

THE BANALITY OF EXCESSIVE DEFENDER WORKLOAD: MANAGING THE SYSTEMIC OBSTRUCTION OF JUSTICE

BENNETT H. BRUMMER¹

© BENNETT H. BRUMMER 2009

I. Introduction	105
II. The Importance of Defender Excessive Workload and Its Societal Context	106
A. Excessive Caseload as a Reflection of Broader Societal, Systematic Failure and Complicity	110
B. The Criminal Justice System	114
C. Consequences of Defender and Other Stakeholder Fecklessness With Regard to Their Stewardship Obligations	116
D. The New Professionalism — The Banality of Evil	117
III. The Nature and Importance of the Right to Appointed Counsel	122
A. The Right to Counsel	122
B. The Constitutional Purposes and Functions Served by the Right to Counsel	125
C. The States Are Obligated to Provide the Assistance of Effective Appointed Counsel	126
IV. Courts' Stewardship of the Judicial Power	133
A. Core Judicial Functions and Inherent Power	136
B. Effective Exercise of the Courts' Administrative and Supervisory Power	141
C. Judges' Constitutional and Ethical Obligations	143

1. Public Defender, Eleventh Judicial Circuit of Florida, 1977–2009. B.A., University of Miami (1962); J.D., University of Miami School of Law (1965). The author began litigating excessive workload issues in 1978 and has been the lawyer for a party or amicus, in many of the Florida excessive workload cases decided over the last 30 years and cited in this article. The author has also served as a consultant to a number of governments and defender organizations across the United States and Latin America.

The author dedicates this article to Hogan & Hartson, L.L.P. for its extraordinary *pro bono* work on behalf of the Office of the Public Defender, Eleventh Judicial Circuit of Florida (“PD-11”) on current excessive workload representation, and particularly to Parker D. Thomson for more than 20 years of *pro bono* support of PD-11; to Public Defender Carlos J. Martinez, without whose courage our current excessive workload litigation could not have been maintained; and to John E. Morrison, Rory S. Stein and the staff of PD-11 for their contributions to this work. The author gratefully acknowledges the National Association of Criminal Defense Lawyers and the American Council of Chief Defenders for their support in the recent PD-11 excessive caseload litigation, and the members of the *St. Thomas Law Review*, especially Jonathan S. Minick, for their substantial contribution to this article.

D. Judicial (and Prosecutorial) Complicity in Obstructing the Right to Counsel	144
E. Florida Judicial Incentives and Disincentives to Addressing Excessive Caseload.....	150
F. Adopting an Inappropriate, <i>Strickland</i> -like Actual Prejudice Standard for Prospective Claims	164
G. Florida Bar Fecklessness Regarding the Right to Counsel and Defender Excessive Caseload.....	170
H. Legislative Intrusion on Judicial Functions.....	175
V. Defender Accountability for Compliance with Ethical Standards Versus Complicity in the Persistence of Excessive Caseload	181
A. Defender Self-Concept and Courage Is Crucial	184
B. Defenders Who Have Proactively Confronted the Banality of Excessive Caseload.....	189
VI. Alternatives Going Forward.....	191

I. INTRODUCTION

This article focuses on the impact of public defender² (“PD”) excessive caseload (“EC”) and related indigent defense issues on the values of professionalism, stewardship, and patriotism. It can be regarded as a sequel to my previous article, “Independent, Professional Judgment: The Essence of Freedom,” which dealt with the same fundamental values, but a wider range of topics.³

The article is intended as a reference, including recent material, in a somewhat different context from previous studies. In my experience, for the last 40 years, the normal functions of our state and local criminal justice systems (“CJS”), especially indigent defense and the right to counsel, have continued to deteriorate, despite prodigious efforts by many dedicated people and organizations. In the 1990’s, the Supreme Court of Florida dealt with a number of appellate cases, involving egregious delays for thousands of convicted defendants, where many defendants had served their prison sentences before the PD even filed the briefs to which the clients were constitutionally entitled.⁴

2. Generally, the term “public defender” or “defender” will be used to refer to any publicly-funded, indigent-defense service, whether provided through an office with attorneys on salary, contracts, or private attorneys accepting appointments. With reference to Florida, the term public defender refers to a regional, chief defender, who is an elected, state constitutional officer; assistant public defender refers to an appointed deputy. *See* FLA. STAT. § 27.50 (2009).

3. *See* Bennett H. Brummer, *Independent, Professional Judgment: The Essence of Freedom*, 10 ST. THOMAS L. REV. 607, 608 (1998).

4. *See, e.g., 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 (Fla. 1998) [hereinafter *In re Public Defender’s Certification of Conflict* 1998].

New norms at the trial level have now sunk to the point that the right to counsel for indigent people, and the system that depends on it, in Florida (and in many other jurisdictions), is a sham.⁵ As the Supreme Court of Florida has noted, “an inundated attorney may be only a little better than no attorney at all.”⁶

This article provides some societal context for the problem, followed by a brief review and analysis of: 1) the right to the effective assistance of counsel as related to excessive caseload,⁷ and 2) the powers, duties, attitudes and actions of the entities most directly involved (e.g., the courts, integrated bar, defenders and prosecutors).⁸

This article is offered as a framework for efforts to redeem professionalism, our adversarial system and individual rights, not so much through litigation, but through changing the prevailing culture of our CJS and judiciary. Reflecting my professional experience and my hope for improvement, Florida is a focus of this article. Florida has an extensive history of dealing with excessive caseload, especially through litigation. The state serves as a good example of a national problem, providing concrete examples of EC dynamics and points of departure for other jurisdictions.

II. THE IMPORTANCE OF DEFENDER EXCESSIVE WORKLOAD AND ITS SOCIETAL CONTEXT

Public defender EC is an undisputed, widely documented, chronic problem of enormous magnitude. Its importance derives from its destructive impact on the right to counsel and all the people, values, and institutions that depend on the right to counsel.

EC is defined, in commonsensical and functional terms, as a caseload or workload that may reasonably be expected to materially interfere with counsel’s ability to provide assistance to existing clients. EC means more than a heavy caseload. EC will actually or likely cause attorneys to provide

5. See Senator Jim Webb (Va.) [hereinafter Sen. Webb], *available at* http://webb.senate.gov/issuesandlegislation/Criminal_Justice_Banner.cfm (“America’s criminal justice system has deteriorated to the point that it is a national disgrace. Its irregularities and inequities cut against the notion that we are a society founded on fundamental fairness. Our failure to address this problem has caused the nation’s prisons to burst their seams with massive overcrowding, even as our neighborhoods have become more dangerous. We are wasting billions of dollars and diminishing millions of lives.”).

6. *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) [hereinafter *In re* Public Defender’s Certification of Conflict 1994].

7. See *infra* Part III (“The Nature and Importance of the Right to Appointed Counsel”).

8. See *infra* Part IV (“Courts’ Stewardship of the Judicial Power”).

substandard representation that violates constitutional, ethical and other professional norms so that what should be done cannot be done.

EC directly and deleteriously affects millions of individuals and cases in our country every year, 800,000 in Florida, and 100,000 in Miami-Dade County alone.⁹ Those cases not only seriously affect people's freedom,¹⁰ but their families and communities as well.¹¹

EC prevents the assistance of counsel guaranteed by our constitutions,¹² as well as the implementation of many other constitutional rights that depend on that right.¹³ Criminal law is rife with constitutionally critical procedures and stages; an EC will necessarily violate numerous constitutional principles.¹⁴

EC undermines the basic values of our free society.¹⁵ EC is a corrosive force far greater than any particular constitutional or ethical justice issue.¹⁶ EC has systemic impact and undermines the integrity and

9. See Florida Public Defender Association, Inc., Caseload Statistics, http://www.flpda.org/caseload_statistics.htm (last visited Oct. 28, 2009).

10. While many take comfort in the assumption that those arrested and convicted are guilty, this is simply not so. Many innocent people are convicted and sent to prison. Of course, inefficiencies in the system also result in guilty people going free. See, e.g., The Innocence Project, <http://www.innocenceproject.org/Content/351.php> (last visited Aug. 3, 2009) (There have been 241 post-conviction DNA exonerations in the United States (10 in Florida) since 1989; 17 of those inmates served time on death row. The average length of time served by exonerees is 12 years.).

11. See Todd R. Clear, *The Effects of High Imprisonment Rates on Communities*, in 37 CRIME AND JUSTICE, A REVIEW OF RESEARCH 97, 97 (Michael Tonry ed., 2006).

12. See U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."). The State of Florida also expressly provides for a constitutional right to counsel. See FLA. CONST. art. I, § 16(a) ("In all criminal prosecutions the accused . . . shall . . . have the right to . . . be heard in person, by counsel or both . . ."). The state right provides broader protection than that provided in the United States Constitution. See *id.*; see also FLA. R. CRIM. P. 3.111 (in reference to providing counsel to indigents). The constitutions of many other states also have some variation on the theme.

13. See U.S. CONST. amend. VI.

14. See *infra* Part III.

15. See Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 835 (1997).

There has never been equal justice in the courts of the United States, state or federal, but equal justice has been the most fundamental aspiration of our legal system. It represents the kind of legal system we would like to have and the kind of society we aspire to be. It has been an important goal that has challenged the legal system, the bar and society. Those responsible, however, appear to have given up on the quest for equal justice for rich and poor.

Id.

16. See *id.* "It represents the kind of legal system we would like to have and the kind of society we aspire to be. It has been an important goal that has challenged the legal system, the bar, and society." *Id.*

moral authority of the judicial system and the legal profession.¹⁷

EC is the most common, profound and destructive problem that defenders face.¹⁸ As a practical matter, this single problem eviscerates many defender operations and all of the people, institutions and fundamental values that depend on them.¹⁹ It increases prison and jail costs in the developed country that incarcerates more of its population than any other.²⁰

Ironically, the stellar importance of the right to counsel is directly proportional to the severity of the breach of that obligation, principally through defender underfunding and the attendant excessive workload.

EC is not a secret. Very extensive scholarly, media and professional attention is a testament to the magnitude of the problem. This body of work contains a wealth of ideas, citations of cases and other materials,²¹ and its contribution to this article is gratefully acknowledged. Only a small sample could be cited herein.²²

17. See NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLIGENCE OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 112 (2009) [hereinafter JUSTICE DENIED], available at http://www.soros.org/initiatives/usprograms/focus/justice/articles_publications/publications/justice_20090401/justice_20090511.pdf.

18. See *id.* at 8.

19. See *id.* at 4.

20. See Senator Jim Webb, Floor Speech to Introduce The National Criminal Justice Commission Act of 2009 (Mar. 26, 2009), available at http://webb.senate.gov/issuesandlegislation/Criminal_Justice_Banner.cfm [hereinafter Webb, Floor Speech]; see also Senator Jim Webb, *What's Wrong with Our Prisons?*, PARADE, Mar. 29, 2009, at 4; Sheila M. Murphy, *Reflections on Judicial Independence in the Criminal Justice System*, 36 HUM. RTS. 14, 15 (2009) (contrasting the U.S.'s higher rate of incarceration with China's, "Currently, the United States is the world's largest jailer."); JUSTICE DENIED, *supra* note 17, at 70 ("The PEW Center on the States recently reported that the United States now incarcerates far more people than any other country in the world.").

21. See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441, (2006), at 1-2, [hereinafter ABA Formal Op. 06-411], available at http://www.abanet.org/cpr/06_441.pdf (discussing ethical obligations of lawyers representing indigent defendants when excessive caseloads interfere with diligent representation); see U.S. DEP'T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE 2-4 (2001).

22. See, e.g., JUSTICE DENIED, *supra* note 17. This excellent, comprehensive report assesses state and local indigent defense systems, focusing on their inadequacies and available remedies. Numerous references in this article are made to the report's case studies and historical analysis; ROBERT C. BORUCHOWITZ, MALIA N. BRINK & MAUREEN DIMINO, MINOR CRIMES, MASSIVE WASTE: THE TERRIBLE TOLL OF AMERICA'S BROKEN MISDEMEANOR COURTS (2009) [hereinafter NACDL MISDEMEANOR REPORT], available at [http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/\\$FILE/Report.pdf](http://www.nacdl.org/public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf); John Eligon, *State Law to Cap Public Defenders' Caseloads, but Only in the City*, N.Y. TIMES, Apr. 5, 2009, at A19 ("Public defenders across the country have complained that large caseloads impede their ability to provide the best advocacy and damage their clients' chances of getting a fair hearing in court."); Editorial, *On Legal Defense, Cuts Indefensible*, ST. PETERSBURG TIMES, Nov. 13, 2008,

For many years, the ABA has promulgated standards requiring defenders to monitor caseloads and actively avoid EC, and implying that other stakeholders should do the same.²³ The lack of response prompted the ABA to pass a formal ethics opinion in 2006, which generally aggregated its earlier positions regarding defender ethical obligations relating to EC.²⁴

In March of this year, a California appellate court catalogued some of the significant, earlier work with particular reference to ABA Formal Opinion 06-441.²⁵ Despite the ABA's long-term efforts, the problem has continued to deteriorate. In August 2009, to more effectively implement the formal opinion, the ABA House of Delegates approved new standards focusing on EC.²⁶

Many of our state and local CJSs work so poorly, that, for the average citizen, falling into the hands of the police and the courts virtually guarantees a denial of justice and due process.²⁷ Although the problem has been the subject of broad scholarly and professional attention and some constructive decisional law, very little effective, *practical*, establishment concern has been demonstrated at the state and federal levels.²⁸

available at

<http://www.tampabay.com/opinion/editorials/article901038.ece> (“Indigent criminal defendants must be given a lawyer who has the time to represent them. Fully funding the state’s public defender offices is the best way to accomplish this constitutional duty — and declining state revenues are no excuse for abdicating that responsibility.”); Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: The ABA Ethics Committee Requires Action*, CHAMPION MAG., Dec. 2006, at 10, available at

http://www.abanet.org/legalservices/sclaid/defender/downloads/ABA_ethicsp10-22.pdf (noting “the pervasive national problem” and other useful articles and reports); Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005).

23. See *infra* note 319 and accompanying text.

24. See ABA Formal Op. 06-411, *supra* note 21, at 1 (This formal opinion, entitled “Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation,” was passed on May 13, 2006. It is based on the Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003).

25. See *In re E.S.*, 90 Cal. Rptr. 3d 564, 584 (Cal. Ct. App. 2009) (holding that jurisdictional proceedings conducted in Mendocino Superior Court were fundamentally unfair and unreliable; judgment is reversed and remanded to juvenile court with directions to conduct a new jurisdictional hearing). Review was granted on the court’s own motion and transferred to Court of Appeal, First Appellate District, Division Two. See *In re E.S.*, 93 Cal. Rptr. 3d 537 (Cal. 2009).

26. See AM. BAR ASS’N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS (2009), at 24–25 [hereinafter EIGHT GUIDELINES], available at http://www.abanet.org/legalservices/sclaid/defender/downloads/sclaid_revised_rpt_119_eight_guidelines.pdf.

27. See JUSTICE DENIED, *supra* note 17, at 111–12.

28. See EIGHT GUIDELINES, *supra* note 26, at 25.

This situation could not arise and persist without the active and conscious dereliction of stewardship obligations by state and federal governments and criminal justice stakeholders.²⁹

Few individuals or institutions take EC and its related problems seriously as a practical matter — not the funders, who create the problem through underfunding and overuse of the CJS; not the PDs who, along with their clients, bear the primary burden of the problems; not the other criminal justice stakeholders, such as judges and prosecutors, who condone the situation, although they are adversely affected by it (in constitutional and ethical terms).³⁰

Despite their awareness of the problem and their sworn constitutional and ethical obligations, PDs, judges, prosecutors and funders fail to use their available institutional powers to fulfill their professional and institutional duties and obligations. These stakeholders condone and even promote the systemic obstruction of justice, through malfeasance, misfeasance and nonfeasance relating to the right to counsel.

A. EXCESSIVE CASELOAD AS A REFLECTION OF BROADER SOCIETAL, SYSTEMIC FAILURE AND COMPLICITY

Despite our many expressions of commitment and self-satisfaction, we have witnessed a broad-based decline in American freedom, fairness, integrity, moral authority, respect and competence.

Our CJS is an integral part of an interdependent web of societal systems and institutions. These crucial systems define who we are, who we will become, and how we value and are valued by the rest of the world.³¹

29. See *infra* notes 40–100 and accompanying text.

30. The following are examples of statements by a responsible judge and prosecutor, recognizing the dependence of the other CJS stakeholders on reasonable funding and workloads for defenders: “‘This is so important to all of us in the justice system,’ said Judge Lippman, who was instrumental in ensuring the legislation’s passage. ‘This affects what judges do in the courtroom every day. We can’t do our jobs unless you have the two key players — the prosecution and the defense — on a level playing field.’” See Eligon, *supra* note 22 (regarding state law establishing maximum defender workload in New York City); see also Adam Gorlick, *Cases Pile Up as Public Defenders are Stung by Budget Cuts*, STANFORD REP., Apr. 1, 2009, available at

<http://news.stanford.edu/news/2009/april8/indigent-public-defenders-budget-cuts-040809.html>. The King County Washington prosecutor’s senior deputy, Erin Becker, recently recognized the impact of defender underfunding on her office: “Becker said crime victims are waiting longer for resolution of their cases because defendants aren’t getting their day in court anytime soon. ‘If public defenders are not adequately funded, our caseload backs up and we’re not bringing justice,’ she said.” *Id.*

31. See Shirley Ann Jackson, Ph.D., President, Rensselaer Polytechnic Institute, *Falling Short in Producing American Scientific and Technical Talent*, <http://www.rpi.edu/homepage/quietcrisis/index.html> (last visited Aug. 11, 2009). Recently, the

Our free society depends on them.

Our legal system has traditionally defined itself in terms of basic values, such as the rule of law, an independent judiciary with an independent bar, and a meaningful adversarial system. The rule of law is an essential part of our American societal infrastructure.³² The rule of law is the key to our moral authority, the democratic values that are accepted domestically and that we export successfully, in varying degrees and forms, internationally.³³ Courts and the decisions they make will be respected only to the degree that they are perceived as being dedicated to fairness. Judicial moral authority, which is an integral part of the rule of law, depends on litigants having their day in court, especially a fair opportunity to be heard.

The same set of values, perspectives and consequences unfolding in the disgraceful meltdown of our political and financial systems are, not surprisingly, eroding our legal system. At their root, they involve:

- The failure of accountability and self-regulation (e.g., apathy and an unwillingness to do the right thing, to enforce stated values and principles), and
- Monied interests (and interest in money) prevailing over the common good, and regulators asleep at the switch.

The lack of accountability in the judicial system is similar to that in the financial system. Of course, lawyers play a key role in both systems, but the role of lawyers is predominant in the judicial branch. It is dangerous to traitorously plan to “kill all the lawyers.”³⁴ It is much more dangerous for those in the establishment, to whom the stewardship of the judicial system and our free society is entrusted, to transform lawyer-stakeholders in our CJS into ethical zombies and bureaucrats.

When huge financial institutions threatened to implode, some were deemed too big to fail and, at least for a while, became zombie banks, not

President of Rensselaer Polytechnic Institute wrote about a “quiet crisis” that has been “building in the United States a crisis that could jeopardize the nation’s pre-eminence and well-being.” *Id.* She was speaking about our failure to produce the necessary scientists and other technically skilled workers. But, the quiet crisis is broad and recursive. In criminal justice, the threat to our well-being and leadership is not the lack of trained personnel, but the deterioration of democratic principles and institutions, and the concomitant erosion of meaningful access to justice.

32. See Guillermo O’Donnell, *Why the Rule of Law Matters*, 15.4 JOURNAL OF DEMOCRACY 32 (2004).

33. See Internet Modern History Sourcebook, Simon de Bolivar: Message to Congress of Angostura 1819, <http://www.fordham.edu/halsall/mod/1819Bolivar.html> (last visited Nov. 1, 2009) [hereinafter Internet Modern History Sourcebook]. “[P]roper morals, and not force, are the bases of law; and . . . to practice justice is to practice liberty.” *Id.*

34. See WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2. “The first thing we do, let’s kill all the lawyers.” *Id.*

quite alive and not quite dead. A similar gangrenous process is eating our judicial system. Because constitutionally it is too big to fail, it is being reduced to a zombie adjudication process, with zombie stakeholders, including PD offices.

We all know what happens “where there is no vision.”³⁵ As Simón Bolívar, a liberator of his people, noted: “[A]n ignorant people is the blind instrument of its own destruction.”³⁶ We are living through the judicial equivalent of blind trust in the integrity and efficacy of markets to correct themselves as conditions spin out of control.

No one rings a bell when our justice system is no longer worthy of its name. The process may move faster or slower, but the quality within the system has been steadily reduced or eliminated. This lack of quality is being accepted as normal.

It is easy for outside observers to overestimate the quality of the adjudicatory process. Many people base their opinions on television shows about the CJS. They often believe that if the quality were significantly diminished, a visible disruption will occur or the system will come to a grinding halt.³⁷ In my experience, this belief is baseless. As the quality is diminished, the system will not be visibly disrupted, halt or collapse. It will continue to operate as a fast-moving conveyor belt, with continually deteriorating quality, reliability and legitimacy. Rapidly closing cases is a key goal of judicial administrators, but, often, it is a reliable indicator of a system running roughshod over individuals’ rights.

“Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard for the charter of its own existence.”³⁸ As James Madison said, “[T]here are more instances of the

35. *Proverbs* 29:18 (King James). “Where there is no vision, the people perish: but he that keepeth the law, happy is he.” *Id.*

36. See Internet Modern History Sourcebook, *supra* note 33.

37. See Connie L. McNeely, *Perceptions of the Criminal Justice System: Television Imagery and Public Knowledge in the United States*, 3 J. CRIM. JUST. & POPULAR CULTURE 1, 3 (1995). *Cf. id.* at 5 (noting how television programs form a cultural representation of the criminal justice system and provide the public with impressions and information (and misinformation) about the criminal justice system). United States Attorney General Eric Holder recently noted, “I want to emphasize education because I believe that if more Americans knew more about how some of their fellow citizens experience the criminal justice system, they would be shocked and angered.” *Remarks as Prepared for Delivery by Attorney General Eric Holder at the Brennan Center for Justice Legacy Awards Dinner*, PR NEWSWIRE, Nov. 16, 2009, available at <http://www.prnewswire.com/news-releases/remarks-as-prepared-for-delivery-by-attorney-general-eric-holder-at-the-brennan-center-for-justice-legacy-awards-dinner-70247422.html> [hereinafter *Remarks by Eric Holder*].

38. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961); see also *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (“If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.”).

abridgement of the freedom of the people by the gradual and silent encroachment of those in power, than by violent and sudden usurpation.”³⁹

There is no objective means of rating or evaluating the judiciary or the CJS. A cacophony of opinions from myriad sources obscures the issue of quality, especially the quality of judicial processes and outcomes. Emotionalism, short-sightedness, and anecdotal policymaking are the norm.⁴⁰ Assessments are often politically motivated (e.g., legislative and public attacks on the courts, and legislative and judicial attacks on defenders attempting to deal with EC).⁴¹

CJS stakeholders have many incentives to put on a good face.⁴² Forced to deal with more work with fewer resources, each local stakeholder will accommodate by using its broad, institutional discretion to ease its workload and rationalize the processes and outcomes, often by reducing quality.⁴³

Some may ask, given this complexity, “What is government supposed to do?” At a minimum, our courts must ensure meaningful implementation of constitutional standards, especially those, like the right to the assistance of counsel, expressly stated in our constitutions. Our legitimacy, as well as our survival as a free nation, depends on reducing the chasm between our stated and operational values.⁴⁴

The systemic failure is so glaring that the authors of *Justice Denied* begin their recommendations begging for CJS stakeholder accountability by stating:

Our recommendations begin, therefore, with the fervent request that those responsible for assuring that defense services are provided do what is necessary to make sure that the right to counsel is honored. This means that legislators must appropriate sufficient funds for indigent defense and that judges and prosecutors must discharge their duties in compliance with decisions of the United States Supreme

39. JAMES MADISON, AN ADDRESS TO THE COMMONWEALTH OF VIRGINIA ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1788), *reprinted in* THE DEBATES IN THE SEVERAL STATE CONVENTIONS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 87 (Jonathan Elliot 2d ed., Burt Franklin 1888) (1891).

40. *See* Murphy, *supra* note 20, at 14.

41. *See infra* Parts IV.D (“Judicial (and Prosecutorial) Complicity in Obstructing the Right to Counsel”), IV.H (“Legislative Intrusion on Judicial Functions”).

42. *But see* Remarks by Eric Holder, *supra* note 37. “Even when counsel is appointed the appointment is oftentimes not meaningful, not truly effective.” *Id.*

43. *See* JUSTICE DENIED, *supra* note 17, at 60.

44. *Cf.* Mapp v. Ohio, 367 U.S. 643, 659 (1961) (“[n]othing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.”).

Court and their ethical responsibilities.⁴⁵

We attorneys have a great deal of power to determine who we are, as well as what will happen to our clients and the society we live and work within. Having a place of privilege and power, we have the moral obligation to say, *enough!* To paraphrase Hillel, if not us, who, if not now, when?

B. THE CRIMINAL JUSTICE SYSTEM

While the stakeholders are stewards of our democratic freedoms and the constitutional processes designed to maintain those freedoms, the CJS is not self-policing. Enormous discretion is broadly diffused among the various stakeholders, but the CJS is self-organizing. No one manages the CJS; it depends on meaningful checks and balances, including an effective defense function, for its sustainability and legitimacy.

Defenders are traditionally the lowest stakeholders on the judicial totem pole (although a number of executive stakeholders, like corrections, mental health or juvenile services, may be lower). We are crucial to the proper functioning of the judicial branch and, even in the worst case, for the constitutional disposition of cases.

Within the CJS, defender EC is a problem of immense proportion and devastating consequence.⁴⁶ Compromising the defense function compromises the entire justice system. ECs are inherently destructive of constitutional and professional standards of all of the stakeholders, including the judges and prosecutors, as well as defenders. Defender ECs have a deleterious impact on all stakeholders and impair their ability to perform their functions in a professional manner. Thus, EC is not just a defender problem. It destroys not only the legitimacy and reliability of the defense function, but of our entire CJS.

EC is a societal and CJS problem and a reflection of broader systemic problems. PD underfunding is just one obvious contributing factor.

Defender EC or relative underfunding is, in part, a symptom of systemic bloat, of over-reliance on the CJS. When legislators decide *there oughta be a law*, too often they mean a new criminal law or an increased criminal sanction. The CJS is used as the dumpster to collect the failures of various social entities and systems (e.g., families, communities, religious organizations, and educational and health care systems).

The result, over time, has been a mindless expansion of the CJS, to a

45. JUSTICE DENIED, *supra* note 17, at 183.

46. *Id.* at 65.

large extent unrelated to improvement in public safety.⁴⁷ Two elements relate directly to EC. First is that the unbalanced funding of law enforcement on the front end of the system and prisons on the back end leave the court system and, especially, the defenders underfunded.⁴⁸ Second is that sanctions and penalties have been dramatically increased and complicated.⁴⁹ Sentencing has become a counterproductive, alphabet soup of sentencing enhancements and restrictions on judicial discretion and individualized penalties.⁵⁰ This unduly increases defender workload, as well as prison costs.

The legislature has irresponsibly shifted enormous responsibility to the CJS to deal with a wide range of serious societal problems, while starving the system of the resources necessary for it to be reasonably effective. Extremely significant and sensitive matters (e.g., drunk driving and domestic violence cases) are routinely disposed of with a few minutes' attention. One systemic way to address EC is through less profligate reliance on criminal processes and sanctions. Instead, greater emphasis should be placed on strengthening and relying upon civil systems, focusing on education and health care, especially substance abuse and mental health.

We must conduct a rational cost-benefit analysis of the money spent in the CJS. Virginia Senator Jim Webb has introduced a bill, The National

47. See Adam Liptak, *In the Supreme Court Spotlight, Challenges to Criminal Justice*, N.Y. TIMES, Nov. 24, 2009, at A1 (“The problem of overcriminalization is truly one of those issues upon which a wide variety of constituencies can agree,” [former U.S. Attorney General] Thornburgh said”).

48. See National Criminal Justice Reference Service, <http://www.ncjrs.gov/fedgrant.html> (last visited Oct. 27, 2009). On February 17, 2009, the President signed into law the American Recovery and Reinvestment Act of 2009 (H.R. 1, Recovery Act), which includes more than \$4 billion for state and local law enforcement and other criminal and juvenile justice activities.” *Id.*; see also Carol Marbin Miller, *Biden Brings Bucks for Police*, MIAMI HERALD, Mar. 7, 2009, at B1 (pointing out that \$135 million from the stimulus package will go to fund Florida law enforcement). This is the traditional federal and state approach to funding by various administrations. *Cf. id.* (outlining how the stimulus money will be allocated to different law enforcement agencies within Florida).

49. See JUSTICE DENIED, *supra* note 17, at 71.

50. See Grover G. Norquist, President, Americans for Tax Reform, Statement to Subcommittee on Crime, Terrorism, and Homeland Security House Committee on the Judiciary (July 14, 2009) (opposing mandatory minimums which he states had found support from both liberals and conservatives, but which transfers power to prosecutors through their control of charging decisions, is “prohibitively expensive” and the “wrong solution”); see also Sentencingproject.org, www.sentencingproject.org/template/index.cfm (last visited Oct. 27, 2009). There are currently over five million people either incarcerated, on parole, or on probation in the United States (around 440,000 in Florida). *Id.* Changes in sentencing law and policy, not increases in crime rates, explain most of the six-fold increase in the national prison population. *Id.* These changes have significantly impacted racial disparities in sentencing, as well as increased the use of “one size fits all” mandatory minimum sentences that allow little consideration for individual characteristics. *Id.*

Criminal Justice Commission Act of 2009, to create a blue-ribbon commission to review every aspect of our CJS with an eye toward reshaping the entire process.⁵¹ The senator has called for “a much-needed and long overdue restructuring of how we address the issue of crime in this country.”⁵² Our policy makers must learn to live within our means and take a more balanced approach.⁵³

C. CONSEQUENCES OF DEFENDER AND OTHER STAKEHOLDER FECKLESSNESS WITH REGARD TO THEIR STEWARDSHIP OBLIGATIONS

The deterioration of the CJS and the development of defender EC are chronic and long-term.⁵⁴ All CJS stakeholders have been complicit in the development of defender EC, including the integrated bar in Florida. When defender clients act improperly on a small scale, society can be quick to react punitively. But when the CJS stakeholders, including the legislature, systemically and chronically violate the Sixth Amendment right to counsel on a mammoth scale, this is not regarded as obstruction of justice, but as business as usual.⁵⁵

51. See Sen. Webb, *supra* note 5.

52. See Webb, Floor Speech, *supra* note 20; Jim Webb, *What's Wrong with Our Prisons?*, PARADE, Mar. 29 2009, at 4; see also Glenn Greenwald, *Jim Webb's Courage v. The 'Pragmatism' Excuse For Politicians*, SALON, Mar. 28, 2009, <http://www.salon.com/opinion/greenwald/2009/03/28/webb/index.html>.

53. See, e.g., Nicholas D. Kristoff, *Priority Test: Health Care or Prisons*, N.Y. TIMES, Aug. 20, 2009, at A23 (discussing irrational incarceration policy and noting the “overinvesting in prisons and underinvesting in schools”); David Ovalle, *Sunpass Toll Tickets Clog Miami-Dade Traffic Court*, MIAMI HERALD, June 8, 2009, <http://www.miamiherald.com/news/top-stories/v-fullstory/story/1085454.html>.

54. See *Public Defenders Form Association*, FLORIDA TIMES UNION, July 3, 1963 (The very first meeting of the Florida Public Defender Association (“FPDA”) in 1963 dealt with the failure of the Florida Legislature to appropriate adequate funds.). In 1976, Florida Governor’s Commission on Criminal Justice Standards and Goals, Courts Task Force (1976) [hereinafter Florida Governor’s Commission (1976)], recommended priority emphasis for the adoption of maximum public defender workload standards to be implemented that fiscal year. See Standard 10.13, Workload of Public Defenders. In 1990, the Supreme Court of Florida observed that the state has provided “woefully inadequate funding of the public defenders’ offices, despite repeated appeals to the legislature for assistance.” *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1132 (Fla. 1990). In 1993, the commissioner appointed by the Second District Court of Appeal noted that he had been “given a statewide view of the overall workload problem” and that “[g]enerally, the workload/caseload demands on the Public Defenders in Florida are extremely high.” *In re Certification of Conflict in Motions to Withdraw Filed by Pub. Defender of the Tenth Judicial Circuit*, 636 So. 2d 18, 25 (Fla. 1994).

55. See William Ecenbarger, *Judges Hear Results of Luzerne Corruption: In the Bribe Scandal, Youths Without Lawyers Were Ushered to Jail, a Panel was Told. Nobody Challenged It*, THE INQUIRER, Dec. 8, 2009, available at http://www.philly.com/philly/news/homepage/20091208_Judges_hear_results_of_Luzerne_corruption.html

The resulting deterioration is well recognized by judges, prosecutors and defenders alike.⁵⁶ We bemoan it and commiserate with each other in private. We do little or nothing to comply with our constitutional and professional stewardship obligations in a public and meaningful way.

Despite a few expressions of outrage, proclamations of the need for better funding and a great deal of apathy, the stakeholders' public posture is generally one of self-satisfaction, even arrogance. Despite a striking lack of quality, we generally are, complacently and callously, content to assert that we're doing a *heckuva job*.

Unaddressed EC issues undermine fundamental values relating to leadership, management, political power and professionalism. When the judicial and CJSs cannot meet constitutional or ethical standards, the question of professionalism is moot. These questions are particularly important because, as discussed above, they transcend institutional, jurisdictional and organizational lines.

D. THE NEW PROFESSIONALISM — THE BANALITY OF EVIL

Sound, systemic management can avoid EC conflicts of interest. Common sense, as well as constitutional and professional principles, requires that EC problems be avoided by adequate funding and planning that anticipates problems and handles those that arise in a professional and cost-effective manner.

EC problems are simply a reflection of inadequate defender resources relative to workload. Additional attorney time (and additional funding) will be at the core of any meaningful EC remedy; only the structure and timing of the additional resources is in question.

Legislative neglect is only the beginning of the problem. EC problems could not have grown to this magnitude and defenders be this passive without powerful disincentives in our individual and institutional cultures to even recognize the problem, let alone to respond morally, professionally and patriotically to it.

Relative to the magnitude of the problem, there has been little discussion of these systemic dynamics.⁵⁷ An analysis may help shed some

(demonstrating complicity of prosecutors and defenders in illegal judicial conduct) (last visited Dec. 10, 2009).

56. See Sanjay K. Chhablani, *Chronically Stricken: A Continuing Legacy of Ineffective Assistance of Counsel*, 28 ST. LOUIS U. PUB. L. REV. 351, 390 (2009) (noting the complicity of defense attorneys and, in particular, the courts in undermining the right to counsel, and documenting the awareness of a number of Supreme Court Justices "of the role of inadequate representation has played in the cases where innocent persons have been convicted").

57. See Harvard Law Review Association, *Gideon's Promise Unfulfilled: The Need for*

light on the forces at play, and lead to a greater appreciation of the significance and complexity of the problem. Sunlight alone is not likely to be a sufficient disinfectant, but such an evaluation may be useful in developing a more effective, strategic approach.

Professions are, ostensibly, largely self-policing. This is particularly true of lawyers.⁵⁸ Professionals and their affiliated institutions are, therefore, morally (as well as professionally) accountable. The systemic failure to address excessive defender workload is a failure of stakeholder, professional self-regulation, which encourages all those involved to tolerate the intolerable and accept it as normal. All of the CJS stakeholders in most jurisdictions where this problem persists are complicit in subjecting Justice and constitutional principles to Procrustes' bed.⁵⁹

When a lack of accountability, discipline and enforcement of stated values allow defender EC to arise, the consequences are profound and far-reaching. Professionalism becomes impossible. The legitimacy of the CJS is destroyed. It also promotes dangerous role models and standards of normalcy, especially for younger professionals entering the system or changing roles within it. These values and processes become recursively ingrained; successive generations learn to lower their own personal expectations of professional behavior to meet the established norms.

EC destroys the moral authority of the stakeholders and creates a valid excuse for noncompliance with a wide range of administrative or professional policy. Attempting to enforce proper standards and policies becomes hypocritical and destructive. Similar principles apply to grievance committees operated by the organized bar in Florida, theoretically to enforce minimum, ethical standards.

The top managers of the CJS stakeholders, including defender organizations, must provide leadership to improve the standards we regard as normal. "Normal" is, too often, a function of dereliction of duty by the CJS stakeholders, who exercise their judgment in ways that routinely lower the floor and the ceiling of courthouse operations.

Although the judges, lawyers and the lawyer-supervisors are all lawyers who have personally committed themselves to constitutional and

Litigated Reform of Indigent Defense, 113 HARV. L. REV. 2062, 2064 (2000).

58. See *infra* Part IV ("Courts' Stewardship of the Judicial Power").

59. THOMAS BULFINCH, MYTHS OF GREECE AND ROME 181 (Penguin Books 1981) (1979). Procrustes was a mythical Greek evildoer, who made travelers fit his bed, by stretching the short ones and lopping off the limbs of the tall ones. *Id.* A Procrustean approach is the undesirable practice of tailoring outcomes to fit an arbitrary or preconceived measure or limit (e.g. a time limit or budget). See *id.*; see also Laura I. Appleman, *The Ethics of Indigent Criminal Representation: Has New York Failed the Promise of Gideon?*, 16 NO. 4 PROF. LAW. 2, 19 (2005) (discussing mockery of the constitutional right to basic legal representation).

ethical standards, most give precedence to their jobs consistent with these norms and with getting along.⁶⁰ Regardless of the uncomfortable parallels, they would not conceive of their professional careers as the banality of evil.⁶¹ Many judges and lawyers, wittingly or unwittingly, routinely undermine the basic values of our CJS, which manifests the power of the state against the individual and defines “freedom” in “the land of the free.” The system rewards incompetence and a lack of integrity of this sort, and creates significant disincentives for those who might contemplate making waves.⁶²

On another level, as human beings, we tend to be myopic. We fail to appreciate the majesty of the law and the significance of our stewardship obligations. The criminal courts are not the stakeholders’ personal workshop, where we can do what we want, or whatever is expedient, with impunity. Our concept of the courts as our workshop and our profession as the means of our livelihood are cavalier. They rarely impose upon us the obligation of institutional stewardship, the difficult work of maintaining and preserving these institutions — in a way that permits them to fulfill their function as bulwarks of our democratic freedoms — and, in doing so, to earn respect from other CJS stakeholders and the public.⁶³

60. See Lefstein & Vagenas, *supra* note 22, at 14–15.

61. See HANNAH ARENDT, *EICHMANN IN JERUSALEM: A REPORT ON THE BANALITY OF EVIL* 252 (Penguin Books 2006) (coining the phrase “banality of evil”). Regardless of its validity, her thesis regarding the Holocaust was that unspeakable acts become normalized and routine and are accepted by ordinary people as “the way things are done.” *Id.* The thesis is that the great evils in history generally, and the Holocaust in particular, were not executed only by fanatics or sociopaths, but by ordinary people who accepted the premises of their state and therefore participated with the comforting thought that their actions were normal. *Id.*

“The banality of evil” can aptly be applied to many defenders (as well as prosecutors, judges and funders), the stewards of our free society. We do our quotidian government jobs in our judicial workshop, serving as the gatekeepers of our prisons and death rows for countless people. In the most egregious circumstances, we are normal people, accepting the values of our state, in a manner reminiscent of the normal people who, every day, did their normal jobs as engineers running the trains to the concentration camps. My emphasis here is not on intentional, extraordinary atrocities. To the contrary, my focus is on the ordinary, on the banality of serious constitutional violations. The acceptance of these violations as normal is directly proportional to the silent encroachment on our freedom that Madison warned us about.

62. See discussion *infra* Part IV.D (“Judicial (and Prosecutorial) Complicity in Obstructing the Right to Counsel”); see also discussion *infra* Part IV.H (“Legislative Intrusion on Judicial Functions”).

63. See Jan Pudlow, *Rules Panel Wants Representation at First Appearances*, FLORIDA BAR NEWS, Aug. 1, 2008, available at <http://www.floridabar.org/DIVCOM/JN/jnnews01.nsf/8c9f13012b96736985256aa900624829/b69cf9b531a2e4cc8525748e004ccca8?OpenDocument> (discussing the more general, traditional banality of our process, without the complications of EC, which was mentioned at a recent bar committee). “Jail is an awful place. I’m reminded of that uniquely every time I take my students there on a tour. The looks on their faces. . . Chesterton wrote that we get too used to it; that all we see is the prisoner in the dock . . . the ‘usual man in the usual place,’ [committee chairman]

All of the CJS stakeholders, not just PDs, have sworn to uphold the Constitution, including the Sixth Amendment.⁶⁴ The prosecutors and judges have taken the oaths of attorneys in addition to those of government officials to uphold the Constitution.⁶⁵

Despite these oaths, many defenders, judges, and prosecutors are complicit in reducing their own constitutional functions and professional status to those of bureaucrats, or worse, mindless processors of people and paper. They are well aware of the EC,⁶⁶ so one might expect the judges and prosecutors to evaluate and seek to alleviate defender EC, or, at least, formally support defenders when they seek to address this problem. Their frequent failure to do so promotes the decline of all elements of the CJS and the societal values the system is intended to promote, including the constitutional values we have sworn to uphold.

If we defenders continue to accept excessive workloads, our actions undermine the fundamental purpose and justification for our existence, vitiate professional standards, and give credence to the falsehood that we are adequately funded.

Defender workload is not the only workload that must be controlled. It is important to focus on the caseloads of all of the CJS stakeholders, including prosecutors, judges and court-appointed attorneys.

Few have focused on the EC of prosecutors and their failure to honor their ethical obligations. Although the state may be entitled to have as poor representation as it cares to, overburdened prosecutors have a deleterious impact on the other stakeholders in the CJS (including defenders, victims, judges, police and corrections officers) and the public.⁶⁷

Fingerhut said.” *Id.*

64. *See, e.g.*, FLA. CONST. art. II, § 5(b) (referring to public officers’ required affirmation before taking office).

65. *See infra* Part IV.C (“Judges’ Constitutional and Ethical Obligations”); *Duncan v. State*, 284 Mich. App. 246, *98 (Mich. App. June 11, 2009) (citing *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008); *Marbury v. Madison*, 5 US (1 Cranch) 137, 177–80 (1803)) (regarding judges’ obligations).

66. *See* Pudlow, *supra* note 63.

67. Order Granting in Part and Denying in Part Public Defender’s Motion to Appoint Other counsel in Unappointed Non-Capital Felony Cases, *Florida v. Loveridge, et. al.* (Case No. 08-14), available at http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf [hereinafter *Blake Order*]. After noting the impact of budget reductions on Florida’s prosecutors, Judge Stanford Blake expressly addressed the prosecutors’ ethical obligations:

From this Court’s daily perspective, the assistant state attorneys in the Eleventh Judicial Circuit also have extreme caseloads. If the budgetary problems facing the criminal justice system are not addressed by the legislature, the hard working prosecutors may unwittingly find themselves in violation of the Florida Rules of Professional Conduct that governs every lawyer in the State of Florida. With some assistant state attorneys handling up to 300 cases in the Eleventh Judicial Circuit, in spite of hard work and dedication by these attorneys, it is not a stretch to realize that

As indicated by Circuit Judge Stanford Blake,⁶⁸ who presided over the recent trial proceedings relating to PD-11 EC, the lack of external attention to prosecutors is due, in part, to their ability to control their workload by exercising virtually unreviewable discretion to decline to prosecute or dispose of cases.⁶⁹ This discretion is sometimes exercised visibly, as a matter of policy, or less visibly, through the application of prosecutorial independent, professional judgment.⁷⁰ When prosecutors file cases, they retain the power to dismiss them or dispose of them through plea bargaining. In addition to declining to prosecute individual cases, some prosecutors reduce their workload, limiting the types of cases they accept by establishing criteria more stringent than those set forth in statutes.⁷¹ The decision to decline to prosecute may temporarily reduce defender workload, but prosecutors are generally better funded and have greater capacity than defenders. Also, this prosecutorial decision, if public, demonstrates to businesses that a problem exists and that the businesses have an interest in helping to resolve the problem, especially with regard to burglary, larceny and worthless check crimes.

Defenders generally do not determine their own caseload.⁷² They lack any similar leverage, except with regard to jail costs that affect local government. While exercising their informal, often opaque, discretion to control their workload, some prosecutors decry as an unfair advantage the formal and public efforts of defenders to control their own workload by seeking judicial relief.⁷³

some victims of crimes of Miami-Dade County are not receiving the attention to their case they deserve. At some point in time, the State Attorney's Office, due to lack of funding, excessive caseloads and the loss of attorneys, may have to decide what cases they can prosecute and which ones they will be unable to handle.

Id. (Although the prosecutor has suffered additional budget cuts since then, she has not found it advisable to formally and transparently address this conflict with professional standards).

68. *Id.* Pleadings and materials relating to the recent PD-11 EC trial and appellate litigation are available at: http://pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm.

69. See Blake Order, *supra* note 67, at n.1.

70. See Jesse McKinley, *Money Shortage Forces Cut in Cases to Be Prosecuted*, N.Y. TIMES, May 9, 2009, at A13 (generally reflecting prosecutorial discretion to reduce the types of cases prosecuted or to threaten to due to lack of money). "The notion that we prosecute all crimes for which we have probable cause is absurd." *Id.* (statement of Robert Weisberg, director of the Stanford Criminal Justice Center).

71. See, for example, the King County, Washington district attorney declines to prosecute cases that do not meet increased dollar thresholds for crimes like shoplifting and larceny than the statutes establish for those crimes. "Erin Becker, the senior deputy prosecutor for King County, Wash., said her office is not pursuing some minor drug and theft cases because there aren't enough public defenders to handle them." Gorlick, *supra* note 30.

72. *Id.* (reporting that district attorneys may decline to prosecute cases in an effort to relieve the caseload of public defenders).

73. See, e.g., Susannah A. Nesmith, *Attorneys for Dade's Poor Vow to Spurn Most Felony Cases*, MIAMI HERALD, June 03, 2008, at A1, available at

The Miami-Dade County prosecutor derided PD-11's recent efforts to deal with its EC problem, calling the position "too absurd."⁷⁴ At the hearing before Judge Blake, the prosecutor's position was that maximum caseload standards should not apply to cases from arrest to arraignment because PD-11 did so little work on them.⁷⁵ On the other hand, PD-11 saw the lack of such representation as evidence of the workload being excessive.⁷⁶

III. THE NATURE AND IMPORTANCE OF THE RIGHT TO APPOINTED COUNSEL

A. THE RIGHT TO COUNSEL

The right of an accused to be assisted by counsel is among our most fundamental rights and is expressly reflected in our Bill of Rights and the Florida Constitution.⁷⁷ The right's constitutional range as well as the procedures and other rights that it implicates have greatly expanded over time.⁷⁸

The right to counsel is not self-executing or self-enforcing.⁷⁹ It is a reflection of our politics, including the basic values and aspirations of our society. Judicial acknowledgment of the right of an indigent to state-funded representation can be found more than 150 years ago, 78 years after the founding of our nation.⁸⁰

<http://www.nlada.org/DMS/Documents/1212499257.33/555857.html>.

74. See *id.* Also, the general counsel for the Florida Prosecuting Attorneys Association said, "I hope the public defender will reconsider what we consider to be a rash action. They ought to work within the system rather than manufacture what we consider an unnecessary crisis." *Id.*

75. Blake Order, *supra* note 67, at 5.

76. *Id.* at 3-4.

77. See U.S. CONST. amend. VI; FLA. CONST. art. I, § 16(a); see also *supra* note 12 and accompanying text.

78. See JUSTICE DENIED, *supra* note 17, at 18 ("The U.S. Constitution and the Supreme Court"), for an excellent, concise history of the Sixth Amendment. See *id.* at 27 ("Waiver of the Right to Counsel") for a summary regarding waiver. See Duncan, B., Underlying Constitutional Principles, at 5-8, for a summary of the right to counsel generally, the right to effective counsel, the right to counsel at critical stages of the proceedings including pretrial stages, and ineffective assistance of counsel claims in criminal appellate proceedings.

79. See JUSTICE DENIED, *supra* note 17, at 18-20.

80. See *Webb v. Baird*, 6 Ind. 11, 16 (Ind. 1854) (holding that counsel must be provided to a destitute defendant). The *Webb* Court stated:

But that the services rendered by Baird [the defense attorney] were necessary to be rendered by some attorney, will scarcely admit of argument. It is not to be thought of, in a civilized community, for a moment, that any citizen put in jeopardy of life or liberty, should be debarred of counsel because he was too poor to employ such aid. No Court could be respected, or respect itself, to sit and hear such a trial. The defense

The exercise of a wide range of constitutional rights of individuals is directly implicated by the right to counsel.⁸¹ Among these are a number of rights that the accused has the right to personally decide whether to exercise or waive.⁸² The accused is entitled to the assistance of counsel in personally making these decisions, but counsel has no authority to contravene those decisions.⁸³ The accused personally has the right to: plead guilty or go to trial,⁸⁴ demand a jury trial,⁸⁵ testify on their own behalf,⁸⁶ decide whether they will represent themselves,⁸⁷ preclude counsel from raising an insanity defense,⁸⁸ waive jury instructions on lesser included offenses in capital trials,⁸⁹ discharge a privately hired attorney.⁹⁰ The

of the poor, in such cases, is a duty resting somewhere, which will be at once conceded as essential to the accused, to the Court, and to the public.

Id. at 15.

81. See, for example, due process, equal protection, access to courts, the presumption of innocence, a determination of probable cause to be detained, reasonable conditions of pretrial release, speedy trial, jury trial, present witnesses, adduce evidence, confront witnesses and cross-examine them, testify on one's own behalf, invoke the right against self-incrimination, other Fifth and Sixth Amendment elements, and the right to appeal.

82. See *Jones v. Barnes*, 463 U.S. 745, 751 (1983). “[T]he accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal. In addition, we have held that, with some limitations, a defendant may elect to act as his own or her own advocate.” *Id.* (citations omitted).

83. See *Brookhart v. Janis*, 384 U.S. 1, 7–8 (1966).

84. See *id.* at 7. “Our question therefore narrows down to whether counsel has power to enter a plea which is inconsistent with his client’s expressed desire and thereby waive his client’s constitutional right to plead not guilty and have a trial in which he can confront and cross-examine the witnesses against him. We hold that the constitutional rights of a defendant cannot be waived by his counsel under such circumstances.” *Id.*; see also *Boykin v. Alabama*, 395 U.S. 238 (1969) (requiring an affirmative showing of defendant’s knowing and voluntary waiver of rights in entering guilty plea); *Brady v. United States*, 397 U.S. 742, 748 (1970). “Central to the plea and the foundation for entering judgment against the defendant is the defendant’s admission in open court that he committed the acts charged in the indictment. He thus stands as a witness against himself and he is shielded by the Fifth Amendment from being compelled to do so — hence the minimum requirement that his plea be the voluntary expression of his own choice.” *Id.*

85. See *Boykin*, 395 U.S. at 242 (in entering guilty plea, defendant’s personal, knowing and intelligent waiver of right to jury trial is required); *Blair v. State*, 698 So. 2d 1210, 1214 (Fla. 1997) (requiring defendant’s personal, on-the-record waiver of right to jury trial); *State v. Singletary*, 549 So. 2d 996, 997 (Fla. 1989) (requiring a defendant’s on-the-record-waiver for those rights which go to the very heart of the adjudicatory process, such as the right to a lawyer or the right to a jury trial).

86. See *Singletary*, 549 So. 2d at 997.

87. See *Faretta v. California*, 422 U.S. 806, 835 (1975) (criminal defendants, upon satisfying the trial court that they possess a minimum degree of competence, have a constitutional right to refuse legal representation and to represent themselves); *Hardwick v. State*, 521 So. 2d 1071, 1074 (Fla. 1988).

88. See generally *Faretta*, 422 U.S. at 819, 834; *Foster v. Strickland*, 707 F. 2d 1339, 1343 (11th Cir. 1983); *Nodal v. State*, 3 So. 3d 439, 440 (Fla. 3d Dist. Ct. App. 2009).

89. See *Harris v. State*, 438 So. 2d 787, 797 (Fla. 1983). “This procedural right to have instructions on necessarily included lesser offenses given to the jury [in capital cases] does not mean, however, that a defendant may not waive his right just as he may expressly waive his right

accused is entitled to the assistance of competent counsel in personally deciding how to exercise these rights.⁹¹

Institutional constitutional principles are also directly implicated by the right to counsel (e.g., the core and inherent power of the judiciary and separation of powers).⁹² The state must respect the independence of PDs.⁹³ Under the Sixth Amendment, clients have the right to counsel who are capable of exercising and who, in fact, exercise independent professional judgment to protect clients' interests.⁹⁴

The right to counsel is particularly important because it is through counsel that all other rights of the accused are protected in our adversarial system.⁹⁵

An individual may waive the right to counsel and other constitutional rights.⁹⁶ However, "courts indulge every reasonable presumption against waiver of fundamental constitutional rights."⁹⁷ Waiver of the right to counsel must be knowing, voluntary, and intelligent, and properly reflected in the record.⁹⁸

This Court's decisions establish that a state criminal trial, a proceeding

to a jury trial." *Id.* (citing *Patton v. United States*, 281 U.S. 276 (1930); *Davis v. State*, 32 So. 2d 827, 829 (Fla. 1947); FLA. R. CRIM. P. Rule 3.260 (1992)). "But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made. *Id.* at 797.

90. *See Branch v. State*, 952 So. 2d 470, 484 (Fla. 2006); *Fratcher v. State*, 842 So. 2d 1044, 1046 (Fla. 4th Dist. Ct. App. 2003).

91. *See* U.S. CONST. Amend. VI; *see also Strickland v. Washington*, 466 U.S. 668 (1984).

92. *See, e.g., In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1138 (Fla. 1990) (reaffirming reliance on the inherent power of the judiciary).

93. *See Polk County v. Dodson*, 454 U.S. 312, 324 (1981); *West v. Atkins*, 487 U.S. 42, 50 (1988); *State ex rel. Smith v. Brummer*, 426 So. 2d 532, 533 (Fla. 1982) ("The state is constitutionally obliged to respect the professional independence of the public defenders whom it engages.").

94. *Crist v. Florida Ass'n of Criminal Def. Lawyers, Inc.*, 978 So. 2d 134, 147 (Fla. 2008) [hereinafter FACDL] (reaffirming *Smith v. Brummer*).

95. *Penson v. Ohio*, 488 U.S. 75, 84 (1988).

It bears emphasis that the right to be represented by counsel is among the most fundamental of rights. We have long recognized that "lawyers in criminal courts are necessities, not luxuries." As a general matter, it is through counsel that all other rights of the accused are protected: "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.

96. *Johnson v. Zerbst*, 304 U.S. 458, 465 (1938).

97. *Id.* at 464.

98. *See id.*; *see also Iowa v. Tovar*, 541 U.S. 77, 81 (2004).

initiated and conducted by the State itself, is an action of the State within the meaning of the Fourteenth Amendment. . . . Unless a defendant charged with a serious offense has counsel able to invoke the procedural and substantive safeguards that distinguish our system of justice, a serious risk of injustice infects the trial itself. When a State obtains a criminal conviction through such a trial, it is the State that unconstitutionally deprives the defendant of his liberty.⁹⁹

As *Argersinger* noted, the state's conduct of a criminal trial itself implicates the state in the defendant's conviction.¹⁰⁰ The actions of court-appointed counsel (as well as private counsel) are generally attributable to the client on the basis of agency.¹⁰¹ However, prejudice resulting from a "breakdown in the public defender system" can be charged to the state.¹⁰²

B. THE CONSTITUTIONAL PURPOSES AND FUNCTIONS SERVED BY THE RIGHT TO COUNSEL

The Sixth Amendment right to counsel serves numerous constitutional purposes, objectives and functions, essential to preserving our free society and avoiding a police state. Some of these have been stated above.¹⁰³ The following is a very small selection, based on precedent.¹⁰⁴ All of these important purposes, which relate to assistance, advocacy and testing of the prosecution's case in our adversarial system, are undermined by defender excessive workload:

99. *Cuyler v. Sullivan*, 446 U.S. 335, 343 (1980) (citations omitted) (citing *Johnson*, 304 U.S. 467–68).

100. *See Argersinger v. Hamlin*, 407 U.S. 25, 38 (1972).

101. *See Kay v. Ehrler*, 499 U.S. 432, 435–36 (1991) (noting that the word "attorney" assumes an agency relationship). While there may be policy reasons for regarding the lawyer as agent of the defendant, these policies should be limited by substantial differences between the choice available indigents and clients who can choose which private attorney to retain.

The Supreme Court stated as one basis for requiring the defendant to prove prejudice, "[t]he government is not responsible for, and hence not able to prevent, attorney errors." (citing *Strickland v. Washington*, 466 US 668, 693 (1984)). That is simply not true in cases involving poor people who have court-appointed lawyers. A poor person accused of a crime does not choose an attorney; a judge or some other government official assigned a lawyer to represent the defendant. Thus, the government is responsible for deficient representation when it provides a lawyer who lacks the experience and skill to handle the case or when it denied a lawyer resources necessary to investigate the case and present a defense. *Strickland* allows the government to get away with it.

Bright, *supra* note 15, at 832; *Vermont v. Brillon*, 129 S. Ct. 1283 (2009). "Assigned counsel, just as retained counsel, act on behalf of their clients, and delays sought by counsel are ordinarily attributable to the defendants they represent." *Brillon*, 129 S. Ct. at 1287.

102. *Brillon*, 129 S. Ct. at 1287.

103. *See supra* notes 106–114.

104. *See United States v. Cronin*, 466 U.S. 648, 654–58 (1984) (cataloging the purposes and functions of the right to counsel, along with citations to other cases and excellent quotations).

- Ensuring “fundamental human rights of life and liberty”¹⁰⁵
- Implementing the right of access to courts¹⁰⁶
- Safeguarding justice¹⁰⁷
- Providing assistance for the defense of the accused¹⁰⁸
- Implementing the presumption of innocence¹⁰⁹
- Promoting the reliability of the adversarial process¹¹⁰
- Promoting the legitimacy and moral authority of the courts¹¹¹
- Ensuring adequate presentation of the defendant’s case and a fair trial¹¹²
- Promoting truth and fairness¹¹³ and,
- Promoting the equality of rich and poor before the law.¹¹⁴

C. THE STATES ARE OBLIGATED TO PROVIDE THE ASSISTANCE OF EFFECTIVE APPOINTED COUNSEL

The states have a clear, affirmative obligation to provide indigents

105. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). “The assistance of counsel is one of the safeguards of the Sixth Amendment deemed necessary to insure fundamental human rights of life and liberty.” *Id.* (citation omitted).

106. See, e.g., FLA. CONST. art. I, § 21 (entitled “Access to Courts” and providing, “The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.”). Indigent defendants must rely on their PDs to represent them in court. Courts will not consider pro se pleadings of a represented defendant. See, e.g., *Logan v. State*, 846 So. 2d 472, 475–76 (Fla. 2003).

107. “[T]he Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done’.” *Gideon*, 372 U.S. at 343.

108. See *Cronic*, 466 U.S. at 654 (The [Sixth] Amendment requires not merely the provision of counsel to the accused, but “[a]ssistance,” which is to be “for his defense.”).

109. See *Powell v. Alabama*, 287 U.S. 45, 52 (1932). “Without [the right to counsel], though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.” *Id.* at 69.

110. See *Penson v. Ohio*, 488 U.S. 75, 84 (1988) (citations omitted); see *supra* note 95 and accompanying text (discussing the adversarial system of justice).

111. See *Strickland v. Washington*, 466 U.S. 668, 692 (1984). “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.” *Id.*

112. See *Betts v. Brady*, 316 U.S. 455, 474 (1942) (overruled by *Gideon v. Wainwright*, 372 U.S. 335 (1963)). “Whether a man is innocent cannot be determined from a trial in which, as here, denial of counsel has made it impossible to conclude, with any satisfactory degree of certainty, that the defendant’s case was adequately presented.” *Id.* at 476 (Black, J., dissenting) (cited with approval in *Cronic*, 466 U.S. at 656 (1984)).

113. See *Cronic*, 466 U.S. at 656. “The system assumes that adversarial testing will ultimately advance the public interest in truth and fairness.” *Id.* (quoting *Polk County v. Dodson*, 454 U.S. 312, 318 (1981)).

114. See *Gideon*, 372 U.S. at 344.

with the assistance of competent, effective, conflict-free counsel.¹¹⁵ The effective assistance of counsel includes the right to the assistance of conflict-free counsel.¹¹⁶ “The public defender’s principal responsibility is to serve the undivided interests of his client.”¹¹⁷

Because clients have the constitutional right to effective, conflict-free counsel, their attorneys have a constitutional obligation to respect, promote and enforce that right.¹¹⁸ However, an EC prevents (or is likely to prevent) counsel from functioning in the manner contemplated by the Sixth Amendment and from providing the assistance to which clients are constitutionally entitled.

In *Powell v. Alabama*, Justice Sutherland extended the right to counsel guaranteed under the Sixth Amendment to the states through the Due Process Clause of the Fourteenth Amendment:

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. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction

115. *Duncan v. State*, 284 Mich. App. 246, *118–119 (Mich. App. June 11, 2009).

We initially reiterate the principle so long ago announced in *Gideon* that it is the state that ultimately has the affirmative constitutional obligation to implement a system that safeguards the right to counsel for indigent defendants, which right, under *Strickland* and *Cronic*, includes the right to the effective assistance of counsel. If a county system is constitutionally inadequate under the standards we have set today, i.e., a finding of widespread and systemic instances of deprivation of counsel and deficient performance resulting from a flawed county system of providing indigent representation, yet, at the same time, the county is in full compliance with existing state law and mandates, the cause of the constitutional deficiencies will necessarily flow from failures by the State.

Id. at *119; see also *Strickland*, 466 U.S. at 686.

116. See *Wood v. Georgia*, 450 U.S. 261, 273 (1981) (remanding case to trial court for hearing to determine if attorney had conflict of interest at defendants’ probation revocation hearing); see also *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978) (joint representation, where there is a conflict of interest, prevents what should be done from being done). “[T]he evil . . . is in what the advocate finds himself compelled to *refrain* from doing not only at trial but also in possible pretrial plea negotiations and in the sentencing process.” *Id.*

117. FACDL, *supra* note 94, at 147 (citations omitted); see also *Cadejuste v. State*, 933 So. 2d 122, 124 (Fla. 4th Dist. Ct. App. 2008) (a conflict of interest adversely affecting performance violates the Sixth Amendment).

118. See *supra* notes 140–144.

because he does not know how to establish his innocence.¹¹⁹

In 1963, the United States Supreme Court held that the Sixth Amendment to the United States Constitution requires that, in all prosecutions for felonies, an accused has a right to the assistance of defense counsel which is obligatory on the states by operation of the Fourteenth Amendment.¹²⁰

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.¹²¹

“Although the Supreme Court stated in *Gideon* that lawyers are “necessities, not luxuries,” the reality in the United States today is that representation by a capable attorney is a luxury, one few of those accused of a crime or in prison can afford.”¹²²

After *Gideon*, the Supreme Court decided a number of cases recognizing the right to counsel for indigents. It attaches to a wide range of proceedings involving the loss of liberty, and is not confined to criminal trial proceedings.¹²³

119. *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932).

120. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

121. *Id.* at 344.

122. *Bright*, *supra* note 15, at 834 (citing *Gideon*, 372 U.S. at 344).

123. *See, e.g.*, *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (misdemeanors and other offenses involving a loss of liberty); *see also In re Gault*, 387 U.S. 1, 13 (1967) (juvenile delinquency proceedings); *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) (custodial interrogations); *United States v. Wade*, 388 U.S. 218 (1967). Counsel is guaranteed “at any stage of the prosecution, formal or informal, in court or not, where counsel’s absence might derogate from the accused’s right to a fair trial.” *Wade*, 388 U.S. at 226. Pretrial identifications and lineups, “scrutiny of any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant’s basic right to a fair trial as affected by his right meaningfully to cross-examine the witnesses against him and to have effective assistance of counsel at the trial itself.” *Id.* at 227; *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2591 (2008) (initial appearance before magistrate). “Counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself.” *Id.* at 2589; *see also Halbert v. Michigan*, 545 U.S. 605 (2005) (appeal following entry of a guilty plea); *Evitts v. Lucey*, 469 U.S. 387, 395 (1985) (right to effective assistance of counsel on first appeal); *Estelle v. Smith*, 451 U.S. 454, 470 (1981) (court-ordered psychiatric exam); *Gagnon v. Scarpelli*, 411 U.S. 778, 782 (1973) (parole revocation proceedings); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970) (preliminary hearings); *Mempa v. Rhay*, 389 U.S. 128, 136 (1967) (probation revocation hearings); *Douglas v. California*, 372 U.S. 353, 359–60 (1963), (indigent defendants’ right to appointed counsel on first appeal of a conviction); *Phillips v. State*, 612 So. 2d 557, 559 (Fla. 1993) (right to counsel under Florida and federal Constitutions attaches at first

Professional standards and attorney roles are the same for private and court-appointed counsel.¹²⁴ The *Strickland* Court noted that: “The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”¹²⁵ The right to effective assistance of counsel representation must be “within the wide range of professional assistance” to be expected of a lawyer¹²⁶ and comply with the “[p]revailing norms of practice as reflected in American Bar Association standards and the like.”¹²⁷

In *Cronic*, the Court stated:

The Sixth Amendment, however, guarantees more than the appointment of competent counsel. By its terms, one has a right to ‘Assistance of Counsel [for] his defense.’ Assistance begins with the appointment of counsel, it does not end there. In some cases the performance of counsel may be so inadequate that, in effect, no assistance of counsel is provided. Clearly, in such cases, the defendant’s Sixth Amendment right to ‘have Assistance of Counsel’ is denied.¹²⁸

The right to counsel ensures the validity of the trial process and the broader adversarial system.¹²⁹

In order to meet the constitutional standard for effectiveness, counsel cannot represent conflicting interests.¹³⁰ Ineffectiveness is presumed when counsel “actively represent[s] conflicting interests.”¹³¹ “Assistance of

appearance).

124. See *Vermont v. Brillion*, 129 S. Ct. 1283, 1291 (2009) (citing with approval *Polk County v. Dodson*); FACDL, *supra* note 94, at 147; see also *In re E.S.*, 90 Cal. Rptr. 3d 564, 584 (Cal. Ct. App. 2009); Formal Op. 06-411, *supra* note 21; see *supra* notes 24–25 and accompanying text.

125. *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

126. *Id.* at 687.

127. *Id.*

128. *United States v. Cronic*, 466 U.S. 648, 654 (1984) (citing *United States v. Decoster*, 624 F.2d 196, 219 (1976) (MacKinnon, J., concurring), *cert. denied*, 444 U.S. 944 (1979)).

129. See *Alabama v. Shelton*, 535 U.S. 654, 667 (2002) (holding that in order for incarceration to be imposed for a violation of misdemeanor probation, a defendant must have had counsel in the underlying adjudication). The *Shelton* Court reasoned: “Deprived of counsel when tried, convicted, and sentenced, and unable to challenge the original judgment at a subsequent probation revocation hearing, a defendant . . . faces incarceration on a conviction that has never been subjected to ‘the crucible of meaningful adversarial testing.’” *Id.* at 667 (quoting *Cronic*, 466 U.S. at 656).

130. See *Holloway v. Arkansas*, 435 U.S. 475, 490 (1978). “[T]he Sixth Amendment contemplates that . . . assistance be untrammelled and unimpaired by a court order requiring that one lawyer should simultaneously represent conflicting interests.” *Id.* at 482; see also *Wood v. Georgia*, 450 U.S. 261, 271 (1981); Standing Committee on Professional Responsibility and Conduct, California Bar Formal Op. 97-0007 [hereinafter California Formal Op. 97-0007] (a lawyer cannot sacrifice the defense of one client to help another).

131. *Cuyler v. Sullivan*, 446 U.S. 335, 350 (1980); see also *Flanagan v. United States*, 465 U.S. 259, 268 (1984); *Cronic*, 466 U.S. at 661.

counsel is among those constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error.”¹³²

Of course, conflicts need not arise within a single case.¹³³ But EC conflicts of interest can be viewed as simply a broader form of the traditional theme of joint representation conflicts in a single case.¹³⁴

Whenever a trial court improperly requires joint representation of several defendants over timely objection, reversal is automatic; prejudice is presumed regardless of whether it was independently shown.¹³⁵

“That an attorney representing multiple defendants with conflicting interests is physically present at pretrial proceedings, during trial, and at sentencing does not warrant departure from this general rule. *Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing.*”¹³⁶

Florida also requires conflict-free counsel and has recognized that EC can violate that requirement.¹³⁷ Florida appellate courts have repeatedly recognized that excessive appellate caseload creates a conflict.¹³⁸ The Supreme Court of Florida has recognized that the issue of excessive

132. *Holloway*, 435 U.S. at 476 (citing *Chapman v. California*, 386 U.S. 18, 23 (1967)).

133. *See, e.g., In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1132 (Fla. 1990) (the same attorney representing clients with conflicting interests in more than one case).

134. *Compare, e.g., Holloway*, 435 U.S. at 476 (deciding whether an attorney who had received confidential information from the codefendants he was representing would create a conflict of interest that would result in ineffective assistance of counsel), *with, e.g., In re Order*, 561 So. 2d at 1131–32 (deciding whether the delay in filing an appeal for indigent defendants caused by an extreme backlog of cases at the Public Defender’s Office is a violation of one’s right to effective assistance of counsel).

135. *See Holloway*, 435 U.S. at 488 (interpreting *Glasser v. United States*, 315 U.S. 60 (1942)). The *Glasser* Court stated:

To determine the precise degree of prejudice sustained by Glasser as a result of the [district] court’s appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.

Glasser, 315 U.S. at 75–76.

136. *Holloway*, 435 U.S. at 489–90 (emphasis added); *see also Glasser*, 315 U.S. at 67–70, 75–76; *Cronic*, 466 U.S. at 661.

137. *See* 14 FLA. JUR. 2d *Criminal Law* § 455 (2009) (explaining that defendants have a right to effective assistance to counsel in Florida); *Hagopian v. Justice Admin. Comm’n*, 18 So. 3d 625 (Fla. 2d Dist. Ct. App. 2009) (recognizing a lawyer’s excessive caseload can cause him or her to render ineffective assistance of counsel to his or her clients).

138. *See, e.g., Kiernan v. State*, 485 So. 2d 460, 461–62 (Fla. 1st Dist. Ct. App. 1986). In the *Kiernan* case, the appellate court permitted a public defender to withdraw from representing a client due to the lawyer’s excessive caseload. *Id.* The court also pointed out that such excessive caseloads also burden an appellate court’s docket; making effective representation of counsel all the more important. *Id.* at 462.

workload is “of constitutional magnitude.”¹³⁹ In *In re Order*, the Supreme Court of Florida wrote, “[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.”¹⁴⁰

Recently, in *Scott v. State*, the court reviewed a denial of a PD’s motion to withdraw based on a conflict of interest.¹⁴¹ Because the issue was raised pretrial, the court quoted Rule 4-1.7(a) of the Rules Regulating The Florida Bar and applied its “substantial risk” standard.¹⁴² The court concluded, “[v]iewed prospectively, any substantial risk of harm is deemed prejudicial.”¹⁴³ The court specifically noted: “Conflicts of interest are best addressed before a lawyer laboring under such a conflict does any harm to his or her client(s)’s interests.”¹⁴⁴

The Supreme Court of Florida has also observed that “an inundated attorney may be only a little better than no attorney at all.”¹⁴⁵ EC may or may not constitute the “complete denial of counsel,”¹⁴⁶ but it is almost certain to create the other situations described in *Cronic* that warrant a presumption of ineffectiveness “without inquiry into counsel’s actual performance at trial.”¹⁴⁷ These situations, even in *Cronic*’s post-conviction status, “are so likely to prejudice the accused that the cost of litigating their

139. *In re Public Defender’s Certification of Conflict* 1998, 709 So. 2d 101, 103 (Fla. 1998) (“[T]he constitutional rights of these indigent appellants are being violated.”).

140. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1135 (Fla. 1990) (quoted with approval in *In re E.S.*, 90 Cal. Rptr. 3d 564, 585 (Cal. Ct. App. 2009). See also, e.g., *Hatten v. State*, 561 So. 2d 562, 565 (Fla. 1990) (granting writ of mandamus ordering public defender to file defendant’s appeal within thirty days or withdraw because of conflict due to excessive caseload); *Day v. State*, 570 So. 2d 1003, 1004 (Fla. 1st Dist. Ct. App. 1990) (allowing public defender to withdraw from 200 cases due to backlog caused by understaffing); *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991) (quashing order denying motion to withdraw from twenty-nine appeals, and holding that the public defender had presented sufficient grounds to permit withdrawal); *In re Public Defender’s Certification of Conflict* 1994, 636 So. 2d 18, 19, 22 (Fla. 1994) (affirming order permitting public defender to withdraw from 382 appeals due to excessive caseload); *In re Public Defender’s Certification of Conflict* 1998, 709 So. 2d at 103–04 (approving order that public defender shall accept no appellate cases until further order of the court due to excessive workload).

141. *Scott v. State*, 991 So. 2d 971, 972 (Fla. 1st Dist. Ct. App. 2008); see also *Johnson v. State*, 6 So. 3d 1262, 1267 (Fla. 4th Dist. Ct. App. 2009). “[C]onflict-free counsel is part of the constitutional provision for effective assistance of appellate counsel.” *Johnson*, 6 So. 3d at 1267 (citing *Holloway*, 435 U.S. at 481, and *Cadejuste v. State*, 993 So. 2d 122, 124 (Fla. 4th Dist. Ct. App. 2008), for the proposition that a conflict of interest adversely affecting counsel’s performance violates the Sixth Amendment).

142. *Scott*, 991 So. 2d at 972–73, 976.

143. *Id.* at 972.

144. *Id.*

145. *In re Public Defender’s Certification of Conflict* 1994, 636 So. 2d at 19.

146. *United States v. Cronic*, 466 U.S. 648, 659 (1984).

147. *Id.* at 662.

effect in a particular case is unjustified”¹⁴⁸

Without the ability of a defender to decline additional appointments when his caseload becomes excessive, the “right to the effective assistance of counsel would be reduced to form without substance.”¹⁴⁹

EC implicates the standard for voluntary waiver of effective assistance. Clients who are involuntarily left without effective assistance due to their attorneys’ excessive workload are denied their right to counsel without a proper waiver of that right. There is no sufficient waiver under *Zerbst* and no sufficient record could be made. Also, clients are stripped of the limited procedures and protections established by the Supreme Court for when courts deal with a defendant who voluntarily seeks to proceed without a lawyer.¹⁵⁰ Worse, appointed counsel’s failure to move the case forward is held against the client, unless there is a systemic or institutional breakdown that implicates the state.

The Sixth Amendment right to counsel, like many constitutional requirements, operates as an unfunded mandate, established by the federal government and imposed on state governments.¹⁵¹ The state, at its expense, is also constitutionally obligated to provide indigents and their lawyers with resources essential to fair and equal treatment in the courts.¹⁵² While state governments are fond of imposing their own unfunded mandates on lower levels of government, they are not fond of being subjected to or

148. *Id.* at 658. Ineffectiveness is presumed not only when counsel is entirely absent, but: when counsel “actively represented conflicting interests.” *Id.* at 661 n.28. “[I]f the accused is denied counsel at a critical stage.” *Id.* at 659. “[I]f counsel entirely fails to subject the prosecution’s case to meaningful adversarial testing.” *Id.* “[W]hen although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.” *Id.* at 659–60. When “the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair.” *Id.* at 660–61.

149. *In re E.S.*, 92 Cal. Rptr. 3d 725, 748 (Cal. Ct. App. 2009).

150. *See Faretta v. California*, 422 U.S. 806, 819–21 (1975) (describing the procedural protection that a defendant must be told and made aware of the risks and disadvantages one faces when choosing to represent oneself).

151. *See Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

152. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (stating that an indigent must be granted access to appellate transcripts); *see also, e.g., Ake v. Oklahoma*, 470 U.S. 68, 74 (1985) (stating that an indigent defendant must be granted access to essential resources necessary to present a defense; specifically the defendant must have access to a “psychiatrist’s assistance”); *State v. Hanger*, 146 Ariz. 473 (Ariz. Ct. App. 1985) (failure of state government to pay constitutionally and statutorily required indigent defense costs warrants dismissal of charges); *Corenevsky v. Superior Court of Imperial County*, 36 Cal. 3d 307 (1984) (limitation on penalty due to budget constraints on indigent defense). Thus, instead of declining or withdrawing due to EC, defenders should consider seeking dismissal of charges or limitation of the penalty that can be sought by the state.

complying with federal mandates.¹⁵³

IV. COURTS' STEWARDSHIP OF THE JUDICIAL POWER

Having briefly reviewed the right to counsel in relationship to EC, we now turn to the powers, duties, attitudes and actions of those entities most directly involved in maintaining and potentially resolving the problem (e.g., the courts, organized bar, defenders and prosecutors).

The judiciary, as a branch of state government, is an integral part of the political system that is obligated to ensure the right to counsel.¹⁵⁴ The values of that larger system, particularly those reflected in the allocation of resources, create pressures in the judiciary that should be resolved in the most constructive and realistic manner possible, in the interest of judges, lawyers, and the society we serve.

The Supreme Court of Florida controls one of the three branches of state government and is responsible for overseeing the operations of the courts.¹⁵⁵ The Supreme Court leads and manages a theoretically co-equal, autonomous and coordinate branch of state government.¹⁵⁶

The courts are obligated to vindicate the judicial power vested in them by the Florida Constitution.¹⁵⁷ Thus, Florida's courts have an institutional and constitutional obligation to fulfill basic judicial functions, including safeguarding constitutional rights, managing and supervising the court system, establishing rules and standards for practice and procedure,

153. See, e.g., *Lewis v. Leon County*, 15 So. 3d 777, 781 (Fla. 1st Dist. Ct. App. 2009) (stating that the legislature's attempt to require counties to pay expenses for state indigent defense agency violates revision to Florida Constitution); *Escambia County v. Behr*, 384 So. 2d 147, 148 n.1 (Fla. 1980) ("The fees and expenses of private counsel appointed to represent insolvent defendants are paid in the same manner as in capital cases, § 27.53, Fla. Stat. (1977); that is, they are paid by the county, § 925.035, Fla. Stat. (1977).").

154. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970). "[I]f the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *Id.*; see also Richard Klein, *Judicial Misconduct in Criminal Cases: It's Not Just the Counsel Who May Be Ineffective and Unprofessional*, 4 OHIO ST. J. CRIM. L. 195, 202 (2006) ("It is indeed the obligation of the trial court to ensure that the adversary system is truly functioning.").

155. See FLA. CONST. art. V, § 2. The Florida Constitution requires the supreme court to "adopt rules of practice and procedure . . ." in order to carry out its duty as the administrative supervisor of the court system. *Id.* Also, the Florida Constitution appoints "[t]he chief justice of the supreme court . . ." to be "the chief administrative officer of the judicial system . . ." *Id.* The various courts have the jurisdiction, i.e., the power and constitutional obligation, to decide cases and controversies. See FLA. CONST. art. V, §§ 3(b), 4(b), 5(b), 6(b).

156. See FLA. CONST. art. V § 1 (stating that the judicial power is vested in specified courts).

157. See FLA. CONST. art. V, §§ 3(b), 4(b), 5(b), 6(b) (detailing the power and responsibilities of the Florida courts).

overseeing lawyers, and the practice of law and the integrated Bar.¹⁵⁸

[T]he role of the judiciary in our tripartite system of government entails, in part, interpreting constitutional language, applying constitutional requirements to the given facts in a case, safeguarding constitutional rights, and halting unconstitutional conduct.¹⁵⁹

But if the state has allegedly failed to satisfy its constitutional obligations with its chosen approach, i.e., switching off state and federal constitutions, it is up to the judiciary to judge whether or not the state has indeed acted consistent with constitutional requirements. From *Marbury to Boumediene*, this field has been defined as including the interpretation of constitutional language, the application of constitutional principles, the judging of constitutional compliance, and the safeguarding of constitutional rights.¹⁶⁰

The state of [Florida] has the obligation under *Gideon* to provide indigent defendants with court-appointed counsel, and the ‘state’ is comprised of three branches, including the judiciary. Ultimately, it is the judiciary, on a daily basis, that is integrally involved with ensuring that, before prosecutions go forward, indigent defendants are provided counsel, without which the court could not carry out its constitutional responsibilities.¹⁶¹

When judges neglect their oaths by encouraging, tolerating or condoning defender EC, they denigrate the entire CJS, especially the judicial function.

[I]t is apparent that the framers of the constitution contemplated that instrument as a rule for the government of *courts*, as well as of the legislature. Why otherwise does it direct the judges to take an oath to support it? . . . Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? [I]f it is closed upon him, and cannot be inspected by him? If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.¹⁶²

The Florida Supreme Court has courageously and properly decided a

158. See FLA. CONST. art. V, §§ 2, 3, 15. Article V, § 2 of the Florida Constitution provides: “The supreme court shall adopt rules for the practice and procedure in all courts including . . . the administrative supervision of all courts. . . . (b) The chief justice of the supreme court . . . shall be the chief administrative officer of the judicial system. . . .” *Id.* Article V, § 3(b) provides: “[The Supreme Court] [m]ay review any decision of a district court of appeal that . . . expressly construes a provision of the state or federal constitution.” Article V, § 15 provides: “The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.”

159. *Duncan v. State*, 284 Mich. App. 246, 255 (Mich. Ct. App. 2009).

160. *Id.* at 341.

161. *Id.* at 383 (citation omitted).

162. *Id.* at 339–40 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 179–80 (1803)).

number of very important indigent defense cases. While many of these cases involve PDs, many do not, and involve broader indigent defense issues.¹⁶³ In this regard, Florida's judiciary is a national leader.

The Florida Supreme Court has recognized its vital, constitutional role in protecting individual rights and its power and obligation to do so.¹⁶⁴ This constructive, institutional approach is essential for a number of reasons. A great number of individual constitutional rights are implicated in indigent defense, in general, and defender excessive workload, in particular. The judiciary is the branch of government on which enforcement of those rights depends.

The Supreme Court has the power and duty to make rules and control practice and procedure in the Florida courts.¹⁶⁵ State constitutions vary on balancing the power of the court with that of the legislature. Florida has one of the broadest grants of judicial rule-making authority in the country.¹⁶⁶ It has the power to override legislative acts when required by "clear necessity" to perform an "essential" judicial function, after established methods have failed and an emergency exists.¹⁶⁷ The Court also has virtually exclusive rule-making power regarding practice and procedure.¹⁶⁸ Due to the Court's power and duty to make rules and control practice and procedure in Florida's judiciary, it is morally and politically responsible for dealing with systemic defender excessive workload.

The power and duty to regulate lawyers and the practice of law is another source of court responsibility for dealing effectively with excessive workload. The judiciary is controlled by and, recursively, controls Florida lawyers.¹⁶⁹ Throughout the state, and within the criminal courts, the Florida Supreme Court has the exclusive power to regulate lawyers and the

163. See FACDL, *supra* note 94, at 134; *Makemson v. Martin County*, 491 So. 2d 1109, 1110 (Fla. 1986); *Rose v. Palm Beach County*, 361 So. 2d 135, 136 (Fla. 1978), *Maas v. Olive*, 992 So. 2d 196, 198 (Fla. 2008).

164. See *Rose*, 361 So. 2d at 137 (explaining that the judiciary is a coequal third branch of government and its most compelling function is to protect fundamental rights).

165. See FLA. CONST. art. V, § 2 ("The supreme court shall adopt rules for the practice and procedure in all courts . . .").

166. See Roger A. Silver, *The Inherent Powers of the Florida Courts*, 39 U. MIAMI L. REV. 257, 263 (1985). "All courts in Florida 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." *Id.* (emphasis added).

167. See *Rose*, 361 So.2d at 138.

168. See *Markert v. Johnston*, 367 So. 2d 1003, 1005–06 (Fla. 1978) (holding that "plain language" of statute prohibiting joinder of insurers invaded the rule-making authority of the court).

169. See Silver, *supra* note 166, at 272 (stating the supreme court has the power to regulate bar admissions, discipline Florida attorneys, and has the "supervisory power over the bar in general").

practice of law.¹⁷⁰ The Court regulates the practice of law through The Florida Bar (“Bar”).¹⁷¹ The Bar is an integrated bar; all lawyers must be members.¹⁷² Lawyers are officers of the court.¹⁷³

A. CORE JUDICIAL FUNCTIONS AND INHERENT POWER

The separation of powers doctrine defines the tensions and balances among the three branches of government.¹⁷⁴ The Constitution confers the “judicial power” on the courts, and grants and limits the power of the judicial branch.¹⁷⁵ Thus, the judiciary has grave responsibilities, including a constitutional stewardship function that requires full use of its powers to fulfill those responsibilities.¹⁷⁶ As the Florida Supreme Court stated in *Bush v. Schiavo*,

The cornerstone of American democracy known as separation of powers recognizes three separate branches of government - the executive, the legislative, and the judicial - each with its own powers and responsibilities. In Florida . . . article II, section 3 of the Florida Constitution . . . [states] “[t]he powers of the state government shall be divided into legislative, executive and judicial branches. No person belonging to one branch shall exercise any powers appertaining to either of the other branches unless expressly provided herein.”¹⁷⁷

170. See FLA. CONST. art V, § 15 (stating that the supreme court has power over attorneys, admissions to the bar and discipline); see *infra* Part IV.A (dealing with the topic of “Core Judicial Functions and Inherent Power”).

171. See generally THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR: INTRODUCTION, [http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/982D8C3C832DF2BA85256CB E007C330C/\\$FILE/RRTFB%203%20cols.pdf?OpenElement](http://www.floridabar.org/TFB/TFBResources.nsf/Attachments/982D8C3C832DF2BA85256CB E007C330C/$FILE/RRTFB%203%20cols.pdf?OpenElement) (last visited Dec. 09, 2009). “The Supreme Court of Florida by these rules establishes the authority and responsibilities of The Florida Bar, an official arm of the court.” *Id.*

172. See THE FLORIDA BAR, *supra* note 171, at R. 1-3.1. “The membership of The Florida Bar shall be composed of all persons who are admitted by the Supreme Court of Florida to the practice of law in this state and who maintain their membership pursuant to these rules.” *Id.*

173. *In re Florida Bar*, 316 So. 2d 45, 49 (Fla. 1975) (“To classify an attorney who is fulfilling his obligation as an ‘officer of the Court’ as a public officer subject to the control of the legislature would seriously impede the operation of the courts.”).

174. See FLA. CONST. art. II, § 3 (“The powers of the state government shall be divided into legislative, executive and judicial branches.”); see also *id.* at art. V, § 1 (“The judicial power shall be vested in a supreme court”); *id.* at § 2(a) (“The supreme court shall adopt rules for the practice and procedures in all courts”); *id.* at § 2(b) (“The chief justice of the supreme court . . . shall be the chief administrative officer of the judicial system.”); *id.* at § 15 (“The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law”).

175. See FLA. CONST. art. V, § 1 (stating the judicial power “is vested a supreme court, district courts of appeal, circuit courts and county courts. No other courts may be established by the state”).

176. See *Effectively Ineffective*, *supra* note 22, at 1744–45.

177. *Bush v. Schiavo*, 885 So. 2d 321, 329 (Fla. 2004).

In *Schiavo*, the Court reaffirmed the principle that “‘the judiciary is a coequal branch of the Florida government vested with the sole authority to exercise the judicial power,’ and ‘the legislature cannot, short of constitutional amendment, reallocate the balance of power expressly delineated in the constitution among the three co-equal branches.’”¹⁷⁸

A Michigan court recently reviewed separation of powers principles and came to a similar conclusion.

[t]o hold [that] the political branches have the power to switch the Constitution on or off at will is quite another [matter].¹⁷⁹ This would unacceptably “permit a striking anomaly in our tripartite system of government, leading to a regime in which Congress and the President, not this Court, say ‘what the law is.’”¹⁸⁰

A chief function of the judicial power is the resolution of cases and controversies consistent with the Constitution.¹⁸¹ Principles of justiciability are intended to “prevent the judiciary from usurping the power of coordinate branches of government. . . .”¹⁸²

It is the role of courts to provide relief to claimants, in individual or class actions, who have suffered, or will imminently suffer, actual harm; it is not the role of courts, but that of the political branches, to shape the institutions of government in such fashion as to comply with the laws and the Constitution. In the context of the present case: It is for the courts to remedy past or imminent official interference with individual inmates’ presentation of claims to the courts; it is for the political branches of the State and Federal Governments to manage prisons in such fashion that official interference with the presentation of claims will not occur.¹⁸³

[I]f a chosen path taken by the executive and legislative branches in an effort to satisfy their constitutional obligations allegedly fails to meet minimum constitutional requirements, the judiciary must examine the allegations and adjudicate the dispute. The judiciary by so intervening is not acting with a lack of judicial modesty or in violation of separation of powers; it is acting in accordance with its constitutional obligations, duties, and oaths of office. Failing to do so results in the political branches effectively deciding “what the law is,” impinging on the judiciary’s role in violation of separation of powers. Judicial modesty does not equate to ignoring constitutional obligations. Constitutional compliance is our only concern; matters regarding the

178. *Id.* at 330 (quoting *Chiles v. Children*, 589 So. 2d 260, 268–69 (Fla. 1991)).

179. *Duncan v. State*, 284 Mich. App. 246, 340 (Mich. Ct. App. 2009) (citing *Boumediene v. Bush*, 128 S. Ct. 2229, 2259 (2008)).

180. *Id.*

181. *See id.* at 290; *see also* U.S. CONST. art. III, §§ 1, 2.

182. *Duncan*, 284 Mich. App. at 290 (describing justiciability).

183. *Lewis v. Casey*, 518 U.S. 343, 349 (1996); *see also Duncan*, 284 Mich. App. at 289–93 (discussing justiciability generally).

method and manner by which the executive and legislative branches effectuate constitutional demands are not our concern, nor can they be, as long as the branches abide by state and federal constitutions. In that same vein, and with respect to the particular issues raised in this action, concerns about costs and fiscal impact, concerns regarding which governmental entity or entities should bear the costs, and concerns about which governmental body or bodies should operate an indigent defense system cannot be allowed to prevail over constitutional compliance, despite any visceral reaction to the contrary.¹⁸⁴

The Supreme Court of Florida has accomplished a great deal in establishing procedures and standards to deal with EC by responding to cases and controversies. For example, in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*,¹⁸⁵ the court addressed public defender EC, stating that if sufficient funds were not appropriated, “the courts of this state . . . will entertain motions for writs of habeas corpus from those . . . whose appellate briefs are delinquent sixty days or more, and . . . will order the immediate release pending appeal of indigent convicted felons who are otherwise bondable.”¹⁸⁶

As an adjunct to their normal constitutional functions, as a coordinate branch of government, courts have the inherent authority to enter such orders as are necessary to carry out their constitutional judicial power.¹⁸⁷ In *Rose v. Palm Beach County*,¹⁸⁸ the Florida Supreme Court held that courts have the inherent power to exceed statutory maximum witness fees and expenses when required by “clear necessity” to perform an “essential” judicial function (i.e., ensuring fair trials of criminal cases for both the accused and the state by effectuating the right to compulsory process).¹⁸⁹ The Court recognized that:

Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts’ ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The

184. *Duncan*, 248 Mich. App. at 255–57.

185. 561 So. 2d 1130 *passim* (Fla. 1990).

186. *Id.* at 1139.

187. *See id.* at 1133.

188. 361 So. 2d 135 *passim* (Fla. 1978).

189. *See id.* at 138–39.

invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.¹⁹⁰

The judiciary is the branch of government most concerned with the protection of individual constitutional rights and individual freedoms. Indeed, as noted in *Chiles v. Children A, B, C, D, E. and F*, a central element of the judicial branch's mission is to guarantee the rights of the people to access to courts.¹⁹¹

[A]ny substantial reductions of the judicial budget can raise constitutional concerns of the highest order. This Court has an independent duty and authority as a constitutionally co-equal 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. Article I, Section 21 of the Florida Declaration of Rights provides that “[t]he courts *shall* be open to every person for redress of any injury, and justice *shall* be administered without sale, denial or delay.”¹⁹²

While appropriations are primarily a legislative prerogative, the courts, in implementing their constitutional functions, are empowered to enter orders affecting the treasury. The *Duncan* court noted that, “during these economically challenging times, the judiciary, in addressing constitutional issues, must be reminded of the words of Chief Justice Warren Berger in *Bowsher v. Synar*.”¹⁹³

No one can doubt that Congress and the President are confronted with fiscal and economic problems of unprecedented magnitude, but “the fact that a given law or procedure is efficient, convenient, and useful in facilitating functions of government, standing alone, will not save it if it is contrary to the Constitution. Convenience and efficiency are not the primary objectives-or the hallmarks-of democratic government. . . .”¹⁹⁴

The Florida Supreme Court, in fulfilling its duty to support individual rights, has demonstrated its willingness to exercise this power and has fulfilled this obligation, even when there might be an impact on the state treasury.¹⁹⁵ In *In re Order*, reaffirmed that “the inherent power of courts is

190. *Id.* at 137; *see also In re Order*, 561 So. 2d at 1138 (reaffirming reliance on inherent power to address excessive workload issues).

191. 589 So. 2d 260, 269 (Fla. 1991). A violation of the right of access to courts does not require complete loss of access, but a cognizable violation occurs if there is “any significant degree” of obstruction or infringement. *See Mitchell v. Moore*, 786 So. 2d 521, 527 (Fla. 2001).

192. *Chiles v. Children*, 589 So. 2d 260, 269 (Fla. 1991).

193. *Duncan v. State*, 284 Mich. App. 246, 342 (Mich. Ct. App. 2009) (citation omitted).

194. *Bowsher v. Synar*, 478 U.S. 714, 736 (1986) (quoting *I.N.S. v. Chadha*, 462 U.S. 919, 944 (1983)).

195. *See, e.g., In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1133 (Fla. 1990); *see also Makemson v. Martin County*, 491 So. 2d 1109, 1115 (Fla. 1986); *Maas v. Olive*,

sufficient to afford us the remedy necessary for the protection of rights of indigent defendants” and to address problems such as excessive workload.¹⁹⁶

Additionally, in *Makemson*, the Florida Supreme Court held that an arbitrary statutory fee cap unconstitutionally affected a defendant’s Sixth Amendment right by prohibiting the trial court from compensating counsel for the time necessary to provide the defendant with effective representation.¹⁹⁷ The Court held that the fee cap encroached upon the court’s inherent power to ensure adequate representation of criminally accused and interfered with a defendant’s right to effective representation by counsel.¹⁹⁸ Also, the trial court need not determine the amount of compensation to be paid prior to representation since the court has authority to award attorney’s fees in excess of statutory limitations in extraordinary and unusual cases.¹⁹⁹

With regard to the clash between the rights of criminal defendants and the state treasury, the Court stated that the judiciary must ensure the primacy of individual rights.²⁰⁰

[W]e must focus upon the criminal defendant whose rights are often forgotten in the heat of this bitter dispute [involving budgets and financial support for attorneys representing indigent defendants]. 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.²⁰¹

In *Maas*, the Court again held a legislative attempt to statutorily cap court-appointed attorney fees unconstitutional, if applied so as to the limit trial court’s inherent authority to ensure a defendant’s constitutional right to effective assistance of counsel.²⁰²

Of course, in addition to involving themselves directly with appropriations matters, judges have numerous traditional remedies, both legal and equitable, available to them.²⁰³ The Florida Supreme Court has demonstrated its willingness to use its decisional powers to maintain an autonomous bench and bar, free to exercise independent, professional

992 So. 2d 196, 204 (Fla. 2008); *Rose*, 361 So. 2d at 139.

196. *In re Order*, 561 So. 2d at 1133.

197. *See Makemson*, 491 So. 2d at 1112, *cited with approval in Chavez v. State*, 12 So. 3d 199, 211–12 (Fla. 2009).

198. *See id.* at 1112.

199. *See id.* at 1115.

200. *See id.* at 1113.

201. *Id.*

202. *Maas v. Olive*, 992 So. 2d 196, 202–03 (Fla. 2008).

203. *Cf. In re Order on Prosecution of Criminal Appeals*, 561 So. 2d 1130, 1133 (Fla. 1990) (stating the court may utilize the remedy necessary to ensure protection of rights).

judgment. After 30 years of deciding cases and controversies, however, the problem has not only persisted, it has worsened.

While the Court has done a great deal, balancing the judicial branch's institutional, constitutional duties and the limits of its decision making power, the persistence of these issues indicates that the Court must do more if the judicial branch is to survive as a respectable and responsible, autonomous entity.

B. EFFECTIVE EXERCISE OF THE COURTS' ADMINISTRATIVE AND SUPERVISORY POWER

There is a grave, unmet need for a more effective, systemic and sustainable judicial approach to defender excessive workload and other indigent-defense-system quality issues. This need can only be met administratively.

The Court has the power, through its governance of the judicial branch, to effectively address these issues by various administrative means (e.g., through court rules, including the rules of procedure and judicial administration; regulation of the bar; and use of commissions and committees).²⁰⁴

However, the Florida Supreme Court has not engaged the full range of its institutional powers to effectively deal with Florida's indigent defense delivery system. It has almost totally neglected the use of its extensive, administrative and supervisory powers in this regard.

Administratively (and in the media), the Supreme Court of Florida has acknowledged increasing concern regarding the legislative lack of coordination of funding for the courts and prosecutors and defenders, and encouraged sufficient staffing for prosecutors and defenders.²⁰⁵

204. *Cf. id.* (stating the court has inherent power to do all things necessary to administer justice).

205. *See In re Certification of Need for Additional Judges*, 3 So. 3d 1177, 1180-81 (Fla. 2009).

State Attorney and Public Defender Staffing: This Court is increasingly concerned about the relationship between the certification of new judgeships, specifically those judges who would be assigned to criminal divisions, and the staffing complements of state attorneys' and public defenders' offices. We relate the criminal justice system to a three-legged stool comprised of judges, state attorneys, and public defenders. If one leg is compromised, the stool cannot function as designed. Authorizing judgeships without corollary funding for state attorneys and public defenders creates an imbalance in the criminal justice system. We encourage the Legislature to provide for sufficient staffing of state attorneys' and public defenders' offices whenever a judgeship is authorized and designated for the criminal division.

Id. The chief judge of the New York Court of Appeals also voiced a similar concern. *See Eligon*, *supra* note 22.

Addressing or failing to address defender EC implicates the essential judicial functions of protecting constitutional rights, supervising the courts, regulating the legal profession and the practice of law, establishing standards and procedures for judicial functions, and deciding cases and controversies.²⁰⁶

Beyond a focus on funding, the Court should establish or update procedures and judicial standards to deal with EC, similar to the procedures previously recommended to the Court²⁰⁷ and those established by the Court in *In re Order*.²⁰⁸

The Court's supervisory role over the Bar and regulation of all Florida lawyers provides a potentially powerful administrative vehicle. "Especially since the integration of The Florida Bar in 1950 the prescription of ethical standards, the designation of educational and moral requirements, and the exercise of supervisory jurisdiction are all peculiarly judicial functions."²⁰⁹ Unfortunately, the Court has seemed quite satisfied with the standards established and enforced by the Bar.²¹⁰

The Court needs to address a wide range of indigent defense issues. The problem is not confined to PDs.²¹¹

Courts in various states have taken an effective administrative or supervisory approach to these problems. In April 2007, the Nevada Supreme Court made an effective and sustainable effort to deal with a wide range of issues by creating an Indigent Defense Commission to study concerns with respect to the selection, appointment, compensation, qualifications, performance standards and caseloads of counsel.²¹²

206. See discussion *supra* Part IV.A.

207. See, e.g., EIGHT GUIDELINES, *supra* note 26, at 3–4 (discussing guidelines for public defenders facing excessive caseloads). See Florida Governor's Commission (1976), *supra* note 54 and accompanying text; The Bar's Committee on the Representation of Indigents (1992); REPORT OF THE FLORIDA BENCH/BAR COMMISSION, THE NECESSITIES OF THE TIMES, FACING CHALLENGES IN THE LEGAL SYSTEM 20, (Jan. 1993) (Recommendations 26, relating to trials, and 27, relating to appeals) [hereinafter BENCH/BAR REPORT]; see also *infra* note 415 and accompanying text.

208. See *In re Order*, 561 So. 2d at 1138–39.

209. State *ex rel.* Florida Bar v. Evans, 94 So. 2d 730, 733 (Fla. 1957).

210. See *infra* Part IV.G.

211. See, e.g., Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625, 625 (Fla. 2d Dist. Ct. App. 2009) (describing the lack of attorneys willing to accept court appointments due low statutory compensation and administrative problems with payment, authorizing involuntarily court-appointed attorney to withdraw, but providing no solution to the trial court's dilemma of finding an attorney); see also Johnson v. State, 6 So. 3d 1262, 1263 (Fla. 4th Dist. Ct. App. 2009) (regarding the recently-created office of regional counsel attempting to insert itself in defender certifications of conflict); FACDL, *supra* note 94 (regarding the role of private court-appointed attorneys, regional counsel or elected public defenders).

212. See *In re Review Of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases*, No. 411 (Nev. S. Ct. Jan. 4, 2008),

The commission filed its report in November 2007, “making numerous unanimous recommendations to promote the independence of the court-appointed public defense system.”²¹³ In its January 4, 2008 order, the Nevada Supreme Court adopted many of the commission’s recommendations.²¹⁴ The court noted the importance of the independence of the court-appointed public defense system from the judiciary and that trial judge involvement in the process created “an appearance of impropriety.”²¹⁵ The Nevada Supreme Court adopted caseload, performance and funding standards.²¹⁶

With regard to performance standards, the court noted: “the paramount obligation of criminal defense counsel in indigent defense cases is to provide zealous and quality representation at all stages of criminal proceedings, adhere to ethical norms, and abide by the rules of court. . . .”²¹⁷

The Nevada Court ordered certain PDs to inform their counties when they are unavailable due to EC,²¹⁸ the performance of weighted caseload studies,²¹⁹ and the establishment of a permanent indigent defense oversight commission.²²⁰

C. JUDGES’ CONSTITUTIONAL AND ETHICAL OBLIGATIONS

Judges are sworn to uphold the state and federal constitutions and to do so whether or not they believe in every portion thereof.²²¹ While “the paramount responsibility of a judicial officer [is] to assure the provision of a fair trial . . . [.]”²²² judges must also ensure various constitutional rights of the accused, including the provision of the “assistance” and of “counsel.”

The United States Supreme Court has stated that trial judges have an affirmative duty “to assure that criminal defendants are not deprived of their right to the effective assistance of counsel by joint representation of

http://www.naacpldf.org/content/pdf/indigent/Nevada_Supreme_Court_Recommendations.pdf [hereinafter Nevada Supreme Court Indigent Defense Order].

213. *Id.* at 1.

214. *Id.* at 1–8.

215. *Id.* at 3.

216. *Id.* at 4–8.

217. *Id.* at 4, 25 (this principle is reiterated in Standard 1: Role of Defense Counsel, Felony and Misdemeanor Trial Cases); *see also* Nevada Indigent Defense Standards of Performance (Ex. A attached to order effective Apr. 1, 2008).

218. Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 6.

219. *Id.* at 7.

220. *Id.* at 8.

221. *Sheiner v. State*, 82 So. 2d 657, 669 (Fla. 1955).

222. *In re E.S.*, 90 Cal. Rptr. 3d 564, 583 (Cal. Ct. App. 2009).

conflicting interests.”²²³ Clearly, this includes protecting and defending the right to counsel by avoiding conflicted representation due to defender excessive workload, that requires a lawyer to choose which clients to try to represent adequately.²²⁴

Judges must exercise independent, professional judgment.²²⁵ The Florida Code of Judicial Conduct (2006) provides: “An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved.”²²⁶

D. JUDICIAL (AND PROSECUTORIAL) COMPLICITY IN OBSTRUCTING THE RIGHT TO COUNSEL

The judiciary and its supporters constantly and justifiably note the importance of independence for this co-equal branch of government.²²⁷

223. *Holloway v. Arkansas*, 435 U.S. 475, 483 (1978).

224. *See In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1130 (Fla. 1990).

225. *See* FLORIDA SUPREME COURT, FLORIDA CODE OF JUDICIAL CONDUCT Preamble (2006), <http://www.floridasupremecourt.org/decisions/ethics/preamble.shtml> (“Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us.”).

226. *Id.* at Canon 1, 2. “A Judge Shall Avoid Impropriety and the Appearance of Impropriety in all of the Judge’s Activities.” *Id.* at Canon 1. “A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.” *Id.* at Canon 2(A). “A judge shall accord to every person who has a legal interest in a proceeding, or that person’s lawyer, the right to be heard according to law.” *Id.* at Canon 3(B)(7). “A judge shall dispose of all judicial matters promptly, efficiently, and fairly.” *Id.* at Canon 3(B)(8). “A judge with supervisory authority for the judicial performance of other judges shall take reasonable measures to assure the prompt disposition of matters before them and the proper performance of their other judicial responsibilities.” *Id.* at Canon 3(C)(3).

227. *See, e.g.,* Murphy, *supra* note 20, at 14. “Judicial independence goes to the heart of the democratic principles that support our liberty. It has been consistently eroded by attacks from those with political motivations.” *Id.* at 14. “The need for judges of courage will never end. . . . Let us not remain silent.” *Id.* at 25. As a local, federal district judge cautioned:

Imagine living in a country where the judge whom you had to trust to decide your case, or possibly to decide your fate, felt obligated to call other local political leaders before passing judgment. What if you stood wrongly accused of a crime, but the tenor of the times were to ‘get tough on crime.’ Would you want your judge to be told by some politician how to decide your case? . . . [T]oday we see an unprecedented attack on our nation’s judiciary. Politicians and ideologues are trying to bully courts into doing what they regard as politically correct, peddling the empty promise that difficult problems faced by our society can be solved by limiting legal representation, limiting access to the justice system. . . or simply by impeaching a few federal judges.

American Bar Association, *Independence of the Judiciary*,

<http://www.abanet.org/publiced/lawday/talking/jdgspsch.html> (last visited, Oct. 29, 2009).

The independence of the judiciary, the integrity of its processes and its moral authority depend on it defending the right to counsel. Otherwise, defense representation will depend on

Much less attention is given to the judiciary's obligation to use its independence to scrupulously adhere to constitutional principles and procedures, including the protection of the right to counsel and avoidance of defender EC.²²⁸ This is crucial because the courts, through litigation or administration, generally have the decisive duty and discretion. There is little recognition that the exercise of this discretion is essential to maintaining the integrity of the courts and, thus, their moral authority and independence.

More significantly, despite judges' constitutional and ethical obligations to ensure a fair trial and the fundamental importance of the right to counsel in fulfilling that obligation,²²⁹ judges frequently, actively obstruct the right to counsel.²³⁰

political leaders, who will tell defenders how to represent their clients (i.e., limiting representation and access to justice).

228. See, e.g., JUSTICE DENIED, *supra* note 17, at ch. 1.

229. See *id.* In Florida, the relationship between the courts and the Bar with regard to attorney regulation is recursive. See Standing Board Policies of the Florida Bar, Policy 15.55. The Bar's policy is to refer complaints arising from criminal cases to the presiding judge. *Id.*

230. Two recent national studies independently found that judges undermined the right to counsel by ignoring constitutional principles relating to waiver:

The ABA's Model Code of Judicial Conduct requires that judges "uphold and apply the law, and ... perform all duties of judicial office fairly and impartially." Among the many responsibilities of judges is the duty to make certain that no waiver of counsel is accepted unless it is "voluntary, knowing, intelligent, and on the record." Moreover, no guilty plea should be accepted from an accused unless there has been a valid waiver of the right to counsel. Not only are these requirements of U.S. Supreme Court decisions, but also the duty is often spelled out in court rules or in statutes. Yet, this report and other studies point to evidence that judges do not always take the necessary steps, especially in misdemeanor cases, to assure that all waivers of counsel are in fact valid. Because of concerns about waiver of counsel, the ABA has long recommended steps that go well beyond this Recommendation and constitutional requirements. The ABA urges that judges not accept waivers of counsel unless the accused has spoken to a lawyer and that judges renew the offer of counsel at each new stage of the proceedings when the accused appears without counsel.

JUSTICE DENIED, *supra* note 17, at 184 (Commentary, Recommendation 1).

In a number of jurisdictions, site teams observed judges ignoring the rules regarding waiver. Time after time, courts made clear to defendants that they must waive counsel to proceed. There were no inquiries into the education or sophistication of the defendants and very few efforts to warn defendants regarding the dangers of self-representation or the kind of assistance counsel could provide. Often the waiver was incorporated into the first part of the proceeding and was presented as a rhetorical, compound question directed at whether the defendant wanted to dispose of the case quickly. The judge asked the defendant something like, "You are waiving counsel and wish to proceed now, right?" and the defendant responded, "Yes."

NACDL MISDEMEANOR REPORT, *supra* note 22, at 15 (discussing Uninformed Waiver of Counsel).

The U.S. Supreme Court has time and again acknowledged that defense counsel is an integral part of the adversary system, and necessary to ensure accurate outcomes in court. The absence of counsel in misdemeanor cases fundamentally undermines the fairness and reliability of the criminal justice system.

Id. at 17 (Recommendation 1, Absence of Counsel).

The right to counsel should be observed in accordance with *Argersinger v. Hamlin*

In the normal daily grind of Florida's overwhelmed trial courts, judges routinely accept pleas at arraignment, and at other times, when the judge knows or should know that the defense attorney has done absolutely no work and is in no position to adequately counsel the defendant.²³¹ Institutionally, the courts have tolerated defender "meet and plead" and have instituted "rocket dockets" and "plea blitzes." This norm is widely regarded as questionable, but necessary for the sustainability of the system.²³²

Regardless of the serious lack of defender accountability or professionalism relating to their own EC, this situation cannot persist without judicial (and prosecutorial) complicity.²³³ Judges and prosecutors are aware of the lack of defender capacity and the attendant problems, and undermine the right to counsel.

One Third District Court of Appeal ("Third District") decision involving the revival of debtor's prison for counsel-less poor people illustrates the complicity of the trial and appellate courts and the prosecution in undermining the right to counsel.²³⁴ A specialized child-support collection court, which operated without defense attorneys, continually and illegally jailed people for failing to pay, without the required showing by the prosecution that the people had the ability to

and *Alabama v. Shelton*. As the Supreme Court stated in *Argersinger*, "[u]nder the rule we announce today, every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel ... and therefore know when to name a lawyer to represent the accused before the trial starts." Despite this pronouncement, more than 35 years later, the Court's ruling is widely ignored.

Id.; see also Jonathan A. Rapping, *You Can't Build on Shaky Ground: Laying the Foundation for Indigent Defense Reform Through Values-based Recruitment, Training, and Mentoring*, 3 HARV. L. & POL'Y REV. 161, 166 (2009), available at <http://southerndefender.files.wordpress.com/2007/06/final-harvard-pdf.pdf> (mentions judicial attitudes promoting "powerful disincentives for any lawyer to take seriously her duty to provide zealous and loyal representation").

231. See *Garcia v. Manning*, 717 So. 2d 59, 59 (Fla. 3d Dist. Ct. App. 1998).

232. See Rapping, *supra* note 230, at 163.

233. See Jessica Hafkin, *A Lawyer's Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones When Faced with Excessive Caseloads that Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. J. LEGAL ETHICS 657, 665-66 (2007) (Section III. Role of the Courts) (Judges lack explicit procedural and ethical standards requiring them to affirmatively ensure that attorneys are not subject to conflicts due to EC and take remedial action where appropriate); Ailsa Chang, *Not Enough Money Or Time To Defend Detroit's Poor*, All Things Considered, NPR, Aug. 17, 2009, available at <http://www.npr.org/templates/story/story.php?storyId=111811319#commentBlock> (quoting a Michigan appellate judge, who had presided over trials in Detroit for more than twenty years, and who had the courage to say that the root of the problem is that the system encourages shortcuts; the article is silent as to what the Detroit judges' response to that systemic failure has been over that time).

234. See *Manning*, 717 So. 2d at 60.

pay.²³⁵ This went on for three years, during which time the appellate court granted relief on exactly the same grounds in more than twenty cases.²³⁶ PD-11 filed a mandamus petition to rectify the pattern; the appellate court denied the petition.²³⁷

Despite the long-term unwillingness of the court to stop this unconstitutional pattern, the court ultimately, in *Manning*, found that there had been “a pattern of either purposeful misapplication, or, at best, willful ignorance of the law in this area by more than one judge.”²³⁸ The court also noted that one judge was “aware of the legal insufficiency of his judgment” at the time he entered it.²³⁹

The court noted that the prosecutor’s office had failed to fulfill its ethical responsibilities and had contributed to the injustice by encouraging the judge to incarcerate the debtor when it should have been “readily apparent” that it had failed to establish the debtor’s ability to pay.²⁴⁰

The court warned: “The continued failure to apply the law correctly in these hearings in the future will require us to refer the offending judge, or judges, to the Judicial Qualifications Commission for consideration of appropriate disciplinary measures.”²⁴¹ Given that *Manning* involves at least the twentieth example of this pattern, the court should have done more than issue a warning. There was no justification for the court to wait for “continued failure.”²⁴² The court appears not to have been any more effective in dealing with the failures of the prosecutor’s office.

The *Manning* decision is salutary, to the extent that the appellate court eventually addressed what it found to be a repeated, purposeful, or willful pattern of *illegal* conduct involving the violation of the right to counsel. However, its long-term tolerance of that pattern and failure to enforce professional standards with regard to the conduct of judges and prosecutors reflected a serious lack of concern and compromised the moral authority of the appellate court.

Courts have taken various approaches in creating great obstacles or disincentives for defenders to deal with the issue of EC. These include: holding a defender who attempts to uphold professional standards in

235. *Id.* at 59–60.

236. *Id.* at 59 n.1 (the court reports a string of ten cases which represent “less than one-half of the petitions” granted). Additionally, logistics precluded other people from access to habeas corpus review. *Id.*

237. *Smith v. Rivkind*, 659 So. 2d 282 (Fla. 3d Dist. Ct. App. 1995).

238. *Manning*, 717 So. 2d at 60.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

contempt; indicating that the problem is a political question, and therefore not justiciable; creating procedural obstacles; and establishing inappropriate ethical or performance standards requiring “actual prejudice” for relief.²⁴³

When a defender, in a professional manner, attempts to enforce the right to counsel, by insisting on sufficient time to be prepared for trial, he or she risks being held in contempt and taken into custody.²⁴⁴

Defenders across the country are forced to carry unethical caseloads that leave too little time for clients to be properly represented. As a result, constitutional obligations are left unmet and taxpayers’ money is wasted . . . [l]egal representation for misdemeanants is absent in many cases.²⁴⁵ When an attorney is provided, crushing workloads often make it impossible for the defender to effectively represent her clients. Counsel is unable to spend adequate time on each of her cases, and often lacks necessary resources, such as access to investigators, experts, and online research tools. These deficiencies force even the most competent and dedicated attorneys to engage in breaches of professional duties. Too often, judges and prosecutors are complicit in these breaches, pushing defenders and defendants to take action with limited time and knowledge of their cases.²⁴⁶ This leads to guilty pleas by the innocent, inappropriate sentences, and wrongful incarceration, all at taxpayer expense.²⁴⁷

There is a great need for judicial standards to make clear judges’ constitutional and ethical duties in this regard, especially with regard to

243. See *infra* Part IV.F (“Adopting an Inappropriate, *Strickland*-like Actual Prejudice Standard for Prospective Claims”).

244. *State v. Jones*, No. 2009-P-0018, 2008 WL 5428009, at *1 (Ohio Ct. App. Dec. 31, 2008), available at <http://www.sconet.state.oh.us/rod/docs/pdf/11/2008/2008-ohio-6994.pdf> (jurisdiction declined by the Supreme Court of Ohio, *State v. Jones*, 903 N.E.2d 323 (Ohio 2009)). In *Jones*, a hearing was later held on the contempt, and an ethics expert testified that the defender would have been in violation of his ethical obligations had he agreed to proceed to trial unprepared. *Id.* at 2. Despite this testimony, the judge upheld the contempt citation. *Id.* In upholding the decision, the judge noted that defenders plead cases and take cases to trial with minimal preparation all the time. *Id.* at 4. The reversal of the contempt on appeal may have been some consolation to the attorney. Ironically, as a reflection of the banality of evil, the judge cited the routine violation of ethical standards by defenders as an acceptable norm. See also NACDL MISDEMEANOR REPORT, *supra* note 22, at 23 (“A Public Defender Stands Up, and Faces Contempt.”); *supra* Part II.D (“The New Professionalism — The Banality of Evil”).

245. See Bob Kemper, *Gideon: Right to Counsel?: Landmark Decision Falls Short of Promise* (Sept. 2009), available at http://www.dcbbar.org/for_lawyers/resources/publications/washington_lawyer/september_2009/gideon.cfm. See generally NACDL MISDEMEANOR REPORT, *supra* note 22.

246. See THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 4-3.8 (Special Responsibilities of a Prosecutor). Rule 4-3.8 provides: “The prosecutor in a criminal case shall: (b) not seek to obtain from an unrepresented accused a waiver of important pre-trial rights such as a right to a preliminary hearing . . .” *Id.*

247. See NACDL MISDEMEANOR REPORT, *supra* note 22, at 7.

tolerating or promoting defender EC.²⁴⁸ The meaningful exercise of the right to counsel is essential to the proper functioning of any American court. By denigrating the right to counsel (e.g., by tolerating, condoning or promoting EC), judges demean themselves, their position and their function.

It is not in the institutional self-interest of the judiciary to be complicit in reducing judges to bureaucrats. Given the core functions of the judiciary, this is precisely the result when judges require defenders to bear excessive workloads, establish improper standards for review of claims of denial of the right, or engage in other unprofessional practices (e.g., not appointing counsel or accepting unconstitutional waivers in what amounts to obviously uncounseled pleas of guilt) that deny the right to counsel.

It is not the proper function of a self-respecting, separate, co-equal branch of government to blindly fulfill legislative mandates, especially when its own core constitutional functions are denigrated. Judges often act like prosecutors with regard to Justice. The sustainability of their own institution, however, requires them to maintain the quality of court procedures and ensure that people have a meaningful day in court. They should maintain professional standards and not tolerate defenders handling too many cases. Their standard cannot be so low that, regardless of the circumstances, the judicial assessment will be that the defenders have sufficient capacity to represent more clients.

There is little evidence of judges being disciplined for violating the right to counsel. The opacity of judicial discipline contributes to the problem of judges actually obstructing Sixth Amendment rights and the perception that they regularly do so. “Judges can be disciplined for failing to protect the right to counsel. Although it is not clear how often this occurs, because frequently the records are not public”²⁴⁹ This opacity undermines confidence in any meaningful enforcement and, thus, is destructive of the legitimacy and moral authority of the courts.²⁵⁰

248. See generally Hafkin, *supra* note 233, at 657 (analyzing ABA Formal Opinion 06-441, discussing approaches to reducing defender caseloads, and the need for the exercise of the judicial power in this effort).

249. See NACDL MISDEMEANOR REPORT, *supra* note 22, at 45 (Judges Face Discipline for Not Honoring Right to Counsel) (citing examples in Washington and New York).

250. See, e.g., *Garcia v. Manning*, 717 So. 2d 59, 59-60 (Fla. 3d Dist. Ct. App. 1998) (lack of disciplinary proceedings against judges and prosecutors for long-term violation of the right to counsel and other illegal conduct).

E. FLORIDA JUDICIAL INCENTIVES AND DISINCENTIVES TO ADDRESSING EXCESSIVE CASELOAD

Defenders have been treated fairly by the vast majority of Florida courts that have dealt with the issue of EC.²⁵¹ However, courts, within and without Florida, have created very significant disincentives for defenders who may need to consider seeking judicial relief from the consequences of EC.

The issuance of rules to show cause against three Florida PDs by the Supreme Court,²⁵² on its own initiative in 1981, was an act of institutional self-defense. It was a positive effort to maintain the integrity of the judicial system. It was not and should not be viewed simply as an attack on the defenders involved. It does, however, indicate the increased sensitivity of the Supreme Court to the delay in capital cases on its own docket, in contrast with similar problems elsewhere in the judicial branch, especially in the trial courts. It also served to divert legislative and public anger regarding delays in capital appeals away from the Court and toward the defenders. It not only emphasized the role of the defenders in creating delay, it was silent regarding the delays caused by the Court itself and by the attorney general. Although the clerk of the court told the author to bring his toothbrush to the hearing on the rule to show cause, the proceedings were fundamentally much more professional than those in *State v. Jones*.²⁵³

The resolution of this issue, as framed by the Court, was pragmatic and effective. It recognized that the delay was caused principally by legislative underfunding and the exercise of PD discretion circumscribed by scarce appropriations.²⁵⁴ As a result of these proceedings, PD-11, in response to a Court order, declined to accept new capital appeals for ten years, until funding improved.²⁵⁵

Unfortunately, Florida intermediate appellate courts, particularly the Second and Third Districts (“Second District” and “Third District”), have

251. See, e.g., Blake Order, *supra* note 67; *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1134 (Fla. 1990); *Turner v. State*, 1D08-2293 (Fla. 1st Dist. Ct. App. Nov. 25, 2008) (stipulation by the attorney general to withdrawal from one case by the appellate defender, whose motion asserted the unconstitutionality of Florida Statutes § 27.5303(1)(d), which precludes such withdrawal).

252. See, e.g., *In re* Directive to the Public Defender of the Eleventh Judicial Circuit of Florida, No. 60,513 (Fla. Apr. 28, 1981) [hereinafter *In re* Directive] (directing the public defender to decline any new capital representation until he could assure the Court that the cases would be handled in a timely manner).

253. *State v. Jones*, No. 2008-P-0018, 2008 WL 5428009 (Ohio Ct. App., Dec. 31, 2008).

254. See *In re* Directive, *supra* note 252.

255. *Id.*

occasionally engaged in what appears to be gratuitous denigration of PDs. This counterproductive approach appears to be designed to smooth relations with the legislative branch, to avoid requiring the state to spend money for a politically unpopular purpose, and to vent anger at frustrating situations beyond the judges' control.

PD-11 recently had a particularly dispiriting experience in the Third District.²⁵⁶ After enduring deteriorating circumstances caused by EC for several months and efforts at improvement had failed, PD-11 filed motions for relief in June, 2008.²⁵⁷ After two months of litigation by the office and its *pro bono* counsel, Hogan & Hartson, the office won in the trial court, which entered an order on September 3, 2008.²⁵⁸

Circuit Judge Stanford Blake, presiding over the hearing on the consolidated motions, found that:

- "PD-11's caseload was excessive by any reasonable standard"²⁵⁹
- "[T]he assistant public defenders of the Eleventh Judicial Circuit function under extreme and excessive caseloads," and that "the caseload of the felony public defenders in the Eleventh Judicial Circuit . . . far exceeds any recognized standard for the maximum number of felony cases a criminal defense attorney should handle annually,"²⁶⁰
- "[T]he number of active cases is so high that the assistant public defenders are, at best, providing minimal competent representation to the accused," and that "future appointments to non-capital felony cases will create a conflict of interest in cases presently handled by PD-11"²⁶¹; and
- "[Less-serious] felony cases are clogging the system and negatively impacting PD-11's felony attorneys' caseload."²⁶²

Judge Blake then held that "PD-11 is in need of relief sufficient to ensure that the assistant public defenders are able to comply with the Florida Rules of Professional Conduct and carry out their constitutional duties."²⁶³ The trial court authorized PD-11 to decline future, less-serious felony cases, about 60% of our felony caseload.²⁶⁴

256. See *State v. Public Defender*, 12 So. 3d 798 (Fla. 3d. Dist. Ct. App. 2009).

257. *Id.*

258. Blake Order, *supra* note 67, at 7.

259. *Id.* at 6.

260. *Id.* at 3-4.

261. *Id.* at 6.

262. *Id.* at 4-5.

263. *Id.* at 5.

264. Blake Order, *supra* note 67, at 6.

The trial court was reasonable, although it did not give PD-11 all the relief that we believed was necessary or to which we were entitled. The grant of relief proved to be ephemeral. It was immediately subject to a stay imposed by the Third District. The appellate court refused to lift the stay, which remained in place until the court reversed the trial court eight months later.²⁶⁵

The Third District's decision ranks with only a few others in the country in creating serious obstacles and disincentives to addressing EC and vindicating the right to counsel.²⁶⁶ The novelty and variety of these obstacles clearly demonstrates that the court prefers not to deal with these claims and takes an unusually superficial view of its obligations under the state and federal constitutions. Some of these obstacles will be discussed below. It is noteworthy that, in reversing Judge Blake's order, the appellate court did not dispute his factual findings.²⁶⁷

In at least three places, the court attempts to justify washing its hands of the problem. The majority opinion states that "The office-wide solution to the problem, however, lies with the legislature or the internal administration of PD11, not with the courts."²⁶⁸ The concurrence raises the issue of whether the motions are justiciable (i.e., present a cognizable case or controversy), and concludes that "this action is nothing more than a political question masquerading as a lawsuit, and should be dispatched on that basis."²⁶⁹ The concurrence goes on "Nor, as the majority well explains, is there any judicially discoverable and manageable standard to establish what is an 'excessive caseload.'"²⁷⁰

This flies in the face of Florida law, the effective approaches taken by other courts, and the court's core judicial responsibilities under the separation of powers.²⁷¹ Numerous courts, in Florida and other states, have taken a diametrically opposite approach to their responsibilities.

The court's evasion of its responsibility is further evidenced by the fact that the court was not being asked to discover or define what an EC is. First, this is not an uncommon judicial function. Courts across the country

265. See *State v. Public Defender*, 12 So. 3d 798, 800 (Fla. 3d. Dist. Ct. App. 2009).

266. See, e.g., *Kennedy v. Carlson*, 544 N.W.2d 1, 3-4 (Minn. 1996); *Platt v. State*, 664 N.E.2d 357, 363 (Ind. Ct. App. 1996).

267. See *Public Defender*, 12 So. 3d at 805-06.

268. *Id.* at 806.

269. *Id.* at 806 (Shepherd, J., concurring).

270. *Id.* at 807.

271. See discussion *supra* Part IV.A ("Core Judicial Functions and Inherent Power"); see also *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1138 (Fla. 1990); *Chiles v. Children*, 589 So. 2d 260, 264 (Fla. 1991); *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978).

have recognized EC when they have seen it and taken effective steps to see that it was managed.²⁷² Second, the identification of EC had already been made, initially by PD-11, the attorney with primary political and ethical responsibility, in the exercise of his independent professional judgment; and the defender's decision had been ratified by a trial judge after an in-depth, contested evidentiary hearing.²⁷³

It is disingenuous for the court to say that the solution lies with the PD.²⁷⁴ The PD sought judicial relief only because he lacked the autonomy to make a decision not subject to judicial review (and had been successful in obtaining relief in the trial court).

To my knowledge, no other court has created so many novel, baseless and difficult obstacles. The logistical burdens created by the court appear to be insurmountable, preventing PD-11 from dealing with its EC on an office-wide basis.²⁷⁵

For the first time in Florida, the Third District appears to have applied a draconian *Strickland*-like,²⁷⁶ actual prejudice standard to EC.²⁷⁷

[W]henver an attorney is burdened with an excessive caseload, there exists the possibility of inadequate representation. The possibility of these harms was discussed at the hearing below. However, there was no showing that individual attorneys were providing inadequate representation, nor do we believe this could have been proven in the aggregate, simply based on caseload averages and anecdotal testimony.²⁷⁸

272. See, e.g., Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 6 (ordering defenders to assert unavailability when appropriate); State *ex rel.* Acocella v. Allen, 604 P.2d 391, 394 (Or. 1979) (determination by the public defender committee that the defender is unable to serve binding on the trial court); Duncan v. State, 284 Mich. App. 246, 324–25 (Mich. Ct. App. 2009); Eligon, *supra* note 22 (regarding the chief administrative judge establishing maximum defender caseloads in New York City, pursuant to a state statute judges helped promote).

273. *Public Defender*, 12 So. 3d at 800.

274. *Id.* at 806.

275. In a subsequent case brought by PD-11, Circuit Judge John Thornton applied the Third District's case-by-case approach and granted a motion to withdraw. Judge Thornton found a "cognizable difference between a withdrawal based solely on workload, and withdrawal where an individualized showing is made that there is a substantial risk that a defendant's constitutional rights may be prejudiced as a result of the workload." State v. Bowens, No. F09-019364 (Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Fla. Stat., Unconstitutional and Granting Public Defender's Motion to Withdraw). This case-by-case approach effectively prevents relief from an EC of any size.

276. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); see also *Public Defender*, 12 So. 3d at 805.

277. See *Public Defender*, 12 So. 3d at 806. "Only after an assistant public defender proves prejudice or conflict, separate from excessive caseload, may that attorney withdraw from a particular case." *Id.*

278. See *id.* at 802–03.

Even assuming, arguendo, that the court's statement regarding the evidence is correct,²⁷⁹ by definition, the term EC means that, rather than a mere "possibility" of harm, the EC was actually causing harm or would reasonably be expected to interfere with competent representation.²⁸⁰ Imminent or substantial risk of harm to the right to counsel is justiciable and warrants relief; no showing of actual inadequate representation should be required.²⁸¹ The Florida rules of professional conduct require an attorney to decline or terminate representation if it is not possible to comply with the rules, rather than to wait until the harm is done.²⁸²

Requiring each individual lawyer, especially in an office with about 95 lawyers handling more than 43,000 felony cases per year, to proceed lawyer-by-lawyer or case-by-case is worse than ironic.²⁸³ The underlying problem is that each lawyer lacks sufficient time to assist existing clients. Each would be required to expend precious time and energy to marshal evidence regarding the actual impact of the lack of resources in each case. The difficulty in mustering the defender resources necessary to raise these issues in accordance with the Third District's requirements increases with

279. *Id.* at 805.

280. *See id.* at 801–02.

281. *See, e.g.*, *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), *dismissed on abstention grounds*, 976 F.2d 673 (11th Cir. 1992) ("The Sixth Amendment protects rights that do not affect the outcome of trial."); *Scott v. State*, 991 So. 2d 971, 972–73 (Fla. 1st Dist. Ct. App. 2008) (applying Florida's Rule Regulating the Florida Bar 4-1.7(a) and its "substantial risk" standard); *Duncan v. State*, No. 278652, 2009 WL 1640975, at *19 (Mich. Ct. App. June 11, 2009) (rejecting application of *Strickland*'s requirement of "deficient performance by counsel"); *Min. Order at 11, Arizona v. Lopez*, No. CR-2007-1544 (Ariz. 2007); *Mem. Decision at 5, Best v. Grant County*, No. 042001890 (Super. Ct. of Wash., Kittitas County, Oct. 14, 2005) [hereinafter *Mem. Decision Best*], *available at* <http://www.defender.org/files/archive/grantcosummjud.pdf>. "Prevent substantial harm from manifesting in actual ineffective assistance of counsel." *Id.* at 5 (rejects *Strickland* test and the need to "demonstrate individual prejudice," as inappropriate when addressing a claim for prospective relief); *New York County Lawyers' Ass'n v. State*, 742 N.Y.S.2d 16, 18 (N.Y. App. Div. 2002) (severe and unacceptably high risk standard); *New York County Lawyers' Ass'n v. State*, 745 N.Y.S.2d 376, 431 (N.Y. Sup. Ct. 2002) ("[T]he right to effective assistance of counsel in New York is much more than just the right to an outcome, threatened injury is enough to satisfy the prejudice element and obtain prospective injunctive relief to prevent further harm"); *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984); ABA Formal Op. 06-441, *supra* note 21; Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 6 (regarding defender unavailability).

282. *See THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, supra* note 171, at R. 4-1.16 (Declining or Terminating Representation). Rule 4-1.16 provides: "[A] lawyer shall not represent a client . . . if the representation will result in violation of the Rules of Professional Conduct or law." *Id.*; *see also Hagopian v. Justice Admin. Comm'n*, 18 So. 3d 625, 643 (Fla. 2d Dist. Ct. App. 2009) ("[U]nder rule 4-6.2(a), a lawyer may seek to avoid appointment by a court to represent a person when 'representing the client is likely to result in violation of the Rules of Professional Conduct or of the law.'").

283. *See Public Defender*, 12 So. 3d at 803–04.

the excessiveness of the caseload, and quickly becomes insurmountable.

This procedural requirement is not only a logistical disincentive to defenders to present claims. The requirement for attorney-by-attorney or case-by-case inquiries in a large jurisdiction with severe EC is a serious logistical burden on the trial courts' ability to hear the claims and grant relief. Equally important, this requirement is as needless as it is novel.

The Third District made numerous distinctions between PDs and assistant public defenders ("APDs"),²⁸⁴ that have no basis in law or common sense. The court held, contrary to years of Florida case law and practice, that excessive caseload issues cannot be raised by the elected PD on behalf of the entire office, but must be raised by individual APDs.²⁸⁵

More generally, the court noted that "The rules of professional conduct, however, are only meant to apply to attorneys, individually, and not the office of the Public Defender as a whole."²⁸⁶ This is contrary to numerous ethical and performance standards that expressly make managers and supervisors responsible for ensuring ethical and competent representation by their subordinates.²⁸⁷

284. *See id.* at 802–03.

285. *Id.* at 806. For EC litigation brought by elected public defenders. *See, e.g.,* Escambia County v. Behr, 384 So. 2d 147, 148 (Fla. 1980); *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1132 (Fla. 1990) (ordering elected Public Defender to decline certain types of new cases until caseloads reduced); *In re* Public Defender's Certification of Conflict 1994, 636 So. 2d 18, 19-21 (Fla. 1994) (approving order for elected public defender to withdraw from cases); *In re* Public Defender's Certification of Conflict 1998, 709 So. 2d 101, 103 (Fla. 1998) (permitting elected Public Defender to temporarily decline appeals).

Various cases have held public defenders accountable for delays caused by the EC of assistant public defenders. *See, e.g., In re* Directive, *supra* note 252 (directing the public defender to decline any new capital representation until he could assure the Court that the cases would be handled in a timely manner); *see also* FLA. STAT. § 27.5303(1) (2009) (statute refers to when a public defender determines there is a conflict of interest so that neither the defender nor staff can counsel a client).

286. *See Public Defender*, 12 So. 3d at 803.

287. *See* THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 4-5.1(b) (Supervisory Lawyer's Duties). Rule 4-5.1(b) provides: "Any 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." *Id.*; *see also id.* at R. 4-5.1(a) (regarding similar duties of managers).

The Florida rules are consistent with those of the ABA and other jurisdictions. "Lawyer supervisors, including heads of public defenders' offices having intermediate managerial responsibilities, must make reasonable efforts to ensure that the lawyers in the other office conform to the Rules of Professional Conduct . . ." ABA Formal Op. 06-411, *supra* note 21, at 1; *see also* EIGHT GUIDELINES, *supra* note 26. Guideline 4 provides: "Persons in Public Defense Provider programs who have management responsibilities determine, either on their own initiative or in response to workload concerns expressed by their lawyers, whether excessive lawyer workloads are present." *Id.* at 10. Guideline 6 provides: Defenders must also "file motions asking a court to stop the assignment of new cases and to withdraw from current cases,

Under rules similar to Florida's, a lawyer has been suspended for failure to ensure that a lawyer under his supervision did not labor under an excessive workload with too little experience and not enough supervision.²⁸⁸ In Florida, a criminal defense attorney's duty to inform his client of limitations on his ability to render effective assistance was vindicated under Canon 6 of the former Code of Professional Responsibility and related Ethical Considerations.²⁸⁹

The Florida rules require that all attorneys monitor and control workload.²⁹⁰

In addition to reducing the scope of the ethical rules to apply only to individual lawyers, the court curtailed cognizable conflicts to those approved by the legislature in section 27.5303(1)(e) ("involving codefendants and certain kinds of witnesses or parties"),²⁹¹ and excluded those established by the constitution or judicial rule (i.e., not "conflicts arising from underfunding, excessive caseload, or the prospective inability to adequately represent a client.").²⁹² The court then held there could be no relief because PD-11 "failed to submit to the trial court any evidence that a 'conflict of interest' as described by section 27.5303(1)(e), existed."²⁹³

This radical departure from ethical standards is contrary to the law,

as may be appropriate" *Id.* at 16. Guideline 7 provides: Defenders must "resist judicial directions regarding the management of Public Defense Programs that improperly interfere with their professional and ethical duties in representing their clients." *Id.* at 18. Guideline 8 provides: Defenders must seek appellate review of denials of such motions. *Id.* at 20; California Formal Op. 97-0007, *supra* note 130, at 3 ("I. A. Duties of Defender and Deputy Defender: the defender heading the office has ultimate responsibility for taking steps to provide competent representation to the indigent criminal defendants for whom she has been appointed."); *see also* THE STATE BAR OF CALIFORNIA, GUIDELINES ON INDIGENT DEFENSE SERVICES DELIVERY SYSTEMS 30 (2006) [hereinafter CALIFORNIA GUIDELINES], *available at* <http://www.calbar.ca.gov/calbar/pdfs/comcom/Indigent-Services-Guidelines.pdf> (personal and professional liability of chief defender for failure to effectively address workloads).

288. *See* Attorney Grievance Comm'n of Md. v. Kimmel, 955 A.2d 269, 284 (Md. 2008).

289. *Easley v. State*, 334 So. 2d 630, 632 (Fla. 2d Dist. Ct. App. 1976).

290. THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 4-1.3 (Comment: "A lawyer's workload must be controlled so that each matter can be handled competently."). Other ethical and performance standards are similar. *See* EIGHT GUIDELINES, *supra* note 26, at 5. Guideline 2 provides: "The Public Defense Provider has a supervision program that continuously monitors the workloads of its lawyers to assure that all essential tasks on behalf of clients, such as those specified in Guideline 1, are performed." *Id.* at 6; *see also* ABA Formal Op. 06-411, *supra* note 21; ABA, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (Feb. 2002) (Principle 5), *available at* <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf>; *State v. Smith*, 681 P.2d 1374, 1382 (Ariz. 1984). *See generally* CALIFORNIA GUIDELINES, *supra* note 287.

291. *Public Defender*, 12 So. 3d at 804.

292. *Id.*

293. *Id.*

including principles relating to separation of powers, the core functions of the courts, and the application of the same standards to court-appointed and private attorneys.

By permitting the legislature to establish lesser ethical standards for PDs, curtailing cognizable conflicts of interest established by the Supreme Court of Florida, the Third District unconstitutionally permitted the legislature to usurp core judicial functions, and promoted a violation of the separation of powers.²⁹⁴ The Supreme Court of Florida has exclusive jurisdiction over lawyers and the ethical codes governing them.²⁹⁵ Section 27.5303(1)(e), Florida Statutes, is therefore a violation of the separation of powers.²⁹⁶ The Third District's approach is also contrary to Supreme Court decisions directing PDs to decline new appointments and making clear the inherent authority of the judiciary to enforce this requirement.²⁹⁷ Trial courts have an affirmative obligation to avoid representation by defense attorneys with actual conflicts, which are presumed to prejudice the right to counsel.²⁹⁸

Contrary to the result reached by the Third District, defenders have the same functions, standards, rights and duties as private attorneys and the state must respect their independence.²⁹⁹

While performing his duties, the public defender retains all of the essential attributes of a private attorney, including, most importantly, his "professional independence," which the State is constitutionally obliged to respect. A criminal lawyer's professional and ethical obligations require him to act in a role independent of and in opposition to the State.³⁰⁰

294. *Id.* at 800; *see also* discussion *supra* Part IV.A ("Core Judicial Functions and Inherent Power").

295. FLA. CONST. art. V, § 15.

296. *See* discussion *supra* Part IV.A ("Core Judicial Functions and Inherent Power"). *But see* State v. Bowens, No. F09-019364 (Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Fla. Stat., Unconstitutional and Granting Public Defender's Motion to Withdraw) (granting PD-11's motion to withdraw due to excessive caseload and construing statute to be constitutional).

297. *See, e.g., In re* Public Defender's Certification of 1998, 709 So. 2d 101, 102-04 (Fla. 1998) (approving order that elected public defender decline cases and requiring monthly reporting of caseloads); *see also In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1138 (Fla. 1990).

298. *See* Holloway v. Arkansas, 435 U.S. 475, 475-76 (1978) (citing Chapman v. California, 386 U.S. 18, 23 (1967)) ("[I]nfraction can never be treated as harmless error."). *See, e.g., supra* notes 67, 275 (orders entered by Judges Blake and Thornton). The former was reversed. The second is pending certiorari review in the Third District. *See* Scott v. State, 991 So. 2d 971, 971 (Fla. 1st Dist. Ct. App. 2008).

299. West v. Atkins, 487 U.S. 42, 50 (1988).

300. *Id.* (internal citations omitted); *see also* Polk County v. Dodson, 454 U.S. 312, 321 (1981); Cuyler v. Sullivan, 446 U.S. 335, 344-45 (1980).

The Supreme Court of Florida has recently reiterated that a PD's "role does not differ from that of privately retained counsel."³⁰¹

The Third District's decision seriously interferes with the elected official's management of his or her office, contrary to Florida law. Despite numerous statements by the Supreme Court of Florida relating to the exercise of judicial power and intrusion into the management of defender offices,³⁰² the Third District was also willing to second-guess the PD-11 administration's attempt to establish more competitive salaries to reduce high turnover.³⁰³

Additionally, according to the Florida Constitution, the PD must be a lawyer and is the lawyer appointed by the court.³⁰⁴ The PD appoints APDs, and the defender, rather than the court, assigns those APDs to represent clients.³⁰⁵

The Third District held that section 27.5303(1)(d), Florida Statutes, prohibits the courts from providing relief from EC, either by withdrawing from existing cases or by declining new ones, except on a case-by-case basis.³⁰⁶

One problem with this statute is that it interferes with the courts' core functions in dealing with the right-to-counsel implications of conflicts of interest arising from EC.³⁰⁷ Another problem is that, on its own terms, the

301. FACDL, *supra* note 94, at 147 (quoting *Schreiber v. Rowe*, 814 So. 2d 396, 398 (Fla. 2002)); *see also* *Vermont v. Brillion*, 129 S. Ct. 1283, 1291 (2009); *Florida ex rel. Smith v. Brummer*, 426 So. 2d 532, 533 (Fla. 1982).

302. *State v. Public Defender*, 12 So. 3d 789, 803–04 (Fla. 3d Dist. Ct. App. 2009). In the context of excessive defender caseloads, Justice Harding wrote that public defenders "should be accorded great independence in making the decisions to carry out their charge." *In re Public Defender's Certification of Conflict 1994*, 636 So. 2d 18, 23 (Fla. 1994) (Harding, J., concurring). The Supreme Court of Florida has stated that "the courts should not involve themselves in the management of public defender offices." *Skitka v. State*, 579 So. 2d 102, 104 (Fla. 1991) (also quoted in *In re Public Defender's Certification of Conflict 1994*, 636 So. 2d at 21); *see also* *Arizona v. Lopez*, No. CR-2007-1544 at 11–12 (Ariz. Super. Ct., Mohave County Dec. 17, 2007) (motion to withdraw granted with expressly no court concern with "funding implications" and no court involvement with management of defender office); *Nevada Supreme Court Indigent Defense Order*, *supra* note 212, at 3 (judicial involvement in the process creates "an appearance of impropriety").

303. *Public Defender*, 12 So. 3d at 805 ("Public Defender Bennett H. Brummer acknowledged that he opted to increase salaries rather than hire additional staff.").

304. FLA. CONST. art. V, § 18.

305. *Id.*

306. *Public Defender*, 12 So. 3d at 804. The statute provides: "In no case shall the court approve a withdrawal by the public defender . . . based solely upon inadequacy of funding or excessive workload of the public defender . . ." FLA. STAT. § 27.5303(1)(d) (2008).

307. *See In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1137 (Fla. 1990); *see also* FLA. CONST. art. I, § 21 (Access to Courts). The statute has a number of other problems that will not be developed in this article, including obviating the presumption that an actual conflict is prejudicial and establishing a

statute prohibits courts from permitting “withdrawal” due to excessive workloads. The Third District expands the scope of the statute and denigrates the significant distinction between withdrawing and declining future appointments, although that distinction is well recognized and widely relied upon.³⁰⁸

In a concurring opinion in *Behr*, then-Chief Justice England elaborated on the importance of defenders declining cases, rather than waiting to withdraw from an EC:

The problem of excessive caseload in the public defender’s office should be resolved at the outset of representation, rather than at some later point in a trial proceeding. Public defenders, at the time of their appointment to a new case, are in the best position to know whether existing caseloads render unlikely their ability to continue to conclusion a new representation. If that prospect exists, they should so advise the trial court before undertaking new commitments. . . . By requiring public defenders to decline new representation on the basis of excessive 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.³⁰⁹

different standard for defenders and their indigent clients. The statute provides: “The court shall deny the motion to withdraw if the court finds the grounds insufficient or the asserted conflict is not prejudicial to the indigent client.” FLA. STAT. § 27.5303(1)(a) (2008). As noted in *Scott*, “Counsel does not have the burden to prove the ill effects of a conflict of interest in order to demonstrate entitlement to leave to withdraw from a case. The court must grant a public defender’s motion for leave to withdraw unless it can rule out prejudice in fact and any substantial risk of prejudice to the client(s) going forward.” *Scott v. State*, 991 So. 2d 971, 976 n.8 (Fla. 1st Dist. Ct. App. 2008).

308. *Public Defender*, 12 So. 3d at 803–05. See, e.g., THE FLORIDA BAR, *supra* note 171, at R. 4-1.16 (Declining or Terminating Representation – distinguishing when each is required or permissible); see also *id.* at 4-1.7(a)(2) (Conflict of Interest; Current Clients) (Comment: “An impermissible conflict of interest may exist before representation is undertaken, in which event the representation should be declined.”); ABA Formal Op. 06-441, *supra* note 21, at 4–5 (“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.”).

309. *Escambia County v. Behr*, 384 So. 2d 147, 150–51 (Fla. 1980) (England, C.J. concurring); see also *Skitka v. State*, 579 So. 2d 102, 102, 104 (Fla. 1991) (quashing order denying motion to withdraw from twenty-nine appeals, and holding that the public defender had presented sufficient grounds to permit withdrawal); *In re Public Defender’s Certification of Conflict* 1994, 636 So. 2d 18, 19, 22–23 (Fla. 1994) (affirming order permitting public defender to withdraw from 382 appeals due to excessive caseload); *In re Public Defender’s Certification of Conflict* 1998, 790 So. 2d 101, 103 (Fla. 1998) (approving order that public defender shall accept no appellate cases until further order of the court due to excessive workload); *In re Directive*, *supra* note 252 (directing the public defender to decline any new capital representation until he could assure the Court that the cases would be handled in a timely manner).

The Third District, in reversing the trial court, contravened the lower court's exercise of authority to vindicate the judicial power. The result is that section 27.5303(1)(d), as construed, not only obstructs, but precludes the Florida courts from providing a meaningful remedy to protect the defendants' right to counsel and access to courts due to EC. The appellate court did not pass on the constitutionality of section 27.5303(1)(d).³¹⁰ In construing and applying the statute, the Third District ceded the judiciary's interests in this aspect of the legislative war on the courts, contrary to its constitutional obligations.³¹¹

In sharp contrast with jurisdictions that grant defenders discretion to declare themselves unavailable due to EC, the Third District has created a procedure that keeps defenders available regardless of the circumstances. This judicial conflict-assessing process is adversarial, affording the prosecutor standing to oppose defender motions,³¹² and requires a case-by-case approach that will foreclose any meaningful remedy affecting a large number of cases. The current PD-11 litigation began in June 2008, and has, so far, involved two cases in two trial courts (which both granted relief), two cases in the Third District and one in the Supreme Court of Florida, all with the support of a national, pro bono law firm. This monumental effort has not resulted in actual relief from a single excessive case in 18 months.

The Third District's dismissal of the testimony of the lawyers that they could not cope with their caseloads as "anecdotal testimony"³¹³ is telling. The United States Supreme Court has acknowledged that counsel's representations of a conflict are presumptively correct:

[M]ost courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. In so holding, the courts have acknowledged and given effect to several interrelated considerations. An "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop

310. *Public Defender*, 12 So. 3d at 800, 807. *But see* State v. Bowens, No. F09-019364 (Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Fla. Stat., Unconstitutional and Granting Public Defender's Motion to Withdraw) (in a case brought subsequent to the Third District ruling; motion to declare statute unconstitutional denied, withdrawal following the case-by-case approach mandated by the Third District, after a contested three-day hearing, allowed). Certiorari taken by the state on November 6, 2009. *See* State v. Bowens, Case No. 3D09-3023, Nov. 9, 2009 (granting state's motion for stay of trial court's order pending further order of the Third District).

311. *See* discussion *supra* Part IV.D ("Judicial (and Prosecutorial) Complicity in Obstructing the Right to Counsel"); Part IV.H ("Legislative Intrusion on Judicial Functions").

312. *Public Defender*, 12 So. 3d at 801.

313. *Id.* at 802-03.

in the course of a trial.” Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. Finally, attorneys are officers of the court, and “when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.” We find these considerations persuasive.³¹⁴

The testimony of the lawyers involved, under oath, regarding their professional judgment that they cannot comply with constitutional or ethical standards is not merely “anecdotal.” On the contrary, it is the best evidence possible from the attorneys in “the best position to know.”³¹⁵ The testimony was presented by the elected defender, defender managers and line attorneys, the people who bore the primary professional responsibility. This was supported by testimony from a private defense attorney and Norman Lefstein, a nationally recognized expert on ethics and EC. Calling their testimony under oath regarding their professional judgment and capabilities “anecdotal,” disrespects defenders as accountable officers of the court.

The Third District acknowledged in an attempt, prior to its decision, to initiate review by the Supreme Court of Florida that the case addressed core values of the Florida CJS, constitutional and ethical requirements as to effective representation of indigent defendants, and constitutional separation of powers.³¹⁶ After the Third District’s decision, however, it declined to certify its decision as being “of great public importance.”³¹⁷

PD-11 has had a similar experience with the Third District (in addition to *Garcia v. Manning*). In 1978, two Florida PDs resorted to litigation to address the duties of PDs to their clients when their ability to provide effective representation was compromised due to ECs.³¹⁸ Jack

314. *Holloway v. Arkansas*, 435 U.S. 475, 485–86 (1978) (internal citations omitted); *see also* *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980).

315. *See supra* notes 155–56 and accompanying text. In Florida and many other jurisdictions, there is no obligation for a judge to hold a hearing on a conflict of interest. *See* FLA. STAT. § 27.5303 (2007). Florida law requires deference to a public defender’s judgment. *Id.* Justice Harding wrote that public defenders “should be accorded great independence in making the decisions to carry out their charge.” *In re Public Defender’s Certification of Conflict* 1994, 636 So. 2d 18, 23 (Fla. 1994) (Harding, J., concurring). In other jurisdictions, the defender’s decision is not even subject to judicial review. *See, e.g., State ex rel. Acocella*, 604 P.2d 391, 396 (Or. 1979) (a determination by the public defender agency that the defender is unable to serve is binding upon the trial court and is enforceable by mandamus).

316. *Public Defender*, 12 So. 3d at *passim*.

317. *Id.* at 800; *see also* FLA. CONST. art. V., § 3(b)(4) (“The Supreme Court [ma]y review any decision of a district court of appeal that passes upon a question certified by it to be of great public importance, or that is certified by it to be in direct conflict with a decision of another district court of appeal.”).

318. *State ex rel. Escambia County v. Behr*, 354 So. 2d 974, 975 (Fla. 1st Dist. Ct. App. 1978); *Dade County v. Baker*, 362 So. 2d 151, 151 (Fla. 3d Dist. Ct. App. 1978).

Behr, the PD for the First Judicial Circuit, was successful in withdrawing from six cases at the trial stage; the author, who was then the PD of PD-11, withdrew from non-capital appeals.³¹⁹

This occurred only six years after Florida's PDs had been elevated to constitutional officers and 15 years after Florida's defender system had been established by statute in the wake of *Gideon*.³²⁰ At the time, many were of the opinion that PDs simply had to handle all the cases assigned to them, within the appropriations provided.

In *State ex rel. Escambia County v. Behr*,³²¹ the First District Court of Appeal ("First District") held that the existing statute, requiring the PD to represent any person deemed insolvent who is charged with a felony,³²² could not be construed to mandate the appointment of the PD if that appointment would compromise the effectiveness of the representation provided.³²³ The court added that circuit courts have the legal authority to grant a PD's motion to withdraw and to appoint private counsel at county expense on the ground of defender EC.³²⁴

In contrast, the Third District, in a 2:1 decision, ruled that the PD had not stated a lawful ground that would justify withdrawal, and that, in granting relief, the trial court had departed from the essential requirements of law.³²⁵ Judge Hubbard, who had previously served as the elected defender for the eleventh circuit, dissented stating that, under the statute, no special circumstances were required for the trial court to appoint other counsel.³²⁶

These decisions were, in turn, addressed as companion cases by the Supreme Court of Florida.³²⁷ The Supreme Court adopted Judge Hubbard's dissent from the Third District's *Baker* decision.³²⁸ A similar approach is warranted today, although the legislature has modified the statutory, indigent defense scheme.³²⁹

The Supreme Court of Florida reaffirmed the *Behr* decision in 1990, writing that: "[w]hen excessive caseload forces the public defender to

319. See *Ex rel. Escambia County*, 354 So. 2d at 975; *Baker*, 362 So. 2d at 154 (quashed by *Escambia County v. Behr*, 384 So. 2d 147, 148-49 (Fla. 1980)).

320. *Baker*, 362 So. 2d at 155.

321. *Behr*, 354 So. 2d at 975.

322. See FLA. STAT. § 27.51 (1977).

323. *Behr*, 354 So. 2d at 975.

324. *Id.* at 975-76.

325. *Baker*, 362 So. 2d at 154.

326. *Id.* at 155 (Hubbard, J., dissenting).

327. See 384 So. 2d at 150 (reviewing *Ex rel. Escambia County* and *Baker*).

328. *Id.* at 149-50.

329. See FACDL, *supra* note 94, at 137.

choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.”³³⁰

For a number of years, Florida’s Second District also had a record of failing to adequately address defender appellate excessive workload until the problem reached crisis proportions.³³¹ As a result, EC plagued successive PDs in that jurisdiction.³³² In 1998, the Second District denied the PD for the Tenth Judicial Circuit’s (“PD-10’s”) motion to withdraw from appeals based on an ethical conflict of interest due to excessive caseload.³³³ The Second District’s decision was modified by the Supreme Court of Florida.³³⁴ The Supreme Court dealt with the Second District’s backlog (exceeding 640 appeals) and described it as:

a major crisis that we have considered on an emergency basis to ensure that the legislature has notice of this problem and can consider providing emergency funding. The district court noted in its opinion that it is reviewing cases in which the defendants have served their prison sentences or have completed their probation before the appellate public defender’s office has filed its briefs with that court.³³⁵

Without any foundation in fact, a Second District opinion attacked the appellate PD, who must run for elective office, as less effective than his peers.³³⁶ The Tampa Tribune quoted the Second District: “Obviously, this order would not be necessary if the public defender’s office had kept reasonably current with its workload as the other four appellate public defenders in this state have consistently done.”³³⁷ The Second District, by repeatedly resisting necessary relief and gratuitously attacking the defender who had the temerity to request it, created significant disincentives that did not go unnoticed among Florida’s elected defenders.

In contrast with the Second and Third Districts, the First District has responded by permitting defender withdrawals after less extreme backlogs have accrued.³³⁸ The First District has relied on private practitioners after

330. *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1135 (Fla. 1990) (quoted with approval in *In re* E.S., 90 Cal. Rptr. 3d 564, 585 (Cal. Ct. App. 2009)). Florida appellate courts also have repeatedly recognized that excessive appellate caseload creates a conflict. *See id.*

331. *Id.* at 1131.

332. *See id.* (PD-10 estimates that as many as 1700 appeals could be awaiting briefs).

333. *See In re* Public Defender’s Certification of Conflict 1998, 709 So. 2d 101, 101 (Fla. 1998).

334. *See id.* at 104.

335. *Id.* at 102.

336. *Id.* at 103.

337. *See* Jeff Stidham, *Judges Rebuke Public Defender*, TAMPA TRIB., Feb. 17, 1998, at 5; *see also In re* Public Defender’s Certification of Conflict 1998, 709 So. 2d at 101.

338. *See, e.g.,* Kiernan v. State, 485 So. 2d 460, 461 (Fla. 1st Dist. Ct. App. 1986) (100 cases); Grube v. State, 529 So. 2d 789 (Fla. 1st Dist. Ct. App. 1988) (100 cases); Terry v. State, 547 So.

developing backlogs of between 20 and 300 appeals.³³⁹

F. ADOPTING AN INAPPROPRIATE, *STRICKLAND*-LIKE ACTUAL PREJUDICE STANDARD FOR PROSPECTIVE CLAIMS

The courts should be willing to fashion a remedy for individual or systemic deficiencies without even requiring an *actual* conflict of interest, let alone requiring that additional “actual *prejudice*” result from a conflict. The adoption of such a standard is a very substantial obstacle to vindication of the right to counsel and has been rejected in the vast majority of jurisdictions.³⁴⁰

To apply a *Strickland*-like³⁴¹ test prospectively is to establish a “Through the Looking Glass” burden.³⁴² If there is any moral justification for such a standard, it cannot, on its own terms, be justified when applied to prospective, constitutional and ethical violations prior to trial, or prior to the inception of representation. The number of courts adopting this dangerous and reprehensible standard with regard to prospective relief is so small as to raise questions as to their motivation.

To require “actual prejudice” is to require attorneys and public officials to violate their oaths to support the Constitution and then to expect them to come forward and confess to these violations in order to protect the Constitution, their clients and the court system.³⁴³ For personal and professional reasons, lawyers are loath to admit publicly (or even to themselves) that they have rendered ineffective assistance of counsel or

2d 712, 713 (Fla. 1st Dist. Ct. App. 1989) (150 cases); *Day v. State*, 564 So. 2d 139 (Fla. 1st Dist. Ct. App. 1990) (300 cases); *Young v. State*, 580 So. 2d 301 (Fla. 1st Dist. Ct. App. 1991) (81 cases); *Woods v. State*, 595 So. 2d 264 (Fla. 1st Dist. Ct. App. 1992) (129 cases); *Bennett v. State*, 605 So. 2d 552 (Fla. 1st Dist. Ct. App. 1992) (23 cases); *Denmark v. State*, 616 So. 2d 1104 (Fla. 1st Dist. Ct. App. 1993) (50 cases); *Dung Van Le v. State*, 683 So. 2d 117 (Fla. 1st Dist. Ct. App. 1996) (48 cases); *see also* *Thomas v. State*, 593 So. 2d 617 (Fla. 1st Dist. Ct. App. 1992); *Turner v. State*, 1D08-2293 (Fla. 1st Dist. Ct. App. Nov. 25, 2008) (court acceptance of stipulation by the attorney general to withdrawal from one case by the appellate defender, whose motion asserted the unconstitutionality of Florida Statutes § 27.5303(1)(d), which precludes such withdrawal).

339. *See supra* note 338 and accompanying text.

340. *See, e.g.*, *Mem. Decision Best*, *supra* note 281, at 3; *see also* cases cited and accompanying text *supra* note 281 (“[I]mminent harm to the right to counsel is justiciable and warrants relief.”).

341. *See supra* notes 111, 276, 281 and accompanying text.

342. *See, e.g.*, *State v. Jones*, No. 2008-P-0018, 2008 WL 5428009, at *1 (Ohio Ct. App., Dec. 31, 2008) (shifts state’s burden of proof to individual).

343. *See, e.g.*, *United States v. Cronin*, 466 U.S. 648 (1984); *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (describing situations which are almost certain to occur when workload is excessive, and which, given our definition of EC, warrant a presumption of ineffectiveness).

have otherwise done harm to their clients.³⁴⁴ A *Strickland*-like standard is certain to embarrass, if not intimidate, lawyers and dissuade them from prospectively recognizing minimum ethical and performance standards. In addition to ego concerns, the approach may jeopardize a lawyer's license and subject the lawyer to civil liability. On the other hand, coming forward may afford a lawyer some protection against civil rights liability.³⁴⁵

The Supreme Court of the United States has indicated that any infraction of the right to counsel is prejudicial.³⁴⁶ In several situations, prospective and retrospective, a presumption of ineffectiveness is appropriate. The Court has also noted the difficulty of demonstrating prejudice.³⁴⁷

The *Holloway* Court rejected the need for actual prejudice.³⁴⁸ The Court stated that an actual conflict of interest warranted a presumption of prejudice, and that a requirement to show prejudice in some specific fashion "would not be susceptible of intelligent, evenhanded application."³⁴⁹

When EC creates an actual conflict and relief should be presumed, requiring actual prejudice begs the courts to decide questions and make the sort of "nice calculations" decried in *Holloway*,³⁵⁰ and to determine, as the *Glasser* Court warned, "the precise degree of prejudice" which the Court said "is at once difficult and unnecessary."³⁵¹ The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its

344. The following has been observed in regard to this reluctance:

In analyzing the unsatisfactory outcome in *Kennedy v. Carlson*, . . . one writer has concluded: The lesson to be learned from the failure of the Minnesota litigation is that a public defender understandably will resist revealing how its own staff is causing or has caused injury to clients. The office would have to publicly admit error—a task that is unpleasant, bad for staff morale, and potentially damaging to its credibility with the public. . . .

JUSTICE DENIED, *supra* note 17, at 143 n.179 (quoting Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 322 (2002)) (internal quotation marks omitted).

345. See *Miranda v. Clark County*, 319 F.3d 465, 469 (9th Cir. 2003) (en banc).

346. *Holloway v. Arkansas*, 435 U.S. 475, 492 (1978) (no infraction of the right to counsel is harmless).

347. See cases cited *supra* note 343 and accompanying text (discussing various situations described in *Cronic* in which a presumption of ineffectiveness is appropriate, even after conviction).

348. See *supra* note 243 and accompanying text.

349. *Holloway*, 435 U.S. at 490; see also *Scott v. State*, 991 So. 2d 971, 972 (Fla. 1st Dist. Ct. App. 2008).

350. See *Holloway*, 435 U.S. at 488 (interpreting *Glasser v. United States*, 315 U.S. 60 (1942)).

351. *Glasser*, 315 U.S. at 75–76.

denial.”³⁵²

Some of these “difficult and unnecessary questions” relate to: How can evidence of some sorts of prejudice, especially prospective prejudice, be marshaled? How much lack of assistance and adversarial testing is sufficient to warrant relief?³⁵³ How much real damage must be caused by a conflict of interest? How much actual prejudice should we tolerate before we consider representation inadequate or the adversarial system unreliable? How many actual “injuries-in-fact” must be shown?³⁵⁴

Defenders asserting EC claims (prospective, retrospective, or both) will often be entitled to a presumption of prejudice.³⁵⁵ However, given their propensity to wait too long, by the time that most assert their claims, they can support the presumption with facts.

By ignoring constitutional and ethical standards, the state not only puts clients’ lives at risk and subjects lawyers to professional and legal liability, it undermines, and ultimately destroys, the adversarial system and engenders widespread disrespect for the judicial system and the rule of law.

To require a showing of bar complaints or sustained client claims of ineffective assistance of counsel creates an enormous disincentive to lawyers coming forward. It requires that unethical and unconstitutional harm be done, a formal complaint made, and the harm recognized by some official body.³⁵⁶ It also posits a standard most unlikely to be met. Relatively few formal complaints are made to the bar; virtually none are sustained.³⁵⁷ The dearth of meaningful enforcement of applicable standards

352. *Id.*

353. *See* United States v. Cronin, 466 U.S. 648, 659 (1984); Gideon v. Wainwright, 372 U.S. 335, 344 (1963).

354. *See* Kennedy v. Carlson, 544 N.W.2d 1 (Minn. 1996).

355. *Id.* at 7.

356. *See* Kennedy, 544 N.W.2d at 8.

357. *See* JUSTICE DENIED, *supra* note 17.

Despite the legal profession’s requirement that competent representation be provided and that workloads be controlled, there is scant evidence in the United States that defense attorneys are ever actually disciplined for failing to represent their clients adequately. Disciplinary commissions in the 50 states normally act in response to complaints from disappointed clients, but neither indigent defendants nor others on their behalf often complain about counsel’s representation to disciplinary authorities.

Id. at 36–37.

It is also worth noting that there are virtually no cases in the country in which disciplinary counsel have sought to sanction public defenders for undertaking the representation of too many clients, perhaps because such counsel understand that the caseloads of defenders are not entirely under their control.

Id. at 144. *But see* Chang *supra* note 233 (multiple reprimands of a court-appointed Michigan attorney who gets paid per case). *See also* *In re* matter of Robert H. Pinto, Public Defender, San Benito County, (California State Bar Court Case No. 93-0-10027); LOS ANGELES DAILY J., bar discipline column, May 8, 1995 (contract county defender placed on probation for failure to supervise a subcontractor resulting in harm to clients); Suzanne Quine Maltin, *California Bar*

by the courts and the bar, and the difficulty of meeting the post-conviction second prong of the *Strickland* standard means that, under normal circumstances, unmade or unsustainable claims will be a disincentive for other claims.³⁵⁸

Whether or not clients formally and publicly complain, to suggest that there are no client complaints stands constitutional and ethical principles (including the presumption of innocence and waiver of the right to counsel) on their head. Of course, clients (and their families) regularly complain, orally and in writing, to defenders and defender offices regarding lack of assistance. Many of these client complaints are justified.

The Third District's recent decision appears to require an actual prejudice standard for a prospective or existing EC claim.³⁵⁹ It is the first Florida decision to do so.³⁶⁰

Only two courts outside of Florida have applied a *Strickland* or *Strickland*-like standard to deny requests for prospective relief, *Platt v. State*,³⁶¹ and *Kennedy v. Carlson*.³⁶² The latter applied what appears to be an "actual prejudice" standard.³⁶³

In *Platt*, the court reviewed a lawsuit challenging the state's county indigent defense system using the *Strickland* standard for ineffective assistance.³⁶⁴ It stated that a violation of the Sixth Amendment will only arise when a defendant shows he was prejudiced by an unfair trial.³⁶⁵ The court found that the claim was not ripe for review under the Sixth Amendment because there was no court proceeding or outcome on which the court could base its analysis.³⁶⁶ It also held that the defendants had "adequate" remedies at law because appellate remedies exist to correct errors.³⁶⁷ However, appellate remedies that focus on errors are not an adequate substitute for initial review of prospective violations of the right

#104084, THE CALIFORNIA BAR J., Feb. 1996, available at

<http://calbar.ca.gov/calbar/2cbj/96feb/2cbj29.htm> (placed on probation after she "stipulated that she failed to perform legal services competently" as a subcontractor with the San Benito County contract defender).

358. See *id.* at 36-37.

359. See *State v. Public Defender*, 12 So. 3d 798, 806 (Fla. 3d Dist. Ct. App. 2009).

360. Cf. *Scott v. State*, 991 So. 2d 971, 972 (Fla. 1st Dist. Ct. App. 2008) ("Conflicts of interest are best addressed before a lawyer laboring under such a conflict does any harm to his or her client(s)'s interests.").

361. *Platt v. State*, 664 N.E.2d 357 (Ind. Ct. App. 1996) (citing *Kennedy* in a footnote to support its holding).

362. *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996).

363. *Id.* at 7.

364. *Platt*, 664 NE.2d at 364.

365. *Id.* at 363.

366. *Id.* at 364.

367. *Id.*

to counsel, especially those aspects that do not relate to outcomes.³⁶⁸ Also, appellate remedies shift the burden to the individual and vitiate the presumption of innocence.³⁶⁹

In *Kennedy*, a PD sought to have an indigent defense funding statute declared unconstitutional.³⁷⁰ The burden to find a statute unconstitutional is very high.³⁷¹ *Kennedy* may have turned, in part, on insufficient pleading by the defender. The *Kennedy* court held that the defender failed to show an injury-in-fact required for the claim to constitute a justiciable controversy, and that a possible, prospective ethics issue is too speculative to constitute a cause of action.³⁷² Of course, applying this actual prejudice standard is not appropriate and the defender should not have been required to meet it.³⁷³

Additionally, the *Kennedy* court overreached in an apparent attempt to undermine EC claims by denigrating national professional standards. The court validly observed that the ABA Caseload Standards are not of constitutional stature.³⁷⁴ However, this point is a straw man. Regardless of the standards' non-constitutional stature, many high courts, including the Supreme Court of the United States, have relied on the ABA and the National Legal Aid & Defender Association ("NLADA") standards to provide professional guidelines, and as a persuasive framework for evaluating indigent defense issues.³⁷⁵ Examples of state and federal courts' reliance on ABA standards are too numerous to permit citation of a representative sample.³⁷⁶

The test must be prospective in order to be consistent with constitutional and ethical principles. Imminent, rather than actual,

368. *State v. Jones*, No. 2008-P-0018, 2008 WL 5428009, at *6 (Ohio Ct. App. Dec. 31, 2008).

369. *See id.*

370. *Kennedy*, 544 N.W.2d at 3.

371. *See* FACDL, *supra* note 94, at 139 (stating possible separation of powers concerns).

372. *Kennedy*, 544 N.W.2d at 8.

373. *See* cases cited *supra* note 281 and accompanying text.

374. *Kennedy*, 544 N.W.2d at 4.

375. *See, e.g.*, *Strickland v. Washington*, 466 U.S. 668, 690 (1984) (referring generally to the "[p]revailing norms of practice as reflected in American Bar Association standards and the like."); *Cuyler v. Sullivan*, 446 U.S. 335, 347 (1980); Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 5 (referring to the NLADA recommended caseload standards); *State v. Smith*, 681 P.2d 1374, 1380, 1382 (Ariz. 1984) (adopting the ABA Standards for Criminal Justice); *see also In re E.S.*, 90 Cal. Rptr. 3d 564, 585 (Cal. Ct. App. 2009) (citing, NLADA, *Workload of Public Defenders* (1973) std. 13.12, p. 276 as objective criteria for the basis of decision).

376. *See* cases cited *supra* 375. *See*, for example, court rules relying on ABA standards which standards are incorporated in court rules, ARIZ. R. CIV. P. 6.8(b)(1)(3), regarding capital cases. Some state bar standards rely on ABA and NLADA standards. *See* STATE BAR OF CALIFORNIA, *supra* note 287.

prejudice is clearly sufficient to warrant relief.³⁷⁷ If the situation is sufficiently dire, a presumption of prejudice applies.³⁷⁸

Prospective relief applies to a wide range of situations, including prior to the inception of representation (prior to appointment to represent future clients in order to protect existing clients), prior to trial, and prior to conviction.³⁷⁹ Professional, ethical rules are forward-looking and speak in terms of imminent harm and substantial risk.³⁸⁰

Post-conviction review standards, by their own terms, are inapposite to dealing with the actual or imminent impact of EC in the context of prospective requests for relief. *Strickland* was intended to be applied in a post-conviction criminal appellate context,³⁸¹ and focuses on a number of factors appropriate only in the post-conviction setting.

Strickland focuses on “counsel’s errors” and their consequences in terms of the reliability of the “adversary process.”³⁸² *Strickland* applies to claims involving “specified errors made by counsel.”³⁸³ There may not be any errors of counsel related to a prospective or systemic EC claim.

The second, or “prejudice,” prong of *Strickland* was created to protect the finality of convictions.³⁸⁴ Prospective EC claims do not involve vacating a verdict or conviction.³⁸⁵ Thus, the public policy of supporting finality is inapposite.³⁸⁶ *Strickland*’s second prong “is essentially harmless error analysis” and is “confused with justiciability analysis in a case

377. See cases cited *supra* note 281 and accompanying text.

378. See *United States v. Cronin*, 466 U.S. 648, 660 (1984); *Holloway v. Arkansas*, 435 U.S. 475, 489 (1978).

379. See *Duncan v. State*, 284 Mich. App. 246, *125 (Mich. App. June 11, 2009). “The right to counsel must mean more than just the right to an outcome.” *Id.*; see cases cited and accompanying text *supra* note 111; *Strickland*, 466 U.S. at 691–92 (quoting “[t]he 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.”).

380. See, e.g., ABA MODEL RULES OF PROF’L RESPONSIBILITY R. 1.9 (2008); THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 4–1.7(a) (stating the “substantial risk standard”); see also *supra* note 308 and accompanying text.

381. *Strickland v. Washington*, 466 U.S. 668, 671 (1984) (citing “[t]his case requires us to consider the proper standards for judging a criminal defendant’s contention that the Constitution requires a conviction or death sentence to be set aside because counsel’s assistance at the trial or sentencing was ineffective”); see also *Duncan*, 284 Mich. App. at *125.

382. *Strickland*, 466 U.S. at 687.

383. *Cronin*, 466 U.S. at 667.

384. See *Strickland*, 466 U.S. at 693–94.

385. See *Duncan*, 284 Mich. App. at *125.

386. See *Witt v. State*, 387 So. 2d 922, 925 (Fla. 1980) (reaffirming *Hughes v. State*, 901 So. 2d. 837, 839–40 (Fla. 2005) (noting that “the State acquires an interest in the finality of convictions”); *Scott v. State*, 991 So. 2d 971, 972 (Fla. 1st Dist. Ct. App. 2008) (quoting “[v]iewed prospectively, any substantial risk of harm is deemed prejudicial”).

involving an altogether different remedy.”³⁸⁷ Thus, neither the judicial principle of justiciability nor the standard for appellate review supports this test with regard to prospective claims.

These widely-criticized tests create disincentives that are worse than daunting or draconian. Substantively, they are nonsensical. Logistically, they are often insurmountable.

G. FLORIDA BAR FECKLESSNESS REGARDING THE RIGHT TO COUNSEL AND DEFENDER EXCESSIVE CASELOAD

The Court’s supervisory role over the Bar and the regulation of all Florida lawyers provides a powerful potential administrative vehicle for protecting the right to counsel. The Bar could be a principal player in determining indigent-defense-system quality issues. Working with the Court, or autonomously, it has a number of effective tools for addressing the problems discussed here. Unfortunately, the Bar has been feckless, and the Court has seemed quite satisfied with the standards set by the Bar and their enforcement.

The Bar is an arm of the Supreme Court of Florida,³⁸⁸ which has “exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.”³⁸⁹

The Court has, numerous times, recognized that an independent legal profession and lawyers free to exercise independent judgment are critical to protecting constitutional principles and individual rights.

[A]n independent legal profession plays a critical role in maintaining our constitutional structure. It is the lawyers who bring cases before a court and advocate issues which assure the integrity of the Constitution and protect individual rights in our society. The availability of lawyers to challenge government conduct that interferes with constitutional rights is essential to assure that these rights are protected.³⁹⁰

The Bar’s stated principles are laudable.³⁹¹ The Bar leadership says it is committed to creating a professional culture that embraces high

387. *Duncan*, 284 Mich. App. at *125.

388. *Dacey v. The Florida Bar*, 414 F.2d 195, 197 (5th Cir. 1969) (stating “[T]he Florida Bar is an agency of the judicial branch”); *In re The Florida Bar*, 316 So. 2d 45, 49 (Fla. 1975).

389. FLA. CONST. art. V, § 15.

390. *In re Amendments to Rules Regulating the Florida Bar 1–3.1(a)*, 598 So. 2d 41, 43 (Fla. 1992); see also FACDL, *supra* note 94, at 147; *State ex rel. Smith v. Brummer*, 426 So. 2d 532, 533 (Fla. 1982).

391. See, e.g., THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 1-2. “The purpose of The Florida Bar shall be to inculcate in its members the principles of duty and service to the public, to improve the administration of justice, and to advance the science of jurisprudence.” *Id.*

standards of conduct and integrity.³⁹²

Based on my experience with the enormous gap between the Bar's stated and operational principles, I have concluded that the Bar is certainly not serious. The Bar's ethical standards in criminal cases are chronically and obviously honored in the breach. The Bar incessantly preaches professionalism, but fails to address systemic circumstances that violate constitutional and ethical duties, denigrate public service, demoralize members of the Bar, and make professionalism impossible.

Our adherence to professional ethics is the only justification for the special place that lawyers have in our society and the only legitimate basis on which we can consider ourselves a profession, rather than a trade (and the only factor distinguishing the bar from a trade association). Professional responsibility is not an oxymoron; it should be recursive or redundant. It is an integral part of ensuring that the people who work in the judicial and CJSs are performing in a manner that promotes justice and dignity. "Professionalism means creating a balanced adversarial system and affording litigants a meaningful day in court."³⁹³ This requires ensuring the meaningful assistance of counsel.³⁹⁴ Professionalism requires working to maintain the courts as autonomous, impartial, disinterested adjudicators of fact and law in the service of justice — not as processors of cases and people.³⁹⁵

"We take these fundamental concerns for granted at our peril."³⁹⁶ We must struggle to keep the judicial system free of EC and other political, structural and procedural impediments to its proper function.

All Florida lawyers must be members of the Bar.³⁹⁷ About 1400 PDs and APDs pay the Bar's mandatory dues, but have received very little effective support from the Bar. This is the professional equivalent of the mandatory application fee imposed upon indigent defender clients by

392. *Id.*

393. Brummer, *supra* note 3, at 623.

394. *See* United States v. Cronin, 466 U.S. 648, 656 (1984).

395. *See, e.g.,* Arthur J. Goldberg, *The Calling of the Law Profession Is Great, When Greatly Pursued*, PERSPECTIVE (Nova Univ. Law School), Fall 1980, at 6.

The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances. If, in each lawyer, there is a deep and genuine commitment to justice and to our constitutional commitment as well as to professional excellence, if each feels in the deep recesses of heart and mind a sacred stir towards justice, then, and only then, will the flame burn bright while the torch [is] in [one's] keeping. Then, and only then, will the great calling of the profession of law be greatly pursued.

Id. at 6 (alterations in original); *see also* Brummer, *supra* note 3, at 622–23.

396. Brummer, *supra* note 3, at 623; *see also supra* note 248 and accompanying text.

397. THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 1–3.1.

Florida statutes.³⁹⁸ It amounts, at best, to benign neglect, especially where the clients and their lawyers receive little or no service.

Ethical standards have been reduced to a sham. This situation has been accompanied by professional self-satisfaction, self-congratulation, and copious lip service.³⁹⁹

The Bar has failed to support indigent defense in countless ways, including failure to use grievance procedures to ensure that ethical standards are met;⁴⁰⁰ to address significant problems that come to its attention;⁴⁰¹ and to effectively support commissions and committees that have attempted to address indigent-defense quality issues.⁴⁰²

Bar grievance procedures designed to enforce ethical standards have been all but abandoned with regard to EC. Theoretically, there are sanctions for failure to ethically perform a lawyer's prescribed role.⁴⁰³ However, the sanctions are almost never applied to defenders, in general, and EC, in particular.⁴⁰⁴

By generally giving PDs (and other court-appointed attorneys) a pass, the Bar fails to maintain any ethical floor under the professional services they provide. Ironically, as a reflection of the banality of evil, when defenders attempt to enforce minimal professional standards, opponents assert, as evidence, that clients have not been prejudiced, and that there are no sustained bar complaints.

398. FLA. STAT. § 57.082(1)(d) (2009) (requiring an application fee up to \$50).

399. Typical of these pieties is the following quote from a justice of the Supreme Court of Florida addressing The Florida Bar Board of Governors in 1992: “[I]mportantly and primarily, The Florida Bar serves the public of Florida by administration of programs that are designed to ensure that legal services are provided by Florida lawyers who are competent, skilled and adhere to the very highest ethical standards.” Jan Pudlow, *Justice Wells Says his Goodbyes, ‘We have no rights unless they are enforced,’* THE FLORIDA BAR NEWS, Mar. 1, 2009, at 1.

400. See FACDL, *supra* note 94, at 147; *Escambia County v. Behr*, 384 So. 2d 147, 151 (Fla. 1980) (England, C.J., concurring).

401. *Id.*

402. *Id.*

403. *Id.*

404. *But see* Attorney Grievance Comm’n of Maryland v. Kimmel, 955 A.2d 269, 272 (Md. 2008). Under Maryland rules, similar to Florida’s, a lawyer was suspended for failure to ensure that a lawyer under his supervision did not labor under an excessive workload with too little experience and not enough supervision. *See id.*

“[T]here are virtually no cases in the country in which disciplinary counsel have sought to sanction public defenders for undertaking the representation of too many clients, perhaps because such counsel understand that the caseloads of defenders are not entirely under their control.” JUSTICE DENIED, *supra* note 17, at 144. After citing three cases related to ethics enforcement from three states, the commentary to Recommendation 14 of JUSTICE DENIED observed, “defense attorneys who represent the indigent are rarely disciplined even when their caseloads are excessive, and they fail to provide competent representation.” *Id.* at 203 n.88 (Commentary, Recommendation 14).

The Bar's continuing failure to provide a meaningful, professional floor under the quality of defender representation makes the Bar an enabler. It permits the continuation of incompetent representation, contrary to constitutional standards and the Bar's own stated purposes and ethical rules.

The Bar has had numerous opportunities to begin investigations, make recommendations, and institute proceedings that would require defenders (and other stakeholders) to desist from violating their constitutional and ethical obligations or face real consequences. The Bar has certainly been aware of the inability of defenders to fulfill their professional obligations; the extent of the EC problem; and the years of litigation expended on these issues.⁴⁰⁵

Recently, in the course of its normal rule-making procedure, the Bar considered the adoption of a rule of procedure that would require defenders to provide representation at first appearance.⁴⁰⁶ The proposed rule merely reflected the constitutional imperative of representation at all critical stages of the proceedings.⁴⁰⁷

A number of Florida PDs publicly opposed adoption of the rule because of logistical and budgetary problems.⁴⁰⁸ On hearing this defender position, one judge publicly and appropriately expressed revulsion: "Eighteenth Circuit Judge O.H. Eaton said, 'I never thought the government was able to use cost benefit analysis for constitutional rights. That makes me kind of nauseous.'"⁴⁰⁹

The proposed rule passed the Bar's Criminal Procedure Rules Committee by a unanimous vote.⁴¹⁰ It was endorsed by the Bar and adopted by the Florida Supreme Court.⁴¹¹ However, the Bar has taken no formal action in response to PDs' admissions that they customarily failed to provide critical representation, admissions made before one of its own

405. See, e.g., Roberta G. Mandel, *The Appointment of Counsel to Indigent Defendants Is Not Enough: Budget Cuts Render the Right to Counsel Virtually Meaningless*, FLORIDA BAR JOURNAL, Apr. 2009, at 43 (the article was published in the Bar's journal). "Florida's public defender offices are so under-funded that it is virtually impossible to adequately and completely fulfill the scope of representation to indigent defendants as defined by law." *Id.*

406. *In re* Amendments to Florida Rule of Criminal Procedure 3.130, 11 So. 3d 341 (Fla. May 28, 2009).

407. See, e.g., *Rothgery v. Gillespie County*, 128 S. Ct. 2578, 2592 (2008); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970); *Phillips v. State*, 612 So. 2d 557, 559 (Fla. 1993) (identifying that the right to counsel under Florida and federal Constitutions attaches at first appearance).

408. Jan Pudlow, *Who Should Be Attending First Appearances? Rules Panel Finds the Answer is Not as Clear as it Might Appear*, FLORIDA BAR NEWS, Feb. 15, 2008, at 1.

409. *Id.*

410. See *In re* Amendments to Florida Rule of Criminal Procedure 3.130, 11 So. 3d at 341.

411. See *id.* at 341-42.

committees and reported in its own newspaper. Promulgating a rule of court is salutary, but it is not a substitute for meaningful corrective action for circumstances officially brought to the attention of the Bar. Isn't the Bar duty bound to inquire into this conduct regardless of the passage of the rule?⁴¹²

On at least two separate occasions, the Bar has been unwilling to support even simple ethical rules related to defender workload. After the Supreme Court's decision in *In re Order*, the Bar's Committee on the Representation of Indigents proposed that the rules regulating the Bar be amended so as to clearly reflect the decision's ethical holding.⁴¹³ Although the proposed language merely followed the decision, the Bar rejected it.⁴¹⁴

Subsequently, the Bench/Bar Commission, a joint effort of the Supreme Court of Florida and the Bar addressed the issue of defender caseloads and recommended standards for approval by the Bar and adoption by the Supreme Court:

The Supreme Court should recommend amending Florida Rule of Criminal Procedure 3.111 (b) by adding a provision that (1). . . [t]he caseload of attorneys employed by the Public Defender shall not exceed a maximum annual standard to be adopted by the Court. . . . (2) Upon certification by the Public Defender that case assignments exceed maximum standards, the trial court shall grant the Public Defender's motion to withdraw and appoint private counsel to represent the defendant.⁴¹⁵

Although the Bar was a sponsor of the commission and the

412. The question of judicial complicity in the conduct of first appearance hearings is a separate, but related matter. The amendment adopted by the Florida Supreme Court required that adequate notice of first appearance hearings be given to the prosecutors and defenders, hearings generally be held during normal business hours, and that an official record of the proceedings be maintained. *See id.* at 341-42.

413. *In re Order* concluded that excessive public defender caseload was an ethical issue, which might create a conflict of interest requiring withdrawal:

When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created. . . .

. . . .

. . . [W]here the backlog of cases in the public defender's office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw. If the court finds that the public defender's caseload is so excessive as to create a conflict, other counsel for the indigent defendant should be appointed. . . . This procedure is equally applicable to cases for trial and on appeal.

In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1135, 1138 (Fla. 1990); *see* 16 C.J.S. *Constitutional Law* § 306 (2009) (expressing the various powers within the scope of the judiciary).

414. The author was the chairman of the committee, in 1992, at the time of the proposal.

415. BENCH/BAR REPORT, *supra* note 207 (Recommendation 26); *see also* Florida Governor's Commission (1976), *supra* note 54 and accompanying text.

recommendation simply implemented the principle set forth in *In re Order*, the Bar failed to adopt the recommendations.

The Bar has never appeared as amicus, or in any other capacity, in any litigation relating to defender EC. It recently declined an express invitation by the Third District to participate as amicus.⁴¹⁶

H. LEGISLATIVE INTRUSION ON JUDICIAL FUNCTIONS

An autonomous judicial branch of government, having within it an independent bar, is a rare and radical concept, worthy of defending. Two of the courts' most basic judicial functions are to remedy constitutional violations and regulate the practice and procedure before courts, including the regulation of lawyers and their ethical obligations.

In Florida, as in other jurisdictions, the legislature has been a major protagonist against the courts, beyond the tensions designed into our system by the separation of powers. The relationship between the legislature and the judiciary provides a clear contrast between our stated and operational values.

In Florida, the legislative power is vested in a bicameral legislature.⁴¹⁷ The legislature has the power to appropriate funds and positions to state entities, including the judicial branch, PDs and other state CJS stakeholders.⁴¹⁸ In exercising this power, the legislature bears the state's obligation to adequately fund constitutionally required functions, especially those expressly set forth (e.g., the right to counsel and core judicial functions).⁴¹⁹ The courts have the duty and inherent power to ensure that this is done.⁴²⁰

Although the legislature cannot constitutionally interfere with core judicial powers and obligations, it regularly, formally interferes with those

416. See *State v. Public Defender*, 12 So. 3d 798, 800 (Fla. 3d. Dist. Ct. App. 2009) (stating that an invitation to the Bar's Standing Committee on Professional Ethics to participate as amicus was declined).

417. FLA. CONST. art. III, § 1 (2009) ("The legislative power of the state shall be vested in a legislature of the State of Florida, consisting of a senate composed of one senator elected from each senatorial district and a house of representatives composed of one member elected from each representative district.").

418. See FLA. CONST. art. VII, § 1(d) (1968) ("Provisions shall be made by law for raising sufficient revenue to defray the expenses of the state for each fiscal period."); *Dickinson v. Stone*, 251 So. 2d 268, 273 (Fla. 1971) (stating that the Florida Constitution requires legislature to make law for the purpose of appropriating funds to pay for expenses of the State).

419. See FLA. CONST. art. I, § 16 (2009) (enumerating core judicial functions); *id.* at art. V, §§ 1, 2, 15.

420. See *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla. 1978). "Every court has inherent power to do all things that are reasonably necessary for the administration of justice . . ." *Id.*

powers, through proposed constitutional amendments and substantive legislation, as well as its power of the purse.⁴²¹ It also deals with the courts through oral communications and less formal proposals.

The legislature has created a defender system that the state is constitutionally obligated to adequately fund. EC is a function of “woefully inadequate funding of the public defenders’ offices, despite repeated appeals to the legislature for assistance.”⁴²²

The obligation of the legislature to adequately fund defenders is inversely proportional to its willingness to do so. This attitude and the “reality” of difficult financial times were anticipated by the Constitution Revision Commission when it proposed the constitutional amendment that expanded state responsibility for funding the state court system.⁴²³ The Commission proposed that the legislature adopt a procedure for supplemental funding of the court system to ensure that state constitutional obligations were met.⁴²⁴ The legislature failed to adopt such a procedure.

421. See *Florida v. Atl. Coastline R.R. Co.*, 47 So. 969, 974–75 (Fla. 1908) (discussing how even though the Constitution sets limitations for each branch of government, the overall purpose is to “secure efficient government by the harmonious cooperation of the separate independent departments”).

422. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1132 (Fla. 1990). Missouri faces a similar situation. See Justine Finney Guyer, *Saving Missouri’s Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335, 360 (2009).

Missouri’s public defender system is being crushed by the weight of excessive caseloads, and adequate funding from Missouri’s state legislature is vital to its recovery. Although this daunting issue has been publicly acknowledged by prominent legal figures, key legislators, and the Office of the Missouri State Public Defender itself, the legislature as a whole has failed to grant the system the funding it requires to function successfully. . . . Without judicial intervention, the system is likely to collapse and every indigent Missourian will be in jeopardy of proceeding through the criminal justice system without constitutionally required effective legal counsel.

Id.

423. See William A. Buzzett & Deborah K. Kearney, *Commentary to 1998 Amendment, Statement of Intent: Article V, Section 14*, FLA. CONST. art. V, § 14 (West 2004) (citing the Constitution Revision Commission). The Constitution Revision Commission specified:

It is further the intent of the proposers that the legislature ensure that the state courts system as well as appropriations for costs that must be incurred to ensure the rights of people under the United States Constitution or the Constitution of the State of Florida are protected from the across-the-board reductions which have been the traditional response to revenue shortfalls. The proposers also recognize that costs necessary to ensure due process rights including, but not limited to, court-appointed counsel, expert witness fees, court reporting services, and court interpreters can vary unpredictably from year to year. Given this reality, it is the intent of the proposers that the legislature adopt a procedure to provide adequate supplemental funding for the state courts system, state attorneys and public defenders in the event that appropriations in a given year, notwithstanding diligent efforts to achieve efficiencies, are insufficient.

Id.

424. See *id.*

To the contrary, as state finances worsened, partly due to economic conditions and partly due to voluntary tax reductions by Governor Jeb Bush and the legislature, harsh, across-the-board budget reductions were imposed on the state CJS, especially on PDs.⁴²⁵

The legislature, and funders in general, has various means of effectively attacking any defender who has the temerity to try to enforce constitutional standards and intimidating the others. Funders have a natural advantage as guardians of the public treasury. The following are actual examples of the manner in which they can exert pressure:

- “[W]e are all in this together.”⁴²⁶ We are all subject to scarce resources and the defender must suffer like everyone else.
- Accuse the defender of mismanagement, including poor budgeting.⁴²⁷ Other defenders are managing to handle their workload. One legislator said that PD-11 was “grandstanding.”⁴²⁸
- Assert that a remedy will be too expensive or will bankrupt the system.
- Threaten additional budget reductions. E.g., if the defender is declining or withdrawing from cases, he obviously does not need

425. See Mary Kelli Bridges, *Big Budget Cuts Force Belt-Tightening on Local Prosecutors, Public Defenders*, NAPLES DAILY NEWS, Dec. 7, 2001, at D1.

426. Memorandum from Senator Victor Crist, Chairman, Criminal and Civil Justice Appropriations Committee, to Criminal and Civil Justice Appropriations Agencies regarding “Budget Reduction Plan Presentation” (Mar. 12, 2008).

427. See Nesmith, *supra* note 73. “[Senator] Crist questioned whether Brummer had simply not budgeted responsibly, noting the office was warned at the beginning of last year of looming budget cuts.” *Id.* (alteration in original); see also Editorial, *Budget Cuts Push Defenders into Corner*, MIAMI HERALD, Jun. 4, 2008, at A22.

Mr. Brummer says that it is his duty as a lawyer and a constitutional officer of the court to handle cases in a professional manner. When that standard can’t be met, he believes that he has the obligation to say so. He has taken this position three times in the past -- in 1978, ‘81 and ‘96 -- and each time, the court has upheld his position. Actually, in 1981, the Florida Supreme Court -- not Mr. Brummer -- initiated the action. Brummer is right — State lawmakers who believe that the problem is about better management of budgets have got it wrong. Sen. Victor Crist, R-Hillsborough, said that lawmakers took pains to make sure state agencies could sustain the cuts and still function.

Id.

428. See Nesmith, *supra* note 73.

But state Sen. Victor Crist, chair of the Justice Appropriations Committee, said Brummer is grandstanding “because the cuts weren’t that severe and they can find better ways to deal with them.” “We made sure that everyone in the budget was funded at levels that we knew they could operate successfully at and do the jobs they are constitutionally required to do,” Crist said.

Id.; see also Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 9, 2008, at A1 (“State Senator Victor D. Crist, chairman of the Criminal and Civil Justice Appropriations Committee, is a vocal critic of the Miami-Dade lawsuit, saying Mr. Brummer is ‘blowing things out of proportion.’”).

or deserve the full funding the funder has provided, because he is not handling all the cases anticipated. Therefore, the funder will reduce the defender's budget accordingly.⁴²⁹

Additionally, funders, such as legislators or governors, may threaten to cut the budget even more. The funder may explicitly raise the possibility of using money withheld — and possible willingness to allocate even more — to fund representation by someone else (i.e., someone more compliant).

Other generic attacks are directed at the presumption of innocence, the defense function and criminal defense attorneys from those who are happy to incarcerate anyone with the dismissive, “Don’t do the crime, if you can’t do the time.”⁴³⁰ A Florida legislator denigrated the presumption of innocence and the defense function, saying publicly that 90% of them are guilty anyway.⁴³¹

EC is but one of many examples of visible legislative interference with the judicial function. Florida legislators have repeatedly threatened to remove the Supreme Court’s constitutional power to regulate lawyers and transfer this responsibility to the Department of Business and Professional Regulation.⁴³² Legislators proposed a constitutional amendment giving the legislature the power to enact rules of court procedure.⁴³³ The legislature has made several efforts to restrict or eliminate depositions in criminal cases that had been made widely available to the defense by a court rule of procedure.⁴³⁴ In 1989, at least partly in response to legislative

429. See Maureen Dimino, *Confronting a Constitutional Crisis: Miami-Dade Chief Public Defender Stands His Ground*, CHAMPION MAG., Oct. 2008, at 24 (noting that volume of cases is an important factor in defender funding).

430. See Jeffrey Zahler, *Allowing Defendants to Present Evidence of Prison Conditions to Convince Juries to Nullify: Can Only the Prosecutor Present “Moral” Evidence?*, 34 N.E. J. ON CRIM. & CIV. CONFINEMENT 485, 514 n.180 (2008) (explaining the meaning of the popular admonition “Don’t do the crime if you can’t do the time”); see, e.g., Richard Hersch et al., *Court Funding*, FLORIDA BAR NEWS, Sept. 1, 2008, available at <http://www.thefreelibrary.com/Court+funding-a0187051870> (“[Senator] Crist is quoted as saying that ‘most [public defender clients] are guilty’ and therefore ‘should not skate’ because they receive court-appointed counsel. The statement not only misses the point, but reflects a total disregard for the constitutionally guaranteed right to counsel and the presumption of innocence.”).

431. See Hersch, *supra* note 431.

432. See, e.g., Fla. Ass’n of Prof’l Lobbyists v. Div. of Legislative Info. Serv., 7 So. 3d 511, 517 (Fla. 2009) (holding that an Act passed by Congress is not found by the Court to infringe on its “jurisdiction to regulate and discipline lawyers”).

433. See S.J. Res. 1234, 1998 Leg., Reg. Sess. (Fla. 1998) (proposing a constitutional amendment to allow the Legislature to enact and repeal rules of criminal procedure adopted by the Supreme Court of Florida by a majority vote of each house); see also State v. Public Defender, 12 So. 3d 798, 803 (Fla. 3d. Dist. Ct. App. 2009) (“In 2004, the legislature promulgated, and in 2007 amended, section 27.5303, which permits assistant public defenders to withdraw from representation based on a conflict of interest.”).

434. See generally FLA. R. CRIM. P. 3.220(h) (providing the rules governing the discovery of depositions).

dissatisfaction, the Court modified its rule to require a showing of good cause in misdemeanor cases.⁴³⁵ In 2009, legislators introduced identical bills in each house to further limit the rule, by requiring a showing of good cause in third degree felony cases, misdemeanors and criminal traffic offenses.⁴³⁶ These bills did not pass the legislature.⁴³⁷

The legislature's tolerance for the financial costs of excessive caseloads diminished radically when its unfunded mandate to the counties was eliminated and the legislature became responsible for those costs, effective 2004.⁴³⁸

In the preceding year, the legislature passed section 27.5303(1) (2003),⁴³⁹ another direct intrusion upon judicial powers and an attempt to restrict the most basic judicial functions (e.g., to remedy constitutional violations, regulate the practice and procedure before courts and regulate attorneys).⁴⁴⁰ Section 27.5303(1)(d), Florida Statutes [(2004)] is a brazen legislative attempt to dictate to the judicial branch how it must rule on the constitutional and ethical issues created by the legislature (i.e., the courts must deny motions for a remedy).⁴⁴¹

Rather than defend the core and inherent aspects of the judicial power, the Third District Opinion accepts and applies the legislative prohibition against the courts approving a defender's motion to withdraw from appointments to ensure adequate representation of criminal defendants.⁴⁴² The decision also prescribes to the judiciary what constitutes

435. See *In re* Amendments to Florida Rule of Criminal Procedure 3.220, 550 So. 2d 1097, 1098 (Fla. 1989) (explaining that even though the Court is amending the discovery rule to curtail abuses, they will retain "discovery depositions in all cases except misdemeanor cases, where depositions may only be taken upon a showing of good causes").

436. See H.R. 383, 2009 Leg., 111th Reg. Sess. (Fla. 2009); see also S. 2154, 2009 Leg., 111th Reg. Sess. (Fla. 2009).

437. See H.R. 383; see also S. 2154.

438. See FLA. CONST. art V, § 14(c) (amended 1998); see FLA. CONST. art. XII, § 25 (amended 1998) (Schedule to Article V Amendment).

439. Act of June 25, 2003, ch. 2003-402, § 19, 2003 Fla. Laws 1, 22 (current version at FLA. STAT. § 27.5303(1) (2009)). Prior to the adoption of this statute, Florida appellate courts repeatedly authorized withdrawal of public defender's offices from appeals or a moratorium on accepting new cases on grounds of inadequate resources and an overload of pending appeals. See, e.g., *In re* Public Defender's Certification of Conflict 1998, 709 So. 2d 101, 103 (Fla. 1998); *In re* Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender, 561 So. 2d 1130, 1138 (Fla. 1990); *Day v. State*, 564 So. 2d 137, 138 (Fla. 1st Dist. Ct. App. 1990).

440. FLA. STAT. § 27.5303(1)(a)-(b), (d) (2009).

441. FLA. STAT. § 27.5303(1)(d) (2004) ("In no case shall the court approve a withdrawal by the public defender or criminal conflict and civil regional counsel based solely upon inadequacy of funding or excess workload of the public defender or regional counsel."). *Contra* Amendments to the Florida Rules of Appellate Procedure, 696 So. 2d 1103, 1104 (Fla. 1996) (stating that the Legislature may place "reasonable conditions upon" the right to appeal so long as these conditions do not "thwart the litigants' legitimate appellate rights.>").

442. See *State v. Public Defender*, 12 So. 3d 798, 805-06 (Fla. 3d. Dist. Ct. App. 2009).

a conflict of interest, by accepting and applying the legislative definition of conflict of interest in subsection 27.5303(1)(e) as the only legally cognizable types of conflicts of interests for defenders.⁴⁴³ Thus, the court approved the legislature deliberately curtailing ethical rules promulgated by the Florida Supreme Court so that the courts cannot remedy EC.

Significantly, the statutory language is not a prohibition on defenders seeking relief, but on courts granting relief. These statutory subsections are unconstitutional not only because they violate individual constitutional rights, but because they violate separation of powers.⁴⁴⁴ As the Supreme Court of Florida noted in the context of fee caps:

[W]e find the statute unconstitutional when applied in such a manner as to curtail the court's inherent power to ensure the adequate representation of the criminally accused. At that point, the statute loses its usefulness as a guide to trial judges in calculating compensation and becomes an oppressive limitation. As so interpreted, therefore, the statute impermissibly encroaches upon a sensitive area of judicial concern, and therefore violates article V, section 1, and *article II, section 3 of the Florida Constitution*.⁴⁴⁵

The Third District's opinion not only accepts the legislature's statutory intrusion, it expands the intrusion by extending the statutory term *withdrawal* to include declining future cases.⁴⁴⁶

The statute conflicts with rules of court that expressly anticipate a defender seeking to refuse appointment to a new capital case based on a claim of EC and provide procedures for that eventuality.⁴⁴⁷ The broad reading of the statute by the Third District conflicts with this rule of court and renders it meaningless.

The existence of this statute, which forbids a court to "approve a withdrawal" based solely on ECs,⁴⁴⁸ substantially affected the strategy of PD-11 in the first stage of its recent EC litigation. In an abundance of caution, in order to avoid the application of the statute, and to limit the

443. *Id.* at 804.

444. *See Makemson v. Martin County*, 491 So. 2d 1109, 1112 (Fla. 1991). *But see State v. Bowens*, No. F09-019364 (Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Fla. Stat., Unconstitutional and Granting Public Defender's Motion to Withdraw).

445. *Makemson*, 491 So. 2d at 1112.

446. *See Public Defender*, 12 So. 3d at 800 (ordering the public defender to "decline all future representation of indigent defendants charged with third-degree felonies"). The Supreme Court now has an opportunity to review this statute and the Third District's application of it. *See Brief of Petitioner-Appellant, Public Defender, Eleventh Judicial Circuit of Florida v. State*, No. SC09-1181 (Fla. July 9, 2009). The statute is antithetical to the related recommendations of the Bench/Bar Commission. *See BENCH/BAR REPORT*, *supra* note 207.

447. *See* FLA. R. CRIM. P. Rule 3.112(j)(2) (providing for, among other things, coordination between the public defender and the chief judge or his or her designee).

448. FLA. STAT. § 27.5303 (1)(d).

issues to be litigated, PD-11 did not move to withdraw from any case to which it had been assigned.⁴⁴⁹ PD-11 sought only to decline new appointments, and therefore did not seek court approval for withdrawal.⁴⁵⁰ This conservative approach was not sufficiently limited, however; the Third District found it necessary to impose numerous additional limitations.⁴⁵¹ In the second stage, PD-11 sought to withdraw and directly attacked the constitutionality of the statute. The trial judge permitted withdrawal and construed the statute to be constitutional.

For additional examples of statutes that required the Florida Supreme Court to defend its inherent authority against legislative encroachment see, Fla. Stat. § 91.14 (repealed 1955), relating to maximum compensation for witnesses, dealt with in *Rose*; Fla. Stat. § 925.036 (1981), relating to compensation of court-appointed attorneys, dealt with in *Makemson*; and Fla. Stat. § 925.036 (2003) (repealed 2003), and Fla. Stat. § 27.711 (2004), relating to compensation of court-appointed attorneys in post-conviction capital collateral proceedings, dealt with in *Maas*.

V. DEFENDER ACCOUNTABILITY FOR COMPLIANCE WITH ETHICAL STANDARDS VERSUS COMPLICITY IN THE PERSISTENCE OF EXCESSIVE CASELOAD

Defenders are not powerless victims. We defenders have important and powerful rights and obligations to ourselves, our clients, the courts and our free society.

Criminal defense attorneys like to think of ourselves as liberty's last champions, and, at our best, we certainly earn that title. To be worthy of this appellation, minimum professional standards require us to develop meaningful attorney-client relationships and effectively use the adversarial system to test our clients' cases.

We lawyers often can summon the courage to confront difficult issues; often we cannot or do not. Two main factors in this process are: how we frame the circumstances and whether we see viable alternatives for going forward.

Our system of checks and balances is not self-executing; it works only if we have the moral courage and stamina to work it.

449. See Answer Brief at 2, Response to Petition of Appellee/Respondent, *State v. Public Defender*, Eleventh Judicial Circuit of Florida, 12 So. 3d 798 (Fla. 3d Dist. Ct. App. 2009) (3D08-2537), available at http://www.pdmiami.com/ExcessiveWorkload/Answer_Brief_-_Response_to_Petition.pdf (last visited Oct. 30, 2009).

450. See *id.*

451. See *Public Defender*, 12 So. 3d at 806.

Defenders are professionally accountable for deciding whether EC conflicts exist in both trial and appellate cases.⁴⁵² Monitoring our workload and taking appropriate action is essential to defenders' constitutional and ethical duties. These determinations are inherent in the defender's role and function under our constitutional, statutory and professional regulatory scheme.

With very few exceptions, defenders fail to effectively confront this problem. Although the judges and prosecutors share primary responsibility for the constitutional operation of our CJS and for ensuring that it is worthy of the term "justice," we defenders are the first responders. Defender inaction is deadly: If we fail to raise the issue, the patient dies or the house burns down. Judges (and the legislature and other stakeholders), who do not proactively honor their own constitutional and ethical obligations, never have to face their responsibilities or visibly shirk them.

Florida Statutes § 27.5303(1)(a) requires that, if a public defender determines that the interests of clients are so "adverse or hostile" that the defender or their staff cannot counsel them because of a conflict of interest, the defender shall file a motion to withdraw and move the court to appoint other counsel.⁴⁵³

This statute is consistent with ethical principles from Florida and other jurisdictions.⁴⁵⁴

452. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Pub. Defender*, 561 So. 2d 1130, 1138 (Fla. 1990) (stating that the defender's responsibility to withdraw due to EC applies to both trials and appeals); *see also Escambia County v. Behr*, 384 So. 2d 147, 150 (Fla. 1980) (England, J., concurring); CALIFORNIA GUIDELINES, *supra* note 287, at 26. "Indigent defense providers shall not accept nor be burdened with excessive workloads that compromise the ability of the provider to render competent and quality representation in a timely manner, without the risk of damaging the mental/physical health and motivation of the providers." *Id.*

453. FLA. STAT. § 27.5303(1)(a).

454. *See THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, supra* note 171, at R. 4-1.7(a).

[A] lawyer shall not represent a client if: (1) the representation of 1 client will be directly adverse to another client; or (2) 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, a former client or a third person or by a personal interest of the lawyer.

MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2) (a conflict of interest exists if "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 . . ."); *see also JUSTICE DENIED, supra* note 17, at 204; California Formal Op. 97-0007, *supra* note 130 (addressing "the ethical obligations of an attorney representing indigent criminal defendants who believes that his or her caseload is too large, or other resources are insufficient, to permit him or her to provide competent representation."). An attorney must seek to withdraw if "his or her mental or physical condition renders it 'unreasonably difficult' to carry out the employment effectively. . . ." California Formal Op. 97-0007, *supra* note 130; *see also CALIFORNIA GUIDELINES, supra* note 287.

The Supreme Court of Florida has written, “[w]hen excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.”⁴⁵⁵

All PDs and APDs must first be lawyers.⁴⁵⁶ The Supreme Court of the United States has made it clear that a defender must meet the same standards, perform the same functions of *counsel*, and provide the same kind of *assistance* or representation that a private lawyer would be expected to provide.⁴⁵⁷ A PD is “[h]eld to the same standards of competence and integrity as a private lawyer, a public defender works under canons of professional responsibility that mandate his exercise of independent judgment on behalf of his client.”⁴⁵⁸

The first line of professional defense is provided by ethical standards applicable to all lawyers, including individual lawyers, defender supervisors and defender offices. The Comment to Rule 4-1.7 states: “Resolving questions of conflict of interest is primarily the responsibility of the lawyer undertaking the representation.”⁴⁵⁹ Managerial and supervisory attorneys are ethically responsible for making reasonable efforts to ensure that all lawyers they supervise conform to the rules of professional conduct.⁴⁶⁰

A number of jurisdictions grant defenders the autonomy and discretion to declare themselves unavailable when caseloads are likely to become excessive.⁴⁶¹ Some defender offices operate pursuant to contracts

In *Hagopian v. Justice Admin. Comm’n*, 18 So. 3d 625 (Fla. 2d Dist. Ct. App. 2009), the court authorized a court-appointed lawyer to withdraw from involuntary appointment due to a conflict of interest caused by insufficient compensation in a complex case. The lawyer described the conflict as “financial and ethical.” *Id.* at 628. Although the trial court had increased the compensation above the statutory maximum, the appellate court found that the impact of the low compensation would have been injurious to the lawyer’s existing clients and solo practice. *Id.* at 632–33.

455. *In re Order*, 561 So. 2d at 1135.

456. See FLA. CONST. art. V, § 18; FLA. STAT. §§ 27.50, 27.53 (2009).

457. See, e.g., *Vermont v. Brillon*, 129 S. Ct. 1283, 1291 (2009); *Strickland v. Washington*, 466 U.S. 668, 688 (1984); *Crist v. Florida Ass’n of Criminal Defense Lawyers, Inc.*, 978 So. 2d 134, 147 (Fla. 2008).

458. *Polk County v. Dodson*, 454 U.S. 312, 321 (1981) (internal citation omitted); see also *Brillon*, 129 S. Ct. at 1291; *West v. Atkins*, 487 U.S. 42, 50 (1988).

459. THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 4-1.7; see also *Cuyler v. Sullivan*, 446 U.S. 335, 346 (1980); *Holloway v. Arkansas*, 435 U.S. 475, 485–86 (1978).

460. See THE FLORIDA BAR, RULES REGULATING THE FLORIDA BAR, *supra* note 171, at R. 4-5.1 (Responsibilities of Partners, Managers, and Supervisory Lawyers); *id.* at R. 4-5.1 (a) (Duties Concerning Adherence to Rules of Professional Conduct); *id.* at R. 4-5.1 (b) (Supervisory Lawyer’s Duties); *id.* at R. 4-5.1 (c) (Responsibility for Rules Violations).

461. See, e.g., Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 6 (regarding

that set limits for the number of cases that the office will have to accept for a given amount of funding.⁴⁶² Additional resources are provided to enable the office to undertake representation in additional cases. Ultimately, these offices can refuse to accept unfunded cases on contractual and ethical grounds.⁴⁶³

Defenders are also obligated to notify their clients and the courts of conflicts of interest or any developments that compromise their ability to provide assistance consistent with constitutional and ethical requirements.⁴⁶⁴

A. DEFENDER SELF-CONCEPT AND COURAGE IS CRUCIAL

The problem is not that defenders are too willing to say their workload is excessive. To the contrary, they too often either refuse to recognize or admit it.⁴⁶⁵

Florida's 20 elected defenders all face chronic underfunding and ECs. Unfortunately, they have been willing to handle caseloads far in excess of their capacity and state or national standards.

Many defenders have addressed this problem administratively. A few have been successful in reducing their workload under the radar, without public contention or serious litigation.⁴⁶⁶ Some have asked for additional

defender unavailability); State *ex rel.* Acocella v. Allen, 604 P.2d 391, 181 (Or. 1979).

462. See, e.g., The Defender Association, *Defender Contracts and Standards*, <http://www.defender.org/node/18> (last visited Oct. 30, 2009).

463. See *id.*

464. See, e.g., Escambia County v. Behr, 384 So. 2d 147, 148 n.3 (Fla. 1980); *Holloway*, 435 U.S. at 486; see also FLA. STAT. § 27.5303(1)(a); Baker v. Humphrey, 101 U.S. 494, 500 (1897) (holding that an attorney must promptly advise his client of information which is important that the client receive); California Formal Op. 97-0007, *supra* note 130, at 2 (discussing the duty to advise clients of significant developments in their cases).

465. See Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 6. The Nevada Supreme Court noted that certain public defenders had deferred "advising the county commissioners of their unavailability to accept appointments even if accepting further appointments might compromise the ability of the public defenders to represent their clients." *Id.* The court ordered those public defenders to

advise the county commissioners of their respective counties when they are unavailable to accept further appointments based on ethical considerations relating to their ability to comply with the performance standards contained in Exhibit A to this order and to represent their clients in accordance with the Rules of Professional Conduct

Id.

466. See, e.g., Turner v. State, 1D08-2293 (Fla. 1st Dist. Ct. App. Nov. 25, 2008) (stipulation by the attorney general to withdrawal from one case by the appellate defender, whose motion asserted the unconstitutionality of Florida Statutes § 27.5303(1)(d), which precludes such withdrawal); see also Jason Geary, *Budget Cuts to Affect Staffing at Branch Courthouses*, THE LEDGER, June 6, 2008, available at <http://www.theledger.com/article/20080606/NEWS/932969946> (Marion Moorman, PD-10, wrote

resources; some have not. Of those who have asked, some have received supplemental support; others have not. Even those who have received additional support have often found themselves carrying caseloads that exceed professional standards.

Many defenders have done little or nothing to attempt to provide quality representation, given an inadequate budget. Worse, some, rather than comply with their constitutional and ethical responsibilities, have publicly asserted that they are justified in failing to provide constitutionally critical representation due to budget limitations.⁴⁶⁷

PD-11 has been the only Florida defender to litigate the issue in recent years. Several other defenders stated publicly that they were considering litigating, but, ultimately, none filed. If any other defender had come forward, that litigation would have been reviewed by an intermediate appellate court other than the Third District. Given the nature of the Third District's decision and the nature of the other district courts' approaches,⁴⁶⁸ the likely outcome of the other litigation would have been more constructive and might have better served the Supreme Court of Florida in developing its approach to the current issues.

By accepting ECs, defenders take a large step toward destroying our democratic values and institutions, including the rule of law, the adversarial system, the presumption of innocence and defender credibility. By acting as doormats, we enable and promote the underfunding that is the root of the EC problem and the source of much defender angst. We continue to help make this situation normal and acceptable, i.e., banal.⁴⁶⁹

Defenders routinely announce that we are underfunded and over worked and request significantly increased budgets. The inconsistency of receiving what we characterize as insufficient funds and continuing to accept excessive workload without taking formal action undermines both defender credibility and professional standards. It is also the source of great comfort to funders, who conveniently conclude that the defenders are adequately funded and are empire building or grandstanding. If one defender does take formal action, he is contrasted with the rest, who apparently find the normal situation acceptable.

Given the dire consequences for ourselves, our clients, our defender offices, our system of justice and our free society, operating at a level

to his chief judge: "The strain on my limited resources caused by this has reached the breaking point" adding that he would cease providing staff at branch courthouses).

467. See Pudlow, *supra* note 63, at 1.

468. See Hagopian v. Justice Admin. Comm'n, 18 So. 3d 625 (Fla. 2d Dist. Ct. App. 2009); Scott v. State, 991 So. 2d 971, 971 (Fla. 1st Dist. Ct. App. 2008).

469. See *supra* Part II.D; see also *supra* note 61 and accompanying text.

below that required by a set of minimum professional, ethical standards ought to be totally intolerable. We should expect the norm to be a vehement defender reaction against accepting ECs. Of course, this is distinctly contrafactual.

What can account for this? The fact that so few defenders have dared to challenge such a pernicious and pervasive situation reveals something about us and the power of the disincentives acting upon us.

We lawyers (and judges) are trained to rationalize anything,⁴⁷⁰ and we bring a great deal of talent and interest to that task with regard to EC. Like the other judicial branch stakeholders, defenders have been front-line observers of and participants in the deterioration of our system of justice.⁴⁷¹

Those who have not manifested the courage to deal with EC directly have found comfort in various value judgments. Some are simply self-centered, judgmental⁴⁷² or apathetic (e.g., “I am just happy to have a job (with health insurance).”) Some seem like defense mechanisms and excuses. Some have said it would do no good to try to improve the situation. They would lose their jobs and be replaced by people who did not have the welfare of the defender office or other elements of the system at heart.

The Procrustean approach of making services fit the available resources is at the heart of defender culture, history and experience. However, for any legal organization to be truly professional, it must be, primarily, client-centered and, secondarily, staff-centered.

There can be no moral or legal justification for an indigent defense service whose only function is to grant impunity to the state and serve as a fig leaf for ethical and constitutional violations. Many defender offices are focused more on survival within the inadequate resources allotted to them than on providing an acceptable level of professional service to their clients. This approach is antithetical to setting minimum professional standards that focus on the competent level of representation to which clients are entitled. It is also inconsistent with a meaningful concern about

470. See, e.g., Memorandum from John C. Yoo, Deputy Assistant Attorney General, Office U.S. Dep’t of Justice, to William J. Haynes II, General Counsel of the Department of Defense, *Re: Military Interrogation of Alien Unlawful Combatants Held Outside the United States* (Mar. 14, 2003), available at <http://www.fas.org/irp/agency/doj/olc-interrogation.pdf>. John Yoo, a lawyer in the Department of Justice’s Office of Legal Counsel, who authored the infamous “torture memo” and other memos expanding the power of the Bush administration. See Ruth Marcus, *Why John Yoo Must Stay*, WASH. POST, Apr. 16, 2008, at A15. The torture memo was repudiated by his office. *Id.*

471. See Sen. Webb, *supra* note 5.

472. See Chang, *supra* note 233 (discussing court-appointed attorney’s formal comment that client does not deserve to live and should be executed).

staff and the workload it is expected to handle. The staff of such offices is immersed in this culture, with predictable consequences.

The culture of many defender offices plays a major role in their failure to provide constitutionally adequate representation.⁴⁷³ The acquiescence of supervisors and peers is a significant contributor to this cultural inertia regarding unprofessional standards. It is incomprehensible that the recent Third District decision would managerially decapitate the PD's office and eliminate the ethical leadership required by chief defenders and the supervisors they designate.⁴⁷⁴

These values have a direct impact on chief defenders and assistant defenders alike. They both have to confront justifiable concerns about job security when deciding whether to attempt to enforce minimum constitutional and ethical standards.⁴⁷⁵ Also, chief defenders are vulnerable to retaliatory budgetary pressures. Assistant defenders will understandably be concerned about approaching their supervisors as caseloads become unmanageable, especially when their supervisors are opposed to dealing with the issues.⁴⁷⁶

Lawyers who come to work in defender offices may face another occupational hazard. They generally know they are accepting employment under adverse conditions, and, based on loyalty to the office and their colleagues, many prefer to see themselves as warriors or soldiers, rather than wimps, whistleblowers or snitches.

Lawyers, especially inexperienced lawyers, whose only job has been in a defender office, may come to view themselves as *experts*, so as to obviate the need for investigation, preparation or communication with clients. These lawyers recognize phony experts when presented by the

473. See Rapping, *supra* note 230, at 164. One article heading is, "Indigent Defense in America: A Culture Shaped by Acceptance of the Status Quo." *Id.*

474. See *State v. Public Defender*, 12 So. 3d 798, 805–06 (Fla. 3d Dist. Ct. App. 2009); *cf.* CALIFORNIA GUIDELINES, *supra* note 287 (citing *Miranda v. Clark County, Nevada*, 319 F.3d 465, 469 (9th Cir. 2003) (en banc); *In Re Matter of Robert Pinto Public Defender San Benito County (California State Bar Court Case No. 93-O-10027)*) ("Failure of a Chief Defender to effectively address workloads may result in personal liability for an adverse civil judgment and jeopardize the right of the Chief Defender to practice law in any capacity.").

475. See, e.g., *Portman v. County of Santa Clara*, 995 F.2d 898, 901 (9th Cir. 1993) (discussing former California chief defender Sheldon Portman, of Santa Clara County); *Ligda v. Superior Court*, 85 Cal. Rptr. 744, 749 (Cal. Ct. App. 1970) (discussing former California chief defender, Paul Ligda's orders to the public defenders of Solano County).

476. See, e.g., *In re E.S.*, 90 Cal. Rptr. 3d 564, 574 (Cal. Ct. App. 2009). The line defender, in *In re E.S.*, said that the case required more resources, greater investigation, and additional support. *Id.* at 573–74. However, "[n]one of these things were possible in light of [his] fear that [he] would lose [his] job if [he] pushed these issues with the [Mendocino] Public Defender." *Id.* (alteration in original); see also CALIFORNIA GUIDELINES, *supra* note 287. *But see* California Formal Op. 97-0007, *supra* note 130, at 2.

prosecution,⁴⁷⁷ but may have more difficulty recognizing their own limitations as advocates. Of course, no level of expertise can obviate an advocate's need for knowledge of the particular facts of their cases and the applicable law. Contrary to some lawyers' beliefs, we are not magicians.

The lack of independent appellate review by an attorney unrelated to the trial office is often an internal, institutional disincentive to the defender system maintaining professional standards.⁴⁷⁸ Even with the quality check of independent review by an attorney outside the trial office, appellate defenders may be unlikely to professionally review and criticize the work of their colleagues. Lawyers at both the trial and appellate levels may be more interested in protecting the egos or political interests of their colleagues than the interests of their clients. The efficacy of appellate attorney input depends, in large part, on leadership from trial office management, the quality of the appellate review, and the extent to which the trial lawyers are interested in improving their professional skills.

From the point of view of honor, certain factors lead some of us to the conclusion that an EC must be addressed or that litigation is essential and unavoidable, while others tolerate the intolerable. What distinguishes the professional advocates from the "potted plants?"⁴⁷⁹ What indicators do we use to determine that this is the last straw?

The answer can be found in our view of professional standards, including constitutional, ethical, performance, civil rights and moral standards, and, recursively, in our self-concept as lawyers. This is fundamentally a personal and spiritual (not necessarily religious) matter.

We need moral courage to maintain any defense independence or professional standard. Without courage we necessarily squander our birthright of freedom, and we leave a legacy of increasing oppression and harassment to future generations.

Under political and financial pressure of various sorts, many of us have witnessed the steady deterioration of the nature of our representation,

477. See, e.g., *Ramirez v. State*, 542 So. 2d 352, 354–55 (Fla. 1989) (discussing a successful defender challenge of ostensible forensic tool mark expert who purportedly could tell which individual knife blade had made a mark).

478. See *In re E.S.*, 90 Cal. Rptr. 3d at 581–82 (given the hesitancy of the line attorney to discuss ethical standards with his supervisors, it seems unlikely that this case would have come to light if the appellate review had been conducted within the same office).

479. See Associated Press, *Excerpts of Third Day of Testimony—On Being the Fall Guy—On Shredding of Documents*, BOSTON GLOBE, July 10, 1987, at 11 (reporting Brendan V. Sullivan, Jr.'s statement, "I'm not a potted plant. I'm here as the lawyer. That's my job."). Brendan V. Sullivan, Jr., counsel for witness Lieut. Col. Oliver L. North, had responded to Senate committee chairman Sen. Daniel K. Inouye, who had admonished Mr. Sullivan for repeatedly interrupting the questioning with objections and told him to "Let the witness object if he wishes to." *Id.*

from the professional to the industrial. Our attention has shifted, in descending order of quality, from clients, to cases, to case numbers.⁴⁸⁰ Once we abandon the attorney-client relationship and representing clients and their interests, we are left to focus on cases. From there, the slope of EC slips rapidly to focusing on files and case numbers. A lawyer can only provide assistance to a limited number of clients, but can process unlimited case numbers. A lawyer who does the latter ceases to function as counsel and becomes a fig leaf, shill and potted plant.

Defenders are accountable for professionally managing our function. We are generally not accountable for the outcome of our efforts to reduce EC, except where we have the discretion to declare ourselves unavailable due to caseload concerns. The power and discretion to control outcomes is generally in the hands of others. We are not professionally or morally responsible for decisions within the discretion of the judiciary or the legislature.

We are accountable only for exercising independent, professional judgment and designing and implementing our best strategy.⁴⁸¹ Although there is no guarantee regarding the outcome of any of our efforts, we are accountable for the decisions that we control.

B. DEFENDERS WHO HAVE PROACTIVELY CONFRONTED THE BANALITY OF EXCESSIVE CASELOAD

A number of individual defenders have demonstrated the moral courage and dedication necessary to overcome the obstacles and disincentives to addressing the problem of EC. Their professional efforts, often undertaken at a great cost, are statistically unusual. As efforts to confront the banality of evil, they warrant mention here.

- Mark E. Stephens,⁴⁸² the elected PD for Knox County TN, who lost his case in the trial court after having the courage to file a petition, having a full evidentiary hearing and a record of uncontroverted evidence, and waiting months for a decision.

- Dana Hlavac,⁴⁸³ PD for Mohave County, who won in Arizona

480. "The indigent defense provider's ultimate and overriding obligation is to properly represent each individual client. Hence all other loyalties and concerns are subordinate to the best interests of each client." CALIFORNIA GUIDELINES, *supra* note 287, at 11.

481. *See supra* Part V.

482. Knox County Public Defender Community Law Office, <http://www.pdknox.org/800main.htm> (last visited Oct. 31, 2009) (click on "Legal Assistance" and then "Staff Attorneys").

483. Law Offices of the Mohave County Public Defender, http://legacy.co.mohave.az.us/pdo/pubdef_files/the_public_defender.htm (last visited Oct. 31, 2009).

v. Lopez, No.CR-2007-1544 (Ariz. Super. Ct., Mohave County Dec. 17, 2007);

- Carlos J. Martinez,⁴⁸⁴ the elected PD for Miami-Dade County, won relief in the trial courts in two EC cases. The first case was reversed by the appellate court. The appellate decision is pending certiorari review in the Supreme Court of Florida. The second case, filed after the appellate decision in the first, is pending certiorari review in the same intermediate appellate court.

- Ernie Lewis, the former Kentucky Public Advocate, and Daniel T. Goyette,⁴⁸⁵ Chief PD and Executive Director of Louisville and Jefferson County PD Corporation, who brought suit to address EC (Lewis v. Hollenbach, No. 08-CI-1094 (Ky. Franklin Cir. Ct. June 30, 2008)).

- Nancy Forster,⁴⁸⁶ the former Maryland PD, who, due to limited funds, stopped paying for private attorneys for clients in conflict cases. Judges appointed private counsel at county expense and the counties protested. The state PD's office received \$3.5 million in supplemental funds. The office was subsequently subjected to budget cuts by the governor's office, of which it is a part.⁴⁸⁷

- Jeff Adachi,⁴⁸⁸ the elected PD for San Francisco, whose budget reductions were partially restored by county supervisors after a long battle.⁴⁸⁹ And,

- Brian Jones, Portage County, Ohio APD.⁴⁹⁰

The foregoing defenders are only the most recent examples. The following are a few older examples: Florida PDs Nancy Daniels and

484. Miami-Dade Public Defender, *Public Defender Carlos J. Martinez's Biographical Information*, http://www.pdmiami.com/biographical_information.htm (last visited Oct. 31, 2009).

485. Louisville-Jefferson County Public Defender Corporation, <http://www.louisvillemetropublicdefender.com/bios.html> (last visited Oct. 31, 2009).

486. See *Md. Public Defender Terminated from Job*, WBALTV.COM, Aug. 21, 2009, <http://www.wbalv.com/news/20493372/detail.html>.

487. See Gorlick, *supra* note 30.

488. *Id.* "It is a system-wide problem," said Jeff Adachi, San Francisco's public defender, who is ignoring Mayor Gavin Newsom's call for city departments to cut their budgets by 25 percent, a move he says would cost nearly 40 lawyers. "This is a crisis of constitutional dimension," he said." *Id.*

489. See San Francisco Public Defender, *Board of Supervisors Votes to Partially Restore Public Defender's Budget*, <http://sfpublicdefender.org/media/2009/07/board-supervisors-votes-partially-restore-public-defenders-budget/> (last visited Dec. 12, 2009).

490. See NACDL MISDEMEANOR REPORT, *supra* note 22, at 23; *supra* note 113 and accompanying text. Also worthy of mention is a suit filed by the Southern Center for Human Rights seeking to halt prosecutions in hundreds of cases until lawyers are provided. Associated Press, *Georgia: Defender System Sued*, N.Y. TIMES, Apr. 8, 2009, at A15, available at <http://query.nytimes.com/gst/fullpage.html?res=9400EEDA1F39F93BA35757C0A96F9C8B63&src=tp>.

Marion Moorman, the appellate defenders in Florida's First and Second Districts respectively.⁴⁹¹ Former California PDs, Sheldon Portman and Paul Ligda; and former Georgia APD Lynne Y. Borsuk.⁴⁹²

VI. ALTERNATIVES GOING FORWARD

The premise of this article is that the Florida legislature, and many other funders, will not willingly remedy their lack of responsibility with regard to the right to counsel and the attendant defender EC. Thus, if the fundamental values the right to counsel is intended to promote are to be served, CJS stakeholders will have to demonstrate the moral courage necessary to take effective action in the real world. The constitutional and professional obligations of all of the CJS stakeholders and the grave impact that defender excessive workload has on CJS institutional interests should be a source of hope for improvement. However, our record over the last 40 years suggests that considerable skepticism is justified.

This section intends to provide some useful alternatives for effective action. The goal is simple: We need meaningful professional standards and their effective enforcement. In a broader sense, we need sound public policy for the CJS and related systems.

One reason for encouragement is that more people are expressing practical concerns about the hollowing out of our critical institutions. If we see some general improvement in leadership, stewardship, professionalism and accountability, perhaps, indigent defense will be advanced and supported by that broader wave of dissatisfaction and reform efforts. As Stanford economist Paul Romer said, "A crisis is a terrible thing to waste."⁴⁹³

While our goal is simple, our approach must be expeditious, serious and sustainable. Obviously, litigation does not meet these criteria and, therefore, cannot be the solution to the problem of EC. The problem is political and managerial; any adequate solution requires continuing oversight. Fortunately, there are a number of examples of success with this approach across the country.

491. See Public Defender-Second Judicial Circuit, <http://www.co.leon.fl.us/pd/index.asp> (last visited Oct. 28, 2009) (providing background and mission of public defenders); Office of Public Defender-10th Judicial Circuit of Florida, *J. Marion Moorman*, <http://www.public-defender10-fl.org/moorman.html> (last visited Oct. 28, 2009).

492. See generally *Portman v. County of Santa Clara*, 995 F.2d 898 (9th Cir. 1993); *Ligda v. Superior Court*, 5 Cal. App. 3d 811 (Cal. Ct. App. 1970); see also BUREAU OF JUSTICE ASSISTANCE, KEEPING DEFENDER WORKLOADS MANAGEABLE 20–21 (Jan. 2001), <http://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

493. Jack Rosenthal, *A Terrible Thing to Waste*, N.Y. TIMES, Aug. 2, 2009, at MM12, available at <http://www.nytimes.com/2009/08/02/magazine/02FOB-onlanguage-t.html>.

While similar recommendations have been made and ignored a few times, the Supreme Court of Florida, independently or in concert with other branches of government, should establish indigent defense workload standards consistent with established ethical and performance standards. It is the Court's constitutional and moral obligation to do so.

The supervisory approach taken by the Nevada Supreme Court provides an excellent model for implementation of this recommendation.⁴⁹⁴ New York City has also moved to address defender workload, adopting a plan to establish new caseload standards by April 1, 2010, and phase them in over the next four years.⁴⁹⁵ The state statute authorizing the plan was passed with the assistance of the chief judge of the New York Court of Appeals.⁴⁹⁶

The indigent defense workload standards adopted by the Florida Supreme Court should include a procedure for defenders to decline or withdraw from cases prospectively, before EC does actual harm.⁴⁹⁷ The current recommendation to adopt a procedure for prospectively declining or withdrawing from cases is consistent with the recommendation made by the commissioner appointed by the Second District.⁴⁹⁸ The current recommendation, very likely, would be unnecessary if earlier, similar recommendations had been heeded.⁴⁹⁹

The Florida Supreme Court should authorize the state's PDs, who are elected, constitutional officers, to declare their unavailability when, in their independent professional judgment, there is a substantial risk that those standards will be exceeded.⁵⁰⁰ This should be an administrative decision independent of the courts, subject to a presumption of correctness, and minimal, if any, judicial review. This could be accomplished in several ways, including the approach adopted by the Nevada Supreme Court and

494. See Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 4–8.

495. See Eligon, *supra* note 22.

496. See *id.*

497. See NLADA, *Workload of Public Defenders*, *supra* note 375, at 276.

498. See *In re Public Defender's Certification of Conflict* 1994, 636 So. 2d 18, 21 (Fla. 1994).

499. JUSTICE DENIED, *supra* note 17, at 12 (Recommendation 6). JUSTICE DENIED recommends that a board or commission "establish and enforce workload limits for defense attorneys, which take into account their other responsibilities in addition to client representation, in order to ensure that quality defense services are provided and ethical obligations are not violated." *Id.*

500. This would require the Florida Supreme Court to deal with FLA. STAT. § 27.5303 (2007) (precluding withdrawal). An existing rule of court, FLA. R. CRIM. P. 3.112, "Minimum Standards for Attorneys in Capital Cases," provides a practical point of departure for an approach calling for a judicial inquiry. Given the constitutional and ethical principles reflected in the rule, it should not be limited to capital cases; it could easily be expanded to all cases. See also BENCH/BAR REPORT, *supra* note 207 (Recommendation 26 "relating to trials"). The recommendation is antithetical to the statute. See *id.*

terms similar to the contracts of defender offices that permit this discretion.⁵⁰¹

The Bar should take meaningful action with regard to implementation of the right to counsel guaranteed by the United States and Florida constitutions. One useful step would be to update and pursue earlier recommendations for the improvement of indigent defense, especially with regard to compliance with constitutional and ethical standards, and the development of maximum workload standards. The Bar should follow the recent example of the California bar in adopting and enforcing meaningful guidelines for indigent defense services.⁵⁰² *Justice Denied* recommended two broad focuses: The Bar should promote compliance with existing professional obligations by the CJS lawyer-stakeholders.⁵⁰³ And, the Bar and CJS stakeholders should advocate for reform of indigent defense services.⁵⁰⁴

In cases involving prospective violations, the United States Supreme Court, the Supreme Court of Florida and other state high courts should adopt a test for ineffective assistance of counsel consistent with the ethical and performance standards normally expected of counsel.⁵⁰⁵ Such a

501. See Nevada Supreme Court Indigent Defense Order, *supra* note 212, at 3 (noting the importance of the “Independence of the Court-Appointed Public Defense System from the Judiciary”); see *id.* at 6 (regarding defender unavailability); State *ex rel.* Acocella v. Allen, 604 P.2d 391, 394 (Or. 1979) (determining by the public defender committee that the defender is unable to serve binding on the trial court); see THE SPANGENBERG GROUP, CONTRACTING FOR INDIGENT DEFENSE SERVICES: A SPECIAL REPORT (Apr. 2000), <http://www.ncjrs.gov/txtfiles1/bja/181160.txt> (contracting of the Defender Association of King County Seattle, Washington).

502. See CALIFORNIA GUIDELINES, *supra* note 287.

503. See generally NACDL MISDEMEANOR REPORT, *supra* note 22.

Enforce ethical obligations of all participants in misdemeanor adjudications— Misdemeanor courts are rife with violations of professional ethical standards. Defenders countenance caseloads that prohibit them from providing competent representation to their clients. Prosecutors talk directly with defendants and convince them to waive their constitutional rights. Judges encourage defendants to proceed without counsel and plead guilty quickly in order to move dockets. Ethical obligations for all professionals in misdemeanor court should be vigorously enforced to ensure that every defendant receives a fair and unbiased proceeding.

Id. at 8. Of course, Florida’s Judicial Qualifications Commission, rather than the Bar, should address unprofessional conduct by judges.

504. See JUSTICE DENIED, *supra* note 17, at 14 (Recommendation 17); see also Bright, *supra* note 15, at 833.

505. See JUSTICE DENIED, *supra* note 17, at 15, 212 (Recommendation 22).

Defense lawyers who provide representation in appellate and post-conviction cases and organizations that advocate as *amicus curiae* should urge the United States Supreme Court and state Supreme Courts to adopt a test for ineffective assistance of counsel that is substantially consistent with the ethical obligation of defense counsel to render competent and diligent representation.

Id.; see *supra* Part IV.F (“Adopting an Inappropriate, *Strickland*-like Actual Prejudice Standard for Prospective Claims”).

standard would help prevent ECs from vitiating the right to counsel by establishing a fair and meaningful floor under it.

The Supreme Court of Florida should establish a broad-based, “statewide task force or study commission” to gather relevant data, assess the quality of indigent defense services “as measured by recognized national standards for the delivery of such services, and make recommendations for systemic improvements.”⁵⁰⁶ The Court should adopt explicit procedural and ethical standards reflecting a judges’ constitutional and ethical duty to ensure that defender caseloads are not excessive, establish prospective standards and procedures, and ensure relief from EC is provided in an expeditious manner.⁵⁰⁷ National organizations, such as the ABA and National Judicial College, should give priority attention to the role of judges in tolerating or promoting defender EC.

In the long term, there is a basis for hope that a focus on indigent defense reform through recruitment, training and mentoring will have some limited success in overcoming the mutually-supportive cultural and political forces that maintain the status quo of substandard defender service.⁵⁰⁸ Although this approach is viable, it is small bore in contrast with the intractable, traditional values of defenders and other CJS stakeholders.

Florida, as well as other states, should develop consistent, comprehensive, sustainable, system-wide workload and staffing standards (i.e., not only for courts, but for defenders and prosecutors) that would realistically reflect the interrelationships among these standards, and would enable the state to adopt a pragmatic, system-wide approach to funding the judicial branch.⁵⁰⁹

General approaches, too numerous to mention here, will tend to reduce excessive defender caseloads. A few of these are: reduction of over-reliance upon the CJS, strengthening and relying more upon civil systems (e.g., health care to deal with substance abuse and mental health, and education), elimination of minimum mandatory sentencing, decriminalization of offenses that do not involve a significant risk to public safety,⁵¹⁰ and trying fewer juveniles as adults and imposing less draconian

506. See JUSTICE DENIED, *supra* note 17, at 12 (Recommendation 4).

507. See Hafkin, *supra* note 233, at 665–67 (Section III. Role of the Courts).

508. See Rapping, *supra* note 230, at 175–77.

509. See *In re Certification of Need for Additional Judges*, 3 So. 3d 1177, 1180–81 (Fla. 2009); see *supra* note 423 and accompanying text (regarding need for balance Constitution Revision Commission).

510. See UNITED STATES SENTENCING COMMISSION, SPECIAL REPORT TO CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM (Aug. 1991), <http://www.ussc.gov/manmin/manmin51.htm> (last visited Oct. 26, 2009); JUSTICE DENIED, *supra* note 17, at 13 (Recommendation 10 – “In order to promote the fair administration of justice,

sentences on them.⁵¹¹

State CJS stakeholders, especially defenders, should assist the proposed National Criminal Justice Commission in its efforts to review our CJS, including how we address the issue of crime in our country, with an eye toward restructuring the entire CJS and its relationships to other systems.

State CJS stakeholders should implement recommendations made in *Justice Denied* to call upon the *federal* government to assist the states in discharging their duty to provide effective representation,⁵¹² as required by the nation's *federal* Constitution.⁵¹³

Reprinted from *St. Thomas Law Review*, Volume 22

Copyright (c) 2009 Bennett H. Brummer

Bennett H. Brummer, "The Banality of Defender Excessive Workload: Managing the Systemic Obstruction of Justice," 22 ST. THOMAS L. REV. 104 (Fall 2009).

For Westlaw, 22 STTLR 104

For LexisNexis, 22 St. Thomas L. Rev. 104

certain non-serious misdemeanors should be reclassified, thereby reducing financial and other pressures on a state's indigent defense system."). *Id.* "Recommendations – Causes of Excessive Caseloads: 1. Offenses that do not involve a significant risk to public safety should be decriminalized. 2. Diversion programs should be expanded." See NACDL MISDEMEANOR REPORT, *supra* note 22, at 27–28.

511. See Editorial, 12 *and in Prison*, N.Y. TIMES, Jul. 28, 2009, at A24, available at <http://www.nytimes.com/2009/07/28/opinion/28tue1.html>.

512. One recent success, after years of effort, was passage of *The John R. Justice Prosecutors and Defenders Incentive Act of 2007* (affording defenders new access to federal loan repayment assistance, along with prosecutors who previously had such access). See S. 442, 110th Cong. § 2 (2007). Also, on June 24, 2009, in remarks to the American Council of Chief Defenders in Washington, D.C., Attorney General Eric Holder renewed the commitment of the Department of Justice's to improving the nation's indigent defense system and proposed specific steps for doing so. See NLADA, *Attorney General Holder Outlines DOJ's Five Steps for Improving Indigent Defense in Address to NLADA's American Council of Chief Defenders*, http://www.nlada.org/News/News_Press_Releases/2009062538498835 (last visited Oct. 27, 2009).

513. U.S. CONST. amend. VI; see JUSTICE DENIED, *supra* note 17, at 13 (Recommendations 12–13); see also Kemper, *supra* note 245 (regarding federal funding preference for prosecution and recognition of federal responsibility for federal indigent defense mandate by U.S. Attorney General Eric Holder).