Supreme Court of Louisiana

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FROM: CLERK OF SUPREME COURT OF LOUISIANA

The Opinions handed down on the **11th day of December, 2020** are as follows:

BY Hughes, J.:

2020-KK-00447 *STATE OF LOUISIANA VS. RODERICK L. COVINGTON, SAMANTHA KELLY, AND KIFFANY SPEARS (Parish of East Baton Rouge)*

REVERSED; DISTRICT COURT RULINGS REINSTATED. SEE OPINION.

Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

Johnson, C.J., dissents and assigns reasons.
Weimer, J., additionally concurs and assigns reasons.
Crichton, J., additionally concurs and assigns reasons.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-KK-00447

STATE OF LOUISIANA

VERSUS

RODERICK L. COVINGTON, SAMANTHA KELLY, AND KIFFANY SPEARS

ON WRIT OF CERTIORARI TO THE FIRST CIRCUIT COURT OF APPEAL, PARISH OF EAST BATON ROUGE

HUGHES, J.[*]

In these consolidated cases, Michael A. Mitchell, Chief Indigent Defender[1] for the Office of Public Defender for East Baton Rouge Parish, filed a "Motion to Withdraw from Current Appointments and to Decline Future Appointments" on October 29, 2018 in each of these Nineteenth Judicial District Court ("19th JDC"), Section VI cases. Mr. Mitchell alleged that long term chronic underfunding of the public defender's office had necessitated the implementation of "service restriction protocols," pursuant to La. Administrative Code, Title 22, Section 1701 et seq., and led to the elimination of a number of attorney and support staff positions. Mr. Mitchell asserted that the consequent increase in the workloads of the remaining attorneys could potentially create conflicts of interest, as counsel might have to allot more time to one case over another, and could potentially cause ineffective

[1] In the courts below, Mr. Mitchell is referred to variously as the "Chief Public Defender" and as the "District Defender." However, we note that, since he is the "attorney employed by or under contract with the board to supervise service providers and enforce standards and guidelines within a judicial district or multiple judicial districts," his title is supplied by La. R.S. 15:143(5) as either the "[d]istrict public defender" or the "chief indigent defender."

[*]Retired Judge James H. Boddie, Jr., heard this case as Justice pro tempore, sitting in the vacant seat for District 4 of the Supreme Court. He is now appearing as an ad hoc for Justice Jay B. McCallum.

assistance of counsel in violation of Louisiana Rules of Professional Conduct, Rules 1.1, 1.3, 1.7, 1.16, 5.1, and 6.2.[2]

In support of these claims, Mr. Mitchell relied primarily on the testimony of expert witnesses related to a 2017 study, entitled "The Louisiana Project, A Study of the Louisiana Public Defender System and Attorney Workload Standards" ("La.

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[2] These rules provide, in pertinent part:

> **Rule 1.1. Competence**
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> (a) A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
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> **Rule 1.3. Diligence**
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> A lawyer shall act with reasonable diligence and promptness in representing a client.
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> * * *
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> **Rule 1.7. Conflict of Interest: Current Clients**
>
> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
>
> (1) the representation of one client will be directly adverse to another client; or
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> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.
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> * * *
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> **Rule 1.16. Declining or Terminating Representation**
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> (a) Except as stated in paragraph (c), a 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 or other law; ....
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> * * *
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> **Rule 5.1. Responsibilities of Partners, Managers, and Supervisory Lawyers**
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> * * *
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> (b) A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.
>
> (c) A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:
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> (1) the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or
>
> (2) the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.
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> * * *
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> **Rule 6.2. Accepting Appointments**
>
> A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as:
>
> (a) representing the client is likely to result in violation of the Rules of Professional Conduct or other law; ....

Project"), which was conducted by the Baton Rouge accounting firm of Postlethwaite & Netterville, APAC, in conjunction with the American Bar Association Standing Committee on Legal Aid and Indigent Defendants. According to the "Executive Summary" contained within the La. Project report, the study employed as the basis for its conclusions the "Delphi Method," which the report described as a "structured and reliable technique" that "integrates opinions of highly informed professionals to develop consensus opinions" by the "Delphi Panel," consisting of "Louisiana private defense practitioners and public defenders" who "provided professional consensus opinions regarding the appropriate amount of time an attorney *should* spend on certain case types to provide reasonably effective assistance of counsel pursuant to prevailing professional norms in the State of Louisiana."[3] (Emphasis original.)

In response to Mr. Mitchell's motions, which were confined to 19th JDC, Section VI cases, the State filed motions for dismissal of the motions for withdrawal and **Daubert** objections[4] to expert testimony relative to the La. Project since it was based on the "Delphi Method," contending, inter alia, that the Delphi Method produced unreliable generalized conclusions about the Louisiana public defender system and, further, that **State v. Peart**, 621 So.2d 780, 783 (La. 1993), requires individualized findings as to whether there has been ineffective assistance of counsel in each specific case.

Following a June 2019 hearing on the parties' motions and the **Daubert** objections,[5] the district court issued rulings, on September 12, 2019, in favor of the

[3] During the district court hearing the Delphi Method was referred to as a forecasting tool, which Postlethwaite & Netterville Associate Consulting Director Madison Field (accepted by the district court as an expert in the application of the Delphi Method) testified they were using to try "to identify what's going to occur in the future rather than what has occurred."

[4] **Daubert v. Merrell Dow Pharmaceuticals, Inc.**, 509 U.S. 579, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

[5] Although neither the State's **Daubert** objections, nor the physical items of evidence introduced by the parties at the hearing on the motions and the **Daubert** objections, appear in the district court

State and against Mr. Mitchell, implicitly finding that any remedy related to chronic underfunding of the public defender system was within the exclusive purview of the Louisiana Legislature[6] and was outside the parameters of what the court had the authority to fashion; however, the court stated that it would consider any individual motions to withdraw from, or to decline, representation on a case-by-case basis.

Thereafter, the appellate court granted the district public defender's writ application, in part, to reverse the district court's denial of the motions to withdraw, to vacate the district court orders appointing the public defender in the remaining ongoing consolidated cases,[7] and to grant the request to allow the named public defenders to withdraw from future representation of indigent defendants "until the caseloads are no greater than 100% of his or her annual capacity." **State v. Covington**, 19-1494, p. 1, 2020 WL 1230134, *2 (La. App. 1 Cir. 3/13/20) (unpublished). Further, the appellate court instructed the district court to "meet with the Chief District Defender and the prosecutors to determine categories of cases in which representation by public defenders in Section VI may be triaged so that each said public defender is able to provide reasonably effective and competent assistance

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records presented to this court, we find it unnecessary to order supplementation of the records in light of the conclusion we reach hereinafter.

[6] "La. Const. Art. I § 13 explicitly states that '[t]he legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.' " **State v. Citizen**, 04-1841, p. 13 (La. 4/1/05), 898 So.2d 325, 335.

[7] In **State v. Covington**, the defendant, Roderick L. Covington, was charged in 19th JDC case number 08-18-0486 with the August 13, 2018 commission of domestic abuse battery with child endangerment and violation of a protective order (violations of La. R.S. 14:35.3 and La. R.S. 14:79, respectively), and in 19th JDC case number 10-18-0529 with the August 13, 2018 commission of illegal possession of a firearm by a convicted felon (a violation of La. R.S. 14:95.1). On April 8, 2019, prior to the June 2019 hearing on the public defender's motion to withdraw, this defendant entered into a plea agreement with the State, whereby the charges at issue in case number 08-18-0486 were dismissed, and the defendant entered a guilty plea in case number 10-18-0529. Thus, Roderick Covington's criminal cases were concluded, apparently with no claim of ineffective assistance of counsel. Nevertheless, with respect to Roderick Covington's criminal case number 10-18-0529, the appellate court held that "the district court's ... order appointing the public defender in docket number 10-18-0529 is rescinded because a plea was entered in this case." **State v. Covington**, 19-1494, p. 1, 2020 WL 1230134, *2 (La. App. 1 Cir. 3/13/20) (unpublished). Based on our decision herein, we find no reason for rescinding the appointment of the public defender in docket number 10-18-0529, particularly since the criminal case had concluded prior to the hearing on the district public defender's motion to withdraw.

of counsel under the Louisiana Rules of Professional Conduct and the United States and Louisiana Constitutions." **State v. Covington**, 19-1494 at p. 2, 2020 WL 1230134 at *2.

In so ruling, the appellate court reasoned that sufficient evidence had been presented to the district court to establish that the appointed public defenders were unable to "effectively represent their indigent clients in a manner consistent with their constitutional and ethical obligations due to excessive caseloads." **State v. Covington**, 19-1494 at p. 1, 2020 WL 1230134 at *1 (citing Louisiana Rules of Professional Conduct, Rule 1.7, and **Strickland v. Washington**, 466 U.S. 668, 685-86, 104 S.Ct. 2052, 2063, 80 L.Ed.2d 674 (1984)). The appellate court further ruled that trial courts have the inherent authority "to manage their dockets in a way that both moves their cases and respects the constitutional and statutory rights of the defendant, the prosecutor, and the public defender," as well as "to triage cases so that those alleging the most serious offenses, those in which defendants are unable to seek or obtain bail, and those that for other reasons need to be given priority in their resolution, are given priority in appointing the public defender and scheduling trials, even if it means that other categories of cases are continued or delayed, either formally or effectively, as a result of the failure to appoint counsel for those unable to afford private counsel." **State v. Covington**, 19-1494 at p. 1, 2020 WL 1230134 at *1. One judge of the three-judge appellate panel dissented in part, stating that he did "not find that handling withdrawals on a case-by-case basis is an abuse of the trial court's discretion." **State v. Covington**, 19-1494 at p. 2, 2020 WL 1230134 at *2 (Theriot, J., dissenting) (citing **State v. Leger**, 05-0011 (La. 7/10/06), 936 So.2d 108, 142, cert. denied, 549 U.S. 1221, 127 S.Ct. 1279, 167 L.Ed.2d 100 (2007)).[8]

[8] In **Leger**, 936 So.2d at 142, this court recognized that "[t]he question of withdrawal of counsel largely rests with the discretion of the trial judge, and his ruling will not be disturbed in the absence of a clear showing of an abuse of discretion."

We granted the State's subsequent writ application to review the appellate court decision. **State v. Covington**, 20-0447 (La. 7/2/20), 297 So.3d 765.

This court previously ruled, in **State v. Peart**, that because there is no precise definition of reasonably effective assistance of counsel, any inquiry into the effectiveness of counsel must be individualized and fact-driven, which necessarily involves a detailed examination of the specific facts and circumstances of the case. **State v. Peart**, 621 So.2d at 788. See also **State v. Reeves**, 06-2419, pp. 66-67 (La. 5/5/09), 11 So.3d 1031, 1075. Although motions pertaining to alleged ineffective representation of multiple indigent defendants may be consolidated, in order to obtain evidence related to a counsel's workload if relevant to assessing the claims made, "the true inquiry is whether an individual defendant has been provided with reasonably effective assistance, and no general finding by the trial court regarding a given lawyer's handling of other cases, or workload generally, can answer that very specific question as to an individual defendant and the defense being furnished him." **State v. Peart**, 621 So.2d at 788. A determination of effectiveness of counsel requires that the trial court "examine each case individually," make "a particularized finding," and "issue an independent judgment regarding each defendant." **Id.**

In **State v. Peart**, the effectiveness of one court-appointed public defender was at issue, and several cases in which he represented defendants were consolidated to evaluate the defense being provided to the indigent defendants in those cases. **State v. Peart**, 621 So.2d at 784. Evidence was offered in **Peart** as to how many total defendants the public defender was representing, how many total active felony cases he was handling, how many days his clients were routinely incarcerated before he met with them, how many guilty pleas were entered at arraignments, how many trials were set within a given period of time, and whether he was provided with sufficient support staff and resources (such as access to an adequate law library and funds for expert witnesses). **Id**. Even so, in **State v. Peart**, this court remanded the

case to the trial court with instructions to "hold individual hearings for each defendant." **Id**., 621 So.2d at 783.

In stark contrast, in the instant case, no evidence was adduced of case-specific facts regarding the individual public defenders or the defense that was being provided to the individual defendants at issue. Instead, the evidence put forward by Mr. Mitchell was offered to establish how many hours of legal work a public defender *should* provide to his or her indigent clients, given the classification of the charged crime, pursuant to the consensus of opinions of the attorneys participating in the La. Project (i.e., felony-life without parole - 200.67 hours; high-level felony - 69.79 hours; mid-level felony - 41.11 hours; low-level felony - 21.99 hours; enhanceable misdemeanor - 12.06 hours; and misdemeanor or city/parish ordinance - 7.94 hours). Based on historical case numbers of the Louisiana public defender system, the La. Project estimated, "[f]or purposes of [its] report," the overall annual Louisiana public defender workload to be 147,220 cases per year, across the entire state, and the number of cases in each category of criminal charges was multiplied by the number of hours of legal work each type of case should purportedly receive, thereby deriving a total statewide number of annual work hours for all Louisiana public defenders of 3,679,792 hours. The total number of possible work hours for Louisiana's 363 full-time-equivalent ("FTE") assistant public defenders (as of October 31, 2016), statewide, was also calculated, and the La. Project report concluded that "the Louisiana public defense system is currently deficient 1,406 FTE attorneys." The La. Project report further stated, "Alternatively, based on the Delphi Method's results and analysis ... the Louisiana public defense system currently only has capacity to handle 21 percent of the workload in compliance with the Delphi Panel's consensus opinions."

In light of the La. Project conclusions, Mr. Mitchell testified that the excessive workloads of Louisiana's assistant public defenders presented a significant risk of

ineffective assistance of counsel.[9] However, despite potentially excessive workloads, Mr. Mitchell was unable to say that the 19th JDC, Section VI assistant public defenders were actually providing ineffective assistance of counsel with respect to any Section VI indigent client,[10] and no evidence was presented to show that there was a "significant risk" that the "representation of one or more clients" of the 19th JDC, Section VI assistant public defenders was being "materially limited," in violation of Rule 1.7 of the Louisiana Rules of Professional Conduct. Moreover, none of the 19th JDC, Section VI assistant public defenders, nor any of the defendants, joined in Mr. Mitchell's motion or testified before the district court. In addition, there was no showing that Mr. Mitchell has exhausted all of the statutory and administrative options available to address his assistant public defenders' workloads, such as the appointment of private counsel to represent indigent defendants, as set forth in 22 La. Admin. Code, Part XV, § 1717(E) ("The district defender may seek assistance from the court, where appropriate, in recruiting members of the local private bar to assist in the provision of indigent representation."). We further note the testimony of Mr. Mitchell, on cross examination, that two of the four full-time Section VI assistant public defenders are allowed to maintain private civil law practices outside of their employment as assistant public defenders.

Thus, we conclude the appellate court finding - that Mr. Mitchell "presented

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[9] Rules 1.7, 1.16, and 6.2 of the Louisiana Rules of Professional Conduct do not allow representation by an attorney (thus requiring a refusal of an appointment or termination of representation) when representation will result in a violation of the Rules of Professional Conduct or other law, such as when representation would involve a concurrent conflict of interest. Pursuant to Rule 1.7, "[a] concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client; or (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

[10] When asked, on cross examination during the June 13, 2019 district court hearing, about whether there had been actual ineffective assistance of counsel by the 19th JDC, Section VI assistant public defenders, Mr. Mitchell stated, "We haven't seen it. We're trying to avoid that."

sufficient evidence to the district court that shows the appointed public defenders cannot effectively represent their indigent clients in a manner consistent with their constitutional and ethical obligations due to excessive caseloads" (see **State v. Covington**, 19-1494 at p. 1) - was reached without evidence of the specific factual details surrounding the work performance of the individual assistant public defenders, vis-à-vis the individual defendants, in these consolidated cases, contrary to this court's holding in **State v. Peart**. As we held in **State v. Peart**, the question of whether assistance of counsel has been constitutionally ineffective cannot be answered without a detailed examination of the specific facts and circumstances of the representation provided by counsel to the individual defendant. **State v. Peart**, 621 So.2d at 788. Therefore, the appellate court erred in reversing the district court and ruling in favor of Mr. Mitchell.

Accordingly, we hold that the district court did not err in denying the relief sought by Mr. Mitchell and correctly ruled that terminating, or refusing to order, public defender representation, on the basis of the deprivation of a Louisiana Constitution, Article I, Section 13[11] right to "reasonably effective" assistance of counsel (see **State v. Peart**, 621 So.2d at 783), can only be decided on a case-by-case basis.[12]

For these reasons, we reverse the March 13, 2020 appellate court decision and reinstate the district court's September 12, 2019 rulings.

REVERSED; DISTRICT COURT RULINGS REINSTATED.

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[11] Section 13 provides, in pertinent part: "At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment. The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents." This court, in **State v. Peart**, 621 So.2d at 783, stated, "Such counsel must be reasonably effective."

[12] Having decided the matter on this basis, we find it unnecessary to rule on the parties' remaining contentions.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-KK-00447

STATE OF LOUISIANA

VS.

RODERICK L. COVINGTON, SAMANTHA KELLY, AND KIFFANY SPEARS

On Writ of Certiorari to the 1st Circuit Court of Appeal, Parish of East Baton Rouge

Johnson, C.J., dissenting:

I agree with all but the result of Justice Weimer's excellent concurring opinion in this matter.

As Justice Weimer points out, though it has been 27 ½ years since this court decided *State v. Peart*, 621 So.2d 780 (La. 1993), the State has still not come up with a sustainable way to pay for an effective system of indigent defenders. Louisiana again has the distinction of having the highest incarceration rate of any state in the country. Louisiana Public Defender Board caseload numbers show that our desire to prosecute increasing numbers of our poorest citizens for all manner of social ills has far outpaced our willingness to pay for each to have a lawyer who can give them individualized attention.

It is undisputed that public defender caseloads in Louisiana are excessive and the trial court acknowledged this to be true. Under these circumstances, as Justice Weimer points out, it is impractical and unrealistic for public defenders to "file separate motions and request separate evidentiary hearings for each adversely affected indigent."

Unless trial courts have the authority to order prospective *in globo* relief consistent with the court of appeal's action in this case, our inadequate system of

indigent defense provision will continue to lurch from crisis to crisis. I dissent because I am persuaded by the defendants' argument that the grossly excessive caseloads of public defenders in the Nineteenth Judicial District necessarily cause them to provide ineffective representation to at least some of their clients, and that relief should be available to prevent future harm. The record in this case is replete with evidence that would support the "more intrusive and explicit measures [we] have thus far avoided." *Peart*, 621 So.2d at 791. For example, testimony and exhibits demonstrated that in 2017 alone the Nineteenth Judicial District Public Defender represented people in 12,167 cases with just one full time investigator; that some of the office's attorneys had inadequate access to computers and basic technology; and that multiple indigent clients were unable to meet with their lawyers before appearing in court. I cannot imagine any defendant choosing to hire a lawyer whose only investigator had 12,166 other cases to work on, who did not have consistent access to a computer, and who was unable to meet with his client before appearing in court.

What more evidence should we require from public defenders before we provide some relief?

Real human tragedies abound in the wake of this State's commitment to incarcerate so many without a corresponding commitment to pay for their defense. Louisiana has one of the highest rates of proven wrongful convictions in the nation; each one a painful injustice to the victim of the crime *and* the wrongly accused.[1] Overburdened defense lawyers cannot reliably prevent innocent defendants from being convicted. Nor can overburdened defense lawyers reliably defend against the type of prosecutorial overreach that sends a United States Army combat veteran with untreated substance abuse issues to prison for life without the possibility of parole

[1] See the report by The National Registry of Exonerations, *1600 Exonerations*, available at: https://www.law.umich.edu/special/exoneration/Documents/1600_Exonerations.pdf, at 14.

for selling $30 worth of marijuana. *State v. Harris*, 18-1012 (La. 7/9/20), —— So. 3d —— (2020 WL 3867207). Every person represented by the state's overburdened indigent defenders is poor. The vastly disproportionate majority are Black.

Public defenders are not responsible for the number of people they must defend; prosecutors who bring charges are. Those same prosecutors argue that public defenders should just make do with what they have and work harder. This argument would not be countenanced if the powerful and influential in Louisiana were required to rely on the public defender system when their loved-ones were in trouble.

There is no equal justice under law when an innocent poor man is assigned a lawyer who doesn't even have adequate access to a computer, but a guilty rich man can purchase an entire legal team who will secure his acquittal. Yet this is the system Louisiana continues to sanction. Our forty-year campaign to imprison our poor in droves has left us in flagrant disregard of the United States Constitution.

For these reasons, I dissent.

12/11/20

SUPREME COURT OF LOUISIANA

NO. 2020-KK-00447

STATE OF LOUISIANA

VERSUS

RODERICK L. COVINGTON, SAMANTHA KELLY, AND KIFFANY SPEARS

On Writ of Certiorari to the First Circuit Court of Appeal, Parish of East Baton Rouge

WEIMER, J., concurring.

I agree with the majority's determination that the evidence presented in this case is not sufficient to establish that "the appointed public defenders cannot effectively represent their indigent clients in a manner consistent with their constitutional and ethical obligations due to excessive caseloads." **State v. Covington**, 20-00447, slip op. at p. 9 (La. 12/__/20) (quoting **State v. Covington**, 19-1494, p. 1 (La.App. 1 Cir. 3/13/20) (unpublished writ action)). Therefore, I respectfully concur in the result reached.

I write separately to note that we are now twenty-seven years post-**Peart**[1] and although reform has occurred–most notably through the enactment of the 2007 Louisiana Public Defender Act, La. R.S. 15:141, *et seq*.–the excessive workloads and chronic lack of resources consistently and regularly encountered by public defenders, and brought to light in **Peart**, continue.[2] Indeed, the district court expressly

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[1] **State v. Peart**, 621 So.2d 780 (La. 1993).

[2] See ***id.*** at 791.

acknowledged that the public defenders in this section, and throughout the East Baton Rouge Parish courts, "are greatly overworked and significantly underfunded."

Given the foregoing, I believe that it may be time to re-visit **Peart** and consider the admonition that, in the absence of legislative action, more intrusive measures may be required to render meaningful the constitutional guarantee of reasonably effective assistance of counsel. **Peart**, 621 So.2d at 791 ("If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonable effective assistance of counsel."). Just what those measures might consist of is the challenging and difficult question.

It is axiomatic that, to comply with the constitutionally required right to an attorney, appointed defense counsel is indispensible because the overwhelming number of defendants are indigent and represented by appointed attorneys. Many district attorneys will concede that public defenders are as indispensable as prosecutors for the system of criminal justice to function.

Clearly, as argued by respondent, to continue to require adherence to **Peart**'s directive that public defenders facing excessive workloads file separate motions and request separate evidentiary hearings for each adversely affected indigent is a waste of judicial resources that potentially could bring the criminal justice system to a standstill. See **Public Defendant, Eleventh Judicial Circuit of Fla. v. State**, 115 So.3d 261, 274 (Fla. 2013) ("In extreme circumstances where a problem is system-wide, the courts should not address the problem on a piecemeal case-by-case basis. This approach wastes judicial resources on redundant inquiries."). While aggregate

motions to decline new cases or withdraw from current ones should be allowed where there is a office-wide or widespread problem as to effective representation, that alone will not solve the problem. Given the varying conditions among the courts of the state, formulating objective standards for determining whether there is a significant risk of ineffective assistance remains a difficult and elusive endeavor, as evidenced by the flawed methodology of the Delphi Method.

Finally, simply ordering as a remedy that more funds be made available to provide indigent defense is no more permanent a solution than the threat to halt prosecutions suggested as a last resort in **Peart**. The problem is clearly not confined to one of resources, but extends to the criminal justice system itself, which is arguably too often used as a substitute for mental health and substance abuse treatment and which is plagued with some draconian laws which persist despite the laudable efforts of the Louisiana Justice Reinvestment Task Force, leaving Louisiana remaining as one of the states with the highest incarceration rates in the nation. Unless and until the legislature sees fit to change such laws, the courts of this state will continue–as we must–to enforce them.[3]

The task of honoring the constitutional guarantee of reasonably effective assistance of counsel to indigent persons is a prodigious one, but action must be taken to break the cycle of underfunding and compromised representation and to bring about meaningful systemic change. Unfortunately, because, at the end of the day, the evidence presented in this case was not sufficient to prove that reasonably effective assistance of counsel is not being rendered, this is not the case to revisit **Peart**.

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[3] Nevertheless, evidence exists in this matter that criminal filings are falling, which paradoxicallly adds to the challenge in resolving this matter. Additionally, prosecutors are utilizing pretrial diversion programs, which generally do not require incarceration.

12/11/20

SUPREME COURT OF LOUISIANA

No. 2020-KK-00447

STATE OF LOUISIANA

VS.

RODERICK L. COVINGTON, SAMANTHA KELLY, AND KIFFANY SPEARS

ON WRIT OF CERTIORARI TO THE FIRST CIRCUIT COURT OF APPEAL, PARISH OF EAST BATON ROUGE

Crichton, J., additionally concurs and assigns reasons.

It is axiomatic that those accused of a crime are entitled to effective assistance of counsel. *State v. Peart*, 621 So. 2d 780, 786 (La. 1993). *See also Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) ("[L]awyers in criminal courts are necessities, not luxuries."). I agree with the majority opinion in all respects, but write separately to highlight the critically important constitutional work in which public defenders engage. La. Const. art. 1, § 13. In my view, the majority opinion is not meant to disparage or undermine that work in any way; however, the evidence presented here entirely failed to comply with the requirements of *Peart*, and the district court order is therefore properly reinstated. *Peart*, 621 So. 2d at 788 ("[T]he true inquiry is whether an individual defendant has been provided with reasonably effective assistance, and no general finding by the trial court regarding a given lawyer's handling of other cases, or workload generally, can answer that very specific question as to an individual defendant and the defense being furnished him."). Finally, I emphasize that the work of a public defender is no less important than any other officer of the court. As such, I encourage their continued diligence to accomplish the difficult work public defense entails, with an eye to potential assistance through legislative action.