STATE OF LOUISIANA
FIRST CIRCUIT COURT OF APPEAL

DOCKET NO. _____

STATE

VERSUS

RODERICK L. COVINGTON, SAMANTHA KELLY, AND KIFFANY SPEARS

ON APPLICATION FROM RULING AND JUDGMENT RENDERED SEPTEMBER 12, 2019 BY THE HONORABLE DONALD JOHNSON OF THE NINETEENTH JUDICIAL DISTRICT COURT, PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA, DOCKET NOS. 08-18-0486; 10-18-0529; 07-18-0409; 07-18-0422; 07-18-0233 CRIMINAL PROCEEDINGS

APPLICATION FOR SUPERVISORY WRITS BY MICHAEL MITCHELL, IN HIS CAPACITY AS DISTRICT DEFENDER OF THE OFFICE OF THE PUBLIC DEFENDERS FOR THE PARISH OF EAST BATON ROUGE

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JURISDICTION OF THE COURT

Michael Mitchell is the Chief Public Defender for the Nineteenth Judicial District. He seeks supervisory review of a district court order denying his motions to allow three public defenders in his office to withdraw as counsel of record in certain matters pending before the district court due to the defenders' excessive workloads and insufficient resources. In accordance with Rule 4-2 of the Uniform Rules of the Courts of Appeal, oral notice of intent to file this application was given to the district court and to all parties on September 12, 2019, and the district court set a return date of thirty days from the rending of its ruling. Exhibit 30, R-1051. Applicant requested an extension of time within which to file its application for supervisory writs. Exhibit 35, R-1068 - R-1070. The district court granted Applicant's motion and extended the return date until November 12, 2019. Exhibit 36, R-1071.

This Court has supervisory jurisdiction over the Application under Article 5, § 10(A) of the Louisiana Constitution and Article 912.1(C) of the Louisiana Code of Criminal Procedure. This is a matter decided within the First Circuit Court of Appeal, over which this Court has appellate jurisdiction and from which an appeal would lie.

ISSUES OF LAW PRESENTED

1. By adopting wholesale the proposed judgements and written reasons provided by the State, whether the district court abdicated its judicial function by failing to provide independent judicial review of the motions pending before it.

2. Whether the district court erred in disqualifying in its written reasons for judgment an expert witness whom it had previously qualified during an evidentiary hearing by applying an improper standard under Louisiana Code of Evidence article 702.

3. Whether the district court erroneously applied the *Daubert* factors to exclude the admission of the methodology utilized in preparing the Louisiana Project study and testimony related to that methodology and study.

4. In granting a motion to dismiss for failure to request a remedy authorized by law, whether the district court erred by applying the wrong standard to a motion seeking only prospective relief.

5. In denying Mr. Mitchell's Motions to Withdraw, whether the district court erred by applying the wrong standard for motions seeking only prospective relief.

ASSIGNMENT OF ERRORS

1. The district court abdicated its judicial function by failing to provide independent judicial review of the motions pending before it.

2. The district court erred in retroactively disqualifying an expert under the *Daubert* factors after properly overruling the State's objections to the expert's qualification and expressly qualifying the same expert at the evidentiary hearing.

3. The district court erred by retroactively excluding the admission of and testimony regarding the methodology utilized in preparing the Louisiana Project, a study conducted and produced by the American Bar Association and Postlethwaite & Netterville, APAC commissioned.

4. The district court erred by improperly granting the State's Motion to Dismiss for failure to request a remedy authorized by law.

5. The district court erred by improperly denying Mr. Mitchell's Motions to Withdraw as Counsel on the basis that Mr. Mitchell failed to produce evidence of actual ineffective assistance counsel, when the motions sought only prospective relief.

STATUS OF THE CASE

As of the filing of this Application, there are no hearings set in these proceedings which were consolidated for purpose of hearing the Motions to Withdraw filed in each matter, and the individual matters have not been set for trial. During the pendency of the hearing on the motions to withdraw, Mr. Covington accepted a plea bargain and his matter is not currently pending in the district court. Ms. Kelly and Mr. Spears' matters are current set for status on November 26, 2019.

STATEMENT OF THE CASE

A. Introduction

This application concerns three motions to withdraw as counsel filed by Michael Mitchell, Chief Public Defender for the Nineteenth Judicial District, on behalf of three public defenders assigned to Section VI of the Nineteenth Judicial District Court for the Parish of East Baton Rouge. Mr. Mitchell moved pursuant to Rule 6.2(a) of the Louisiana Rules of Professional Conduct for an order (a) permitting each of the public defenders assigned to that section to withdraw from representation of certain indigent defendants, including the defendants in whose cases the motions were filed and (b) permitting the public defenders to decline future appointments for as necessary to comply with their professional obligations under the Louisiana Rules of Professional Conduct. Mr. Mitchell offered substantial competent evidence demonstrating that the three public defenders were so over-worked and under-resourced that there exists a substantial risk that they will be unable to provide effective assistance of counsel to their clients. Mr. Mitchell was obligated to file the motions to withdraw under the Louisiana Rules of Professional Conduct ("LRPC"), as detailed below.

B. Mr. Mitchell's Prior Restrictions of Services

At the recommendation of the legislative auditor, in 2012 LPDB promulgated regulations to put in effect a "service restriction protocol" to assist district public defender offices facing a fiscal crisis and/or an excessive workload. LAC 22:1707-1717.[1] If the fiscal crisis or excessive workload cannot be otherwise be avoided, the chief district defender is required to develop and submit for approval a "restriction of services" ("ROS") plan to address the situation.

In compliance with these regulations, a number of district public defender offices, including EBR, have promulgated ROS plans. EBR first submitted a ROS plan to LPDB for approval in February 2015 for the fiscal year ending June 30, 2015.[2] In an effort to reduce expenditures, the plan provided for the elimination of six attorney positions, one investigator position and one administrative staff position. EBR submitted a supplement to its ROS plan to LPDB in March 2016.[3] Pursuant to the supplement, EBR eliminated six additional investigators and its conflict panel consisting of four attorneys, and instituted a 10% to 25% reduction in salaries of several staff attorneys and investigators. The 2016 supplement also instituted a waiting list for indigent defendants from whom EBR could not assign counsel, and provided:

> Should the Court refuse to allow placement on a waiting list and insist on appointing the Public Defender's Office, the District Defender shall immediately file a Motion to Withdraw including specific details (i.e., detailed information on excessive caseloads and inadequate resources).

Since March 2016, EBR has continued to operate under its ROS plan, as supplemented. Toward the end of the 2018 fiscal year (June 30, 2018), LPDB

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1 *See* Exhibit 11, Petitioner's Exhibit 1, R-633-656.

2 Exhibit 12, Petitioner's Exhibit 2, R-657-662.

3 Exhibit 14, Petitioner's Exhibit 4, R-665-667.

conducted an on-site review of EBR's fiscal condition and operations, and reported the results to EBR by a letter dated July 2, 2018 from the State Public Defender, James T. Dixon, Jr. to Mr. Mitchell.[4]

While praising the professionalism and efforts of EBR' public defenders, Mr. Dixon raised concern about the difficulties these defenders are 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.[5]

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).[6]

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

5 *Id.*

6 *Id.*

C. The Louisiana Project

In 2015, LPDB retained the accounting firm Postlethwaite & Netterville, APAC ("P&N") and the American Bar Association (the "ABA") to perform an analysis of the workloads handled by Louisiana public defenders.[7] At the conclusion of the study, known as the "Louisiana Project," P&N and the ABA issued a report dated February 15, 2017."[8] The Louisiana Project study focused on the annual "caseloads"[9] of the State as a whole, and four district public defender offices, including EBR. Using a statistical analytics tool known as the "Delphi Method," which had been introduced by researchers at the Rand Corporation in 1962, the Louisiana Project presents reliable consensus opinions of 23 experienced Louisiana criminal defense lawyers (12 private practitioners and 11 public defenders with over 500 years of combined experience) (the "Delphi Panel") as to the average amount of time that is reasonably required to provide reasonably effective assistance of counsel in a variety of case types.[10]

By applying these consensus opinions to actual statewide caseload data of Louisiana public defenders in Louisiana, the Louisiana Project concluded that the then existing number of Louisiana public defenders had "workloads"[11] so excessive that they could competently and effectively handle approximately 21

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7 Exhibit 19, Petitioner's Exhibit 9 at preface, R-700; Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 8:1-14, R-482.

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

9 The Louisiana Project defines "caseload" to refer to the total number and different kinds of cases assigned either to a jurisdictional district of LPDB or to all such districts, measured at any point in time.

10 Exhibit 19, Petitioner's Exhibit 9 at p. 20, R-722.

11 The Louisiana Project defines "workload" to refer to an attorney's responsibility for all cases on which an attorney works during the course of a year, as well as the attorney's other responsibilities not pertaining specifically to the cases for which the attorney is responsible.

percent of their actual workloads.[12] P&N also specifically reviewed the workloads of the public defenders in East Baton Rouge Parish and concluded that the attorneys could competently and effectively handle approximately 34 percent of their actual workloads.[13]

Prior to the Louisiana Project, the Delphi Method had previously been utilized by the accounting firm RubinBrown[14] to conduct a similar study for the State of Missouri, which came to be known as The Missouri Project.[15] *See Dalton v. Barret*, 2019 U.S. Dist. LEXIS 116803 at *61 (W.D. Mo. 7/12/19) (noting that RubinBrown utilized the Delphi Method to estimate average time required for controllable case tasks for an attorney provide reasonable effective representation for each case type).

This same method of gathering expert consensus opinion regarding the amount of time required to provide reasonably effective assistance of counsel (called a Blueprint for Future Workload Studies in The Missouri Report) has also been performed in Rhode Island, Colorado, and Texas[16] and is currently underway in Indiana, New Mexico and Oregon.[17] In the first judicial test of the reliability of the Delphi Method as applied to the workload of a public defender, the expert conclusions of The Missouri Report were applied by a trial court to grant relief to 16 public defenders in St. Louis County, Missouri.[18]

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12 Exhibit 19, Petitioner's Exhibit 9 at p. 21, R-723.

13 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 127:26-128:6, R-423-424.

14 RubinBrown is a top 100 professional accounting and consulting firm in the United States.

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

16 *See* Exhibits 21, 22, and 23, Petitioner's Exhibits 11, 12, and 13, R-809 -960.

17 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 112:23-28, R-408.

18 *See* https://www.documentcloud.org/documents/4417162-Beach-Public-Defender-Order-

(continued on next page)

D. The Motions to Withdraw

Mr. Mitchell's motions to withdraw, which were filed on October 29, 2018, recite that they were filed pursuant to LRPC 5.1.[19] LRPC 5.1 provides in pertinent part:

> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

Based on the professional opinions of experts in the field and the advice of James T. Dixon, Jr., who was the Louisiana State Public Defender at that time, Mr. Mitchell concluded that the workloads that the Section VI public defenders are required to handle create concurrent conflicts of interest between their clients in violation of LRPC 1.7.[20] Under LRPC 5.1(b), Mr. Mitchell is obligated to: (i) make reasonable efforts to ensure that these defenders do not violate Rule 1.7. Under LRPC 5.1(c)(1), he is obligated to avoid ratifying a violation of LPRC 7.1 by these defenders. Under LRPC 5.1(c)(2), he is obligated to take reasonable remedial action to avoid or mitigate the consequences of any violation of LPRC 7.1 by these defenders. Mr. Mitchell concluded that the motions to withdraw were the only reasonable manner in which he could attempt to comply with these ethical obligations.

The motions to withdraw expressly sought relief pursuant to the

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19 *See* Exhibits 1, 2, and 3, Motions to Withdraw, R-54-271. For purposes of this record and to conserve paper, Applicants have attached the supporting affidavits and exhibits only to Exhibit 1. The attachments to Exhibits 2 and 3 were identical to those attached to Exhibit 1.

20 *Id.*; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 70:5-12, R-366.

LRPC, the Louisiana Constitution, and the United States Constitution.[21] Under LRPC 1.1(a), each EBR public defender owes to each of his or her clients the duty to provide "competent representation," which includes "thoroughness and preparation reasonably necessary for the representation." Under LRPC 1.3, each EBR public defender also owes each of his or her clients the duty to "act with reasonable diligence and promptness." And under LRPC 1.7, Due to each EBR public defender owes a duty to his clients not to engage in practice that will materially limit their responsibilities to their client, as doing so creates a conflict of interest. Mr. Mitchell asserted that due to their excessive workloads, the EBR public defenders cannot fulfill the duties of competence and diligence they owe to their clients. Due to their excessive workloads, therefore, the EBR public defenders have no choice but to violate LRPC 1.1(a) and LRPC 1.3. This situation necessarily constitutes a "concurrent conflict of interest" that violates LRPC 1.7(a). LRPC 1.16 and 6.2, thus, requires Mr. Mitchell to seek withdrawal. *See also State v. Singleton*, 2015-1099 (La. App. 4 Cir. 5/25/16), 216 So. 3d 985 (permitting the chief public defender of Orleans Parish to decline appointment when such appointment would violate ethical rules established in LRPC as well as the Louisiana and United States Constitutions).

Mr. Mitchell also sought to withdraw pursuant to the Sixth Amendment of the Constitution, as all EBR clients are entitled to conflict-free counsel. *Holloway v. Arkansas,* 435 U.S. 475, 482, 98 S. Ct. 1173, 1177(1978) ("[T]he 'assistance of counsel' guaranteed by the Sixth Amendment contemplates that such assistance be untrammeled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests.") (*quoting*

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[21] *See* Exhibits 1, 2, and 3, R-54-271.

Glasser v. United States, 315 U.S. 60, 70 (1942). Importantly, in order to establish a Sixth Amendment violation based on the conflicts of interest faced by his public defenders due to their excessive caseloads, Mr. Mitchell did not need to show that any particular EBR client will be prejudiced by the conflicts of interest. He needed only to show that that there is a substantial risk that all EBR clients will be prejudiced because of the conflicts.[22]

Mr. Mitchell requested that the district court conduct an evidentiary hearing on the matter and, that, following that hearing, that the district court issue an order granting the following relief:

> 1. Permitting each EBR public defender in this Section to withdraw from current appointments and decline future appointments to any case until, utilizing the Louisiana Project analytics, each said EBR public defender's workload is no greater than 100% of his or her annual capacity; so that each said EBR public defender is then able to provide reasonably effective and competent assistance of counsel under prevailing professional norms to each of their clients consistent with the Louisiana Rules of Professional Conduct, the Louisiana Constitution, and the United States Constitution;
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> 2. Delaying the effectiveness of the order for 30 days after its entry to allow for an orderly transition;
>
> 3. Directing Mr. Mitchell to file, every 60 days until further order of the Court, an updated EBR workload metric report showing the actual workloads then being handled by said EBR public defenders;
>
> 4. Providing that, in the event no EBR public defender or other competent lawyer can be found to represent any one or more indigent defendants on the Court's docket, the case against such an indigent defendant shall be dismissed and, if the defendant is in custody, he or she shall be released; and
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> 5. Providing that this Court shall retain jurisdiction of this cause to enforce its orders entered herein.

E. The State's Pre-Hearing Motions

The evidentiary hearing on the motions to withdraw was reset and continued several times. Ultimately, the matter was set for hearing on June 13,

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22 *See Luckey v Harris* and cases cited on page 40 below.

2019. Two days before the hearing, the State filed a motion to dismiss the motions to withdraw, asserting that: (i) the district court lacked jurisdiction, (ii) Mr. Mitchell was barred from seeking an injunction, (iii) the motions sought systemic relief that was not legally permissible, and (iv) Mr. Mitchell had not alleged specific instances of ineffective assistance of counsel.[23] Mr. Mitchell opposed the State's motion.[24] The merits of the motion to dismiss were argued at the opening of the June 13 evidentiary hearing, but the district court took the motion under advisement and permitted the hearing to proceed.[25]

On the morning of the hearing, the State filed a "Daubert Objection to Expert Testimony on the Delphi Method of Caseload Determination."[26] This motion argued, without support, that the Delphi Method utilized in the Louisiana Project study does not rise to the level of scientific certainty and reliability to allow for the admission of expert testimony. The motion requested that the district court "deny any expert testimony on the Delphi Method as used in the Louisiana Project or, in the alternative, provide the State with a Daubert hearing at which the Public Defender be required to meet the Daubert Standard prior to he [sic] admissibility of any testimony on the Louisiana Project of Delphi Method."[27] The parties did not argue the Daubert motion at the hearing because Mr. Mitchell had just been served with notice of the motion prior to the hearing that morning.

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23 Exhibit 5, State's Motion to Dismiss, R-284-287.

24 Exhibit 6, Chief District Public Defender's Opposition to State's Motion to Dismiss, R-288-293.

25 Exhibit 8, Transcript 6/13/2019 at 7:12-21:6, R-303, R-317.

26 Exhibit 7, State's Daubert Objection to Expert Testimony on the Delphi Method of Caseload Determination, R-294-296.

27 *Id.* at p. 3, R-295.

F. The Evidentiary Hearing

During the hearing on June 13, 14, and 17, 2019, the State offered no affirmative evidence regarding the excessive workloads faced by the Section VI public defenders and the consequences of those workloads. The State's entire case consisted of the arguments and statistical analysis of its counsel (who disclaimed any expertise on this subject), attacking through cross examination the use of the Delphi Method for measuring criminal defense attorney workloads. At the close of the hearing, counsel for the State announced that it would not offer any fact or expert evidence and, instead, it would solely rely on its counsel's argument that the Delphi Method is not reliable.

Accordingly, the State made no attempt at the hearing to rebut the substantial competent evidence offered by Mr. Mitchell. This evidence demonstrated: (i) the workloads faced by the Section VI defenders are excessive under any legitimate analysis; (ii) Mr. Mitchell has no resources to relieve the defenders' excessive workloads; (iii) the defenders' excessive workloads create a significant risk that they will result in violations of the duties they owe their clients under the Louisiana Rules of Professional Conduct ("LRPC"), the Louisiana Constitution, and the United States Constitution and, therefore; (iv) the defenders' excessive workloads create a significant risk that they will be unable to provide to their clients reasonably effective assistance of counsel pursuant to prevailing norms.

(1) Testimony of Michael Mitchell

Michael Mitchell, who has served as the Chief Public Defender for EBR since 1994, oversees all aspects of the delivery of indigent defense services in that parish. From 2014 through 2018, his office experienced a reduction of

approximately $1,700,000 in locally generated funding that has resulted in a situation that he describes as "fiscal crisis."[28] During 2015, Mr. Mitchell projected that his office would have a budget deficit of $665,950 for the 2016 fiscal year.[29] As required under regulations promulgated by the Louisiana Public Defender Board ("LPDB"), Mr. Mitchel submitted to LPDB a restriction of services ("ROS") plan to reduce the projected budget deficit through a reduction in expenses.[30] Under the ROS plan, which was approved by LPDB,[31] Mr. Mitchell eliminated six attorney positions, an investigator and an administrative position.[32] When the 2015 reduction in services proved to be insufficient, Mr. Mitchell submitted to LPDB on March 30, 2016 a second ROS plan under which he suspended the contracts of four conflicts attorneys, laid off six staff investigators, and instituted salary reductions for several staff attorneys and the remaining two investigators.[33]

As of January 2019, Mr. Mitchell had expanded his office's ROS by eliminating additional staff services, including the office's sole bilingual attorneys and two attorneys who worked in the Zachary and Baton Rouge City Courts.[34] Through emergency funding from LPDB during the 2019 fiscal year and an increase in regular LPDB funding for the 2020 fiscal year, EBR has been able to

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28 Exhibit 12, Petitioner's Exhibit No. 2, R-658; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 52:17-28, 56:14-25, R-348, R-352.

29 Exhibit 12, Petitioner's Exhibit No. 2, R-659; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 52:22-28, R-348.

30 Exhibit 12, Petitioner's Exhibit No. 2, R-657-662.

31 Exhibit 13, Petitioner's Exhibit No. 3, R-663-664.

32 Exhibit 12, Petitioner's Exhibit No. 2, R-659; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 53:3-12, R-349.

33 Exhibit 14, Petitioner's Exhibit No. 4, R-665-667; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 53:24-54:6, R-349-350.

34 Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 57:20-58:10, R-353-354.

avoid any further reductions in staff attorney and investigator positions.[35] Mr. Mitchell, however has been unable to replace the eliminated positions.[36] At the time of the June 2019 hearing conducted by the Court, Mr. Mitchell's office employed 27 staff attorneys assigned to the Nineteenth Judicial District Court.[37] 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.[38] Low-level felony cases are rarely investigated at all.[39]

During 2018, Mr. Mitchell received complaints from indigent clients that they had not been able to talk to their lawyers before appearing in court.[40] After obtaining expert advice that the workloads of EBR staff attorneys were excessive, Mr. Mitchell concluded that, due to their workloads, there was a significant risk that his staff attorneys were unable to provide effective assistance of counsel in all cases.[41] He further concluded that the Louisiana Rules of Professional conduct required that he take action to seek relief for his attorneys from their excessive workloads.[42] Mr. Mitchell, therefore, filed the motions to withdraw asking that the Court to authorize the public defenders in Section VI to withdraw from all but high felonies and life without parole ("LWOP") cases and to

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35 *Id.* at 58:23-59:22, R-354-355.

36 *Id.*

37 *Id.*

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

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

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

41 *Id.* at 60:20-61:12, R-356 - 357.

42 *Id.* at 61:13-18, R-357.

decline appointment in all but these serious felony cases going forward.[43]

(2) The Louisiana Project Evidence

Mr. Mitchell presented unrebutted expert testimony in support of the use of the Delphi Method to reach conclusions regarding criminal defense attorney workloads in Louisiana. Stephen Hanlon is the General Counsel of the National Association for Public Defense, which has a membership of 20,000 public defenders.[44] He has taught law school courses and authored published law review articles on the subject of public defender workloads.[45] He also has served as lead counsel in litigation throughout the country concerning public defender workloads.[46] The district court qualified Mr. Hanlon as an expert in the law and standards applicable to public defender workload studies using the Delphi Method, without objection from the State.[47]

Following litigation in Missouri concerning public defender caseloads, 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.[48] He asked RubinBrown, a top 100 national accounting and consulting firm, to determine whether the Delphi Method was an appropriate and reliable methodology to measure public defenders workloads.[49] As discussed in the literature review then conducted by RubinBrown, the Delphi Method has been

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43 *See* Exhibits 1, 2, and 3, Motions to Withdraw, R-54-271.

44 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 102:25-30, R-398.

45 Exhibit 17, Petitioner's Exhibit 7, R-689 - R-693; Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 103:4-9, 14-20, R-399.

46 Exhibit 17, Petitioner's Exhibit 7, R-691; Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 103:21-105:21, R-399 -401.

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

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

49 *Id*.

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.[50]

After an exhaustive literature review, 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.[51] Mr. Hanlon, on behalf of the ABA, provided the legal framework for the study while RubinBrown provided the study's statistical framework.[52] Since the completion of the Missouri study in 2014,[53] in addition to the Louisiana Project, Mr. Hanlon has completed similar Delphi Method studies of public defender workloads in Colorado and Rhode Island.[54] He also consulted on a Texas study[55] and currently is directing studies in Indiana, New Mexico and Oregon.[56]

In explaining how the Delphi Method is utilized to reach a consensus on the amount of time required to provide reasonably effective assistance of counsel pursuant prevailing professional norms for criminal practice in Louisiana,

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50 *See* https://www.ncsc.org/Topics/Court-Management/Workload-and-Resource-Assessment/State-Links.aspx (link to all NCSC workload studies – over 67 workload/needs assessments performed/published); https://www.ncsc.org/Topics/Court-Management/Workload-and-Resource-Assessment/Resource-Guide.aspx (over 25 states utilized this method to determine workload as opposed to caseload).

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

52 *Id.*

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

54 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.

55 Exhibit 23, Petitioner's Exhibit 13, R-867-960.

56 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 112:23-28, R-408

Mr. Hanlon analogized the process to a jury reaching a decision pursuant to jury instructions:

> SO, THIS IS WHY I THINK – I THINK THE DELPHI STUDY WAS CREATED FOR THIS JOB. I THINK IT WAS – THERE WAS NEVER – THERE'S NEVER BEEN A MORE APPROPRIATE ROLE FOR A DELPHI STUDY, BECAUSE THAT'S WHAT WE DO EVERY DAY. WE GIVE THE CASE TO THE JURY. WE GIVE THEM INSTRUCTIONS, THEY'VE GOT THE FACTS, AND WE SAY NOW REACH YOUR JUDGMENT WITH THESE RESTRAINTS. OKAY. AND SO, JURIES ALL OVER THE COUNTRY, AND TODAY, ARE DETERMINING WHAT'S REASONABLE. WELL, THAT'S WHAT WE'RE TRYING TO DO – WHAT'S REASONABLE. OKAY. THAT'S ALL IT IS. IT'S REASONABLY EFFECTIVE ASSISTANCE OF COUNSEL PURSUANT TO PREVAILING PROFESSIONAL NORMS IN ALL CRITICAL STAGES OF THE REPRESENTATION. AND I DON'T WANT TO GET INTO ANY DISCUSSIONS ABOUT CADILLACS AND CHEVYS AND EVERYTHING. I DON'T KNOW ANYTHING ABOUT CARS. I DO KNOW WHAT PREVAILING PROFESSIONAL NORMS ARE, AND THAT'S WHAT NEEDS TO DRIVE THIS THING, AND THAT DOES DRIVE THIS THING.[57]

Madison Field is an associate consulting director at P&N specializing in data analytics and forensics.[58] The district court twice qualified Mr. Field as an expert in the application of the Delphi Method, over the objection of the State.[59] Mr. Field confirmed that the Louisiana Project study was conducted in accordance the peer-reviewed prior Delphi Method public defender and judicial workload studies, as well as the American Institute of Certified Public Accountants' Statement on Standards for Consulting Services.[60] He explained how the Delphi panel members were selected,[61] the three phases of the Delphi Method portion of the study,[62] and how the feedback provided to the participants (all experienced criminal lawyers, both public and private) allowed them to reach a consensus on

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57 *Id.* at 126:7-23, R. 422.

58 Exhibit 18, Petitioner's Exhibit 8, R-694 - R-696; Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 5:11-13, 12:13-15, R-479, R-486.

59 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 24:18-28; 70:1-71:13, R-498, R-544-545.

60 *Id.* at 28:21-26, R-502.

61 *Id.* at 37:31-38:18, R-511-512.

62 *Id.* at 29:22-30:3, R-503-504.

how many minutes each discreet case task should take to complete, based on the case type.[63]

The participants evaluated case types and assigned the number of minutes to eleven different case tasks for an average case. The participants also assigned a percentage of the cases in which each task should be performed to reach the ultimate conclusion of how much time should be spent on each case type. The consensus reached by the Delphi panel as to the amount of time spent on high-level felony and LWOP cases appears below, as it does in Exhibit 2.2. to the Louisiana Project:[64]

	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**

63 *Id.* at 38:29-41:16, R-512-515.

64 Exhibit 19, Petitioner's Exhibit 9, R-756.

The consensus reached by the Delphi panel as to the amount of time that should be spent on all case types appears below as it does on page 1 of the Louisiana Project:[65]

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 total hours per case type was calculated based on three assumptions provided to the panel members: (1) that the time calculated was the time over the entire life of the case; (2) that the attorney had adequate support, secretarial assistance, and investigative staff; and (3) that the case is the average case, and not an extreme example.[66]

(3) Testimony of Delphi Panel Participants

Two panel members who participated in the Louisiana Project also testified at trial regarding the Louisiana Project and their participation in the study.

Christie Smith has had a private practice for 23 years.[67] He is a Board Certified Criminal Lawyer, certified by the National Board of Trial Advocacy,[68] has been appointed to thousands of indigent defense cases in the parish in which he practices,[69] has defended thousands of defendants charged with high felony

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65 *Id*. at R-703.

66 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 44:28-45:7, R-518-519.

67 Exhibit 9, Testimony of Mr. Smith, 6/14/2019 at 73:6-18, R-547.

68 *Id.* at 73:19-25, R-547.

69 *Id.* at 75:13-32, R-549.

crimes,[70] and has defended dozens of defendants charged with crimes punishable by life without parole.[71] Mr. Smith, who participated at all levels of the Louisiana Project, opined that the time requirements reached by the consensus of the panel were the "minimum" number of hours that should be worked by an attorney to meet the "constitutional minimum."[72] Mr. Smith emphasized in his testimony that the greatest time commitment that a defense attorney must spend should be at the front of a case, taking the time and resources to evaluate the case and determine a strategy.[73] When that work is not done, then an attorney has less ability to forecast the outcome of the case, and the client is left more exposed to negative results.[74]

Chris Murrell has approximately twelve years of experience has a public defender, working for the Georgia Capital Defender, the Orleans Public Defender Board, and the Capital Appeals Project.[75] Mr. Murrell also participated in the three stages of the Louisiana Project and was a member of the final panel that reached the consensus reported in the Louisiana Project.[76] Mr. Murrell testified that in the panel meeting that he "generally tended to say" that the numbers reached by the consensus were too low and do not represent enough time to fulfill a lawyer's ethical obligations and Sixth Amendment duties.[77] Mr. Murrell agreed with Mr. Smith's assessment that the work done at the beginning of the case

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70 *Id.* at 84:31-:85:1, R-558-559.

71 *Id.* at 91:29-92:1, R-565-566.

72 *See id.*at 91:6-24, R-565 (discussing 70 hours assigned to High-Level Felony cases); 93:19-24, R-567 (discussing 200 hours assigned to Life Without Parole cases).

73 *Id.* at 90:3-91:5, R-564-565.

74 *Id.* at 94:17-95:5, R-568-569.

75 Exhibit 10, Testimony of Mr. Murrell, 6/17/2019 at 4:22-5:7, R-609-610.

76 *Id.* at 5:11-15, R-610.

77 *Id.* at 6:19-32, R-611.

to assess and investigate the facts is critical to the preparation of a defense and time that cannot be recovered.[78]

(4) Testimony of Mr. Hanlon

In addition to providing background information regarding the use of the Delphi Method to evaluate public defender workloads, Mr. Hanlon provided unrebutted expert testimony regarding how excessive workloads invariably lead public defenders to "triaging" their cases to the detriment of other 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 DEVASTATING ON THESE PEOPLE. THEY KNOW VERY GOOD AND WELL AT THE END OF THE DAY WHAT HAS HAPPENED.[79]

Mr. Hanlon further 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

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78 *Id.* at 9:3-10:24, R-614-615.

79 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 129:19-130:1, R-425-426.

> 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.[80]

Mr. Hanlon also 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.[81]

(5) Testimony of James Dixon

Mr. Dixon was the Louisiana State Public Defender at the time of the evidentiary hearing[82] and, in that capacity, was responsible for the delivery of indigent defender services on a statewide basis. While he observed that excessive

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

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

82 Exhibit 9, Testimony of Mr. Dixon, 6/14/2019 at 96:19-21, R-570.

public defender caseloads exist throughout the state, he became particularly concerned about EBR 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.[83] Accordingly, he undertook a closer examination of the EBR workloads, including those of the Section VI defenders.[84]

Utilizing the comprehensive database maintained by LPDB and the results of the Louisiana Project statewide workload study, he documented that the three Sections 6 public defenders were assigned respective workloads of 7,020 hours, 6,366 hours and 9,732 hours during the 2018 calendar year.[85] He further documented that the three defenders had already been assigned new cases during 2019 representing respective caseloads of 3,003 hours, 2,870 hours and 2,692 hours.[86] Considering the estimated workloads remaining for the cases that carried over from 2018 into 2019, Mr. Dixon estimated that, as of June 2019, the three Section VI defenders had current respective 2019 workloads of 5,141 hours, 5,614 hours and 6,652 hours.[87] These workloads grossly exceed the 2,080 hour maximum annual capacity utilized in The Louisiana Project study. 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

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83 *Id.* at 102:19-104:31, R-576-578.

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

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

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

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

> 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.[88]

Mr. Dixon also explained the basis for his agreement with the remedy proposed by Mr. Mitchell:

> THE THINKING BEHIND THAT IS THAT WHEN YOU'RE DEALING WITH LIFE WITHOUT PAROLE AND HIGH FELONIES, THOSE ARE – I MEAN FROM BOTH SIDES. ON THE ONE HAND ON THE DEFENSE SIDE, THOSE ARE YOUR CLIENTS THAT ARE FACING THE MOST SEVERE SENTENCES AND THE MOST SEVERE RESULTS. FROM THE OTHER SIDE, PUBLIC SAFETY ISSUE. THOSE ARE THE FOLKS – THOSE ARE THINGS THAT NEED TO BE TAKEN CARE OF. SO THE IDEA WAS IF WE TOOK CARE OF HIGH FELONIES AND THE L.W.O.P'S. IT'D BE FROM A PUBLIC SAFETY POSITION – AND A DEFENSE SYSTEM, THE MOST EFFECTIVE USE OF RESOURCES.[89]

G. Post-Hearing Submissions

Upon the conclusion of the presentation of evidence by Mr. Mitchell, the District Attorney indicated that it would not call any witnesses and requested that the district court allow the parties to provide closing arguments to the district

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

89 *Id.* at 116:13-23, R-590.

court.[90] The district court indicated that oral arguments would be held and requested that prior to oral arguments that the parties submit proposed judgments to the district court addressing each of the outstanding motions.[91]

The deadline for filing post-hearing submissions was delayed several times. On August 12, 2019, Mr. Mitchell submitted three proposed judgments and a post-hearing memorandum addressing the pending motions.[92] The State also submitted three proposed judgments, but rather than submitting a post-hearing memorandum, the State submitted three separate proposed written reasons for judgment.[93] The district court had ordered simultaneous post-hearing filings;[94] thus Mr. Mitchell did not have an opportunity to respond to the State's proposed written reasons for judgment, some of which presented the bases for the State's objections for the first time.

H. The September 12 Rulings

The parties appeared for oral argument on the morning of September 12, 2019. But rather than hear closing oral arguments, the district court read its per curiam opinion into the record and notified the parties of its issuance of three separate judgments.[95] The district court issued three separate judgments and separate written reasons for judgment supporting those judgments.[96] These judgments and written reasons for judgment adopted the District Attorney's

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90 Exhibit 10, Transcript 6/17/2019 at 21:4-22:1; 25:12-27, R-626-627, R-630.

91 *Id.* at 22:2-25:27, R-627-630.

92 Exhibit 28, R-970-1030.

93 Exhibit 29, R-1031-1046.

94 Exhibit 10, 6/17/2019 Transcript at 24:6-14, R-629.

95 Exhibit 30, 9/12/2019 Transcript at 4:1-5:25, R-1050-1051.

96 Exhibits 32, 33, and 34, R-1058-1067.

proposed judgments and proposed written reasons for judgment verbatim.[97] The copy of the district court's per curiam opinion provided to counsel even included the State's motion submitting the proposed judgments as an attachment.[98]

Mr. Mitchell notified the district court of his intent to seek supervisory writs, and the district court set a return day for thirty days.[99] The district court also invited Mr. Mitchell to seek an extension of the return date if additional time was necessary to prepare the application.[100] Mr. Mitchell requested an additional thirty days in which to file his application for supervisory writs,[101] which relief was ordered by the district court, extending the return date until November 12, 2019.[102]

Mr. Mitchell now files this application for supervisory writs, seeking review of the district court's judgments, specifically it's use of the State's proposed written reasons for judgment without alteration; the sustaining of the State's Daubert object and exclusion of expert testimony after the district court had previously qualified the expert; the dismissal of the Motions to Withdraw for failure to request a remedy authorized by law; and the denial of Mr. Mitchell's Motions to Withdraw for failure to provide evidence of actual ineffective assistance of counsel.

REASONS FOR GRANTING THE WRIT

"A court of appeal has plenary power to exercise supervisory jurisdiction over district courts and may do so at any time, according to the

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97 *Compare* Exhibit 29, R-1031-1046, *with* Exhibits 32, 33, and 34, R-1058-1067.

98 *See* Exhibit 31, R-1056-1057.

99 Exhibit 30, 9/12/2019 Transcript at 5:23-28, R-1051.

100 *Id.* at 5:29-6:3, R-1051-52.

101 Exhibit 35, Request for Extension of Return Date, R-1068-1070.

102 Exhibit 36, Order granting Request for Extension of Return Date, R-1071.

discretion of the court." *Herlitz Construction Co. v. Hotel Investors of New Iberia, Inc.,* 396 So. 2d 878, 878 (La. 1981). The Court should exercise its plenary power in this case for several reasons. First, the district court applied inappropriate standards and issued contradictory and unnecessary rulings when it fully adopted the proposed written reasons for judgment submitted by the District Attorney to deny the Motions to Withdraw filed on behalf of the public defenders appearing before the district court. The rulings were contrary to the law and the district court's wholesale adoption of the District Attorney's arguments require a finding that the district court failed to perform its judicial function and abdicated its duty to independently analyze the law, evidence, and arguments. Thus, this Court should grant writ review and reverse the holdings of the district court.

ARGUMENT

A. The district court abdicated its judicial function.

The district court adopted verbatim the three proposed written reasons for judgment submitted by the State following the three-day hearing in this matter.[103] This adoption included typographical errors as well as substantive errors contained in the State's submissions.

By adopting the District Attorney's submissions, the District Court also adopted interpretations of the law and recitation of facts that do not comport with the law or evidence that was before the district court. Instances of such erroneous adoptions will be discussed in detail below in the sections pertinent to each matter and ruling. As an initial matter, however, extra scrutiny is warranted and *de novo* review is appropriate where, as here, lower courts fail to perform their

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[103] *See* Exhibits 32, 33, and 34, September 12, 2019 Judgments by the District Court, R-1058-1067. Compare with Exhibit 29, proposed written reasons for judgment submitted by the District Attorney, R-1031-1046.

judicial function and adopt arguments of counsel without evidence of independent judicial review. *See, e.g., Bright v. Westmoreland County*, 380 F.3d 729 (3rd Cir. 2004); *Andre v. Bendix Corp.*, 774 F.2d 786 (7th Cir. 1985) (vacating and remanding for a new trial before a different judge where court adopted 54 out of 55 pages of the party's post-trial brief, including footnotes, citations, and spelling and typographical errors); and *Chicopee Mfg. Corp. v. Kendall Co.*, 288 F.2d 719, 724-25 (4th Cir. 1961) (reversing and remanding after *de novo* review after determining "there is no authority . . . that countenances the preparation of the opinion by the attorney for either side. That practice involves the failure of the trial judge to perform his judicial function.".)

> Judicial opinions are the core work-product of judges. They are much more than findings of fact and conclusions of law; they constitute the logical and analytical explanations of why a judge arrived at a specific decision. They are tangible proof to the litigants that the judge actively wrestled with their claims and arguments and made a scholarly decision based on his or her own reason and logic. When a court adopts a party's proposed opinion as its own, the court vitiates the vital purposes served by judicial opinions.

Bright, 380 F.3d at 732. In *Bright*, the appellate court reversed and remanded the matter to the trial court to reevaluate a motion to dismiss when there was "no record evidence that would allow [the court] to conclude that the District Court conducted its own independent review, or that the opinion is the product of its own judgment." *Id.*

Although recycling language from party submissions may be useful and expedient in some cases that are less complex than this one, "it is not appropriate to use form language where those statements are not an accurate reflections of the testimony and evidence." *Prowell v. State*, 741 N.E.2d 704, 712 (Ind. 2001). In *Prowell*, the trial court had adopted proposed findings of fact and conclusions law almost verbatim submitted by the State of Indiana in a post-

conviction relief proceeding, making only a few minor changes that did not affect the substance of the submission. *Id.* at 708. The Indiana Supreme Court in its review of the trial court's practice did not "prohibit the practice of adopting a party's proposed findings" but noted that "when this occurs, there is an inevitable erosion of the confidence of an appellate court that the findings reflect the considered judgment of the trial court." *Id.* at 709. The court further noted that "[t]his is particularly true when the issues in the case turn less on the credibility of witnesses than on the inferences to be drawn from the facts and the legal effect of essentially unchallenged testimony." *Id.* The Indiana Supreme Court found that the trial court had adopted numerous errors by adopting the State's submission and ultimately reversed the trial court's judgment. *Id.* at 718.

The State did not put forth any witness to attempt to discredit the testimony offered by Mr. Mitchell or any of his witnesses or any of the four previously peer-reviewed public defender workload studies that utilized the Delphi Method admitted into evidence without objection. In fact, the State declined to offer the testimony of any witness, expert or lay, to challenge the use of the Delphi Method or the results of the Louisiana Project. Instead, the State submitted post-hearing proposed written judgments and "written reasons," taking statements and facts out of context that were thoroughly rebutted at the hearing. Accordingly, the district court adopted misleading statements as findings and made clearly erroneous findings of fact and law that require a review of the district court's judgments and written reasons *de novo*.

B. The district court improperly granted a motion to dismiss that was not filed.

By adopting verbatim the State's "Written Reasons for Judgment" for a "Motion to Dismiss for Failure to Request a Remedy Authorized by Law," the district court's order granted a phantom motion that had not even been filed.[104] Two days before the hearing in the matter, the State filed a "Motion to Dismiss," asserting these grounds: (i) that the district court was without jurisdiction to hear the motions to withdraw, (ii) that Mr. Mitchell is statutorily barred from seeking an injunction, (iii) that Louisiana law does not permit systemic challenges, and (iv) that Mr. Mitchell's motions did not allege specific instances of ineffective assistance of counsel.[105] The State's submission and the district court's written reasons regarding the State's motion address only the last two grounds, but they also assert a ground never previously raised – that the district court is without authority to dismiss cases pending before it.[106]

The State's submission, which the district court adopted, grossly mischaracterized the relief sought by Mr. Mitchell. For instance, the written reasons adopted by the court suggest that Mr. Mitchell sought an order "allowing his office to withdraw for ineffective assistance of counsel from 80% of their current cases."[107] In fact, Mr. Mitchell sought orders allowing three public defenders practicing in one section of the district court to withdraw from certain existing cases and decline certain future appointments due to their workloads to avoid the risk that they would be unable to provide effective assistance of counsel

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104 Exhibit 32, Ruling and Order and Written Reasons, R-1058-1060,

105 Exhibit 5, R-284-287.

106 Exhibit 32, R-1060.

107 *Id*. at ¶ 1, R-1059.

to their clients. Mr. Mitchell never asserted that the attorneys on whose behalf the Motions were filed had provided actual ineffective assistance as of that time.

The written reasons adopted by the court also state that Mr. Mitchell sought an order "barring his office from enrolling in any future cases until their caseloads fall below those recommended in the Louisiana Project."[108] The written reasons also state that"[t]here is some question whether a state judge can enjoin the state funded and supervised Public Defender."[109] These statement address relief that Mr. Mitchell never sought. Mr. Mitchell sought an order allowing his office to withdraw from certain representations and to decline certain representations, not an order barring or enjoining his office from accepting any and all appointments.[110] The district court's wholesale adoption of the State's gross mischaracterizations of the relief sought by Mr. Mitchell further demonstrates the court's failure to perform an independent analysis of the motions before it.

The written reasons adopted by the district court also grossly mischaracterized the underlying bases for Mr. Mitchell's motions by asserting: "The Chief Public Defender has based his claim of ineffective assistance of counsel on a systemic challenge of the caseloads in his office."[111] In fact, Mr. Mitchell did not claim ineffective assistance of counsel, did not assert a systemic challenge, and did not challenge the "caseloads" of his office. Mr. Mitchell asserted that at the time of trial in June, 2019 the three public defenders practicing in Section VI of the district court been assigned workloads for high level felony cases and life without parole cases that, standing alone, exceeded the

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108 *Id.*

109 *Id*. at ¶ 3, R-1059.

110 *See* Exhibit 1, Motion to Withdraw at pp. 10-11, R. 63-64; Exhibit 2 at pp. 10-11, R-259-260; Exhibit 3 at pp. 10-11, R-270-271.

111 Exhibit 32 at ¶3, R-1059.

amount of work that could be competently and effectively performed by those three public defenders over the course of an entire year.[112] Mr. Mitchell also asserted that the defenders' excessive workloads, combined with the lack of investigative and other resources available to them, created a substantial risk that they would be unable to provide effective assistance of counsel to the clients they represented at that time.[113] Mr. Mitchell simply requested that these three public defenders be permitted to withdraw from certain current cases and be permitted to decline appointments in certain future cases until their workloads would permit them to represent their clients with reasonable competence and effectiveness.[114]

(1) The authorities cited by the State and adopted by the district court do not prohibit a district court from addressing issues that may be deemed systemic.

State v. Reeves, 2006-2419 (La. 5/5/09), 11 So. 3d 1031, cited by the State, did not even involve any relief that could be deemed systemic. The supreme court addressed only the clams of one capital defendant, specifically with regard to his choice of counsel and a *Peart* motion filed on his behalf. The trial court conducted a hearing and found that the defendant presented insufficient evidence to support a finding that his attorney's "caseload was so burdensome, and the resources available to him were so limited, as to result in the delivery of constitutionally ineffective assistance of counsel." 11 So. 3d at 1077.

In *State v. Citizen*, 04-1841 (La. 4/1/05), 898 So. 2d 325, the motions of individual capital defendants were consolidated to address issues of funding and the appropriate course of action for trial courts to employ when funding is not available for an indigent capital defendant. In the consolidated case, defense

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112 *See* Exhibit 28 at pp. 11-12, R-980-981.

113 *Id.* at pp. 18-19, R-987-988.

114 *Id.* at 22, R-991.

counsel challenged the constitutionality of certain Revised Statutes as they related to funding. In this case, Mr. Mitchell is not asking the trial court to rule on the constitutionality of any statute. He seeks relief under the Rules of Professional Conduct, and the Louisiana and United States Constitutions in order to meet his ethical and constitutional obligations to his clients.

In *State v. Peart*, 621 So. 2d 780 (La. July 2, 1993), one attorney sought relief in multiple clients' cases, which the trial court turned into an inquiry of all public defender services in his section. The supreme court's opinion does not indicate that the trial court was presented with evidence relating to the workloads of all indigent defenders in his section. *Peart* was also decided before the creation of the Louisiana Indigent Defense Assistance Board in 1997 and the Louisiana Public Defender Board in 2007, by which the Legislature attempted to make systemic changes to address the issues raised in cases like *Peart* and *Citizen*.

It is significant that all three cases cited by the State were decided before the Louisiana Legislature's passage of the Public Defender Act (La. R.S. 15:146 *et seq.*), which was intended to address systemic issues plaguing public defense in the State of Louisiana. Despite the laudable goal of the Public Defender Act, public defenders are still faced with grossly excessive caseloads and workloads, and their ethical and constitutional obligations to their clients have not changed.[115] The Legislature's attempt to address systemic issues plaguing public defense does not subvert a court's authority and obligation to ensure that each defendant before it receives his or her Sixth Amendment right to reasonably effective assistance of counsel. The district court in this case has the same authority and obligation to ensure that these three public defenders do not face

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115 *See* Exhibit 19, The Louisiana Project, R-697-760.

caseloads that create a significant risk of ineffective assistance of counsel and concurrent conflicts under Rule 1.7, LRPC.

The unrebutted testimony of Mr. Mitchell, Mr. Dixon, and Mr. Hanlon demonstrated that there is a substantial risk that the three public defenders assigned to Section VI will be unable to provide the conflict-free, competent and reasonably effective counsel to each of their clients that is required under the Louisiana Rules of Professional Conduct, and the Louisiana and United States Constitutions.

(2) The record evidence demonstrates that the workloads of the Section VI defenders are excessive.

Mr. Mitchell testified how his loss of locally-generated revenue between 2014 and 2018 has required him to institute and remain under a ROS plan that has crippled the ability of his defenders to provide competent representation to all of their clients.[116] These plans have required him to make drastic reductions in the numbers of lawyers and staff, including investigators.[117] Although he has received some supplemental funding from the State Board, it does not fill the gap.[118]

Both Mr. Mitchell and Mr. Dixon testified about the devastating effects of the lack of resources has had on the ability of the public defenders in this district and this section to perform their basic jobs.[119] Virtually no real

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116 Exhibit 12, Petitioner's Exhibit No. 2, R-658; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 52:17-28, 56:14-25, R-348, R-352

117 Exhibit 12, Petitioner's Exhibit No. 2, R-659; Exhibit 14, Petitioner's Exhibit No. 4, R-665-667; Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 53:3-54:6, R-349-350.

118 Exhibit 8, Testimony of Mr. Mitchell, 6/13/2019 at 58:23-59:22, R-354-355.

119 *See id.* at 60:4-19, R-356.

investigation is undertaken except for the most serious offenses.[120] The defenders' excessive workloads require that they triage their cases, paying attention only to the most pressing cases at the expense of all the others.

Mr. Smith and Mr. Murell, the two Delphi panel members who testified at the hearing, explained the importance of spending time on the front end of each case in order to evaluate the case and determine a strategy to obtain the most favorable result possible.[121] But, due the necessity of triaging their cases, the public defenders practicing in Section VI of the 19th Judicial District Court never get the opportunity to undertake these crucial, early evaluations.[122]

Even without the Louisiana Project study, there is more than ample evidence in the record for the Court to conclude that these three public defenders face grossly excessive workloads and these workloads create a significant risk that their clients will not receive conflict-free, reasonably effective and competent assistance of counsel according to prevailing professional norms. The real value of the Louisiana Project is that it provides a tool that can be used to measure just how excessive the public defenders' workloads are and how courts, and in this instance Section VI of the 19th Judicial District Court, can begin to address the problem. The Louisiana Project considered a full-time public defender to have 2080 hours available each year to solely work on his or her cases. That number is the product of multiplying 40 hours per week times 52 weeks in the year.[123] The figure obviously is extremely conservative because it assumes that the defender will do

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120 *Id.* at 47:27-31, R-343; 48:8-30, R-344

121 Exhibit 9, Testimony of Mr. Smith, 6/14/2019 at 90:3-91:5, R-564-565; Exhibit 10, Testimony of Mr. Murrell, 6/17/2019 at 9:3-10:24, R-614-615.

122 *See* Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 125:9-28, R-421.

123 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 32:20-32, R-506.

his or her administrative work, obtain CLE hours, and take sick leave and time off over and above those hours.[124]

Mr. Dixon conservatively assumed that the three Section VI public defenders had 2080 maximum annual workload capacities.[125] Mr. Dixon utilized the Louisiana Public Defender Board's comprehensive case database to evaluate the current actual workloads of the three Section VI public defenders.[126] Applying the Louisiana Project results for average hours per case type, he found that the three defenders had active cases as of December 31, 2018 that represented current workloads of, respectively, 7,020 hours, 6,366 hours and 9,732 across all case types to which they were assigned.[127] Based on historical data, he estimated that one-half of these workload hours would remain at the end of 2018 and be carried over into 2019.[128]

Using the same data, Mr. Dixon found that between January 1, 2019 and the date of the evidentiary hearing in June, the same three public defenders had already been appointed to cases representing workload of, respectively, 3,003 hours, 2,870 hours and 2,692 hours across all case types.[129] By adding the estimated carried-over hours from 2018 to the new 2019 workload hours, Mr. Dixon concluded that the defenders respective current workloads as of mid-

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124 *See* Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 30:10-21, R-326.

125 Exhibit 9, Testimony of Mr. Dixon, 6/14/2019 at 103:31-109:22, R-577-583.

126 *Id.* at 109:23-26, R-583

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

128 *Id.* at 11:30-112:26, R-585-586.

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

June 2019 were 5,141 hours, 5,614 hours and 6,652 hours.[130] The workloads obviously are grossly in excess of their 2,080-hour maximum capacities.

Mr. Dixon explained the consequences of these kinds of workloads in this way: "What this does is this actually puts a number on it. It shows you what it is and what kind of workloads they have and what kind of expectation you can have for 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 are well overworked, and they can't handle the cases they've got now and adding anymore would be disastrous."[131]

C. By adopting the State's reasons for denying Mr. Mitchell's motions to dismiss, the district court employed erroneous legal standards.[132]

(1) Mr. Mitchell was not required to present evidence of actual ineffective assistance of counsel because he sought only prospective relief.

The district court's ruling criticizes Mr. Mitchell for "not provid[ing] this court with evidence needed to properly analyze question [sic] of actual, not prospective, ineffective assistance of counsel." Similarly, the ruling criticizes Mr. Mitchell for failing to provide "individualized evidence of ineffective assistance of counsel" and cites the "absence of any evidence that any public defender in the 19th Judicial District Court has ever been found to have provided ineffective assistance of counsel." These statements evidence a profound misunderstanding of

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

131 Exhibit 9, Testimony of Mr. Dixon, 6/14/2019 at 115:26-116:1, R-589-590.

132 By granting the state's motion to dismiss, there was no reason for the district court even to consider the substantive merits of Mr. Mitchell's motions. Nevertheless, because the court dutifully adopted all of the State's proposed judgments and written reasons, the court also entered a separate order denying Mr. Mitchell's motions. This further demonstrates court's abdication of its obligation to provide independent judicial reasoning for the judgments issued.

the proof required for prospective relief to avoid a conflict that creates a substantial risk of future ineffective assistance of counsel.

When a defense attorney or a criminal defendant raises the prospect of ineffective assistance of counsel due to a potential conflict, that claim must be addressed at the time that it is raised. *Holloway v. Arkansas,* 435 U.S. 475, 98 S. Ct. 1173 (1978). Indeed, *State v. Peart*, cited by the district court in granting the States motion to dismiss, explicitly acknowledges that a trial court may hear ineffective assistance of counsel claims prior to trial:

> If the trial court has sufficient information before trial, the judge can most efficiently inquire into any inadequacy and attempt to remedy it. Thus, treating ineffective assistance claims before trial where possible will further the interests of judicial economy. It will also protect the defendants' constitutional rights, and preserve the integrity of the trial process. It matters not that the ineffective assistance rendered may or may not affect the outcome of the trial to the defendant's detriment.

621 So. 2d at 787.

An attorney has an ethical duty to raise a conflict of interest as soon as he is aware of it. If it were true that the district court could not grant relief to address a conflict of interest raised by defense counsel prior to trial, the Sixth Amendment would have no application in the trial court and could only be applied retroactively on appeal. Under LRPC 1.7, an attorney need not prove that he has already provided ineffective assistance of counsel to seek relief, but only that "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." Under LRPC 1.16, the attorney ***must*** move to withdraw and "take reasonable steps to protect the interests of his clients." Mr. Mitchell fulfilled his obligation to do so, as he was required by LRPC 5.1.

(2) The Louisiana Supreme Court has reserved the authority of courts to provide systemic relief through more intrusive measures when the legislature has not properly provided for an effective public defense system.

The written reasons provided to the district court by the State for denying the motions to dismiss cite *State v. Peart* for the proposition that Louisiana courts must deny systemic challenges to public defender caseloads and seek relief from the Louisiana Public Defender Board. What these written reasons fail to recognize is that *Peart* court remanded the case to the district court with the instruction that the district court employ a rebuttable presumption that the attorneys of the Orleans Public Defenders were operating with insufficient resources and were providing ineffective assistance of counsel due to their workloads and lack of resources. Thus, on remand, the burden on the State was to prove that the public defenders' clients in fact were receiving effective assistance of counsel.

Importantly, when the *Peart* court remanded with instructions to apply the rebuttable presumption, it specifically noted that this measure was an initial step:

> We decline ***at this time*** to undertake more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance." 621 So. 2d at 791 (emphasis added). "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 specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel. *Id.* at 791.

The evidence presented by Mr. Mitchell makes clear that legislative action has not sufficient addressed the problems facing public defense to enable the Section VI public defenders to effectively and competently represent their clients.

The *Peart* court also reviewed what other states had done to craft remedies to address issues plaguing public defense. The court specifically cited to cases in which other state supreme courts were addressing systemic problems with

the provision and funding of indigent defense services. In each of those cases, the courts considered and crafted remedies based on the inherent power of the judiciary to regulate the practice of law and ensure the constitutional rights of both defendants and those representing them. *See In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990); *State v. Lynch*, 796 P.2d 1150 (Okla. 1990); *Arnold v. Kemp*, 813 S.W.2d 770 (Ark. 1991); *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987); *State v. Robinson*, 46 A.2d 1214 (N.H. 1983).

Courts have the inherent authority to regulate the practice of law before them. The fact that no Louisiana court has yet granted the relief sought by Mr. Mitchell does not mean that they may not do so. In *Peart,* the Supreme Court expressly endorsed the possibility that a court may have to adopt drastic measures when defendants are not afforded the assistance of counsel guaranteed to them by the Sixth Amendment. The federal courts have envisioned such measures when classes of defendants are at substantial risk of receiving ineffective assistance of counsel. *See Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert. denied,* 495 U.S. 957, 110 S. Ct. 2562 (1990). The *Luckey* court ultimately abstained because it determined that the request for relief was more appropriately addressed by the state courts. Since *Luckey* was decided, a number of state courts have adopted its burden-of-proof standard for claims seeking prospective relief with respect to systemic Sixth Amendment violations. *See, e.g., Kuren v. Luzerne Cnty.,* 146 A. 3d 715, 744 (Pa. 2016); *Public Defender v. State,* 115 So. 3d 261, 276 (Fla. 2013); *Duncan v. State,* 774 N.W. 2d 89, 128-29 (Mich. App. 2009). *See also State v. Peart,* 621 So. 2d 780, 787 (La. 1993) (citing *Luckey* for the proposition that "[i]t matters not that the ineffective assistance rendered may or may not affect the outcome of the trial to the defendant's detriment.")

D. The district court improperly applied the *Daubert* factors in retroactively disqualifying an expert witness whom the court had qualified at the evidentiary hearing.

(1) The district court qualified Mr. Field as an expert at the evidentiary hearing in the application of the Delphi Method, not as an expert in the Delphi Method itself.

The district court heard extensive testimony at the evidentiary hearing regarding Madison Field's qualifications, including his education, experience, and training as a consultant specializing in quantitative methodologies.[133] The Court concluded that Mr. Field was qualified as an expert in the application of quantitative methodologies, including the Delphi Method, and then reaffirmed Mr. Field's qualification at the conclusion of the hearing after hearing the entirety of Mr. Field's testimony, stating:

> REGARDING THE APPLICATION IN EXPERTISE THAT'S NECESSARY TO USE A METHODOLOGY THAT IS DEPLOYED, AND BASED UPON HIS TESTIMONY THAT I'VE HEARD, I BELIEVE THAT HE'S QUALIFIED TO – AND I BELIEVE HE'S – HE – THE EXPERTISE TO UTILIZE THIS --- THIS METHOD. I DECLINE TO REVERSE MY POSITION ON HIS TRAINING, HIS EXPERIENCE, HIS APPLICATION IN THE USE OF THE METHODS THAT HE'S DEPLOYED HERE. I BELIEVE HE'S QUALIFIED TO GIVE ME AN OPINION. SO I'LL OVERRULE THE OBJECTION WITH RESPECT TO THE WITNESS'S EXPERTISE BASED UPON WHAT I'VE WITNESSED AND OBSERVED IN THE APPLICATION OF THIS DISCIPLINE – THIS COMPONENT OF THE METHOD OF REACHING A CONCLUSION BASED UPON THE APPLICATION AND THE PRINCIPLES …. [134]

The State's attempt to claw back the qualification of Mr. Field by supplying the district court with unfounded written reasons after the conclusion of trial is entirely inappropriate. Furthermore, the basis for disqualifying Mr. Field does not comport with the either the tender of Mr. Field or the law. Mr. Field was tendered as an expert in quantitative methodology, including the application of the

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[133] Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 5:4 - 24:25, R-479-498.

[134] *Id*. at 70:31-71:13, R-544-545.

Delphi Method.[135] The written reasons completely ignore the purpose for which Mr. Field was offered as an expert and the field in which the court qualified him. Nor do the written reasons set forth exactly what testimony by Mr. Field was excluded, as he testified not only about the Delphi Method but also about the method in which the Louisiana Project was conducted, the caseloads of public defenders in Louisiana, as well as the study of the public defender personnel. The Louisiana Project goes into detail about each of these matters as well.

Under Rule 702 of the Louisiana Code of Evidence, the admissibility of an expert's testimony "turns upon whether it would assist the trier of fact understand the evidence or determine a fact at issue." Comment (c) to Article 702. In *Cheairs v. State*, 03-680 (La. 12/3/03); 86 So. 2d 536, the Louisiana Supreme Court adopted a three-prong inquiry as set forth by the Eleventh Circuit in *City of Tuscaloosa v. Harcros Chemicals, Inc.*, 158 F.3d 548 (11th Cir. 1998) noting that "the holding in *Daubert* does not directly address that issue." 86 So. 2d at 542. The admission of expert testimony is proper if the following three things 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 is 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 to determine a fact at issue.

Id.

The State and, therefore, the district court, ignored this inquiry in the written reasons for retroactively disqualifying Mr. Field. Among other things, the written reasons assert that Mr. Field cannot be considered an expert "until he has published his own research on the Delphi Method and has had that research

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135 *Id.* at 70:20-29, R-544.

validated through peer review." This is not the law. In *State v. Lutz*, 2017-0425 (La. App. 1 Cir. 11/01/17); 235 So. 3d 1114, 1132, this Court has specifically held that publication is not a requirement for the qualification of an expert: "A combination of specialized training, work experience, and practical application of the expert's knowledge can combine to demonstrate that the person is an expert; a person may qualify as an expert based upon experience alone." S*ee also Giavotella v. Mitchell*, 2019-0100 (La. App. 1 Cir. 10/24/19); 2019 La. App. LEXIS 1884 at *24; *Lee v. La. Bd. of Trs.*, 2017-1433 (La. App. 1 Cir. 03/13/19); 2019 La. App. LEXIS 462 at *17; *State ex rel. Dep't of Soc. Servs. v. Ashy*, 94-0903 (La. App. 1 Cir. 03/03/95); 653 So. 2d 20, 25.

Even if publication and peer review were a requirement, Mr. Field has been published as one of the authors of the Louisiana Project, which is cited as guidance relied upon by the authors in the Rhode Island study,[136] and is currently in the process of assisting other accounting firms publishing public defender workload studies in other states that utilize the Delphi Method, as he testified at trial.[137] The written reasons fail to properly consider that Mr. Field was not proffered as an expert in the Delphi Method itself but in quantitative methodology, which is what the Delphi Method is considered to be. Mr. Field did not put forth "his ideas" regarding the use of the Delphi Method, as the written reasons state. Rather, he testified based on his experience and research as a consultant performing quantitative analyses regarding P&N's application of the Delphi Method to conduct the Louisiana Project. His experience alone qualifies him as an expert, and the district court properly qualified him at the hearing on this matter.

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136 Exhibit 21, Petitioner's Exhibit 11, The Rhode Island Project at n28, R-838.

137 Exhibit 9, Testimony of Mr. Field, 6/13/2019 at 15:2-7, R-489.

The State's retroactive attempt to disqualify Mr. Field based on his failure to publish, a factor not considered by Louisiana courts, must be rejected.

(2) Not all of the *Daubert* factors apply to Mr. Field's testimony regarding the Louisiana Project.

The written reasons focus on two areas in which the State contends the Delphi Method does not satisfy the *Daubert* factors: its reproducibility and whether it has a known error rate. In *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999), the United States Supreme Court extended the application of *Daubert* to fields other than "hard science." In reaching its decision, the Court concluded that a "trial court *may* consider one or more of the specific factors that *Daubert* mentioned when doing so will help determine that testimony's reliability." But … *Dauber's* list of factors neither necessarily nor exclusively applies to all experts or in every case." *Id.* at 141. In *State v. Lutz*, this Court cited the standard set forth in *Kumho* and explained: "The trial court may consider one or more of the four *Daubert* factors, but that list of factors neither necessarily nor exclusively applies to all experts or in every case. Rather, the law grants a district court the same broad latitude when it decides how to determine reliability as it enjoys in respect to its ultimate reliability determinations." 2017-0425 (La. App. 1 Cir. 11/01/17); 235 So. 3d 1114, 1132.

The district court, of course, has broad discretion when applying the *Daubert* factors in any given case. But that proposition assumes that the district court *actually exercises* such discretion in the rigorous process of judicial labor. Because the district court simply copied the State's proposed written reasons, that did not happen in this case. Here, the district court failed to consider whether the *Daubert* factors which the written reasons purport to employ were even applicable to the testimony and evidence offered. They are not and the district court's

exclusion of the "Delphi Method" and any testimony or data resulting from the use of the method is in error.

a. The Delphi Method is reproducible.

P&N and Mr. Field confirmed that the Louisiana Project study was conducted in accordance the peer-reviewed prior Delphi Method studies, as well as the American Institute of Certified Public Accountants' Statement on Standards for Consulting Services.[138] P&N specifically noted in the Louisiana Project that "[t]he Delphi method offers a reliable and structured means to integrate opinions of highly informed professionals to develop a consensus opinion."[139] Mr. Fields explained how the Louisiana Project panel members were selected,[140] the three phases of the Delphi Method portion of the study,[141] and how the qualitative and quantitative feedback provided to the participants (all experienced criminal lawyers, both public and private) allowed them to reach a consensus on how many minutes each discreet case task should take to complete, based on the case type.[142] The methodology itself is reproducible and has been reproduced in the Louisiana Project, the Texas Project, the Colorado Project, the Missouri Project, and the Rhode Island Project. In fact, other courts have referenced the Delphi Method across a variety of contexts. *See In re Certification of Need for Additional Judges*, 206 So.3d 22 (Fla. 2016) (utilized to make a qualitative adjustment to time entry to assess additional time needed to complete tasks); *National Wildlife Federation v. United States Forest Service*, 592 F.Supp. 931 (D. Or. 1984) (referenced in connection with predicting timber usage); *Allen v. NIH*, 974 F.Supp.2d 18, n8 (D.

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138 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 28:21-26, R-502

139 Exhibit 19, Petitioner's Exhibit 19, Louisiana Project at p. 14, R-716.

140 Exhibit 9, Testimony of Mr. Field, 6/14/2019 at 37:31-38:18, R-511-512.

141 *Id.* at 29:22-30:3, R. 503-504.

142 *Id.* at 38:29-41:16, R. 512-515.

Mass 2013) (referenced as the "most widely accepted forecasting method using a panel of experts"); *Conservation Law Foundation v. FHA*, 2007 DNH 106, n12 (D.N.H. 2007) (in ordering the parties to reconsider its position in light of the consensus opinion derived from a Delphi study, the court noted that "a Delphi Study uses a highly structured method for collecting and refining group opinions"). Most recently, a circuit court in St. Louis County Missouri accepted "The RubinBrown Study" referenced in Mr. Hanlon's testimony and granted relief to the public defender's office, specifically finding that certain public defenders would be unable to provide effective assistance of counsel due to their current caseloads, limiting their caseloads, and permitting the creation of a waitlist for the appointment of counsel.[143] The State put forth no contradictory evidence or testimony to rebut Mr. Field's application of the Delphi Method in the Louisiana Project for this very purpose.

What the State, and consequently the district court, wrongly focuses on is whether the Delphi methodology will produce the same or similar result every time. The reproducibility factor focuses on whether the methodology can be reproduced not whether the methodology produces the same conclusion ("output") in applications with differing facts and circumstances ("input"). The State's manipulation of the results to create a chart compares apples-and-oranges due to jurisdictional differences considered in each study. It does not compare the utilization and application of the methodology employed in each study, which was consistent across all of the studies. Each such study, including The Louisiana

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143 *See* https://www.documentcloud.org/documents/4417162-Beach-Public-Defender-Order-032118.html?utm_source=In+Justice+Today+%E2%80%94+MN%2FIA%2FMO+Edition&utm_campaign=866e9ab571-IJT_Daily_Newsletter_9_059_5_2017&utm_medium=email&utm_term=0_c9be67c13e-866e9ab571-58358155

Project, was modeled on the National Blueprint for Future Workload Studies produced by RubinBrown and the ABA in The Missouri Project. In fact, RubinBrown was consulted and formed part of the Louisiana Project team.[144] The written reasons' focus on the reproducibility of results is in error and did not justify the district court's order to exclude testimony and evidence of the Delphi Method that P&N used to conduct the Louisiana Project.

b. The known error rate factor is not applicable to the Louisiana Project.

The written reasons' conclusion that the Delphi Method must have a "known error rate" also is erroneous. As this Court has acknowledged, not all factors mentioned in *Daubert* are applicable in all cases. The *Daubert* factors are flexible and do not represent a definitive check list, of which some or none of the factors may be readily applied in a particular case. *Kumho*, 526 U.S. at 150; *Independent Fire Ins. Co. v. Sunbeam Corp.*, 99-2181 (La. 2/29/00), 755 So. 2d 226, 234. On its face, attempting to assess a known error rate to a consensus expert professional judgment about the amount of time that is required to provide reasonably effective assistance of counsel in criminal cases in Louisiana makes no sense. The State's basis of attacks on the differences in the conclusions reached in each study do not bear on the reliability of the Delphi Method under *Daubert*, but rather go to the weight of the evidence.

(3) "Human behavior tools" are admissible as evidence.

In addition to opining that the Delphi Method should be disqualified under the *Daubert* standard, the written reasons also erroneously excluded the method as a "human behavior tool":

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144 Exhibit 9, Testimony of Madison Field, 6/14/2019 at 10:25-11:14, R-484-485.

> This Court concludes that the Delphi Method is a human behavior tool, not a scientific method. . . . The numbers it produces cannot be relied upon to produce real world numbers though they may be of some use in forecasting, planning, and policy development situations.[145]

This reasoning undercuts the very reason that it provides for excluding the Louisiana Project from evidence. The written reasons acknowledge that the Delphi Method is useful for forecasting, planning, and policy development. Since the Delphi Method was developed, "its use beyond forecasting has ranged from program planning, needs assessment, policy determination and resource utilization." Chia-Chien Hsu & Brian A. Sandford, The Delphi Technique: Making Sense of Consensus, (2007), available at http://pareonline.net/pdf/v12n10.pdf

The Louisiana Project is just such a needs assessment study, similar to the over 67 workloads/needs assessment Delphi studies done by the National Center for State Courts in 25 states. Its purpose was to establish a baseline for the amount of time, on average, that should reasonably be devoted by an attorney to each type of criminal matter and then to assess the number of attorneys needed to handle the actual number of cases in the State. Mr. Dixon then utilized those same results to analyze the current workload of the public defenders in the 19th Judicial District Court, specifically those practicing in Section VI, in order to determine the number of cases they could competently handle on an annual basis.

Although the State attempts to suggest otherwise by referring to the Delphi Method as a "human behavior tool," building expert consensus is not atypical and not inadmissible. In fact, Louisiana law specifically provides for the admissibility of medical expert panels (expert consensus opinions). Courts also routinely admit differing expert opinions on the same issue when the issue at hand

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145 Exhibit 33 at R-1062.

is not subject to precise measurement. For example, two different business valuations are admitted as expert evidence in courts every day. Courts weigh the credibility of the experts, the inputs used, and the methodology, but they do not throw out those expert opinions because they differ with each other. These types of expert opinions require a degree of professional judgment that are not subject to the same type of standards that might apply to a DNA test for which there is only one correct answer. As such, the district court's exclusion of the Delphi Method was in error.

(4) There is no reliable empirical data that establishes how much time an attorney should spend on a case or what his workload should be.

The written reasons also suggest that Mr. Mitchell has ignored empirical data that is available to him in order to utilize the Delphi Method. This is simply incorrect. Mr. Field was questioned extensively regarding the timekeeping data referenced in the Louisiana Project. In his testimony, he stated that the data collected was unreliable, a candid professional acknowledgement that should give any court confidence in the professionalism exhibited by P&N in this endeavor.

Rather than use timekeeping results from public defenders who were so overwhelmed with their client work that they could not accurately record their time devoted to specific cases, (as Missouri and Colorado, with significantly lower caseloads, did) P&N chose to use the reliable data that was extensively depicted in the Historical Caseloads and Staffing section of The Louisiana Report. (pp. 7-11). That analysis contains a wealth of reliable empirical data. The Rhode Island study did the exact same thing.

The fact that timekeeping data was not used in The Louisiana Project or The Rhode Island Project has no bearing on the reliability of those studies. Even when reliable timekeeping is possible for a public defender organization, as

was true in Missouri and Colorado, its purpose is for post-study analysis by those using its results, not for use by the experts involved in the Delphi study. As Mr. Hanlon explained in his testimony,[146] the anchor for the experts' professional judgment is not the world of "is" (timekeeping), but rather the world of "should" (the professional standards and norms that govern the conduct of all lawyers, including public defenders, who represent criminal defendants).

Once again, the specific application of the Delphi Method in the Louisiana Project are an issue of credibility and weight of the expert opinions, not their admissibility. The testimony and evidence put forth by Mr. Mitchell and unrebutted by contrary testimony or evidence supports that the testimony regarding the Delphi Method and its application to the Louisiana Project is admissible. To the extent that there is any question regarding the Delphi Method, those questions go to the weight afforded the evidence and testimony offered. The district court erred when it ruled that any testimony and evidence resulting from the Delphi study was inadmissible.

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146 Exhibit 8, Testimony of Mr. Hanlon, 6/13/2019 at 107-112, R. 403-408.

PRAYER FOR RELIEF

For the foregoing reasons, Applicant prays that the Court grant this Application, vacate the September 12, 2019 rulings of the district court, and render judgment in favor of Applicant, permitting the relief requested in the district court.

Respectfully submitted,

/s/ John M. Landis
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Attorneys for Applicant Michael Mitchell, in his capacity as District Defender of the Office of the Public Defender for the Parish of East Baton Rouge

C E R T I F I C A T E

I hereby certify that a copy of the above and foregoing Application for Supervisory Writs by Applicant Michael Mitchell has been served on the following parties by electronic mail this 12th day of November, 2019:

COUNSEL FOR THE STATE

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/s/ John M. Landis

STATE OF LOUISIANA
FIRST CIRCUIT COURT OF APPEAL

DOCKET NO. _____

STATE

VERSUS

RODERICK L. COVINGTON, SAMANTHA KELLY, AND KIFFANY SPEARS

ON APPLICATION FROM RULING AND JUDGMENT RENDERED SEPTEMBER 12, 2019 BY THE HONORABLE DONALD JOHNSON OF THE NINETEENTH JUDICIAL DISTRICT COURT,
PARISH OF EAST BATON ROUGE, STATE OF LOUISIANA,
DOCKET NOS. 08-18-0486; 10-18-0529; 07-18-0409; 07-18-0422; 07-18-0233
CRIMINAL PROCEEDINGS

DECLARATION OF JOHN M. LANDIS

John M. Landis, does declare and state, in accordance with Uniform Rules of Louisiana Courts of Appeal Rule 4-5 and Local Rule of the First Circuit Court of Appeal 8-H did state that:

1. He is attorney of record for Michael Mitchell, Applicant in this Court;

2. He has prepared and read the Application for Supervisory Writs by Applicant Michael Mitchell, and that all the allegations contained therein are true and correct to the best of his knowledge;

3. A list of all parties, interested parties and counsel is:

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4. He has served a copy of this application on the Honorable Donald Johnson, District Judge, Nineteenth Judicial District Court for the Parish of East Baton Rouge, 300 North Boulevard, Suite 10201, Baton Rouge, Louisiana 70801 (225) 873-6550, this 12th day of November, 2019.

5. The trial court and the District Attorney's office have been notified by telephone or by e-mail that this application is being filed.

/s/ John M. Landis