IN THE SUPREME COURT OF FLORIDA

CASE NOS. 09-1181 & 10-1349

PUBLIC DEFENDER, ELEVENTH JUDICIAL CIRCUIT OF FLORIDA,

Petitioner,

-vs-

STATE OF FLORIDA, et al.,

Respondents.

ON PETITION FOR DISCRETIONARY REVIEW

AMENDED BRIEF OF AMICUS CURIAE, FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS PUBLIC INTEREST LAW SECTION OF THE FLORIDA BAR UNIVERSITY OF MIAMI SCHOOL OF LAW - CENTER FOR ETHICS & PUBLIC SERVICE NATIONAL ASSOCIATION FOR CRIMINAL DEFENSE LAWYERS BRENNAN CENTER FOR JUSTICE CONSTITUTION PROJECT IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF AMICUS CURIAE

This brief is filed on behalf of the Appellants by the Florida Association of Criminal Defense Lawyers (FACDL), the Center for Ethics and Public Service of the Miami School of Law, the Public Interest Law Section of the Florida Bar, the National Association of Criminal Defense Lawyers (NACDL), the Brennan Center for Justice, and the Constitution Project.

FACDL is a statewide organization representing 1700 members, all of whom are criminal defense practitioners. Over 300 of FACDL's members are Public Defenders or Assistant Public Defenders who represent the indigent, and *all* of FACDL's members are concerned that the indigent receive the level of representation required by the Sixth Amendment to the United States Constitution. The members of FACDL have extensive knowledge of what is required by the Sixth Amendment to adequately defend a criminal defendant from the date of arrest to the completion of the case.

The Public Interest Law Section (PILS) is a section of The Florida Bar whose purpose is to further the advocacy and enhancement of constitutional, statutory or other rights that protect the dignity, security, justice, liberty, or freedom of the individual or public, and a forum for discussion and exchange of ideas leading to increased knowledge and understanding of the areas of public interest law. Adequate legal representation of indigent defendants is a core

concern of PILS and its members, and is essential to vindicate not only their constitutional rights, their dignity, and their interest in liberty, but also the public's interest in the fair administration of justice.[1]

Founded in 1996, the University of Miami School of Law's Center for Ethics and Public Service (CEPS) is an interdisciplinary program devoted to the values of ethical judgment, professional responsibility, and public service in law and society. The Center observes three guiding principles: interdisciplinary collaboration, public-private partnership, and student mentoring and leadership training. Its goal is to educate law students to serve their communities as citizen lawyers.

CEPS's interest in this case stems not only from its general dedication to the promotion of ethical lawyering and the fundamental guarantee of Constitutional rights for all, regardless of socio-economic status, but also from its specific experience in the South Florida community. CEPS works with underserved individuals and groups in Miami's distressed Coconut Grove Village West community through its Historic Black Church Program; provides continuing legal

[1] This brief was reviewed by the Executive Committee of the Board of Governors of The Florida Bar on January 2, 2012, consistent with applicable standing board policies. It is co-signed solely by the Public Interest Law Section, supported by the separate resources of this voluntary organization – not in the name of The Florida Bar, and without implicating the mandatory membership fees paid by any Florida Bar licensee.

educational ethics training to South Florida's legal community through its Professional Responsibility & Ethics Program, which trains the Miami-Dade County Public Defender's Office each year; and teaches law students about the value of public service through the CEPS Summer Public Interest Program, which places law students at the Miami-Dade County Public Defender's Office each summer to experience, first hand, the importance of equal access to justice for all members of society.

The National Association of Criminal Defense Lawyers (NACDL) is a not-for-profit professional organization that represents the nation's criminal defense attorneys. Founded in 1958, NACDL has a membership of more than 10,000 direct members and an additional 40,000 affiliate members in all 50 states, U.S. Territories and 28 nations. Its members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. NACDL frequently appears as *amicus curiae* before the Supreme Court of the United States as well as numerous federal and state courts throughout the nation.

The Brennan Center for Justice at New York University School of Law (Brennan Center) is a non-partisan public policy and law institute that focuses on fundamental issues of democracy and justice. An important part of the Brennan

Center's work is its effort to close the "justice gap" by strengthening public defender services and working to secure the promise of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

The Brennan Center's Access to Justice Project is dedicated to ensuring that low-income individuals, families, and communities in this country are able to obtain effective legal representation. The Brennan Center has filed a number of amicus briefs in support of the rights of the indigent accused, including briefs before the United States Supreme Court, federal courts of appeal, and state high courts. *See, e.g.*, *Rothgery v Gillespie County*, 554 U.S. 191 (2008) (amicus brief filed on behalf of the Brennan Center, NLADA, and the NAACP Legal Defense and Educational Fund); *Hurrell-Harring v State of New York*, 930 N.E. 2d 217 (N.Y. 2010) (amicus brief filed on behalf of former prosecutors).

Through its work to close the "justice gap," the Brennan Center has gained an in-depth understanding of the burdens that inadequate defense services for the poor place on the least advantaged, on the prosecution, on the courts, and on our society. The Brennan Center's experiences provide it with a unique perspective on the issues raised in this lawsuit.

The Constitution Project (TCP) is an independent, not-for-profit think tank that promotes and defends constitutional safeguards and seeks consensus solutions to difficult constitutional and legal issues. TCP achieves these goals through

constructive dialogue across ideological and partisan lines, and through scholarship, activism, and public education efforts. TCP frequently appears as *amicus curiae* before the United States Supreme Court, the federal courts of appeals, and the highest state courts in support of the protection of constitutional rights.

TCP's National Right to Counsel Committee is a bipartisan committee of independent experts representing all segments of America's justice system. Established in 2004, the Committee spent several years examining the ability of state courts to provide adequate counsel, as required by the United States Constitution, to individuals charged in criminal and juvenile delinquency cases who are unable to afford lawyers. In 2009, the Committee issued its seminal report, *Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel* (available at http://www.constitutionproject.org/pdf/139.pdf), which included the Committee's findings on the right to counsel nationwide, and based on those findings, made 22 substantive recommendations for reform. The Committee's recommendations urged states to provide sufficient funding and oversight to comply with constitutional requirements and endorsed litigation seeking prospective relief when states fail to comply with those requirements.

SUMMARY OF THE ARGUMENT

By reversing the trial court's orders in the two cases at bar, the Third District Court of Appeal improperly limited the scope of the Sixth Amendment to the United States Constitution. Specifically, the district court rejected the firmly held tenet that systemic risks to the constitutional right to effective assistance of counsel in criminal proceedings may form the basis for prospective relief alleviating such risk. Instead, the court not only required a case-by-case showing of prejudice, but implicitly held that only Sixth Amendment violations based on *outcomes* rather than the quality of representation will render a motion to withdraw based on excessive caseloads viable.

The undersigned contend that the application of the Sixth Amendment is significantly broader than that, requiring attorneys to withdraw at the outset of a criminal case regardless of whether the attorney or client can demonstrate that counsel's projected deficiencies are likely to change the outcome of the proceeding. Furthermore, such withdrawal may be approached systemically where, as here, a law office can demonstrate that its aggregate caseloads are so high that none of its attorneys can meet their Sixth Amendment obligations if the office is forced by the court to accept more cases.

ARGUMENT

I. Appellants have shown that their excessive caseloads imminently threaten not only to create conflicts of interest but to deprive their current and former indigent clients of the effective assistance of counsel and are therefore entitled to limit further representations now, without waiting for those threats to materialize.

The undersigned urge this Court to reject the decisions of the Third District Court of Appeal because the court failed to recognize that the excessive workload of the Eleventh Circuit Public Defender (PD11) has led to systemic problems that not only threaten ethical violations by the Appellants, but also violations of their clients' right to effective assistance of counsel at every stage of their criminal prosecution. Relief *prior* to the emergence of these violations is both necessary and required under the Sixth Amendment, regardless of whether PD11 can demonstrate that their excessive caseloads will affect the outcome of their cases because there exists no equivalent posctoncviction remedy.

In *Gideon v. Wainwright*, 372 U.S. 335 (1963), the United States Supreme Court held that the Sixth Amendment right to counsel is a fundamental right essential to a fair trial and is, therefore, binding on the states by way of the Fourteenth Amendment. Now, almost fifty years later, another one of this state's cases will determine whether *Gideon*'s recognition of the right to counsel was merely a hollow promise or, instead, an assurance that all people entitled to appointed counsel be afforded an attorney who has sufficient time and resources to

defend their liberty interests in accordance with the Sixth Amendment.

Unfortunately, given the caseloads of PD11, the right to counsel espoused in *Gideon* is ringing hollow in Florida's most populous county. Both PD11 and attorney Jay Kolsky presented startling evidence below of their inability to meet the Sixth Amendment needs of their clients.

A. The extensive evidence presented in the trial court establishes both ongoing violations of the Sixth Amendment rights of PD11's clients and an unacceptable risk of future such violations.

In the trial court, PD11 and Jay Kolsky presented ample evidence to support a finding that PD11 faces a systemic problem that the Sixth Amendment requires be remedied regardless of whether they have demonstrated their caseloads are likely to affect the outcome of each individual case, as the district court held below. Consider, as just one example, Assistant Public Defender Amy Weber's performance due to her excessive caseload. Ms. Weber received a B.A. from Cornell in 1996 and then worked in the Congressional Budget Office for three years. She then attended Yale Law School, graduating in 2002. In 2003, she went to work for PD11. (7/30/08 Hrg., Vol. II at 261[2]). Yet, because of the dramatically reduced funding of PD11, coupled with an increase in appointments and attrition,

[2] Citations are to the record on appeal before the Third District Court of Appeal in *Public Defender, Eleventh Judicial Circuit v. State,* 12 So. 3d 798 (Fla. 3d DCA 2009), and *State v. Bowens, 39 So. 3d 479* (Fla. 3d DCA 2010).

Ms. Weber testified that she has been unable to fulfill *Gideon*'s promise, causing her to go to her supervisor with concerns about her own capacity to represent her clients because of her excessive caseload. (7/30/08 Hrg., Vol. II at 264).

Ms. Weber handles both A felonies and overflow C felonies. She is required to be in court one week out of three for each division, or a total of two weeks. In the remaining two weeks, she also has to appear in court to handle "Repeat Offender Court" and plea or status hearings on her cases. Thus, she effectively has little or no time out of court to prepare her cases, let alone to visit her clients, which she does on the weekend, typically spending less than an hour with each. (7/30/08 Hrg., Vol. II at 262-65). That hour often constitutes the total amount of time she has to start preparing a case. Yet, clients will rarely trust her enough on that first visit to share the kinds of details needed to pursue all possible claims.[3] (7/30/08 Hrg., Vol. II at 265-66).

Out of all the cases Ms. Weber has handled, she has had time to visit only

[3] Rory Stein, General Counsel and Training Director of PD11 since 1990, also testified that many of the lawyers in PD11 "see the clients once, sometimes they see them more, depending upon how long the case is pending, but for the most part the quality of the communication and the quality of the relationship between the lawyer and client is very poor." (7/30/08 Hrg., Vol. II at 230). Metro West Jail is in the Everglades, which makes visiting an all-day event. The number of interview rooms is inadequate, so PD11 lawyers have a long wait to see their clients. (7/30/08 Hrg., Vol. II at 224-25). The office also serves many Spanish-speaking clients and interpreters are scarce, which makes it more difficult to find time to meet with clients.

one crime scene. (7/30/08 Hrg., Vol. II at 266). For investigation, she relies entirely on her investigator—who typically has never met her client—to interview witnesses. She also must sometimes rely on the investigator to assess the witnesses' strength and credibility when she cannot meet with them herself. (7/30/08 Hrg., Vol. II at 267). Not only is she unable to prepare for depositions, but she also has had to ask other attorneys to cover them on her behalf when time is short. (7/30/08 Hrg., Vol. II at 267-68).

Ms. Weber is never able to take advantage of the speedy trial rule and frequently has done nothing but the client interview when the first trial date arrives. Thus, her clients are incarcerated for long periods of time just waiting for their cases to be *investigated*, let alone to proceed to trial. With this delay, PD11 attorneys lose a valuable tool to force dismissal or pleas when the state is not ready for trial within the speedy trial period. (7/30/08 Hrg., Vol. II at 268-69).

Because of her caseload, Ms. Weber makes choices about what she will do on a given case "based on how likely she is to win." If she does not have time for an *Arthur* hearing and does not think the judge will let her client out of custody, she will not ask for the hearing, even if she has a good-faith basis for doing so. She thinks in terms of what will be the best use of her time, rather than what is required for each client under the Sixth Amendment. In short, "there are a lot of things that I can't do for my clients because I don't have sufficient time, and lots of

choices that I have to make between one client and another."[4] (7/30/08 Hrg., Vol. II at 270). This practice is a direct violation of the Florida Bar Rules of Professional Conduct, which prohibit an attorney from representing one client to the detriment of another. Fla. Bar R. 4-1.7(a)(2) ("a lawyer should not represent a client if . . . there is a substantial risk that the representation of 1 or more clients will be materially limited by the lawyer's responsibilities to another client. . . .").

Unfortunately, Ms. Weber's situation is not unique. The trial court determined that Assistant Public Defender Jay Kolsky was handling between 525 and 630 felony cases annually. (Vol. I at 2, Ex. 1). Supervising attorney Stephen Kramer testified in the trial court hearing that Ms. Weber's experience is typical at PD11, that attorneys representing clients facing twenty to forty years in prison only spend about an hour with their clients prior to trial. (7/30/08 Hrg., Vol. II at 258-59). Eleventh Judicial Circuit Public Defender Carlos Martinez echoed the

[4] Ms. Weber described one particular conflict caused by her high caseload in which she had thirteen cases set for trial on one day. One of the cases proceeded to trial on a count against which she was unprepared to defend, so she spent her lunch break writing the cross-examination of the victim. Earlier in the day, the state extended a plea offer to one of Ms. Weber's twelve other clients in a case for which she was also unprepared for trial. The client, an alleged sex offender, was in a holding cell throughout the day, but because Ms. Weber was so busy preparing for and conducting her trial, she failed to go see him and convey the plea offer to him. The state later revoked the offer because the defendant had not acted on it quickly enough. Ms. Weber informed the court she had been ineffective and her client was assigned replacement counsel. (7/30/08 Hrg., Vol. I at 271-72).

concern: "I am not talking about OJ Simpson representation. I am talking about the basic minimum of being able to speak to your attorney for at least an hour. We are not able to do that right now, and it's getting worse." (7/30/08 Hrg., Vol. II at 130). Rory Stein reported, "Our [felony] C lawyers . . . walk into court and have 40 to 50 cases set for trial in one week. The notion that those people are properly prepared to try any one of those cases is a joke[.]" (7/30/08 Hrg., Vol. II at 222). In Mr. Stein's estimation, lawyers make numerous decisions every day that benefit one client at the expense of another. (7/30/08 Hrg., Vol. II at 233).

The impact of PD11's excessive caseloads begins at one of the very first critical stages of the felony proceedings—arraignment. Prosecutors try to move as many cases through to conclusion at this stage as possible by offering plea bargains. Mr. Martinez refers to them as "meet and greet pleas" because often the lawyers who will handle the cases to judgment will be meeting their clients for the first time at arraignment. (7/30/08 Hrg., Vol. II at 135-36). Up until that stage, lawyers from the office's "Early Representation Unit" (ERU) are assigned the task of investigating the case to prepare for arraignment, when the charges are ordinarily filed.

This twenty-one-day period between first appearance and arraignment was described by private attorney Rick Freedman as one of the most critical stages in the entire life of a case. During that time, on his cases, Mr. Freedman compiles a

presentation packet for the screening unit of the prosecutor's office. In putting the packet together, he familiarizes himself with the background of the client, conducts witness interviews, obtains affidavits, visits the crime scene, takes pictures if necessary, and potentially hires an investigator. If there is any challenge to be made against the arrest affidavit, the time to make that determination is in those twenty-one days. The strategy is to provide the prosecutor with enough information to convince her not to bring charges at all, or at least to downgrade them. (7/31/08 Hrg., Vol. I at 8-9). In short, doing nothing during that twenty-one-day period can change the entire course and ultimate disposition of the clients' proceeding.[5]

Yet, PD11's ERU attorneys do absolutely nothing for their nonincarcerated

[5] A lawyer's advocacy is also a critical factor in determining whether arrestees are released at first appearance shortly after their arrest or whether they spend substantial periods of time in pretrial incarceration. *See* Douglas L. Colbert, Ray Paternoster & Shawn Bushway, *Do Attorneys Really Matter? The Empirical & Legal Case for the Right of Counsel at Bail*, 23 Cardozo L. Rev. 1719, 1763 (2002). In fact, researchers in a Baltimore City study found that indigent arrestees represented by counsel were over two-and-a-half times as likely to be released on their own recognizance and spend less time in jail. *See id.* at 1755. Such injuries are particularly pronounced for defendants who are ultimately acquitted or whose cases are dismissed, but who nevertheless lose licenses, homes, jobs, education, time, opportunity, and income as a result of the denial of prompt, effective assistance of counsel. Such injuries are not regrettable collateral side effects of every criminal prosecution, but instead stem directly from underfunding and excessive workload: inadequate investigation, a lack of prompt communication, and overall ineffective representation.

clients. For the approximately 18,000 clients who make bond after first appearance, the ERU attorney never meets with the client or otherwise represents him. (7/30/08 Hrg., Vol. I at 135-36). The attorneys are so strapped for time that they are making the only choice they can—to focus on the 20,000 or so clients who are unable to bond out and are therefore incarcerated. (7/30/08 Hrg., Vol. I at 135).

By the time the bonded client gets to arraignment, he has no expectation of legal representation and is often offered a plea deal that will allow him to go home. There is little the client's new lawyer, who likely has just met with him for eight to ten minutes in the hallway[6] (7/31/08 Hrg., Vol. I at 15), can say to dissuade the client—according to Rory Stein, in most cases, the only information the attorney has at that point is an arrest report which, of course, only represents the state's side of the story.[7] (7/30/08 Hrg., Vol. II at 205) (Stein testifying that "in every instance

[6] Private attorney Rick Freedman testified regarding clients who hire him after having first been appointed a public defender: "[T]he biggest complaint that we get when they knock on my door or call us on the phone is not, 'I didn't have a qualified attorney,' it's, "Who is my attorney? I can't get them on telephone. I try and try and try. I can't meet them in person and I don't know who they are, and they spent, you know, ten minutes with me in the corridor of the hall[.]'" (7/31/08 Hrg., Vol. I at 15).

[7] PD11 Supervising Attorney Stephen Kramer echoed Mr. Freedman's assessment that the prearraignment period is a critical stage in the case and testified that PD11 attorneys do not have time to do any investigation prior to the charging decision. Such investigation can literally mean the difference between the

our lawyers are completely ill equipped to handle [the arraignment] proceeding.").

In sum, the problems faced by PD11 are *systemic*, *not* anecdotal. From 2004 to 2008, the number of criminal charges the office was responsible for handling had risen 29 percent. The office's budget had been cut so drastically that by 2005, PD11 had lost 30 positions. At the same time, administrative duties increased due to the passage of article V. (7/30/08 Hrg., Vol. I at 19-20) The simple truth is that these changes have led to a constant barrage of irreconcilable conflicts of interest for its attorneys.

To compound the problem, PD11 is bleeding lawyers; they are leaving in droves due to burnout, sick leave, inadequate raises, and low morale. (7/30/08 Hrg., Vol. II at 232). Mr. Stein reported that a "mind boggling and appalling" number of attorneys in the office work second jobs to supplement their income. They are waiting tables or serving coffee at Starbucks. (7/30/08 Hrg., Vol. II at 213). A starting attorney's salary at the office is $42,000. As of 2008, there had been only two raises in the last five years. (7/30/08 Hrg., Vol. II at 232). With law school debt and the high cost of living in Miami, the salaries are simply too low to retain good attorneys, despite the exemplary reputation of the office's leadership. Some of the attorneys are "often forced to choose between paying their light bill

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prosecutor choosing to file or not to file the client's charges. (7/30/08 Hrg., Vol. II at 224-25).

and doing the things that are necessary to represent their clients." (7/30/08 Hrg., Vol. II at 213-14).

B. The Third District Court of Appeal improperly limited the Scope of the Sixth Amendment as it applies to systemic deficiencies that threaten to deprive a defendant of his constitutional right to counsel.

The Supreme Court has made clear that the right to counsel simply "cannot be satisfied by mere formal appointment." *Avery v. Alabama*, 308 U.S. 444, 446 (1940). The excessive caseloads currently assigned the attorneys employed by PD11 create an imminent and irreparable risk that the indigent defendants accused in the Eleventh Circuit will be denied their right to counsel under both the Sixth Amendment as applied through the Fourteenth Amendment of the United States Constitution. Just as fixed fees "pit[] the layer's economic interest . . . against the interest of the client in effective representation[,]" *see* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. Pitt. L. Rev. 293, 321 (2002), excessive caseloads pit one client's interest against another's.

The deprivation of the right to counsel is remedied most often in the post-conviction context by individual defendants addressing the specific facts of their cases under the standard established by *Strickland v. Washington*, 466 U.S. 668, 692 (1984). Under *Strickland*, not only must a defendant demonstrate counsel's

deficient performance, but he must also prove that the outcome of his case was prejudiced by that deficiency. *Bruno v. State*, 807 So. 2d 55, 61 (Fla. 2002) (citing *Strickland*, 466 U.S. 668).

The *Strickland* standard, however, is inapplicable where a defendant, or a lawyer on behalf of her client(s), seeks prospective relief from the likelihood of a Sixth Amendment violation that may or may not affect the outcome of a case, such as a conflict of interest or a more widespread systemic deficiency such as excessive caseloads or low hourly compensation for appointed counsel. As the Eleventh Circuit stated in *Luckey v. Harris*, 860 F.2d 1012, 1017 (11th Cir. 1988), unlike the standard established for error by the Supreme Court in *Strickland*,

> [t]he sixth amendment protects rights that do not affect the outcome of a trial. Thus, deficiencies that do not meet the "ineffectiveness" standard may nonetheless violate a defendant's rights under the sixth amendment. In the post-trial context, such errors may be deemed harmless because they did not affect the outcome of the trial. Whether an accused has been prejudiced by the denial of a right is an issue that relates to relief – whether the defendant is entitled to have his or her conviction overturned – rather than to the question of whether such a right exists and can be protected prospectively.

Luckey, 860 F.2d at 1017.[8] The Eleventh Circuit held in *Luckey* that a bilateral class of "all indigent persons presently charged or who will be charged in the

[8] The Eleventh Circuit later ruled that the lawsuit in *Luckey* was properly dismissed on remand on abstention grounds since the remedy sought would have required ongoing monitoring by the district court. *Luckey v. Miller*, 976 F.2d 673 (11th Cir. 1992).

future with criminal offenses in the courts of Georgia[,] and of all attorneys who represent or will represent indigent defendants in the Georgia courts[,] . . . had stated a [section 1983] claim on which relief could be granted[.]" The class alleged that numerous systemic deficiencies in the Georgia indigent defense system denied or risked denying the plaintiffs their Sixth Amendment right to counsel, among other rights.

Similarly, in *New York County Lawyer's Ass'n v. State*, 294 A.D.2d 69 (N.Y. App. Div. 1st Dep't 2002), the Plaintiff Association was permitted to proceed with a lawsuit on behalf of its clients seeking injuctive relief for the low compensation rates for court-appointed attorneys. The court held that the Association had demonstrated that the underfunding of the indigent defense system had created a "severe and unacceptably high risk" that indigent clients would receive ineffective assistance of counsel and that postconviction litigation would be inadequate to vindicate the clients' right to counsel. *Id.* at 71-2. *See also Hurrell-Harring v. New York*, 930 N.E.2d 217 (N.Y. 2010) (holding that a class of indigent defendants in five New York counties had presented a cognizable claim for the constructive denial of the Sixth Amendment right to counsel based on the unacceptable risk that the defendants would be denied their constitutional right to counsel; the suit for injunctive relief to remedy the systemic problems was thereby permitted to proceed); *New York County Lawyer's Ass'n. v. State*, 745 N.Y.S.2d

376, 384 (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. . . ."), *aff'd*, 294 A.D.2d 69 (N.Y. App. Div. 1st Dep't 2002). *See also Best et al. v. Grant Cty.*, No. 042001890, Mem. Decision at 5 (Wash. Super. Ct. Oct. 14, 2005) (allowing a class of indigent defendants to proceed with a prospective declaratory judgment complaint against the Grant County Public Defender based on the class's "well-grounded fear their rights to effective assistance of counsel will be violated, to their profound injury[,]" due to prior and continuing "systemic deficiencies" in the defender system).

The court in *Hurrell-Harring v. New York* echoed the Eleventh Circuit in *Luckey*, stating that when the question before the court concerns systemic underfunding and/or excessive caseloads, the analysis is different from the "sort of contextually sensitive claims that are typically involved when ineffectiveness is alleged." 930 N.E.2d at 224. "The basic, unadorned question presented by such claims where, as here, the defendant-claimants are poor is whether the State has met its obligation to provide counsel, not whether under all the circumstances counsel's performance was inadequate or prejudicial." *Id.*

As in the cases cited above, the systemic deficiencies that plague PD11 in the form of excessive caseloads have put its current and future clients at risk of

losing their Sixth Amendment right. In some cases, this right undoubtedly has been compromised already. And the record provides absolutely no evidence demonstrating that the problem is a result of lack of leadership or competence on the part of the attorneys in the office – to the contrary, the leadership of PD11 is among the most highly praised in the country.[9] *See* (7/30/08 Hrg., Vol. I at 5, 107) However, the reality is that no public defender office could continue to provide effective representation under the conditions faced by PD11: the workload increased by twenty-nine percent over four years with a budget that remained essentially static over the same period of time.

In *Luckey*, the Eleventh Circuit held that the class of plaintiffs, prospective and current indigent defendants, along with their lawyers, had stated a cognizable claim by alleging

> that systemic delays in the appointment of counsel deny them their sixth amendment right to the representation of counsel at critical stages in the criminal process, hamper the ability of their counsel to defend them, and effectively deny them their eighth and fourteenth amendment right to bail, that their attorneys are denied investigative and expert resources necessary to defend them effectively, that their attorneys are pressured by courts to hurry their cases to trial or to

[9] The problem cannot be blamed on waste either. According to former Public Defender Bennett Brummer, PD11 is as administratively lean as it can be and is operating at maximum efficiency. Costs simply cannot be cut any further in order to save money. The office salary rates are so low they are not competitive with any government-paid attorney in Dade County, including attorneys for the School Board and Municipal Governments. (7/30/08 Hrg., Vol. I at 18; Def. Exh. 6).

> enter a guilty plea, and that they are denied equal protection of the laws.

860 F.2d at 1018. In *New York County Lawyer's Ass'n*, the facts relied on by the trial court in granting a preliminary injunction and finding the plaintiffs had presented a cognizable claim were

> the adverse effects and the depth of the crisis of the current 18-B compensation rates on juvenile delinquency cases, abuse and neglect proceedings, appeal backlogs, arraignment overload, individual assigned counsel case overload, uncertified panel counsel, and prolonged delays. The report of the Appellate Division, First Department, Committee on Representation of the Poor . . . concluded that: "the entire system by which poor people are provided legal representation is in crisis. As a result of shamefully low rates of compensation of assigned counsel, lack of resources, support and respect, inadequate funding of institutional providers, combined with ever-increasing caseloads, New Yor''s poor are too often not afforded the 'meaningful and effective' representation to which they are entitled under New York Law and the New York State Constitution." (Mar. 23, 2001 at 1-2; *see also, In re Nicholson*, 181 F. Supp 2d 182 (E.D. NY 2002)).

N.Y. County Lawyer's Ass'n, 745 N.Y.S.2d at 389.

In *Hurrell-Harring*, the Court of Appeals of New York relied on evidence that defendants were completely denied counsel at certain pretrial stages, and were constructively denied counsel at others. 930 N.E. 2d at 227-28.

Contrary to the Third District's finding below that PD11 "presented evidence of excessive caseload and no more," *State v. Public Defender, Eleventh Judicial Circuit*, 12 So. 3d 798, 802-03 (Fla. 3d DCA 2009), the evidence before

the lower court in this case is no less extensive or compelling than that in the preceding cases. Existing and potential clients of PD11 who post bond are constructively denied any representation prior to arraignment, a critical period in determining the outcome of their case. The attorneys of PD11 have, by necessity, prioritized the incarcerated clients during the arrest-to-arraignment period. Following arraignment, the attorneys are faced with ongoing conflicts of interest among their clients. The clients with the more serious charges or the greatest chance of success are given the most time than the others. Attorneys do not visit crime scenes, they do not prepare for depositions, they present witnesses they have never met, and they prepare cross-examinations during a lunch break in the middle of trial. Attorneys lack the time to prepare even for capital cases because they are due in court every week to cover felony B and C cases and drug court. Some attorneys are handling over four hundred felony cases. This is not what the Supreme Court contemplated when it decided *Gideon*.

The district court below failed to recognize the critical distinction between an outcome driven, case-by-case analysis required by *Strickland*, and a systemic, prospective one founded solely on the Sixth Amendment. In *State v. Public Defender*, 12 So. 3d at 802-06, the court rejected prospective injunctive relief in the aggregate, requiring each attorney to file a motion to withdraw in each case, demonstrating the potential risk of a Sixth Amendment violation. Then when, as

instructed by the district court, Mr. Kolsky file a single motion to withdraw and presented evidence demonstrating that his own caseload was too excessive to represent Mr. Bowens adequately, the court *still* held that attorney Kolsky had not made a sufficient showing to demonstrate a Sixth Amendment violation. Reducing the two days of evidence presented in the trial court to only two deficiencies—forfeiting the client's speedy trial right and requesting continuances, the court held,

> This "prejudice" is not the type of prejudice that this Court referred to in *State v. Public Defender*. Prejudice means there must be a real potential for damage to a constitutional right, such as effective assistance of counsel or the right to call a witness, or that a witness might be lost if not immediately investigated. And this is the critical fact—the PD11 has not made any showing of individualized prejudice or conflict *separate from* that which arises out of an excessive caseload.

State v. Bowens, 39 So. 3d 479, 481 (3d DCA 2010).

The Third District's open dismissal of the defendant's fundamental liberty interest is inexplicable in light of the United States Supreme Court's recent decision in *Rothgery v. Gillespie County*, 554 U.S. 191 (2008), which reaffirmed its long-standing application of *Gideon* to all critical stages of a criminal prosecution, protecting defendants from a broad set of injuries of which wrongful conviction is but one. More importantly, however, the lower court has set the bar too high by requiring a showing of prejudice before the case has begun. Essentially, it has applied the *Strickland* standard in a non-postconviction context.

Amici urge the Court to reject that standard and to adopt the analysis espoused in *Luckey, New York County Lawyer's Ass'n, and Hurrell-Harring*.

CONCLUSION

Paradoxically, it is the countless wrongfully accused, now and in the future, who will suffer the greatest harm if this Court does not act by reversing the opinions below. To provide no relief while the rights of countless indigent accused are routinely violated is antithetical to the fundamental role of the judiciary as the ultimate guardian of constitutional rights. These cases present an opportunity for the highest court of one of the most populous and influential states to join New York, Washington, and Arizona in affirming that there is a mechanism available to Florida's most vulnerable defendants whose Sixth Amendment rights are threatened by the excessive caseloads of their public defenders.

If the Third District's decisions are permitted to stand, the court will be sending a message to the legislature that lawmakers are entirely insulated from defining the boundaries of the Sixth Amendment as it chooses. When budgets are tight, as they are now, caseloads will rise with impunity, no matter how much they limit an attorney's capacity to meet her constitutional duties. The rule the Court adopts here must recognize that systematic, constitutionally deficient assistance of counsel cannot be put beyond the reach of the courts; that the system-wide deprivation of counsel transcends an individual remedy for the convicted; and that

this decision has an impact on both the integrity of the legal profession and the perception of the State's system of indigent defense.

Respectfully submitted,

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