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NOTE

Bail Reform: A Possible Solution to Missouri's Broken Public Defender System?

*Dana Kramer**

I. INTRODUCTION

Bail reform is currently sweeping through the United States. Over forty jurisdictions have implemented new bail systems based on empirical data that aim to assist judges in determining bail and to reduce the use of cash bail.¹ Missouri, following the lead of many other states, has introduced new court rules from the state's Supreme Court that embrace this bail reform movement.² The state's bail reform intersects with the issues facing the Missouri Public Defender System (the "MSPD"). The MSPD suffers from excessive caseloads and gross underfunding, both of which significantly undermine public defenders' ability to provide effective counsel to indigent defendants.³ Because indigent defendants are the class of persons most affected by the current bail system, the bail reform movement is largely meant to impact them.

Bail reform in several jurisdictions is not producing these intended effects and is instead posing many risks to indigent defendants' pretrial procedural and constitutional rights. This Note considers the bail reform in Missouri, which took effect in 2019, as well as its implications on Missouri public defenders and the indigent defendants they represent. To do so, Part II first relates the constitutional protections afforded to indigent defendants and examines the problematic history of the MSPD. Part III delves into recent attempts in Missouri to remedy the MSPD's problems, including the state's proposed bail reform, and compares bail reform in Missouri with other states who have also adopted new bail systems. This Note then concludes, in Part

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1. See Meghan Stevenson, *Assessing Risk Assessment in Action*, 103 MINN. L. REV. 303, 345 (2017).

2. See *infra* Section III.C.

3. See, e.g., Chris Dandurand, Note, *Walking Out on the Check: How Missouri Abandoned Its Public Defenders and Left the Poor to Foot the Bill*, 76 MO. L. REV. 185 (2011).

IV, with a discussion of the consequences of the new bail system and offers suggestions to improve Missouri's bail reform.

II. LEGAL BACKGROUND

A criminal defendant's right to counsel is constitutionally rooted in the Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."⁴ The Missouri Constitution contains a similar right in its Bill of Rights: "That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel . . ."⁵ This right ensures that indigent defendants – defendants who cannot afford an attorney – receive representation in their criminal case.⁶ This Part provides background on the development of this right. Section A details the rights afforded to indigent criminal defendants under the Sixth Amendment, and Section B focuses on attempts in Missouri to provide this right to indigent defendants.

A. *The Supreme Court's Interpretation of the Sixth Amendment*

In 1963, the United States Supreme Court in *Gideon v. Wainwright* interpreted the Sixth Amendment's right to counsel to extend to persons charged with a felony.⁷ *Gideon* involved an indigent defendant in Florida who was convicted of a felony and sentenced to eight years' incarceration.⁸ A Florida state court denied the defendant appointment of a public defender because Florida law at the time only allowed the court to appoint a public defender in capital cases.⁹ Stating that "any person hailed into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him," the Supreme Court distinguished the right to counsel as "fundamental and essential in fair trials."¹⁰ The Supreme Court concluded that indigent persons charged with felonies have a constitutional right to counsel.¹¹ The Supreme Court further held that this right is applied to all states through the Fourteenth Amendment.¹²

However, *Gideon* only addressed the right to counsel in felony cases.¹³ The Supreme Court did not extend the Sixth Amendment right to counsel to misdemeanor cases until 1972.¹⁴ In *Argersinger v. Hamlin*, a defendant

4. U.S. CONST. amend. VI.

5. MO. CONST. art. I, § 18(a).

6. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

7. *Id.* at 345.

8. *Id.* at 338.

9. *Id.* at 336–37.

10. *Id.* at 344.

11. *Id.*

12. *Id.* at 341–42.

13. *Id.* at 342.

14. *See Argersinger v. Wainwright*, 407 U.S. 25 (1972).

charged with a misdemeanor offense and sentenced to ninety days in jail alleged that he was deprived of his right to counsel as an indigent defendant.¹⁵ The Supreme Court considered the historical roots of the Sixth Amendment, noting that twelve of the thirteen colonies recognized the right to counsel in all criminal cases, including petty offenses.¹⁶ The Supreme Court then discussed and applied the rationale of *Gideon*, reasoning that the legal and constitutional questions presented in misdemeanor cases are no less complex merely because the person charged may be imprisoned for six months or less.¹⁷ Therefore, the Supreme Court extended the right to counsel to misdemeanor and petty offense prosecutions where the defendant faces the possibility of incarceration.¹⁸

The Supreme Court held in *Rothgery v. Gillespie County* that the right to counsel attaches when “formal judicial proceedings have begun,” or, in other words, when a criminal defendant first appears before a judge and learns of the charges against him.¹⁹ As a result of *Rothgery* and *Argersinger*, many states, such as Wisconsin, require attorneys to represent criminal defendants when the defendant first appears in court and bail is set.²⁰ In some states, however, defendants do not appear with counsel at their initial appearance, meaning that these defendants may not be appointed counsel for weeks or months.²¹

The Supreme Court further specified the right to counsel in *McMann v. Richardson* as entitlement to *effective* counsel.²² The Missouri Supreme Court, in 2012, likewise followed the holding that “the Sixth Amendment right to counsel is a right to effective and competent counsel,”²³ which “requires counsel to appropriately investigate, prepare, and present [a] client’s case.”²⁴

The United States Supreme Court has declined to specify what effective counsel entails.²⁵ However, the American Bar Association (the “ABA”) published the Criminal Justice Standards for the Defense Function

15. *Id.* at 26.

16. *Id.* at 30.

17. *Id.* at 31–33.

18. *Id.* at 36–37.

19. *Rothgery v. Gillespie County*, 554 U.S. 191, 211, 213 (2008).

20. *See* WIS. STAT. § 970.01 (2018); *see also* DeWolfe v. Richmond, 76 A.3d 1019, 1031 (Md. 2013) (“[W]e hold that . . . an indigent defendant is entitled to state-furnished counsel at an initial hearing . . .”).

21. *See* Douglas Colbert et al., *Do Attorneys Really Matter? The Empirical and Legal Case for the Right to Counsel at Bail*, 23 CARDOZO L. REV. 1719, 1782 (2002).

22. *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

23. *State ex rel. Mo. Public Def. Comm’n v. Waters*, 370 S.W.3d 592, 597 (Mo. 2012) (en banc).

24. *Taylor v. State*, 262 S.W.3d 231, 249 (Mo. 2008) (en banc).

25. *Strickland v. Washington*, 466 U.S. 668, 688 (1984) (“More specific guidelines are not appropriate The proper measure of attorney performance remains simply reasonableness under prevailing professional norms.”).

(“Standards”) to “provide guidance for the professional conduct and performance of defense counsel.”²⁶ These Standards include:

a duty of confidentiality . . . a duty of communicating and informing the client . . . a duty of carrying an appropriate workload that will not interfere with providing quality representation . . . a duty of establishing a relationship with the client and maintaining that relationship . . . a duty of investigating in all cases . . . a duty of preparing for court proceedings in advance . . . [and] a duty of considering and relating to the client consequences that may arise from a charge, plea, or conviction and the effects of this on sentencing.²⁷

Missouri State Public Defender Guidelines for Representation, principally tracking the Standards language, specifically state the responsibilities of Missouri public defenders.²⁸ Additionally, the Missouri Supreme Court Rules of Professional Conduct prescribe that attorneys act with “reasonable diligence and promptness in representing a client” and keep clients reasonably informed about their case.²⁹

Though effective counsel is a constitutional right to which every criminal defendant facing incarceration is entitled and the ABA provides guidelines on how to meet this responsibility, many criminal defendants across the United States, and particularly in Missouri, do not receive effective counsel from state public defenders.³⁰ Inadequate funding for public defender systems and increasing caseloads undermine an indigent defendant’s doctrinal right to effective counsel.³¹ The MSPD has been one of the most dysfunctional public defender systems in the United States for the past few decades.³²

B. Missouri’s Public Defender System

In the aftermath of *Gideon*, Missouri courts appointed attorneys to represent indigent defendants without pay.³³ However, the Missouri Supreme

26. *Criminal Justice Standards for the Defense Function- Standard 4-1.1(a)*, AM. BAR ASS’N (Apr. 16, 2015), https://www.americanbar.org/groups/criminal_justice/standards/DefenseFunctionFourthEdition/ [perma.cc/LA28-RK45].

27. *Id.* (discussing Standards 4-5.4 and 4-8.3).

28. See Expert Report of Rodney J. Uphoff at 4–5, *Church v. Missouri*, 268 F. Supp. 3d 992, 996–97 (W.D. Mo. 2017) (No. 17-04057-CV-C-NKL), 2017 WL 9857219.

29. MO. SUP. CT. R. 4-1.3, 4-1.4.

30. See Rodney Uphoff, *Foreword*, 75 Mo. L. Rev. 667, 669–70 (2010).

31. Lauren Sudeall Lucas, Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731, 1734 (2005).

32. Uphoff, *Foreword*, *supra* note 30, at 670.

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

Court soon held in *State v. Green* that the responsibility of representing indigent defendants was not the duty of Missouri attorneys but was constitutionally “the burden of the State.”³⁴ In 1972, the state legislature responded to *Green* with the enactment of Chapter 600 of the Missouri Revised Statutes.³⁵ Chapter 600 created the MSPD and the Public Defender Commission (the “PDC”), which governs the entire MSPD and establishes criteria for indigency.³⁶ This new legislation created a dual system for handling indigent cases, which consisted of fourteen local public defender offices and appointed counsel programs where private attorneys would contract with the State to represent indigent defendants at a set fee.³⁷ However, the MSPD soon faced issues of underfunding, as the amount appropriated to the MSPD remained stagnant while caseloads increased dramatically.³⁸ In fiscal year 1980, less than ten years after the MSPD’s inception, the MSPD ran out of funds nearly two months before the fiscal year ended.³⁹ As a result, local public defender offices were grossly underfunded and contracted attorneys were not paid for their work.⁴⁰

The Missouri Supreme Court was soon called upon to compel the General Assembly to pay attorneys for their work in *State ex rel. Wolff v. Ruddy*.⁴¹ Reluctant to violate the separation of powers, the court concluded that it could not force the legislature to provide more funds to the MSPD.⁴² However, the court found that it could require members of the Missouri Bar to provide representation.⁴³ The court’s decision left Missouri attorneys to continue representing indigent defendants despite a gross lack of funding and the possibility of never receiving compensation.⁴⁴

The Missouri legislature responded to *Ruddy* in 1982 with the creation of the Office of the State Public Defender (the “OSPD”), a department

34. *Id.* (citing *State v. Rush*, 217 A.2d 441, 446 (N.J. 1966)).

35. MO. REV. STAT. § 600.011 (2018).

36. *See State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. 1981) (en banc) (per curiam); MO. REV. STAT. ch. 600 (2018). MO. REV. STAT. § 600.086 (2018) (defining indigency as: “[a] person shall be considered eligible for representation . . . when it appears from all the circumstances of the case including his ability to make bond, his income and the number of persons dependent on him for support that the person does not have the means at his disposal or available to him to obtain counsel in his behalf . . .”).

37. *State ex rel. Mo. Pub. Def. Comm’n v. Pratte*, 298 S.W.3d 870, 876 (Mo. 2009) (en banc).

38. *Fiscal Year 2018 Annual Report*, STATE OF MO. PUB. DEF. COMM’N 5, 9, <https://publicdefender.mo.gov/wp-content/uploads/2018/10/MSPD-2018-Annual-Report-Print-Copy-Color-10172018.pdf> [perma.cc/BA83-AUKD].

39. *State ex rel. Wolff*, 617 S.W.2d at 65.

40. *Id.* at 66.

41. *Id.* at 64.

42. *Id.* at 65.

43. *Id.* Attorneys must be a member of the Missouri Bar to practice in the state of Missouri. *Id.*

44. *Id.* at 66–67.

independent of the judicial branch that was authorized to set guidelines for determining indigency.⁴⁵ The OSPD could also appoint private counsel to represent indigent defendants.⁴⁶ But finding private attorneys willing to represent indigent defendants became increasingly difficult, spurring reorganization of the MSPD.⁴⁷ The MSPD was restructured into three specialized divisions: the Capital Division, the Appellate/Post-Conviction Relief Division, and the Trial Division.⁴⁸ Today, the MSPD consists of thirty-three district offices, six appellate sections, and three capital sections.⁴⁹ Private attorneys are still contracted to handle indigent cases, with approximately thirteen percent of the MSPD's caseload being contracted to the private bar in 2018.⁵⁰

However, these legislative actions proved ineffectual and funding remained excessively low.⁵¹ A 2009 study conducted by the Spangenberg Group found that Missouri had “the lowest per-capita expenditures of all states, except for Mississippi,”⁵² and in 2013, the National Juvenile Defense Center found Missouri's indigent defense system to be “in crisis” as a result of the many years of immense caseloads and insufficient resources.⁵³ In 2018, the MSPD disposed of over 70,000 cases with only 384 full-time attorneys employed.⁵⁴

The immense pressure of high caseloads, inadequate resources, and low salaries resulted in 15.5% of attorneys leaving the MSPD in 2018.⁵⁵ The MSPD's 2018 annual report credits the high turnover rate to staggering

45. *Our Distinguished History*, MO. STATE PUB. DEF. (2017), <https://publicdefender.mo.gov/about-mspd/history-of-mspd/> [perma.cc/XL4C-XYMT]. The OSPD was under the control of the Public Defender Commission. *Id.*

46. *Id.*

47. *See State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 876 (Mo. 2009) (en banc).

48. *Our Distinguished History*, *supra* note 44. The Capital Division handles first degree murder cases in which the state is seeking the death penalty and juvenile first-degree murder cases with the possibility of life without parole. *Fiscal Year 2018 Annual Report*, *supra* note 38. The Appellate/Post Conviction Relief Division handles appeals and post-conviction relief cases. *Id.* at 53. The Trial Division handles felonies, misdemeanors, juvenile cases, and probation violations. *Id.* at 16.

49. *Fiscal Year 2018 Annual Report*, *supra* note 38, at 1.

50. *Id.* at 63.

51. 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).

52. *Id.*

53. Mary Ann Scali et al., *Missouri: Justice Rationed; An Assessment of Access to Counsel and Quality of Juvenile Defense Representation in Delinquency Proceedings*, THE NAT'L JUV. DEFENSE CTR. 7, 33 (2013), <http://njdn.org/uploads/digital-library/Missouri-Justice-Rationed-Assessment-of-Access-to-Counsel-NJDC-2013.pdf> [perma.cc/HG5U-MHAH].

54. *Fiscal Year 2018 Annual Report*, *supra* note 38, at 13–14.

55. *Id.* at 7.

student debt and overwhelming caseloads.⁵⁶ The high turnover leaves few experienced attorneys at the MSPD, resulting in new, inexperienced attorneys handling serious felony cases.⁵⁷ The turnover rate affects supervision within the MSPD, as supervisors are expected to handle their own caseloads in addition to reassigning cases to remaining attorneys and hiring and training new attorneys.⁵⁸

The turnover rate combined with excessive caseloads lowers the quality of representation provided to indigent defendants.⁵⁹ When public defenders handle hundreds of cases alone, the amount of time devoted to each indigent defendant decreases drastically, often resulting in public defenders being underprepared or not prepared at all for trial.⁶⁰ The turnover rates can also result in indigent defendants being appointed multiple different public defenders throughout their case, meaning that each newly appointed public defender must meet the client and orient themselves with the case.⁶¹

Recognizing the issues with the MSPD, the Missouri Senate created an Interim Committee to review the MSPD system in 2007.⁶² The Committee's report recommended that caseloads be reduced, staff numbers increased, base salaries increased, and funding added "through supplanting unconstitutional court costs and providing additional appropriations."⁶³ The PDC's annual report that year similarly found that the high caseload was overwhelming to the point that public defenders would have to start declining new cases.⁶⁴

In 2009, the Missouri Senate responded and introduced Senate Bill 37, which would have set "caseload maximums and contract[ed] with private attorneys to handle cases exceeding those maximums."⁶⁵ Though the Bill passed with ease through both the Senate and the House of Representatives, then-Governor Jay Nixon vetoed the bill.⁶⁶

With Governor Nixon's heavy hand on the veto, the MSPD turned to the courts for relief.⁶⁷ The PDC adopted 18 C.S.R. Section 10-4.010, which created a procedure that allowed public defenders to refuse new cases.⁶⁸

56. *Id.*

57. See Uphoff, *supra* note 28, at 12.

58. *Id.*

59. *Id.* at 12–13; see generally Richard A. Opperl Jr. & Jugal K. Patel, *One Lawyer, 194 Felony Cases, and No Time*, THE N.Y. TIMES (Jan. 31, 2019), <https://www.nytimes.com/interactive/2019/01/31/us/public-defender-case-loads.html?searchResultPosition=1> [perma.cc/Z7Q6-SQ4Q].

60. Uphoff, *supra* note 28, at 13–14.

61. *Id.* at 27.

62. *Id.* at 14.

63. *Id.* (internal citations omitted).

64. *Id.* at 15.

65. *Id.*

66. *Id.*

67. Uphoff, *supra* note 28, at 15.

68. 18 C.S.R. 10-4.010 (2009); Uphoff, *supra* note 28, at 15. Section 10-4.010 "authorized the MSPD director to declare an office of limited availability when its

Section 10-4.010 allows the public defender's office to select "categories of cases to be designated for exclusion from public defender representation once the district is certified . . . as of limited availability."⁶⁹

In *State ex rel. Missouri Public Defender Commission v. Pratte*, the public defender's office in Boone County, Missouri, after being designated as of limited availability, notified the circuit court that it would not accept any new probation violation cases where a suspended execution of sentence had been imposed.⁷⁰ A public defender attempted to utilize this policy and filed a notice with the court that the public defender's office was unavailable to represent an indigent defendant whose probation was suspended.⁷¹ Despite this, the judge appointed the public defender to the case.⁷²

As a result, the PDC, the Director of the MSPD, and the appointed public defender filed a petition for a writ of prohibition.⁷³ The Missouri Supreme Court held that Section 10.4-010 denied an indigent defendant the right to representation.⁷⁴ The court further posited that the PDC could not categorically reject a certain class of cases, finding that refusing to accept probation violation cases contradicted the PDC's obligation to represent all indigent defendants: "Indigent defendants who are accused of violating their probation have the same Sixth Amendment right to counsel as all other indigent defendants who face the possibility of imprisonment."⁷⁵ The court then offered suggestions on how to "reduce the demand for public defender services," recommending that prosecutors agree to limit the number of cases where the state seeks incarceration and that judges withhold from appointing counsel in certain cases.⁷⁶

After *Pratte*, the MSPD continued to rely on Section 10-4.010 to manage its caseload.⁷⁷ However, in 2012, the same issue in *Pratte* appeared again before the Missouri Supreme Court in *State ex rel. Missouri Public Defender Commission v. Waters*.⁷⁸ In *Waters*, the Director of the MSPD certified a district defender's office as of limited availability pursuant to Section 10-

caseload became excessive," which was determined on "an office exceeding the maximum caseload standard for a period of three consecutive months." Uphoff, *supra* note 28, at 15 (quoting 18 C.S.R. 10.4.010 (2009)) (Subsection 18 CSR 20-4.010(2)(E) voided by *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (en banc)).

69. *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 884 (2009) (quoting 18 C.S.R. 10-4.010). Certification of limited availability allowed a public defender's office to decline to take new cases. *Id.*

70. *Id.* at 883.

71. *Id.* at 884.

72. *Id.* at 883-84.

73. *Id.* at 881, 884-85.

74. *Id.* at 883.

75. *Id.* at 885.

76. *Id.* at 887.

77. See Uphoff, *supra* note 28, at 17.

78. See *State ex rel. Mo. Pub. Def. Comm'n v. Waters*, 370 S.W.3d 592 (2012) (en banc).

4.010.⁷⁹ Despite this, and over objection, a judge appointed a public defender to represent the defendant.⁸⁰ The MSPD moved to set aside the appointment because it violated Section 10-4.010.⁸¹ The Missouri Supreme Court reiterated its holding from *Pratte* that regardless of the resources available for the defense of an indigent defendant, a judge must ensure that such defendant receives effective counsel.⁸²

Governor Nixon again impeded repair of the MSPD in 2015 when he withheld almost three million dollars from the MSPD.⁸³ Frustrated with Governor Nixon's actions, Michael Barrett, the Director of the MSPD, appointed Governor Nixon, who had an active law license, to represent an indigent defendant.⁸⁴ Barrett relied on Section 600.042.5 of the Missouri Revised Statutes, which grants the director of the MSPD the power to "delegate the legal representation of an eligible person to any member of the state bar of Missouri," to appoint Governor Nixon.⁸⁵ A Missouri court, however, disallowed the appointment on the basis that courts have the sole power to appoint counsel.⁸⁶ Though unsuccessful, Barrett's attempted appointment made national headlines and brought further attention to the ongoing struggles of the MSPD.⁸⁷

III. RECENT DEVELOPMENTS

Missouri's efforts to address the crisis facing the MSPD have thus far been ineffective.⁸⁸ Recently, however, new avenues have been proposed to remedy this. One such attempt involves a group of criminal defendants who brought a class action asking the judiciary to compel the legislature to adequately fund the MSPD.⁸⁹ Alternatively, new court rules that seek to

79. *Id.* at 600–01.

80. *Id.* at 601.

81. *Id.* at 602.

82. *Id.* at 606 (quoting *State ex rel. Mo. Pub. Def. Comm'n v. Pratte*, 298 S.W.3d 870, 875 (2009) (en banc)).

83. *Fiscal Year 2018 Annual Report*, *supra* note 38, at 9. Governor Greitens also withheld funds in the amount of \$3.5 million from the MSPD in 2017. *Id.*

84. Celeste Bott, *Court Rules Public Defender Can't Appoint Missouri Governor as a Defense Attorney*, ST. LOUIS POST-DISPATCH (Aug. 25, 2016), https://www.stltoday.com/news/local/govt-and-politics/court-rules-public-defender-can-t-appoint-missouri-governor-as/article_c59059f8-98c8-50fe-9068-12a9b092b7f3.html [perma.cc/L3YH-PQBB].

85. Matt Ford, *A Governor Ordered to Serve as a Public Defender*, THE ATLANTIC (Aug. 4, 2016), <https://www.theatlantic.com/politics/archive/2016/08/when-the-governor-is-your-lawyer/494453/> [perma.cc/G3AK-6SR2]; MO. REV. STAT. § 600.042.5 (2018).

86. Bott, *supra* note 84.

87. *Id.*

88. *See supra* Part II.

89. *See Church v. Missouri*, 913 F.3d 736, 741–42 (8th Cir. 2019).

modify traditional judicial discretion took effect recently in Missouri.⁹⁰ This Part begins with a discussion of *Church v. Missouri*, followed by a discussion of a national bail reform movement and Missouri's bail reform.

A. *Church v. Missouri*

In 2017, a group of Missouri criminal defendants attempted a different approach at a potential judicial remedy.⁹¹ The defendants brought a putative class action to challenge the adequacy of the MSPD.⁹² In *Church v. Missouri*, the plaintiffs alleged violations of their constitutional rights under both the United States and Missouri Constitutions and sought prospective relief for both themselves and other defendants in Missouri “who are eligible to be represented by the MSPD.”⁹³ The plaintiffs named the State of Missouri and then-Governor Eric Greitens as defendants (“Defendants”).⁹⁴

The named plaintiffs of the class (“Plaintiffs”) each experienced frustrations with the MSPD.⁹⁵ Plaintiff Shondell Church, arrested and charged in 2016 for felony theft, did not meet his appointed public defender until he had spent over forty days in jail and was not informed of a subsequent change in his legal representation during the course of his case when his originally appointed attorney left the MSPD.⁹⁶ Plaintiff Randall Lee Dalton, having physical and mental disabilities, could not access his medication while incarcerated and did not appear before a tribunal until almost two months after his arrest because Dalton's appointed public defender waived Dalton's appearance and reset his case without Dalton's knowledge.⁹⁷ Plaintiff Dorian Samuels, facing a thirty-year sentence for assault, had a total of three public defenders appointed to him during the course of his case.⁹⁸ Samuels' third public defender wrote Samuels to inform him of the probable forthcoming inadequate representation due to the attorney's overwhelming caseload.⁹⁹ Plaintiff Viola Bowman's public defender continued her trial at least ten times due to his obligations in other cases and managerial duties, resulting in Bowman's pretrial incarceration for over 800 days.¹⁰⁰ Plaintiff Brian Richman, as a result of his public defender waiving his right to appear at

90. See H.R. 666, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019).

91. See *Church v. Missouri*, 268 F. Supp. 3d 992, 996–97 (W.D. Mo. 2017), *rev'd* 913 F.3d 736 (8th Cir. 2019).

92. *Id.* at 997.

93. *Id.* at 1008.

94. *Id.* Governor Greitens resigned as governor while this case was pending appeal. *Id.* at 754 n.1. Per Federal Rule of Appellate Procedure 43(c)(2), his successor, Michael Parson, was automatically substituted as a defendant. *Id.*

95. *Id.* at 1002–07.

96. *Id.* at 1002–03.

97. *Id.* at 1004.

98. *Id.*

99. *Id.* at 1006.

100. *Id.* at 1007.

hearings without first obtaining his consent, began writing letters directly to the judge to advocate on his own behalf.¹⁰¹

Of the five named plaintiffs, none had counsel present with them when bail was set.¹⁰² Randell was held on bond despite not seeing a judge or an attorney.¹⁰³ Though Plaintiffs could not afford the bail that had been set, none of their public defenders advocated for a reduction of bail amount.¹⁰⁴ Moreover, the public defenders failed to conduct any investigation or pretrial motion practice on behalf of their clients.¹⁰⁵

Plaintiffs filed expert reports from Professors Robert Boruchowitz and Rodney Uphoff.¹⁰⁶ In his report, Professor Boruchowitz concluded that Plaintiffs “[were] constructively denied counsel in violation of the 6th Amendment” due to various structural and systemic problems, including inadequate funding, enormous caseloads, insufficient training and attorney-client communications, and “a disparity of resources between prosecution and defense.”¹⁰⁷ Professor Uphoff similarly found that “Missouri public defenders are handling too many cases leaving defenders insufficient time or the resources to do all of the tasks needed to adequately defend their clients.”¹⁰⁸

Defendants moved to dismiss the class action, arguing that sovereign immunity barred Plaintiffs’ claims.¹⁰⁹ The United States District Court for the Western District of Missouri denied the State’s motion to dismiss.¹¹⁰ The court held that Plaintiffs’ claims against the Defendants were not barred by sovereign immunity because, under Missouri law, the state has no immunity from claims seeking equitable relief and because then-Governor Greitens – being responsible for the enforcement of Missouri laws – had a sufficient connection to the challenged conduct.¹¹¹

The United States Court of Appeals for the Eighth Circuit disagreed, however.¹¹² The Eighth Circuit stated that “sovereign immunity applies

101. *Id.* at 1007–08.

102. *Id.* at 1002, 1004–07.

103. *Id.* at 1004.

104. *Id.* at 1002–07.

105. *Id.*

106. Robert Boruchowitz worked as a public defender in Washington for over thirty years and has written extensively on public defender standards and restructuring public defender systems. Expert Report of Robert C. Boruchowitz at sec. III, *Church*, 268 F. Supp. 3d (No. 17-04057-CV-C-NKL), 2017 WL 9857221. Rodney Uphoff is an Emeritus Professor at the University of Missouri-Columbia School of Law. Uphoff, *supra* note 28, at 1. He has written numerous articles on criminal defense, indigent defense services, and ethical issues facing those working in the criminal justice system. *Id.*

107. Boruchowitz, *supra* note 106, at ¶¶ 5, 7.

108. Uphoff, *supra* note 28, at 24–25.

109. *Church*, 268 F. Supp. 3d at 1009.

110. *Id.* at 996.

111. *Id.* at 1011–13.

112. *Church v. Missouri*, 913 F.3d 736, 741 (8th Cir. 2019).

unless it is waived or a statutory or recognized common law exception, such as consent, is applicable.”¹¹³ Finding no waiver or common law exception in its de novo review, the Eighth Circuit concluded that sovereign immunity barred Plaintiffs’ claims.¹¹⁴ Neither the district court nor the Eighth Circuit addressed Plaintiffs’ allegations of constitutional violations.¹¹⁵

B. Bail Reform in the United States

The United States Supreme Court recognized in the early twentieth century that bail is “perhaps the most critical period of the proceedings.”¹¹⁶ *Church v. Missouri* briefly touched on the issue of bail, which is currently receiving national reformation.¹¹⁷ In *Church*, all Plaintiffs were held on bail but could not afford to pay.¹¹⁸ Plaintiffs did not have counsel present when bail was set.¹¹⁹ This is typical for Missouri’s indigent defendants, though studies have proven that representation at initial hearings significantly increases the number of defendants released on their own recognizance.¹²⁰ Moreover, two-and-a-half times as many represented defendants had their bail reduced to an affordable amount as compared to unrepresented defendants.¹²¹

In states where many defendants initially appear before the court without an attorney present, as in *Church*, the court generally sets bail at a predetermined amount, which is based upon the charged offense instead of an assessment of the defendant’s ability to pay.¹²² If bail is set, a bail bondsman will charge the defendant a fee to post bond for the defendant.¹²³ Once the case is dissolved, the court returns the money to the bondsmen, resulting in a profit to the bondsman.¹²⁴ If the defendant is unable to pay for bail himself or pay the bondsman’s fee, the court detains the defendant until bond is posted, modified to an amount that the defendant can pay, or the case concludes.¹²⁵

This bail process leads to excessive detention because detainment is based on a defendant’s ability to pay bail.¹²⁶ Many defendants are detained not because they are a flight risk or a threat to society but because they are

113. *Id.* at 743.

114. *Id.* at 745–46.

115. *See generally id.*

116. *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

117. *See Church v. Missouri*, 268 F. Supp. 3d 992, 1014 (W.D. Mo. 2017), *rev’d* 913 F.3d 736 (8th Cir. 2019).

118. *Id.* at 1002, 1004–07.

119. *Id.*

120. *See Colbert, supra* note 21, at 1720.

121. *Id.*

122. Note, *Bail Reform and Risk Assessment: The Cautionary Tale of Federal Sentencing*, 131 HARV. L. REV. 1125, 1127 (2018).

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

unable to post bail.¹²⁷ Nearly two-thirds of jailed persons in the United States have not been convicted but are in jail because they cannot afford bail.¹²⁸ As many of these defendants qualify as indigent, their cases are sent to state public defender offices, adding to the already overwhelming caseloads.¹²⁹

Some states, like New Jersey, have turned to bail reform to decrease the number of defendants incarcerated after bail hearings.¹³⁰ Implemented in 2017, New Jersey's bail reform aimed to replace judicial discretion regarding pretrial detention with an objective, scientific assessment based on empirical data and risk factors.¹³¹ The empirical data is largely supplied by criminal justice statistics.¹³² The reform created a Pretrial Services Program, a unit within the criminal division of the New Jersey Judiciary tasked with preparing automated risk assessments, called Public Safety Assessments ("PSA"), which recommend conditions of release for each criminal defendant.¹³³ PSAs utilize nine risk factors that measure a defendant's risk of failure to appear and risk of committing new criminal activity before trial.¹³⁴ These factors include: age at current arrest; current violent offense; pending charge at the time of the offense; prior misdemeanor convictions; prior felony convictions; prior violent convictions; prior failure to appear pretrial in the past two years; prior failure to appear pretrial older than two years; and prior sentence to incarceration.¹³⁵

Each of the nine factors adds points to a defendant's raw score.¹³⁶ For example, if a defendant failed to appear pretrial within the last two years, a

127. *Id.*

128. *See id.* at 1127.

129. *Id.* at 1130.

130. *Id.*; John Gregory, *Prospects for Bail Reform in Kentucky*, PBS: KY. EDUC. TELEVISION (Feb. 19, 2019, 8:30 AM), <https://www.ket.org/public-affairs/prospects-bail-reform-kentucky/> [perma.cc/G2K6-HXE8]; Rebeca Ibarra, *New Jersey's Bail Reform Law Gets Court Victory*, WNYC NEWS (Jul. 9, 2018), <https://www.wnyc.org/story/new-jerseys-bail-reform-law-gets-court-victory/> [perma.cc/DJ9T-QVFH]; Vanessa Romo, *California Becomes First State to End Cash Bail After 40-Year Fight*, NPR (Aug. 28, 2018, 10:49 PM ET), <https://www.npr.org/2018/08/28/642795284/california-becomes-first-state-to-end-cash-bail> [perma.cc/DAM3-732P].

131. Note, *Bail Reform and Risk Assessment*, *supra* note 122, at 1130; *see* N.J. STAT. ANN. § 2A:162-25 (2017).

132. Youngjin Choi, *Lessons from California and New Jersey Bail Reform Legislation*, NY L. J. (Dec. 7, 2018), <https://www.law.com/newyorklawjournal/2018/12/07/lessons-from-california-and-new-jersey-bail-reform-legislation/?slreturn=20190230131957> [perma.cc/P3VF-LKES].

133. N.J. STAT. ANN. § 2A:162-25 (2017).

134. Public Safety Assessment: New Jersey Risk Factor Definitions – December 2018, 1–4, <https://www.njcourts.gov/courts/assets/criminal/psariskfactor.pdf?c=R6P> [perma.cc/438C-CYH8].

135. *Id.*

136. Note, *Bail Reform and Risk Assessment*, *supra* note 122, at 1131.

point would be added to his risk assessment score.¹³⁷ A defendant's points are totaled into a raw score.¹³⁸ The raw score is then converted to a six-point scale, with one being low risk and six being high risk.¹³⁹ These nine factors are weighed to compute three prediction scores: a failure to appear score, a risk of new criminal activity score, and a risk of new violent criminal activity score.¹⁴⁰ These scores are then reported to the court.¹⁴¹ Judges reference the PSA report at bail hearings to determine whether to set bail, release the defendant on his or her own recognizance, or detain the defendant.¹⁴²

New Jersey's PSA proved popular, and other states began implementing similar bail reforms.¹⁴³ Risk assessments are used in approximately forty jurisdictions, including Alaska and California.¹⁴⁴ California adopted an algorithmic system similar to New Jersey's model, and its system categorically prohibits pretrial release for certain classes of crimes, such as violent felonies and felonies involving a deadly weapon.¹⁴⁵ Additionally, California's bail reform entirely eliminated cash bail.¹⁴⁶ Instead, a court will release a defendant on his or her own recognizance with nonmonetary conditions "that will reasonably assure the public safety and the person's return to court" or the defendant will be detained.¹⁴⁷ The outcome depends in part on the defendant's raw score from the risk assessment.¹⁴⁸

Many of these bail reform systems also create a presumption of detention for certain classes of offenses.¹⁴⁹ In 2020, California will vote on an additional proposal to the state's reformed system that, will create a presumption that "no condition or combination of conditions of pretrial supervision will reasonably assure [public safety] pending arraignment" if the crime charged is a violent felony, the arrested person was on a form of postconviction supervision or threatened a witness, or the arrested person has violated a condition of pretrial release.¹⁵⁰ Such instances may lead to first-time offenders being incarcerated pretrial or may compel a defendant to plead guilty in return for immediate release.¹⁵¹

137. Public Safety Assessment, *supra* note 134, at 1–4.

138. Note, *Bail Reform and Risk Assessment*, *supra* note 122, at 1131.

139. *Id.*

140. Public Safety Assessment, *supra* note 134, at 1–4.

141. Note, *Bail Reform and Risk Assessment*, *supra* note 122, at 1131.

142. *Id.*

143. See Romo, *supra* note 130, at 2.

144. See ALASKA STAT. § 33.07.010 (2018); CAL. PENAL CODE § 1320.10(e) (West 2019); see also Stevenson, *supra* note 1, at 307, 342.

145. CAL. PENAL CODE § 1320.10(e) (West 2019).

146. § 1320.10(d).

147. § 1320.10(c).

148. § 1320.10.

149. § 1320.10(c).

150. § 1320.13.

151. Choi, *supra* note 132, at 3–4.

The structure of the risk assessment tool varies by jurisdiction.¹⁵² For example, Alaska developed two scales to convert a defendant's risk assessment score, unlike New Jersey which uses one scale to produce three separate scores.¹⁵³ One of the scales produces a risk score for failure to appear and the other provides a risk score for new criminal arrest.¹⁵⁴ Alaska's Pretrial Enforcement Division, tasked with performing pretrial risk assessments, then uses the highest score of the two scales when making its recommendations to the court.¹⁵⁵ Within states like Colorado, Missouri, and Texas who have yet to officially pass a bail reform, courts will be required to create and implement risk assessment tools as well as determine which factors its assessment will consider.¹⁵⁶

This bail reform movement is similar to federal efforts to reform sentencing guidelines in the late twentieth century.¹⁵⁷ Prior to reform, federal judges had great discretion in sentencing, which resulted in sentencing that widely varied across jurisdictions.¹⁵⁸ Congress subsequently passed the Sentencing Reform Act of 1984, establishing the Sentencing Commission.¹⁵⁹ The Sentencing Commission formulated sentencing guidelines that were "intended to limit sentencing disparities and to ensure that sentences would 'adhere to a consistent sentencing philosophy.'"¹⁶⁰ Under the new guidelines, judges would score the characteristics of the offense and the offender based on a rubric that would then relay a sentencing range.¹⁶¹

This federal sentencing reformation largely failed.¹⁶² Soon after the guidelines were established, Congress began to override the goals of the guidelines by imposing congressionally mandated minimum sentences and sentencing ranges.¹⁶³ These sentencing schemes forced judges to impose overly lengthy sentences on defendants who they would otherwise have given

152. See ALASKA STAT. § 33.07.010 (2018); H.B. No. 19-1226, 72d Gen. Assemb., 1st Reg. Sess. (Co. 2019); H.B. 94, 2019 Gen. Assemb., Reg. Sess. (Ky. 2019); H.B. 1323, 86th Legis., Reg. Sess. (Tx. 2019).

153. See Pamela Cravez, *Pretrial Risk Assessment Tool Developed for Alaska*, UNIV. OF ALASKA ANCHORAGE JUST. CTR., <https://www.uaa.alaska.edu/academics/college-of-health/departments/justice-center/alaska-justice-forum/34/3winter2018/a.pretrial-risk-assessment.cshtml> [perma.cc/ZHW8-2K3S] (last visited Nov. 12, 2019).

154. *Id.*

155. *Id.*

156. H.B. No. 19-1226, 72d Gen. Assemb., 1st Reg. Sess. (Co. 2019); H.B. 666, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019); H.B. 1323, 85th Legis., Reg. Sess. (Tx. 2019).

157. Note, *Bail Reform and Risk Assessment*, *supra* note 122, at 1134.

158. *Id.*

159. *Id.*

160. *Id.* (quoting S. REP. NO. 98-225, at 59 (1983)).

161. *Id.*

162. *Id.*

163. *Id.*

a shorter sentence or placed on probation.¹⁶⁴ Additionally, reduced judicial discretion led judges to increase reliance on prosecutorial recommendations.¹⁶⁵ As a result of their increased influence, prosecutors often recommended to judges that a given defendant be incarcerated pending trial, leading to an influx in federal jail populations.¹⁶⁶ Consequently, the Sentencing Reform Act makes it easier for prosecutors and judges to detain defendants who are presumed innocent for weeks or months as their cases pend.¹⁶⁷ This remains the case today.¹⁶⁸

C. Bail Reform in Missouri

In January 2019, Missouri joined the reform bandwagon when Missouri Supreme Court then-Chief Justice Zel Fischer announced new court rules.¹⁶⁹ During his State of the Judiciary speech, Chief Justice Fischer outlined the major changes the new rules will bring, including restructuring the courts' approach to ordering release or detainment.¹⁷⁰ Highlighting the motivation for these changes, Chief Justice Fischer noted the number of people who cannot afford bail and who, as a result, "lose their jobs, cannot support their families, and are more likely to reoffend."¹⁷¹ Chief Justice Fischer commented that the judiciary has a responsibility to ensure that accused persons are treated fairly under the law without regard to their ability to pay.¹⁷²

The new rules, which became effective on July 1, 2019, modify Missouri Court Rules of Criminal Procedure 21, 22, and 33.¹⁷³ These changes adjust how courts determine whether to detain an arrested person or to grant conditional release.¹⁷⁴ When a defendant is arrested under a warrant, he must appear before a judge within forty-eight hours of confinement for this determination to be made.¹⁷⁵ For a defendant charged with a bailable offense,

164. *See id.* at 1136.

165. *Id.* at 1135.

166. *Id.* at 1137.

167. *Id.*

168. Although the federal government has taken steps to reform the federal criminal justice system, these efforts, specifically the FIRST STEP Act signed by President Donald Trump in 2018, generally do not affect arraignment proceedings or defendants who are incarcerated pretrial. *See* First Step Act of 2018, Pub. L. No. 115-391, 132 Stat. 55194, <https://www.congress.gov/bill/115th-congress/house-bill/5682/text> [perma.cc/V34U-LSR6].

169. Hon. Zel M. Fischer, *State of the Judiciary, Jefferson City, January 2019*, MO. COURTS (Jan. 24, 2018), <https://www.courts.mo.gov/page.jsp?id=136253>.

170. *Id.*

171. *Id.*

172. *Id.*

173. *Order Dated December 18, 2018, Re: Rules 21, 22, and 33*, MO. COURTS § 21.09 (Dec. 18, 2018), <https://www.courts.mo.gov/page.jsp?id=134633>.

174. Fisher, *supra* note 169.

175. *Order Dated December 18, 2018, Re: Rules 21, 22, and 33*, *supra* note 173, at § 21.09.

the court must first consider nonmonetary conditions of release, seeking “the least restrictive condition or combination of conditions of release.”¹⁷⁶ In doing so, the court must evaluate the likelihood of the defendant reappearing at trial or other stages of the proceedings and the safety of the community, victims, and witnesses.¹⁷⁷ If the court determines that nonmonetary conditions will not secure the defendant’s appearance or provide protection, the court may then consider monetary conditions or a combination of monetary and nonmonetary conditions.¹⁷⁸

When imposing monetary conditions, the court must evaluate the defendant’s ability to pay and cannot impose a higher payment than necessary to ensure the defendant appears at trial or the community’s safety.¹⁷⁹ Only upon a determination by clear and convincing evidence may a court detain a defendant pretrial.¹⁸⁰ Whether the defendant should be released or detained is determined on a case-by-case basis.¹⁸¹

Following the Missouri Supreme Court’s lead, Missouri’s General Assembly introduced a bill that would codify these new court rules. Titled the Money Bail Reform Act of 2019 (the “MBRA”), the Act was introduced in the Missouri House of Representatives in January 2019.¹⁸² As of the time of the writing of this Note, the MBRA had been referred to the Crime Prevention and Public Safety Committee in the House of Representatives, where the bill subsequently died.¹⁸³ The MBRA was modeled after bail reforms in other jurisdictions, where public defenders and civil rights groups are now attacking the effectiveness of those bail. The next Section discusses the criticisms of bail reform and potential issues with Missouri’s bail reform movement.

IV. DISCUSSION

Public defenders across the United States are criticizing the bail reform movement.¹⁸⁴ In Virginia, public defenders argue the new bail reform is

176. *Id.* at § 33.01(c).

177. *Id.*

178. *Id.*

179. *Id.*

180. *Id.* at § 33.01(d).

181. *Id.* at § 33.01(e).

182. H.B. 666, 100th Gen. Assemb., 1st Reg. Sess. (Mo. 2019). This bill would have enacted provisions under Chapter 544 of Missouri’s Criminal Procedure statutes pertaining to arrest, examination, commitment and bail. *Id.*

183. *Id.*

184. *See, e.g.,* Alice Cherem & Carly Taylor, *Bail Reform Hasn’t Led to Fewer Held in Jail, Court Records Show*, MD. REPORTER (Jan. 1, 2019) <https://marylandreporter.com/2019/01/01/bail-reform-hasnt-led-to-fewer-held-in-jail-court-records-show/> [perma.cc/2PXZ-QNF6].; Choi, *supra* note 132; Alex Koma, *Public Defenders Blast Arlington Prosecutor’s Cash Bail Reforms as ‘Misleading’ and Ineffective*, ARL Now (Nov. 15, 2018, 3:45 PM),

ineffective and merely pledges to follow the law that is already in place, particularly the Eighth Amendment's prohibition of excessive bail.¹⁸⁵ In California, public defenders pulled their support before the state's bail reform bill passed, reasoning that the bill gave too much power to judges and relied too heavily on the risk assessment tool.¹⁸⁶ Additionally, the American Civil Liberties Union and other civil rights organizations criticized the algorithms as inherently flawed because "they perpetuate racial disparities within the criminal justice system."¹⁸⁷

In addition to heavy criticism from both public defenders and civil rights groups, bail reform does little to protect indigent defendants' right to effective counsel because the reform does not reduce public defenders' caseloads or increase funding. This Part first addresses the effects and criticisms of bail reform, then discusses methods to improve the bail system in Missouri.

A. *The Effects of Bail Reform*

The ultimate goal of bail reform is to reduce pretrial incarceration rates.¹⁸⁸ Bail reform seeks to align this goal with ensuring pretrial justice and preserving the presumption of innocence.¹⁸⁹ But like the federal Sentencing Reform Act, bail reform has thus far been heavily criticized for not producing these expected outcomes.¹⁹⁰

For instance, Maryland is experiencing the opposite effects as those intended by its bail reform.¹⁹¹ Though the use of cash bail has decreased in the state, a 2018 study found that Maryland judges have replaced cash bail with "no bail" detainment instead.¹⁹² The percentage of defendants held with

<https://www.arlnow.com/2018/11/15/public-defenders-blast-arlington-prosecutors-cash-bail-reforms-as-misleading-and-ineffective/> [perma.cc/NM6L-HL4M].

185. Koma, *supra* note 184. The Eighth Amendment states that "[e]xcessive bail shall not be required, nor excessive fines imposed . . ." U.S. CONST. amend. VIII.

186. Abbie Vansickle, *So Much for the Great California Bail Celebration*, THE MARSHALL PROJECT (Aug. 30, 2018), <https://www.themarshallproject.org/2018/08/30/so-much-for-the-great-california-bail-celebration> [perma.cc/ENM4-Z7LL].

187. Madeleine Carlisle, *The Bail-Reform Tool That Activists Want Abolished*, THE ATLANTIC (Sept. 21, 2018), <https://www.theatlantic.com/politics/archive/2018/09/the-bail-reform-tool-that-activists-want-abolished/570913/> [perma.cc/L2ZA-SBL4].

188. Note, *Bail Reform and Risk Assessment*, *supra* note 122, at 1144.

189. *Id.*

190. See Christopher Zoukis, *Maryland Bail Reform Backfires, Drives Up Number of Inmates*, ZOUKIS PRISONER HANDBOOK (Jul. 19, 2018), <https://www.prisonerresource.com/prison-reform/maryland-bail-reform-backfires-drives-up-number-of-inmates/> [perma.cc/U5RC-F8LP].

191. *Id.*

192. Cherem & Taylor, *supra* note 184; *Prince George's County: A Study of Bail*, COLOR OF CHANGE & PROGRESSIVE MD. 3 (Jul. 2018), https://static.colorofchange.org/static/v3/pg_report.pdf?akid=14740.3112990.hZo0eM&rd=1&t=8 [perma.cc/99XB-9HXU].

no bail increased by over fourteen percent, whereas the percentage of defendants released with no bail increased by only two percent.¹⁹³ Moreover, the study found that the jail population remained the same after the reform took effect.¹⁹⁴

A similar result was found in Kentucky.¹⁹⁵ There, a study on judicial tendencies after bail reform was passed concluded that “[i]f judges followed the recommendations associated with the risk assessment, ninety percent of defendants would be granted immediate non-financial release. In practice, only twenty-nine percent are released on non-monetary bond at the first bail-setting.”¹⁹⁶ The results in Kentucky show that the judicial discretion impedes the effectiveness of bail reform.¹⁹⁷ In California, many civil rights organizations pulled their support from the state’s bail reform bill because of the great breadth of discretion the bill provided judges.¹⁹⁸

Bail reform is criticized for being institutionally biased as well.¹⁹⁹ Risk assessments base their algorithms on data largely provided by criminal justice statistics.²⁰⁰ This data contains race, gender, and socio-economic disparities.²⁰¹ Because risk assessments are based on data “influenced by structural racism,” they produce results that are therefore discriminatory.²⁰² This may cause certain classes of individuals to be incarcerated pretrial for low-level offenses where such individuals would not have been detained before bail reform.²⁰³ In California, over one hundred organizations, in withdrawing support from the bail reform bill, signed a statement saying that “automated predictions based on such data – although they may seem objective or neutral – threaten to further intensify unwarranted discrepancies in the justice system and to provide a misleading and undeserved imprimatur of impartiality for an institution that desperately needs fundamental change.”²⁰⁴

With these criticisms in mind, Missouri should consider educating judges on the dangers of no bail provisions. Alternatively, Missouri could direct judges, through either Chief Justice George W. Draper III or the General

193. *Prince George’s County*, *supra* note 192, at 11.

194. *Id.* at 9.

195. Stevenson, *supra* note 1, at 362–63.

196. *Id.* at 310–11.

197. *Id.* at 311.

198. See Vansickle, *supra* note 186.

199. *Id.*; Choi, *supra* note 132.

200. Choi, *supra* note 132; Vansickle, *supra* note 186.

201. Carlisle, *supra* note 187; *Essie Justice Group Withdraws Support for SB 10*, ESSIE JUST. GRP. (Aug. 14, 2018), <https://essiejusticegroup.org/2018/08/essie-justice-group-withdraws-support-for-sb-10/> [perma.cc/6UPC-BLGH].

202. Carlisle, *supra* note 187; Choi, *supra* note 132.

203. Choi, *supra* note 132; *The Use of Pretrial “Risk Assessment” Instruments: A Shared Statement of Civil Rights Concerns*, <http://civilrightsdocs.info/pdf/criminal-justice/Pretrial-Risk-Assessment-Full.pdf> [perma.cc/2WKP-KLA6].

204. *The Use of Pretrial “Risk Assessment” Instruments*, *supra* note 203.

Assembly, to approach bail hearings with the presumption of release without monetary conditions unless there is clear evidence of risk of flight or danger to public safety. As seen in Kentucky and Maryland, when judges are presented with the option of releasing defendants without bail, granting conditional release, or detaining defendants without bail, judges are more likely to detain without bail, which is the opposite of the MBRA's goals.²⁰⁵ Creating a presumption of release without bail rather than a presumption of detainment, as California did for certain offenses,²⁰⁶ would better serve the goals of bail reform. Prosecutors would then be required to overcome this presumption, which would preserve a defendant's presumption of innocence, encourage equality in pretrial litigation, and reduce the number of persons detained after initial appearances.

B. Missouri's Money Bail Reform Act and the MSPD

The MSPD is currently suffering from gross underfunding and debilitating caseloads.²⁰⁷ The new court rules will not significantly alleviate these problems or change the quality of representation a public defender can provide to an indigent defendant. The struggles the MSPD experiences do not change when a defendant is granted conditional release or released on his or her own recognizance.²⁰⁸

Arguably, bail reform may have some positive effects on the adequacy of representation public defenders could provide. Reform may increase and improve communication between a defendant and his public defender because defendants can access more forms of communication outside of jail. Defendants released conditionally or without bail may also be able to aid their public defender in obtaining critical evidence and locating witnesses. Although this may be helpful, public defenders, burdened with hundreds of cases and the stress of being under-resourced, lack the time necessary to conduct thorough investigations, perform motion practice, and research to prepare a defense.²⁰⁹ The new court rules do little to remedy the fact that indigent defendants are not being afforded their right to effective counsel.

A defendant who is no longer required to pay bail may be able to afford a private attorney or at least the attorney's retention fee.²¹⁰ If defendants hire private attorneys, the number of cases assigned to public defenders should decrease. When the costs of discovery, motion practice, and investigation are factored in, however, the total cost of private representation is much higher

205. Prince George's County, *supra* note 192; Stevenson, *supra* note 1, at 354–57.

206. *See infra* Part II.B.

207. *Id.*

208. *Id.*

209. Uphoff, *supra* note 28, at 23.

210. Uphoff, *Foreword*, *supra* note 30, at 669.

than an initial retention fee or a bail amount.²¹¹ Many low-income defendants cannot afford the total cost of hiring a private attorney.²¹² Although, in theory, defendants released on bail have more of an opportunity to hire a private attorney, in practice few will be able to do so. Consequently, the reform is likely to have little effect on the overwhelming caseloads of the MSPD.

But there are ways to improve Missouri's bail system so that public defenders can provide effective counsel to indigent defendants. One method is to require indigent defendants to be represented by public defenders at initial appearances.²¹³ Currently in Missouri, as depicted in *Church*, public defenders are not required to appear at arraignment.²¹⁴ Rather, a defendant may make a showing of indigency at the initial appearance, and only upon a determination of indigency will the court then appoint counsel to the defendant.²¹⁵ Without defense counsel present to advocate for a defendant, judges rely on prosecutorial recommendations, their own experience, and the nature of the crime charged when determining bail.²¹⁶ While Missouri's bail reform facially eradicates this custom, in practice the effect may not be as comprehensive as intended because the new court rules defer to a court's judgment when determining bail. The rules merely provide more factors to consider during arraignment. As a result, a defendant in Missouri may continue to wait in jail for weeks or months after his or her initial appearance before being appointed a public defender.²¹⁷

Many arrested persons face low-level misdemeanor charges, which are offenses that generally should not require bail or detainment and which, according to *Argersinger*, entitle the defendant to representation.²¹⁸ Requiring representation at bail hearings forces the court's focus to the front end of the criminal process, increasing the likelihood that these low-level cases will be dismissed and discouraging prosecution of such minor offenses.²¹⁹ In cases that continue past initial appearances, indigent defendants are less likely to be detained or have bail set when provided representation at the bail setting

211. Rodney Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 744 (2006); see also Uphoff, *Foreword*, *supra* note 30, at 669. (2010) ("Generally, the marginally poor who face criminal charges either represent themselves or scrape up just enough money to hire private counsel to negotiate a plea bargain.").

212. Uphoff, *Convicting the Innocent*, *supra* note 211, at 744.

213. See Charlie Gerstein, Note, *Plea Bargaining and the Right to Counsel at Bail Hearings*, 111 Mich. L. Rev. 1513, 1529–34, (2013); Colbert et al., *supra* note 21, at 1719.

214. Other states like Wisconsin require representation at initial appearances. See *supra* Part II.

215. MO. SUP. CT. R. 31.02.

216. See Gerstein, *supra* note 213, at 1532.

217. See Uphoff, *supra* note 28, at 23.

218. *Argersinger v. Wainwright*, 407 U.S. 25, 36–37 (1972); see Colbert et al., *supra* note 21, at 1721.

219. See Colbert et al., *supra* note 21, at 1721.

stage.²²⁰ Public defenders and their ability to argue on behalf of indigent defendants regarding bail are therefore imperative to protecting indigent defendant's pretrial procedural rights.

In order to have public defenders present at initial appearances, Missouri's General Assembly must increase funding to the MSPD. Properly funding the MSPD would allow the system to hire more attorneys. Greater manpower would increase the amount of time a public defender can spend on a case. At the moment, Missouri public defenders are forced to pick which cases to allocate their attention.²²¹ The result is that misdemeanors and lesser felonies – the cases that would benefit the most from representation at bail hearings – generally go uninvestigated.²²² Much of the investigation for these cases happens right before trial, which decreases the likelihood that critical evidence and witnesses will be found.²²³ Additionally, public defenders do not have time for aggressive motion practice or legal research, and excessive caseloads restrict the public defenders' ability to litigate discovery issues.²²⁴ Increasing funding to allow for the hiring of more attorneys would fix this problem. Public defenders would be able to properly investigate each case and effectively represent clients in a manner that satisfies *Gideon* and its progeny.

Additionally, increased funding and greater manpower would reduce the number of cases appointed to each public defender. This, in turn, would afford public defenders the time to represent indigent defendants at initial appearances. Public defenders could then argue on behalf of indigent defendants for a conditional release, a release on the defendant's own recognizance, or a reduced bail amount. For indigent defendants, having a public defender argue for, and potentially obtain, these results could allow defendants to keep their jobs, avoid eviction from their homes, and continue to support their families, which, as then-Chief Justice Fischer pointed out, is the goal of the new court rules and bail reform.²²⁵ The new court rules give too much deference to judges and prosecutors without allowing defense counsel the opportunity to advocate for their clients at arraignment, with the likely result being that indigent defendants charged with low-level offenses remain incarcerated due to failure to post bail.²²⁶

V. CONCLUSION

The new court rules have the potential to provide positive outcomes for indigent defendants and the MSPD. However, Missouri should consider how bail reform in other states have panned out and be wary of the benefits

220. *Id.* at 1720.

221. *See Uphoff, supra* note 28, at 23.

222. *Id.* at 21–22.

223. *Id.* at 25–26.

224. *Id.* at 24.

225. *See Colbert et al., supra* note 21, at 1720.

226. *Id.*

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promised by the reform that will actually be delivered. Missouri's legislature should instead focus on providing adequate funding to the MSPD. This will enable public defenders to represent indigent defendants at initial appearances, which will improve the quality of representation public defenders can provide. Proper funding will additionally negate the need to establish a new agency that the state government will have to fund. This, in turn, will bring Missouri one step closer to improving the MSPD and providing indigent defendants with their constitutionally protected Sixth Amendment rights.