No. 1032528

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

IN RE DETENTION OF M.E.,

PETITIONER KING COUNTY DEPARTMENT OF PUBLIC DEFENSE'S OPENING BRIEF

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I. INTRODUCTION

The right to assistance of counsel is a fundamental principle in our system of justice. To satisfy that right, the representation provided must be effective. And to be effective, the representation must be ethical. The formal appointment of an attorney who lacks the capacity to competently and diligently defend a client will not suffice.

The Washington State Bar Association (WSBA) and this Court have developed standards aimed at ensuring that public defense attorneys can give each client the time and effort necessary for effective representation. Two of these standards are critical to achieving that goal. The first involves maximum caseload limits. The second involves independence from judicial influence and control.

Petitioner King County Department of Public Defense (DPD) is charged with managing and overseeing public defense services in the superior and district courts for King County. DPD's

responsibilities include tracking the caseloads of staff attorneys, evaluating their work, and monitoring compliance with standards, policies, and contractual obligations. If the number of cases coming into the Department exceeds the overall capacity of its attorneys, DPD must inform the court that the Department is unable to take additional assignments until further notice.

Like other public defense agencies in this state (and, indeed, across the country), DPD has struggled to retain attorneys and replace those who depart. The Department engages in extensive recruitment efforts, seeking both to hire internally and to secure contracts with external "capacity" counsel, but the shortage of attorneys continues.

Among its clientele, DPD represents respondents in commitment proceedings brought under the Involuntary Treatment Act (ITA), chapter 71.05 RCW. The ITA court in King County is a busy one, with approximately 5,000 cases per year on average. In April 2024, DPD determined that the attorneys in its

ITA unit, both internal and external, had reached their monthly caseload capacities a week before the month ended. Accordingly, DPD informed the superior court that it could not take further case assignments until May 1.

With a week remaining in May, DPD once again found its ITA attorneys had reached their monthly caseload capacities. When DPD informed the superior court that further case assignments would be declined, a commissioner of the court ordered the Department to "promptly appoint counsel" for respondents in more than 40 cases.

Because this issue was certain to recur, the superior court ordered an evidentiary hearing regarding DPD's capacity to represent ITA respondents. DPD submitted several declarations and supporting documents, detailing its duties under applicable standards, its methods for monitoring attorneys and tracking caseloads, its capacity contracts, and its recruitment efforts. The court took briefing and heard argument on June 28, 2024.

A few hours before the hearing, DPD informed the court that it had again reached maximum capacity and would be unable to cover 14 pending ITA cases. M.E.'s case was one of them. Though the evidence regarding DPD's lack of capacity was undisputed, the court ordered DPD to assign an attorney to represent M.E.

DPD challenges the lawfulness of that order.

II. ASSIGNMENT OF ERROR AND ISSUES

A. Assignment of error.

The superior court erred by ordering DPD to assign an attorney to represent M.E.

B. Issues pertaining to assignment of error.

1. Did the superior court exceed its authority by interfering with DPD's independent power to manage and oversee public defense services? **Yes.**

2. Did the superior court violate GR 42 by overriding DPD's public defense management and oversight decisions? **Yes.**

III. STATEMENT OF THE CASE

A. DPD is responsible for managing and overseeing public defense services in King County.

The Washington legislature has determined "that effective legal representation must be provided for indigent persons . . . consistent with the constitutional requirements of fairness, equal protection, and due process in all cases where the right to counsel attaches." RCW 10.101.005. A person qualifies as "indigent"—and the right to counsel attaches—if they are "[i]nvoluntarily committed to a public mental health facility." RCW 10.101.010(3)(b); *see also, e.g.*, RCW 71.05.148(6)(d) ("respondent shall be represented by counsel"); RCW 71.05.230(6) (court must "appoint[] counsel to represent [detaind] person" before probable cause hearing); RCW 71.05.300(2) ("court shall immediately appoint an attorney to represent him or her").

To ensure that effective representation is provided in all cases, the legislature requires each county to "adopt standards for the delivery of public defense services," including standards addressing "duties and responsibilities of counsel, case load limits and types of cases," and "monitoring and evaluation of attorneys." RCW 10.101.030. "The legislature recommends that the standards governing indigent public defense promulgated by the Washington State Bar Association (WSBA) should serve as guidelines to local authorities in adopting their own standards." *Davison v. State*, 196 Wn.3d 285, 297 (2020) (citing RCW 10.101.030).

In 2013, the King County Council established DPD as an executive department "responsible for managing . . . the provision of public defense services" in the county's superior and district courts. King Cnty. Code § 2.60.020(A); *see also* King Cnty. Charter § 350.20.60 ("Additional duties may be prescribed by ordinance."). This includes defense services provided to

respondents in judicial proceedings brought under the Involuntary Treatment Act, chapter 71.05 RCW. *See* King Cnty. Code § 2.60.050(A) ("commitment proceedings"); RCW 10.101.020(1).

DPD must "assign counsel in a manner that avoids conflicts of interest." King Cnty. Code § 2.60.035(A). And it must render services "in an efficient manner that ensures effective representation." King Cnty. Code § 2.60.020(B)(2).

DPD is "directed by the county public defender." King Cnty. Code § 2.60.026(A); *see also* King Cnty. Charter § 350.20.61. In carrying out her duties, the county public defender is obligated to follow the WSBA State Standards for Indigent Defense Services (the "WSBA Standards"). King Cnty. Code § 2.60.026(A)(5). The county public defender is also obligated to ensure that the American Bar Association Ten Principles for a Public Defense Delivery System "guide the management of the department and

development of department standards for legal defense representation." King Cnty. Code § 2.60.026(A)(4).

B. DPD attorneys are limited to a maximum of 250 ITA cases annually on a full-time basis, and DPD must ensure an even distribution of those cases throughout the year.

1. The maximum annual ITA caseload is 250 cases.

a. The WSBA Standards

"The WSBA Standards detail the minimum requirements for attorneys representing individual clients and for state and local administrators," like the county public defender, "who 'manage and oversee' public defense services." *Standards for Indigent Defense Services* (Wash. State Bar Ass'n Mar. 8, 2024) (*WSBA Standards*), Introduction. These minimums are "necessary to ensure [that] legal representation for clients represented by a public defense attorney meets constitutional, statutory, and ethical requirements." *Id*.

Under the WSBA Standards, every "contract or other employment agreement or government budget" for public

defense services "shall specify the types of cases for which representation shall be provided and the maximum number" of cases per type. *Id*., Standard 3.A. The maximum number "assume[s] [that] an attorney's public defense work is . . . full-time (exclusively public defense)" and that the cases being handled are "of average complexity and effort" and "reasonably distributed throughout the year." *Id*., Standard 3.D.

For an attorney handling civil commitments, the maximum caseload is 250 cases per year. *Id*., Standard 3.K. A "case" is defined as "a new court filing or action that names a person who is eligible for appointment of a public defense attorney." *Id*., Definitions. For cases brought under chapter 71.05 RCW, this is the civil commitment petition. *Id*.

b. The Court Standards

In addition to the WSBA Standards, DPD and its attorneys are bound by the Court's Standards for Indigent Defense (the "Court Standards"), which are set forth in CrR 3.1, CrRLJ 3.1, JuCR

9.2, and MPR 2.1. Like the WSBA Standards, the Court Standards "address certain basic elements of public defense practice related to the effective assistance of counsel." MPR 2.1 Standards, Preamble.

Under the Court Standards, each public defense contract or other employment agreement "shall specify the types of cases for which representation shall be provided and the maximum number of cases which each attorney shall be expected to handle." *Id*., Standard 3.1. These limits "reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified." *Id*., Standard 3.3. "Caseload limits assume a reasonably even distribution of cases through the year." *Id*.

For DPD's ITA attorneys, the caseload limit is "250 Civil Commitment cases per attorney per year." *Id*., Standard 3.4. "A case is defined as the filing of a document with the court naming

a person as . . . respondent, to which an attorney is appointed in order to provide representation." *Id*., Standard 3.3.

The Court Standards "require attorneys to certify to the courts that they comply with caseload limits . . . ." *Davison*, 196 Wn.2d at 299. Each attorney must file this certification "on a quarterly basis in each court in which the attorney has been appointed as counsel." MPR 2.1 Standards, Certification of Compliance.

c. DPD's contractual obligations

In the labor agreement that applies to its line attorneys, DPD is obligated to adhere to both the WSBA Standards and the Court Standards, including the limitation in each of 250 ITA cases per attorney per year. CP 55-57, 65, 114-15, 142; *see also* MPR 2.1 Standards, Standard 3.1; *WSBA Standards*, Standard 3.K. "DPD recognizes" in the agreement "that caseloads must be limited to ensure King County public defenders are able to provide high quality representation to their clients." CP 115.

If DPD were to violate the applicable standards—for example, by assigning ITA cases to line attorneys that exceed the limit—the union representing the attorneys "would be required to take action on behalf of its attorney members, including at a minimum, commencement of the grievance procedures laid out in [the labor agreement]." CP 58. The union could also "initiate a separate cause of action against [DPD] for a violation of the [labor agreement] and for forcing attorneys to choose between accepting cases over the established caseload maximums (and violating their ethical obligations) or potentially ending their employment." CP 59, 65.

2. DPD monitors caseload capacities monthly.

As noted above, "[c]aseload limits require a reasonably even number of case appointments each month, based on the number of cases appointed in prior months." *WSBA Standards*, Standard 3.L; *see also* MPR 2.1 Standards, Standard 3.3.

To meet this requirement, DPD works to ensure that ITA attorneys "average no more than 20.8 cases per month" or "62.5 cases per quarter." CP 66. DPD determines the monthly capacity for each attorney "by summing the number of cases [that] attorney was assigned in the prior 11 months and subtracting that number from 250." *Id*. For example, an ITA attorney "who received 230 cases from June 2023 through April 2024 can be assigned 20 cases in May 2024." *Id*. At that point, the attorney will have been assigned the maximum of 250 ITA cases for the year June 1, 2023, to May 31, 2024. *Id*.[1]

[1] If an attorney transfers into DPD's ITA unit from a different practice area, "credits from that prior practice area are converted into ITA credits so that the attorney maintains a yearly rolling total consistent with the caseload limit of their current practice area." CP 66-67; *see also WSBA Standards*, Standard 3.E ("If a public defense attorney accepts appointment to cases from more than one case type, this standard should be applied proportionately to determine a maximum full caseload."); MPR 2.1 Standards, Standard 3.3 ("If a defender . . . is carrying a mixed caseload . . . these standards should be applied proportionately to determine a full caseload.").

If DPD assigns more than 20.8 ITA cases to a full-time attorney in one or more months, it must compensate in subsequent months by assigning fewer cases to that attorney. CP 67. Otherwise, the attorney would reach the annual maximum of 250 cases in fewer than 12 months and would "face the possibility of sitting idle for however long it takes for the prior over-assignment months to 'drop off'" such that the total count over the 11-month-lookback period is fewer than 250. *Id*.

C. DPD's ITA attorneys regularly work at maximum caseload capacity.

King County has a very busy ITA court. *See* CP 67, 72. From July 2023 to June 2024, DPD assigned attorneys to represent respondents in approximately 4,900 ITA cases. CP 67. The court reached a high of 5,600 ITA cases in 2022. CP 342.

These figures exceed DPD's capacity for representation. *See* CP 66-72. As of June 2024, DPD had 14 attorneys and two supervisors in its ITA practice area. CP 70. Because those

supervisors were each managing at least seven attorneys, their supervisory duties were considered "a full-time assignment" that "normally" precluded them from taking cases. CP 70, 142. DPD nevertheless assigned some cases to the supervisors, though it was contractually obligated to limit those assignments to "unusual overflow situations." *Id*. The supervision of one attorney is deemed to be "equivalent to 10% of the caseload limits"; thus, DPD could not assign more than 6.25 cases per month to supervisors when they were representing respondents. CP 142.

In June 2024, DPD had three contracts with private attorneys to handle a total of 55 ITA cases per month. CP 70. DPD began entering contracts like this while facing a capacity crisis in 2023. CP 69. These contracts, which are allowed by ordinance, comply with WSBA guidelines. *Id*. (citing King Cnty. Code § 2.60.035(B)).

As shown by the above data, DPD's capacity for ITA cases was substantially below the number of cases being filed in King County during 2024. Fourteen attorneys working on a full-time basis could cover a maximum of 3,500 ITA cases per year.[2] Two supervisors handling ITA cases on a 30-percent basis could ostensibly cover a maximum of 150 additional ITA cases per year,[3] though such case assignments are supposed to be "temporar[y]." CP 142. The private attorneys with whom DPD contracted could cover a maximum of 660 ITA cases per year.[4]

DPD's annual capacity in 2024 was thus no more than 4,310 ITA cases,[5] a figure substantially below the range of 4,900 to 5,600 seen in recent years. *See* 67, 342. This shortfall is

[2] The formula for this calculation is 14 * 250 = 3,500.

[3] The formula for this calculation is 250 * 0.3 * 2 = 150.

[4] The formula for this calculation is 55 * 12 = 660.

[5] The formula for this calculation is 3,500 + 150 + 660 = 4,310.

expected to "be ongoing and worsening," as King County "will continue to expand" ITA case filings "through the coming years with the [introduction of] additional ITA beds." CP 72.

D. DPD makes good-faith efforts to hire attorneys internally and secure additional contracts with external counsel, but those efforts have thus far proved unsuccessful.

DPD works hard to recruit qualified attorneys for internal hiring as well as external contracting. CP 47-49, 70-71. Despite these efforts, DPD has been unable to fill its vacancies or obtain contracts sufficient to cover all ITA cases. CP 48, 70, 312.

1. DPD's efforts to hire internally.

DPD continuously posts employment opportunities with organizations like the Washington Defender Association, the WSBA, the King County Bar Association, and Idealist, a social-impact job board. CP 70. DPD also advertises available positions on LinkedIn. *Id*.

DPD engages in various outreach efforts to boost its profile in the labor market. *Id*. For example, staff members speak at law

schools and attend job fairs in Washington and around the country. *Id*. DPD cultivates relationships with law professors, especially clinical professors, to encourage a pipeline of interested candidates. *Id*. And DPD undertakes advocacy work and high-profile litigation, which it believes helps to create visibility with people interested in racial and social justice. CP 71.

For the past two years, DPD has offered higher attorney salaries to make the organization more attractive to prospective employees. *Id*. DPD has done this by starting new attorneys at the second step of the salary scale and by offering lateral attorneys more credit for prior experience. *Id*. DPD has also worked with the unions to obtain a retention bonus for attorneys qualified to take Class A cases, which DPD hopes will help the Department retain as well as recruit employees. *Id*.

2. DPD's efforts to contract with outside counsel.

Since 2020, DPD has been soliciting and signing "capacity contracts" without private attorneys. CP 47. The purpose of

these contracts is to ensure that representation is provided "in cases where DPD determines it cannot assign an attorney from within a given Department division for reasons other than a conflict of interest."[6] CP 47-48. DPD "use[s] capacity counsel primarily in situations where a division [of DPD] lacks the operational capacity to accommodate the cases." CP 48. This includes ITA cases. CP 69.

DPD has solicited proposals for capacity contracts from qualified law firms, non-profit organizations, and solo practitioners. CP 48-49. DPD has also cold-called attorneys in surrounding counties and contacted former DPD employees to get them to engage in capacity coverage. *Id*. DPD struggles to find sufficient contractors for all practice areas, but "[t]he number of

[6] DPD has a separate "Conflict Counsel Panel" of private attorneys who may be willing to accept cases where a conflict of interest prevents DPD from engaging in representation. CP 47. But these attorneys do not sign "formal contracts for an agreed set volume of work." *Id*.

attorneys willing and able to provide representation in ITA cases is extremely limited." *Id*.

As of June 2024, DPD was able to maintain only three ITA capacity contracts. CP 48. Two of those contracts were for 20 cases each per month, and one was for 15 cases per month. *Id*.

3. DPD has been unable to fill the void.

Despite its efforts, DPD has been unable to reach the internal and external staffing levels necessary to cover all the ITA cases filed in King County. CP 49, 70.

DPD is not alone. CP 49, 53, 312. As stated in a press release from Washington Courts last summer, public defense providers throughout the state are "facing a crisis of attrition and an inability to recruit staff brought about by excessive workloads and poor compensation." Press Release, Wash. Courts, Proposed Changes to Wash. Supreme Court Pub. Defense Standards Open for Pub. Comment by Oct. 31 (July 17, 2024) (quoting Washington State Bar Association and Counsel on Public

Defense).[7] Indeed, "more than 87 percent of Washington counties [have] reported facing challenges in recruiting and retaining a sufficient pool of defense attorneys." CP 71.

E. As it was obligated to do, DPD began declining assignments when its ITA attorneys reached caseload capacity.

The purpose of caseload limits is to ensure that public defense attorneys have the ability "to give each client the time and effort necessary to ensure effective representation." *WSBA Standards*, Standard 3.B; MPR 2.1 Standards, Standard 3.2. Accordingly, when DPD's line attorneys have reached their caseload capacities and contract attorneys are unable to handle the overflow, DPD "must notify courts and appointing authorities that [the Department] is unavailable to accept additional assignments and must decline to accept additional cases." *WSBA*

[7] Available at https://www.courts.wa.gov/newsinfo/?fa=newsinfo.pressdetail&newsid=50456.

Standards, Standard 3.B; *see also* MPR 2.1 Standards, Standard 3.2 ("Neither defender organizations, county offices, contract attorneys, nor assigned counsel should accept workloads that, by reason of their excessive size, interfere with the rendering of quality representation."); *Ten Principles of a Public Defense Delivery System*, Principle 3 (Am. Bar Ass'n 2023) (*ABA Ten Principles*) ("If workloads become excessive, Public Defense Providers are obligated to take steps necessary to address [the issue], which can include notifying the court or other appointing authority that the Provider is unavailable to accept additional appointments . . . .").

In April 2024, DPD determined that it had "reached capacity" with respect to ITA cases. CP 323. As a result, DPD informed the superior court that the Department would be ceasing case assignments for the remainder of the month:

> We can accept 2 more cases internally, and, pursuant to contracts entered with private attorneys, we will be able to assign three cases

> via that route on Friday, Monday, and Tuesday. DPD will assign those cases in the order they appear on the whiteboard. DPD will otherwise not assign attorneys to cases until May 1st.

Id. In support of this decision, DPD cited Standards 3.3 and 3.4 of the Court Standards, King County Code Section 2.60,026(A)(5), the WSBA Standards, "and DPD's labor contracts." CP 322-23.

DPD agreed to keep the superior court informed regarding the Department's capacity moving forward. CP 322. On May 16, 2024, for example, DPD provided a status update for the month: "We believe we have the capacity to take approximately 115 more cases in DPD, and to assign approximately 3 cases per day to assigned counsel." CP 322.

The following week, DPD wrote the court to state that its ITA capacity was down to "approximately 30 more cases." CP 321. DPD supported this assertion with a declaration from the Department's Deputy Director, who outlined DPD's process for determining capacity. *Id*.; *see also* CP 63. The email concluded:

"[We] do not believe [that] we will have enough capacity to assign all respondents counsel this month. [We] will email the court when [we] have more precise information regarding when DPD will run out of capacity." CP 321.

Two days later, DPD sent the following email to the superior court:

> DPD assigned 12 cases internally on Thursday and will assign 10 cases today. Next week, DPD will reach capacity under Standards 3.3 and 3.4 of CrR 3.1, and, without an order of the court directing DPD to make assignments in excess of court rule maximum, will not be able to assign all the cases referred to us on Tuesday 5/28—Friday 5/31.

CP 320-21 (emphasis in original).

On May 28, 2024, "DPD was able to assign counsel to only 11 more ITA respondents." CP 72. DPD informed the court that the Department was unable to represent the remaining respondents because all ITA attorneys "had reached their caseload limit." *Id*.; *see also* CP 544.

F. The superior court ordered DPD to appoint counsel to dozens of respondents even though DPD lacked capacity.

On May 29, 2024, a commissioner of the superior court entered 37 orders directing DPD to "promptly appoint counsel for respondent in the above captioned case, without delay." CP 163-277. The following day, the commissioner entered six more of these orders. CP 278-95.

All 43 orders were identical save for the case number, the name of the respondent, and the location of the respondent's custody. *See generally* CP 163-295. Each began with four findings. *See, e.g.,* CP 166-67. The superior court first found that DPD "is charged with providing attorneys to those individuals involuntarily detained under the Involuntary Treatment Act (ITA) in order to protect their state and federal constitutional rights." CP 166. In the next two findings, the Court summarized DPD's efforts in April and May 2024 to communicate that the Department "had reached maximum caseload limits for the

attorneys who are currently assigned to represent ITA patients." *Id*. Finally, the court found that "DPD has not assigned an attorney to represent the respondent herein." CP 167.

Each order also contained the following six conclusions of law:

1. It is the King County Prosecuting Attorney's Office (KCPAO) duty to represent individuals or agencies petitioning for involuntary treatment or detention.

2. It is the Court's statutory and constitutional obligation to ensure that counsel is provided to ITA respondents.

3. It is the DPD's obligation to provide counsel to ITA patients as provided by contract with the King County Executive and as ordered by the Court.

4. It is the Court's obligation to ensure that ITA respondents have access to court hearings in a timely manner, as is required by the ITA and our state and federal constitution.

5. It is also the Court's obligation to ensure that ITA respondents do not languish in hospitals or flood emergency rooms as a result of a failure to have their cases litigated.

6. The Court has considered and balanced the needs of DPD attorneys to handle manageable caseloads against the constitutional rights of those involuntarily detained pursuant to RCW 71.05 and/or RCW 71.34.

Id.

In every order, the commissioner of the superior court set "a tentative Show Cause Hearing" for June 14, 2024. CP 490; *see also generally* CP 163-295. The hearing was contingent on DPD being "unwilling or unable to comply" with the court's instruction to appoint counsel. CP 168.

On May 31, 2024, the Director of DPD filed with this Court a petition against the superior court commissioner, seeking a writ of review or, in the alternative, prohibition. *See* CP 4, 490.[8] Shortly thereafter, the judge overseeing the ITA court ordered DPD to appear at a show-cause hearing on June 14, 2024. CP 490. DPD amended its petition to this Court to substitute the judge in

[8] The petition was assigned Washington Supreme Court Case No. 103134-3. DPD eventually withdrew it.

place of the commissioner. *Id*. DPD then moved to continue the show-cause hearing. *Id*.

The superior court struck the June 14 show-cause hearing and scheduled an evidentiary hearing for June 28, 2024. CP 491. In the order, the court wrote that it was obligated "to ensure that counsel is provided to ITA respondents . . . that ITA respondents have access to court hearings in a timely manner . . . [and] that ITA respondents do not languish in hospitals or flood emergency rooms as a result of a failure to have their cases litigated." CP 490. The court also stated that it was obligated "to create a full and accurate record for appellate purposes and to document the factors the Court considered in arriving at its decision" in each of the 43 orders of May 29 and 30, 2024. *Id*.

"To fulfill the above obligations," the court required DPD to produce "documented evidence relating to efforts by . . . DPD to ensure that ITA respondents have representation." CP 491. The court wrote that "[s]uch evidence shall include, at a

minimum" labor agreements involving DPD personnel; information on DPD's efforts to hire internally; documents showing "the mechanism by which the Executive has designated DPD as the entity responsible for securing agreements with non-DPD attorneys to perform ITA work"; information relating to efforts to secure such agreements; the standards by which DPD determines caseloads; and "[i]nformation showing how the time and effort required for a particular ITA case are measured." *Id*.

On June 14, 2024, DPD complied with the superior court's order, submitting three declarations that outlined DPD's jurisdiction, labor relations, caseload policies and practices, management of ITA attorneys, and efforts to hire internally as well as contract with private counsel for the representation of ITA respondents. CP 47-300. DPD also filed a brief in which it argued that the court "lacks the authority to order DPD to appoint attorneys to represent respondents when doing so will

result in those attorneys exceeding the caseload limits . . . .” CP 37; *see also* CP 47-300.

G. The superior court continued ordering DPD to represent ITA respondents despite the Department’s lack of capacity, and DPD sought discretionary review.

On June 24, 2024, DPD once again informed the superior court that the Department was facing capacity issues with respect to ITA cases. CP 320. Four days later, DPD listed 14 ITA cases by case number and wrote, “DPD will not be assigning counsel” to these cases “absent a court order.” CP 317. M.E. was the respondent in one of those cases. *Id*.; *see also* CP 1, 4.

Later that day, the superior court held its evidentiary hearing on DPD’s capacity to represent ITA respondents. *See* CP 397-447. After the hearing, the court entered an Order Requiring DPD to Appoint Counsel in M.E.’s case. CP 1-3. The court’s order referenced communications from April, May, and June regarding DPD’s lack of capacity and set forth the same conclusions of law that were included in each of the 43 May orders. *Id*. DPD

complied with the order and assigned an attorney to represent M.E. CP 5.

Eleven days later, the superior court entered an Amended Order Requiring DPD to Appoint Counsel in M.E.'s case, which is the order before this Court on review. CP 4-9, 12-21. In the amended order, the superior court stated that it had requested an evidentiary hearing, in part, "because DPD had informed the [c]ourt that [the Department's lack of capacity for ITA cases] would be an ongoing issue." CP 4; *see also* CP 330. The court also stated that "[t]he briefing submitted in response to the June 7 Order for Supplemental Briefing and Setting of Evidentiary Hearing and the facts and arguments presented at the June 28 hearing are as relevant to the initial group of 43 cases as they are to [M.E.'s] case." CP 5. Accordingly, the court incorporated by reference the briefing, declarations, and arguments. CP 4.

In its conclusions, the court acknowledged that the "Executive Branch" of King County "elected to have DPD provide

counsel to ITA respondents as required by the Revised Code of Washington (RCW), the King County Code (KCC), the King County Charter, and the Washington State Constitution." CP 6. The court also acknowledged that the Executive "understand[s] Court Rules and County Ordinance prohibit [the Executive's] involvement in DPD operations except for budgetary issues." *Id*.; *see also ABA Ten Principles*, Principle 1 ("Public Defense Providers and their lawyers should be independent of political influence");[9] *American Bar Association Eight Guidelines of Public Defense Related to Excessive Workloads*, Guideline 7 cmt. (Am. Bar Ass'n 2009) (*ABA Eight Guidelines*) ("defense services should be independent of the . . . executive branches of government");[10] King Cnty. Code

[9] In the Court Standards, these principles are cited as one of several "Related Standards." *See* MPR 2.1 Standards, Standard 3.

[10] These guidelines are also cited in the Court Standards as one of several "Related Standards." *See* MPR 2.1 Standards, Standard 3.

§ 350.20.60 ("Elected officials shall not interfere with the exercise of the[] duties" of DPD.).

The superior court then turned to DPD's evidence and arguments regarding ITA caseloads, writing:

> Through emails, declarations and filings, the DPD indicated they were at capacity and had reached the case load standard as indicated by the Washington Supreme Court and Washington State Bar Association. They argue that these standards are mandatory and that they cannot exceed them. They have also indicated that there are shortages of attorneys in their office and that they are unable to fill these positions despite intense and frequent recruitment. The DPD has also indicated that there are no budgetary reasons why they do not have attorneys, but rather, they simply cannot find attorneys to fill these positions. As a result, the attorneys DPD assigned to their ITA unit were at capacity per the case standards as of June 28, 2024 [the day that the court ordered DPD to represent M.E.].

CP 6.

As with the initial 43 orders, the superior court stated that it has an obligation "to ensure that ITA respondents have access

to counsel," that "all rights of ITA respondents are protected," and that "timely court hearings [occur] so the merits of the litigation may be heard." *Id*. The court then wrote that it "has inherent power to preserve the administration of justice," a "judicial function [that] extends beyond the determination of questions in controversy and includes functions necessary or incidental to the adjudicative role." CP 6-7 (quoting *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232, 242 (1976)).

Finally, the superior court recognized that "[i]t is solely the DPD's responsibility to manage and allocate attorney resources and determine case assignments." CP 7. Nevertheless, the court held that DPD must "fulfill its statutory and constitutional obligations by providing an attorney to respondent." *Id*. "Who that attorney is and where they come from and what caseloads they carry," the court wrote, "is a decision for . . . DPD." CP 7-8.

DPD moved for discretionary review under RAP 2.3(b)(2) and RAP 2.3(b)(4). DPD simultaneously filed a statement of

grounds for direct review under RAP 4.2(a)(4). On November 6, 2024, the Court granted DPD's motion and retained the case for hearing and decision. The Court consolidated the matter with *In re the Detention of R.S.*, a case that involves a virtually identical assignment order and that was accepted for direct review based on a motion filed by the King County Executive.

IV. ARGUMENT

A. The standard of review is *de novo*.

DPD maintains the superior court exceeded its authority when it ordered DPD to assign an attorney to represent M.E. "Whether a court has exceeded its authority is a question of law reviewed de novo." *State v. Buck*, 2 Wn.3d 806, 812 (2024); *see also Matter of Dependency of A.M.-S.*, 196 Wn.2d 439, 448 (2020) ("The scope of a court's inherent authority is a question of law reviewed de novo.").

DPD also maintains the superior court violated GR 42. "This [C]ourt interprets court rules the same way it interprets statutes,

using the tools of statutory construction." *State v. Hawkins*, 181 Wn.2d 170, 183 (2014). Thus, the "application" of a court rule "to a specific set of facts is a question of law reviewed de novo." *Id*.

B. The superior court exceeded its authority by interfering with DPD's independent power to manage and oversee public defense services.

King County has charged DPD with responsibility for managing public defense services in superior and district courts. King Cnty. Code § 2.60.020(A). In carrying out its duties, DPD must comply with the WSBA Standards. King Cnty. Code § 2.60.026(A)(5). To provide public defense attorneys with "the time and effort necessary to ensure effective representation," the WSBA has established an annual maximum of 250 civil commitment cases per year on a full-time basis. *Id.*, Standard 3. These cases must be distributed in a manner that provides "a reasonably even number of case appointments each month, based on the number of cases appointed in prior months." *Id*.

The superior court correctly recognized "DPD's responsibility to manage and allocate attorney resources and determine case assignments." CP 7. And the court was aware that DPD's ITA attorneys were all "at or above the caseload limits" set by the WSBA as of June 28, 2024. CP 5-6. Nevertheless, the court ordered DPD to represent M.E. CP 1-9.

The superior court's order was in error. The court exceeded its authority by interfering with DPD's public defense management and oversight powers and overriding DPD's caseload capacity determinations. This conclusion is supported by applicable standards and the decisions of courts in Washington and other states.

1. Applicable standards give DPD the independence to monitor caseloads and decline appointments when attorneys are at capacity.

The WSBA Standards provide that "[j]udges and judicial staff shall not manage [or] oversee public defense offices"; rather, this should be done by "[a]ttorneys with public defense

experience" who are "insulated from judicial and political influence." *WSBA Standards*, Standard 19. The terms "manage" and "oversee" include "monitoring attorney caseload limits" and "monitoring compliance with contracts, policies, procedures, and standards." *Id*.

"If a public defense agency or nonprofit's workload exceeds the Director's capacity to provide counsel for newly assigned cases, the Director must notify courts and appointing authorities that the provider is unavailable to accept additional assignments and must decline to accept additional cases." *WSBA Standards*, Standard 3.B. This determination "should be accorded substantial deference because Providers are in the best position to assess the workloads of their lawyers." *ABA Eight Guidelines*, Guideline 7 cmt.[11] "While it is appropriate for judges to review

[11] The WSBA Standards explicitly cite to the ABA Eight Guidelines of Public Defense Related to Excessive Workloads. *See WSBA Standards*, Standard 3.C n.9 & App. D. As noted above, these

motions asking that assignments be stopped," they "should not undertake to micro-manage the operations of defense programs." *Id*. To the contrary, "the judiciary needs to ensure that Providers and their lawyers are not forced to accept unreasonable numbers of cases." *Id*.

DPD regularly monitors its ITA attorneys and in April, May, and June of last year, DPD determined that all of those attorneys had reached their monthly caseload capacities early. CP 66-67, 160, 316-24, 544. In each instance, DPD appropriately notified the court that the Department could no longer take assignments for the remainder of the month. CP 4-6, 160, 316-24, 544. The court requested that DPD back up these determinations, and DPD provided ample evidence. CP 47-160. That evidence was never disputed. *See* CP 6.

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guidelines are also cited in the Court Standards. *See* note 10, *supra*.

By ordering DPD to assign counsel to M.E. and other ITA respondents when the Department's attorneys were at capacity, the court usurped DPD's management and oversight functions. This action was beyond the court's authority.

2. Washington's appellate courts have held that judges should not force public defense attorneys to work beyond their caseload limits.

Two appellate decisions from this state demonstrate that the judiciary oversteps when it forces public defense attorneys to exceed their capacity. In *State v. Graham*, a public defense attorney moved for an extension of time to file the opening brief in an appeal from a first-degree murder conviction. 194 Wn.2d 965, 967 (2019). The attorney "explain[ed] that his current workload had prevented him from starting on [the] appeal, which had an extensive record, including 1,300 pages of transcripts." *Id*. The clerk of the Court of Appeals granted the extension but warned "that failure to file the brief by [the new deadline] would result in the imposition of a $200 sanction." *Id*.

When the deadline arrived, the attorney "filed a second request for an extension of time." *Id*. In support of this request, the attorney asserted, among other things,

> that he had worked on the brief as quickly as he could within his constitutional obligations and the Standards for Indigent Defense. He noted that the standards restricted the number of briefs he could write to three a month when the average transcript length is 350 pages, and he believed it would be impossible to comply with these standards and file [the opening] brief within the 63 days he had had since his office received the complete set of transcripts.

Id. at 967-68.

The clerk of the Court of Appeals granted the second extension but also sanctioned the attorney $200 for not filing the opening brief by the initial extension deadline. *Id*. at 968. The attorney moved to modify the sanction ruling, but the motion was denied. *Id*.

This Court reversed, holding that the Court of Appeals "abused its discretion by sanctioning [the attorney] when he

requested an extension of time in order to fulfill his duty of effective representation." *Id*. at 970-71.[12] In reaching its decision, the Court noted that "[r]ecent cases have highlighted the constitutional importance of maintaining proper caseloads in indigent defense cases." *Id*. at 970 (citing cases). The Court also found that the attorney "was prompt in communicating the constraints placed on him by his current caseload and explaining why another extension was necessary." *Id*. Finally, the record showed no "malfeasance or lack of diligence" on the attorney's part; rather, it "reveal[ed] [his] primary concern with fulfilling his duty of effective representation." *Id*.

The Court concluded that under these circumstances, the imposition of a sanction "was contrary to the policies promoting

[12] Unlike here, where the superior court has no authority to override the management decision of DPD, the Court of Appeals is authorized to sanction counsel for late filings. *See* RAP 10.2(i); RAP 18.9(a). Accordingly, the appropriate standard of review in *Graham* was abuse of discretion.

effective representation of indigent criminal defendants on appeal." *Id*. Indeed, had the sanction been allowed to stand, the attorney would have been placed in the unfair position of either violating the caseload standards that applied to him or being punished for complying with those standards. The lower court erred by forcing this dilemma on the public defender. *See id*.

A similar situation was presented in *City of Mount Vernon v. Weston*, 68 Wn. App. 411 (1992). There three public defenders had represented indigent defendants at trial and during RALJ appeals but moved to withdraw after the defendants filed notices for discretionary review to the Court of Appeals. *Weston*, 68 Wn. App. at 413-14. The basis given was that the attorneys "did not have the time, expertise, and resources to provide representation past the RALJ stage." *Id*. at 414. The superior court denied the motions on the ground "that the local public defender[s] would be able to undertake further appellate

representation at some overall savings to the taxpayers of this state." *Id*.

The Court of Appeals reversed, finding the lower court had abused its discretion because "the undisputed evidence in the record fails to support the . . . stated reasons for denying the motion[s] to withdraw." *Id*.[13] In particular, "the public defenders here were operating with caseload levels in excess of those endorsed by the ABA, by the Washington State Bar Association, and by the Skagit County Code." *Id*. at 415. As such, "the [s]uperior [c]ourt's assumption that the public defenders had the time to undertake further representation" was an "untenable" basis for denying withdrawal. *Id*. at 416.

[13] Again, unlike here, the superior court was authorized by an appellate rule to "determine questions relating to the appointment and withdrawal of counsel for an indigent party on review." *Weston*, 68 Wn. App. at 414 (citation omitted). Thus, the standard of review was abuse of discretion. *See id*.

As these cases demonstrate, the purpose of setting a *maximum* caseload is to ensure that the public defender is able "to give each client the time and effort necessary to ensure effective representation." *WSBA Standards*, Standard 3.B. Once a public defender has reached the maximum, a court should no longer assign cases to the attorney until she once again has capacity.

3. The highest courts in other states have held that judges lack authority to require public defense providers to take cases beyond their capacity.

Three state supreme courts have addressed the situation presented in this case, and their decisions are instructive. In *Carrasquillo v. Hampden Cnty. Dist. Courts*, the Massachusetts Supreme Judicial Court took review of a lower court order that required the Springfield public defender division (PDD) of the Committee for Public Counsel Services (CPCS) "to provide counsel to Courtroom I in the Springfield District Court every day who shall accept appointments in all cases as ordered by the

Court . . . .” 142 N.E.3d 28, 34 (Mass. 2020). Before the lower court issued this order, “the attorney in charge of the Springfield office and CPCS’s deputy chief counsel determined . . . that the staff attorneys in the Springfield PDD office had exceeded their caseload capacity” and thus “could not provide effective assistance to any additional clients.” *Id*. at 35. “Accordingly . . . the attorney in charge informed the First Justice of the Springfield District Court that CPCS staff attorneys in the Springfield office could not handle any more duty days in that court.” *Id*.

The Massachusetts Supreme Judicial Court held that by ordering the attorneys to continue taking cases, the lower court “overstepped the bounds of [its] inherent powers”:

> The June 12 order and subsequent appointments of CPCS staff attorneys improperly infringed upon CPCS’s statutory authority to control assignments and to limit caseloads for its staff attorneys . . . because the order and the appointments overrode CPCS’s determination that the staff attorneys in its

> Springfield office had already reached their caseload capacity and could not accept any more cases, without any contrary findings by the [c]ourt that put in doubt the validity of that determination.

Id. at 35, 46.

Like DPD, CPCS "is responsible for planning, overseeing, and coordinating the delivery of criminal and certain noncriminal legal services . . . on behalf of indigent criminal defendants and other litigants who are entitled to counsel," including respondents in "mental health proceedings." *Id*. at 38. The statute that charges CPCS with these duties "requires CPCS to establish standards for these legal services, including caseload limitations, and to monitor compliance with these standards." *Id*. CPCS must "monitor and evaluate compliance with the standards . . . to [e]nsure competent representation of defendants." *Id*. at 46 (internal marks and citation omitted).

Because "CPCS has experience and expertise in managing the caseloads of its attorneys," the Supreme Judicial Court held

that CPCS's "determinations whether individual staff attorneys have exceeded those limitations are entitled to appropriate deference when supported by substantial evidence." *Id*. at 47 (punctuation altered). "The First Justice did not make any findings that put in doubt the validity of that determination." *Id*. Thus, by ordering the Springfield PDD to accept cases beyond the capacity of its attorneys, the lower court "impermissibly overrode . . . CPCS's statutory authority and obligation to control caseloads for its staff attorneys." *Id*.

A similar conclusion was reached in the case of *Lozano v. Circuit Court of Sixth Judicial Dist.*, 460 P.3d 721 (Wyo. 2020). There the state public defender had "notified the Circuit Court of the Sixth Judicial District that until further notice, the public defender was not available to take appointments to represent misdemeanor defendants due to an excessive caseload and shortage of attorneys in its Campbell County office." *Lozano*, 460 P.3d at 724. "[T]he circuit court entered orders appointing [the

public defender], or her representative, to represent misdemeanor defendants in two cases. When the local public defender's office declined the appointments, the court held [the public defender] in contempt." *Id*.

The "dispositive issue" on appeal was whether "the circuit court err[ed] in ruling that the public defender must accept all appointments to serve as counsel for indigent defendants unless and until the appointing court rules otherwise." *Id*. The trial court had based its decision on language in Wyoming's Public Defender Act providing that "[t]he public defender shall represent as counsel any needy person," which the trial court interpreted as "requir[ing] the public defender to accept all court appointments." *Id*. at 728 (quoting Wyo. Stat. Ann. § 7-6-104(a)). The Supreme Court of Wyoming found this interpretation "flawed," concluding that the section in question merely "describes an indigent defendant's right to representation." *Id*. at 729. This right, the Court added, "does not establish a [trial]

court's appointment authority or mandate that the public defender accept all appointments." *Id*. at 730.

As for the public defender's availability, the Supreme Court concluded that "[t]he public defender is in the best position to know its resources, including its attorneys, the skills and experience of its attorneys, and the weight and complexity of each office's caseload." *Id*. at 734. Furthermore, "the public defender's policies on caseloads and excessive caseloads" were "a reasoned implementation of the principles that have been carefully developed by the ABA on a national level." *Id*. at 725-26 (citation omitted). Under these circumstances, "the circuit court's order mandating that the public defender accept the two misdemeanor appointments was not lawful because it disregarded the public defender's determination that no public defender was available." *Id*. at 738.

Finally, in *State ex rel. Missouri Pub. Defender Comm'n v. Waters*, a public defender's office "decline[d] additional

appointments" after certifying it had "exceed[ed] its caseload capacity" and thus had "limited availability." 370 S.W.3d 592, 597, 601 (Mo. 2012). The trial court "held an evidentiary hearing at which the public defender presented evidence it had exceeded its caseload capacity," and this evidence was unquestioned. *Id*. at 601. The trial court nevertheless ordered the office to represent an indigent defendant, concluding that it "'had no choice' . . . because to do otherwise would have violated the defendant's Sixth Amendment right to counsel, as the court could identify no other realistic mechanism by which to provide other counsel." *Id*. at 597, 601.

On review, the Supreme Court of Missouri held that "the trial court exceeded its authority by appointing the public defender's office to represent a defendant in contravention of [caseload limits]." *Id*. at 612. The Court reasoned that caseload limits ensure "each district office can be assigned without compromising effective representation," thus "protect[ing] the

constitutional and statutory rights of the accused." *Id*. at 599. The Court also held that the trial judge "erred" in concluding that there were "no realistic alternative mechanisms for handling the issue of excessive appointments." *Id*. at 598. The Court noted that trial courts can, among other things, "'triage' cases on their dockets so that those alleging the most serious offenses, those in which defendants are unable to seek or obtain bail, and those that for other reasons need to be given priority" are assigned first, "even if it means that other categories of cases are continued or delayed . . . ." *Id*. at 598. Ultimately, the Supreme Court added, "it is incumbent on judges, prosecutors and public defenders to work cooperatively to develop solutions" to avoid a public defender having limited availability because of excessive caseloads. *Id*. at 612.

As these authorities demonstrate, public defense providers are empowered to stop accepting assignments once their attorneys are at or above capacity, and it is beyond the authority

of trial courts to require the providers to take more cases under those circumstances.

C. The superior court violated GR 42 by overriding DPD's public defense management and oversight decisions.

On January 1, 2023, this Court enacted General Rule 42, which applies to superior courts and courts of limited jurisdiction. GR 42(b). The purpose of GR 42 "is to safeguard the independence of public defense services from judicial influence or control." GR 42(a); *see also* 2 Elizabeth A. Turner, *Wash. Prac., Rules Practice GR 42* (9th ed. June 2024 Update) (GR 42 "is intended to bring Washington State into alignment with the ABA Ten Principles of a Public Defense Delivery System") (quoting drafters' comment).

Under GR 42, "[j]udges and judicial staff . . . shall neither manage nor oversee public defense services . . . ." GR 42(d)(1). This includes a prohibition on judges managing or overseeing a public defense agency's "attorney caseload limits" and

"compliance with contracts, policies, procedures and standards." GR 42(d)(2).

Regarding the assignment of public defense attorneys in individual cases, "the role of judges and their staff" is limited to

> (a) determin[ing] whether a party is eligible for appointment of counsel by making a finding of indigency or other finding that a party is entitled to counsel; or (b) refer[ring] the party for an indigency determination; and (c) refer[ring] the party to a public defense agency or a public defense administrator to designate a qualified attorney.

GR 42(e)(1). If no qualified attorney is available, a judge "shall appoint an attorney who meets the qualifications in the Supreme Court Standards for Indigent Defense." GR 42(e)(3).

As explained in detail above, DPD is responsible for "[p]roviding legal defense services in an efficient manner" that not only "ensures effective representation" of clients but also ensures compliance with the WSBA Standards and with the labor agreement that governs DPD's employment of line attorneys.

King Cnty. Code § 2.60.020(B)(2); *see also* King Cnty. Code § 2.60.026(A)(5); CP 53-59, 95-134. To achieve these objectives, DPD must closely monitor its attorneys and take the steps necessary to control their caseloads. *See* CP 63-69. This includes declining additional case assignments when attorneys are at capacity. *See WSBA Standards*, Standard 3.B; MPR 2.1 Standards, Standard 3.2; *ABA Ten Principles*, Principle 3.

By ordering DPD to assign an attorney to represent M.E., the superior court usurped DPD's management and oversight functions. *See* CP 4-9. Though it acknowledged that DPD is "solely" responsible for managing and allocating attorney resources and determining case assignments, the court substituted its own conclusions in place of DPD's reasoned judgments regarding compliance with contracts, policies, and standards. *See, e.g.*, CP 7. In doing so, the court invalidated DPD's independence in violation of GR 42.

D. Requiring public defenders to exceed caseload limits raises significant ethical and constitutional concerns.

"The right to effective counsel . . . [is] fundamental to, and implicit in, any meaningful modern concept of ordered liberty." *State v. A.N.J.*, 168 Wn.2d 91, 96 (2010); *see also Matter of Garcia-Mendoza*, 196 Wn.2d 836, 840 (2021) ("The right to effective assistance of counsel is a foundational part of the compact between each of us and our state."). "Compliance with the rules of professional conduct is a basic component of effective assistance." *Office of Pub. Advocacy v. Superior Court, First Judicial Dist.*, ___ P.3d ___, 2025 WL 498790, at *10 (Alaska Feb. 14, 2025) (unpublished); *see also WSBA Standards*, Standard 2 ("Representation shall be prompt and delivered in a professional, skilled manner consistent with minimum standards set forth by . . . the Washington Rules of Professional Conduct.").

Several authorities have recognized that various "ethical and constitutional pitfalls" arise when public defense attorneys

are ordered to take assignments beyond their maximum caseloads. *Carrasquillo*, 142 N.E.3d at 48; *see also, e.g.*, *Lozano*, 460 P.3d at 724; *Waters*, 370 S.W.3d at 605-09; ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006); Wash. State Bar Ass'n Advisory Op. 1336 (1990). Indeed, it has been said that "public defenders are risking their own professional lives when appointed to an excessive number of cases." *Waters*, 370 S.W.3d at 608 (citation omitted). It has also been said that "a systemic deprivation of the right to [effective] assistance of counsel" is "the natural, foreseeable, and expected result" of excessive caseloads. *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1124, 1133 (W.D. Wash. 2013).

1. <u>The impact of excessive caseloads on professional conduct obligations</u>.

Excessive caseloads risk impeding the ability of public defense attorneys to satisfy at least three of their obligations under the Rules of Professional Conduct. First, a lawyer "shall

provide competent representation to a client," which requires the "thoroughness and preparation reasonably necessary for the representation." RPC 1.1. Second, "[a] lawyer shall act with reasonable diligence and promptness in representing a client." RPC 1.3. And third, a lawyer "shall not represent a client if the representation involves a concurrent conflict of interest." RPC 1.7(a). A concurrent conflict of interest exists if "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 . . . ." RPC 1.7(a)(2).

"[A] lawyer with an excessive workload cannot provide competent, diligent or conflict free representation." *Lozano*, 460 P.3d at 724. Thus, when a court orders a public defense attorney to take appointments beyond the maximum allowed, the court "risks interfering with [the attorney's] ethical obligations . . . to act with reasonable diligence and promptness in representing [her] clients . . . ." *Carrasquillo*, 142 N.E.3d at 35-36. "In addition,

having too many clients and matters at once may create concurrent conflicts of interest . . . if attorneys are then forced to pick and choose between clients who will receive their limited time and attention and others who will necessarily be neglected." *Id*. at 49; *see also Office of Pub. Advocacy*, 2025 WL 498790, at *12 ("When an attorney is assigned too many cases, the risk increases that the attorney's ability to represent any one client may be limited by responsibilities to others"); *Waters*, 370 S.W.3d at 608 ("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") (quoting *In re Edward S.*, 92 Cal. Rptr. 3d 725, 746-47 (2009)).

Excessive caseloads also present issues for the lawyers who manage public defense attorneys. *See* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006). "A lawyer shall be responsible for another lawyer's violation of the

Rules of Professional Conduct if . . . the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved." RPC 5.1(c)(1). A lawyer with "managerial authority" or "direct supervisory authority over the other lawyer" is also responsible if he "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." RPC 5.1(c)(2). Accordingly, "supervisors must, working with the lawyers they supervise, monitor the workload of the subordinate lawyers to ensure that the workloads are not allowed to exceed that which may be handled by the individual lawyers." ABA Formal Op. 06-441; *see also* Wash. State Bar Ass'n Advisory Op. 1336 (1990) (same).

At the end of the day, "[a] lawyer can be smart, dedicated, and experienced, but too much work will prevent even the best lawyer from providing clients with ethical effective assistance of counsel." Peter A. Joy, *Ensuring the Ethical Representation of*

Clients in the Face of Excessive Caseloads, 75 Mo. L. Rev. 771, 778 (2010).

2. The impact of excessive caseloads on the right to effective assistance of counsel.

Because ethical representation is a fundamental component of effective representation, any order that requires a public defense attorney to exceed applicable caseload limits also "threatens to undermine the very right to counsel that the order seeks to protect." *Carrasquillo*, 142 N.E.3d at 35-36; *see also Lozano*, 460 P.3d at 724 ("if the public defender offices have workloads that exceed 100%, the right to counsel is jeopardized"). "A situation in which an attorney is overloaded with cases compromises the attorney's ability to comply with relevant rules of professional conduct and," consequently, "may deny a defendant effective assistance of counsel." *Office of Pub. Advocacy*, 2025 WL 498790, at *12. "Ineffective representation can result in a wrongful conviction or juvenile court adjudication,

inappropriate civil commitment, or unlawful termination of parental rights." *WSBA Standards*, Introduction.

Of "the major factors contributing to poor quality of defense services . . . the problem of excessive caseloads is the most pernicious." Joy, *Ensuring the Ethical Representation of Clients*, *supra*, at 778. "Each and every corner cut leads to substandard assistance of counsel even if it does not rise to the level of prejudice required to demonstrate ineffective assistance of counsel." *Id*. at 779; *see also Carrasquillo*, 142 N.E.2d at 49 ("Ordering assignment of additional cases to public defenders who are already carrying maximum caseloads risks making them ineffective, by hindering them from" accomplishing various responsibilities, "thereby defeating the purpose of the right to counsel."). The Court knows this all too well, having adopted "caseload limitations on public defenders" in "the wake of the Grant County Case, *A.N.J.*, and other similar cases." *Davison*, 196 Wn.2d at 305 (Gonzalez, J., concurring).

As the WSBA Board of Governors stated in 2022, courts "should provide relief when excessive caseloads threaten to lead to representation lacking in quality or to the breach of professional obligations. *To do otherwise, not only harms individual defendants but our entire justice system*." Wash. State Bar Ass'n Board of Governors, *Statement: Public Defense Lawyers Should Seek Relief from Excessive Workloads* 3 (July 21, 2022) (emphasis in original; citation omitted). Stated more directly, "it is just plain wrong" for a court "to force lawyers to ration their services to clients in drastic ways just so it can be said that a warm body possessing a law license 'represented' the accused." Norman Lefstein, *Executive Summary and Recommendations—Securing Reasonable Caseloads: Ethics and Law in Public Defense* 5 (Am. Bar Ass'n 2012); *see also A.N.J.*, 168 Wn.2d at 121 (Sanders, J., concurring) (There "is no reason for [a] court to facilitate [potential] constitutional violation[s] by appointing lawyers" who are "out of compliance" with relevant standards

for indigent defense.). "In effect, such a solution improperly shifts 'the burden of systemic lapse' in [a] public defender system to the very defendants the system was intended to protect . . . ." *Carrasquillo*, 142 N.E.3d at 49.

Compliance with caseload standards protects not only those who face the loss of liberty or other protected rights but also "the public, victims, state and other jurisdictions, as well as public defense attorneys." *WSBA Standards*, Introduction.

E. The superior court provided insufficient grounds for ordering DPD to appoint counsel to represent M.E.

In ordering DPD to appoint counsel to represent M.E., the superior court provided three categories of justification. All are without merit.

First, the court grounded its decision in the right of "respondents to [have] access to counsel" and DPD's corresponding obligation to provide such counsel. CP 6. The court stated that it had weighed "the needs of how DPD manages its

caseloads against the [assistance of counsel] rights of those involuntarily detained pursuant to RCW 71.05 and/or RCW 71.34," and the right of respondents to counsel prevailed. CP 7.

This conclusion is flawed because "the duty to represent indigent defendants can and must be balanced with the obligation of an attorney to provide *competent and effective* assistance in order to meet an attorney's ethical and constitutional obligations." *Waters*, 370 S.W.3d at 605 (emphasis in original); *see also Lozano*, 460 P.3d 732 (rejecting trial court's conclusion that "statutory obligations" of public defense attorneys to represent indigent individuals "take precedence over the rules of conduct and [that] the rules must yield"). Indeed, "[i]t was with these rights and obligations of [indigent individuals] and of counsel in mind that the" caseload limits were established. *Waters*, 370 S.W.3d at 608; *see also WSBA Standards*, Introduction; MPR 2.1 Standards, Preamble. Ultimately, neither the right to counsel nor the obligation to

provide counsel will be satisfied if the appointed attorney is working beyond the maximum caseload. *See* Section IV.E, *supra*.

The second justification offered by the superior court was its "inherent power to preserve the administration of justice," which the court supported with a citation to *Matter of Salary of Juvenile Dir.*, 87 Wn.2d 232 (1976). CP 6-7. But that case involved judicial authority to ensure sufficient funding for court functions. *Juvenile Dir.*, 87 Wn.2d at 242. Moreover, this Court held that the lower court's actions there amounted to "an improper check on the function of the legislative branch of government." *Id*. at 252. As explained above, the superior court here likewise exceeded its authority by usurping DPD's management and oversight of public defense services in King County. *See* Sections IV.C-D, *supra*.

The final justification offered by the superior court was the assertion that it "is not intervening in [DPD's] management decisions for individual attorneys," as "[w]ho [the ultimate attorney for M.E.] is and where they come from and what

caseloads they maintain is a decision for . . . DPD." CP 6-7. A similar argument was made in *Carrasquillo*, but the Massachusetts Supreme Judicial Court rejected it:

> [The court's] order had the effect of overriding [the agency's] authority to control case assignments by requiring Springfield PDD staff attorneys to appear and accept additional appointments . . . even though [the agency] had already determined that they should not do so due to their existing caseloads, and even though the court had not made any findings showing that [the agency's] decision was erroneous.

142 N.E.3d at 47-48.

The same is true here. DPD made clear to the court that due to excessive caseloads, there were no attorneys available—either internally or externally—to represent M.E. *See* CP 5-6, 317, 319-20. Thus, regardless of the court's "don't ask, don't tell" approach, it was obvious that DPD could only comply by appointing an attorney the Department had already determined was unable to take additional cases. This was beyond the court's authority. *See* Sections IV.C-D, *supra*.

V. CONCLUSION

As a former state supreme court justice recently noted, "the literature abounds with sorrowful declarations of the failure of the promise of *Gideon*."[14] Indeed, though it has been more than six decades since the United States Supreme Court issued that landmark decision, our system of justice continues to struggle to ensure that the right to *effective* counsel is fact, not myth; substance, not illusion.[15] Great strides have been made, to be sure. But as we continue to build toward that goal, we must keep our cornerstones secure.

Caseload limits and independence from judicial influence and control are fundamental components of a public defense

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[14] Brent R. Appel, *State and Federal Constitutional Right to Counsel in an Age of Case Specific and Systemic Inadequacies*, 93 UKMC L. Rev. 523, 523 (2025).

[15] *See A.N.J.*, 168 Wn.2d at 98 ("troublesome limits on indigent counsel have made the promise of effective assistance of counsel more myth than fact, more illusion than substance").

system that provides effective assistance of counsel to its clients. By ordering DPD to continue assigning cases when its attorneys were indisputably at capacity, the superior court interfered with DPD's independent power to manage and oversee public defense services and overrode the Department's caseload decisions. In doing so, the court exceeded its authority and violated GR 42.

This Court should make clear to the lower courts of Washington that they cannot interfere with the reasoned and supported caseload management decisions of public defense attorneys. That includes the decision to decline additional case assignments until there is capacity under applicable standards.

VI. APPENDIX

A. *Office of Pub. Advocacy v. Superior Court, First Judicial Dist.*, ___ P.3d ___, 2025 WL 498790 (Alaska Feb. 14, 2025) (unpublished)

RAP 18.17(b) CERTIFICATION

Petitioner's counsel certifies that this brief contains 10,823 words in compliance with RAP 18.17(b) and RAP 18.17(c)(11).

RESPECTFULLY SUBMITTED AND DATED this 26th day of March, 2025.

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CERTIFICATE OF SERVICE

I certify that on March 26, 2025, I caused a true and correct copies of the foregoing to be served on the following via the Court of Appeals Electronic Filing Notification System:

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 26th day of March, 2025.

By: /s/ Toby J. Marshall, WSBA #32726
Toby J. Marshall, WSBA #32726

Appendix A

2025 WL 498790
Only the Westlaw citation is currently available.

Supreme Court of Alaska.

OFFICE OF PUBLIC ADVOCACY, Applicant,
v.
SUPERIOR COURT, FIRST JUDICIAL DISTRICT, Respondent.

Supreme Court No. S-18741
|
February 14, 2025

Synopsis

Background: The Office of Public Advocacy (OPA) was appointed to represent a criminal defendant after the Public Defender Agency withdrew from the case based on a shortage of available attorneys. The Superior Court, First Judicial District, Ketchikan, Daniel Doty, J., denied OPA's motion to withdraw. OPA filed an original application for relief with the Court of Appeals challenging its appointment, and the Supreme Court accepted the Court of Appeals' certification to transfer jurisdiction.

Holdings: The Supreme Court, Carney, J., held that:

[1] trial court did not violate the separation of powers doctrine by appointing OPA to represent defendant;

[2] evidence supported trial court's conclusion that appointment of OPA to represent defendant was necessary to protect her right to effective assistance; and

[3] OPA was statutorily required to provide legal representation to defendant who could not be represented by Public Defender Agency due to a conflict of interest caused by Agency's lack of capacity to provide effective representation.

Affirmed.

Procedural Posture(s): Original Jurisdiction; Motion to Withdraw as Counsel.

West Headnotes (26)

[1] **Criminal Law** Statutory issues in general
Criminal Law Constitutional issues in general

Questions of statutory interpretation and constitutional issues are questions of law to which the Supreme Court applies its independent judgment.

[2] **Criminal Law** Review De Novo

Whether a conflict of interest exists under the Rules of Professional Conduct is an issue of law reviewed de novo under the independent judgment standard.

[3] **Criminal Law** Scope of Inquiry

In exercising its independent judgment, the Supreme Court will adopt the rule of law that is most persuasive in light of precedent, reason, and policy.

[4] **Constitutional Law** Nature and scope in general
Constitutional Law Nature and scope in general
Constitutional Law Nature and scope in general

The Alaska Constitution vests legislative power in the legislature; executive power in the governor; and judicial power in the courts.

[5] **Constitutional Law** Encroachment in general

The separation of powers doctrine limits the authority of each branch to interfere in the powers that have been delegated to the other branches.

[6] **Constitutional Law** Purposes of separation of powers

The separation of powers and its complementary doctrine of checks and balances are part of the constitutional framework of Alaska; it not only protects each branch's functional existence, it also precludes the exercise of arbitrary power and safeguards the independence of each branch of government.

[7] **Constitutional Law** Encroachment on Executive

Under the separation of powers doctrine, when an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts.

[8] **Criminal Law** Public Defenders

A court may not interfere with the management of public defender services unless presented with a case that demonstrates that the public defender agency's operations violate the constitution, either because of unlawful managerial decisions or a lack of resources necessary for providing the effective representation required under the constitution and statutes.

[9] **Criminal Law** Deprivation or Allowance of Counsel

Trial courts play an important role in safeguarding the constitutional right of effective assistance of counsel. U.S. Const. Amend. 6.

[10] **Criminal Law** Role and Obligations of Judge

Criminal Law Duty of court to inquire as to effectiveness in general

Courts have an obligation to ensure the integrity of the justice system and to ensure that defendants receive constitutionally effective assistance of counsel. U.S. Const. Amend. 6.

[11] **Criminal Law** Deficient representation in general

Compliance with the rules of professional conduct is a basic component of the effective assistance of counsel. U.S. Const. Amend. 6.

[12] **Criminal Law** Advice, inquiry, and determination

Courts must inquire when an apparent conflict of interest exists to ensure that the defendant receives conflict-free representation. U.S. Const. Amend. 6.

[13] **Criminal Law** Objections and waiver

To ensure conflict-free representation, courts may disqualify an attorney or condition continued representation upon the defendant's waiver of a conflict that is waivable under the ethics rules. U.S. Const. Amend. 6.

[14] **Constitutional Law** Criminal Law

Criminal Law Public Defenders

Trial court did not violate the separation of powers doctrine by ordering the Public Defender Agency to withdraw from representing defendant and to appoint the Office of Public Advocacy (OPA) to represent her; having determined that the Agency was failing to provide representation consistent with its ethical and constitutional obligations, the court had a duty to ensure defendant's rights were protected and that she received effective assistance of counsel. U.S. Const. Amend. 6.

[15] **Criminal Law** Deficient representation in general

Effective representation requires more than simply showing up for hearings. U.S. Const. Amend. 6.

[16] **Criminal Law** Public Defenders

Evidence supported trial court's conclusion that appointment of Office of Public Advocacy (OPA) to represent defendant was necessary to protect her right to effective assistance of counsel; the attorney assigned to defendant by the Public Defender Agency had resigned and not yet been replaced, defendant's former attorney had not actively worked her case for at least two months before her resignation, and the Agency could not assign an attorney to actively work on her case for another three months, a delay that was excessive since defendant had been charged three years prior and sought to vindicate her right to a speedy trial. U.S. Const. Amend. 6.

[17] **Criminal Law** Appointment; waiver; appearance pro se

Trial court's requirement that defendants to waive their right to the effective assistance of counsel if they wished to remain represented by the Public Defender Agency after the attorney assigned to represent them had resigned, rather than waiving their right to a speedy trial, was not reversible error; trial court determined that the affected clients would not have meaningful representation for nearly five months and that the delay would conflict with their speedy trial rights under the state and federal constitutions, and delay thus required defendant to waive their speedy trial rights if they wanted to remain with the Agency. U.S. Const. Amend. 6; Alaska Const. art. 1, § 11; Alaska R. Crim. P. 45(b).

[18] **Criminal Law** Duty of court to inquire as to effectiveness in general

When it is apparent to the court that a defendant is not receiving effective representation, the court has an affirmative duty to intervene. U.S. Const. Amend. 6.

[19] **Criminal Law** Particular cases in general

A situation in which an attorney is overloaded with cases compromises the attorney's ability to comply with relevant rules of professional conduct and may deny a defendant effective assistance of counsel. U.S. Const. Amend. 6; Alaska R. Prof. Conduct 1.1(a), 1.3, 3.2.

[20] **Criminal Law** Partners and associates; public defenders

A public defender agency's inability to provide effective assistance because of a lack of attorneys or hours can amount to a conflict of interest. U.S. Const. Amend. 6; Alaska R. Prof. Conduct 1.7(a).

[21] **Criminal Law** Partners and associates; public defenders

Criminal Law Public Defenders

Office of Public Advocacy (OPA) failed to establish that the phrase "a conflict of interests" in statute requiring the OPA to provide legal representation to indigent persons who could not be represented by the Public Defender Agency did not include a conflict of interest due to a lack of capacity; plain language of statute did not distinguish between particular kinds of conflicts, and legislative deliberations and related testimony mainly discussed the fiscal benefits of creating an office to handle cases where the Agency had a conflict, not what constituted a conflict. Alaska St. § 44.21.410(a)(4).

[22] **Criminal Law** Public Defenders

Office of Public Advocacy (OPA) was statutorily required to provide legal representation to defendant who could not be represented by Public Defender Agency due to its lack of capacity to provide effective representation; statute requiring the OPA to provide legal representation to indigent persons who could not be represented by the Agency due to a conflict of interest, including a conflict caused by lack of capacity. Alaska St. § 44.21.410(a)(4).

[23] **Statutes** Undefined terms
Statutes Dictionaries

In the absence of a statutory definition, the Supreme Court construes statutory terms according to their common meaning; dictionaries provide a useful starting point for this exercise.

[24] **Statutes** Plain Language; Plain, Ordinary, or Common Meaning

The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be.

[25] **Statutes** Burden of proof

If statutory language is clear and unambiguous, then the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent.

[26] **Criminal Law** Partners and associates; public defenders
Criminal Law Public Defenders

A "conflict of interests" in statute requiring the Office of Public Advocacy (OPA) to provide legal representation to those who could not be represented by the Public Defender Agency means all conflicts of interests and does not exclude conflicts due to capacity. Alaska St. § 44.21.410(a)(4).

Certified Original Application for Relief and Jurisdiction Transfer from the Court of Appeals of the State of Alaska, on original application for relief from the Superior Court of the State of Alaska, First Judicial District, Ketchikan, Daniel Doty, Judge. Court of Appeals No. A-14132, Superior Court Nos. 1KE-20-00202 CR, 1KE-19-01040 CR, 1PW-20-00093 CR, 1PW-20-00134 CR, 1PW-20-00109 CR, 1PW-20-00118 CR, 1PW-20-00074 CR

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Before: Maassen, Chief Justice, Carney, Borghesan, and Henderson, Justices, and Winfree, Senior Justice.* [Pate, Justice, not participating.]

OPINION

CARNEY, Justice.

I. INTRODUCTION

***1** After the unanticipated resignation of an assistant public defender, the Public Defender Agency proposed a plan to temporarily assign other attorneys to her cases until a permanent replacement was hired. The superior court rejected the Agency's plan because no specific attorney would be assigned to the cases or prepare them for trial. It ordered the Agency to advise affected clients that if they wished to remain represented by the Agency, they would have to waive their rights to effective assistance of counsel until an attorney was permanently assigned to their cases, and if they did not waive their rights, the Agency would withdraw.

The Agency was able to assign specific attorneys for all but one client's case. It withdrew from that case as ordered by the superior court. The court then appointed the Office of Public Advocacy (OPA) to represent that client. OPA moved to withdraw. It argued that its appointment to the case was not authorized under AS 44.21.410 because the Agency's lack of capacity to take on additional cases was not a conflict of interest under that statute and that the superior court had exceeded its authority by rejecting the Agency's proposed plan to cover the affected cases. The superior court denied the motion to withdraw.

OPA eventually filed an original application for relief with the court of appeals challenging its appointment. The court of appeals certified the original application to this court and asked us to accept transfer of jurisdiction, which we granted.

We issued an order continuing OPA's appointment, stating that a written opinion explaining the order would follow. We now explain that the superior court did not err by intervening in the affected cases; lack of capacity can amount to a conflict of interest; and when the Agency has a conflict due to its lack of capacity to take cases, AS 44.21.410(a)(4) requires that OPA be assigned.

II. FACTS AND PROCEEDINGS

A. Background

1. Public Defender Agency

In 2021 the Agency assigned attorneys from its Juneau office to cases in other Southeast locations, including Ketchikan, Sitka, and Prince of Wales. In late 2022 it became apparent that one of the attorneys was struggling to manage her caseload.

In early November, less than an hour before the scheduled start of a felony sentencing hearing in Ketchikan, the attorney filed a request to continue the hearing. The attorney appeared at the hearing by telephone without her client. The court denied the continuance and ordered the attorney to appear in person the next day for the sentencing hearing. The hearing was held the following day.

A few days later the attorney was again scheduled to be in Ketchikan for a felony trial. Trial proceedings were set to begin at 8:30 a.m. Shortly before that time, the attorney emailed the court that her flight from Juneau was delayed; she subsequently emailed that it had been cancelled. The court rescheduled trial to begin the next day. It also indicated it would set a sanctions hearing to address the attorney's failure to appear and her failure to advise her client about her absence. The court noted that even if the scheduled flight had arrived on time, the attorney still would not have been able to be in court at 8:30.

***2** In addition, the attorney had a hearing scheduled before a different Ketchikan judge at the same time that the trial was supposed to start. And the attorney had not advised either judge of the scheduling conflict.

The attorney appeared as ordered in Ketchikan the following day. After being admonished by the court, the attorney moved to continue the trial, arguing that the court had damaged her relationship with her client and was unfairly penalizing her for travel difficulties. The court denied the request for a continuance; trial commenced and the defendant was convicted.

The same attorney represented another client, Georgina Mathes, in an unclassified felony case; Mathes's codefendant was represented by an OPA contract attorney.[1] Mathes had been charged in 2020. In October and again in early November 2022 the attorney advised the court that she was ready for trial. But due to the codefendant's attorney's schedule, trial was continued until December.

At a trial call on November 29, Mathes's attorney informed the court that she had been assigned to a murder case that was scheduled for a six-week trial beginning in March in Anchorage. She advised the court that she was therefore unable to do another trial until after the Anchorage trial concluded and asked that Mathes's case be continued until May or later.

The codefendant's attorney opposed any continuance but was willing to sever his case from Mathes's. The prosecution opposed both a continuance and severance, arguing that either option would be prejudicial to the State and to the victim. The court denied both the continuance and severance, finding that they were prejudicial to the State. It also concluded that the time between the end of Mathes's trial and the beginning of the Anchorage trial would provide Mathes's attorney sufficient time to prepare. The court scheduled trial for December 6.

Mathes's attorney then filed a new motion to continue, arguing that she would not be able to represent Mathes and her other clients effectively if she were required to try Mathes's case before the six-week Anchorage trial. In an affidavit she stated that her investigation for Mathes's trial was incomplete and that she had 95 cases, most of which were felonies, including 26 class A felonies, sex felonies, and unclassified felonies. The Deputy Public Defender also filed an affidavit confirming that the attorney's caseload was greater than appropriate, given the severity and number of cases, and that the Anchorage trial was her top priority. The court denied the continuance.

At the beginning of the scheduled trial on December 6, the Deputy Public Defender sought a continuance because Mathes's attorney was unavailable due to a medical emergency. After the court granted the request, the Agency filed a motion to continue several of the attorney's cases before that court, including Mathes's. It asserted that the caseloads its attorneys, including Mathes's attorney, carried were far in excess of recommended maximums and that because of the stress caused by such caseloads, Mathes's attorney was unable to try any cases before the Anchorage homicide trial. The court scheduled an evidentiary hearing on the Agency's motion for early January.

***3** On December 26, the Agency notified the court that Mathes's attorney had decided to resign. It requested that the court therefore vacate the evidentiary hearing. The court denied the motion but consolidated the evidentiary hearing with the sanctions hearing it had scheduled in the earlier case.

2. Evidentiary hearing

The court held a hearing in early January focused on the Agency's plan to provide representation to clients affected by the attorney's resignation. The Deputy Public Defender stated that the Agency planned to contract homicide cases to outside counsel, reassign other serious felonies to assistant public defenders, and "float" the remaining cases — meaning that those cases would be assigned temporarily to attorneys to cover hearings until a replacement could be hired and assigned to the cases on a more permanent basis. The court recognized that a new Agency attorney was scheduled to start in Sitka in mid-March and that clients would not remain with their temporary attorneys for very long before being reassigned to the new attorney.

The court also questioned the accuracy of Mathes's attorney's assertions that she had an overwhelming caseload. It noted that the Deputy Public Defender had submitted a list of her cases to the court that reflected she had fewer cases than she had earlier reported to the court; and of those cases, fewer still were as serious or active as she had claimed. The court noted that the Deputy Public Defender had provided no specifics when initially asked to explain the discrepancy between the attorney's affidavit, which represented that she had 95 cases — a majority of which were reported to be felonies — and the number presented to the court, which was 73 cases — including 40 felonies — and had speculated the affidavit included probate cases, might have counted the cases differently, or included cases that had been reassigned. When questioned, the Deputy Public Defender appeared to suggest that he relied on the attorney's sworn — but inaccurate — representations. The court found it "inexcusable" that Mathes's attorney misled the court "on a point so material to the issues in these cases."

In Mathes's case, the Deputy Public Defender requested a two-month continuance to determine who would represent Mathes; the codefendant agreed to a short continuance but opposed a lengthy one. The prosecution said it was "resigned to the need for a short continuance." The court continued the cases to February. The court also advised the parties that it still intended to address its duty to ensure all of the attorney's other clients received effective assistance of counsel.

3. The court's order

A few days later the court issued an "Order on Cost Bill & Sufficiency of Representation."[2] The court recognized that criminal defendants are entitled to effective assistance of counsel "at all critical stages of a criminal prosecution," citing *Perez v. State*.[3] It observed that the Agency was required to provide competent representation to its clients. The court interpreted "competent" representation under the Rules of Professional Conduct and the state and federal constitutions to include a duty to "move a case reasonably quickly." The court concluded that the Agency was required to provide its clients "representation that is both prepared *and* prompt" (emphasis in original). It held that defendants are entitled to more than just "an attorney show[ing] up for hearings."

***4** The court then found that the Agency was failing to meet those duties. It found that Mathes's attorney "ha[d] not been meaningfully available to most or all of her clients since she moved to continue [Mathes's case] in late November." It also concluded that the Agency's proposed plan to provide representation until a new attorney arrived did not satisfy the professional conduct rules or *Perez*. It noted that a replacement attorney would not start until March and the Agency had limited capacity to reassign cases in the interim. It concluded that by March, the affected clients would have been inadequately represented for about four months.

Based on the Agency's lack of "capacity to provide trial-level representation" to many of the affected clients for so many months, the court found that the Agency had a conflict of

interest under Rule of Professional Conduct 1.7(a)(2) because of the "significant risk that representation of one or more clients will be limited by the lawyer's responsibilities to another client."[4] It found that the Agency as a whole had a conflict of interest because the current Agency attorneys who would be assigned the affected cases would be forced to choose between providing representation to their current clients and the reassigned clients.

The court recognized that the conflict "presents an odd wrinkle" because it would last only until the new attorney was able to provide meaningful representation. It also acknowledged the Deputy Public Defender's concerns that if the Agency withdrew from the affected cases, those clients would simply sit unrepresented on a waiting list until the Agency itself could resume taking cases. But the court concluded that would not be the case because OPA exists in part to step in where the Agency is unable to represent a client.

The court explained that OPA's authorizing statute, AS 44.21.410(a)(4), requires it to represent "indigent persons who are entitled to representation [under the Agency's authorizing statute] and who cannot be represented by the [Agency] because of a conflict of interests." It highlighted that the statute "does not inquire about the nature of a conflict, or whether the conflict is temporary." The court therefore concluded that as long as a conflict of interest existed at the time of withdrawal, OPA was authorized to provide representation.

Recognizing that withdrawal and reassignment to another agency was a drastic step, and that OPA might also "be overburdened, or might have its own case-specific conflicts," the court ordered the Agency to meet with the clients affected by the attorney's resignation; advise them of the Agency's plans for their continued representation; and, if the Agency would not be assigning permanent attorneys, advise them that, if they wished, it would withdraw from representation so that the affected cases could be transferred to OPA.[5] The court further directed that, if the client preferred to remain with the Agency, the client would have to waive any claim of ineffective assistance of counsel until a permanent attorney was assigned.

The court also ordered that, after meeting with each of the affected clients, the Agency was, in each case, to have an attorney file an entry of appearance, a motion to withdraw, or a notice that the client requested to remain with the Agency. And in those cases in which clients requested to remain with the Agency, the court ordered that a representation hearing be held to ensure the clients had been fully advised and had knowingly, intelligently, and voluntarily "waive[d] their right to the effective assistance of counsel until a permanent attorney can be assigned to the case."

4. Further proceedings

***5** The prosecution moved for partial reconsideration of the court's order. While it agreed that judicial intervention was warranted because the Agency had an irreparable conflict "imped[ing] its ability to effectively represent the named defendants," the prosecution argued that requiring waiver of the right to effective assistance of counsel was "constitutionally unworkable" and violated the ethical rules governing prosecutors and defense attorneys. The prosecution requested that the court appoint counsel through OPA or Alaska Administrative Rule 12(e) instead.[6]

The Agency also responded to the court's order. After stating its general intent to comply with the court's order and outlining the specific steps it intended to take, it disputed the court's conclusion that its previously proposed plan constituted ineffective assistance of counsel. The Agency argued that its proposed plan to provide representation was constitutionally sufficient because each client would be assigned to a current Agency attorney and given the lawyer's name and contact information, and that lawyer would "address issues that concern the client until the case is reassigned to the new lawyer," including bail, negotiations, discovery, and hearing preparation and appearances. The Agency asserted that its coverage plan therefore did not "present[ ] the same concerns highlighted by the Alaska Court of Appeals in *Perez*."[7]

The superior court denied the prosecution's motion for reconsideration. The court stated that the Agency "ha[d] sorted things out" by providing permanent attorneys for most of the affected clients and by withdrawing from two others, in which the court had appointed OPA. The court acknowledged the prosecution's concern that its order was not constitutionally permissible but concluded that the concern was "academic" because the public defender covering the remaining cases advised the court that he "plan[ned] to work the cases, investigate what needs investigating, file motions if they need to be filed, hire experts if they need to be hired, [and] negotiate if it is fruitful to negotiate." The court

observed that, "[i]n the end, [that] is all anyone can really ask for."

B. Office Of Public Advocacy Appointment

On January 23, 2023, the Agency moved to withdraw from Mathes's case, consistent with her request and the court's order. The court granted the motion and appointed OPA to represent Mathes on January 24.

On February 8, OPA filed a motion to vacate its appointment. First, it argued that the Agency did not have a conflict of interest as a matter of fact or as a matter of law. OPA argued that the court's prior order denying the prosecution's motion for reconsideration showed that the Agency did not have a conflict of interest because the court had concluded that the Agency's coverage plan satisfied its effective representation concerns. OPA also cited the "additional information" supplied by the Agency during those hearings as establishing that the Agency had capacity to represent Mathes. OPA also argued that the court had incorrectly interpreted "[f]ailure to meet the [c]ourt's desired trial schedule" as a conflict, and that even if it were a conflict, it would not create an Agency-wide conflict of interest. But if it did create an Agency-wide conflict, OPA argued, then OPA had the same conflict — if not worse, because it had fewer staff attorneys than the Agency.

***6** OPA disagreed with the court's reliance on *Perez v. State*[8] and *Donnelly v. State*.[9] *Perez*, OPA argued, recognized that the Agency is responsible for analyzing conflicts of interest but did not suggest that a delay in assigning a permanent attorney violates the right to effective counsel. And *Donnelly*, it asserted, was inapposite because the court in that case denied the Agency's motion to withdraw and did not appoint OPA. Instead, OPA argued, the court should have looked to *Nelson v. State*[10] for its ineffective assistance of counsel analysis. OPA characterized *Nelson* as holding that a criminal defendant cannot raise an ineffective assistance of counsel claim before a verdict. OPA also noted that we did not extend the conflict in *Nelson* to the entire Agency. We limited the imputed conflict to the regional Agency office where the conflicted attorney worked.[11]

OPA next claimed that it was statutorily prohibited from representing Mathes because it was only authorized to take cases when the Agency had an "actual" or "legal" conflict of interest. It argued that a capacity-based conflict was not an actual conflict as contemplated by its authorizing statute. OPA also suggested that the superior court had exceeded its authority by asserting a conflict when the Agency, an executive branch entity, avowed that there was none. In OPA's view, the court's plan effectively "ordered the [Agency] to present indigent clients with a choice of counsel." And under *Daniels v. State*,[12] OPA argued, a trial court cannot interfere with the administrative assignment of cases by presenting indigent clients a choice of counsel. Furthermore, OPA asserted, the superior court's conclusions would encourage Agency attorneys unable to meet deadlines to claim conflicts of interest or encourage clients to demand a new attorney when they are unsatisfied with the pace of their pending cases.

OPA also objected to its appointment to represent Mathes in six misdemeanor cases in addition to her felony case. OPA argued that there was no conflict in the misdemeanor cases, that its appointment was a clerical error because of ambiguity of the court's order, and that nothing in the record or the order indicated that the Agency lacked capacity to handle the misdemeanors. Finally, OPA asked the court to reappoint the Agency or appoint counsel under Administrative Rule 12(e).

The court denied OPA's motion on February 21. It first rejected OPA's argument that the factual basis of its order had changed, observing that OPA had not presented any evidence to support its argument. It reaffirmed that, based upon the record, the Agency had a conflict of interest that had not changed since the court's January 9 order.

The court next noted that OPA previously had refused its offer of an evidentiary hearing and that its representations on behalf of the Agency were ambiguous. The court found that it had the authority and duty to intervene to correct a conflict and ensure Mathes was adequately represented, that *Daniels* supported its position, and that *Nelson* did not limit a court to remedying an ineffective assistance of counsel claim only after a conviction.

The court reiterated its conclusion that the Agency had a conflict of interest under the professional rules and the federal and state constitutions. It held that this conflict arose from the deficit of Agency attorneys to handle its caseload, which led to almost three years of delays in Mathes's case and an expected further delay of at least five months. It held therefore that the Agency was permitted to withdraw and cited court decisions from across the country and formal opinions

from both the American Bar Association and other state bar associations to bolster its conclusion. [13]

***7** The court concluded that AS 44.21.410(a)(4) required it to appoint OPA. It explained that because the statute did not exclude "temporary conflicts" and did not "limit the definition of the term 'interest' to exclude a person's interest in speedy, prompt, and diligent representation," OPA had to be appointed. The court rejected OPA's request to appoint Rule 12(e) counsel because Rule 12(e) counsel may be appointed only if neither the Agency nor OPA were authorized to accept the appointment. Finally, noting the issue was not moot because Mathes continued to suffer from the "lack of a *timely* attorney," the court rejected OPA's argument that the Agency had resolved the conflict by planning to assign its newly hired attorney to Mathes's cases six weeks later (emphasis in original). [14]

Two days later, OPA moved to withdraw once again. It made a variety of arguments. It first argued that the Public Advocate was counsel of record in Mathes's case, which created statewide conflicts for OPA and compromised his neutrality as OPA's director. It argued that the Public Advocate's appointment was therefore directly adverse to Mathes. And it argued that because the Public Advocate was responsible for resource allocation for OPA, including contracting with outside attorneys, his appointment created a conflict with any case assigned to a contract attorney, including Mathes's codefendant's. Finally, OPA asserted that appointing it would further delay Mathes's case.

The court denied the motion. It first held that it had not created OPA's "perceived conflict" because it had "not assign[ed] the OPA director to represent ... Mathes." And it noted that if, as OPA claimed, there were any such perceived problems, they could be addressed by simply assigning the case to a staff attorney.

The court again concluded that OPA had not established that it or its contractors had conflicts and that it misconceived the nature of the Agency's conflict. The court reiterated that the conflict was due to an additional delay of at least five months "with an indefinite maximum" length before a specific Agency attorney could represent Mathes. It determined that because that conflict was "driven by the Agency's lack of capacity," the conflict required the court's intervention to ensure Mathes received effective assistance. The court clarified that it was not requiring "an attorney who could immediately try an unclassified felony," but only "someone who is available, *now*, to counsel ... Mathes, even on pretrial matters," and held that OPA's authorizing statute and the professional rules required OPA to provide that attorney (emphasis in original).

The court repeated its observation that OPA had not presented any evidence that it had a conflict or requested an evidentiary hearing to support its claim that it had the same conflict as the Agency. And the court dismissed OPA's argument that a lack of capacity in its local offices amounted to an agencywide conflict, pointing out that OPA is a statewide agency and AS 44.21.410(a)(4) required it to provide representation when the Agency had a conflict. The court concluded that "OPA has offered nothing to explain how the whole agency, which continues to enter appearances and resolve cases in courts around the state even as this order is being written, lacks the capacity to accept a single client's cases."

Two days later, OPA filed a motion for reconsideration, a motion for evidentiary hearing, and a motion to stay its appointment pending appellate review and appoint Rule 12(e) counsel to represent Mathes in the interim. The court denied the motions for reconsideration and an evidentiary hearing the next day. On March 3, OPA filed a motion in the court of appeals to stay its appointment and appoint Rule 12(e) counsel, noting it intended to file a petition for review.

***8** On March 6, the superior court denied the stay and ordered OPA to file an entry of appearance in Mathes's case. The court noted that a stay "would cause undue — and unconstitutional — delays in the appointment of counsel" for Mathes.

C. Original Application For Relief

On March 7, the court of appeals converted OPA's motion for stay of its appointment in the superior court to an original application for relief under Appellate Rule 404. [15] It certified OPA's original application to us in May under AS 22.05.015(b). [16]

The court stated three reasons for its certification. First, "the issues presented here relate to questions of court administration and the allocation of statewide budgets — and the answers to these questions will have repercussions far beyond this individual case" which are "matters that fall directly within the Alaska Supreme Court's expertise." Second, "the issues presented here raise substantial questions

regarding the ethical obligations of appointed attorneys under the professional rules of responsibility, the oversight of which is vested in the supreme court." And finally, "the issues presented here relate to an on-going crisis involving state agencies and constitutional representation for indigent defendants that is of sufficient importance to warrant the supreme court granting a petition for hearing in this case."

We accepted certification and invited the Agency and prosecution to participate.[17] On March 7, 2024, following oral argument, we ordered that OPA continue to represent Mathes in her cases through resolution in the trial courts. We promised a written opinion explaining our order; this is our explanation.

II. STANDARD OF REVIEW

[1] [2] [3] "Questions of statutory interpretation and constitutional issues are questions of law to which we apply our independent judgment."[18] "Whether a conflict of interest exists under the Alaska Rules of Professional Conduct is an issue of law also reviewed de novo under the independent judgment standard."[19] "In exercising our independent judgment, we will adopt the rule of law that is most persuasive in light of precedent, reason, and policy."[20]

IV. DISCUSSION

A. The Superior Court Did Not Err By Intervening.

[4] [5] [6] "The Alaska Constitution 'vest[s] "legislative power in the legislature; executive power in the governor; and judicial power" in the courts.' "[21] "Derived from this 'distribution of power among the three branches of government' is the separation of powers doctrine, which 'limits the authority of each branch to interfere in the powers that have been delegated to the other branches.' "[22] "[T]he separation of powers and its complementary doctrine of checks and balances are part of the constitutional framework of this state."[23] It not only "protect[s] each branch's functional existence," it also "preclude[s] the exercise of arbitrary power and ... safeguard[s] the independence of each branch of government."[24]

***9 [7]** The Agency, OPA, and the Department of Law are all executive branch agencies, while the superior court is part of the judicial branch. "Under the separation of powers doctrine, '[w]hen an act is committed to executive discretion, the exercise of that discretion within constitutional bounds is not subject to the control or review of the courts.' "[25] OPA argues that the court violated the separation of powers doctrine by intervening in the Agency's representation of Mathes. Specifically, it contends the court improperly interfered with the internal workings of an executive agency. It also argues that the court exceeded its authority by allowing Mathes the "choice" between Agency and OPA counsel and preventing the return of her cases to the Agency once the Agency enacted a plan to provide representation to Mathes and other affected clients until its new attorney arrived.

[8] As arms of the executive branch, the Agency, OPA, and the Department of Law are entitled to full independence, "subject to judicial authority and review only in the same manner and to the same extent as retained counsel."[26] We agree with other courts that have recognized that a court may not interfere with the management of public defender services unless "presented with a case that demonstrates that the [public defender agency's] operations violate the constitution, either because of unlawful managerial decisions or a lack of resources necessary for providing the effective representation required under our Constitution and statutes."[27]

[9] [10] [11] [12] [13] But we also agree with the court of appeals that "[t]rial courts play an important role in safeguarding [the] constitutional right" of effective assistance."[28] Courts have an obligation to ensure the integrity of the justice system[29] and to ensure that defendants receive constitutionally effective assistance of counsel.[30] Compliance with the rules of professional conduct is a basic component of effective assistance.[31] Courts must inquire when an apparent conflict of interest exists to ensure that the defendant receives conflict-free representation.[32] To ensure conflict-free representation, courts may disqualify an attorney or condition continued representation upon a defendant's waiver of a conflict that is waivable under the ethics rules.[33]

***10 [14] [15]** We agree with the superior court that effective representation requires more than simply "show[ing] up for hearings." When the court determined the Agency was failing to provide representation consistent with its ethical and constitutional obligations, it instructed the Agency to take certain steps to remedy the situation. Concluding the Agency had a conflict of interest, the court ordered the Agency to withdraw and appointed OPA. Because the court had a duty to ensure Mathes's rights were protected,

it did not violate the separation of powers doctrine by doing so.

In *Daniels v. State* the court of appeals determined the trial court abused its discretion by disqualifying a public defender because he had represented a witness ten years earlier in an unrelated matter.[34] The defense strategy involved suggesting that the witness had committed the crime being prosecuted.[35] The client waived any conflict of interest due to the past representation, and after consulting with independent counsel, the witness did not perceive any conflict, but the court granted the prosecution's motion requiring the public defender to withdraw.[36] The court of appeals noted that although indigent defendants do not have the right to demand a particular attorney, "courts do not disqualify an attorney on the grounds of conflict of interest unless the former client moves for disqualification."[37] Because the conflict was waivable and neither client nor their attorneys claimed that a conflict of interest existed, the court of appeals reversed the trial court's withdrawal order.[38]

OPA's claim that the superior court gave Mathes a "choice" of counsel mischaracterizes the court's order. The court ordered the Agency to advise affected clients that they would have to waive any claim of ineffective assistance of counsel until a permanent attorney was assigned to their case if they wished to remain represented by the Agency. The court ordered the Agency to withdraw from any case in which the client did not waive the conflict. Agency clients were not given a choice of preferred counsel as OPA suggests.

Nor did the superior court "prevent[ ] transfer" back to the Agency as OPA alleges. The Agency withdrew from Mathes's cases, as ordered, because she did not waive the conflict of interest. OPA did not give the court any basis to transfer Mathes's cases back to the Agency.

***11** **[16]** OPA challenges the court's conclusions that the affected clients had been inadequately represented for months and that the Agency's "floating" approach would result in further inadequate representation. But as the court explained in its order denying OPA's motion to vacate its appointment, neither OPA nor the Agency presented any evidence to suggest that representing Mathes was no longer beyond the Agency's capacity. Although the court was satisfied by the temporary attorney's stated intention to actively represent the clients in the four cases to which he was assigned, neither he nor the Agency gave the court similar assurances in Mathes's case. The record before the court made clear that Mathes's former attorney had not actively worked her case for at least two months before her resignation and the Agency could not assign an attorney to actively work on her case for another three months. Such delay was "excessive" when Mathes had been charged three years prior and "was pushing to vindicate her right to a speedy trial."

[17] OPA argues that the superior court exceeded its authority by requiring defendants to waive their rights to claim ineffective assistance of counsel. The superior court ordered that the clients "waive their right to the effective assistance of counsel" if they wished to remain represented by the Agency, rather than specifying the more usual waiver of speedy trial. The court determined that the affected clients would not have meaningful representation for nearly five months and that the delay would conflict with their speedy trial rights under the state and federal constitutions.[39] It also concluded that the delay was likely to be far beyond the 120-day trial deadline in Alaska Criminal Rule 45.[40] But criminal defendants can and often do waive their speedy trial rights.[41] The delay resulting from the Agency's plan thus required clients waive their speedy trial rights if they wanted to remain with the Agency until a new attorney was hired. The superior court's somewhat inartful language does not amount to a reversible error.

OPA also argues that the superior court's interpretation of *Perez v. State* was flawed and *Perez* should not be extended to allow courts to intrude into the management decisions of executive agencies.[42] It argues that *Perez* "presented a different situation" because it involved a client to whom no attorney was assigned for five months, while the clients here had individual counsel at all times.[43] From this OPA argues that the superior court erred by concluding that *Perez* required an attorney to be "actually" assigned to the case.

Contrary to OPA's claim, however, *Perez* did not hold only that assigning an individual attorney to a defendant was required. In *Perez* the defendant had "no attorney keeping track of his case between pretrial hearings, no attorney communicating with him outside these hearings, no attorney reviewing the discovery and discussing it with him, and no attorney assisting him with other pretrial matters" for five months.[44] Under these circumstances, the court of appeals held that the superior court "had an affirmative duty to act [to safeguard the defendant's constitutional right to counsel]

when it became clear that [he] had no attorney assigned" and that the "conflict issues ... were not being timely resolved."[45]

***12** **[18]** In both *Perez* and Mathes's case, the court was concerned that a defendant was not receiving effective representation. When it is apparent to the court that a defendant is not receiving effective representation, the court has an affirmative duty to intervene.[46]

B. The Superior Court Did Not Err By Appointing OPA.

OPA disagrees with the superior court's conclusion that a capacity-based conflict is a conflict of interest under the enabling statute authorizing its appointment.[47] OPA argues that the legislative history of AS 44.21.410(a)(4) and 30 years of practice show that it was created to represent indigent defendants when the Agency has an "actual" conflict of interest, such as in cases of codefendant representation, not as an "overflow" agency to fill in when the Agency is "over capacity." It argues that the superior court therefore erred by appointing it when it found that Mathes could not be represented by the Agency due to its lack of capacity.

1. Lack of capacity can be a disqualifying conflict of interest.

Rule of Professional Conduct 1.7(a) provides that a lawyer "shall not represent a client if the representation involves a concurrent conflict of interest." Subsection (a)(2) of the rule goes on to define a concurrent conflict of interest as arising when 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."[48]

Rule 1.1(a) requires attorneys to provide "competent" representation to their clients. Competent representation entails the "thoroughness and preparation reasonably necessary for the representation."[49] And under Rules 1.3 and 3.2, attorneys have a duty to "act with reasonable diligence and promptness in representing a client"[50] and to "make reasonable efforts to expedite litigation consistent with" a client's interests.[51] Commentary to Rule 1.3 specifies that "[a] lawyer's work-load must be controlled so that each matter can be handled competently."

[19] A situation in which an attorney is overloaded with cases compromises the attorney's ability to comply with relevant rules of professional conduct and may deny a defendant effective assistance of counsel.[52] When an attorney is assigned too many cases, the risk increases that the attorney's ability to represent any one client may be limited by responsibilities to others. As a caseload increases, the attorney's ability to bring to each case the thoroughness and preparation necessary to provide competent representation may diminish. And as the number of assigned cases increases, the attorney's ability to promptly and diligently expedite any one case may decrease.

[20] Courts from other jurisdictions have also concluded that a shortage of public defenders and the resulting excessive caseloads can amount to a conflict of interest because the attorneys must choose between the rights of their clients.[53] Rule 1.7(a)(2)'s plain language, when read in conjunction with the other professional rules' requirements, makes clear that a public defender agency's inability to provide effective assistance because of a lack of attorneys or hours can amount to a conflict of interest.

***13** OPA asserts that an evidentiary hearing should be required when the Agency alleges it is "over capacity" and asks that we establish such a procedure. It argues that because the superior court did not hold an evidentiary hearing, we should vacate its order. But OPA declined the court's invitation to have an evidentiary hearing[54] and the superior court made adequate findings. Because the court's process and factual findings are sufficient for our review, we see no need to require more.

2. Alaska Statute 44.21.410(a)(4) requires OPA to take a case if the Agency has a conflict of interest due to a capacity conflict.

Alaska Statute 44.21.410(a)(4) requires OPA to provide legal representation "in cases involving indigent persons who are entitled to representation [by the Agency] and who cannot be represented by the public defender agency because of a conflict of interests." The statute does not define "conflict of interests." The superior court reasoned that "[t]he existence of a conflict at the time of withdrawal is enough to justify an OPA appointment" because "[t]he statute does not inquire

about the nature of a conflict, or whether the conflict is temporary."

OPA contends that a conflict of interest due to lack of capacity is not the sort of conflict contemplated by the legislature when it enacted AS 44.21.410(a)(4). It argues that a "conflict of interest" under AS 44.21.410(a)(4) "has always meant an actual/legal conflict arising under the Professional Conduct Rules — most often Rule 1.7."

[21] **[22]** OPA seems to suggest that the "actual" conflicts of interest in AS 44.21.410(a)(4) are limited to conflicts presenting adverse representation "such as multi-defendant cases." It points to legislative history and "the history of the agencies' transactions" to support its interpretation. But the plain language of the statute says nothing about the type of conflict that authorizes OPA's appointment. And OPA falls well short of overcoming its heavy burden to show that the legislature intended to give the term "conflict of interests" OPA's preferred meaning.

[23] **[24]** **[25]** "In the absence of a [statutory] definition, we construe statutory terms according to their common meaning[;] [d]ictionaries provide a useful starting point for this exercise."[55] "The plainer the statutory language is, the more convincing the evidence of contrary legislative purpose or intent must be."[56] "If the language is 'clear and unambiguous,' then 'the party asserting a different meaning bears a correspondingly heavy burden of demonstrating contrary legislative intent.' "[57]

The plain language of the statute does not exclude conflicts based on lack of capacity. Black's Law Dictionary defines a "conflict of interest" as "[a] real or seeming incompatibility between two interests that one possesses or is obligated to serve" or "[a] real or seeming incompatibility between the interests of two of a lawyer's clients, such that the lawyer is disqualified from representing both clients if the dual representation adversely affects either client or if the clients do not consent."[58] Merriam-Webster defines the term as "a conflict between competing duties."[59] And the American Heritage Dictionary defines it as "[a] conflict between a person's private interests and public obligations."[60] The Restatement (Third) of the Law Governing Lawyers defines a conflict of interest as a circumstance in which "there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person."[61] It does not distinguish between particular kinds of conflicts.[62]

***14** Other authorities from the time AS 44.21.410 was enacted are in agreement. The statute was passed in 1984.[63] Just one year earlier, the American Bar Association (ABA) adopted the Model Rules of Professional Conduct.[64] Those rules identified impermissible conflicts of interest as situations in which representation of a client "will be directly adverse to another client" or "may be materially limited by the lawyer's responsibilities to another client."[65] The 1990 edition of Black's Law Dictionary incorporated the ABA's standard into its definition of "conflict of interest," explaining that "[t]he Code of Professional Responsibility and Model Rules of Professional Conduct set forth standards for actual or potential conflicts of interest between attorney and client."[66] None of these definitions suggests that the term refers only to a subsection of all conflicts of interest. Given that the plain language of AS 44.21.410(a)(4) does not exclude particular types of conflicts of interest, OPA bears a "heavy burden" to demonstrate the legislature intended such an exclusion.[67]

OPA does not satisfy that burden. OPA was established in the wake of lawsuits challenging the court system's former practice of appointing private attorneys to represent indigent defendants when the Agency had a conflict of interest.[68] The court system was already contracting with private counsel at great cost and faced even greater expenses if the lawsuits were successful.[69] OPA was proposed as cost-savings solution "to handle many cases where the public defender had a conflict."[70] It could "pass cases back and forth and avoid conflict situations."[71] The governor's transmittal message to the legislature declared that OPA would be "empowered to provide public guardian and guardian ad litem services as well as legal representation to indigent persons, when authorized by existing statutes."[72] He hailed the proposed agency as "permit[ting] efficient sharing of resources, including space, personnel, clerical support, and other administrative costs."[73]

[26] This legislative history only bolsters our conclusion that "a conflict of interests" in AS 44.21.410(a)(4) means *all* conflicts of interests and that OPA has not carried its burden

to show that it means only certain conflicts. Legislative deliberations and related testimony mainly discussed the fiscal benefits of creating an agency to handle cases where the Agency had a conflict, not what constituted a conflict. [74] The governor's transmittal message similarly focused on the cost savings and more efficient provision of representation for indigent criminal defendants that would result from OPA's creation without mention of the type of conflict that would lead to OPA's appointment. [75]

***15** OPA also argues that it and the Agency have historically understood "conflicts" to only mean "actual conflicts" involving their clients, despite having no memorandum documenting their understanding. OPA invites us to adopt its limited definition of "conflict of interests" based on the agencies' practice. But such a practice cannot overcome the statute's plain language and legislative history, which do not reveal any legislative intent to give the phrase "conflict of interests" a meaning that would exclude conflicts due to capacity.

Alaska Statute 44.21.410(a)(4)'s plain language requires OPA to provide legal representation to indigent persons who cannot be represented by the Agency due to a conflict of interests. Conflicts of interests include those resulting from the Agency's lack of capacity to provide effective representation. [76]

V. CONCLUSION

We AFFIRM the superior court's order appointing OPA to represent Mathes.

All Citations

--- P.3d ----, 2025 WL 498790

Footnotes

* Sitting by assignment made under article IV, section 11 of the Alaska Constitution and Alaska Administrative Rule 23(a).

1 OPA is authorized to contract with attorneys to provide representation when its staff attorneys have conflicts of interest. *See* AS 44.21.430.

2 It first decided not to sanction the Agency, although it concluded that the Agency bore some responsibility for the situation that led to the attorney's resignation. The court found that an Agency supervisor should have at least been aware of the problems with the flight the attorney booked and directed her to ensure the situation did not repeat itself. The court noted that this "conflict reveal[ed] the Agency's failures" because it had not noticed warning signs from the attorney's performance, intervened by ordering the attorney to take leave, or otherwise addressed the impending problem.

3 521 P.3d 592, 598-99 (Alaska App. 2022) (holding trial court had "affirmative duty to act" to remedy Agency's failure to assign counsel for defendant for five months).

4 It noted that the court of appeals previously had commented favorably on the view that an unsustainable workload could create a conflict under Rule 1.7(a)(2), citing an unpublished order in *Donnelly v. State*, Nos. A-13597/13598 (Alaska Court of Appeals Order, Nov. 3, 2021) (unpublished order on motion to permit withdrawal of counsel).

5 The superior court used the term "permanent" as a "shorthand" to mean an attorney who, when entering an appearance, intended to represent the client until trial.

6 Alaska Admin. R. 12(e) authorizes a court to appoint "counsel, or a guardian ad litem, or other representative" for an indigent person if the court determines that the appointment is "required by law or rule" but is not

authorized under AS 18.85.100(a) or AS 44.21.410, which provide for appointment of attorneys for indigent persons by the Agency or OPA.

7 At issue in *Perez* was the right to assistance of counsel for an Agency client who was not assigned an attorney for over five months. *Perez*, 521 P.3d at 598.

8 521 P.3d 592 (Alaska App. 2022).

9 Nos. A-13597/13598 at *3 (Alaska App. Order, Nov. 3, 2021) (unpublished order on motion for withdrawal of counsel).

10 440 P.3d 240, 243-44, 247-48 (Alaska 2019).

11 *Id.* at 246 & n.23.

12 17 P.3d 75 (Alaska App. 2001).

13 The court cited *State v. Smith*, 140 Ariz. 355, 681 P.2d 1374 (1984); *In re Edward S.*, 173 Cal.App.4th 387, 92 Cal. Rptr. 3d 725, 746-47 (2009); *People v. Roberts*, 321 P.3d 581, 589 (Colo. App. 2013); *In re Ord. on Prosecution of Crim. Appeals by Tenth Jud. Cir. Pub. Def.*, 561 So. 2d 1130 (Fla. 1990); *United States v. Hanhardt*, 155 F. Supp. 2d 861, 871 (N.D. Ill. 2001); *State v. Peart*, 621 So. 2d 780 (La. 1993); *Carrasquillo v. Hampden Cnty. Dist. Cts.*, 484 Mass. 367, 142 N.E.3d 28, 49 (2020); *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 607-08 (Mo. 2012) (en banc); *United States v. De Castro-Font*, 583 F. Supp. 2d 243, 247-48 (D.P.R. 2008); *Lozano v. Cir. Ct. of Sixth Jud. Dist.*, 460 P.3d 721 (Wyo. 2020). For formal opinions the superior court cited to, *see* ABA Comm. on Ethics & Pro. Resp., Formal Op. 06-441 (2006); Colo. Bar Ass'n, Formal Op. 146 (2022); Or. State Bar, Formal Op. No. 2007-178 (2007); S.C. Bar Ethics Advisory Comm, Ethics Advisory Op. 04-12 (2004); State Bar of Wis., Formal Op. E-84-11 (1998).

14 The court acknowledged that it had not considered Mathes's misdemeanor cases in its original order but nonetheless continued OPA's appointment, noting that OPA had not requested a hearing to contest the Agency's basis for withdrawal and had not presented any evidence that the Agency did not have a conflict.

15 Alaska R. App. P. 404 (authorizing original application for relief in appellate court when "relief is not available from any other court and cannot be obtained through process of appeal, petition for review, or petition for hearing").

16 AS 22.05.015(b) (authorizing certification of questions "involv[ing] a significant question of law under the Constitution of the United States or under the constitution of the state or involv[ing] an issue of substantial public interest that should be determined by the supreme court").

17 *Off. of Pub. Advocacy v. Super. Ct. First Jud. Dist.*, No. S-18741 (Alaska Supreme Court Order, June 19, 2023).

18 *Alaska Pub. Def. Agency v. Super. Ct.*, 450 P.3d 246, 251 (Alaska 2019).

19 *Nelson v. State*, 440 P.3d 240, 243-44 (Alaska 2019); *see also Burrell v. Disciplinary Bd. of Alaska Bar Ass'n*, 702 P.2d 240, 242-43 (Alaska 1985).

20 *Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 871 (Alaska 2014) (quoting *John v. Baker*, 982 P.2d 738, 744 (Alaska 1999)).

21 *State v. Recall Dunleavy*, 491 P.3d 343, 367 (Alaska 2021) (alteration in original) (quoting *Jones v. State, Dep't of Revenue*, 441 P.3d 966, 981 (Alaska 2019)).

22 *Id.* (quoting *Alaska Pub. Int. Rsch. Grp. v. State*, 167 P.3d 27, 35 (Alaska 2007)).

23 *Id.* (quoting *Alaska Pub. Int. Rsch. Grp.*, 167 P.3d at 34-35).

24 *Id.* (quoting *Alaska Pub. Int. Rsch. Grp.*, 167 P.3d at 35).

25 *Jackson v. State*, 127 P.3d 835, 836 (Alaska App. 2006) (alteration in original) (quoting *Pub. Def. Agency v. Super. Ct.*, 534 P.2d 947, 950 (Alaska 1975)).

26 AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM, 3 (2023), https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls-sclaid-ten-princ-pd-web.pdf; *see also, e.g.*, *Kerr v. Parsons*, 378 P.3d 1, 12 (N.M. 2016) (Vigil, J., concurring specially) ("In the absence of a constitutional violation, it is imperative in the administration of justice that we respect the independence of the Department and the Commission and refrain from interfering with their internal management decisions."); *In re Certification of Conflict in Motions to Withdraw Filed by Pub. Def. of Tenth Jud. Cir.*, 636 So. 2d 18, 23 (Fla. 1994) (Harding, J., concurring) ("Except in the most unusual circumstances, I would leave th[e] decision [of who should exercise authority and make decisions about whether the public defender has the resources to perform all the responsibilities required by law] with the public defender and as a court would not second-guess it.").

27 *Kerr*, 378 P.3d at 13 (Vigil, J., concurring specially); *accord id.* at 10 (majority opinion) ("Where there is no violation of right, a court lacks the power to compel an officer of a coordinate branch of government to perform a duty."); *see also* *Lavallee v. Justs. in Hampden Super. Ct.*, 812 N.E.2d 895, 910-11 (Mass. 2004) (requiring prosecution to be dismissed if no attorney appeared for indigent defendant within 45 days of arraignment); *In re Certification of Conflict*, 636 So. 2d at 22 (holding court did not interfere with management of public defender's office by reviewing its motion to withdraw because its inquiry was limited to existence of factual basis for motion); *id.* at 23 (Harding, J., concurring) ("It is only when the decision of a public defender impacts significantly upon the court that any inquiry should be made."); *Cuyler v. Sullivan*, 446 U.S. 335, 347, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980) ("Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.").

28 *Perez v. State*, 521 P.3d 592, 598 (Alaska App. 2022).

29 Alaska Code Jud. Conduct Canon 1; *see, e.g.*, *Bunton v. Alaska Airlines, Inc.*, 482 P.3d 367, 373-74 (Alaska 2021); *Alvarez-Perdomo v. State*, 454 P.3d 998, 1008 (Alaska 2019).

30 *See, e.g.*, *Powell v. Alabama*, 287 U.S. 45, 71, 53 S.Ct. 55, 77 L.Ed. 158 (1932) ("[T]he failure of the trial court to make an effective appointment of counsel was ... a denial of due process."); *Moreau v. State*, 588 P.2d 275, 283-84 & n.27 (Alaska 1978) (imposing on trial court obligation to advise defendants of "potential dangers of representation by counsel with a conflict of interest" and obtain voluntary waiver of constitutional protections for such representation to proceed (quoting *State v. Olsen*, 258 N.W.2d 898, 906 (Minn. 1977))); *Risher v. State*, 523 P.2d 421, 423 (Alaska 1974) ("The mere fact that counsel represents

an accused does not assure this constitutionally-guaranteed assistance. The assistance must be 'effective' to be of any value." (quoting *McCracken v. State*, 521 P.2d 499, 508 (Alaska 1974))).

31 *See* *Wood v. Georgia*, 450 U.S. 261, 271, 101 S.Ct. 1097, 67 L.Ed.2d 220 (1981).

32 *See, e.g.*, *id.* at 272, 101 S.Ct. 1097 (noting that while it was unclear if "actual conflict of interest was present," record demonstrated "[t]he *possibility* of a conflict was sufficiently apparent ... to impose upon the court a duty to inquire further" (emphasis in original)); *Perez*, 521 P.3d at 598 ("Trial courts play an important role in safeguarding th[e] constitutional right [to the assistance of counsel in all critical stages of a criminal prosecution]."); *State v. Peart*, 621 So. 2d 780, 787 (La. 1993) ("If the trial court has sufficient information before trial, the judge can most efficiently inquire into any inadequacy [of representation] and attempt to remedy it."); *cf.* *Cuyler*, 446 U.S. at 347, 100 S.Ct. 1708 ("Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry.").

33 *See* *Wheat v. United States*, 486 U.S. 153, 159-60, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988) (requiring trial court to take appropriate measures to protect criminal defendants from attorney's conflict of interest); *Daniels v. State*, 17 P.3d 75, 82 (Alaska App. 2001) ("[A] defendant's right to waive their attorney's conflict of interest is not absolute; '[the] courts have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them.' " (alteration in original) (quoting *United States v. Locascio*, 6 F.3d 924, 931 (2d Cir. 1993))); *Perez*, 521 P.3d at 599 (observing trial court failed to fulfill duty to safeguard defendant's constitutional right to counsel).

34 *Daniels*, 17 P.3d at 78, 86-87.

35 *Id.*

36 *Id.* at 78-79.

37 *Id.* at 82 (quoting *United States v. Rogers*, 9 F.3d 1025, 1031 (2d Cir. 1993)).

38 *Id.* at 79, 87.

39 U.S. Const. amend. VI; Alaska Const. art. I, § 11.

40 Alaska R. Crim. P. 45(b) ("A defendant charged with a felony, a misdemeanor, or a violation shall be tried within 120 days.").

41 *See, e.g.*, *Glasgow v. State*, 469 P.2d 682, 686-87 (Alaska 1970) (concluding court cannot infer generally waiver of constitutional speedy trial right from mere silence but defendant may "knowingly and intelligently waive[ ] such constitutional rights"); *Rutherford v. State*, 486 P.2d 946, 950 (Alaska 1971) (same); *Conway v. State*, 707 P.2d 930, 934 (Alaska App. 1985) (noting criminal defendant may "waive or under certain circumstances forfeit the right to assert a speedy trial violation"); *James v. State*, 567 P.2d 298, 300 (Alaska 1977) (concluding defendant forfeited right to complain of speedy trial rule violation by failing to complain before voir dire); *Trudeau v. State*, 714 P.2d 362, 365-66 (Alaska App. 1986) (concluding superior court did not err by finding defendant forfeited right to complain of speedy trial violation by waiting

until after jury selection); *Alaska Pub. Def. Agency v. Super. Ct.*, 530 P.3d 604, 609-10 (Alaska App. 2023) (holding continuance under Rule 45 requires consent of defendant).

42 *Perez v. State*, 521 P.3d 592 (Alaska App. 2022).

43 *See id.* at 595-97.

44 *Id.* at 598.

45 *Id.*

46 *See id.*

47 *See* AS 44.21.410(a)(4) (requiring OPA to represent indigent persons that qualify for Agency representation when Agency has conflict of interest).

48 Alaska R. Prof. Conduct 1.7(a)(2).

49 Alaska R. Prof. Conduct 1.1(a).

50 Alaska R. Prof. Conduct 1.3.

51 Alaska R. Prof. Conduct 3.2.

52 *See Carrasquillo v. Hampden Cnty. Dist. Cts.*, 484 Mass. 367, 142 N.E.3d 28, 48-49 (2020) (concluding same based on Massachusetts's Professional Conduct Rules, which are worded nearly identically).

53 *See, e.g.*, *In re Edward S.*, 173 Cal.App.4th 387, 92 Cal. Rptr. 3d 725, 746-47 (2009) ("[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."); *People v. Roberts*, 321 P.3d 581, 589 (Colo. App. 2013) (same); *In re Ord. on Prosecution of Crim. Appeals by Tenth Jud. Cir. Pub. Def.*, 561 So. 2d 1130, 1135 (Fla. 1990) ("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."); *Carrasquillo*, 142 N.E.3d at 48-49 ("Requiring defense attorneys to take on more clients than they can reasonably handle may impede their ability to meet [the] obligation" to "act with reasonable diligence and promptness in representing a client" and "may create concurrent conflicts of interest."); *United States ex rel. Green v. Washington*, 917 F. Supp. 1238, 1275 (N.D. Ill. 1996) ("When an agency such as [the Office of the State Appellate Defender] is appointed to more cases than it can timely handle, ... conflicts of interest are necessarily created as a surfeit of clients compete for the scarce resources of available attorney time and attention."); *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592, 608 (Mo. 2012) (en banc) (same).

54 OPA later moved for an evidentiary hearing along with its motion for reconsideration, which the court denied because new evidence cannot be introduced in connection with a motion to reconsider.

55 *State, Dep't of Fam. & Cmty. Servs., Off. of Child.'s Servs. v. Karlie T.*, 538 P.3d 723, 730 (Alaska 2023) (alterations in original) (quoting *State v. Recall Dunleavy*, 491 P.3d 343, 359 (Alaska 2021)).

56 *Id.* (quoting *State, Dep't of Com., Cmty. & Econ. Dev., Div. of Ins. v. Alyeska Pipeline Serv. Co.*, 262 P.3d 593, 597 (Alaska 2011)).

57 *Guerin v. State*, 537 P.3d 770, 778 (Alaska 2023) (quoting *State v. Planned Parenthood of the Great Nw.*, 436 P.3d 984, 992 (Alaska 2019)).

58 *Conflict of Interest*, BLACK'S LAW DICTIONARY (12th ed. 2024) (citing MODEL RULES OF PRO. CONDUCT r. 1.7(a) (AM. BAR ASS'N 2013)).

59 *Conflict of Interest*, MERRIAM-WEBSTER'S DICTIONARY (2024).

60 *Conflict of Interest*, AMERICAN HERITAGE DICTIONARY (5th ed. 2016).

61 RESTATEMENT (THIRD) OF THE L. GOVERNING LAWYERS § 121 (AM. L. INST. 2000).

62 *See id.*

63 Ch. 55, § 1, SLA 1984.

64 Model Rules of Professional Conduct, 69 A.B.A.J. 1592, 1671 (1983).

65 *Id.* at 1678.

66 *Conflict of Interest*, BLACK'S LAW DICTIONARY (6th ed. 1990).

67 *See* *Guerin v. State*, 537 P.3d 770, 778 (Alaska 2023).

68 *See* *Wood v. Super. Ct.*, 690 P.2d 1225 (Alaska 1984); *DeLisio v. Alaska Super. Ct.*, 740 P.2d 437 (Alaska 1987).

69 Minutes, S. Fin. Comm. Hearing on S.B. 312, 13th Leg., 2d Sess. (Feb. 2, 1984) (testimony of Arthur H. Snowden, Admin. Dir., Alaska Ct. Sys.).

70 Minutes, S. Fin. Comm. Hearing on S.B. 312, 13th Leg., 2d Sess. (Apr. 27, 1984) (statement of Sen. Albert Adams, Chair).

71 Minutes, S. Fin. Comm. Hearing on S.B. 312, 13th Leg., 2d Sess. (Feb. 2, 1984) (testimony of Arthur H. Snowden, Admin. Dir., Alaska Ct. Sys.).

72 1983 S. Journal 1251.

73 *Id.*

74 *See* Minutes, S. Fin. Comm. Hearing on S.B. 312, 13th Leg., 2d Sess. (Apr. 27, 1984) (comments of Rep. Terry Martin); Minutes, House Jud. Comm. Hearing on S.B. 312, 13th Leg., 2d Sess. (Mar. 7, 1984) (testimony of Karla Forsythe, Gen. Counsel, Alaska Ct. Sys.).

75 *See* 1983 S. Journal 1250-51. The message only mentioned conflicts of interest once, describing Alaska's then-current practice of appointing private attorneys. *Id.* at 1250 ("The court system, by statute ... appoints and compensates attorneys who represent indigent persons when the public defender agency cannot provide an attorney because of a conflict of interests.").

76 OPA also argues the court should have appointed counsel under Alaska Administrative Rule 12(e) because it found the Agency had a capacity conflict. But because the superior court did not err by intervening and appointing OPA to represent Mathes under AS 44.21.410(a)(4), Rule 12(e) does not apply.

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