

Funding *Gideon*'s Promise by Viewing Excessive Caseloads as Unethical Conflicts of Interest

by HEIDI REAMER ANDERSON*

Thou shalt not ration justice.
—*Judge Learned Hand*¹

Introduction

State legislatures currently may negate a defendant's constitutional right to effective assistance of counsel via a novel two-step maneuver. First, the legislature may refuse to fund public defender systems adequately, which inevitably burdens public defenders with excessive caseloads. Excessive caseloads due to the underfunding of public defenders have been the status quo for decades; thus, this first step is nothing new.² However, what is new—and especially troubling—is what some legislatures are doing to hide the unethical representation that results from inadequate funding. In this second step, the same legislature that inadequately funds public defense also bars a public defender from withdrawing from the representation due to the excessive caseload created by the legislature in the first step.³

The state's underfunding creates two types of conflicts for the public defender: (i) a current client conflict, in which the number of

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1. 75th Anniversary Address to the Legal Aid Society of New York (Feb. 16, 1951) (“If we are to keep our democracy there must be one commandment: Thou shalt not ration justice.”).

2. See *infra* Part I.A. (providing national overview of excessive caseload problem).

3. See *infra* Part I.B. (chronicling Florida's enactment of statute in response to court's recognition of excessive caseload problems).

other criminal defendant clients currently assigned to him “materially limits” his ability to represent any one of his clients; and (ii) a personal interest conflict, in which the lawyer’s personal financial interest in maintaining employment conflicts with the lawyer’s duty to report himself or others for failing to provide competent, diligent and communicative representation.⁴ When the state legislature that created the conflicts of interest through underfunding also states, by statute, that its underfunded creation cannot be deemed an unethical conflict of interest, the end result is a Catch-22 of sorts for defendants and their public defenders. Specifically, criminal defendants are further deprived of effective assistance of counsel while their own counsel is prevented from doing anything about it.⁵ Florida and Colorado already have taken the two steps described above to effectively legislate around the Sixth Amendment.⁶ With many state budgets tighter than ever before, other states soon may follow Florida and Colorado’s lead.⁷

The significance of excessive caseload conflicts cannot be overstated. Ninety-five percent of convictions are the result of plea bargains.⁸ Most defendants who plead guilty are represented by public defenders.⁹ If those public defenders are advising their clients

4. See *infra* Part III.A (illustrating how the excessive caseload conflict would fit within existing ethical standards defining conflicts of interest).

5. In an admittedly stretched analogy, it is like Dr. Frankenstein creating his monster and then devising a potion that prevents everyone from calling it a monster.

6. FLA. STAT. § 27.5303(1)(d) (2009); COLO. REV. STAT. § 21-2-103(1.5) (b), (c) (2009); see *infra* Part II.B; see also Wayne A. Logan, *Litigating the Ghost of Gideon in Florida: Separation of Powers as a Tool to Achieve Indigent Defense Reform*, 75 MO. L. REV. 885, 887 (2010) (noting that the Florida and Colorado statutes prohibiting withdrawals based on excessive caseload “stan[d] alone in the nation”).

7. See Heather Baxter, *Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341, 353–54 (2010) (reporting recent cuts to indigent funding, such as a more than seventy-percent decrease in Georgia’s Northern Judicial Circuit); Steven N. Yermish, *Ethical Issues in Indigent Defense: The Continuing Crisis of Excessive Caseloads*, THE CHAMPION, June 2009, at 22, 22, available at <http://www.criminaljustice.org/Champion.aspx?id=14650> (“In the face of severe government revenue shortfalls, indigent defense has been a favorite target for cost savings at the expense of the constitutional rights of the poor in our courtrooms. This situation has resulted in . . . excessive caseloads, and a lack of crucial resources such as expert witnesses, investigative services, and mitigation and disposition specialists.”).

8. See David A. Perez, Note, *Deal or No Deal? Remediating Ineffective Assistance of Counsel During Plea Bargaining*, 120 YALE L.J. 1532, 1539 (2011) (citing Jenny Roberts, *Too Little, Too Late: Ineffective Assistance of Counsel, the Duty to Investigate, and Pretrial Discovery in Criminal Cases*, 31 FORDHAM URB. L.J. 1097, 1136 (2004)).

9. See Robert P. Mosteller, *Failures of the American Adversarial System to Protect the Innocent and Conceptual Advantages in the Inquisitorial Design for Investigative*

to plead guilty while laboring under excessive caseload conflicts, they repeatedly are failing to provide effective assistance of counsel without any potential for the kind of post-hoc scrutiny available after an actual trial.¹⁰

In this article, I suggest that courts effectively mandate adequate funding to resolve the excessive caseload problem via their own two-step comeback. First, courts should state more clearly that the excessive caseload problem facing public defenders often amounts to an unethical conflict of interest.¹¹ Although many legal sources have suggested that the excessive caseload problem is unethical, no consensus has emerged as to how the problem directly equates to an unethical conflict of interest under the Model Rules of Professional Conduct.¹² The time to reach that consensus is now. Second, courts should declare that a lawyer's continued representation of a defendant despite an excessive caseload conflict of interest violates that defendant's Sixth Amendment right to effective assistance of counsel under the standard established in *Cuyler v. Sullivan*.¹³ In order to apply *Sullivan*, courts should equate excessive caseload conflicts with the other types of unethical conflicts that the Supreme Court has deemed fatal to the delivery of effective assistance of

Fairness, 36 N.C.J. INT'L L. & COM. REG. 319, 326 (2011) ("In the United States, over 80% of those charged with felonies are indigent."); *id.* at 330 ("[R]esolution by guilty plea occurs in the vast majority of cases, and trials in criminal cases are rare events . . .") (citing statistics from Ronald Wright and Marc Miller, *Honesty and Opacity in Charge Bargains*, 55 STAN. L. REV. 1409, 1415 (2003)).

10. See F. Andrew Hessick III and Reshma Saujani, *Plea Bargaining and Convicting the Innocent: the Role of the Prosecutor, the Defense Counsel, and the Judge*, 16 BYU J. PUB. L. 189, 219–20 (2002) ("[T]he temptation to plead puts a burden on the ability of defense counsel to advise defendants fully and impartially about the wisdom of a guilty plea. As Professor Alschuler noted, 'This system subjects defense attorneys to serious temptations to disregard their clients' interests' As a result, defense attorneys may encourage defendants to plead guilty pursuant to offers that do not accurately reflect the strength of the government's case."); Yermish, *supra* note 7, at 22 ("Perhaps the most common, and significant, impact of the excessive caseload dilemma is the creation of the 'meet 'em and plead 'em' attorney, who has no meaningful communication with the client before urging an uninformed guilty plea."); see also *Premo v. Moore*, 131 S. Ct. 733, 742 (2011) (suggesting that satisfying *Strickland* ineffective assistance of counsel standard is an especially high burden when challenging pleas); see generally Perez, *supra* note 8 (suggesting alternatives to *Strickland* when evaluating ineffective assistance of counsel claims at the plea stage).

11. See *infra* Part III.A.

12. See *infra* Part II.

13. *Cuyler v. Sullivan*, 446 U.S. 335 (1980); see *infra* Part III.C (discussing facts and holding of *Cuyler v. Sullivan*).

counsel, such as multiple representation conflicts.¹⁴ Ultimately, I believe that this two-step method is the most direct way to “constitutionalize” the excessive caseload problem and finally address the injustice of underfunded indigent representation.¹⁵

Part I of this article defines the excessive caseload problem on two levels. First, Part I.A briefly chronicles the current status of excessive caseloads on a national basis. On a narrower “case study” level, Part I.B then examines the excessive caseload problem in Florida, including the recent legislative and court responses to the problem. Part II walks through the Supreme Court’s ineffective assistance precedent in order to show why viewing the excessive caseload problem as a conflict of interest matters so greatly. Part III.A draws upon multiple legal ethics sources to illustrate how the excessive caseload problem is most properly characterized as an unethical conflict of interest. Part III.B then shows how the excessive caseload conflict should be evaluated under the ineffective assistance standard in *Sullivan* instead of under *Strickland*. This article concludes that viewing excessive caseloads as conflicts of interest is one way to finally fund *Gideon*’s promise of effective assistance of counsel.¹⁶

14. See *infra* Part III (arguing that the *Cuyler v. Sullivan* “adverse-effect” standard is the appropriate way to evaluate excessive caseload conflicts given common characteristics such conflicts share with multiple representation conflicts).

15. See *infra* Conclusion. At the very least, courts must reassert their exclusive right to determine what qualifies as ethical legal representation—and stop legislatures from doing it for them. See Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 136–40 (2009) (showing how Florida statute likely violates separation of powers doctrine); Logan, *supra* note 6, at 898 (discussing separation of powers issues associated with “an aggressive effort by the Florida Legislature to limit the judiciary’s constitutional oversight and remedial authority”).

16. In this article, I assume that *Strickland* currently would apply even in a prospective relief scenario, as the Supreme Court stated in *Premo*, 131 S. Ct. at 740. However, there are strong arguments for applying a different standard at the pre-trial stage, especially if one views the excessive caseload problem as a “systemic” defect, as the Eleventh Circuit has viewed it. See *Luckey v. Harris*, 860 F.2d 1012, 1018 (11th Cir. 1988); see also *State v. Smith*, 681 P.2d 1374, 1381 (1984) (finding presumption of prejudice warranted giving systemic flaws in Arizona county’s indigent defense system); see generally Laurence A. Benner, *When Excessive Public Defender Workloads Violate the Sixth Amendment Right to Counsel Without a Showing of Prejudice*, ACS ISSUE BRIEF, Mar. 2011, available at http://www.acslaw.org/sites/default/files/bennerib_excessivepd_workloads.pdf (suggesting “a litigation strategy which avoids *Strickland*’s prejudice prong” by equating the excessive caseload problem with “the absence of counsel at a critical stage of the proceedings”).

I. The Excessive Caseload Problem

In this Part, I use some “real world” context to define the excessive caseload problem in two ways. First, I provide a nationwide, surface-level overview of excessive caseload standards and realities. Next, I offer a snapshot of the excessive caseload problem in South Florida, where public defenders, the courts, and the Florida legislature are battling over whether the excessive caseload problem should be viewed as an unethical conflict of interest.¹⁷

A. A National View of the Excessive Caseload Problem

The answer to when a public defender’s caseload is “excessive” depends on whom you ask—the attorney, the court, the state bar, the legislature, or the drafters of the Model Rules of Professional Conduct. Drawing upon all of these sources and more, the American Bar Association (“ABA”), in a carefully crafted 2006 Formal Opinion, declared as follows:

If a lawyer believes that her workload is such that she is unable to meet the basic ethical obligations required of her in the representation of a client, she must not continue the representation of that client or, if representation has not yet begun, she must decline the representation When an existing workload does become excessive, the lawyer must reduce it to the extent that what remains to be done can be handled in full compliance with the Rules.¹⁸

Thus, whether a caseload is excessive depends primarily on whether an individual lawyer subjectively believes that she cannot represent another client consistent with her ethical duties, including the duties of diligence, competence and loyalty.¹⁹

17. In this article, I use the term “public defender” as shorthand for any defense counsel appointed to represent an indigent defendant, whether that counsel is an attorney working in a traditional state or county funded public defender office, a private attorney appointed on a case-by-case basis, or an attorney working as part of a contract-based system. For additional details concerning each model, see Baxter, *supra* note 7, at 348–49.

18. See ABA FORMAL OPINION 06-441, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation (May 13, 2006), at 4. In its Formal Opinion, the ABA also stated that “whether a public defender’s workload is excessive often is a difficult judgment requiring evaluation of factors such as the complexity of the lawyer’s cases and other factors.” *Id.* at 6.

19. MODEL RULES OF PROF’L CONDUCT R. 1.1 (competence), 1.3 (diligence), 1.4 (communications), 1.7 (current client conflict of interest), 1.8 (current client conflicts of interest in specific situations); See Brummer, *supra* note 15, at 106–07 (“Excessive

Because the subjective ethical standard described above is difficult for other stakeholders to grasp and evaluate, some respected commentators have suggested more objective numerical “caps” on the number of cases any single public defender can handle consistent with her ethical duties. Perhaps the most commonly used and cited numerical caseload standards are those initially established by the National Advisory Commission (“NAC”) on Criminal Justice Standards and Goals in 1973.²⁰ Under these standards, which assume an office with adequate support staff, a public defender should be assigned in one year no more than 150 felony cases, 400 misdemeanor cases, 200 juvenile delinquency petitions, 200 civil commitment proceedings, or twenty-five appeals (or some combination thereof).²¹ As recently as 2002, the ABA again endorsed the NAC numerical limits.²²

caseload is a caseload or workload that may reasonably be expected to materially interfere with counsel’s ability to provide assistance to existing clients. Excessive caseload is more than a heavy caseload. Excessive caseload will actually or likely cause attorneys to provide substandard representation that violates constitutional, ethical, and other professional norms so that what should be done cannot be done.”)

20. Nat’l Advisory Comm’n on Criminal Justice Standards & Goals, Task Force on Courts, Chapter 13, Standards 13.8, 13.9, *The Defense* (1973).

21. *Id.*

22. See ABA Standing Comm. on Legal Aid & Indigent Defendants, *Ten Principles of a Public Defense Delivery System* (2002), at 5 n.19, available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> (stating that NAC’s “national caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement”) (citations omitted). According to the ABA, “[t]he Principles constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.” *Id.* For a discussion of other standards sources, see ABA, *Gideon’s Broken Promise: America’s Continuing Quest for Equal Justice* (2004), at 2 (“Many years ago the ABA recognized the need for national standards regarding the provision of indigent defense services. In 1967, four years after *Gideon* was decided, the ABA adopted the *ABA Standards for Criminal Justice: Providing Defense Services* (now in its third edition). The *ABA Standards for Criminal Justice: The Defense Function* soon followed in 1971, and the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* were adopted in 1989 and revised in 2003. Other organizations also have adopted standards in the indigent defense area during the past three decades. The National Legal Aid and Defender Association (“NLADA”) adopted its *Defender Training and Development Standards* in 1997, *Performance Guidelines for Criminal Defense Representation* in 1995, *Standards for the Administration of Assigned Counsel Systems* in 1989, *Standards for the Appointment of Counsel in Death Penalty Cases* in 1987, *Guidelines for Negotiating and Awarding Governmental Contracts for Criminal Defense Services* in 1984, and *Standards and Evaluation Design for Appellate Defender Offices* in 1980. The Institute of Judicial Administration collaborated with the ABA to create the *IJA/ABA Juvenile Justice Standards*, totaling twenty-three chapters, adopted in 1979-1980.

Fewer than ten states have adopted the NAC limits or other similarly objective standards to define what is “excessive.”²³ Other states have legislated general principles,²⁴ which then are overseen by task forces²⁵ or state commissions.²⁶ In states without precise numerical limits, it is up to the individual attorney or the supervising attorney to refuse an appointment; often, the appointment then may be given to a private contract attorney.²⁷

Caseload standards, numerical or not, are not very telling if they are merely aspirational versus reflective of reality. For example, if it is true that almost two-thirds of state public defense offices are exceeding caseload caps, even for felonies,²⁸ then perhaps the standards are not particularly descriptive of reality.²⁹ Instead, one should examine what kind of excessive caseloads actually are occurring and, as a result, what kind of assistance actually is (or, more aptly, is not) being provided.

The ABA’s comprehensive report, *Gideon’s Broken Promise*, summarizes collected testimony, data, and anecdotes regarding the kinds of public defense being provided in all fifty states, as of 2004.³⁰

The National Study Commission on Defense Services adopted *Guidelines for Legal Defense Systems in the United States* in 1976, and the President’s National Advisory Commission on Criminal Justice Standards and Goals adopted *Chapter 13, Report of the Task Force on the Courts*, in 1973.”).

23. See Baxter, *supra* note 7, at 357 (citing Lynn Langton and Donald J. Farole, Jr., Bureau of Justice Statistics, *Census of Public Defender Offices, 2007-Statistical Tables 6* (2007), <http://bjs.ojp.usdoj.gov/content/pub/pdf/pdo07st.pdf>. The states are Colorado, Connecticut, Maryland, Massachusetts, Montana, New Hampshire, New Jersey, Vermont, and Wisconsin. *Id.*

24. See *Gideon’s Broken Promise*, *supra* note 22, at 30. For example, “in April 2002, the Georgia State Bar adopted a set of six principles to guide reform of indigent defense in the state” which later were incorporated into 2003 reform legislation. *Id.*

25. See *Gideon’s Broken Promise*, *supra* note 22, at 30–31 (describing efforts in Texas).

26. See *Gideon’s Broken Promise*, *supra* note 22.

27. See *Gideon’s Broken Promise*, *supra* note 22 (“The primary models for furnishing counsel include: (1) traditional ‘public defender’ programs, in which salaried attorneys provide representation in indigent cases; (2) court assignments of indigent cases to private attorneys who are compensated on a case-by-case basis; and (3) contracts in which private attorneys agree to provide representation in indigent cases.”).

28. See Langton and Farole, *supra* note 23 (cited by Baxter, *supra* note 7, at 355).

29. See *Gideon’s Broken Promise*, *supra* note 22, at 17 (“Caseloads are radically out of whack in some places in New York. There are caseloads per year in which a lawyer handles 1,000, 1,200, 1,600 cases.” (quoting Jonathan Gradess, Executive Director, New York State Defenders Association)). Public defenders in Maryland, Pennsylvania, Rhode Island and Nebraska offered similar reports. *Id.* at 17–18.

30. *Gideon’s Broken Promise*, *supra* note 22.

That report paints a rather bleak picture of the harms caused by the excessive caseload problem and its root cause—inadequate funding.³¹ Stories reported therein include thousands of clients pleading guilty to misdemeanors without ever seeing a lawyer, public defender offices with no investigator or expert services available, no motions filed in over ninety-nine percent of cases,³² lawyers from the same firm representing a defendant and the material witness,³³ and a defendant accused of shoplifting \$72 worth of goods spending eleven months in jail prior to seeing a lawyer.³⁴ With state budget cuts on the rise nearly everywhere, excessive caseloads are likely to get worse before they get better; thus, calls for additional funding via the legislature simply will not lead to results unless court ordered.³⁵ Accordingly, rather than exhaustively re-state what's already reported elsewhere, I offer a case study of excessive caseloads in a single jurisdiction from the past two years. This case study of Florida lays the groundwork for later arguments that excessive caseloads are properly viewed as unethical conflicts of interest.

B. The Excessive Caseload Problem in Florida

On August 5, 1963, a Bay County, Florida jury acquitted Clarence Earl Gideon of felony theft.³⁶ At trial, Mr. Gideon was assisted by counsel appointed to him after the Supreme Court, in his

31. Other reported causes include overcriminalization, generally, and, more specifically, the “war on drugs.” See Baxter, *supra* note 7, at 382, 386 (“Over the years stricter drug laws and tougher sentences for drug offenses have contributed to a much larger prison population. The number of people in prison for drug crimes has increased from 40,000 (1980) to 500,000 (2010).”) (citing *Rough Justice in America: Too Many Laws, Too Many Prisoners*, THE ECONOMIST, July 22, 2010, at 29; Marc Mauer, *Tough Sentencing Harder on Budgets Than on Crime*, LEXINGTON HERALD LEADER, June 7, 2009, at D1).

32. Gideon’s Broken Promise, *supra* note 22, at 19.

33. Gideon’s Broken Promise, *supra* note 22, at 19.

34. Gideon’s Broken Promise, *supra* note 22, at 23. See generally Benner, *supra* note 16 (providing more current anecdotal evidence).

35. See Baxter, *supra* note 7, at 353–54; Benner, *supra* note 16, at 12 (“A case in point is Fresno County, California. In fiscal year 2006-2007, the institutional Public Defender had seventy-six staff attorneys and nineteen investigators. Although it was already handling felony and misdemeanor caseloads twice the maximum allowed by national standards, by 2010 the office had been cut to only forty-eight staff attorneys and nine investigators.”).

36. See Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and In a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 286 (2009) (excerpting facts from appellate brief for Gideon).

prior appeal of his earlier conviction for the same crime, found that denying Mr. Gideon free legal counsel in his first trial deprived him of his Sixth Amendment right to “Counsel for his defense.”³⁷ The triumphant legal battle fought in Mr. Gideon’s name was chronicled in the book, movie and *New Yorker* profile often collectively referred to as *Gideon’s Trumpet*.³⁸ Nearly fifty years after Mr. Gideon’s lawyer-assisted acquittal, Florida once again is the scene of an important battle regarding effective assistance of counsel for indigent defendants. In this modern version, the players in the drama remain generally the same—indigent defendants, judges, and lawyers on both sides—with one new and important addition. Much like how Hollywood sequels often introduce a new villain, this Florida-based *Gideon* sequel involves someone new as well—the state legislature. This new battle between the Florida legislature and Florida courts is detailed below.

Florida is discussed as a single state-level case study to provide additional depth unavailable via a national-only overview. Also, it is the only state in which a public defender’s office actually challenged the legislative two-step detailed above. Thus, the record is replete with current statistics and ethical positions. Florida also is discussed because of its connection to *Gideon*.

1. *Statutory Bar on Excessive Caseload Conflicts*

In a 2004 statute, the Florida legislature declared that no public defender in Florida may withdraw from a case based solely on her belief that her excessive caseload creates an unethical conflict of interest.³⁹ “In no case shall the court approve a withdrawal by the public defender [or appointed counsel] based solely on the inadequacy of funding or excess workload of the public defender.”⁴⁰ The statute essentially forces a public defender to continue representing a client despite her personal belief that she cannot do so

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

38. ANTHONY LEWIS, *GIDEON’S TRUMPET* (1964).

39. FLA. STAT. § 27.5303(1)(d) (2009).

40. *Id.* Although the statute only purports to limit withdrawals, Florida courts have interpreted it to apply to both withdrawals and refusals to accept new appointments. See *State v. Pub. Defender*, 12 So. 3d 798, 804 (Fla. 3d. Dist. Ct. App. 2009) (“First, permitting PD11 to withdraw by merely couching its requests as motions to decline future appointments, would circumvent the plain language of section 27.5303(1)(d).”).

ethically because of an excessive caseload.⁴¹ Stuck in this position, public defenders must sacrifice some clients in the interest of others and, as documented elsewhere, often give some clients no effective representation at all.⁴² The ultimate irony, of course, is that if Mr. Gideon had been assigned counsel in 2011 instead of in 1963, he likely would have plead guilty, regardless of his own innocence, because his Florida public defender would have had no time or resources to investigate his case and, ultimately, pursue a trial.⁴³

2. *Miami-Dade Public Defender Litigation*

The lack of time and resources currently available to public defenders in Florida was detailed by the Office of the Public Defender for Miami and Dade Counties (“Miami PDO”) in its recent filings challenging the 2004 statute.⁴⁴ Testimonial and other evidence indicating a conflict of interest came from the public defenders themselves, as well as from experts who opined as to whether the workload of those public defenders violated ethical standards.⁴⁵ The Miami PDO challenged the Florida statute on two flanks: (i) first, in the aggregate, via a motion to appoint other counsel in an entire category of felony cases; and (ii) second, via a motion to withdraw from a single felony case based on the court’s guidance in rejecting the first approach. Both approaches are chronicled below.

a. Miami PDO’s Aggregate Approach

In June 2008, the Miami PDO filed twenty-one Motions to Appoint Other Counsel in Unappointed Noncapital Felony Cases.⁴⁶ As part of each motion, the public defender certified that there was a

41. See Logan, *supra* note 6, at 901 (“In short, the Florida Legislature impermissibly sought to deny courts the power to allow withdrawal of counsel as a result of excessive caseload, the adverse effects of which serve as a judicially recognized basis for conflict.”).

42. See *supra* notes 19–35 and accompanying text (chronicling effects of excessive caseloads).

43. See *infra* Part I.B.2 (describing resource shortages facing Florida public defenders).

44. The Miami-Dade PDO is the fourth largest public defender office in the nation and the largest in Florida. See Initial Brief of State of Florida, at 10, *State v. Pub. Defender, Eleventh Judicial Circuit, In re Reassignment and Consolidation of Pub. Defender’s Motions to Appoint Other Counsel in Unappointed Non-Capital Felony Cases*, No. 3D08-2272 (Fla. Dist. Ct. App. 2008), [hereinafter *State Brief*] available at http://www.pdmiami.com/ExcessiveWorkload/States_Brief_3d_DCA.pdf.

45. All filings and opinions in the Florida litigation are conveniently available at http://www.pdmiami.com/ExcessiveWorkload/Excessive_Workload_Pleadings.htm.

46. *Id.*

conflict of interest based on excessive caseloads, which necessitated the motion.⁴⁷ Supporting testimony from public defenders included admissions that “[a]ll of us are drowning,” that working seven days a week was “not enough,” and that “we do not meet our responsibilities to [our] clients.”⁴⁸ For example, one public defender declared that his office “lacks the resources to interview out-of-custody clients until after arraignment—a delay of several weeks—making it impossible to counsel clients regarding early plea offers.”⁴⁹ Regarding post-arraignment counsel, public defenders confessed that they have, at most, one hour to speak with clients facing up to forty years in prison.⁵⁰ Further, excessive caseloads left at least one public defender:

- “unable to communicate with her clients”
- “unable to investigate and adequately prepare cases”
- “unable to file motions to advocate her clients’ positions,” and
- “generally unable to be in multiple places at one time.”⁵¹

With respect to numerical standards, the Miami PDO showed that lawyers “handled an average of over 436 noncapital felony cases per year,” which is more than twice as many cases as recommended.⁵² This anecdotal and statistical evidence led to the following expert conclusion: “That’s not legal representation. That’s a warm body repeating the State’s offer.”⁵³

The trial court consolidated the motions and ultimately agreed with the Miami PDO. Specifically, the Florida trial court concluded that refusing additional cases was proper because “future appointments . . . [would] create a conflict of interest . . . under any

47. See *State Brief*, *supra* note 44, at 1 (“The underfunding of the Public Defender’s office has created excessive caseloads such that PD-11 cannot ethically or legally accept additional noncapital felony cases at this time . . .”).

48. See Response to Petition of Respondent, *State v. Pub. Defender*, Eleventh Judicial Circuit, (Fla. Dist. Ct. App. Jan. 30, 2009), at 4–5 [hereinafter “*Miami PD Brief*”].

49. *Miami PD Brief*, *supra* note 48, at 5.

50. *Miami PD Brief*, *supra* note 48, at 5–6. That amounts to a little over one minute of counsel per year of prison time faced.

51. *Miami PD Brief*, *supra* note 48, at 4–8.

52. *Miami PD Brief*, *supra* note 48, at 9.

53. *Miami PD Brief*, *supra* note 48, at 10 (quoting report of Professor Norman Lefstein).

reasonable standard.”⁵⁴ Accordingly, the trial court ordered the public defenders’ office to decline any more third-degree felony cases in an effort to incrementally “lowe[r] caseloads as older cases are resolved.”⁵⁵

After an initial stay of the trial court’s order, Florida’s Third District Court of Appeal eventually reversed, finding serious fault with the “aggregate determination” of excessive caseload conflicts.⁵⁶ The state appellate court also found that the public defenders’ refusals to accept additional appointments on the basis of excessive caseload conflicts violated “the plain language” of Section 27.5303(1)(a) and (d).⁵⁷ The appeal of that case now sits unresolved at the Florida Supreme Court.

b. Miami-Dade’s Individualized Approach

Shortly after the Third District’s ruling on the aggregate front, an individual Miami PDO public defender, Jay Kolsky, filed a motion to withdraw from a single felony case based on an excessive caseload conflict of interest.⁵⁸ Kolsky’s motion also sought a declaration that Section 27.5303(1)(d) was unconstitutional.⁵⁹ In support of his withdrawal, Kolsky showed that, in the fiscal year 2008–2009, he “handled a total of 736 felony cases, in addition to 235 pleas at arraignment.”⁶⁰ Anecdotally, the evidence showed that Kolsky could

54. *Miami PD Brief, supra* note 48, at 15–16 (citing Order Granting in Part and Denying in Part Public Defender’s Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases, *State v. Loveridge*, No. 08-1, Admin. Order No.: 08-14, 15 Fla. L. Weekly Supp. 1078a (Sept. 3, 2008)).

55. *Miami PD Brief, supra* note 48, at 16.

56. *State v. Pub. Defender*, Eleventh Judicial Circuit, 12 So. 3d at 798, 803 (Fla. Dist. Ct. App. 2009) (“[T]herefore, under the facts of this case, the determination of whether or not a conflict exists under the [Rules Regulating the Florida Bar] must be made on an individual basis.”). Previously, the Third District Court of Appeal certified the case as “presenting issues of great public importance for the Florida Supreme Court’s consideration” but the Florida Supreme Court dismissed for lack of jurisdiction. *State Brief, supra* note 44, at 9.

57. *State v. Pub. Defender*, 12 So. 3d at 804.

58. See Assistant Public Defender’s Motion to Withdraw and to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional, *State v. Bowens*, (Fla. Cir. Ct. Aug. 3, 2009), available at http://www.pdmiami.com/ExcessiveWorkload/Filed_08-03-09_Motion_to_Withdraw.pdf.

59. See *infra* Part III for further discussion of this argument.

60. See Order Denying Public Defender’s Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and Granting Public Defender’s Motion to Withdraw, at 2–3, *State v. Bowens*, No. F09-019364 (Fla. Cir. Ct. Oct. 23, 2009), available at http://www.pdmiami.com/ExcessiveWorkload/Bowens_Order_10-23-09.pdf (citing parties’ stipulation) [hereinafter *Order*].

not “provide meaningful assistance” because he could hold only very brief, nonconfidential conversations with his clients that did not include discussing important matters such as “possible defense witnesses and preservation of evidence.”⁶¹ With respect to the individual case involving defendant Bowens, who faced a sentence of life in prison, “[t]he un rebutted testimony [was] that Kolsky has been able to do virtually nothing on [his] case.”⁶² For example, Kolsky had no time to obtain a possible witness list, to take a deposition, to visit the crime scene, to consult with any expert, to prepare a mitigation package, or to file any defense motions.⁶³ Along with his own motion-based assertions, Kolsky offered a Memorandum of Law and affidavits from his supervisor and from legal experts.⁶⁴

The Florida Circuit Court granted Kolsky’s motion to withdraw but denied his motion to declare Section 27.5303(1)(d) unconstitutional. Specifically, the court found that Kolsky had shown that there was a substantial risk of prejudicing the defendant’s rights as a result of his excessive workload.⁶⁵ In evaluating whether such prejudice was present, the court noted that the “substantial risk” portion of the standard necessitated a “forward looking” approach.⁶⁶ In this case, Kolsky’s workload was so excessive that there was a substantial risk of prejudice to the defendant, Bowens, in the future.

Shortly after the granting of Kolsky’s motion, the State petitioned for certiorari from the pretrial order because it was concerned that the Miami PDO soon would attempt to withdraw from 4,000 to 6,000 cases. Eventually, the Third District Court of Appeal reversed the trial court because “the law” required evidence of “actual or imminent prejudice to Bowens’ constitutional rights . . . separate from that which arises out of an excessive caseload.”⁶⁷ Kolsky’s “speculative” prejudice, including “the need to file a continuance, [did] not rise to the threshold level of actual prejudice.”⁶⁸

61. See *Order, supra* note 60, at 3 (citing transcripts).

62. *Order, supra* note 60, at 4.

63. *Order, supra* note 60, at 4.

64. See Memorandum of Law in Support of Motion to Withdraw and to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional, at 2 n.1, *State v. Bowens*, No. F09-019364 (Fl. Cir. Ct. Aug. 3, 2009), available at http://www.pdmiami.com/ExcessiveWorkload/Filed_08-03-09_Memo_of_Law.pdf.

65. *Order, supra* note 60, at 7–8.

66. *Order, supra* note 60, at 9.

67. *State v. Bowens*, 39 So. 3d 479, 481 (Fla. Dist. Ct. App. 2010) (emphasis in original).

68. *Id.*

Whether such “actual prejudice” should be required under these circumstances is addressed in Part II, below.

II. Why Being a Conflict of Interest Matters—The Supreme Court’s Ineffective Assistance of Counsel Precedent

In Part I, I described the excessive caseload problem on a national basis and illustrated how the problem has played out in one jurisdiction, South Florida. In the Miami PDO case, public defenders characterized the excessive caseload problem as a conflict of interest. Before showing that their characterization was correct in Part III, it is important to understand why being a conflict of interest matters. That is the purpose of this Part II.

A. Establishing the Right to Assistance of Counsel

The Sixth Amendment states in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.”⁶⁹ Since declaring that the right to the assistance of counsel for certain indigent criminal defendants applied to the states, the Supreme Court occasionally has stepped in to help clarify what kind of counsel does or does not qualify as sufficient, initially settling on the concept of “effective assistance.”⁷⁰ In this Part, I briefly discuss the Supreme Court’s general assistance of counsel cases before describing how those and other cases dictate when conflicts of interest qualify as ineffective assistance. As shown below, the Court’s relatively limited guidance has created some gaps open for interpretation and, sadly, for abuses.⁷¹

The Supreme Court first determined that the Sixth Amendment right to counsel was a fundamental right that applied to the states via the Fourteenth Amendment in 1963.⁷² In *Gideon v. Wainwright*,

69. U.S. CONST. amend. VI (emphasis added).

70. See *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (“On the one hand, uncertainty is inherent in predicting court decisions; but on the other hand defendants facing felony charges are entitled to the effective assistance of competent counsel.”).

71. This section provides a relatively cursory review of necessary guideposts. There are many existing sources with more exhaustive reviews of the applicable case law. See, e.g., Sanjay K. Chhablani, *Disentangling the Right to Effective Assistance of Counsel*, 60 SYRACUSE L. REV. 1 (2009) (providing history of right’s evolution from Court’s reliance on Due Process to the Sixth Amendment).

72. The Court already had decided that indigent criminal defendants were entitled to counsel in all federal proceedings. See *Powell v. Alabama*, 287 U.S. 45, 50 (1932) (often referred to as the “Scottsboro Boys” case); *United States v. Glasser*, 315 U.S. 60, 68 (1942) (discussed *infra*). However, for purposes of this article, it is not necessary to engage in a

Clarence Gideon contended that a Florida trial court's refusal to appoint counsel violated his fundamental right to counsel under the Sixth Amendment.⁷³ At trial, Mr. Gideon requested counsel but his request was denied, in large part because Florida courts only appointed counsel to defendants facing the death penalty.⁷⁴ Mr. Gideon later was convicted and sentenced to five years in prison for burglary.⁷⁵ From prison, Gideon sought habeas corpus relief from the United States Supreme Court.⁷⁶ In its 1963 decision, the Court held that the Florida state court's refusal to appoint counsel violated Mr. Gideon's Sixth Amendment rights.⁷⁷ The immediate consequence of the Court's ruling for Mr. Gideon was a new trial, at which he was acquitted.⁷⁸ The long-term consequence for many states was that they were required, for the first time, to provide free counsel to all indigent defendants.⁷⁹

B. The Right to “Effective” and “Competent” Assistance

After *Gideon*, state courts routinely struggled with important questions related to the procedural and substantive rights attendant to the right to counsel. These questions included: (i) which defendants are entitled to counsel (e.g., those that are accused of felonies versus those accused of any crime), (ii) the time at which the right to counsel should attach (e.g., prior to police questioning, at the plea stage, or at some other time), and (iii) what kind(s) of assistance must be provided in order to qualify as the “assistance of counsel.” This third category—the effective assistance “floor”—is the most

detailed discussion of most pre-*Gideon* cases because they were not based expressly on the Sixth Amendment. See Chhablani, *supra* note 71, at 1–12.

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

74. *Id.* at 337.

75. *Id.* at 336 (“[Gideon] was charged in a Florida state court with having broken and entered a poolroom with intent to commit a misdemeanor.”).

76. *Id.* at 337.

77. *Id.* at 344–45 (“The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. A defendant's need for a lawyer is nowhere better stated than in the moving words of Mr. Justice Sutherland in *Powell v. Alabama*: ‘The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.’”).

78. See ANTHONY LEWIS, *GIDEON'S TRUMPET* 237 (1964).

79. Many states already were providing counsel to indigent defendants. See Chhablani, *supra* note 71, at 6–10.

relevant to this article. Thus, the “competence” and “conflicted” aspects of effective assistance are discussed below.

In defining the level of substantive assistance required under the Sixth Amendment, the Supreme Court initially decided that “effective” assistance must be provided.⁸⁰ What level of “competence” was required to be “effective” was further fleshed out in *McMann v. Richardson*. In *McMann*, the defendants pled guilty based on their lawyers’ opinion that their earlier confessions could be used against them at trial.⁸¹ Defendants later claimed that the confessions likely could not have been used as evidence because they were coerced. Thus, defendants asserted that their lawyers’ erroneous assessment of the confessions’ admissibility deprived them of the assistance of counsel.⁸²

The Supreme Court disagreed. Instead, the Court reiterated that “a plea of guilty in a state court is not subject to collateral attack in a federal court on the ground that it was motivated by a coerced confession unless the defendant was *incompetently* advised by his attorney.”⁸³ In assessing whether defendants’ counsel is “competent” enough to be “effective,” the proper inquiry is “whether the advice was within the range of competence demanded of attorneys in criminal cases” and not “whether a court would retrospectively consider counsel’s advice to be right or wrong.”⁸⁴ In applying this standard to counsel’s alleged error in *McMann*—incorrect advice regarding the admissibility of his coerced confession—the Court noted that McMann’s choice to waive trial naturally “entail[ed] the inherent risk that the good-faith evaluations of a reasonably competent attorney will turn out to be mistaken.”⁸⁵ To the *McMann* Court, the mere fact that a court “might hold a defendant’s confession inadmissible in evidence, possibly by a divided vote, hardly justifies a conclusion that the defendant’s attorney was incompetent or ineffective when he thought the admissibility of the confession

80. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (“[D]efendants facing felony charges are entitled to the effective assistance of competent counsel.”). The *McMann* Court also stated that “[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel.” *Id.* (citing *Reece v. Georgia*, 350 U.S. 85, 90 (1955); *Glasser v. United States*, 315 U.S. 60, 69–70 (1942); *Avery v. Alabama*, 308 U.S. 444, 446 (1940); *Powell v. Alabama*, 287 U.S. 45, 57 (1932)).

81. *McMann*, 397 U.S. at 762.

82. *Id.*

83. *Id.* at 772 (emphasis added).

84. *Id.* at 771.

85. *Id.* at 770.

sufficiently probable to advise a plea of guilty.”⁸⁶ Ultimately, because the Court concluded that counsel’s pre-trial advice regarding the confession’s admissibility did not involve “gross error” or “serious derelictions,” defendants could not seek reversal of their convictions based on ineffective assistance of counsel at the plea stage.⁸⁷

Fifteen years after *McMann*, the Supreme Court attempted to provide sweeping clarification regarding the effective assistance of counsel standard in *Strickland v. Washington*.⁸⁸ The defendant in *Strickland*, who confessed to three murders, claimed that his trial counsel was ineffective because his counsel failed to investigate or proffer evidence regarding defendant’s mental state and character during the sentencing phase of his trial.⁸⁹ In order to address defendant’s claim, the Supreme Court first had to decide what showing a defendant must make to prove “actual ineffectiveness.”⁹⁰

The *Strickland* Court held that a defendant claiming ineffectiveness must make a two-part showing of (i) deficient performance by counsel, and (ii) actual prejudice.⁹¹ Under this standard, counsel’s errors must have been “so serious as to deprive the defendant of a fair [and reliable] trial.”⁹² Regarding part (i)’s requirement of deficient performance, the Court refused to provide “more specific guidelines,” instead choosing to defer to “the legal profession’s maintenance of standards.”⁹³ Thus, whether a lawyer’s performance was deficient depends on whether it was “reasonabl[e] under prevailing professional norms” given “all the circumstances.”⁹⁴ In applying this standard to “acts or omissions” identified by a defendant, courts are to avoid indulging in “hindsight” and instead “indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance.”⁹⁵ Under part (ii)’s requirement of actual prejudice, a defendant “need not show that [the

86. *Id.*

87. *Id.* at 772; 774. The Court also stated: “That a guilty plea must be intelligently made is not a requirement that all advice offered by the defendant’s lawyer withstand retrospective examination in a post-conviction hearing.” *Id.* at 770.

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

89. *Id.* at 675–76.

90. *Id.* at 684.

91. *Id.* at 687.

92. *Id.* at 687.

93. *Id.* at 688.

94. *Id.*

95. *Id.* at 689.

deficiency] more likely than not altered the outcome.”⁹⁶ Instead, a defendant must show that “but for counsel’s unprofessional errors” identified under (i), there is a “reasonable probability that . . . the result of the proceeding would have been different” such that “confidence in the outcome” has been undermined.⁹⁷ Only in very limited circumstances—such as when one’s lawyer was laboring under a conflict of interest—would actual prejudice ever be presumed.⁹⁸

C. Ethical Conflicts of Interest as Ineffective Assistance

In *Strickland*, the Supreme Court distinguished the conflict of interest scenario from virtually all others. This distinction initially was fleshed out in a much earlier case, *Glasser v. United States*.⁹⁹ In *Glasser*, three defendants accused of defrauding the government each retained or were appointed separate counsel. When one defendant, Kretske, fired his initial counsel, the trial court appointed Stewart, the lawyer for one of the other defendants, Glasser, to represent Kretske along with Glasser, over the objection of Glasser. The Supreme Court held that this appointment of Stewart to represent both Glasser and Kretske violated Glasser’s Sixth Amendment right to the effective assistance of counsel. More specifically, the Court stated that “the ‘assistance of counsel’ guaranteed by the Sixth Amendment contemplates that such assistance be untrammelled and unimpaired by a court order requiring that one lawyer shall simultaneously represent conflicting interests.”¹⁰⁰

In applying this standard to the representation provided by Stewart to Glasser, the Court noted Stewart’s failure to cross-examine a witness on behalf of Glasser because it would hurt Kretske, and also noted Stewart’s failure to object to certain testimony likely inadmissible with respect to Glasser out of a “desire to avoid prejudice to Kretske.”¹⁰¹ These examples of “trammeling” of the defendant’s Sixth Amendment rights were especially troubling to the Court because the trial court itself was “responsible for creating [the] situation which resulted in the impairment of [Glasser’s] rights.”¹⁰²

96. *Id.* at 693.

97. *Id.* at 698.

98. *Id.* at 692.

99. *Glasser v. United States*, 315 U.S. 60 (1942). This case predates *Gideon* because it involves the right to effective assistance of counsel in a federal trial.

100. *Id.* at 70.

101. *Id.* at 72–73.

102. *Id.* at 71.

Thus, given the clear effects of a conflict of interest, neither Glasser nor other similarly situated defendants need show any actual prejudice. Instead, the Court stated, “[t]he right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial.”¹⁰³

In four key cases following *Glasser*, the Supreme Court confirmed that conflicts of interest are to be analyzed separately from other defects allegedly affecting the effectiveness of counsel. The first of these four, *Holloway v. Arkansas*, was decided in 1978.¹⁰⁴ In *Holloway*, three defendants accused of the robbery of a restaurant and rape of two restaurant employees were represented by a single court-appointed attorney.¹⁰⁵ Counsel twice requested that the court appoint separate counsel based on likely conflicts of interest, but the trial court rejected each request.¹⁰⁶ The Supreme Court held that the trial judge’s failure to appoint separate counsel, or to at least adequately investigate the potential detrimental effects of the alleged conflict, deprived the defendants of the effective assistance of counsel.¹⁰⁷ The Court emphatically concluded that “[w]henver a trial court improperly requires joint representation over timely objection reversal is automatic.”¹⁰⁸

Only two years later, in *Cuyler v. Sullivan*, the Supreme Court clarified the reach of *Holloway* and the obligations placed on trial courts.¹⁰⁹ In *Sullivan*, the Court reiterated that state trial courts must “investigate timely objections to multiple representation.”¹¹⁰ However, the *Sullivan* Court also declared that state trial courts need not “initiate inquiries into the propriety of multiple representation in every case.”¹¹¹ Instead, state trial courts may defer to “the good faith and good judgment of defense counsel,” who inherently “is in the best position professionally and ethically to determine when a conflict

103. *Id.* at 75–76.

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

105. *Id.* at 477.

106. *Id.*

107. *Id.* at 484.

108. *Id.* at 488.

109. *Cuyler v. Sullivan*, 446 U.S. 335 (1980). In *Sullivan*, one of three defendants represented by the same two retained lawyers claimed that he received ineffective assistance of counsel due to the attorneys’ conflicts of interest. *Id.* at 338.

110. *Id.* at 346.

111. *Id.*

of interest exists or will probably develop in the course of a trial.”¹¹² Because no participant in Sullivan’s trial objected to the multiple representation, “nothing in the circumstances of [his] case indicate[d] that the trial court had a duty to inquire whether there was a conflict of interest.”¹¹³ The *Sullivan* Court further held that a defendant claiming ineffective assistance of counsel due to a conflict of interest who failed to object to the representation at trial must show that the “conflict of interest actually affected the adequacy of his representation.”¹¹⁴

In *Wood v. Georgia*, the Supreme Court identified a circumstance in which a trial court would be obligated to inquire further into the possibility of a conflict of interest absent a motion by counsel.¹¹⁵ In that case, two defendants accused of distributing obscene materials were represented by their employer’s lawyer, “who may not have pursued their interests” due to the conflicting interests of the employees and the employer.¹¹⁶ The lower court’s failure to inquire into a possible conflict of interest likely violated the defendants’ Sixth Amendment “right to representation that is free from conflicts of interest.”¹¹⁷ Accordingly, the Court remanded the case and ordered the court to determine whether there was an actual conflict of interest and, if there was, to hold a new hearing “untainted by a legal representative serving conflicted interests.”¹¹⁸ In doing so, the *Wood* Court reiterated the mandate in *Sullivan* that a court’s “fail[ure] to make an inquiry even though it ‘knows or reasonably should know that a particular conflict exists’” deprives a defendant of his Sixth Amendment rights.¹¹⁹

Although the Court in *Holloway*, *Sullivan*, and *Wood* appeared to emphasize a trial court’s need to inquire into conflicts of interest and to treat them differently when analyzing Sixth Amendment claims, the Court also imposed an important limitation on such claims—the requirement that a defendant show some “adverse

112. *Id.* at 346–47 (quoting *Holloway*, 435 U.S. 475 at 485).

113. *Id.* at 347.

114. *Id.* at 347–48.

115. *Wood v. Georgia*, 450 U.S. 261 (1981)

116. *Id.* at 271–72. The payment of legal fees by a third party inherently triggers conflict of interest concerns under the rules of professional conduct. See MODEL RULES OF PROF’L CONDUCT R. 1.8 (2006).

117. See *Wood*, at 271 (citing *Sullivan*, 446 U.S. 335, and *Holloway*, 435 U.S. at 481).

118. *Id.* at 273–74.

119. *Id.* at 273 n.18 and accompanying text.

effect” of the conflict. This limitation was illustrated most profoundly in the case of *Mickens v. Taylor*, decided by a 5-4 decision in favor of the state.¹²⁰ The defendant, Mickens, represented by court-appointed counsel, Saunders, was convicted of murder and sentenced to death.¹²¹ Mickens claimed that he had been deprived of the effective assistance of counsel because, unbeknownst to Mickens, his lawyer in the murder trial had been representing the victim, Hall, in an unrelated proceeding at the time that Mickens allegedly murdered Hall.¹²² The Supreme Court held that the mere existence of this conflict, which was not raised by Mickens’s counsel, was not enough to mandate reversal of his conviction.¹²³ Rather, in these circumstances, a defendant also must “establish that the conflict of interest adversely affected his counsel’s performance.”¹²⁴ Because Mickens failed to show an adverse effect, his conviction was upheld.¹²⁵

D. Summary

Collectively, the cases discussed above reflect the Supreme Court’s view of what often fails to qualify as “assistance of counsel” in an individual representation, i.e., representation that is incompetent, ineffective or conflicted. For general ineffective assistance claims, the defendant must show that the constitutionally infirm representation caused “actual prejudice.”¹²⁶ If a conflict of interest (at least one involving joint multiple representation)¹²⁷ is involved, the defendant need only demonstrate an “adverse effect” on his counsel’s representation, a burden that is much easier to satisfy than “actual

120. *Mickens v. Taylor*, 535 U.S. 162 (2002).

121. *Id.* at 164.

122. *Id.*

123. *Id.* at 172–74.

124. *Id.* at 174; see Jeffrey Scott Glassman, Note, *Mickens v. Taylor: The Court’s New Don’t Ask, Don’t Tell Policy for Attorneys Faced with a Conflict of Interest*, 18 ST. JOHN’S J.L. COMM. 919, 976 (2004) (“Today, a defendant who was himself a victim of a trial court’s neglect of its duty to inquire into a conflict of interest that is known or should have been known, must not only show that the conflict existed, but that it adversely affected the representation.”).

125. *Mickens*, 535 U.S. at 174.

126. The Supreme Court reapplied these Sixth Amendment standards in its latest term via the companion cases of *Premo* and *Richter*. *Premo v. Moore*, 131 S. Ct. 733, 742 (2011). *Premo* involved an allegation of ineffective assistance at the plea stage based on counsel’s failure to file a motion to suppress a confession prior to defendant entering his plea. *Id.*

127. See *infra* Part III.B (discussing whether multiple representation conflicts are and should be the only conflicts that qualify).

prejudice.” Thus, whether an excessive caseload qualifies as a conflict of interest significantly affects whether a post-hoc ineffective assistance of counsel claim is likely to succeed.

III. The Excessive Caseload Problem is a Conflict of Interest That Should Be Evaluated Under *Sullivan*

In Part I, I defined the excessive caseload problem and showed how at least one legislature is trying to hide the problem. In Part II, I explained why classifying the excessive caseload problem as a conflict of interest matters under the Supreme Court’s Sixth Amendment cases. Specifically, if there is a conflict of interest, a defendant likely must demonstrate only an adverse effect versus actual prejudice. In this part, I show exactly how one could classify the excessive caseload problem as an unethical conflict of interest using existing legal ethics sources.

A. How the Excessive Caseload Problem is a Conflict of Interest

The Department of Justice (“DOJ”) succinctly described the relationship between excessive caseloads and ethical conflict obligations when it stated, “Many public defenders fail to acknowledge the conflict of interest that arises when excessive caseloads force them to choose which of their clients will receive the defense to which they are entitled.”¹²⁸ Like the DOJ, some state courts and legal scholars have suggested that the time and resource pressures placed on public defenders due to excessive caseloads could be viewed as conflicts of interests under the ABA’s Model Rules. In this sub-part, I review and then synthesize these legal ethics sources before concluding that the excessive caseload problem is best viewed as a conflict of interest.

1. The ABA’s Model Rules

Fundamentally, a conflict of interest is a conflict of duties.¹²⁹ If a lawyer feels as though his duty (of loyalty, diligence, confidentiality, or another) to one client conflicts with his duty to another person or client, or with his personal interests, then he may face a conflict of

128. BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, NCJ NO. 185632, KEEPING DEFENDER WORKLOADS MANAGEABLE 4 (2001), available at <https://www.ncjrs.gov/pdffiles1/bja/185632.pdf>.

129. See Heidi Reamer Anderson, *Allocating Influence*, 2009 UTAH L. REV. 683, 708 (2009).

interest.¹³⁰ Under the ABA's Model Rules of Professional Conduct, a "current client conflict" occurs if there is "direct adversity" or if there is a "significant risk" that a lawyer's representation of one client will be "materially limited" by the lawyer's responsibilities to another client. Similarly, a "personal interest conflict" arises if there is a "significant risk" that a lawyer's representation of one client will be "materially limited" by the lawyer's own "personal interest."¹³¹

Using these conflict definitions, an excessive caseload would rise to the level of a conflict of interest in one of two ways. First, an excessive caseload could be viewed as a "current client conflict." Specifically, if a public defender believes that there is a significant risk that his ability to represent a criminal defendant is materially limited by his obligations to represent the hundreds or even thousands of other criminal defendants currently assigned to him, then the public defender's excessive caseload triggers a current client conflict of interest.¹³² Although it may be true that most attorneys often feel like they face resource or time shortages, those other attorneys generally have the power to prevent those natural time and resource pressures from rising to the level of a conflict by turning down new matters, by hiring additional attorneys, or by seeking help from fellow attorneys. Public defenders likely have no such "anti-conflict" options available. Rather, due to the legislative two-step detailed in Part II, they generally must accept the cases assigned to them, no matter how many other clients they already have. Thus, these public defenders hold a unique position in the criminal justice system due to their

130. Underlying the lawyer-client relationship and the conflict of interest rules is an expectation that the lawyer's representation will not be limited by his responsibilities to another. MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2008) ("Loyalty and independent judgment are essential elements in the lawyer's relationship to a client. Concurrent conflicts of interest can arise from the lawyer's responsibilities to another client, a former client or a third person or from the lawyer's own interests.").

131. *Id.* at R. 1.7(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 (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.").

132. See *Brummer*, *supra* note 15, at 106-07.

inherent lack of discretion.¹³³ Consequently, they are uniquely vulnerable to excessive caseload conflicts.¹³⁴

Second, as an alternative to the current client conflict option, an excessive caseload could be viewed as a personal interest conflict. A personal interest conflict arises when there is a conflict between the client's interest and the lawyer's own personal interest, financial or otherwise. In the case of excessive caseloads, the personal interest conflict would be between the client's interest in competent, diligent and conflict-free representation and the lawyer's interest in self-preservation. In stark terms, the client has a significant interest in exposing his public defender's unethical lack of competence and diligence while the public defender herself has just as significant of an interest in hiding those same unethical realities in order to continue to have a job.¹³⁵ If a public defender's excessive caseload would trigger a conflict under either of these two theories—current client conflict or personal interest conflict—the Rules require the public defender to obtain a waiver based on informed consent from the client.¹³⁶

2. *Judicial Opinions*

In searching for possible applications of the ABA's conflict rules to excessive caseloads, one naturally would turn next to case law. The clearest judicial attempt to equate the excessive caseload problem to an unethical conflict of interest occurred over twenty years ago in Florida in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*.¹³⁷ Several years prior to this

133. See *Polk County v. Dodson*, 454 U.S. 312, 332 (1981) (“The public defender’s discretion in handling individual cases—and therefore his ability to provide effective assistance to his clients—is circumscribed to an extent not experienced by privately retained attorneys.”) (citing *Robinson v. Bergstrom*, 579 F.2d 401, 402–03 (7th Cir. 1978)).

134. The Model Rules already recognize that certain types of attorneys face unique circumstances, and owe clients and the justice system unique duties, that other attorneys do not face or owe. For example, the Model Rules detail special obligations applicable only to criminal prosecutors. See MODEL RULES OF PROF’L CONDUCT R. 3.8 (2006) (“Special Responsibilities of a Prosecutor”).

135. See *Brummer*, *supra* note 15, at 118–19 (“Although the judges, lawyers and the lawyer-supervisors are all lawyers who have personally committed themselves to constitutional and ethical standards, most give precedence to their jobs consistent with these norms and with getting along The system rewards incompetence and a lack of integrity of this sort, and creates significant disincentives for those who might contemplate making waves.”).

136. See *Brummer*, *supra* note 15, at 132 (discussing waiver option).

137. *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990) (per curiam) [hereinafter “*Order on*”

decision, the Florida legislature had deleted a statutory provision expressly providing “an independent mechanism for appointment of counsel in lieu of the public defender.”¹³⁸ State court judges previously had relied upon the deleted provision when appointing additional counsel to help deal with the excessive caseload problem. In the 1990 *Order on Prosecution of Criminal Appeals*, the Florida Supreme Court found a new basis for appointing additional counsel when the assigned public defenders faced an extreme excessive caseload problem—an existing statute that authorized the appointment of additional counsel in the event of a conflict of interest.¹³⁹

In order for state court judges to rely upon this other provision, they would have to conclude that excessive caseloads created conflicts of interest. The Florida Supreme Court connected the dots as follows: “When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created.”¹⁴⁰ The court also provided logistical advice to lower court judges using the conflict of interest language: “[W]here the backlog of cases in the public defender’s office is so excessive that there is no possible way he can timely handle those cases, it is his responsibility to move the court to withdraw. If the court finds that the public defender’s caseload is so excessive as to create a conflict, other counsel for the indigent defendant should be appointed”¹⁴¹

Prosecution of Criminal Appeals”]. In *Order on Prosecution of Criminal Appeals*, the Florida Supreme Court affirmed an order appointing other counsel to file appellate briefs that were delayed so long that defendants served sentences before briefs filed while those represented by private counsel won appeals.

138. *Id.* at 1135.

139. *Id.* (In “section 27.53(3), Florida Statutes (1989), the legislature has provided an appropriate mechanism to handle the problem of excessive caseload. That subsection provides in pertinent part: ‘(3) If at any time during the representation of two or more indigents the public defender shall determine that the interests of those accused are so adverse or hostile that they cannot all be counseled by the public defender or his staff without conflict of interest, or that none can be counseled by the public defender or his staff because of conflict of interest, it shall be his duty to move the court to appoint other counsel. The court may appoint either: (a) One or more members of The Florida Bar, who are in no way affiliated with the public defender, in his capacity as such, or in his private practice, to represent those accused; or (b) A public defender from another circuit. Such public defender shall be provided office space, utilities, telephone services, and custodial services, as may be necessary for the proper and efficient function of the office, by the county in which the trial is held.’”).

140. *Id.* at 1135.

141. *Id.* at 1138.

Because no other state shares Florida's unique history of "tit for tat" between the legislature and the courts, one would expect no other state to share the Florida Supreme Court's view of excessive caseloads as conflicts of interest.¹⁴² However, in at least one other state—California—courts are beginning to draw the same comparison. In *In re Edward S.*, a 2009 California appellate court decision, the court declared that "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing."¹⁴³ The court then relied upon its conflict of interest finding to conclude that a juvenile defendant had received substandard representation under *Strickland* in part because his conflicted attorney did not investigate facts that would discredit the victim's story.¹⁴⁴ Similarly, in a 2010 case, the same California court found that a contract-appointed public defender's failure to obtain investigatory help due to extremely limited investigatory resources was a conflict of interest that prejudiced the defendant and others like him.¹⁴⁵ Specifically, with only one investigator to assist twelve public defenders, "[a]n accused person whose defense requires investigation is as prejudiced by the excessive caseload of the investigators the government provides as by that of the public defenders."¹⁴⁶

3. *Legal Scholars*

In addition to judges in the cases above, several legal scholars have begun to equate public defenders' forced allocation of limited resources to a conflict of interest. For example, in discussing conflicts facing certain "cause lawyers," a category that includes some criminal defense attorneys, Margareth Etienne has equated the process of

142. See *Logan*, *supra* note 6, at 887.

143. *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746–47 (Cal. Ct. App. 2009).

144. *Id.* at 748.

145. *People v. Jones*, 111 Cal. Rptr. 3d 745, 760–63 (Cal. Ct. App. 2010); *id.* at 764 ("Quinn's testimony put the trial court on notice of a conflict of interest that may prejudice not just Jones, but many other indigent defendants in Lake County represented by contract public defenders obliged to share inadequate investigative or other support services.").

146. *Id.* at 765. The court further admonished public defenders for failing to raise the excessive caseload conflict, stating: "A public defender who believes there is a genuine basis upon which to make such withdrawal motion, but fails to do so, participates in the denial of his or her client's Sixth Amendment rights." *Id.*

divvying up one's time and resources as "prioritization."¹⁴⁷ David Luban personalized this prioritization dilemma from the perspective of a fictional public defender's internal debate: "[H]er dilemma of aggressive defense is a problem of desperate triage; her moral question is . . . , '[g]iven that many of my clients deserve aggressive defense, how do I choose whom to provide with aggressive defense?'"¹⁴⁸ In discussing Luban, Darryl Brown suggested that the question was not one of "whom do I aggressively defend," but more likely "whom do I represent at all."¹⁴⁹ In Brown's view, many public defenders are engaging in the rationing of even the most basic facets of representation.¹⁵⁰ Given the apparent inevitability of the excessive caseload problem, Brown has suggested that public defenders at least should recognize that what they are doing is rationing scarce resources, and should develop some consistent principles to guide that rationing.¹⁵¹

What these and other scholars essentially are saying is that a public defender's obligation to provide some level of representation to hundreds or thousands of clients often "materially limits" her ability to provide representation to another client.¹⁵² The prospect of

147. See Margareth Etienne, *The Ethics of Cause Lawyering: An Empirical Examination of Criminal Defense Lawyers as Cause Lawyers*, 95 J. CRIM. L. & CRIMINOLOGY 1195, 1244-45 (2005) ("An indirect conflict of interest more commonly arises when the interests of one client are not fully compatible with the interests of other future clients who otherwise (and perhaps better) embody the lawyer's cause. This generally means that lawyers have to prioritize among clients. The need to prioritize among clients is common among criminal defense lawyers, particularly those with limited resources.").

148. See David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1765 (1993). Luban further stated, "My own view is that she should utilize her scarce resources on behalf of those clients who are in greater jeopardy and who are less dangerous, rather than the other way around." *Id.*

149. See Darryl K. Brown, *Correspondence: Criminal Procedure, Justice, Ethics and Zeal*, 96 MICH. L. REV. 2146, 2149 (1998) ("[R]esource scarcity is sufficiently great in many settings that attorneys must trade off practices more basic than aggressive techniques—often practices related to important fact investigation. Given the scarcity of their time, attorneys cannot meet their professional obligations solely by rationing aggressive defense tactics or sustaining high levels of zeal. They must also ration fact investigation, and perhaps procedural litigation as well.").

150. See generally Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801 (2004).

151. Brown, *supra* note 149, at 815-28.

152. See Daniel A. Farber, *Another View of the Quagmire: Unconstitutional Conditions and Contract Theory*, 33 FLA. ST. U.L. REV. 913, 939-40 (2006) ("[O]verworked public defenders . . . have a conflict of interest regarding any individual client since full representation of that client would require skimping even further on the interests of others.").

rationing services forces a public defender to balance the interests of one client against the interests of another—a problem that is a quintessential conflict of interest.¹⁵³ When a public defender like Miami PDO's Jay Kolsky must decide which of his deserving clients to interview, to the exclusion of his many other deserving clients, he is facing a conflict of interest.¹⁵⁴ Similarly, when there is only enough time to draft a single motion, and multiple clients' cases are worthy of such a motion, the forced decision as to which client gets his time involves a conflict of interest.¹⁵⁵

One way to address this type of problem is to do what Darryl Brown suggests—acknowledge the rationing and develop some criteria for allocating scarce resources properly using choice theory.¹⁵⁶ What Brown provides is an admirable recipe for “How to Do Something Unethical in a More Professional Way.” Although his suggestions are quite helpful and practical as a “Band-Aid” of sorts, they ultimately do not address the cause of the injury—inadequate funding that leads to the excessive caseload conflict. In Part III.B below, I offer a way to do just that.

B. Excessive Caseload Conflicts Should Be Evaluated Under *Sullivan* Instead of Under *Strickland*

In Part II, I reviewed a critical dichotomy in the Supreme Court's Sixth Amendment ineffective assistance of counsel cases. Generally, all defendants seeking reversal of a conviction on the basis of

153. Etienne, *supra* note 147, at 1256 (“[O]nce the attorney begins to weigh the interests of the clients against the cause or that of other clients, the lawyer's representation becomes materially limited.”); Stephanie L. McAlister, Note, *Between South Beach and a Hard Place: The Underfunding of the Miami-Dade Public Defender's Office and the Resulting Ethical Double Standard*, 64 U. MIAMI L. REV. 1317, 1318 (2010) (“Consistent underfunding of the Florida judiciary has caused a simultaneous increase in caseloads and decrease in personnel in county public defender's offices. This forces attorneys in the public defender's offices into an ethical quagmire, requiring them to trade time spent on one case for the interests of a different client.”).

154. See *supra* notes 59–64 and accompanying text.

155. See *supra* note 57 and accompanying text; see also Logan, *supra* note 6, at 899 (“Finally, excessive caseloads threaten a systematic violation of the basic tenet of client loyalty and capacity for independent judgment, namely that a lawyer ‘shall not represent a client if . . . there is a substantial risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client’”).

156. See *supra* notes 150–151 and accompanying text; Brown, *supra* note 149, at 2154 (“Once we recognize that attorneys may make strategic choices with important substantive consequences among basic advocacy tasks as well as among tasks that define the outer boundaries of zeal, we see a need for more guidance (and self-awareness) of those decisions.”).

ineffective assistance must show that the representation was defective. After that initial burden is satisfied, the cases diverge. If the source of the defective representation was a conflict of interest, then the defendant next must show that the defect had an “adverse effect.”¹⁵⁷ However, if the source of the defective representation is anything other than a conflict of interest, the defendant instead must show “actual prejudice,” a standard that has proven nearly impossible to satisfy in the context of excessive caseloads.¹⁵⁸ Thus, if one characterizes a defect as a conflict of interest under the first prong, that characterization significantly reduces a defendant’s burden under the second prong.

Although the *Strickland* versus *Sullivan* dichotomy appears relatively clear at first, the dividing line between the two is not perfectly well-established. This is because whether the adverse effect test applies to *all* conflicts of interest versus only to *some* kinds of conflicts is a question that remains open. Thus far, the Supreme Court has hinted but not definitively stated that only “joint representation” conflicts of interest qualify for the easier-to-satisfy “adverse effect” test.¹⁵⁹ In each of three seminal cases discussed above—*Sullivan*, *Glasser*, and *Holloway*—the source of the conflict was the attorney’s joint representation of two or more co-defendants accused of the same crime.¹⁶⁰ These sources have led some to assume

157. See *supra* notes 90–97 and accompanying text.

158. See Recent Cases, *Criminal Law—Conflicts of Interest—First Circuit Rules That a Defendant Whose Lawyer Had a Conflict That the Judge Should Have Known About Must Show Adverse Effect To Receive a New Trial*, 115 HARV. L. REV. 938, 944 (2002) (“The [adverse effect] test is nearly impossible to satisfy, requiring a defendant not only to imagine alternate strategies or trial tactics that his lawyer failed to pursue, but also to connect that failure to the conflict.”).

159. *Mickens v. Taylor*, 535 U.S. 162, 176 (2002) (“Whether *Sullivan* should be extended to [successive conflict and other] cases remains, as far as the jurisprudence of this Court is concerned, an open question.”); see Glassman, *supra* note 124, at 960–61.

160. See *supra* Part II. Additionally, Rule 44(c) of the Federal Rules of Criminal Procedure specifies as follows:

(1) Joint Representation. Joint representation occurs when:

(A) two or more defendants have been charged jointly under Rule 8(b) or have been joined for trial under Rule 13; and

(B) the defendants are represented by the same counsel, or counsel who are associated in law practice.

(2) Court’s Responsibilities in Cases of Joint Representation. The court must promptly inquire about the propriety of joint representation and must personally advise each defendant of the right to the effective assistance of counsel, including separate representation. Unless there is good cause to believe that no conflict of interest is likely to arise, the court must take appropriate measures to protect each defendant’s right to counsel.

that the only kind of conflict of interest that triggers *Sullivan's* adverse effect test versus *Strickland's* actual prejudice test is a joint representation conflict.¹⁶¹

Under the Model Rules, the joint representation type of conflict falls within the broader category of concurrent client conflicts described in Model Rule 1.7.¹⁶² The conflicts in *Wood* and *Mickens*, however, are in two separate sub-categories. In *Wood*, the conflict was between the clients' interest in loyal and zealous representation and the lawyer's personal interest in payment from those clients' employer, who was paying for their representation. That type of conflict between the client's interest and the lawyer's personal interest is specifically addressed in Model Rule 1.8(f).¹⁶³ In *Mickens*, the conflict was between the lawyer's duty to his current client, defendant Mickens, and a former client, Hall (also Mickens's victim).¹⁶⁴ Yet another rule, Model Rule 1.9,¹⁶⁵ addresses former client conflicts like that in *Mickens*.¹⁶⁶

The value of this rules-based distinction was vitiated in Glassman, *supra* note 124, at 966–68, given that the rule merely reiterates the Court's holding in *Holloway*.

161. *Beets v. Collins*, 65 F.3d 1258, 1265 (5th Cir. 1995) (en banc) (“First, *Cuyler*, like all the other Supreme Court cases that have discussed a lawyer's conflict of interest, solely concerned the representation of multiple clients. The Supreme Court has not expanded *Cuyler's* presumed prejudice standard beyond cases involving multiple representation.”); *id.* at 1265 n.8 (grouping simultaneous joint representation with serial representations into single category of multiple representation).

162. MODEL RULES OF PROF'L CONDUCT R. 1.7 states:

A concurrent conflict of interests 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

163. MODEL RULES OF PROF'L CONDUCT R. 1.8(f) states:

A lawyer shall not accept compensation for representing a client from one other than the client unless:

- (1) the client gives informed consent;
- (2) there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship; and
- (3) information relating to representation of a client is protected as required by Rule 1.6

164. *Mickens*, 535 U.S. at 164.

165. MODEL RULES OF PROF'L CONDUCT R. 1.9 states:

- (a) A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.

The fact that *Wood* and *Mickens* involve conflicts other than joint representation means that the pathway to *Sullivan* may not be closed to excessive caseload conflicts.¹⁶⁷ Given the Supreme Court's skepticism about whether *Sullivan* applies to conflicts other than concurrent representation conflicts, however, merely pointing to *Wood* and *Mickens* likely is insufficient. Rather, in order for my theory for constitutionalizing funding for *Gideon* to work, courts must not only characterize the excessive caseload problem as a conflict of interest; they also must find that it is the exact *kind* of conflict of interest that automatically triggers *Sullivan* versus *Strickland*. The case for excessive caseload conflicts qualifying for *Sullivan*'s adverse effect test would be much stronger if the excessive caseload conflict could be compared favorably to the multiple representation conflicts at the heart of *Sullivan*, *Glasser* and *Holloway*. Fortunately, the excessive caseload conflict shares much in common with a more typical joint representation conflict. Four of these shared characteristics are discussed below.

First, the most feared harm of joint representation conflicts—the “gag effect”—is even more pronounced with excessive caseload conflicts.¹⁶⁸ The Supreme Court has described this silencing effect as follows:

(b) A lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client

(1) whose interests are materially adverse to that person; and

(2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter; unless the former client gives informed consent, confirmed in writing.

(c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:

(1) use information relating to the representation to the disadvantage of the former client except as these Rules would permit or require with respect to a client, or when the information has become generally known; or

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

166. *Mickens*, 535 U.S. at 164.

167. *But see* *Nix v. Whiteside*, 475 U.S. 157, 167 (1986) (finding that “conflict” between defendant wanting to perjure himself and lawyer who insisted on withdrawal was not the kind of conflict of interest contemplated in *Sullivan*).

168. *See* Joe Margulies, *Criminal Law: Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 703 (1989) (“One source of incompetent counsel is the joint representation of conflicting interests. Its evil is the gag placed on counsel, quite apart from his or her own abilities. In fact, it is the attorney’s devotion to one client which inevitably commands that he or she sacrifice another.”). This *gag effect* has been

Joint representation of conflicting interests is suspect because of what it tends to *prevent* the attorney from doing.¹⁶⁹

[I]n a case of joint representation of conflicting interests the evil—it bears repeating—is in what the advocate finds himself compelled to *refrain* from doing, not only at trial but also as to possible pretrial plea negotiations and in the sentencing process.¹⁷⁰

A public defender laboring under a multiple representation conflict suffers from a temptation to sacrifice the interests of one client in order to better represent the interests of the other client. However, for a public defender laboring under an excessive caseload conflict, that possibility of sacrifice is more than a temptation—it is a certain and necessary evil.¹⁷¹ As the examples above show, public defenders like Jay Kolsky frequently refrain from doing many things that would benefit their clients.¹⁷² Thus, if the *Sullivan* rule applies to multiple representation conflicts because they cause attorneys to refrain from doing certain things on behalf of a client, that rule should apply with equal (if not more) force to excessive caseload conflicts.¹⁷³ As the Court stated in *Holloway*, “[t]he mere physical presence of an

described more mildly as “soft pedal[ing].” See Debra Lyn Bassett, *Three’s a Crowd: A Proposal to Abolish Joint Representation*, 32 RUTGERS L.J. 387, 449 n.246 (2001) (citations omitted).

169. *Holloway v. Arkansas*, 435 U.S. 475, 489–90 (1978) (emphasis added).

170. *Id.* at 490 (emphasis in original).

171. Some would say that Mr. Kolsky and similarly situated public defenders are failing to file motions or cross-examine someone because they are “pulling punches.” See Etienne, *supra* note 147, at 1255 (“The problem of ‘materially limited’ conflicts is sometimes described as one of lawyers ‘pulling [] punches’ or ‘soft-pedaling’ the representation. In a sense, this is precisely what is at issue when criminal defense lawyers use the impact litigation strategy of seeking test cases in which to raise to particular issues or when they decline to raise issues in certain cases so as to reserve their credibility for more deserving cases.”).

172. See Margulies, *supra* note 168, at 706 (“This evil also includes the neglect of pretrial investigations, legal research, and consultation with clients.”).

173. At least one court and commentator agree with this connection. See Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 BUFF. L. REV. 329, 424 n.450 (1995) (citing *State v. Smith*, 681 P.2d 1374, 1381 (Ariz. 1984) (noting that “[t]he insidiousness of overburdening defense counsel is that it can result in concealing from the courts, and particularly the appellate courts, the nature and extent of damage that is done to defendants by their attorneys’ excessive caseloads”); Suzanne E. Mounts, *The Right to Counsel and the Indigent Defense System*, 14 N.Y.U. REV. L. & SOC. CHANGE 221, 234 (1986) (pointing out that “[w]hen errors are of omission rather than commission, it is often difficult for courts to see the effect”).

attorney does not fulfill the Sixth Amendment guarantee when the advocate's conflicting obligations have effectively sealed his lips on crucial matters."¹⁷⁴ That admonition should apply equally whether the source of that seal is an inner temptation or a state's lack of funding.

A second parallel between *Sullivan*-worthy multiple representation conflicts and excessive caseload conflicts is that both are state-created.¹⁷⁵ In *Sullivan*, the Supreme Court distinguished conflict scenarios from other sources of ineffective assistance in part because they are like scenarios for which "the prosecution is directly responsible," and because they are "easy for the government to prevent."¹⁷⁶ This emphasis tracked that of *Glasser*, where the trial court was "responsible for creating [the] situation which resulted in the impairment of [Glasser's] rights."¹⁷⁷ This same "government-created" rationale supports extending *Sullivan* to excessive caseload conflicts. Excessive caseload conflicts are government-created conflicts because they generally result solely from inadequate government funding.¹⁷⁸ Excessive caseload conflicts also are "easy for the government to prevent" because they can be erased by appropriating adequate funding. At least one state court has linked excessive caseload conflicts (albeit for investigators, rather than the public defenders themselves) with the *Sullivan* standard for this very "state-created" reason.¹⁷⁹ Similarly, Justice Breyer, in his *Mickens*

174. Holloway, 435 U.S. at 490.

175. Some call these defects "systemic" or "structural." If a defect is structural, then prejudice automatically may be presumed and a defendant does not even need to show "adverse effect." See Margulies, *supra* note 168, at 711 (citing *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988), *cert denied*, 495 U.S. 957 (1990); Benner, *supra* note 16, at 3 n.17.

176. *Strickland v. Washington*, 466 U.S. 668, 692 (1984).

177. *United States v. Glasser*, 315 U.S. 60, 71 (1942).

178. Other government-created causes include overcriminalization. See *Baxter*, *supra* note 7, at 382, 386.

179. *People v. Jones*, 111 Cal. Rptr. 3d 745, 767 n.12 (Cal. Ct. App. 2010) ("Although we rely on the conventional guidelines regarding prejudice, the inadequacy of investigative resources provided contract public defenders by Lake County arguably eliminates Jones's need to demonstrate prejudice. As explained in *Strickland*, prejudice is presumed in certain contexts in which the state significantly interferes with counsel's assistance or counsel was otherwise prevented from assisting the accused at a critical stage of the proceedings. The effective denial of investigative assistance to a class of accused persons certainly constitutes state interference with counsel's assistance. It is 'reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice' where there is such interference not only because the government created the problem, but also due to "'he ability of trial courts to make early inquiry.' It may also be that '[p]rejudice in these circumstances is so likely that case-by-case inquiry into prejudice is not worth the cost.'" (citations omitted).

dissent, suggested that the conflict in *Mickens* warranted reversal because “the Commonwealth ‘[had] created a structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself.’”¹⁸⁰ Finally, as much as the “government-created” factor ties together multiple representation conflicts and excessive caseload conflicts, it also distinguishes them from other personal conflicts, such as those caused by a lawyer having sex with client or a lawyer’s advance book deal.¹⁸¹

Third, equating excessive caseload conflicts with multiple representation conflicts honors the Court’s emphasis on deferring to counsel’s judgment when evaluating Sixth Amendment claims. As noted above, the *Holloway* Court stated that defense counsel “‘is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial.’”¹⁸² The *Strickland* Court cited that same passage from *Holloway*, adding that state trial courts may defer to “the good faith and good judgment of defense counsel.”¹⁸³ Most recently, in *Premo*, the Court reiterated that “the standard for judging counsel’s representation is a most deferential one” because “[u]nlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge.”¹⁸⁴ Ultimately, many of the Court’s Sixth Amendment cases are built on this same foundation

180. *Mickens v. Taylor*, 535 U.S. 162, 209 (2002) (Breyer, J., dissenting) (citing *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991)).

181. These other types of conflicts are the “lighter” conflicts that triggered skepticism from Justice Scalia in *Mickens* and from the Fifth Circuit in *Beets*. See *Mickens*, 535 U.S. at 174–75 (criticizing lower courts that “have applied *Sullivan* ‘unblinkingly’ to ‘all kinds of alleged attorney ethical conflicts,’ *Beets v. Collins*, 65 F.3d 1258, 1266 (5th Cir. 1995) (en banc)” and for “invok[ing] the *Sullivan* standard not only when (as here) there is a conflict rooted in counsel’s obligations to former clients, see, e.g., *Perillo v. Johnson*, 205 F.3d 775, 797–799 (5th Cir. 2001); *Freund v. Butterworth*, 165 F.3d 839, 858–60 (11th Cir. 1999); *Mannhalt v. Reed*, 847 F.2d 576, 580 (9th Cir. 1988); *United States v. Young*, 644 F.2d 1008, 1013 (CA4 1981), but even when representation of the defendant somehow implicates counsel’s personal or financial interests, including a book deal, *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir.1980), a job with the prosecutor’s office, *Garcia v. Bunnell*, 33 F.3d 1193, 1194–95, 1198 n.4 (9th Cir. 1994), the teaching of classes to Internal Revenue Service agents, *United States v. Michaud*, 925 F.2d 37, 40–42 (1st Cir. 1991), a romantic ‘entanglement’ with the prosecutor, *Summerlin v. Stewart*, 267 F.3d 926, 935–41 (9th Cir. 2001), or fear of antagonizing the trial judge, *United States v. Sayan*, 296 U.S. App. D.C. 319, 968 F.2d 55, 64–65 (D.C. Cir. 1992).”

182. See *Holloway v. Arkansas*, 435 U.S. 475, 486–86 (1978) (quoting *State v. Davis*, 514 P.2d 1025, 1027 (1973)).

183. See *Cuyler v. Sullivan*, 446 U.S. 335, 346–47 (1980).

184. *Premo v. Moore*, 131 S. Ct. 733, 740 (2011).

of deferring to counsel's judgment. If defense counsel believes that he is laboring under an excessive caseload conflict of interest that deprives him of his ability to represent a defendant, then presumably a court must defer to his judgment. To instead use *Strickland* and its progeny as a basis for undermining counsel's judgment would be an absurd deviation from the Court's primary Sixth Amendment rationales.

A fourth way in which excessive caseload conflicts compare well with multiple representation conflicts is that recognizing both types of conflicts is consistent with yet another fundamental policy rationale supporting *Strickland*—the need to ensure a fair trial leading to confidence in the result.¹⁸⁵ The Court's emphasis on ensuring a fair trial goes all the way back to *Powell v. Alabama*, when the right to counsel was based on the Due Process Clause.¹⁸⁶ In *Powell*, the Court stated that a failure to be heard is what triggers a constitutional violation.¹⁸⁷ With an excessive caseload conflict, a defendant often cannot be heard by his own lawyer, let alone have his position heard by the court.¹⁸⁸

In *Cronic*, the Court declared that “the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial.”¹⁸⁹ Similarly, the *Strickland* Court stated that “[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding.”¹⁹⁰ Excessive caseload conflicts often strike at that confidence even deeper than multiple representation

185. Perez, *supra* note 8, at 1571 (“Additionally, the Court’s recognition of the right to effective assistance of counsel goes beyond the ‘fair trial’ context ‘to the ability of the adversarial system to produce just results.’”) (citations omitted); *id.* at 1561 (“In this way, the right to counsel protects more than simply a fair trial, for it also ‘serves to protect the reliability of the entire trial process.’”) (citation omitted); *id.* at 1569 (“Of course the right is designed to ensure a fair trial, but ‘it does not follow that the rights can be disregarded so long as the trial is, on the whole, fair.’”) (citations omitted).

186. See *Powell v. Alabama*, 287 U.S. 45, 70–71 (1932) (“[I]t is equally true that that provision was inserted in the Constitution because the assistance of counsel was recognized as essential to any fair trial of a case against a prisoner.”).

187. *Id.* at 68–69 (“The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”).

188. See *supra* Part I.

189. *United States v. Cronic*, 466 U.S. 648, 658 (1984).

190. *Strickland v. Washington*, 466 U.S. 668, 691–92 (1984); Glassman *supra* note 124 (noting that reversal is the only remedy that can “‘maintain public confidence in the fairness of the procedures employed in capital cases’”) (quoting Stevens, J., dissent in *Mickens*).

conflicts do. Although it is conceivable that an attorney could internally block out a loyalty issue and potentially serve two masters adequately, it is impossible for a public defender conflicted by excessive caseload to make more time in the day in order to represent his hundreds of masters. As Joe Margulies so eloquently stated, “the ‘mischief’ [of] systemic resource deprivation” present with excessive caseload conflicts is “no less a threat to a fair trial than outright denial of the right to counsel.”¹⁹¹

Conclusion

Increasingly, states have interpreted the obligation to provide effective assistance of counsel as the obligation to provide a “warm body repeating the state’s offer.”¹⁹² Despite this reality, the actual standard remains the same. In order to succeed on a Sixth Amendment claim, a defendant must show “actual prejudice,” unless his attorney was laboring under a conflict of interest, in which case the defendant need only show an “adverse effect.” A public defender’s excessive caseload often should be viewed as a conflict of interest worthy of this lower burden for the reasons stated in Part III above. The next step depends on whether judges and public defenders are ready to admit that these unethical conflicts exist.

If public defenders are ready to risk their financial and ethical standing, they should stand up and file motions to withdraw, like the courageous public defenders of the Miami PDO have done. Doing so would place each judge in an uncomfortable yet proper position, in which he would have two options: (i) grant the motion, and force the state to spend additional money, or (ii) deny the motion, and face the prospect of a later reversal under *Sullivan*, because he now “knows or reasonably should know” that the conflict exists. Exercising either option essentially would force each state legislature to do what is long overdue—finally provide adequate funding for indigent defense.

191. Margulies, *supra* note 168, at 688.

192. See *supra* note 157 and accompanying text.