SUPREME COURT
STATE OF LOUISIANA

DOCKET NO. 2020-KK-00447

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

ORIGINAL BRIEF OF RESPONDENT MICHAEL MITCHELL ON THE MERITS

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STATEMENT OF THE CASE

Even though he prevailed in the court of appeal, Mr. Mitchell urged this Court to grant the State's writ application because of the importance of the issues raised in this case and the ability of the Court to exercise its constitutional and inherent powers, and supervisory jurisdiction, to provide a systemic remedy for a systemic denial of effective assistance of counsel. The record evidence on which the court of appeal relied for its ruling would support the same relief in virtually any section of any district court in the state. That evidence demonstrated that: (i) the state's public defenders have grossly excessive workloads and a chronic lack of resources; and (ii) due to these conditions, Louisiana's public defenders are prevented from satisfying the ethical duties they owe to their clients, which creates a significant risk that their clients will not receive effective assistance of counsel.

The relief ordered below by the court of appeal necessarily was limited in its scope to one section of the Nineteenth Judicial District Court. This Court is not so limited due to the Court's constitutional and inherent powers, and supervisory jurisdiction over all other Louisiana courts. In light of the chronic and pervasive nature of the problems faced by Louisiana's public defenders, the Court should exercise its powers and jurisdiction to fashion a state-wide, systemic remedy. Mr. Mitchell recognizes the disruption to the criminal justice system that such relief could cause if it were immediately and completely implemented. Accordingly, Mr. Mitchell respectfully suggests that the Court could minimize any such disruption by implementing its remedy in the delayed and phased-in manner described in this brief. This approach also would show due deference to the Louisiana Legislature by giving it a fair opportunity to address the issues in the first instance.

The Court, however, must not abdicate its constitutional duty to ensure that Louisiana's criminal justice system provides ethical and constitutionally effective assistance of counsel to indigent criminal defendants. In urging the Court to grant the State's writ application, Mr. Mitchell cited the Court's admonition in *State v. Peart,* 621 So. 2d 780, 791 (La. 1993) that, although the Court would defer to the legislature to address the conditions causing the systemic constitutional violations shown in that case, that deference was conditioned on the legislature taking appropriate steps to do so:

> If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and explicit measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.

Although the legislature enacted the Louisiana Public Defender Law (La. R.S. 15:141, *et seq*) in 2007, that action has proven to be inadequate to address the unethical and unconstitutional conditions that were present in 1993 and continue to exist today. If, despite being given another opportunity to act, the legislature fails to do so in a meaningful way, the Court must implement its own remedy for the the ongoing ethical and constitutional violations inherent in Louisiana's indigent defense system.[1]

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[1] The contention at page 18 of the State's brief that Mr. Mitchell "seeks to avoid *Peart's* parameters" by relying on "non-controlling jurisprudence" is off base. What Mr. Mitchell seeks is exactly what this Court said it would do in *Peart* – that is, invoke its authority to take measures "it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel." 621 So. 2d at 791.

ARGUMENT

I. The Delphi Method is a reliable methodology to measure public defender workloads, and it was reliably utilized in The Louisiana Project.[2]

The development of the use of the Delphi Method to measure public defender workloads[3][4] was explained at the evidentiary hearing by Stephen Hanlon,[5] who, without objection from the State, was qualified by the district court as an expert in the law and standards applicable to public defender workload studies using the Delphi Method.[6] Following litigation in Missouri

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2 The First Circuit Court of Appeal implicitly found the Delphi Method and The Louisiana Project report to be reliable in its ruling that "Relator presented sufficient evidence to the district court that shows the appointed public defenders cannot effectively represent their indigent clients in a manner consistent with their constitutional and ethical obligations due to excessive caseloads." *State v. Covington*, 2019-1494 (La. App. 1 Cir. 3/13/20), 2020 La. App. LEXIS 440 at *1. Moreover, the court ruled that "the request to allow the named public defenders to withdraw from representation of certain defendants in Section VI until the caseloads are no greater than 100% of his or her annual capacity is granted." *Id.* at **2-3. That annual capacity had been determined through the use of the Delphi Method in The Louisiana Project.

3 The Louisiana Project report defines the term "caseload" to mean the total number and different kinds of cases assigned to an individual public defender, a district public defender office or the Louisiana Public Defender Board ("LPDB"). The term "workload" is defined to mean the time needed for public defenders to competently handle their caseloads on an annual basis. Notably, the workloads measured in The Louisiana Project were case-specific and did not include time spent on activities such as supervisory and administrative work, training and continuing legal education. *See* Exhibit 19, Petitioner's Exhibit 9, The Louisiana Project at Appendix A, R-725. The Louisiana Project is also available at http://lpdb.la.gov/Supporting%20Practitioners/Standards/txtfiles/pdfs/Louisiana%20Project%20Report.pdf

4 In support of its Writ of Certiorari, the State submitted Mr. Mitchell's Application for Supervisory Writs filed with the First Circuit Court of Appeal, along with all of its attachments. For ease of reference, Mr. Mitchell refers to the exhibits attached to the Application filed in the First Circuit Court of Appeal as "Exhibit" with the appropriate record citation as they are numbered in the copy provided to the Court. The exhibits to the application are also available at https://www.publicdefenders.us/files/workloads/Compiled%20Exhibits%20Page%2054%20-%20Page%201071.pdf

5 At the time of his testimony, Mr. Hanlon was the General Counsel of the National Association for Public Defense, which has a membership of 20,000 public defenders. He also has taught law school courses and has authored published law review articles on the subject of public defender workloads. Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 102:27-103:20, R-398-399.

6 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 114:8-18, R-410.

concerning public defender caseloads,[7] Mr. Hanlon began a search to develop a reliable statistical framework by which to rationally measure public defender workloads to determine when they become excessive.[8] In his search, Mr. Hanlon learned of the Delphi Method, which had been developed by the Rand Corporation in the 1960's. He asked RubinBrown, a top 100 national accounting and consulting firm, to determine whether the Delphi Method would be an appropriate and reliable methodology to measure public defenders workloads.[9] Based on an exhaustive literature review, RubinBrown found that the Delphi Method has been utilized in the past by judicial organizations and legislatures as a reliable analytical and statistical framework to measure attorney and judicial workloads in studies performed by the National Center for State Courts and other organizations across the United States.[10]

Based on its findings, RubinBrown concluded that the Delphi Method could reliably be used for the purpose proposed by Mr. Hanlon and agreed to direct a study of public defender workloads in Missouri using the Delphi Method.[11] Mr. Hanlon, on behalf of the American Bar Association ("ABA"), provided the legal framework for the study while RubinBrown provided the study's statistical framework.[12] Since the completion of the Missouri study in 2014,[13] in addition to The Louisiana Project, Mr. Hanlon and major accounting firms have completed similar Delphi Method studies of public defender workloads in Colorado and Rhode

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7 Mr. Hanlon has served as lead counsel in litigation throughout the United States concerning public defender workloads. Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 103:21-105:21, R-399-401.

8 See Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 106:19-108:20, R-402-404.

9 *Id.*

10 *See* https://www.ncsc.org/services-and-experts/areas-of-expertise/workload-assessment (link to all NCSC workload studies – over 67 workload/needs assessments performed/published); https://cdm16501.contentdm.oclc.org/digital/collection/ctadmin/id/2322 (over 25 states utilized this method to determine workload as opposed to caseload).

11 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 108:29-112:15, R-404-408.

12 *Id.*

13 Exhibit 20, Petitioner's Exhibit 10, R-761-808.

Island.[14] Mr. Hanlon also consulted on a Texas study[15] and currently is directing studies together with major accounting firms in Indiana, New Mexico and Oregon.[16] Reports from all of the completed studies, which uniformly concluded that the Delphi Method is a reliable methodology to measure public defender workloads, were introduced into evidence without objection from the State and are included in the record in the case.

In 2015, LPDB retained the Louisiana accounting firm Postlethwaite & Netterville, APAC ("P&N") and the ABA to perform a Delphi Method study of the workloads handled by Louisiana public defenders. This study came to be known as The Louisiana Project.[17] As part of its work, P&N reviewed the RubinBrown literature review and the prior studies in which the Delphi Method was used to measure workloads. Based on this review, P&N concluded:

> The Delphi Method offers a reliable and structured means to integrate opinions of highly informed professionals to develop a consensus opinion. As a methodological strategy, the Delphi Method is an iterative process of surveys given to a group of professionals, with structured feedback presented to the experts at each interval stage. The surveying practices applied by the Delphi Method can be either interviews or questionnaires that focus on fundamental questions of significance to the experts convened.
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> *******
>
> Since its introduction, the Delphi Method has been employed across a diverse array of industries, such as health care, education, information systems, transportation and engineering. The purpose of its use beyond forecasting has ranged from "program planning, needs assessment, policy determinations and resource utilization." Within the legal system, early examples of the use of the Delphi Method can be traced back a couple of decades and are considered an appropriate methodology for a weighted caseload study. Examples of these attempts were

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14 Exhibits 21 and 22, Petitioner's Exhibit 11 and 12, R-809-866; Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 112:21-23, R-408. The Colorado study was conducted by the ABA and RubinBrown. The Rhode Island study was conducted by the ABA and BlumShapiro, the largest accounting and consulting firm based in New England.".

15 Exhibit 23, Petitioner's Exhibit 13, R-867-960. The Texas study was conducted by the ABA and The Public Policy Research Institute, a leading policy research group at Texas A&M University engaged in survey administration, statistical analysis, evaluation and systems management.

16 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 112:23-28, R-408. The Indiana study is being conducted by the ABA and Crowe, LLP, an international public accounting, consulting and technology firm. The New Mexico and Oregon studies are being conducted by the ABA and Moss Adams, LLP, a 107-year-old professional services firm with more than 25 locations in the United States.

17 Exhibit 19, Petitioner's Exhibit 9, R-697-760; Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 8:1-14, R-482.

> sponsored by both the National Association of Court Management and the National Center for State Courts. These efforts were principally charged with assessing judicial and court support staff needs.[18]

The Louisiana Project is a needs assessment study.[19] The Louisiana Project report, which was introduced into evidence without objection from the State, provides this overview of how the Delphi Method is utilized for this purpose:

> In general, a group of experts first provide individual, anonymous responses on a given topic based on the background information provided and their expertise. Next, professionals are provided the same survey with the inclusion of the aggregated results from the initial survey, including peer review means and ranges. At this time, the participants may then choose to adjust their initial responses based on the feedback provided by the aggregated results and their expertise. This iterative process of alternating participants' independent assessments with other anonymous peer response data enables professional opinions to be converted into objective consensus opinion.[20]

The "group of experts" for The Louisiana Project were selected through a two step process. An initial panel of informed lawyers, consisting of four members chosen by the ABA, LPDB and highly regarded criminal defense practitioners, identified 125 additional Louisiana criminal defense lawyers, who were invited to serve on The Louisiana Project's Delphi panel. The 125 lawyers consisted of 65 private defense practitioners and 60 public defenders.[21]

In the round one survey, the 125 panel members (called "luminaries") were asked to complete an online survey by using ABA and LPDB criminal defense standards, as well as their own expertise in criminal practice.[22] The survey included eleven separate "Case Types" and eleven "Case Tasks" for each Case Type.[23] The panel members were asked to provide their opinions as to the number of minutes they believed should be spent to accomplish each Case Task" in an

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18 Exhibit 19, Petitioner's Exhibit 9 at 14-15, R-716-717 (footnotes omitted).

19 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 14:6-8, R-488.

20 Exhibit 19, Petitioner's Exhibit 9 at 14, R-716.

21 *Id.* at 16, R-718. The statement at page 5 of the State's brief that the Delphi panel members were "all high-ranking, pro-defense persons" is only partly right; all of the panel members were "pro-defense persons" in that they have all practiced criminal defense, but almost half of the panel members self-identified as public defenders.

22 *Id.*

23 *Id.* at 17-18, R-719-720.

average case. Sixty-two of the 125 participants completed the round one survey and were invited to particpate in the round two survey. Of the 62 responders, 36 panel members self-identified as private practitioners and 26 self-identified as public defenders.[24]

In the round two survey, the 62 responding participants were asked to answer the same questions with the benefit of having the aggregrated results from the round one survey.[25] Fourty-eight of the participants completed the round two survey, split between 28 who self-identified as private practitioners and 20 who self-identified as public defenders.[26] The responding participants were invited to participate in a round three, in-person survey.[27]

The round three survey consisted of 23 luminaries with an average of 29 years of experience, split between twelve who self-identified as private practitioners and eleven who self-identified as public defenders.[28] The round three panel members were asked to reach a consensus (2/3) opinion on the number of minutes necessary to competently perform each Case Task in each Case Type. In doing so, they were asked to consider the ABA and LPDB standards, the Rules of Professional Conduct, their own experiences, and the aggregate data from the round two survey.[29]

The ABA standards that the panel members were asked to consider in all three rounds are the ABA Criminal Justice Standards ("ABA Standards"),[30] which are "the result of the considered judgment of *prosecutors*, defense lawyers, judges and academics."[31] The panel members also were asked to consider: (1) the performance standards of *Strickland v. Washington,*

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24 *Id.* at 18, R-720.

25 *Id.* at 18-19, R-720-721.

26 *Id.* at 19, R-721.

27 *Id.*

28 *Id.*

29 *Id.*; Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 41:17-28, R-515.

30 *See* Exhibit 19, Petitioner's Exhibit 9 at 3-4, R-705-706.

31 *Id.* at 4 (quoting Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years in Excellence*, 23 CRIM. JUST. 10 (2009), *available at* https://www.americanbar.org/content/dam/aba/publications/criminal_justice_magazine/makingofstandards_marcus.pdf) (emphasis supplied).

466 U.S. 668, 688 (1984) ("reasonably effective assistance of counsel pursuant to prevailing professional norms of practice") and (2) that the Supreme Court had found in *Padilla v. Kentucky*, 559 U.S. 356, 366-367 (2010) that the ABA Standards "may be valuable measures of the prevailing professional norms of effective representation."[32] Mr. Hanlon testified at the evidentiary hearing that the ABA standards perform the same kind of function for the expert panel that jury instructions do for a trial jury, focusing and guiding the professional judgment of the expert panel members.[33]

The members of the expert panel were asked in particular to consider Section 4-6.1(B) of the ABA Standards concerning the Duty to Explore Disposition Without Trial (Pleas).[34] Section 4-6.1(b) provides:

> In every criminal matter, defense counsel should consider the individual circumstances of the case and the client, and should not recommend to a client acceptance of a disposition offer (plea) ***unless and until appropriate investigation and study of the matter has been completed.*** Such study should include:
>
> - Discussion with the client,
> - Analysis of relevant law,
> - Analysis of the prosection's evidence,
> - Analysis of potential dispositions, and
> - Analysis of relevant potential consequences
>
> Defense counsel should also advise against a guilty plea at the first appearance, unless, after discussion with the client, a speedy disposition is clearly in the client's best interest. (Emphasis supplied).[35]

Against this background, the expert panel members were asked to assume that (1) the time calculated was over the entire life of the case, (2) the participant had adequate support,

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32 *Id.* at 3-4, R-705-706.

33 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 110:2-19, R-406.

34 Section 4-6.1(B) is a particularly important standard in this context because, as the United States Supreme Court noted in *Missouri v. Frye*, "ninety-four percent of state convictions are the result of guilty pleas." 566 U.S. 134, 143 (2012) (citing Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online).

35 Exhibit 19, Petitioner's Exhibit 9 at 3-4, R-705-706 (citing American Bar Association, Criminal Justice Standards for the Defense Function, 4th Ed. (2017), *available at* https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/).

secretarial assistance and investigative staff, and (3) the case is an average case, and not an extreme example.[36] Having been given these instructions, the expert panel members then collaberated to provide their consensus professional judgments on each Case Task in each Case Type in the study, for both the time required for each Case Task and the percentage of cases in which Case Task was necessary.[37]

The following charts, which appear in Exhibit 2.2 to The Louisiana Project report[38] show the consensus reached by the Delphi panel as to the amount of time required for average high-level felony and felony life without parole ("LWOP") cases.

High-level Felony			
	Minutes Per Case	Percentage Performed	Total
	Delphi Panel Results		
Client Communication	480	100%	480.00
Collecting Records	210	100%	210.00
Interviews / Field Investigation	360	100%	360.00
Experts	300	50%	150.00
Legal Research and Writing	480	100%	480.00
Negotiations	240	100%	240.00
Court Preparation	800	100%	800.00
Case Preparation	600	100%	600.00
Sentencing	240	99%	237.60
Court Time	450	100%	450.00
Client Care	180	100%	180.00
Total Minutes per Case			**4,187.60**
Total Hours per Case			**69.79**

Felony- Life Without Parole			
	Minutes Per Case	Percentage Performed	Total
	Delphi Panel Results		
Client Communication	2,500	100%	2,500.00
Collecting Records	600	100%	600.00
Interviews / Field Investigation	900	100%	900.00
Experts	600	95%	570.00
Legal Research and Writing	1,200	100%	1,200.00
Negotiations	300	100%	300.00
Court Preparation	1,600	100%	1,600.00
Case Preparation	1,800	100%	1,800.00
Sentencing	240	100%	240.00
Court Time	2,000	100%	2,000.00
Client Care	330	100%	330.00
Total Minutes per Case			**12,040.00**
Total Hours per Case			**200.67**

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36 The State's contention that the Delph Method, as utilized for The Louisiana Project, failed to take into account the relative complexities of different cases charging the same crime deliberately ignores that the Delphi panel members were asked to consider the average case for each case type. Obviously, some cases will take more time and some will take less. The law of averages takes this into account.

37 Exhibit 19, Petitioner's Exhibit 9 at 19, R-721.

38 *Id.* at Exhibit 2.2, R-756.

The following chart, which appears at page 1 of The Louisiana Project report,[39] shows the consensus reached by the Delphi panel as to the total amount of time required for all eleven case types considered:

Delphi Panel Survey Results	
Case Type	**Hours Per Case**
Misdemeanor or City Parish Ordinance	**7.94**
Enhanceable Misdemeanor	**12.06**
Low-level Felony	**21.99**
Mid-level Felony	**41.11**
High-level Felony	**69.79**
Felony-Life Without Parole	**200.67**
Juvenile Delinquency	**19.78**
Families in Need of Service (FINS)	**9.66**
Child in Need of Care (CINC)	**25.08**
Revocation	**8.47**

The State contends that it successfully rebutted the expert consensus that the Delphi Method is a reliable methodology solely through its own counsel's cross examination of Mr. Mitchell's witnesses. An examination of the record demonstrates that the State did no such thing.

For example, the State claims at pages 5-6 of its brief to have established through cross examination that The Louisiana Project was unreliable because it did not utilize an empirical, time-based study. This claim is squarely contradicted by the record. As Mr. Field[40] testified, all of the state public workload studies placed into evidence, including The Louisiana Project, were needs assessment studies that involved three phases.[41] The Louisiana Project report described the three phases in this way:

> The Louisiana Project consisted of three main phases: (1) an analysis of the Louisiana public defense system's historic caseloads and staffing; (2) an analysis of actual time spent by public defenders on recent caseloads in pilot districts; and (3) the application of the Delphi Method as a survey process to identify how much time

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39 *Id.* at 1, R-703.

40 Contrary to the State's assertions that Mr. Field was only "offered" as an expert in application of the Delphi Method (State's Brief at p. 5) and that the district court rejected his testimony (State's Brief at p. 8), the district court actually qualified Mr. Field on the record TWICE over the objections of the State. Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 24:18-28; 70:1-71:13, R 498, R-544-545. Despite this fact, the State submitted a post-hearing proposed judgment granting the State's *Daubert* motion, which the district court adopted without explanation.

41 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 29:22-36:11, R-503-507.

> an attorney *should* spend, on average, in providing representation in certain types of criminal cases to provide reasonably effective assistance of counsel pursuant to prevailing professional norms.[42]

P&N obtained data regarding historic caseloads and staffing from LPDB's comprehensive database.[43] P&N obtained data regarding actual time spent on recent cases through time studies conducted in four "pilot" judicial districts, including the Nineteenth Judicial District.[44]

The State argues that The Louisiana Project was somehow deficient because the time study data were not shown to the Delphi panel for use in their deliberations. Based on its cross examination of Mr. Hanlon, the State apparently was unaware until the evidentiary hearing that none of the other state studies had provided time study data to their respective Delphi panels.[45] Mr. Field explained that P&N agreed with the accounting firms involved in the other studies that time study data should not be provided to The Louisiana Project Delphi panel because that data is a "biased cognitive anchor."

> What has been peer-reviewed – and my definition of it, at least, is that it was found to be a cognitive anchor. So one of the things that is done in a number of these studies is you'll have a time study, then you'll have a time sufficiency study that is sent to the population. What the sufficiency study tells you, and almost unanimously, is either in judicial needs assessments, public defender assessments, people need more time. They need more time and that's the answer. And what has now been determined based on the evolving methodology that's been 10 – 12 studies is that that is a biased anchor. So for example, if you were to – I equate this to building a house and a foundation. So if you were provided data that was, to your knowledge, skewed lower than it should be, and that is your reference point, that would skew you to be more conservative and go towards that data, and that essentially has been the relevant thinking around removing the world of what is because it is an inappropriate prominent influencer that's basically creating bias towards the lower end of the spectrum, and that's what it has been removed in – at least the four studies admitted as well as other studies.[46]

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42 Exhibit 19, Petitioner's Exhibit 9 at 1, R-703.

43 *Id.* at 7-9, R-709-711.

44 *Id.* at 11-13, R-713-715.

45 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 165:15-167:13, R-461-463.

46 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 54:1-21, R-528. Moreover, after it examined the time study data collected for The Louisiana Project, P&N concluded that the data "understates the Case Specific time spent on legal representation of clients on specific cases by public defenders during the analysis period." Exhibit 9, Petitioner's Exhibit 19 at 12, R-714.

As Mr. Hanlon explained, the appropriate "anchor" in all of the state studies were the professional practice standards that the Delphi panel members were instructed to consider in their deliberations.[47]

In support of its argument against the reliability of the Delphi Method, the State also cites its counsel's questioning of Mr. Hanlon regarding a 2011 treatise by Norman Lefstein, which advocated utilizing empirical data when such data is available. What the State fails to disclose is that Professor Lefstein (who was unavailable to testify at the hearing due to cancer treatment and is now deceased) published his treatise in 2011 (three years before the Missouri study was published and six years before The Louisiana Project report was published), and that he was an editor of and consultant to The Louisiana Project.[48] Professor Lefstein also submitted an affidavit that adopted use of the Delphi Method in support of Mr. Mitchell's motions to withdraw.[49]

Professor Lefstein obviously concluded that the professional judgment of the data and analytics experts at RubinBrown regarding the use of appropriate empirical data in Delphi Method workload studies was correct; *i.e.*, that even if reliable timekeeping data were available, it should not be shown to an expert panel in a Delphi study. In such a study, a Delphi panel is not studying what public defenders are currently doing, but what public defenders should be doing according to specifically defined prevailing professional norms previously approved by the United States Supreme Court. Counsel's use of Professor Lefstein's treatise to cross examine Mr. Hanlon, therefore, did nothing to undermine the overwhelming evidence of the reliability of the Delphi Method to measure public defender workloads.

The State's attempt at page 6 of its brief to denigrate the Delphi Method by calling it "human behavior science" that is designed to lead experts in a field to a consensus of opinion also is misplaced.[50] The admission into evidence of consensus expert opinions is not unusual. For

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47 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 166:31-32, R-462.

48 *Id.* at R-700; *see also* Exhibit 1, Motion to Withdraw, Affidavit of Mr. Lefstein at Paragraph 27, R-185.

49 Exhibit 1, Motion to Withdraw, Affidavit of Mr. Lefstein, R-179-201.

50 The State's reference to the Delphi Method in this manner is in the context of its assertion that the trial court "ruled the expert methodology used by the PDO to establish its

example, Louisiana law specifically provides for the admissibility of the consensus opinions of medical expert panels. The Delphi Method's ability to develop a consensus opinion among criminal defense experts regarding how much time should be spent on various case activities in order to provide reasonably effective assistance of counsel is exactly what makes it a reliable methodology to achieve that purpose.

The State's contention that none of Mr. Mitchell's witnesses could explain why similar Delphi Method studies performed in other states produced results different from those of The Louisiana Project is misleading at best. The only "evidence" presented by the State to attempt to show differences in the results of the various workload studies was a self-serving chart prepared by its own counsel, who was allowed to use the chart for cross-examination without having to explain his own methodology in preparing it.[51] As the State's counsel could not be cross-examained about the chart, there is no basis on which to know whether he considered and accounted for factors that would be expected to produce different results in different states. These factors include different criminal codes, different "case type" definitions,[52] different practices and procedures, and different priorities. Mr. Field, who had reviewed all of the workload studies

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justification for withdrawal was unreliable and did not satisfy *Daubert."* State's Brief at p. 6. The State acknowledges, however, that the trial court signed the written reasons for judgment supplied by the State. This Court should not give the trial court's written reasons "any real value," as they do not reflect the inner thoughts of the trial court but that of counsel for the State. *See Bell v. Ayio*, 97-0534 (La. App. 1 Cir. 11/13/98), 731 So. 2d 893, 896; *see also Carrollton Presbyterian Church v. Presbytery of South Louisiana of the Presbyterian Church (U.S.A.)*, 2014-1214 (La. App. 1 Cir. 3/9/15), 172 So. 3d 1, 6-7; *Miller v. Smith*, 391 So. 2d 1263, 1265 (La. App. 1 Cir. 1980). "When reasons are provided, a reviewing court must be assured that the thinking process was that of the judge and not an advocate in the lawsuit. . . . In the present case, the reasons for judgment are counsel's, not the judge's. Counsel, in brief, repeatedly cites his own written reasons, a highly self-serving act. Contrary to our general practice, we cannot place any real value on the written reasons presented." *Miller*, 391 So. 2d at 1265. The State's citation to its own written reasons for judgment in this case is equally self-serving and should be given no weight.

51 Exhibit 26, State's Exhibit 4, R-964.

52 In fact, the chart created by the State's counsel does not even utilize the Case Types identified in The Louisiana Project. The Louisiana Project did not analyze case types identified in the chart as "Homicide," "A/B Felonies," "C/D Felonies," or "Sex Felonies."

admitted into evidence, called the State's chart a "gross oversimplification."[53] Mr. Field further explained that the Delphi Method is:

> a methodology to determine something that is not subject to precise measurement, similar to a business valuation. . . . This is a methodology to be able to come up with that answer at the end of the day because there is no, necessarily empirical data that tells us in Louisiana or in a particular jurisdiction how much time someone should spend.[54]

In sum, the only things the State can point to in support of its claim that it successfully rebutted the overewhelming evidence showing the reliability of the Delphi Method are its own counsel's self-serving statements, questions, and arguments at the evidentiary hearing.[55] The State offered no actual evidence, expert or otherwise. The actual evidence, consisting of testimony and documentary exhibits, unquestionably demonstrates the Delphi Method's reliability.

II. The public defender workloads in the Nineteenth Judicial District were shown to be excessive.

A. Testimony of Mr. Mitchell

Mr. Mitchell testified at the evidentiary hearing that, due to chronic funding shortages, his office had been operating under "restriction of services" ("ROS") plans since June 2016.[56] Under these plans, he eliminated six staff lawyer positions, seven investigator positions, and his conflict panel consisting of four lawyers.[57] Toward the end of the 2018 fiscal year (June 30, 2018), LPDB conducted an on-site review of the fiscal conditions and operations of Mr. Mitchell's office. The Louisiana State Public Defender at that time, James Dixon, reported the results of the review in a letter to Mr. Mitchell dated July 2, 2018.[58] While praising the professionalism and efforts of Mr. Mitchell and his staff, Mr. Dixon raised concern about the

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53 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 63:9, R-537.

54 Exhibit 9, Testimony if Mr. Field, 6/14/2019 at 14:15-23, R-488.

55 It is notable that the State retained an expert whose testimony it intended to use to rebut the reliability of the Delphi Method, but declined the district court's invitation to leave the record open to allow that expert to testify when he was available. Exhibit 10, 6/17/2019 Transcript at 21:24-22:1, R-626-627.

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

57 Exhibit 12, Petitioner's Exhibit No. 2, R-659; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 53:3-12, R-349. The State's assertion that Mr. Mitchell's office has increased its staffing is misleading, as the State compares staffing decades ago to current staffing and ignores the substantial reduction in staffing since 2015.

58 Exhibit 15, Petitioner's Exhibit 5, R-668-669.

difficulties these defenders were facing in providing effective assistance of counsel as a result of the crisis:

> 1. Line defenders in your office have excessive workloads that cannot be maintained.
>
> 2. Attorneys cannot maintain sufficient contact with clients. This deficiency is related in part to the excessive workloads maintained by your attorneys. However, this deficiency is also related to the number of incarcerated defendants who are housed outside of parish. It is our understanding that as many as 1,500 defendants are housed in local jails located two hours or more from Baton Rouge. It would be impossible for any attorney, much less an already overloaded attorney, to maintain proper client contact under these conditions.
>
> 3. We also found that the number of full-time investigators is woefully deficient. During 2017, attorneys in your office represented 12,167 cases in the 19th Judicial District Court with access to just one full-time investigator. It is not possible for one person to fully investigate every case, or even just the serious felony cases handled by your office, at a level that is conformity with the Trial Court Performance Standards.
>
> 4. We found that some attorneys have inadequate access to computers and other basic technology.[59]

Mr. Dixon's letter concluded:

> To be clear, nothing in our findings should be construed as a critique of your office, its staff, its attorneys, or its management. Fundamentally, this is an instance of a management staff struggling to maintain service levels while facing inexorably depleting funding sources beyond its control. When faced with such a situation, LPDB staff must insist that you remain in restriction of services (ROS).[60]

Mr. Mitchell completely agreed with the accuracy of Mr. Dixon's observations.[61] During 2018, Mr. Mitchell also received complaints from indigent clients that they had been unable to meet with their lawyers before appearing in court.[62]

As of January 2019, Mr. Mitchell had been again forced to reduce his office's capabilities through forced elimination of additional staff services, including the office's sole bilingual attorneys and two attorneys who worked in the Zachary and Baton Rouge City Courts.[63]

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59 *Id.*

60 *Id.*

61 Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 54:23-568, R-350-352.

62 *Id.* at 60:4-19, R-356.

63 *Id.* at 57:20-58:10, R-353-354.

At the time of the June 2019 evidentiary hearing, Mr. Mitchell's office employed 27 staff attorneys assigned to the Nineteenth Judicial District Court.[64] Those attorneys were assisted by one chief investigator (who is assigned to high-level felony cases), two junior investigators (who are assigned to mid-level felony cases), and one part-time investigator.[65] Low-level felony cases are rarely investigated at all.[66]

B. Testimony of Mr. Dixon

As the Louisiana State Public Defender at the time of the evidentiary hearing, Mr. Dixon was responsible for the delivery of indigent defender services throughout the state. While he observed that excessive public defender caseloads exist throughout the state, he became particularly concerned about the Nineteenth Judicial District due to its dramatic decline in local funding and the resulting conditions outlined in his July 2018 report advising Mr. Mitchell that his office was required to continue to operate under an ROS plan.[67] Accordingly, Mr. Dixon undertook a closer examination of the Nineteenth Judicial District workloads, including those of the Section VI public defenders.[68]

Utilizing the comprehensive database maintained by LPDB and the results of The Louisiana Project statewide workload study, he documented that the three Section VI public defenders were assigned respective workloads of 7,020 hours, 6,366 hours and 9,732 hours during the 2018 calendar year.[69] He further documented that the three defenders had already been assigned new cases through June 2019 that represented additional respective caseloads of 3,003 hours, 2,870

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64 *Id.* The State's criticism of Mr. Mitchell for permitting his staff attorneys to maintain part-time private practices ignores Mr. Mitchell's testimony that (1) the salaries and benefits his is able to offer to public defenders are not comparable to other attorneys in the criminal system and (ii) he requires all staff attorneys to devote 40 hours per week to their indigent clients. *Id.* at 95:3-16., R-391.

65 *Id.* at 47:27-31, R-343.

66 *Id.* at 48:8-30, R-344.

67 Exhibit 9, Testimony of Mr. Dixon, 6/14/2019 at 102:19-104:31, R-576-578.

68 *Id.* at 104:28-31, R-578.

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

hours and 2,692 hours.[70] Considering the estimated workloads remaining for the cases that carried over from 2018 into 2019, Mr. Dixon estimated that, at the time of the June 2019 evidentiary hearing, the three Section VI defenders had current respective 2019 annual workloads of 5,141 hours, 5,614 hours and 6,652 hours.[71] These workloads grossly exceed the 2,080 hour maximum annual capacity utilized in The Louisiana Project study.[72] When asked what conclusion he drew from his analysis, Mr. Dixon responded:

> So what we know and what we've always known is that the public defenders, in Baton Rouge, in this division, and frankly statewide – this is not – this is not a problem that's unique to this division. They're overworked. They have too many cases. And because of that, they're having to make choices to the detriment of clients who don't get the proper attention to their case. Not through lack of hard work, not through any fault of their own, it's the fact that they have too many cases. They can't possibly do everything they are supposed to do in these cases. So you have – you have folks that are suffering, and what this does is this actually puts a number on it. It shows you what it is and what kind of workload they have, and what kind of expectations you can have of them. If someone has a year's work – worth of work in the first six months, you can't possibly get to it. You just can't. So the conclusions are they're well overworked, and they can't handle the cases they've got now, and anymore – adding on to anymore would be disastrous.[73]

III. Excessive public defender workloads are not unique to the Nineteenth Judicial District.

Because the district court could deal only with the cases before it, the evidentiary hearing primarily was focused on the conditions under which public defenders must work in the Nineteenth Judicial District. Nevertheless, the record demonstrates that those conditions and the resulting excessive workloads were not limited to that district, but existed throughout the state. Moreover, recent available public data shows that conditions have not materially improved since The Louisiana Project was conducted.

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70 Exhibit 25, Petitioner's Exhibit 15, R-962-963; Exhibit 9, Testimony of Mr. Dixon, 6/14/2019 at 113:16-32, R-587.

71 Exhibit 25, Petitioner's Exhibit 15, R-963.

72 This number of hours represents 40 hours per week for 52 weeks per year and represents only time spent on case-specific work. The number undoubtedly is conservative, as it does not take into account any time for administrative or supervisory work, required CLE training, travel time, sick leave, or vacations.

73 Exhibit 9, Testimony of Mr. Dixon, 6/14/2019 at 115:15-116:1, R-589-590.

A. The Louisiana Project report shows that excessive workloads exist on a state-wide basis.

The most comprehensive evidence that public defender workloads are excessive throughout the state is provided by The Louisiana Project report.[74] Using the experts' consensus opinions and detailed case data obtained from LPDB, The Louisiana Project authors were able to estimate the total number of hours, on an annual basis that would be required to properly handle all cases then assigned to public defenders in Louisiana. The following chart, which appears at page 2 of The Louisiana Project report, shows that estimate:[75]

	Estimated Workload	Delphi Panel Results	Workload Analysis
Delphi Case Type	Annual Cases By Case Type	Hours Per Case	Total Hours Per Case Type
Misdemeanor or City Parish Ordinance	27,755	**7.94**	**220,490**
Enhanceable Misdemeanor	36,860	**12.06**	**444,347**
Low-level Felony	20,242	**21.99**	**445,155**
Mid-level Felony	21,029	**41.11**	**864,397**
High-level Felony	16,561	**69.79**	**1,155,847**
Felony - Life Without Parole	575	**200.67**	**115,383**
Juvenile Delinquency	9,025	**19.78**	**178,545**
Families in Need of Service (FINS)	1,736	**9.66**	**16,770**
Child in Need of Care (CINC)	7,528	**25.08**	**188,827**
Revocation	5,909	**8.47**	**50,030**
Estimated Annual Workload	147,220		**3,679,792**

Again, using public defender staffing data obtained from LPDB, the authors estimated that the 363 full-time-equivalent public defenders employed as of October 31, 2016 could handle only 21% of their aggregate annual workloads in compliance with the Delphi panel's consensus expert workload opinions.[76]

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74 Exhibit 19, Petitioner's Exhibit 9, R-697-760.

75 *Id.* at 2, R-704.

76 *Id.*at 21, R-704.

B. More recent, publicly available data show that excessive workloads continue to exist.

LPDB releases an annual report each year that includes information pertaining to the number of new and open cases for the prior calendar year. Because The Louisiana Project report was published in Feburary 2017, the data available for the report was for calendar year 2016, in which aproximately 150,473 new cases were opened by public defenders across the state.[77] For calendar year 2017, LPDB reported 160,831 new cases.[78] In calendar year 2018, the number of new cases increased to 165,167.[79] The most current available data pertaining to public defender caseloads state-wide are included in the January 2020 report for Calendar Year 2019.[80] LPDB reports that the number of new cases state-wide increased again and that 165,580 new cases were opened in 2019.[81]

The Louisiana Project report projected that the public defense system only had the capacity to handle 21% of its workload and needed an additional 1,406 FTE attorneys to meet the demands of its 2016 caseload. With the rising number of new cases over the last three years, the need for additional public defenders in order to provide effective assistance of counsel in all cases has only increased.

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77 *Id.* at 8, R-710. The Louisiana Project annualized the data available as of October 31, 2016. LPDB's Annual Report for 2017 (reporting on Calendar Year 2016) reported total new cases as reported by the individual districts in the amount of 159,239. *See* Louisiana Public Defender Board 2016 Annual Report, *available at* http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2016%20LPDB%20Annual%20Report.pdf

78 Louisiana Public Defender Board 2017 Annual Report at p. 46, *available at* http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2017%20LPDB%20Annual%20Report.pdf

79 Louisiana Public Defender Board 2018 Annual Report at p. 43, *available at* http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2018%20LPDB%20Annual%20Report.pdf

80 Louisiana Public Defender Board 2019 Annual Report, *available at* http://lpdb.la.gov/Serving%20The%20Public/Reports/txtfiles/pdf/2019%20LPDB%20Annual%20Report.pdf

81 *See id.* at p. 47.

IV. Excessive public defender workloads create a significant risk of ethical violations by the public defenders and a resulting denial of effective assistance of counsel to their clients.

Just as it did in its writ application to this Court, the State largely ignores in its brief the compelling evidence that excessive workloads prevent public defenders from fulfilling the ethical duties they owe to their clients under the Louisiana Rules of Professional Conduct ("LRPC"). Indeed, faced with this evidence, Mr. Mitchell had no choice but to take action.

Under LRPC 5.1(b), Mr. Mitchell has a duty to take reasonable measures to ensure that the lawyers over whom he has supervisory authority conform to the LRPC. Under LRPC 5.1(c)(2), Mr. Mitchell would be responsible for any ethical violations of his staff lawyers if he knew of the offending conduct "at a time when its consequences can be avoided or mitigated" and he failed "to take reasonable remedial action." Where, as here, other resources to address excessive workloads are unavailable, filing a motion to decline new appointments and to withdraw from current appointments is the recommended action. *See* ABA Eight Guidelines Of Public Defense Related To Excessive Workloads (ABA 2009), Guideline 6 ("Public Defense Providers or lawyers file motions asking a court to stop assignments of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable.").[82]

Excessive public defender workloads implicate at least the following rules of professional conduct:

- LRPC 1.1(a) – a lawyer must represent each of his clients with the "thoroughness and preparation reasonably necessary for the representation."
- LRPC 1.3 – a lawyer must "act with reasonable diligence and promptness in representing" the client.
- LRPC 1.4(a)(2) – a lawyer must "reasonably consult with the client about the means by which the client's objectives are to be accomplished."
- LRPC 1.4(a)(3) – a lawyer must "keep the client reasonably informed about the status of the matter."

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[82] American Bar Association, Eight Guidelines Of Public Defense Related To Excessive Workloads (ABA 2009), *available at* https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.pdf Hereinafter referred to as "ABA Eight Guidelines."

- LRPC 1.16(a)(1) – a lawyer must decline a representation and withdraw from a representation of a current client if "the representation will result in violation of the rules of professional conduct or other law."

See State ex rel. Mo. Pub. Defender Comm'n v. Waters, 370 S.W.3d 592, 607 (Mo. 2012) (hereinafter referred to as *Waters*) ("Counsel violates these rules if she accepts a case that that results in a caseload so high that it impairs her ability to provide competent representation, to act with reasonable diligence and to keep the client reasonably informed."). Based on his own observations and those in Mr. Dixon's July 2, 2018 letter, Mr. Mitchell reasonably concluded that his public defenders were at significant risk of violating all of these rules and that he was ethically obligated to seek judicial relief.

Mr. Mitchell's motion also was necessitated by LRPC 1.7(a)(2), which prohibits a lawyer from representing a client if "the representation involves a concurrent conflict of interest," including "if there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another client." Mr. Hanlon was qualified by the district court at the evidentiary hearing as an expert on "the law and standards applicable to public defender workload studies" without objection from the State.[83] In his affidavit in support of Mr. Mitchell's motions and at the hearing, Mr. Hanlon explained how a public defender's excessive workload necessarily leads to the type of concurrent conflict of interest prohibited under LRPC 1.7:

> In fact, in such a situation, each public defender has a concurrent conflict under LRPC 1.7 with every single one of his or her clients, since every moment of the day that he or she works on one client's case is a moment that should have been worked on another client's case if that other client were to receive reasonably effective assistance of counsel under prevailing professional norms. And vice versa. That is, their responsibilities to each one of their clients are materially limited by their responsibilities to each one of their other clients. And vice versa, for every single client represented by every single EBR public defender.[84]

Mr. Hanlon's opinion that Mr. Mitchell's defenders face concurrent conflicts under LRPC 1.7 due to their excessive workloads is not new or unique. *See, e.g., Waters, supra* at 607 (a criminal "attorney's acceptance of a new case violates [rule of professional conduct 1.7] if it compromises

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83 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 114:8-18, R-410.

84 Exhibit 1, Affidavit of Stephen Hanlon attached to Motion to Withdraw, R-239-249; *see also*, Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 116:25-117:23, R-412-413.

her ability to continue to provide effective assistance of counsel to her other clients."); *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,* 561 So. 2d 1130, 1135 (Fla. 1990) ("When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created").[85]

Because excessive workloads create a significant risk of ethical violations for public defenders, they they also create a significant risk that their clients will be denied effective assistance of counsel in violation of the Sixth Amendment and Article 1, §13 of the Louisiana Constitution. *See, e.g., Carrasquillo v. Hampden County District Courts,* 142 N.E.3d 28, 34 (Mass. 2020) ("Ordered assignments of additional cases to public defenders who are already carrying maximum caseloads risks making them ineffective, by hindering them from, among other responsibilities, giving adequate attention to contesting pretrial detention if necessary, investigating their cases, making strategic decisions, filing pretrial motions, and preparing for trial, thereby defeating the very purpose of the right to counsel."); *Waters, supra,* at 597 (The Sixth Amendment right to effective assistance of counsel is an "affirmative and prospective" right that is applicable at all critical stages of the proceeding.).

Mr. Hanlon also provided unrebutted expert testimony regarding how excessive workloads invariably lead public defenders to "triage" their cases, thereby creating conflicts of interest among their clients:

> But the one thing we can see is that invariably and every jurisdiction we go into, public defenders do what we would expect them to do under those circumstances. It's only reasonable. They move their resources to the higher risk cases. Okay. And those numbers, for the murder and the high felony and that, they're not nearly as these numbers down here for the mid felony and the low felony and the high and low misdemeanor. These people are being thrown under the bus to take care of these people – okay, in the high felonies. Lawyers simply may not do that. It's against the rules. We all rose – raised our hand and said we would never do such a thing, when we were sworn in. So that's the effect. I can tell you it's emotionally

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[85] It is telling that the State offers no authority for the contention at page 18 of its brief that "Professional Conduct Rule 1.7 is a conflict rule that applies to a concurrent representation, not single representation of a lot of people." It is the State, not Mr. Hanlon and Mr. Mitchell, that misunderstands the scope of Rule 1.7.

> devastating on these people. They know very good and well at the end of the day what has happened.[86]

Mr. Hanlon also explained how EBR's lack of investigative resources leads to plea bargains in violation of professional norms that were developed for the ABA by prosecutors, judges, defenders and academics:

> These standards, by the way, have been specifically approved as being valuable measures of prevailing professional norms. That's exactly what we're trying to do, measure prevailing professional norms with a Delphi study. So the standard is defense function standard 4-6.1b. Okay. And it sets out the prevailing professional norm for defense counsel. It says he has – he or she has a duty to explore plea and then it says in every – and it begins really well, from my point of view. In every criminal matter – okay, defense counsel should consider the individual circumstances of the case and of the client and should not recommend acceptance of a plea to a client unless and until appropriate investigation of the matter has been – and the verb is important. Completed, not thought about, kicked around with your buddies, completed – including discussion with the client, analysis of relevant law, and analysis of the prosecutor's evidence, and analysis of potential dispositions, and analysis of relevant collateral consequences. He can't possibly investigate his cases with three investigators, and he's got 5,000 cases.[87]

Mr. Hanlon further explained how trial judges often are unaware of the lack of investigation before accepting plea bargains:

> No. No, because that's the triage, and that happens, I would imagine. I mean, I've talked to judges around the country, and they'll say well it looks – when they come in here, it looks pretty good. They're winning some of their cases, but what the judges don't see is that a lot of these other ones are just going into this plea system and they're not investigated. Okay. And it makes a real difference. We know it makes a difference in the outcomes because we have public defenders in this country who have reasonable workloads, and at least one of them, they win 50 percent of their felony cases. That makes a difference.[88]

Mr. Mitchell's conclusion that his public defenders' excessive workloads created significant risks of their violating their ethical obligations, and of their clients thereby receiving ineffective assistance of counsel, is entitled to judicial and prosecutorial deference.

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86 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 129:19-130:1, R-425-426. This situation, by its nature, creates concurrent conflicts of interest in violation of LRPC 1.7, as the public defender cannot dedicate the time necessary to any single case, and each time he gives to one case necessarily takes away time he or she should be spending on another case. This is not an absurd premise, as the State suggests, but one grounded in the inherent limitation of public defenders being assigned more clients that they can competently handle.

87 *Id.* at 125:9-28, R-421.

88 *Id.* at 131:7-17, R-427.

> When Providers file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because Providers are in the best position to assess the workloads of their lawyers. As the ABA has noted, "[o]nly the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take."[89]

See also Holloway v. Arkansas, 435 U.S. 475, 486 at n. 9 (1978) ("When a considered representation regarding a conflict of interest comes from an officer of the court, it should be given the weight commensurate with the grave penalties risked for misrepresentation."). The Court also should closely examine the State's arguments in opposition to Mr. Mitchell's motions because

> when a Provider seeks relief in court from an excessive workload, the prosecutor seemingly has a conflict in opposing the Provider's motion. Not only do the decisions of prosecutors in filing charges against persons directly impact the caseloads of Providers, but the likelihood of successful prosecutions are enhanced if Providers are burdened with excessive caseloads. The adversary system is premised on the assumption that justice is best served when both sides in litigation are adequately funded and have sufficient time to prepare their respective cases.[90]

V. Mr. Mitchell was not required to show actual prejudice for each client on a case-by-case basis.

Relying almost entirely on the Court's ruling in *State v. Peart*, the State takes the position that, regardless whether Mr. Mitchell has demonstrated that his public defenders have excessive workloads that create significant risks of ethical violations and denials of effective assistance of counsel, this Court must hold that (1) Mr. Mitchell can seek judicial relief only on a case-by-case basis and (2) in order to obtain relief, Mr. Mitchell must demonstrate actual prejudice to each client. The State's position is untenable for several reasons. **First**, the position implies that the Court is forever bound by a ruling it made 27 years ago and cannot fashion a different remedy based on the evidence presented in this case and the Court's experience in supervising the state's criminal justice system over those 27 years. Obviously, the Court is not bound by its ruling in *Peart*, and it is free to rule differently in this case.

Second, the State's position completely ignores the Court's admonition in *Peart* that, if the legislature did not act to ensure that indigent defendants receive reasonably effective assistance of counsel, then the Court "may find it necessary to employ the more intrusive and explicit measures it has thus far avoided." The action taken by the legislature – the enactment of

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89 ABA Eight Guidelines, *supra,* Comment to Guideline 7 (footnote omitted).

90 ABA Eight Guidelines, *supra,* n. 52.

the Louisiana Public Defender Law (La. R.S. 15:141, *et seq*) in 2007 – clearly has not achieved the desired result, and it is time for the Court to exercise its constitutional authority and supervisory jurisdiction.

Finally, the State's position would bring the criminal justice system to a screeching halt in that it would require that public defenders with excessive workloads (which includes most, if not all, of the public defenders in the state) file a separate motion and request a separate evidentiary hearing in each and every one of their cases. *See, e.g., Public Defender v. State,* 115 So. 3d 261, 274 (Fla. 2013) (A piecemeal approach "wastes judicial resources on redundant inquiries. . . . This is tantamount to applying a band aid to an open head wound.").

In essence, the State is saying that the Court must apply the standard of *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984), which requires a showing that counsel's ineffective assistance has caused actual prejudice to the client. But the *Strickland* standard does not apply in a case seeking prospective relief to prevent ethical and constitutional violations from occurring.

> Where a party seeks to overturn his or her conviction, powerful considerations warrant granting this relief only where the defendant has been prejudiced. The *Strickland* court noted the following factors in favor of deferential scrutiny of a counsel's performance in the post-trial context: concerns for finality, concern that extensive post-trial burdens would discourage counsel from accepting cases, and concern for the independence of counsel. These considerations do not apply when only prospective relief is sought.
>
> Prospective relief is designed to avoid future harm. Therefore, it can protect constitutional rights, even if the violation of those rights would not affect the outcome of a trial.

Luckey v. Harris, 860 F.2d 1012, 1017 (11th Cir. 1988) (citations omitted). *See also Lozano v. Circuit Court of the Sixth Judicial Dist.,* 220 WY 44, 58, 2020 Wyo. LEXIS 45 (Wyo. 2020) (Application of the *Strickland* standard "presumes an attorney cannot act to prevent an ethical violation or violation of the client's right to effective assistance of counsel but must instead violate either or both before obtaining relief.").

Mr. Mitchell submits that the standard of LRPC 1.7 must be applied to determine whether Mr. Mitchell has met his burden in this case. Under Rule 1.7(a), a lawyer faces a concurrent conflict and is thereby prohibited from representing a client if "there is a significant risk that the representation . . . will be materially limited by the lawyer's responsibilities to another

client." Mr. Mitchell has shown a significant risk that excessive public defender workloads create a significant risk of both ethical and constitutional violations.

VI. The Court should fashion a systemic and phased-in remedy to minimize disruption to the state's criminal justice system.

The record in this case, as well as other publicly available data of which the Court may take judicial notice, shows that excessive public defender workloads are not limited to the Nineteeth Judicial District, but exist throughout the state. The Court, therefore, should exercise its supervisory jurisdiction over all other Louisiana courts to fashion a state-wide remedy that will protect prospectively all public defenders and their clients. To avoid unnecessary disruption to the criminal justice system and to give due deference to the Louisiana Legislature, Mr. Mitchell respectfully suggests that the Court consider a tailored, phased-in remedy, such as the following proposed order:

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[91] 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

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[91] Mr. Austin is president of the JFA Institute (www.jfa-associates.com) and the principal investigator for the Brennan Center's Report on American Prisons and Jails (www.brennancenter.org).

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.

Mr. Mitchell offers this proposed order as an example of the kind of remedy he believes would address the problems created by excessive public defender workloads without disrupting the criminal justice system in this state. The Court, of course, may have other ideas regarding an appropriate remedy. Mr. Mitchell submits, however, that it is crucial that the Court to provide an appropriate systemic remedy designed to bring an end to the long-standing ethical and constitutional violations established by the record in this case.

CONCLUSION

The problems that existed when this Court decided *Peart* continue to exist. Because Louisiana's indigent system is severely underfunded, public defenders are at significant risk of violating both their ethical obligations and their clients' constitutional rights. Under our Constitution and laws, it is the responsibility of the legislature, and not this Court, to adequately fund Louisiana's indigent defense system; and so this Court is without power to compel the legislature to do that under well settled separation of powers principles. Under Article 5, §5(A) of the same Constitution, however, the citizens of our state have given this Court general supervisory jurisdiction over all other courts. Thus, this Court has been charged by the citizens of our state with the fundamental constitutional duty to ensure the integrity of our criminal justice system. Accordingly, the Court should provide an appropriately tailored, structured and phased-in remedy to cure the clearly established ethical and constitutional violations demonstrated by the record in this case.

Respectfully submitted,

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Attorneys for Respondent Michael Mitchell, in his capacity as District Defender of the Office of the Public Defender for the Parish of East Baton Rouge

VERIFICATION AND CERTIFICATE OF SERVICE

I, John M. Landis, certify that I am counsel of record for Respondent Michael Mitchell, in his capacity as District Defender of the Office of the Public Defender for the Parish of East Baton Rouge, and have prepared and reviewed the foregoing Original Brief of Michael Mitchell on the Merits; all of the allegations of fact and law are true and correct to the best of my knowledge, information and belief; and copies of the foregoing documents have been delivered to all counsel of record, the Honorable Donald R. Johnson, Section VI, Nineteenth Judicial District Court for the Parish of East Baton Rouge, State of Louisiana, and the Honorable Rodd Naquin, Clerk of Court, Court of Appeal, First Circuit, as follows:

Hon. Donald R. Johnson, Judge
19th Judicial District Court
Section VI
300 North Boulevard
Baton Rouge, LA 70801
Phone: (225) 389-4700

(via e-mail)

Hon. Rodd Naquin, Clerk of Court
First Circuit Court of Appeal
1600 North Third Street
Baton Rouge, LA 70802
Phone: (225) 382-3000

(simultaneously filed electronically)

Dylan Alge, Assistant District Attorney
19th Judicial District Court
222 St. Louis Street, 5th Floor
Baton Rouge, LA 70802
Phone: (225) 389-3453

(via e-mail)

/s/ John M. Landis