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Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding

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Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding

I. INTRODUCTION

The Constitutions of both the United States and the state of Missouri guarantee an indigent defendant the right to effective legal counsel when the defendant's freedom is in jeopardy.[1] Due to a caseload crisis that is compounded by many other factors, the Office of the Missouri Public Defender cannot serve all the indigent clients who depend on it. The most notable of the issues plaguing the public defender system is that of funding. As a result of a severely underfunded system, public defenders are without resources necessary to effectively represent all of their clients. In order to improve client services and to overcome the system's current state of instability, greater funding is needed from Missouri's state legislature. Thus far, the legislature has failed to give such funding voluntarily, and unless such funds are obtained, Missouri's public defender system will not be able to provide constitutionally adequate legal assistance to all indigent Missouri defendants. To achieve this greater level of funding, it may be necessary for Missouri's judiciary to compel the legislature to provide funding, and it will certainly be necessary for Missouri's legal community to support the system in its efforts.

II. LEGAL BACKGROUND

A. Development of the Indigent Client's Constitutional Right to Counsel

In 1963, the United States Supreme Court decided the famous case of *Gideon v. Wainwright*,[2] and forever changed the dynamics of the criminal

1. "In all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. "No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1; *see also* MO. CONST. art. I, § 18(a) ("the accused shall have the right to appear and defend, in person and by counsel").

2. 372 U.S. 335 (1963).

justice system. In this case, the Court held for the first time in our nation's history that the Sixth[3] and Fourteenth[4] Amendments of the United States Constitution guaranteed indigent defendants the right to counsel in state felony prosecutions.[5] Following *Gideon,* the United States Supreme Court came down with several other cases that further expanded an indigent defendant's right to counsel during a first appeal,[6] at every stage of prosecution,[7] in state juvenile delinquency proceedings,[8] and in state misdemeanor proceedings in which actual imprisonment[9] or a suspended jail sentence[10] is imposed. In response to these decisions, states developed three primary models for providing indigent defense programs. First, some states set up traditional "public defender" programs, in which attorneys are paid salaries to provide representation to indigent clients on a full-time basis.[11] Second, other states require each court to assign indigent cases to private attorneys who are then compensated on a case-by-case basis.[12] Third, states sometimes enter into contracts with private attorneys who agree to provide representation in indigent cases.[13]

After states established their chosen indigent defense programs, issues regarding attorney performance within those systems arose. While many of

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3. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. CONST. amend. VI.

4. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

5. *Gideon*, 372 U.S. at 341-45.

6. Douglas v. California, 372 U.S. 353, 355-57 (1963).

7. United States v. Wade, 388 U.S. 218, 224-25 (1967).

8. *In re* Gault, 387 U.S. 1, 41 (1967).

9. Argersinger v. Hamlin, 407 U.S. 25, 37 (1972).

10. Alabama v. Shelton, 535 U.S. 654, 662, 674 (2002).

11. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *GIDEON*'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 2 (2004) (citing Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995)).

12. *Id.*

13. *Id.* Missouri has experience with a variance of each of the three primary models of providing indigent defense. *See infra* Part II.B.

the early post-*Gideon* cases focused on errors within the judicial system and an indigent client's ability to retain counsel, the Court's decision in *Strickland v. Washington*[14] addressed attorney errors that impeded the client's right to *effective* counsel.[15] In *Strickland*, the Court held that relief was appropriate if a client could prove that he was deprived of his Sixth Amendment right to counsel.[16] This could be accomplished by first showing that his counsel's performance was below accepted community standards and was therefore "objectively unreasonable,"[17] and second, that his counsel's deficient performance negatively affected the outcome of the trial.[18]

Even today, the *Strickland* test remains the proper standard for determining whether a defendant was denied his constitutional right to effective assistance of counsel in most cases.[19] However, the United States Supreme Court in *United States v. Cronic*[20] made it possible in some cases for the defendant to prove ineffective assistance of counsel by demonstrating that his attorney "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing."[21] Furthermore, although "[a]bsolute equality is not required,"[22] an indigent defendant is entitled to legal representation that is substantially equal to that received by defendants with privately paid attorneys.[23] Thus, a high expectation is placed on states to deliver competent, effective indigent defense programs. Missouri has put forth many efforts to do just that, but with only limited success.

B. Missouri's Public Defender System

The Missouri Constitution, consistent with aforementioned principles, guarantees "the right to appear and defend, in person and by counsel."[24] After the *Gideon* decision, indigent defendants in Missouri were represented by court-appointed attorneys who were not paid for their legal assistance.[25] In 1967, legislation establishing a public defender system was proposed in the state's General Assembly but it did not pass.[26] Similar proposals came before

14. 466 U.S. 668 (1984).

15. Joe Margulies, *Resource Deprivation and the Right to Counsel*, 80 J. CRIM. L. & CRIMINOLOGY 673, 687 (1989).

16. *Strickland*, 466 U.S. at 687.

17. Smith v. Robbins, 528 U.S. 259, 285 (2000) (citing *Strickland*, 466 U.S. at 687-91).

18. *Strickland*, 466 U.S. at 687, 691-94.

19. *See Smith*, 528 U.S. at 285; *see also* Bell v. Cone, 535 U.S. 685, 698 (2002).

20. 466 U.S. 648 (1984).

21. *Id.* at 659.

22. Douglas v. California, 372 U.S. 353, 357 (1963).

23. McCoy v. Court of Appeals of Wis., 486 U.S. 429, 438 (1988); *see also Smith*, 528 U.S. at 277 n.9.

24. MO. CONST. art. I, § 18(a).

25. State v. Green, 470 S.W.2d 571, 572-73 (Mo. 1971) (en banc).

26. *Id.* at 579 (Finch, C.J., dissenting).

the General Assembly and failed at each legislative session until 1972.[27] Saddled with the responsibility of representing indigent defendants without compensation from the state, Missouri attorneys grew tired of this financial burden and took the issue to the Missouri Supreme Court in 1971 in *State v. Green*.[28] At the time, Missouri was one of only three states that did not have an established program to compensate attorneys who represented indigent clients.[29] The *Green* court held that it would no longer "compel the attorneys of Missouri to discharge alone 'a duty which constitutionally is the burden of the State,'" and left the funding problem as an issue for the state legislature.[30]

As a result, in 1972 Chapter 600 of the Missouri Revised Statutes[31] established a Public Defender Commission, thereby securing paid counsel for indigent clients.[32] At the time of its inception, the Missouri program relied on federal grants to employ public defenders and create court-appointed counsel programs.[33] Public defender offices were established in St. Louis and Kansas City and private, court-appointed counsel were available throughout the rest of the state.[34] By 1977, public defender offices were in eighteen of Missouri's judicial circuits and the remaining twenty-five judicial circuits used the appointed counsel program.[35]

Several years later, in 1982, the Office of the Missouri State Public Defender (MSPD) was established as an independent department within Missouri's judicial branch, and court-appointed counsel were replaced with contract counsel.[36] In other words, as a result of the MSPD, private attorneys contracted with the state to represent indigent clients in areas where there was no public defender office.[37] However, hiring contract counsel became exceedingly expensive for the state and finding private attorneys willing to work for the state's set fee became progressively more difficult.[38] Consequently, the system was again reorganized in 1989, and the contract counsel practice was eliminated in favor of full-time public defenders in

27. *Id.*
28. *Id.* at 572 (majority opinion).
29. *Id.* at 579 n.3.
30. *Id.* at 573 (quoting State v. Rush, 217 A.2d 441, 446 (N.J. 1966)).
31. *See* MO. REV. STAT. §§ 600.011-.101 (2000 & Supp. 2008).
32. STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2007 ANNUAL REPORT 6 (2007), *available at* http://www.publicdefender.mo.gov/about/FY2007AnnualReport.pdf.
33. *Id.* "High Impact" grants for urban areas supplemented Federal Law Enforcement Assistance Grants given by the Department of Justice. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*

offices throughout the state.[39] This specialized structure of employing full-time public defenders is how the program continues to operate today.[40]

With the hope of improving efficiency, this current system aims to promote specialized practice areas and has three legal services divisions to meet that goal.[41] First, the Trial Division represents indigent defendants charged with misdemeanors or felonies at the trial level and is divided into thirty-three district offices throughout the state.[42] Additionally, a statewide trial division office, the Civil Commitment Defense Unit, represents defendants in "sexually violent predator commitment cases."[43] Second, the Appellate/Post-Conviction Relief Division represents indigent defendants who have been convicted of felonies and are seeking appeals.[44] Consequently, this division defends clients in direct appeals to state appellate courts and the Supreme Court of Missouri.[45] It also represents clients in post-conviction proceedings in state courts and writs of certiorari to the United States Supreme Court.[46] This division has offices in Kansas City, St. Louis, and Columbia.[47] Third, at both the trial and appellate levels, the Capital Division represents indigent defendants facing the death penalty.[48] This division also has offices in Kansas City, St. Louis, and Columbia.[49]

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39. *Id.*

40. *Id.*; *see also* Missouri State Public Defender, Legal Divisions, http://www.publicdefender.mo.gov/legal/legal_division.htm (last visited Mar. 23, 2009). However, the MSPD does still utilize a contract program with private attorneys under some circumstances, and is hoping to expand its contract program to relieve some of its public defenders from a small portion of their caseload. Missouri State Public Defender, MSPD Contract Counsel Cases, http://www.publicdefender.mo.gov/contracts/contract_overview.htm (last visited Mar. 30, 2009).

41. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 6.

42. *Id.*; *see also* Missouri State Public Defender, Legal Divisions, *supra* note 40. According to Deputy Director Cathy Kelly, there are now 33 district offices instead of 36 because two Youth Advocacy Units and one Conflicts Office were closed due to MSPD's inability to support the caseloads. E-mail from Cathy Kelly, Deputy Director, Office of the Missouri Public Defender, to author (Feb. 18, 2009) (on file with author).

43. E-mail from Cathy Kelly to author, *supra* note 42.

44. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 6; *see also* Missouri State Public Defender, Legal Divisions, *supra* note 40.

45. Missouri State Public Defender, Legal Divisions, *supra* note 40.

46. E-mail from Cathy Kelly to author, *supra* note 42. This includes some post-conviction death-row proceedings at the trial level. Missouri State Public Defender, Legal Divisions, *supra* note 40.

47. Missouri State Public Defender, Appellate / Post-Conviction Relief Division, http://www.publicdefender.mo.gov/legal/appellate_PCR.htm (last visited Mar. 23, 2009).

48. This includes state trial courts, the Supreme Court of Missouri, and the United States Supreme Court. Missouri State Public Defender, Legal Divisions, *supra* note 40.

49. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 6.

The indigent defense system in Missouri started with two public defender offices and a majority of court-appointed attorneys, transitioned into more offices and some contract attorneys, and is now entirely reliant on full-time public defenders located in offices state-wide. Though the system has demonstrated progressive tendencies since its inception, more evolution is needed to keep pace with the ever-changing needs of Missouri's indigent population.

C. An Emerging Crisis

The American Bar Association (ABA) unveiled distressing findings about the nation's indigent defense programs in its 2004 publication, Gideon*'s Broken Promise: America's Continuing Quest for Equal Justice.*[50] In this report, the ABA concluded that, "due to chronic under-funding and a lack of essential resources, coupled with crushing attorney workloads and other factors, many indigent defense systems do not provide even constitutionally adequate representation, much less the type of quality representation recommended by national standards."[51] In some cases, indigent clients only received counsel after spending months or years in jail, while other poor individuals never receive counsel at all.[52] Even for those who eventually received counsel, indigent defendants were, and still are, often faced with sub-standard representation due to a number of factors, such as lack of continuity in client-attorney relationships and lack of investigative resources.[53] Further, the trend of sub-par representation of indigent clients has increased the incidence of wrongful conviction,[54] depriving up to 10,000 innocent people a year of their rights and freedom, and even taking the lives of others.[55]

As to the cause of the disastrous condition of the nation's indigent defense programs, the ABA cites a number of different factors. First, the ABA report highlights the systemic problems caused by the gap in resources allocated between prosecutors and public defenders.[56] Further, the problem is also compounded by attorneys who are ineffective due to inexperience, unmanageable caseloads, and other prominent factors.[57] In addition, the

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50. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 11.

51. *Id.* at 16.

52. *Id.* at 22-23.

53. *See infra* note 57.

54. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 11, at 4 (citing The Innocence Project, http://www.innocenceproject.org).

55. *Id.* at 3-4.

56. *Id.* at 13-14.

57. *Id.* at 16-20. Other factors, some of which arise out of a lack of resources and heavy caseloads, include client meetings only hours before hearings, premature encouragement for defendants to plead guilty, lack of continuity in client-attorney

ABA states judges also encourage frightened and confused defendants to waive their right to counsel in order to speed up their processing time and receive leniency.[58]

Unfortunately, Missouri's public defender system suffers from many of these same problems discussed in the ABA report – problems that are exacerbated by inadequate funding. The MSPD's 2007 annual report began by stating, "Missouri's State Public Defender System continues to operate in a crisis mode."[59] The report cited attorneys' caseloads and a "tsunami of . . . turnover" as pressing issues because they perpetuate a "vicious cycle" of attorneys leaving due to high caseloads and being replaced with less experienced attorneys who later resign because they also cannot handle the heavy caseloads.[60] Highlighting the caseload crisis, Missouri's public defenders serve as the attorney for 75-80% of criminal cases in most jurisdictions throughout the state.[61] In other words, the MSPD's approximately 350 attorneys serve as counsel in almost 90,000 Missouri cases each year.[62] Each trial division public defender has an average of 296 cases per year, which is well above the Department of Justice's National Advisory Commission on Criminal Justice (NAC) recommended 225 cases per year.[63] Due to the heavy caseload, attorneys continue to succumb to the pressure and leave the MSPD with an annual 20% turnover rate.[64]

Another factor contributing to the public defender's retention rate is financial in nature. A 2005 independent study of the state's public defender system concluded that Missouri's public defender system was *the* lowest funded statewide indigent defense system in the nation and that the whole system was "on the verge of collapse."[65] Underfunding not only limits the MSPD's ability to hire a larger number of attorneys, it also restricts the salary

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relationships, lack of investigation, research and zealous advocacy, conflicts in representation, and ethical violations. *Id.*

58. *Id.* at 23-25.

59. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 3.

60. *Id.* at 3-4.

61. *Id.* at 7.

62. Missouri State Public Defender, About MSPD – Agency Profile, http://www.publicdefender.mo.gov/about/agencyprofile.htm (last visited Mar. 23, 2009).

63. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 8. NAC standards actually "recommend no more than 150 felony cases *or* 400 misdemeanor[] [cases] *or* 200 juveniles cases *or* 25 appeals." E-mail from Cathy Kelly to author, *supra* note 42 (emphasis added). MSPD concluded that its blended caseload of misdemeanors and felonies translates to a recommended caseload of 225 per the NAC standards. *Id.*

64. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 9.

65. Press Release, Mo. State Pub. Defender, Public Defender Commission Adopts Rule to Limit Availability of Overloaded Offices to Take on More Cases (Nov. 2, 2007), *available at* http://www.publicdefender.mo.gov/Newsfeed/20071102.htm.

of those it does employ. A salary with the MSPD starts at $37,296 per year,[66] which is at least 14.5% below the average minimum salary for comparable positions.[67] New attorneys are unable to work at substandard salaries while simultaneously paying off tens of thousands of dollars in student loan debt and supporting families.[68] Further, a full-time prosecuting attorney makes at least $36,000 more per year than a full-time district public defender.[69] Additionally, public defenders average more than seven years of criminal law experience and serve as counsel in most of Missouri's intricate criminal cases, but are still paid less than the average new attorney in Missouri's private sector.[70] Compounding the low salary is the fact that until last year,[71] public defenders were the *only* state employees forced to pay their own parking expenses, costing each attorney an average of $80 per month.[72] With this bleak financial picture, it is difficult to attract or retain experienced, zealous advocates as public defenders in Missouri.

While paying parking expenses may seem petty, it is indicative of a much larger problem. While national standards dictate that states must fund their indigent defense systems,[73] Missouri requires its counties to provide and fund public defender office space and utilities.[74] A large issue arises, therefore, when counties have to share public defender offices because "[c]ounties simply have no interest in the adequacy of the Public Defender facilities."[75] This disinterest arises in large part because the MSPD division offices often cover more than one county, and many counties assert that they should not have to pay for offices or parking physically located elsewhere.[76] Missouri's current funding system, therefore, necessitates that counties cooperate with each other and with the MSPD[77] but this has not been the case. It has so far instead resulted in hostility toward the MSPD and conflicts between counties.[78] The self-paid parking dilemma was a result of the state's declaration that it is each *county*'s responsibility to pay for public defenders'

66. Missouri State Public Defender, Salaries, http://www.publicdefender.mo.gov/employment/salaries.htm (last visited Mar. 23, 2009).

67. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 9.

68. *Id.*

69. *Id.* at 72.

70. *Id.* at 68.

71. E-mail from Cathy Kelly to author, *supra* note 42.

72. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 91, 94.

73. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 11, at 8.

74. MO. REV. STAT. § 600.040.1 (2000).

75. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 90.

76. *Id.* Counties vehemently resist contributing to the economy of other counties at the expense of their own, and this sort of dispute has given rise to a lawsuit between counties at least once. *Id.*

77. *See id.* at 91.

78. *Id.* at 90.

parking and other facilities, and many counties' flat refusal to do so.[79] This attitude of county non-responsibility is also demonstrated by counties' refusal to pay rent for the MSPD facilities or fund necessary expansions and improvements to existing facilities, resulting in patently inadequate offices.[80]

The lack of adequate resources extends far beyond physical structures. Funding problems also leave indigent defense systems such as the MSPD without the support services that are essential to clients' adequate representation, such as research capabilities, basic technology and "the indispensable assistance of investigators, experts, and administrative staff."[81] For example, in the MSPD's annual report for 2007, the office requested an additional $5,500 in funding in order to implement an electronic discovery system that was already available to prosecutors.[82] This request was denied by the legislature.[83] The MSPD also asked for forty-five additional legal assistants, investigators, and paralegals to aid in administrative matters thereby allowing the attorneys to dedicate additional time to their more serious or complex cases.[84] This request was also denied, leaving the MSPD with one investigator for every 1,837 cases, one secretary for every 1,421 cases, one legal assistant for every 3,030 cases, and one paralegal for every 21,592 cases.[85] As the MSPD stated the issue, until the public defender system in Missouri is drastically reformed, "[j]ustice for all no longer applies."[86]

D. The Separation of Powers Issue

In response to similar problems, other states' indigent defense systems have attempted various methods of compelling legislative action. Courts, however, are reluctant to impose direct orders for more funding on their state

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79. *Id.* at 90-91.

80. *See id.* at 90. Problems include multiple attorneys sharing offices (rendering "confidential client meeting[s] impossible"), attorneys setting up offices in closets and eliminating all public space in the office, installing locks on filing cabinets because they are forced to relocate them to public hallways, eviction notices because counties refused to pay increases by landlords, and having offices with mud floors, asbestos, and cockroaches. *Id.* MSPD contends that these "working conditions undoubtedly contribute to [high] turnover" rates. *Id.* MSPD recently filed a complaint with the Judicial Finance Commission to resolve a dispute over an office which was housed in a county-owned building with toxic mold. E-mail from Cathy Kelly to author, *supra* note 42. MSPD relocated its attorneys, and the county refuses to pay for the alternate office space. *Id.*

81. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 11, at 7.

82. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 95.

83. E-mail from Cathy Kelly to author, *supra* note 42.

84. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 85.

85. E-mail from Cathy Kelly to author, *supra* note 42.

86. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 66.

legislatures.[87] This is because in some circumstances, a court's ability to compel change from its state's legislature has been called into question as a possible violation of the separation of powers doctrine.[88]

In the United States, Congress has all legislative powers[89] while the Supreme Court and other federal courts have the judicial power,[90] and neither department is permitted to encroach on the powers of the other. The United States Constitution does not require states to operate under these same principles.[91] Even so, it appears that all states function under a similar separation of powers doctrine in accordance with their own state constitutional principles.[92]

Unlike its federal counterpart, Missouri's state constitution explicitly adopts a separation of powers doctrine:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.[93]

87. For example, the Louisiana Supreme Court defended its refusal to compel its legislature to fund indigent services by stating, "this Court should not lightly tread in the affairs of other branches of government." State v. Peart, 621 So. 2d 780, 791 (La. 1993).

88. The separation of powers doctrine refers to "[t]he division of governmental authority into three branches of government – legislative, executive, and judicial – each with specified duties on which neither of the other branches can encroach; the constitutional doctrine of checks and balances by which the people are protected against tyranny." BLACK'S LAW DICTIONARY 1396 (8th ed. 2004). This is not expressly stated in the Constitution, but it is clearly inferred from its division of enumerated powers among the three distinct branches. Kwai Chiu Yuen v. Immigration & Naturalization Serv., 406 F.2d 499, 500-01 (9th Cir. 1969).

89. U.S. CONST. art. I, § 1.

90. U.S. CONST. art. III, § 1.

91. Sweezy v. New Hampshire, 354 U.S. 234, 255 (1957) (citing Dreyer v. Illinois, 187 U.S. 71 (1902)); *see also* Daniels v. Area Plan Comm'n of Allen County, 306 F.3d 445, 467 (7th Cir. 2002).

92. 16 C.J.S. *Constitutional Law* § 216 (2008); State *ex rel.* Black v. Burch, 80 N.E.2d 294, 299 (Ind. 1948).

93. MO. CONST. art. II, § 1.

However, the Supreme Court of Missouri has repeatedly acknowledged that, "From a pragmatic standpoint it is obvious that some overlap of functions necessarily must occur."[94]

Still, some courts have applied indirect persuasion in order to compel the legislature to act. For example, in the 1981 Missouri Supreme Court case *State ex rel. Wolff v. Ruddy*,[95] the court "urge[d] the co-equal Executive and Legislative branches of government to each assume its share of responsibility," but declined to directly *order* the legislature to pay the attorneys who represented indigent defendants.[96] Instead, the court acknowledged that its primary duty was to secure the constitutional rights of indigent defendants, and outlined temporary guidelines that required the release of any indigent defendant who was denied timely right to counsel.[97] Similarly, other courts prevented the prosecution of indigent defendants until the legislature remedied the issue of inadequate legal representation through proper funding.[98] This is usually done by establishing a rebuttable presumption that each defendant received inadequate assistance of counsel.[99]

Notably, two courts further extended their use of judicial power to force the legislature into action. In *State v. Smith*,[100] the Arizona Supreme Court ordered a county to follow specific guidelines, based largely on the ABA Standards for Criminal Justice.[101] The new guidelines required a decrease in attorney caseloads and an increase in attorneys' fees paid by the county, although at the time the county had no limit on caseloads and it had a difficult time acquiring contract attorneys to work for its offered compensation.[102] Still, the court was unsympathetic and stipulated that if the guidelines were not followed, the court would reverse all appealed convictions obtained under the deficient system, unless the state could demonstrate that its error was harmless in each case.[103] This essentially "forced legislative action," as the county quickly adopted the new guidelines despite the high cost.[104]

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94. Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 12 (Mo. 1992) (en banc) (emphasis omitted); State Tax Comm'n v. Admin. Hearing Comm'n, 641 S.W.2d 69, 74 (Mo. 1982) (en banc).

95. 617 S.W.2d 64 (Mo. 1981) (en banc).

96. *Id.* at 66-68.

97. *Id.* at 67.

98. *See, e.g.*, Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 912-13 (Mass. 2004); State v. Citizen, 898 So. 2d 325, 338-39 (La. 2005).

99. *See, e.g.*, State v. Peart, 621 So. 2d 780, 791 (La. 1993).

100. 681 P.2d 1374 (Ariz. 1984).

101. *Id.* at 1381. The ABA guidelines included setting maximum caseload limits, considering criteria for determining attorneys' fees in criminal cases, and requiring adequate investigative and support services for the defense counsel. *Id.* at 1380, 1382.

102. *Id.* at 1382.

103. *See id.* at 1381 ("there will be an inference that the adequacy of representation is adversely affected by the system"); *see also* Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*,

In *State v. Lynch*, [105] the Oklahoma Supreme Court took a different approach after declaring some appointed attorneys' compensation to be unconstitutional.[106] Two court-appointed attorneys spent more than 175 hours working on a first degree murder case in which the state sought the death penalty, and at the end of the trial the defendant was convicted and sentenced to life.[107] During their work on the case, the attorneys lost a significant amount of money in overhead expenses and billable services, for which they requested compensation at a rate well above the maximum statutory fee of $1,600 each.[108] The court granted the request, as it concluded that the inadequate compensation offered by the state amounted to an unconstitutional taking of the attorneys' property.[109] While it "invite[d] legislative attention to [the] problem," the court put guidelines in place for indigent attorneys' fees that corresponded with the hourly rates of the state's prosecutors.[110] The court ordered that the guidelines be followed until the legislature solved the problem itself.[111] In response, Oklahoma's state legislature created an indigent defense system and raised its attorney compensation caps significantly.[112] However, neither the *Smith* nor the *Lynch* court was effective in the long-term; both indigent defense systems involved were again in financial crisis within years of implementing the compelled guidelines.[113]

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118 HARV. L. REV. 1731, 1740 (2005) (citing Rodger Citron, Note, *(Un)*Luckey v. Miller*: The Case for a Structural Injunction to Improve Indigent Defense Services*, 101 YALE L.J. 481, 501 (1991)).

104. Note, *supra* note 103, at 1741 (citing Caroline A. Pilch, State v. Smith*: Placing a Limit on Lawyers' Caseloads*, 27 ARIZ. L. REV. 759, 767 (1985)).

105. 796 P.2d 1150 (Okla. 1990).

106. *Id.* at 1152-54.

107. *Id.* at 1153.

108. *Id.* at 1153-54. The court concluded that had the two attorneys accepted the statutory fee, one attorney would have lost $41.41 per hour and the other $33.39 per hour in overhead expenses alone. *Id.*

109. *Id.* at 1154, 1163.

110. *Id.* at 1160-61.

111. *Id.*

112. Note, *supra* note 103, at 1739 (citing Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1, 9).

113. By 1992, in the county at issue in *Smith*, funding was "'scarce,'" attorneys were representing 200 defendants per year instead of the court's standard of 150, and "'successive recent budget cuts [] threaten[ed] office paralysis and quality assurance.'" *Id.* at 1741 (quoting Dean Trebesch, *New Challenges in Indigent Defense*, ARIZ. ATT'Y, Nov. 1992, at 25, 26). Additionally, hiring and promotions had ceased entirely, and turnover rates and caseloads continued to increase. *Id.* The Oklahoma Indigent Defense System that was created in response to *Lynch* was "nearly forced to shut down" in 1992, and had since faced "repeated financial crises" due to lack of enforcement of the guidelines established by the court. *Id.* at 1739-40.

III. RECENT DEVELOPMENTS

More than a decade ago, the American Bar Association (ABA) placed public defenders in the spotlight by highlighting problems plaguing the system.[114] More recently, the ABA also stimulated developments in the criminal justice community when it issued the opinion, Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent and Diligent Representation.[115] In this opinion, the ABA commanded that, "[i]f workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients."[116] The ABA made it clear that this workload-limiting rule, derived from the Model Rules,[117] applies equally to private lawyers and to "lawyers who represent indigent persons charged with crimes."[118] In assessing whether a caseload is excessive, many factors must be considered, including actual number of cases, the complexity of each case, the amount of resources available to the lawyer, the lawyer's own qualifications (including experience and ability), and the lawyer's collateral duties to his office and clients.[119]

According to the ABA opinion, if a public defender believes that his caseload is excessive, it is his ethical duty to not accept new clients and he must request the court or his supervisor to refrain from assigning him new cases.[120] Further, if the public defender believes that his excessive caseload prevents him from competently representing *current* clients, he must also ask the court or his supervisor for permission to withdraw from a sufficient number of cases.[121] In the event that permission is denied in either situation, the public defender must comply with the court's order, but also take all steps "reasonably feasible" to competently and diligently represent his clients.[122]

Professionals in Missouri's legal community agree with the ABA's assertion that heavy caseloads are endangering indigent defendants' access to competent legal assistance. For example, in a 2007 address, Laura Denvir Stith, Chief Justice of the Supreme Court of Missouri, voiced her concern over the condition of Missouri's public defender system.[123] She asserted that

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114. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 11.

115. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006).

116. *Id.*

117. MODEL RULES OF PROF'L CONDUCT RR. 1.1, 1.2(a), 1.4 (2008).

118. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441, *supra* note 115.

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. Laura Denvir Stith, *Chief Justice Laura Denvir Stith Addresses the Missouri Bar, Judicial Conference in Springfield*, 63 J. MO. B. 282, 284-85 (2007).

Missouri must support its failing public defender system in order to ensure that all Missourians have access to proper legal representation.[124] She further acknowledged that the MSPD has a "growing problem of providing constitutionally adequate legal representation" due to its high turnover rates and soaring caseloads.[125]

In the recent Missouri case *State ex rel. Wolfrum v. Wiesman*,[126] the Missouri Supreme Court addressed whether two public defenders should have been granted additional time to prepare for a capital trial when they were admittedly unprepared due to a heavy caseload and restricted investigatory resources.[127] The two attorneys were representing indigent clients in a total of eleven capital cases, and one attorney was also the managing supervisor over twenty pending first-degree murder cases.[128] Further, the public defender's office only had "one investigator and two mitigation specialists" for its entire caseload.[129] The court held that, despite the defendant's demand to be tried within 180 days pursuant to Missouri Revised Statute § 217.460, the attorneys showed good cause for additional time and the trial judge should have granted the attorneys' request.[130] Due to the attorneys' inadequate time and resources, a continuance of the underlying case was required in order to avoid the possibility of ineffective assistance.[131] In arguing against the grant of additional time, the state contended that the error of ineffective assistance could simply be corrected by a later retrial.[132] The court found this argument to be inappropriate and emphasized, "[a]ny defendant that has exercised his right to counsel is guaranteed effective assistance of counsel, and courts should do the utmost to protect the defendant's right to adequate and competent representation."[133]

The issue of inadequate indigent defense again gained national attention in 2007, when an Ohio judge assigned a public defender to try a case only two and a half hours after appointment, and the public defender – unprepared and following his office's policy – refused to accept the case for trial.[134] As a result, the judge arrested the public defender for contempt and held him in custody for five hours, complaining that the delay inconvenienced the state's witnesses and that "most defendants plead guilty in his court just after meeting their lawyer anyway."[135] The public defender was later fined $100

124. *Id.*
125. *Id.* at 285.
126. 225 S.W.3d 409 (Mo. 2007) (en banc).
127. *Id.* at 410.
128. *Id.* at 410 n.5.
129. *Id.*
130. *Id.* at 411-12.
131. *Id.* at 412.
132. *Id.*
133. *Id.* (citing McMann v. Richardson, 397 U.S. 759, 771 (1970)).
134. Jack King, *NACDL News*, CHAMPION, Sept.-Oct. 2007, at 8, 10-11.
135. *Id.* at 11.

and ordered to pay $50 restitution to compensate two state trial witnesses for their time away from work.[136] The president of the National Association of Criminal Defense Lawyers (NACDL), Carmen Hernandez, expressed disgust with the judge's actions, stating:

> Too often in this country, defense lawyers are pressured to go to trial or plead clients guilty without having performed the investigation and research required by the Sixth Amendment and ethical rules . . . . Criminal defense lawyers take an oath to uphold the Constitution and that requires that we provide effective assistance of counsel. Without a prepared defense lawyer, the prosecution is not put to its proof and the system fails in its truth-seeking function. NACDL is committed to supporting lawyers, like [the public defender in this case], who stand up for their clients' rights and fight to ensure that the system produces justice, not just efficiency.[137]

The NACDL also issued a public statement condemning the judge's actions in hopes of bringing attention to the constitutional rights of indigent defendants to receive effective assistance of counsel.[138]

Heavy public defender caseloads were again at issue in the 2008 Minnesota case of *State v. Davis*,[139] in which the defendant was charged with a serious crime[140] and was represented by a public defender.[141] At the defendant's first appearance, his public defender assisted him in obtaining a trial date, which was set according to the defendant's formal demand for a speedy trial.[142] However, three days before the scheduled trial date, the public defender requested a continuance due to a month-long conflict with another trial.[143] The defendant did not waive his right to a speedy trial.[144] Nonetheless, the trial court granted the continuance and informed the defendant that because it was his counsel who caused the delay in the trial, the defendant lost his ability to complain on appeal that he was denied his right to a speedy trial.[145] On appeal, the defendant asserted that because his counsel was court-appointed, the state should "bear the responsibility for the delay caused by public defenders' caseloads," as the state did when

136. *Id.* at 10-11.
137. *Id.* at 11.
138. *Id.*
139. No. A07-0331, 2008 WL 2020402 (Minn. Ct. App. May 13, 2008).
140. The crime was "fleeing a peace officer in a motor vehicle resulting in death." *Id.* at *1.
141. *Id.* at *2.
142. *Id.* at *2, *4.
143. *Id.*
144. *Id.*
145. *Id.*

prosecutors' caseloads caused trial delays.[146] The appellate court granted the defendant no relief, reasoning that the state would not bear this responsibility because it did not *deliberately* overburden its public defenders.[147]

A recent Kentucky case, *Lewis v. Hollenbach*,[148] foreshadows what might soon happen in other states. In an attempt to force Kentucky's general assembly to properly fund the state's public defender system, a group of public defenders and similarly interested organizations[149] filed a petition for declaratory judgment against Kentucky state officials.[150] The petition claimed that Kentucky's public defender system is in a severely underfunded condition that is forcing its attorneys to handle an unethical number of cases,[151] and that the public defender system will run completely out of money in mid-2009.[152] Anticipating the inevitable, the public defenders developed a "service reduction plan" that would reduce their caseload and work within the system's meager funding limits.[153] In order to implement the plan, the plaintiffs sought three declarations from the court: that (1) Kentucky public defenders "may . . . legally decline to accept certain appointments to represent indigent criminal defendants," (2) indigent defendants who are declined by public defenders but still subject to prosecution must be appointed private defense counsel at the state's expense, and (3) that it is "legal and proper" for Kentucky courts to order the state of Kentucky to pay for the fees of any such private defense counsel.[154] Other

146. *Id.* at *3.

147. *Id.*

148. Lewis v. Hollenbach, No. 08-CI-1094 (Ky. Franklin Cir. Ct. June 30, 2008).

149. The plaintiffs were (1) "Erwin W. Lewis, individually and in his official capacity as Kentucky's Public Advocate and on behalf of attorneys employed by the Department of Public Advocacy," (2) "The Department of Public Advocacy," (3) "Daniel T. Goyette, individually and in his capacity as Chief Public Defender and Executive Director of Louisville and Jefferson County Public Defender Corporation and on behalf of attorneys employed by the Louisville and Jefferson County Public Defender Corporation," (4) "Louisville and Jefferson County Public Defender Corporation," (5) "Frank Mascagni, III, individually and on behalf of others similarly situated," and (6) "John Doe individually and on behalf of others similarly situated." Petition for Declaratory Judgment at 1-2, Lewis v. Hollenbach, No. 08-CI-1094 (Ky. Franklin Cir. Ct. June 30, 2008).

150. *See generally id.*

151. *Id.* at 3. This is based on NAC Standard 13.12: *Workload of Public Defenders*, issued in a 1973 report of the National Advisory Commission on Criminal Justice Standards and Goals. *Id.* at 14. In 2007, the American Council of Chief Defenders urged that caseloads should never exceed the NAC standards. *Id.* at 15. Petitioners also cited ABA Formal Opinion 06-441. *Id.; see also* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441, *supra* note 115.

152. Petition for Declaratory Judgment, *supra* note 149, at 4.

153. *Id.*

154. *Id.* at 4-5.

state public defender systems with remarkably similar problems – including Missouri – will surely be interested in the outcome of this case.

In November, 2007, Missouri's Public Defender Commission took a different approach to reform its public defender system. In an attempt to address the caseload crisis which is "jeopardizing justice in Missouri[],"[155] the Commission adopted a procedure that allowed the MSPD Director to assess when a district office has operated with excessive caseloads[156] for at least three consecutive months and thereafter certify an overburdened office as "of limited availability."[157] If an office was certified as such, the appropriate court would receive a notice of at least one month before the office planned to stop accepting some cases.[158] The District Defender was then required to consult with the court and the state's attorney to discuss categories of cases the overburdened office would no longer accept.[159] When the office actually intended to function on a limited availability status, it was then required to file with the court a final list of categories of cases it would no longer accept, and no cases that fell within that category would be accepted by the office for as long as it retained its limited availability status.[160] Cathy R. Kelly, a Deputy Director of the MSPD,[161] admitted that this procedure was not what was best for defendants who would be turned away, but asserted that it *was* constitutional and it *was* necessary because, "[i]f we can't handle every case that walks in the door – and we can't – we need to take care of those cases with the most serious consequences for the client."[162]

Unfortunately, this limited availability procedure was short-lived. On April 14, 2009 the Missouri Court of Appeals, Western District declared that the MSPD could no longer use the procedure to refuse cases, because doing so directly violated a statutory mandate.[163] The conflicting Missouri statute explicitly requires the MSPD to provide representation in the types of cases the limited availability procedure allowed the MSPD to decline.[164] The court

155. Press Release, *supra* note 65.

156. The standard is maintained by the State Public Defender Commission. MO. CODE REGS. tit. 18, § 10-4.010(1)(A) (2008).

157. *Id.* § 10-4.010(2)(A); *see also* Press Release, *supra* note 65.

158. MO. CODE REGS. tit. 18, § 10-4.010(2)(B). The appropriate court is the court before which that office has cases pending. *Id.*

159. *Id.* § 10-4.010(2)(C).

160. *Id.* § 10-4.010(2)(E). The limited availability status will be removed when the caseloads at the office have remained under their maximum caseload standard for at least two months. *Id.* § 10-4.010(3)(B).

161. Current deputy director, as of March 23, 2009.

162. Press Release, *supra* note 65.

163. State ex rel. Mo. Pub. Defender Comm'n v. Hamilton, Nos. WD70327, WD70349, 2 (Mo. App. W.D. Apr. 14, 2009), *available at* http://www.courts.mo.gov/file/Opinion_WD70327%20and%20WD70349.pdf; *see also* MO. REV. STAT. § 600.042.4 (Supp. 2008).

164. *See Hamilton*, Nos. WD70327, WD 70349, at 2.

declared that the MSPD had exceeded the scope of its statutory authority as a state agency and further asserted that when a regulation promulgated by an agency is inconsistent with a statute, "'the regulation must fail.'"[165] Despite this ruling, the court did acknowledge "that serious issues exist concerning the caseloads the public defender system is asked to shoulder and the staffing and other resources it is afforded to accomplish its important mission," and commended the MSPD for its "effort to address these serious issues in a considered, systematic, and responsible way."[166] It is still possible for the limited availability procedure to become a valid, legally recognized practice. Currently, the Missouri General Assembly is considering a bill that would give the MSPD statutory authority to decline cases.[167] If this bill passes, it would undoubtedly resolve the conflict the court found in this recent case.

Even so, as a result of this ruling, the MSPD is in an even more dismal situation. According to Deputy Director Cathy Kelly, the MSPD would have to hire 192 additional public defenders in order to effectively represent all of its current clients.[168] This seems especially unlikely to occur in light of the MSPD's current funding crisis. In fact, in December 2008, the MSPD was forced to implement a department-wide hiring freeze in order to meet its payroll costs.[169] This freeze further weakened an already severely injured system.[170] The MSPD requested additional funding necessary to lift the hiring freeze, but has not yet received a response from the state legislature.[171] As long as the MSPD is unable to fill vacancies in its district offices, "for many of Missouri's poor facing criminal charges, the constitutional right to a lawyer may be on hold."[172]

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165. *Id.* at 8, 15.

166. *Id.* at 14.

167. *See* Mark Morris, *Appeals Court Says Missouri Public Defenders Cannot Refuse New Cases*, KANSAS CITY STAR, Apr. 14, 2009, *available at* http://www.kansascity.com/115/story/1142392.html; *see also* Michael Bushnell, *Missouri Senator Seeks to Overhaul Public Defender System*, COLUMBIA MISSOURIAN Apr. 15, 2009, *available at* http://www.columbiamissourian.com/stories/2009/04/15/mo-senator-seeks-overhaul-public-defender-system/.

168. *See* Morris, *supra* note 167.

169. Press Release, Mo. State Public Defender, Missouri's Public Defender System Announces Hiring Freeze (Dec. 15, 2008), *available at* http://www.publicdefender.mo.gov/Newsfeed/20081215.htm.

170. *Id.* "We already don't have enough people to handle the caseload . . . . We need every lawyer we have, and then some. But we also need the funding to pay every lawyer." *Id.*

171. *Id.*

172. *Id.*

IV. DISCUSSION

A. Change Must Happen on a Systemic Level

While the 2006 ABA opinion regarding a workload-limiting rule was powerful, it stopped short of implementation of the policies it urged. The opinion demanded that public defenders turn away new defendants when excessive caseloads rendered competent represention of new clients impossible.[173] Unfortunately, however, the opinion's useful guidance ends here, as it speaks only to the responsibility of individual attorneys rather than addressing reform for the system as a whole. It gives no indication of what should happen to the cases that are turned away and offers no options for how to resolve the situation on a systemic level. The ABA's related piece, *Gideon's Broken Promise*, is also compelling but it, too, offers the bare recommendation that attorneys refuse to accept new cases in the face of excessive workloads.[174] These recommendations should be followed but fall short of being realistic if defendants have nowhere else to go.

Further, ordering a public defender to represent a client when he cannot do so competently, as the Ohio judge did,[175] is unethical and will not solve any of the deeper problems plaguing Missouri's Public Defender System. In fact, if a public defender's efforts to be ethical can so easily be thwarted by a judge, and if the push toward appropriate reform is not met with the resources required for success, public defenders will continue to work in vain for a revolution that will never happen. In order for true transformation of the system to occur, all of the players – including judges – must work together in order to overhaul the entire public defender system. The state of Missouri needs to clearly redefine its indigent defense mission and lay out the steps necessary to address the problem on a large scale, involving the judiciary, legislature, the MSPD, and all attorneys who are members of the Missouri Bar in its efforts. Within this charge to overhaul the system, the first step should be to create and implement a plan for allocating reasonable funding.

B. There Must Be Adequate Funding

Since *Gideon,* Missouri has tried each of the three primary models for providing statewide indigent defense.[176] The first two – appointed counsel and contract counsel – were abandoned due to failure, and the current system is in danger of failing as well. Regardless of the model chosen, success is

173. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441, *supra* note 115, at 1.

174. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 11, at 43.

175. *See* King, *supra* note 134, at 10.

176. *See supra* Part II.B.

possible only with adequate funding. The MSPD's "limited availability" procedure, which utilized some of the strategies recommended by Missouri's Chief Justice Stith,[177] was necessary for the MSPD to survive its current underfunded condition.[178] Public defenders in "limited availability" offices were working with prosecutors to waive jail time for some offenses, thereby eliminating the constitutional requirement of counsel in some cases.[179] Even it had not been struck down, the procedure was less than ideal because it left many indigent defendants without counsel. Furthermore, it would not have solved the current crisis because there still is a large funding shortfall. In 2007, Chief Justice Stith publicly called for increased funding from the legislature.[180] Without more funding, the MSPD will either have to continue to juggle more cases than its attorneys can competently manage, or, if the legislature passes a statute allowing it to do so, severely restrict the cases it accepts. Both of these options, however, are practices that risk sacrificing the defense of some indigent criminal defendants in order to save the constitutional rights of others.

On the other hand, the MSPD's new procedure, even though recently struck down, might still indirectly lead to more legislative funding. In fact, reinstatement of this procedure or one that would similarly allow the MSPD to determine a maximum caseload is a real possibility,[181] and it is estimated that all but four or five of the MSPD's district offices could be labeled with having an excessive caseload, thus qualifying for limited availability status.[182] Because a number of indigent clients would necessarily be turned away by the MSPD, the implications are obvious. Indigent defendants in most areas of the state could soon be refused representation by the MSPD, and those who do not have a constitutionally established right to an attorney[183] might be faced with the prospect of trudging through Missouri's criminal court system

177. Stith, *supra* note 123, at 284-85. The suggestions were (1) establish a court rule to limit the caseload of public defenders, (2) "reduc[e] the types of cases in which public defenders are appointed," (3) encourage prosecutors "to eliminate incarceration as a potential punishment for [some] offenses," and (4) "greatly increas[e] funding from the legislature." *Id.* at 285.

178. Press Release, *supra* note 65.

179. *Id.* However, there is no *requirement* for prosecutors to do so.

180. Stith, *supra* note 123, at 284-85.

181. The bill to essentially enforce by statute the MSPD limited availability procedure, Senate Bill 37, was approved in the upper chamber of the General Assembly by a vote of 32-0 in March 2009 and is now being considered by the House General Laws Committee (as of April 15, 2009). *See* Bushnell, *supra* note 167.

182. Kelly Wiese, *Missouri Public Defenders Commission Will Refuse to Take Some New Cases*, KANSAS CITY DAILY REC., Oct. 1, 2007, *available at* http://findarticles.com/p/articles/mi_qn4181/is_20071001/ai_n21102975?tag=col1;fa_related_widget.

183. Generally, this pertains to offenses that do not have a possibility of jail time, or the prosecutor waives jail time. This includes most misdemeanors and many non-violent felonies. Press Release, *supra* note 65.

without any legal representation at all. However, as previously discussed, *Gideon, Strickland* and a long line of other cases have clearly established a constitutional right to effective assistance of counsel for indigent defendants under many circumstances.[184] Moreover, these cases do not indicate in any sense that the right simply disappears when state-funded public defenders refuse to accept indigent clients. In January 2009, Chief Justice Stith expressed her concern that Missouri's inability to meet constitutional requirements for indigent defense could ultimately lead to defendants being set free rather than going to jail, which is "a serious public safety aspect of the public defender crisis."[185] As a result, if Missouri judges want to avoid the dismissal of cases, they will be forced to appoint private counsel to ensure quality legal representation for defendants who face the possibility of incarceration. This, in turn, begs the question of exactly how those private attorneys will be paid.

There was apparently only one minimal compensation safeguard offered by the MSPD limited availability procedure.[186] The judge had to inform the defendant's appointed private counsel (assuming he has been granted private counsel), that he was entitled to file a request for reimbursement of reasonable litigation costs with the MSPD, which *may* approve the request.[187] If the MSPD did not, or in the more likely event could not, reimburse the attorney, or reimbursed him only partially, the attorney would not be satisfied. Missouri's highest court has already declared that it will not force the state's attorneys to accept the responsibility at their own expense.[188] Furthermore, counties will not likely volunteer to assist in the effort to pay these extra costs, as they have already shown distaste for funding the MSPD district offices.[189] Therefore, a cycle of dysfunction is evident. If the MSPD turns away indigent defendants, judges will appoint private counsel. Private counsel will not be reimbursed by the state, so judges will then stop appointing private counsel. Ultimately, the indigent defendants will remain without counsel.

Successful reform of Missouri's public defender system can only happen with more funding, and that funding must come from Missouri's legislature. The ABA candidly agrees with this point, as is clear in its first recommendation for battling the nation's indigent defense crisis:

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184. Gideon v. Wainwright, 372 U.S. 335, 341-45 (1963); Strickland v. Washington, 466 U.S. 668, 685 (1984); *see also supra* Part II.A.

185. Laura Denvir Stith, Chief Justice of the Missouri Supreme Court, State of the Judiciary Address (Jan. 28, 2009), *available at* http://www.courts.mo.gov/page.asp?id=28987.

186. MO. CODE REGS. tit. 18, § 10-4.010(5)(A) (2008).

187. *Id.*

188. State v. Green, 470 S.W.2d 571, 572-73 (Mo. 1971) (en banc).

189. *See supra* text accompanying notes 73-80.

> "[t]o fulfill the constitutional guarantee of effective assistance of counsel, *state governments* should provide increased funding for the delivery of indigent defense services . . . at a level that ensures the provision of uniform, quality legal representation. The funding for indigent defense *should be in parity with funding for the prosecution function*, assuming that prosecutors are funded and supported adequately in all respects."[190]

The ABA urged implementation of this recommendation.[191] Additionally, as alluded to by the ABA's above statement, a gross inequality of public defender resources compared to prosecutorial resources is unacceptable. Such a scheme only worsens the systemic problem because an adversarial system cannot properly function when the adversaries are unjustly mismatched.[192] There is no appropriate rationale for providing more funding and higher salaries to prosecutors in Missouri[193] while denying much-needed funding to those who defend a citizen's constitutional right to competent counsel.

C. The Judiciary Should Mandate Adequate Legislative Funding

It is clear that greater funding is necessary, but the ultimate issue is how to best approach the state legislature's apparent unwillingness to increase funding to the MSPD. The pending lawsuit in Kentucky seeks to have the state's judiciary force the legislature to pay for court-appointed counsel for indigent defendants who are not accepted by its overburdened, under-funded public defense system;[194] however, at this point, Missouri has sought no such judicial action. Yet, Missouri's recent limited availability procedure – although not permissible at this time – may prompt judges, who would be forced to appoint private counsel if the procedure was revived, to take action themselves. In order to implement an effective, long-term solution, the Supreme Court of Missouri should avoid recommending "guidelines" for fee structures to be paid by the legislature. This timid strategy has repeatedly proven ineffective in other states[195] and in Missouri as well, as evidenced by the lack of funding and progress since *State ex rel. Wolff v. Ruddy*.[196] Rather, the court should work with other legal professionals to determine the amount of funding necessary and directly *order* the expenditure of funds by the

190. ABA STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, *supra* note 11, at 41 (emphasis added).

191. *Id.*

192. *Id.* at 13-14.

193. *See supra* text accompanying notes 65-69.

194. *See supra* text accompanying notes 148-54 (discussing Lewis v. Hollenbach, No. 08-CI-1094 (Ky. Franklin Cir. Ct. June 30, 2008)).

195. *See supra* text accompanying notes 100-04.

196. *See supra* text accompanying notes 95-97.

legislature. The court must then establish enforcement mechanisms to ensure a long-term solution.

If the court takes these steps, it is likely that some will view this as a judicial intrusion on legislative powers. In fact, Missouri's legislature has recently demonstrated its fear of judicial interference in funding by attempting to put a "'jurisdiction-stripping' resolution"[197] before the voters as a proposed constitutional amendment.[198] As proposed, the amendment would have forbidden state courts from ordering the general assembly to "expend public funds except as expressly approved by legislation or the vote of the people."[199] However, the resolution never made it to Missouri's voters,[200] and Missouri's Constitution remains unchanged.[201] Therefore, there currently is no constitutional barrier preventing the Supreme Court of Missouri from ordering the legislature to properly fund the MSPD; the court must only abide by the separation of powers doctrine in its common form, as it is already expressed in Article II of Missouri's Constitution.[202]

Notably, even the United States Supreme Court has asserted that the separation of powers doctrine neither requires nor expects complete separation of the three branches of government.[203] Although it is true that generally the courts are not permitted to interfere with the legislature's authority to tax and spend,[204] there is a recognized exception to this judicial limitation. That exception states that courts have the power and authority "to determine and compel payment of those sums of money which are reasonable and necessary to carry out their mandated responsibilities and their powers and duties to administer justice."[205] This includes adequate funding of court-

197. Missouri Bar Watch, Missouri Bar Spring Meeting, http://www.mobarwatch.com/report.aspx?id=27 (last visited Mar. 24, 2009).

198. H.R.J. Res.41, 94th Gen. Assem., 2d Reg. Sess. (Mo. 2008).

199. *Id.*

200. For current status of the resolution, see Missouri House of Representatives, HJR 41, http://www.house.mo.gov/billtracking/bills081/bills/hjr41.htm.

201. Article 5 of the Missouri Constitution currently states, "The judicial power of the state shall be vested in a supreme court, a court of appeals consisting of districts as prescribed by law, and circuit courts." MO. CONST. art. V, § 1. The amendment would have been added to this language as sections 2, 3, and 4 of article 5. H.R.J. Res. 41.

202. *See supra* note 93 and accompanying text.

203. Buckley v. Valeo, 424 U.S. 1, 121 (1976) ("Yet it is also clear from the provisions of the Constitution itself, and from the Federalist Papers, that the Constitution by no means contemplates total separation of each of these three essential branches of Government."); *see also* Hampton & Co. v. United States, 276 U.S. 394, 406 (1928).

204. See *supra* Part II.D for discussion of the separation of powers doctrine. *See also* Richard M. Frank, *The Scorpions' Dance: Judicially Mandated Attorney's Fees – The Legislative Response and Separations-of-Powers Implications*, 1 EMERGING ISSUES ST. CONST. L. 73, 74-75 (1988).

205. 20 AM. JUR. 2d *Courts* § 40 (2005); *see also* Note, *supra* note 103, at 1742.

appointed attorneys as well as the state's public defender system. In a 1985 child abandonment proceeding, the Supreme Court of Louisiana, citing to courts from several states,[206] asserted this power:

> The court's power to furnish counsel for indigents necessarily includes the power, when reasonably necessary for effective representation, to issue an order requiring the state, its appropriate subdivision, department, or agency, to provide for the payment of counsel fees and necessary expenses.[207]

The Louisiana court further insisted that, "[the legislature's] acts or *failure to act* cannot destroy, frustrate, or impede the court's inherent constitutional authority."[208]

Some courts have gone as far as claiming a judicial *duty* to compel the legislature to adequately fund its indigent defense program. The court in *Lynch* did so and stated:

> [b]ecause of our constitutional responsibilities relating to the managerial and superintending control of the district courts and of the practice of law; because of the inherent power of this court to define and regulate the practice of law; and because of the public nature, and the certainty of reoccurrence of the problem presented . . .[209]

The Massachusetts Supreme Court, in a strikingly similar situation, emphasized that it is its duty, as the state's highest court, "to remedy an ongoing violation of a fundamental constitutional right to counsel."[210] Justice demands – and it is the court's duty to ensure – that indigent defendants receive effective counsel, and reasonable funding is critical to providing defendants with this constitutional right.

The Supreme Court of Missouri long ago established that it is the constitutional duty of the state legislature to provide funding for adequate indigent defense counsel.[211] Furthermore, the Missouri Constitution grants the Missouri Supreme Court "general superintending control over all" lower

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206. M. v. S., 404 A.2d 653 (N.J. Super. Ct. Law Div. 1979); Luke v. L.A. County, 74 Cal. Rptr. 771 (Cal. Ct. App. 1969); Knox County Council v. State *ex rel.* McCormick, 29 N.E.2d 405 (Ind. 1940); Smith v. State, 394 A.2d 834 (N.H. 1978); State v. Rush, 217 A.2d 441 (N.J. 1966); State v. Campbell, 324 So. 2d 395 (La. 1975).

207. *In re* Johnson, 475 So. 2d 340, 342 (La. 1985).

208. *Id.* (emphasis added).

209. State v. Lynch, 796 P.2d 1150, 1163 (Okla. 1990).

210. Lavallee v. Justices in Hampden Superior Court, 812 N.E.2d 895, 911 (Mass. 2004).

211. State v. Green, 470 S.W.2d 571, 573 (Mo. 1971) (en banc).

courts.[212] This type of supervisory power has been asserted by the Louisiana Supreme Court – in its continuing battle to bring its own indigent defense system out of crisis – as granting "inherent powers 'to do all things reasonably necessary for the exercise of its functions' . . . includ[ing] the authority 'to fashion a remedy which will promote the orderly and expeditious administration of justice.'"[213] Furthermore, the Supreme Court of Missouri has asserted that "some overlap of functions necessarily must occur."[214] Overlap between the judicial and legislative branches is inherent with regard to the state's indigent defense system, a system which *must* function within Missouri's courts but *cannot* function without legislative funding. Therefore, Missouri's highest court can and should order the state's legislature to meet at least constitutional standards, and the legislature must comply.[215]

V. CONCLUSION

Ideally, the legislature would go beyond mere constitutional requirements for funding in order to truly repair the state's public defender system. A significant increase in funding would allow for positive reform of a broken system. Even if the MSPD's limited availability procedure for controlling its caseload is reinstated by statute – and especially if it is not – its attorneys will continue to work for substandard salaries with second-rate facilities and a serious lack of support services.[216] These factors contribute to the deprivation of adequate representation as well as attorney burnout and a high turnover rate.[217] If the MSPD were able to secure adequate funding, it should then hire the number of attorneys necessary to ethically represent the full extent of cases involving indigent defendants.[218] It should also hire

212. MO. CONST. art. V, § 4.

213. State v. Peart, 621 So. 2d 780, 790-91 (La. 1993) (quoting Konrad v. Jefferson Parish Council, 520 So. 2d 393, 397 (La. 1988); State v. Mims, 329 So. 2d 686, 688 (La. 1976)).

214. Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 12 (Mo. 1992) (en banc) (emphasis omitted); State Tax Comm'n v. Admin. Hearing Comm'n, 641 S.W.2d 69, 74 (Mo. 1982) (en banc).

215. Note, *supra* note 103, at 1742.

216. *See supra* text accompanying notes 59-86.

217. Stith, *supra* note 123, at 284-85.

218. During the fiscal year 2006, the 292 public defenders in MSPD's trial division opened 86,368 new cases, translating to an average annual caseload per public defender of about 296. STATE OF MO. PUB. DEFENDER COMM'N, *supra* note 32, at 8. MSPD has concluded that its blended caseload of misdemeanors and felonies translates to a standard recommended by the Department of Justice's National Advisory Commission on Criminal Justice Standards (NAC) of 225 cases per attorney per year. *Id.* Therefore, for MSPD to meet NAC's standard, it would need to employ 384 attorneys (86,368 total cases divided by 225 cases per attorney). MSPD would need to hire approximately 92 more full-time attorneys.

additional support staff for its offices and fund investigative resources that are comparable to those of Missouri's prosecutors.

These measures would drastically reduce the amount of undue stress that currently plagues Missouri's public defenders, which would likely decrease the high turnover rate. If the MSPD is able to retain its attorneys for longer periods of time and provide them with necessary resources, it could become armed with a staff of highly skilled advocates who are extensively competent and experienced in criminal defense litigation. This would bring greater integrity and dignity to Missouri's public defenders and the system they advocate under, thereby legitimizing the indigent defendant's constitutional right to effective assistance of counsel.

Missouri's public defender system is being crushed by the weight of excessive caseloads, and adequate funding from Missouri's state legislature is vital to its recovery. Although this daunting issue has been publicly acknowledged by prominent legal figures, key legislators, and the Office of the Missouri State Public Defender itself, the legislature as a whole has failed to grant the system the funding it requires to function successfully. The Office of the Missouri State Public Defender has attempted to take on the crisis on its own with its recent failed attempt to operate under a "limited availability" status, which might have alleviated some of the problems currently caused by unethically high caseloads. However, even implementation of this procedure would have left the MSPD with an enormous dilemma. It is clear that without a systemic approach, the support of the judiciary, and a substantial increase in funding from Missouri's state legislature, the problem will not be solved. Because the legislature has thus far been unwilling to adequately fund Missouri's public defender system, the judiciary should use its authority to compel the legislature to do so. Without judicial intervention, the system is likely to collapse and every indigent Missourian will be in jeopardy of proceeding through the criminal justice system without constitutionally required effective legal counsel.

JUSTINE FINNEY GUYER*

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