

IN THE FLORIDA SUPREME COURT

CASE No. 09-1181

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,

Petitioner,

v.

THE STATE OF FLORIDA,

Respondent.

BRIEF OF *AMICUS CURIAE* HARRY LEE ANSTEAD, ROBERT A.
BUTTERWORTH, HENRY M. COXE, III, TALBOT D'ALEMBERTE, PHILLIP
A. HUBBART, BRUCE R. JACOB, GERALD KOGAN, JOHN A. REED, JR.,
LEANDER J. SHAW, JR., LARRY GIBBS TURNER and STEPHEN N. ZACK

ON DISCRETIONARY REVIEW OF A DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT

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STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is filed on behalf of Harry Lee Anstead, Robert A. Butterworth, Henry M. Coxe, III, Talbot D'Alemberte, Phillip A. Hubbard, Bruce R. Jacob, Gerald Kogan, John A. Reed, Jr., Leander J. Shaw, Jr., Larry Gibbs Turner and Stephen N. Zack (hereinafter, *Amici*). *Amici* are prominent members of The Florida Bar, among whom are retired trial and appellate judges, including former Justices of this Court, as well as former Bar presidents. See Motion for Leave to File Amicus Brief. *Amici* have a common interest in ensuring that the Florida courts provide equal justice to all and, to that end, that those citizens who are unable to retain counsel when charged by the state with a crime have access to the same quality of representation that is available to monied defendants.

As lawyers with many years of practice before the Florida courts, including in *pro bono* or public-service representation of indigent clients, as former judges and justices who well know that the courts, as well as indigent clients, are well served by vigorous and untrammelled representation of those who cannot retain counsel with their own resources, and as Florida citizens, *Amici* are keenly interested in the outcome of this litigation, and believe that they bring a unique viewpoint to the case.

SUMMARY OF ARGUMENT

The Third District Court of Appeal acknowledged that, “whenever an attorney is burdened with an excessive caseload, there exists the possibility of inadequate representation,” but – because the court could not ascertain an identifiable standard for relying on aggregate calculations to ascertain whether an

“excessive caseload” exists – held that an “office-wide solution ... lies with the legislature or the [Public Defender’s] internal administration ..., not with the courts.” *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798, 802, 806 (Fla. 3d DCA 2009) (hereinafter, *Public Defender*). In his concurring opinion, Judge Shepherd concluded that the question whether the Public Defender’s caseload is excessive is not justiciable in the first instance, *i.e.*, “this action is nothing more than a political question masquerading as a lawsuit, and should be dispatched on that basis.” *Id.* at 806 (Shepherd, J., concurring). This amicus brief will address why resolution of the Public Defender’s dilemma is properly addressed by the judiciary in its role as guardian of the constitutionally guaranteed right to counsel.

The right of an indigent criminal defendant to appointed counsel was born of judicial interpretation of the Sixth Amendment, and the courts have long been charged with the duty of safeguarding that right, protecting it against depredation by trial judges and lawyers who fail, either willfully or otherwise, to carry out their constitutional duties. And that duty does not exist solely in the context of appellate or post-conviction review of flawed criminal convictions. Rather, the courts – and trial judges in particular – must proactively protect against prospective violations of the right to effective counsel. That, in the end, is all that the trial judge did in this instance, after finding a conflict arising from the Public Defender’s crushingly excessive caseload.

The trial judge no more tread on the Legislature’s prerogative than this Court has in addressing similar conflicts in decisions going back some 20 years.

No judge has ordered or – should this Court overturn the Third District’s unduly narrow view of the judiciary’s duty to protect the right to counsel – will order, the Legislature to appropriate monies for indigent representation. This Court should exercise its authority, as it has over the years, to ensure that indigent defendants do not bear the brunt of budgetary woes. Trial judges, in the exercise of fully informed discretion, must be permitted to exercise their authority to ensure that all Florida citizens accused of crimes and facing a loss of liberty receive constitutionally adequate representation at trial.

ARGUMENT

I. THE JUDICIARY’S ROLE UNDER FLORIDA’S TRIPARTITE CONSTITUTIONAL SYSTEM.

A. The Constitutional Guarantee of an Independent Judiciary.

Florida applies a strict separation-of-powers doctrine, *e.g.*, *State v. Cotton*, 769 So. 2d 345, 353 (Fla. 2000), which doctrine is expressly codified in Article II, Section 3, of the Florida Constitution. Section 3 vouchsafes the integrity of three distinct branches of government, and precludes one branch from exercising powers “appertaining to either of the other branches unless expressly provided herein.” *Id.* Article V establishes the jurisdiction and duties of the various courts, Art. V, §§ 3(b), 4(b), 5(b), 6(b), and this Court is granted ultimate authority to review and construe the Florida and United States Constitutions. Art. V., § 3(b), Fla. Const.

As amended in 1956, Article V directs that this Court “shall adopt rules for the practice and procedure in all courts including ... the administrative supervision of all courts[.]” Art. V, § 2(a), Fla. Const. Under a 1972 amendment, the

Legislature's power over court rules is limited to repeal by general law enacted by a two-thirds vote. *Id.* This Court is also granted exclusive jurisdiction to regulate both the admission of lawyers and their discipline. Art. V, § 15, Fla. Const.

Thus, “[u]nder the express separation of powers provision in our state constitution, ‘the judiciary is ... vested with the sole authority to exercise the judicial power.’” *Bush v. Schiavo*, 885 So. 2d 321, 330 (Fla. 2004) (citation omitted). And the “chief justice of the supreme court ... shall be the chief administrative officer of the judicial system.” Art. V, § 2(b), Fla. Const.; *see Chiles v. Children A, B, C, D, E, and F*, 589 So. 2d 260, 268 (Fla. 1991). In recognizing the importance of the “independence of the judiciary” and the effective administration of justice, this Court has declared that it “has an independent duty and authority as a constitutionally coequal and coordinate branch of the government of the State of Florida to guarantee the rights of the people to have access to a functioning and efficient judicial system.” *Chiles*, 598 So. 2d at 269; *see* Art. I, § 21, Fla. Const. (“courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay”).

B. The Judiciary's Inherent Power.

It is a fundamental principle of constitutional law that each branch of government has the “inherent right” to accomplish all objects naturally within its ambit, without the need of an express grant of the power to do so. *E.g., Sun Ins. Office, Ltd. v. Clay*, 133 So. 2d 735, 742 (Fla. 1961) (citation omitted). Thus, long before the specific rule-making grant in the 1956 amendment to the Florida Constitution, this Court recognized that the courts have inherent powers that

necessarily arise from their status as courts. *Humphries v. Hester & Stinson Lumber Co.*, 141 So. 749 (Fla. 1932) (“court has always been clothed with inherent power to make rules for its governance”); *State ex rel. Ross v. Call*, 22 So. 748, 749 (Fla. 1897) (recognizing that when a constitution gives a general power, it also gives, by implication, every power necessary for the exercise of that power); see Roger A. Silver, *The Inherent Power of the Florida Courts*, 39 U. MIAMI L. REV. 257, 263 (1985) (“[a] court’s inherent powers arise from its existence as a court”; Florida courts “possess the inherent powers to do all things that are reasonable and necessary for the administration of justice within the scope of their jurisdiction, subject to valid existing laws and constitutional provisions”) (footnotes omitted).

This Court has explained that the courts’ inherent power “exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government.” *Rose v. Palm Beach Cnty.*, 361 So. 2d 135, 137 (Fla. 1978).¹ And the courts’ inherent power “is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.” *Id.* (footnote omitted).

¹ Early in its history, the United States Supreme Court similarly recognized the courts’ inherent power. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812) (“[c]ertain implied powers must necessarily result to our Courts of justice from the nature of their institution ... powers which cannot be dispensed with in a Court, because they are necessary to the exercise of all others”).

II. THE JUDICIARY’S ROLE IN PROTECTING THE FUNDAMENTAL RIGHT TO COUNSEL.

A. The Constitutional Right to Counsel in Criminal Prosecutions.

The Sixth Amendment, as adopted in the Bill of Rights, provides that, “[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.” U.S. Const. amend VI. Article I, Section 16(a) of the Florida Constitution, which derives from the 1885 Constitution, *see* Art. I, § 11, Fla. Const. (1885); *O’Berry v. State*, 36 So. 440, 441 (Fla. 1904), also explicitly guarantees the right to counsel. Art. I, § 16(a), Fla. Const. (“[i]n all criminal prosecutions the accused ... shall ... have the right to ... be heard in person, by counsel or both”).

In 1932, the United States Supreme Court first declared that the right to counsel applied to the states through the Fourteenth Amendment’s Due Process Clause, recognizing that the “right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.” *Powell v. Alabama*, 287 U.S. 45, 69 (1932). And in 1963, that Court, after granting review of a *pro se* petition by Clarence Gideon, a Florida prisoner (and appointing counsel for Mr. Gideon), held that the Sixth Amendment mandates the appointment of counsel in felony prosecutions against an accused who does not have the resources to hire a lawyer:

The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal

cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Gideon v. Wainwright, 372 U.S. 335, 344 (1963).² Some nine years later, addressing another Florida case, the Court extended this right to counsel to indigent defendants charged with misdemeanors and other offenses involving a loss of liberty. *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972).

This Court has recognized that *Gideon* “found fundamental the right to effective counsel and established the state’s duty to provide representation to the indigent.” *Makemson v. Martin Cnty.*, 491 So. 2d 1109, 1114 (Fla. 1986). It is no longer open to question that the right to be represented by counsel and, indeed the right to *effective* representation by that counsel, is among the most fundamental of rights. *Penson v. Ohio*, 488 U.S. 75, 84 (1988). Because “it is through counsel that all other rights of the accused are protected,” the Supreme Court has recognized the overarching magnitude of the right:

Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have. The paramount importance of vigorous representation follows from the nature of our adversarial system of justice. This system is premised on the well-tested principle that truth – as well as fairness – is best discovered by powerful statements on both sides of the question.

Id. (citation and internal quotations omitted).

² In so holding, the Court overruled its decision in *Betts v. Brady*, 316 U.S. 455 (1942), which had held that the “appointment of counsel is not a fundamental right, essential to a fair trial” and accordingly was not incorporated within the Due Process Clause. *Id.* at 472.

B. The Courts' Responsibility for Safeguarding the Right to Conflict-Free Counsel.

The “purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.” *Strickland v. Washington*, 466 U.S. 668, 692 (1984). As the Supreme Court recently has reaffirmed, “[i]t is our responsibility under the Constitution to ensure that no criminal defendant ... is left to the ‘mercies of incompetent counsel.’” *Padilla v. Kentucky*, – U.S. –, 130 S. Ct. 1473, 1486 (2010) (citation omitted).

One of the most fundamental elements of effective assistance, of course, is that a lawyer must be free of disabling conflicts of interest. *E.g.*, *United States v. Cronin*, 466 U.S. 648, 654 (1984); *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980); *Derrick v. State*, 983 So. 2d 443, 454 (Fla. 2008). Because “the right to effective assistance of counsel encompasses the right to representation free from actual conflict,” *Hunter v. State*, 817 So. 2d 786, 791 (Fla. 2002) (citations omitted), “[c]ounsel’s allegiance to a client must remain unaffected by competing obligations to other clients.” *Barclay v. Wainwright*, 444 So. 2d 956, 958 (Fla. 1984).

The courts will presume prejudice to the accused from a conflict of interest, because “[t]he conflict itself demonstrate[s] a denial of the right to have the effective assistance of counsel.” *Cuyler*, 446 U.S. at 349 (citations and internal quotations omitted); *accord Barclay*, 444 So. 2d at 958 (“[a]n actual conflict of interest that adversely affects a lawyer’s performance violates the sixth amendment and cannot be harmless error”) (citations omitted).

III. THE COURTS' DUTY TO SAFEGUARD THE RIGHT TO COUNSEL EXTENDS TO PROTECTING INDIGENT CLIENTS FROM CONFLICTS CREATED BY A PUBLIC DEFENDER'S EXCESSIVE CASELOAD.

A. The Courts' Inherent Power to Protect Indigent Clients from Ineffective Representation Caused by Excessive Caseloads.

The concurring opinion in the Third District mistakenly conflates protecting the right to counsel – which unmistakably is vested in the courts – with the Legislature's power of the purse. *Public Defender*, 12 So. 3d at 806-07 (Shepherd, J., concurring). The decision upon which the concurring opinion primarily relies rejected, as non-justiciable, a claim that the Legislature was funding public education inadequately. *Id.* (citing *Coal. for Adequacy & Fairness in Sch. Funding, Inc. v. Chiles*, 680 So. 2d 400, 408 (Fla. 1996)). But unlike school funding – or, for that matter, funding of Public Defender offices – there is no “textually demonstrable commitment” of protecting the right to counsel for indigent defendants “to a coordinate political department.” 12 So. 3d at 806-07 (citation omitted).³

The question whether a Public Defender should prospectively present excessive caseload as a reason to decline appointments, because that caseload

³ Following the concurring opinion's rationale, one could just as readily argue that *Gideon* itself, by impelling the Florida Legislature, in an appropriate legislative policy decision, almost immediately to adopt a statewide public defender system in 1963, *see* Ch. 63-409, Laws of Fla., somehow had intruded on the Florida Legislature's prerogatives. To the contrary, the Legislature's response to *Gideon* has been treated as a reason for pride in Florida's criminal justice system. *See Graham v. State*, 372 So. 2d 1363, 1365 (Fla. 1979) (“Florida was one of the first jurisdictions in this country after *Gideon* to provide a state public defender system to represent indigent defendants”) (footnote omitted).

creates a conflict of interest, is, in principle, indistinguishable from a lawyer's obligation promptly to inform a trial court when multiple representations require the appointment of separate counsel. *See, e.g., Scott v. State*, 991 So. 2d 971, 972 (Fla. 1st DCA 2008) (“[c]onflicts of interest are best addressed *before* a lawyer laboring under such a conflict does any harm” to a client’s interests) (emphasis added).⁴ As this Court has recognized, a “conflict of interest is inevitably created” whenever excessive caseloads force a public defender to choose between the rights of the various indigent defendants whom he or she is asked to defend. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130, 1135 (Fla. 1990).

Thus, this Court has long sought to protect against the risk that counsel will be unable to provide effective representation when a public defender is laboring

⁴ Rule 4-1.7(a)(2) of the Rules Regulating The Florida Bar prohibits representation if there is a “substantial risk that the representation of 1 or more clients will be materially limited by the lawyer’s responsibilities to another client.” The Second District, in permitting a court-appointed attorney to withdraw, cited to an ethics opinion from the American Bar Association that provides guidance on a public defender’s ethical responsibilities to existing clients, and an ineluctable mandate to decline new cases rather than risk violating the rules:

A lawyer’s primary ethical duty is owed to existing clients. Therefore, a lawyer must decline to accept new cases, rather than withdraw from existing cases, if the acceptance of a new case will result in her workload becoming excessive. When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.

Hagopian v. Justice Admin. Comm’n, 18 So. 3d 625, 639-40 (Fla. 2d DCA 2009); *see Day v. State*, 564 So. 2d 137, 138 (Fla. 1st DCA 1990) (recognizing propriety of public defender withdrawing from both existing and future appellate cases, based on standards adopted by the Florida Public Defender Association).

under an excessive caseload. *Id.* at 1134 (citing *Escambia County v. Behr*, 384 So. 2d 147 (Fla. 1980)). Indeed, the Court has noted that “an inundated attorney may be only a little better than no attorney at all.” *In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18, 19 (Fla. 1994).⁵

In the *Criminal Appeals* decision, the Court quite specifically addressed an appellate public defender’s excessive caseload, directing the public defender “to move to withdraw” and for the trial court to appoint separate counsel upon a determination that “the public defender’s caseload is so excessive as to create a conflict.” 561 So. 2d at 1138. With respect to an existing backlog, the Court directed an “immediate resolution” through “massive employment of the private

⁵ Prospective relief simply makes good sense:

By requiring public defenders to decline new representation on the basis of excess caseload, rather than to withdraw from pending proceedings on that ground, the trial courts of this state will not only prevent delays in the administration of the criminal justice system, but will also avoid the creation of a different standard of professional representation in public defender offices than among private attorneys.

Behr, 384 So. 2d at 150 (England, C.J., concurring). Prospective relief is appropriate in appellate representation as well. *In re Public Defender’s Certification of Conflict and Motion to Withdraw Due to Excessive Caseload and Motion for Writ of Mandamus*, 709 So. 2d 101, 103 (Fla. 1998); *Haggins v. State*, 498 So. 2d 953, 954 (Fla. 2d DCA 1986) (en banc); see *In re Certification of Conflict in Motions to Withdraw Filed by Public Defender of the Tenth Judicial Circuit*, 636 So. 2d 18, 21 (Fla. 1994) (recognizing long-term suggestion for “[a]doption of a prospective withdrawal procedure ... to allow the Public Defender to withdraw early based on a recognition that the cases cannot be timely handled in the future”); ABA Formal Opinion 06-441 (lawyer should not accept new clients if workload prevents lawyer from providing competent and diligent representation to existing clients).

sector bar on a ‘one-shot’ basis.” *Id.* Notably, the Court recognized the judicial branch’s limitations and the proper role of the Legislature, *id.* at 1136 (“it is not the function of this Court to decide what constitutes adequate funding and then order the legislature to appropriate such an amount”), but – as both the Legislature and the Court have done on prior occasions when their separate powers are brought to bear on a systemic problem – *suggested* a pragmatic solution:

The legislature is best able to address this emergency situation. The legislature, therefore, *should* appropriate sufficient funds so that private counsel may be appointed to brief and pursue these appeals forthwith.

Id. at 1138-39 (emphasis added).⁶

⁶ The Court expressly recognized *both* its duty to act “in the absence of appropriate legislative action,” because it is then “the responsibility of the courts to do so,” *and* that it is the Legislature’s prerogative to appropriate funds. *Id.* at 1139. But the Court, in no uncertain terms, “advise[d] the legislature” that a failure to appropriate funds for the emergency appointments would require the courts to consider habeas corpus applications by indigent defendants whose appeals could not be heard due to the public defender’s excessive caseload. *Id.* An authoritative treatise has observed that the Court’s decision is “probably best understood as an all writs case,” *see, e.g., Couse v. Canal Auth.*, 209 So. 2d 865, 867-68 (Fla. 1968); Art. V, § 3(b)(7), Fla. Const., by which the Court addressed “a pressing governmental crisis.” Harry Lee Anstead, Gerald Kogan, Thomas D. Hall, & Robert Craig Waters, *The Operation and Jurisdiction of the Supreme Court of Florida*, 29 NOVA L. REV. 431, 557 (2005). Surely, hearing a motion to withdraw prompted by an unmanageably excessive caseload, as in the present case, would be well within the mainstream of the Florida courts’ jurisdiction, even if the Legislature might, as a result, be impelled to consider allocating additional funds for representation of indigent Florida citizens who are charged with crimes and face imprisonment.

B. Legislative Action or Inaction Does Not Destroy the Court's Inherent Power.

This Court, while acknowledging its respect for legislative prerogatives in matters of appropriations and lawyer compensation, *see, e.g., Metro. Dade Cnty. v. Bridges*, 402 So. 2d 411 (Fla. 1981), has been vigilant in defending the Sixth Amendment right to counsel as within the Court's proper province. For example, the Court has recognized its duty to allow private court-appointed counsel to obtain fees that exceed statutory limitations for work in exceptional and unusual cases:

[W]e must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute. In order to safeguard that individual's rights, it is our duty to firmly and unhesitatingly resolve any conflicts between the treasury and fundamental constitutional rights in favor of the latter.

* * * *

We simply cannot on the one hand instruct the bench and bar ... that "[a] perfunctory appointment of counsel without consideration of counsel's ability to fully, fairly and zealously advocate the defendant's cause is a denial of meaningful representation which will not be tolerated," and at the same time deny the courts the ability to exceed the fee limits when necessary to do justice.

Makemson v. Martin Cnty., 491 So. 2d 1109, 1113, 1114 (Fla. 1986) (citation omitted). Several years after *Makemson*, this Court – while declining to hold a fee-cap statute unconstitutional, and recognizing that it is “within the legislature’s province to appropriate funds for public purposes and resolve questions of compensation” – declared the statute “unconstitutional when applied in such a manner that curtails the court’s inherent power to secure effective, experienced counsel for the representation of indigent defendants in capital cases.” *White v.*

Bd. of Cnty. Comm'rs of Pinellas Cnty., 537 So. 2d 1376, 1379 (Fla. 1989) (citations omitted).

The Court explained: “At that point the statute impermissibly encroaches upon a sensitive area of judicial concern,” in violation of both Article II and Article V. *Id.* In elucidating the risk that arises when a lawyer is not fairly compensated, the Court precisely and cogently described the risk to clients’ rights that occurs when public defenders labor under an excessive caseload:

[T]here is a risk that the attorney may spend fewer hours than required representing the defendant or may prematurely accept a negotiated plea that is not in the best interests of the defendant. A spectre is then raised that the defendant received less than the adequate, effective representation to which he or she is entitled, the very injustice appointed counsel was intended to remedy.

Id. at 1380.

This Court applied *Makemson* and *White* to authorize fees exceeding the statutory cap for court-appointed counsel in capital clemency proceedings, notwithstanding that there is only a statutory, but not a constitutional, right to counsel for clemency, because “[t]he appointment of counsel in any setting would be meaningless without some assurance that counsel give *effective* representation.” *Remeta v. State*, 559 So. 2d 1132, 1135 (Fla. 1990) (original emphasis). And more recently, the Court, addressing amendments to fee-cap statutes that suggested a legislative intent that caps not be exceeded under any circumstances, once again authorized trial courts to award fees exceeding the caps based on extraordinary or unusual circumstances, by invoking “the courts’ inherent power to ensure adequate representation for death row inmates in postconviction challenges.” *Maas v. Olive*,

992 So. 2d 196, 203 (Fla. 2008). The Court underscored a trial court's inherent authority to ensure effective representation by counsel:

In a long line of cases, we have consistently held that statutory limits for compensation of counsel may not constitutionally be applied in a manner that would curtail the trial court's inherent authority to ensure adequate representation.

* * * *

[The] courts have authority to do things that are absolutely essential to the performance of their judicial functions. This authority emanates from the courts' constitutional powers in the Florida Constitution.

Id. at 202-04 (citations omitted). The Court thus agreed with the trial court's interpretation of the statute as permitting fees in excess of the statutory caps in extraordinary cases, and noted that, in light of this interpretation, "the statute does not violate the separation of powers doctrine." *Id.* at 204.

The Court has been equally vigilant in exercising its inherent power to ensure the effective representation by a public defender. Indeed, the public defender's "role does not differ from that of privately retained counsel," *Crist v. Fla. Ass'n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 147 (Fla. 2008) (citation omitted), such that a public defender has the same independent professional duty to provide effective and zealous representation:

[T]he basic requirement of due process in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of this professional duty in any case.

Id. (citation omitted).

This Court has underscored the supreme duty that a public defender owes each client, making clear that “lack of support by the legislature does not relieve the public defender of his legal and professional duty to safeguard each of his client’s interests and to act with reasonable diligence in the representation of his clients.” *Hatten v. State*, 561 So. 2d 562, 565 (Fla. 1990). *Amici* thus must take exception to the concurring opinion’s suggestion that “it is the natural condition of the public servants who serve clients before the judicial branch of this state” to be “over-worked and under-resourced.” *Public Defender*, 12 So. 3d at 807 (Shepherd, J., concurring). The relief sought before the trial court was not for *the Public Defender’s benefit*, but to protect Public Defender *clients* from the inexorable consequences of being represented by lawyers who simply do not have enough hours in the day to attend to their cases in a constitutionally effective manner. And this Court in *Hatten* cited Rule 4-1.3 of the Rules Regulating The Florida Bar (Diligence), in emphasizing that all attorneys “whether state-supplied or privately retained are under the professional duty not to neglect any legal matters entrusted to them.” *Id.* at 563 (citation omitted); *see Kiernan v. State*, 485 So. 2d 460, 462 (Fla. 1st DCA 1986) (courts cannot “solve the financial problems facing publicly paid attorneys,” but “[i]t is within our power, at least to some extent, to require the same standard of professional performance from publicly paid attorneys as is expected from the rest of the Bar”).⁷

⁷ This Court’s exclusive jurisdiction over lawyer discipline includes the duty “to see that the code or rules of professional responsibility” are followed. *Bammac, Inc. v. Grady*, 500 So. 2d 274, 278 (Fla. 1st DCA 1986). The Court likewise has
(continued . . .)

Finally, the concurring opinion's suggestion that there is no "judicially discoverable and manageable standard to establish what is an 'excessive caseload,'" 12 So. 3d at 807, should not give the Court pause, particularly in light of its long experience in dealing with such issues. As the United States Supreme Court recently noted, in lauding guidance offered by "authorities of every stripe," *Padilla*, 130 S.Ct. at 1482, including standards promulgated by the American Bar Association, criminal defense and public defender organizations, as well as authoritative treatises, and bar publications:

We long have recognized that "[p]revailing norms of practice as reflected in American Bar Association standards and the like ... are guides to determining what is reasonable. Although they are "only guides," and not "inexorable commands," these standards may be valuable measures of the prevailing professional norms of effective representation

*Id.*⁸

(. . . continued)

exclusive jurisdiction over the adoption of, or amendment to, the Rules Regulating The Florida Bar, including rules relating to representation that raises the spectre of a conflict of interest. *E.g.*, *The Florida Bar re: Amendments to Rules Regulating The Florida Bar*, 635 So. 2d 968, 969-70 (Fla. 1994).

⁸ And the Court turned also to the canons of professional responsibility in considering what attorney conduct might prove sufficiently egregious to justify an equitable tolling of the time limitation for federal habeas corpus petitions:

A group of teachers of legal ethics tells us that these various failures violated fundamental canons of professional responsibility, which require attorneys to perform reasonably competent legal work, to communicate with their clients, to implement clients' reasonable requests, to keep their clients informed of key developments in their cases, and never abandon a client.

Holland v. Fla., – U.S. –, 130 S. Ct. 2549, 2564 (2010).

In the end, the justiciability of the Public Defender's claim is beyond challenge, because the judiciary has a responsibility to safeguard the Sixth Amendment fundamental right to counsel and accordingly, "[t]he right asserted is within the reach of judicial protection." *Baker v. Carr*, 369 U.S. 186, 237 (1962). Simply stated, the Sixth Amendment guarantee of counsel is deserving of the protection that the trial court afforded to it.

As this Court stated, some 65 years ago, when called upon to adopt procedural rules – even before the constitutional provisions expressly setting forth such authority had been adopted:

The administration of justice is the primary function of the judiciary.... Courts have the facilities, the technical knowledge, and experience which much better equip them for this duty than the Legislature.... But there is no magic in a grant of power to prescribe rules of practice and procedure unless the bench and bar are actuated by the will to employ it. The best system that can be devised will be fruitless in the hands of a legal profession indifferent to its exercise.

Petition of Fla. State Bar Ass'n for Adoption of Rules for Practice and Procedure, 21 So. 2d 605, 608 (Fla. 1945).


The trial court's recognition of the impossibility for effective representation due to excessive caseload – and the court's refusal to be indifferent to the Sixth Amendment degradation that necessarily results from such a caseload – was a proper and necessary exercise of its judicial obligation to administer justice.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman, 14-point font, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

A handwritten signature in blue ink, appearing to read "Gloria Scherker", is written over a horizontal line.

*MIA SCHERKER*181,344,346v2 12-27-11