IN THE SUPREME COURT OF THE STATE OF FLORIDA

PUBLIC DEFENDER, ELEVENTH
JUDICIAL CIRCUIT OF FLORIDA,

Petitioner,

Case Nos. SC09-1181
SC10-1349

vs.

L.T. Case Nos.: 3D08-2272
3D08-2537
08-01

THE STATE OF FLORIDA,

Respondent.
_____/

AMICUS BRIEF OF THE AMERICAN BAR ASSOCIATION IN SUPPORT OF PETITIONER, PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA

On Review from the District Court of Appeal, Third District of Florida

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The American Bar Association ("ABA"), as *amicus curiae*, respectfully submits this brief in each of these consolidated cases in support of Petitioner, the Public Defender of the Eleventh Circuit of Florida (the "Public Defender"). Although the ABA takes no position on any of the factual issues, including but not limited to the Public Defender's assertion "that underfunding led to the excessive caseloads,"[1] or on the Florida constitutional and statutory issues presented by these consolidated cases, the ABA believes that the Court's consideration of the issues may be aided by ethical opinions and guidelines previously promulgated by the ABA.

To assist the Court, the ABA offers two documents, each of which is discussed in the Argument below: (A) the ABA Committee on Ethics and Professional Responsibility's Formal Opinion 06-441, "Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere With Competent and Diligent Representation" ("Formal Opinion 06-441"), a copy of which is attached as Appendix A;[2] and (B) the ABA Standing Committee on Legal Aid and Indigent Defendants' "Eight Guidelines of Public

[1] *Florida v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798, 800 (Fla. 3d DCA 2009).

[2] ABA Committee on Ethics and Prof'l Responsibility, Formal Op. 06-441 (May 13, 2006), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_ethics_opinion_defender_caseloads_06_441.pdf (last visited Nov. 10, 2011).

Defense Related to Excessive Workloads" (the "Eight Guidelines"), a copy of which is attached as Appendix B.[3]

The ABA is the largest voluntary professional membership organization and the leading organization of legal professionals in the United States. Its nearly 400,000 members come from all 50 states and other jurisdictions. They include attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as judges, legislators, law professors and law students.[4]

Since its founding, the ABA has actively worked to improve the quality of the legal profession by "[p]romot[ing] competence, ethical conduct and

[3] The black letter, introduction and commentary of the Eight Guidelines were presented to and adopted as ABA policy by the ABA House of Delegates as Report and Recommendation #119 (Policy adopted Aug. 2009), http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_aba_sclaid_revised_rpt_119_eight_guidelines.pdf (last visited Nov. 10, 2011). The ABA's House of Delegates is composed of over 560 delegates representing states and territories, local and state bar associations, affiliated organizations, ABA sections and divisions, ABA members and the Attorney General of the United States, among others. *See* ABA General Information, http://www.abanet.org/leadership/delegates.html (last visited Nov. 10, 2011).

[4] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the American Bar Association. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

professionalism."[5] Especially pertinent to the issues of this case is the ABA's work in the fields of legal ethics and indigent defense. In 1908, the ABA adopted its first CANONS OF PROFESSIONAL ETHICS (now the MODEL RULES OF PROFESSIONAL CONDUCT). In 1920, the ABA created the Standing Committee of Legal Aid and Indigent Defendants ("SCLAID"), and charged SCLAID with the study of the administration of justice as it affects the poor and the promotion of remedial measures to assist the poor in protecting their legal rights. Throughout its existence, the results of SCLAID's work have been adopted by the ABA House of Delegates as ABA policy.[6]

In addition, the ABA continues to refine its Standards for Criminal Justice.[7] These Standards address the duties imposed on every lawyer in the criminal justice context and are divided into volumes by topical area, of which the Defense

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[5] ABA Mission and Association Goals, http://www.americanbar.org/utility/about_the_aba/association_goals.html (last visited Nov. 10, 2011).

[6] *E.g.*, Report and Recommendation #107 (Policy adopted Aug. 2005) (Resolution 4 states: "Attorneys and defense programs should . . . discontinue indigent defense representation, and/or decline to accept new cases for representation, when, in the exercise of their best professional judgment, workloads are so excessive that representation will interfere with the rendering of quality legal representation or lead to the breach of constitutional or professional obligations"), http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/20110325_aba_res107.pdf (last visited Nov. 10, 2011).

[7] A history of the development of the ABA Standards for Criminal Justice is available at http://www.abanet.org/crimjust/standards/home.html. *See also* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, 23 CRIM. JUST. 10, 14-15 (Winter 2009) (describing the careful and balanced process by which the Standards are developed and promulgated).

Function Standards and the Providing Defense Services Standards are pertinent here.[8] The ABA Standards do not purport to establish a constitutional baseline for effective assistance of counsel. However, as Chief Justice Burger stated in his concurring opinion in *Argersinger v. Hamlin*, "[t]he right to counsel has historically been an evolving concept," and "[p]art of this evolution has been expressed in the policy prescriptions of the legal profession itself." 407 U.S. 25, 43-44 (1972) (referring to the ABA project that produced the original ABA Standards for Criminal Justice). More recently, the Supreme Court stated that the Standards provide "guides to determining what [performance of counsel] is reasonable." *Wiggins v. Smith,* 539 U.S. 510, 524 (2003) (quoting *Strickland v. Washington,* 466 U.S. 668, 688 (1984)).

With its 100-year history of working to improve the quality of legal representation generally, and its 90-year history of working for indigent rights specifically, the ABA submits this brief and its Appendices, as they may be helpful to the Court's consideration of the issues before it.

ABA policy assumes that public defenders will use public resources efficiently and that defender offices will use their resources to provide adequate representation for indigent defendants. No one can ignore the clear factual disagreement between the trial court and the court of appeal as to how the defender

[8] *Available at* http://www.abanet.org/crimjust/standards (last visited Nov. 10, 2011).

office at issue allocated public funds. Accurate resolution of the facts will ultimately be essential to a determination whether the defender office is entitled to any relief. The ABA takes no position on which facts are correct.

The ABA supports the position that whether or not caseload burdens will result in ineffective assistance of counsel should be made on a systemic rather than a case-by-case basis – based on accurate facts.

SUMMARY OF THE ARGUMENT

A standard that requires proof of an actual ethical violation and an injury to the client before awarding a lawyer relief from an excessive caseload would have the effect of requiring the lawyer to breach that lawyer's ethical duties to the client. It would also disregard the 47-year history of indigent criminal defense since *Gideon v. Wainwright,* 372 U.S. 335 (1963), including Formal Opinion 06-441, which concluded that all lawyers, including public defenders, must provide competent and diligent representation. As required by both the Florida Rules and the ABA Model Rules, lawyers with an excessive caseload have an ethical duty not to undertake the representation or, if already underway, to terminate the representation, if the representation will result in violation of the rules of professional conduct.

Further, requiring a showing that a public defense provider's individual attorneys are providing inadequate representation would disregard the provider's ethical obligations. As set out in Formal Opinion 06-441, a supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate, and must ensure that subordinate lawyers comply with the Rules of Professional Conduct. The Eight Guidelines counsel the public defense provider to take corrective action in advance, "to *avoid* furnishing legal services in violation of professional conduct rules," which action may include filing a motion

requesting that assignments be stopped and that withdrawals be permitted. When public defense providers file such motions, their prayer for relief should be accorded substantial deference because they are in the best position to assess the workloads of their lawyers. Moreover, as officers of the court, their declarations should be given the weight commensurate with the grave penalties for misrepresentation. Finally, deference promotes the independence of the defense function from the judiciary.

The ABA believes that, ultimately, the courts must ensure that public defense providers and their lawyers are able to provide competent and diligent representation in accordance with their professional obligations.

ARGUMENT

I. Requiring Proof Of An Actual Ethical Violation And Injury To The Client Before Awarding Relief From An Excessive Caseload Would Effectively Require A Lawyer To Breach The Lawyer's Ethical Duties To The Client.

The District Court of Appeal, in each of its opinions below, concluded: "Only after an assistant public defender proves prejudice or conflict, separate from excessive caseload, may that attorney withdraw from a particular case." *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798, 805 (Fla. 3d DCA 2009); *State v. Bowens*, 39 So. 3d 479, 481 (Fla. 3d DCA 2010) (*quoting, Public Defender*).

The ABA respectfully submits that this conclusion does not consider the ethical obligations of either the individual assistant public defender or of the Public Defender. It also disregards the 48-year history of indigent criminal defense since *Gideon v. Wainwright*,[9] during which organizations including the ABA have studied the effects of excessive caseloads on indigent criminal defense systems and, applying the legal profession's ethical rules, have developed standards and procedures to address those effects.

For example, in 2004, to commemorate *Gideon's* 40th anniversary, SCLAID produced a report, *Gideon's Broken Promise: America's Continuing Quest for*

[9] 372 U.S. 335 (1963).

Equal Justice ("Gideon's Broken Promise").[10] The report concluded that indigent defense lawyers "frequently are burdened by overwhelming caseloads and essentially coerced into furnishing representation in defense systems that fail to provide the bare necessities for an adequate defense (*e.g.*, sufficient time to prepare, experts, investigators, and other paralegals), resulting in routine violations of the Sixth Amendment obligation to provide effective assistance of counsel."[11] The report further stated that "ethical violations routinely are ignored not only by the lawyers themselves, but also by judges and disciplinary authorities."[12]

In 2005, armed with this report, SCLAID and the National Legal Aid and Defender Association ("NLADA") requested that the ABA's Standing Committee on Ethics and Professional Responsibility (the "ABA Ethics Committee") prepare an opinion on excessive defender caseloads. In 2006, the ABA Ethics Committee

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[10] http://www.americanbar.org/groups/legal_aid_indigent_defendants/initiatives/indigent_defense_systems_improvement/gideons_broken_promise.html. The report was based on four public hearings at which 32 witnesses from 22 states presented testimony on the provision of indigent defense services in their respective states. It also drew on the expertise that SCLAID has developed during its years of advocacy for effective indigent civil and criminal legal services. The report focused solely on state indigent defense systems, as opposed to the federal system, which is considerably better funded. More than 20 years earlier, in a similar report, SCLAID, in cooperation with the ABA Sections for Criminal Justice and for General Practice and the National Legal Aid and Defender Association, complained of "public defenders [who] have too many cases and lack support personnel." *Gideon Undone: The Crisis in Indigent Defense Funding* 3 (ABA 1982), http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/gideonundone.pdf.

[11] *Gideon's Broken Promise*, *supra* note 5, at 38.

[12] *Id.* at 39.

issued Formal Opinion 06-441, a copy of which is attached as Appendix A, in which it concluded that all lawyers, including public defenders, must provide competent and diligent representation as required by the rules of professional conduct, such that indigent defense programs and their lawyers must move to withdraw from cases if they are unable to furnish representation in compliance with their ethical duties and, when clients are being assigned through a court appointment, they should advise the court not to make any new appointments.[13] "The Rules provide no exceptions for lawyers who represent indigent persons charged with crimes."[14]

While Formal Opinion 06-441 is based on the ABA Model Rules of Professional Conduct as amended by the ABA House of Delegates through August 2003, the Formal Opinion notes that the laws, court rules, regulations, rules of professional conduct and opinions promulgated in the individual jurisdictions are controlling.[15] In the present case, of course, the Rules Regulating the Florida Bar ("Florida Rules") govern.

Both the Florida Rules and the ABA Model Rules begin with the requirement that a lawyer "provide competent representation to a client." R. Reg. Fla. Bar 4-1.1; ABA Model Rule 1.1. This requires that the lawyer not only have

[13] *Id.* at 1.
[14] *Id.* at 3.
[15] *Id.* at 1.

knowledge and skill, but also the time for the "thoroughness and preparation reasonably necessary for the representation." R. Reg. Fla. Bar. 4-1.1. As the comments to both rules emphasize, an essential element of the competent handling of any matter includes "adequate preparation." R. Reg. Fla. Bar Comment to Rule 4-1.1; Comment 5 to ABA Model Rule 1.1.

Similarly, the Florida Rules and the ABA Model Rules require a lawyer to act with "reasonable diligence and promptness in representing the client." R. Reg. Fla. Bar 4-1.3; ABA Model Rule 1.3. As the comments observe, this requires that a lawyer's "work load be controlled so that each matter can be handled competently." R. Reg. Fla. Bar Comment to Rule 4-1.3; Comment 2 to ABA Model Rule 1.3. Thus, in taking on a new matter, the lawyer must consider the impact of the new representation on current clients. The lawyer must not take on any representation when there is a significant risk that the new representation "will be materially limited by the lawyer's responsibilities to another client." R. Reg. Fla. Bar 4-1.7; ABA Model Rule 1.7(a)(2).

All of these basic rules concerning the lawyer's ability to represent the client must be considered both at the outset and during the course of the representation. When these duties cannot be fulfilled, the lawyer must not take on the representation (or withdraw from a current representation). As stated by the Florida Rules and the ABA Model Rules, the lawyer "shall not represent a client

or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the rules of professional conduct." R. Reg. Fla. Bar 4-1.16(a)(1); ABA Model Rule 1.16(a)(1).

Where counsel is court-appointed, both the Florida Rules and the ABA Model Rules state that counsel should not seek to avoid court appointments except for good cause, such as when "representing the client is likely to result in a violation of the Rules of Professional Conduct." R. Reg. Fla. Bar 4-6.2; ABA Model Rule 6.2.

In sum, both the Florida Rules and the ABA Model Rules require the lawyer to ensure that the client can be represented diligently and competently. If those duties cannot be fulfilled, the lawyer has an ethical duty not to undertake the representation (or if already underway, the representation must be terminated).[16] To require proof of an actual ethical violation and an injury to the client before awarding relief would, in effect, force a lawyer to breach his or her ethical duties to the client.

[16] *See also* Defense Function Standard 4-1.3(e) (requiring that defense counsel "not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations.").

II. Requiring A Showing That Individual Attorneys Are Providing Inadequate Representation Would Disregard The Public Defense Provider's Ethical Obligations.

The Third District Court of Appeal, in its *Public Defender* opinion below, stated: "PD 11 presented evidence of excessive caseload and no more . . . . [T]here 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." *State v. Public Defender, Eleventh Circuit*, 12 So. 3d 798, 802-03 (Fla. 3d DCA 2009) (footnotes omitted).

The ABA respectfully submits that requiring a showing that individual attorneys are providing inadequate representation disregards the ethical obligations of the Public Defender. First, Formal Opinion 06-441 notes that the public defender's office should be considered as a law firm assigned to represent the client, such that responsibility for handling cases falls upon the office as a whole.[17] The Formal Opinion states, "If a supervisor [including the head of a public defender's office and those within such an office having intermediate managerial responsibilities] knows that a subordinate's workload renders the lawyer unable to provide competent and diligent representation and the supervisor fails to take

[17] *Id.* at 5 n. 17, citing Model Rule 1.0(c).

reasonable remedial action, the supervisor is responsible for the subordinate's violation of the Rules of Professional Conduct."[18]

Formal Opinion 06-441 also states that the supervisor must monitor the workloads of subordinate lawyers to ensure that the workload of each lawyer is appropriate. This includes "consideration of the type and complexity of cases being handled by each lawyer; the experience and ability of each lawyer; the resources available to support her, and any non-representational responsibilities assigned to the subordinate lawyers."[19] The supervisor should take whatever additional steps are necessary to ensure that a subordinate lawyer is able to meet her ethical obligations, which may require "transferring case(s) to another lawyer or other lawyers."[20] Because the supervisor is required to remain aware of the workload of each subordinate lawyer, the ABA believes that a public defense provider has the information necessary to establish the existence of an excessive caseload without demonstrating that individual lawyers are providing inadequate representation.

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[18] *Id.* at 9; *see also* Providing Defense Services Standards, Standard 5-5.3(a) (prohibiting a public defender organization from accepting "workloads that, by reason of their excessive size, interfere with the rendering of quality representation or lead to the breach of professional obligations").

[19] *Id.* at 7. *See also* ABA Defense Services Standards, Comment to Standard 5-5.3 at 71 ("Only the lawyers themselves know how much must be done to represent their clients and how much time the preparation is likely to take.").

[20] *Id.* at 7.

Further, the Eight Guidelines, a copy of which is attached at Appendix B, provide an "action plan" that public defense providers – defined as public defender agencies and other programs that furnish assigned lawyers and contract lawyers – should follow when faced with excessive caseloads in order to comply with their professional responsibilities.[21] The Eight Guidelines build on, *inter alia*, Formal Opinion 06-441 and the ABA Criminal Justice Standards.[22]

The Eight Guidelines note that a concurrent conflict of interest is created when there are an excessive number of cases, forcing a lawyer to choose among the interests of clients and depriving some if not all of them of competent and diligent defense services.[23] The Eight Guidelines counsel the public defense provider to take corrective action in advance, "to *avoid* furnishing legal services in

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[21] *Supra* note 3. The black letter, introduction and commentary of the Eight Guidelines were adopted as ABA policy in August 2009. Guideline 1 urges public defense providers to assess whether excessive workloads are preventing their lawyers from fulfilling performance obligations. Guidelines 2, 3 and 4 relate to the need for continuous supervision and monitoring of workloads, training of lawyers respecting their ethical duty when confronted with excessive workloads, and the need for public defense providers to determine if excessive workloads exist. Guidelines 6 through 8 address the range of options that public defense providers and their lawyers should consider when excessive workloads are present. As set out in Guideline 6, the circumstances may warrant that public defense providers or the individual lawyers seek redress in the courts, but Guideline 5 suggests that the public defense provider consider other choices before this step is required.

[22] *Id.*

[23] *Id.* at 5, citing *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender,* 561 So. 2d 1130, 1135 (Fla. 1990); *see also* ABA Model Rule 1.7(a)(2); Formal Opinion 06-441 (supervisors and managers of public defense organization must monitor workload of their supervised lawyers to ensure that workloads do not exceed a level that may be competently handled).

violation of professional conduct rules," which may include filing a motion requesting that assignments be stopped and that withdrawals be permitted.[24] As stated in the Comment to Guideline 6, "Normally, public defense providers, rather than individual lawyers, will take the initiative and move to suspend new case assignments" and, where the public defense provider has followed the Guidelines, "it should be in an especially strong position to show that its workload is excessive, and its representations regarding workloads should be accepted by the court." As also stated in the Comment to Guideline 6, the public defense provider should support the motion through "statistical data, anecdotal information, as well as other kinds of evidence." As stated in the Comment to Guideline 7, "When Providers file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference because Providers are in the best position to assess the workloads of their lawyers."

Moreover, the providers are officers of the court. When they "address the judge solemnly upon a matter before the court, their declarations are virtually made under oath" and their representations "should be given the weight commensurate with the grave penalties risked for misrepresentation." Comment to Guideline 7 (*citing Holloway v. Arkansas*, 435 U.S. 475, 486, 486 n. 9 (1978)). Further,

[24] Comment to Guideline 6 (emphasis supplied); *compare* Formal Opinion 06-441 at 5 (lawyer's primary duty is to existing clients; thus, a lawyer "must decline to accept new cases, rather than withdraw from existing cases" if existing workload becomes excessive).

deference to the public defense provider promotes the independence of the defense function. *See* Comment to Guideline 2 ("the ABA endorses complete independence of the defense function, in which the judiciary is neither involved in the selection of counsel nor in their supervision").

The ABA believes that, ultimately, the courts must ensure that public defense providers and their lawyers are able to provide competent and diligent representation in accordance with their professional obligations. *See, e.g.*, ABA Providing Defense Services Standards, Standard 5-5.3(b) ("Courts should not require individuals or programs to accept caseloads that will lead to the furnishing of representation lacking in quality or to the breach of professional obligations"); Comment to Guideline 7 (judiciary should ensure that providers and their lawyers are not forced to accept unreasonable numbers of cases). The ABA therefore offers Formal Opinion 06-441 and the Eight Guidelines to assist the Court as it considers whether the Public Defender must make a showing that individual attorneys are providing inadequate representation in order to establish that excessive caseloads prevent the Public Defender from carrying out its legal and ethical obligations to indigent defendants.

CONCLUSION

For the foregoing reasons, and taking no position on any of the factual or the Florida constitutional and statutory issues presented by these consolidated cases, *amicus curiae* American Bar Association requests that the Florida Supreme Court take ABA policy on excessive caseloads into consideration as it reaches its decision in this case.

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I HEREBY CERTIFY that this brief complies with the font requirements of Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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CERTIFICATE OF SERVICE

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