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December 19, 2007

Hon. A. William Maupin
Chief Justice
Supreme Court of Nevada
201 South Carson Street
Carson City, Nevada 89701

Sent via Facsimile (775) 684-1523

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DEC 20 2007

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Re: Caseload and Performance Standards

Dear Chief Justice Maupin:

At the Supreme Court's hearing on the proposed caseload and performance standards for counsel, on December 14, 2007, members of the Court raised questions about the potential effect of the standards on the litigation of habeas corpus cases involving claims of ineffective assistance of counsel. In particular, members of the Court questioned whether a failure to meet the standards would result in a per se finding of the "deficient performance" prong of the test for ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668, 687 (1984). Under the current state of the law, there does not seem to be any basis for concluding that a violation of the standards by itself would have that effect in post-conviction federal habeas corpus litigation.

A. The Standard of Effective Assistance

The purpose of caseload and performance standards is to improve the general quality of representation, but that is not the purpose of the Sixth Amendment guarantee of effective assistance of counsel. The Supreme Court in Strickland, makes this distinction clear:

> "The purpose of the effective assistance guarantee of the Sixth Amendment is not to improve the quality of legal representation, although that is a goal of considerable importance to the legal system. The purpose is simply to ensure that criminal defendants receive a fair trial."

Strickland, 466 U.S. at 689.

As a result, while the Supreme Court has looked to the American Bar Association standards as "guides to determining what is reasonable" for counsel to do, see Rompilla v. Beard, 545 U.S. 374, 387

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(2005); Wiggins v. Smith, 539 U.S. 510, 524 (2003); Strickland, 466 U.S. at 688, it has never found that the violation of such a standard constitutes a per se showing of deficient performance:

> Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable, but they are only guides. No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.

Strickland, 466 at 688-689. In fact, it held to the contrary in the companion case to Strickland, United States v. Cronic, 466 U.S. 648 (1984). There, the Court of Appeals held that habeas relief should be granted on IAC grounds, based on inadequate time for investigation and preparation, counsel's inexperience, the complexity of possible defenses, and the inaccessibility of witnesses, based on "an inference that counsel was unable to discharge his duties." Id. at 625, 658. The Supreme Court reversed, holding that, unless the circumstances amounted to a complete denial of the assistance of counsel, the analysis had to focus on the actual conduct of the trial. The court held:

> The five factors listed in the Court of Appeals' opinion are relevant to an evaluation of a lawyer's effectiveness in a particular case, but neither separately nor in combination do they provide a basis for concluding that competent counsel was not able to provide this respondent with the guiding hand that the Constitution guarantees.

Id. at 663. The court accordingly remanded for further proceedings to determine if the defendant could "make out a claim of ineffective assistance only by pointing to specific errors made by trial counsel." Id. at 666 (footnote omitted); Strickland v. Washington, 466 U.S. at 693-696.

B. Caseload Standards

Following Cronic and Strickland, courts have been unanimous in rejecting claims of IAC based merely on allegations that defense counsel's caseload was too high to allow effective representation and have required the habeas petitioner to demonstrate some actual effect on the representation in the particular case. In Olivo v. Lafler, 2007 WL 1747154 *8 (E.D. Mich. June 18, 2007), the federal district court rejected the contention that

> counsel's performance was ineffective because he represented petitioner while he was underpaid, understaffed, and working with "an unbearable caseload due to systematic failures in funding in the Wayne County Circuit Court." Petitioner's claim that his defense counsel was overworked, understaffed, and underfunded is insufficient to establish

> constitutionally ineffective assistance of counsel, unless he can show that counsel's performance fell below some objective standard of reasonableness and actually prejudiced defendant's chances at trial. See Roller v. McKellar, 711 F.Supp. 272, 283-84 (D.S.C. 1989). Because petitioner has failed to make such a showing under Strickland, he is not entitled to habeas relief.

Accord, Bell v. State, 879 So.2d 423, 432 (Miss. 2004) ("absent specific instances of error, defendant's allegations that trial counsel was inexperienced, carried unduly heavy caseload and had severely limited resources, are insufficient to support a claim for ineffective assistance of counsel. Cabello v. State, 524 So.2d 313, 316 (Miss. 1988)"); Jividen v. State, 569 S.E.2d 589, 592 (Ga. App. 2002) (counsel's heavy caseload and limited time available to devote to case did not establish ineffective assistance, where counsel testified that he had time to prepare adequate defense and would not have done anything differently if he had had more time); State v. Robinson, 820 So.2d 571, 582 (La. App. 2002); Scott v. State, 942 P.2d 755, 759 (Okla. Crim. 1997); Dallas v. State, 711 So.2d 1101, 1111-1112 (Ala. Crim. 1997); Sublett v. State, 665 N.E.2d 621, 622-623 (Ind. App. 1996); see also Harlow v. State, 105 P.3d 1049, 1069 (Wyo. 2005) (inexperience).

A clear example of this rule is Wrinkles v. State, 749 N.E.2d 1179 (Ind. 2001). The Indiana Rules of Criminal Procedure impose specific caseload limits for counsel litigating capital cases. In Mr. Wrinkles' case, his two attorneys were not in compliance with the caseload standards during much of the capital proceedings, and at times the attorneys' caseloads were double the limits imposed by the rule. Id. at 1201-1202. On appeal, Mr. Wrinkles argued that counsel's performance was deficient, and that a conflict of interest existed, because of the violation of the caseload limits. The Indiana Supreme Court analyzed what counsel had actually done, and how much time they had actually spent on the case, and concluded "that counsel were not ineffective based solely on their non-compliance with" the limits imposed by the rule. Id. at 1203.

To the extent that an excessive caseload is argued as creating a conflict between counsel and a particular defendant, courts implicitly rely upon the rule that they "necessarily rely in large measure upon the good faith and good judgment of defense counsel," in drawing conflicts to the court's attention. Burger v. Kemp, 483 U.S. 776, 784 (1987), quoting Cuyler v. Sullivan, 446 U.S. 335, 347 (1980). Thus if counsel does not seek to withdraw, courts presume that there is no conflict. Webb v. Commonwealth, 528 S.E.2d 138, 344-346 (Va. App. 2000); see Nev. Rules Prof. Conduct, Rules 1.1 (competence), 1.16(a)(1) (declining or withdrawing from representation if representation will result in violation of rules).

A habeas petitioner thus is still required to demonstrate how excessive caseload issues actually affected his or her own case. In some cases, the caseload standards may be used to impeach the credibility of counsel, if counsel testifies that he or she was able to provide adequate representation in a particular case when counsel's caseload was so extreme that there would be virtually no time to pay serious attention to any individual case. But that showing could be made now, without the imposition of the caseload standards, if the facts supporting it are presented. Accordingly, there is no reason to

believe that the adoption of caseload standards will alter the litigation of claims of ineffective assistance of counsel under the Strickland standard.

Of course, the Supreme Court's decisions on the standard of effective assistance of counsel under the Sixth Amendment do not limit the power of state actors to attempt to improve the quality of representation by imposing stricter standards than those required by the federal constitution, or by using more rigid mechanisms - - such as evidentiary presumptions in state habeas corpus proceedings on claims of ineffective assistance, injunctive relief or imposition of administrative rules - - to enforce them. So, for instance, in State v. Smith, 681 P.2d 1374, 1382-1384 (Ariz. 1984), the Arizona Supreme Court rejected a claim of ineffective assistance of counsel in the particular habeas corpus case before it. Because of the excessive caseloads of defense attorneys in the county in which the case was tried, however, it held that in future habeas cases in that county, there would be a presumption that counsel was ineffective unless the caseloads were reduced. Accord State v. Peart, 621 So.2d 780, (La. 1993) (imposing rebuttable presumption of ineffective assistance based upon excessive caseloads and underfunding, in consolidated pretrial writ proceedings). The Florida Supreme Court, faced with an excessive appellate caseload in a public defender's office, held that a court had inherent power to appoint private counsel, when the public defender's office moved to withdraw because the excessive caseload created a conflict with the office's clients. Escambia County v. Behr, 384 So.2d 147, 150 (Fla. 1980). In In re Order on Prosecution of Criminal Appeals by Tenth Judicial Circuit Public Defender, 561 So.2d 1130, 1138-1139 (Fla. 1990), the court reaffirmed that a public defender's office should move to withdraw when excessive caseloads create a conflict with the client's interests, and the court should appoint private counsel. In order to deal with the "enormous backlog of appellate cases," the court imposed a "massive employment of the private bar on a 'one-shot' basis," id. at 1138 (footnote omitted), and held that the legislature should provide funds for private counsel. The court concluded that, if the legislature did not provide funds, the courts would entertain habeas corpus petitions for the release of prisoners whose briefs were delinquent. Id. at 1139.

While the measures taken in these cases may be available to this Court, the imposition of caseload standards now is an appropriate first step in addressing the problem of excessive caseloads, which cannot practicably be accomplished through the litigation of thousands of individual habeas corpus proceedings.

C. Performance Standards

As the Court pointed out during the hearing on December 14, 2007, the performance standards published by the American Bar Association are already in existence and have been relied upon by the Supreme Court as "guides to determining what is reasonable" since the decision in Strickland. Rompilla v. Beard, 545 U.S. at 387 (citing ABA Standards for Criminal Justice, Prosecution Function and Defense Function 4-4.1 (3d ed. 1993)); Wiggins v. Smith, 539 U.S. at 522; Strickland v. Washington, 466 U.S. at 688 (citing ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980)). Thus adoption of the proposed Nevada performance standards should not result in any substantive change with respect to what is demanded of reasonably effective counsel.

In the habeas context, a list of detailed performance standards may give a petitioner a clearer idea of what things counsel did or did not do, in order to allege that counsel acted unreasonably in failing to perform some task listed in the standards. But the failure of counsel to perform a rote set of tasks does not establish that counsel acted unreasonably. See Strickland v. Washington, 466 U.S. at 688-689. Cases citing the ABA guidelines do not automatically find IAC for an alleged violation of one of the standards: it is still open to counsel to show that, under the circumstances of the case, it was not unreasonable to omit some task on the list, or that there was a tactical or strategic reason for doing so. See, e.g., Schriro v. Landrigan, 127 S.Ct. 1933, 1941-1962 (2007) (defense counsel's failure to present mitigating evidence at penalty phase not IAC where defendant instructed counsel not to present mitigation); Bell v. Cone, 535 U.S. 685, 701-702 (2002) (waiver of final argument in penalty phase not ineffective, where waiver prevented more persuasive prosecuting attorney from giving final argument for state); LaGrand v. Stewart, 133 F.3d 1253, 1274 (9th Cir. 1998) (failure of defense counsel to personally interview prospective witnesses, and failure to call them because he believed their testimony would be cumulative, not IAC). cf., e.g., Harries v. Bell, 417 F.3d 631, 638 (6th Cir. 2005) (failure to investigate because counsel does not think it would help found ineffective as "abdication of advocacy").

D. Prejudice

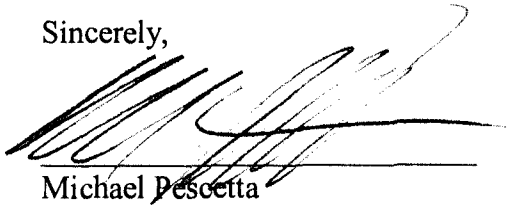
Under either the caseload or performance standards, even if a finding of deficient performance is made, it will still remain the habeas petitioner's burden to demonstrate that any failure to meet the standards was prejudicial, which is by no means automatic. See, e.g., Tanner v. McDaniel, 493 F.3d 1135, 1144 (9th Cir. 2007) (counsel ineffective for failing to discuss filing appeal with defendant, but potential claims frivolous so deficient performance harmless); Evans v. State, 946 S.2d 1, 12 (Fla. 2006) (no evidence failure to appoint second counsel prejudiced defendant); Torres v. State, 120 P.3d 1184, 1189 (Okla. Crim. 2005); Harlow v. State, 105 P.3d at 1070-1071 (no ineffective assistance in failure to raise meritless issues); Mitchell v. State, 971 P.2d 727, 733 (Idaho 1998). This aspect of the Strickland standard will be unaffected by the adoption of the standards.

E. Conclusion

This Court has the opportunity to address the serious systemic problems in the delivery of defense services by adopting the proposed performance and caseload standards. These standards are meant to have a systemic effect, and to help appointed counsel to obtain the time and resources to provide adequate representation in all cases in which they are appointed. See Riley v. State, 107 Nev. 220, 223, 808 P.2d 560, 562 (1991) (declining to impose sanctions for delay on individual public defender, where delay "is more likely the fault of the system.

The Public Defender should assign sufficient personnel to the appellate division to meet the briefing requirements of this court. And, if the Public Defender does not have an adequate number of attorneys it is the county's obligation to provide them.") This Court should be proud of taking the lead on this important issue. It should not be deterred by predictions of dire consequences in habeas corpus proceedings if the standards are enacted, because there is no legal basis for anticipating such effects.

Sincerely,



Michael Pescetta
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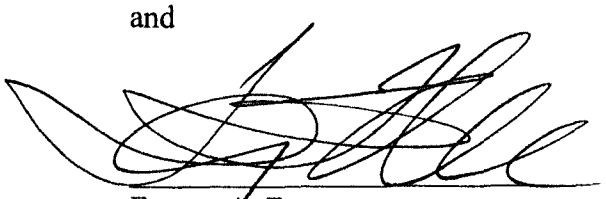

Franny A. Forsman
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cc: Hon. Mark Gibbons
Hon. James W. Hardesty
Hon. Ron D. Parraguirre
Hon. Michael L. Douglas
Hon. Michael A. Cherry
Hon. Nancy M. Saitta