart's* parameters and unse non-controlling jurisprudence.

The PDO's "significant risk" standard, predicated on part of Professional Conduct Rule 1.7 is not the law.[7] Professional Conduct Rule 1.7 is a conflict rule that applies to concurrent representation, not single representation of a lot of people. And the PDO never mentions or cites Professional Conduct Rule 1.7(b)(1), which still allows for concurrent representation when the lawyer believes it is possible. For a public defender to withdraw from a case there must be legitimate grounds, actual conflict or hardship. Conflict counsel is employed precisely for this reason. When there is a conflict or hardship, conflict counsel gets the case. And the decision of when conflict counsel should take over is made on a case-by-case basis, only when it is abundantly clear the public defender is incapable of handling that individualized case. At no point in time during this case has any relevant Section VI public defender made this assertion.

Finally, even were this Court to entertain the PDO's "significant risk" theory, the PDO still loses. At best, the PDO established at the withdrawal hearing that Section VI possessed a heavy caseload and is, in general terms, overworked. *It did not establish a single instance of a*

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[6] The majority in *Pub. Def.* also cited *Peart*, but it was solely for the proposition that an ineffective assistance analysis could be conducted in a pre-trial setting. *Pub. Def.*, at 277.

[7] This "significant risk" theory for withdrawal originated in the OPD's motion and was later presented by Hanlon, the caseload expert. Professional Conduct Rule 1.7 reads:

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

(1) the representation of one client will be directly adverse to another client; or

(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, a former client or a third person or by a personal interest of the lawyer.**

(b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:

(1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;

(2) the representation is not prohibited by law;

(3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and

(4) each affected client gives informed consent, confirmed in writing.

significant risk of conflict or possible ineffective assistance. The four public defenders in Section VI did not join in the motion. Nor did they testify. In fact, no evidence was adduced at the hearing that Spears, Kelly, or Covington were receiving subpar representation by virtue of the Section's caseload. No evidence was adduced that the public defenders were in violation of either the ethical or constitutional obligations owed to their past, current, or future clients.

At the hearing Mike Mitchell acknowledged the public defenders in Section VI enjoy more manpower than the prosecutors in Section VI (4 to 3). And the three Assistant District Attorneys of Section VI, who cannot practice privately, screen hundreds of cases in addition to prosecuting every case that actually goes forward. Unlike defense counsel, prosecutors are the ones charged with the burden of proving a case beyond a reasonable doubt. They have to line up the witnesses, prepare the evidence for trial. They do not enjoy the presumption of innocence, nor do they enjoy the distinct possibility of not calling a single witness in a case. They cannot divert cases to conflict counsel. A portion of their cases is also not diverted to hired private counsel. And they carry this caseload while possessing an additional ethical/professional obligation. Only prosecutors have their own special professionalism rule. Rule of Professional Conduct 3.8, "Special Responsibilities of a Prosecutor," extends to victims, the public, and a defendant (*Brady*). Yet they confront this being "overworked" by working harder.

It is unclear why the PDO has not put a halt to private practice if it is so worried about caseload stress. No explanation was put on the record. But there is no reason to think that if the motion to decline fututre appointments is granted, the other seven Sections of criminal court in the 19th JDC, all of which currently have a higher caseload than Section VI, will follow suit. Private attorneys will ultimately bear the brunt. Attorneys at large and small firms, solo practictioners, in-house counsel, all inexperienced in criminal law, will be appointed to cases so that they may spend countless hours on unbillable work.[8]

Unlike the public defender in *Peart*, the Section VI public defenders did not participate in the PDO's motion for relief. Unlike *Peart*, there is not a scintilla of evidence from Section VI public defender's that they are incapable of doing their jobs ethically and professionally. This Court must now use valuable judicial time and resource addressing a complaint based solely on

[8] This presupposes that these attorneys would not render ineffective assistance for failing to be adequately up to speed on criminal law.

speculative workload where the persons who actually possessed the standing to complain never did so.[9]

The Louisiana Project and Delphi Method sought to establish how the public defenders might be ineffective in the future. But unreliable speculation is not the standard. The public defenders in Section VI have gone many, many years without ever being adjudicated ineffective or unethical. The PDO did not prove any ethical or constitutional violations were occurring with respect to its Section VI public defenders. Nor did it establish a "significant risk" existed these violations would occur. The trial court was well-within its province to reject the Delphi Method as unreliable. And it correctly determined that, in line with *Peart*, motions to withdraw must be made on an individualized, case-by-case basis. The First Circuit was incorrect to reverse the trial court's rulings. The trial court's rulings must be reinstated.

CONCLUSION

WHEREFORE, the State of Louisiana prays that the judgment of the trial court denying the PDO's motion to withdraw from current appointments and decline future appointments be reinstated.

RESPECTFULLY SUBMITTED,

HILLAR C. MOORE, III
DISTRICT ATTORNEY

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[9] Unlike *Peart*, the constitutionality of the OPD's funding was never at issue.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent, via electronic mail, to John Landis and Maggie Broussard, Attorneys for Defendants, at jlandis@stonepigman.com and mbroussard@stonepigman.com.

Baton Rouge, Louisiana, this ~27th~ day of July, 2020.

/s/ Dylan C. Alge
Assistant District Attorney