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NOTE

CAUGHT BETWEEN A ROCK AND A HARD PLACE: A MISSOURI COURT'S TOUGH CHOICE AND THE POWER TO CHANGE THE FACE OF INDIGENT DEFENSE

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I. INTRODUCTION

Former Illinois Supreme Court Justice Walter Schaefer said it best: "Of all of the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have."[1] Yet today, this fundamental belief is compromised daily thanks to a nationwide indigent-defense system that persists on life support. It is those less fortunate—the weak, the poor, the powerless—that feel the effects the hardest. Justice demands more.

Troubles plaguing indigent-defense systems are as old as the landmark case *Gideon v. Wainwright*, which first recognized that the

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1. Walter Schaefer, *Federalism and State Criminal Procedure*, 70 HARV. L. REV. 1, 8 (1956).

Sixth and Fourteenth Amendments guarantee counsel for those charged with a felony in court who cannot afford representation.[2] Despite attempt after attempt and study after study to attain relief from excessive defender caseloads and severe underfunding, the situation only gets worse, magnified by the economic downturn and rising number of indigent defendants. In 2006, the American Bar Association (ABA) Standing Committee on Ethics and Professional Responsibility issued an unprecedented opinion recommending that public defenders either withdraw from representation or refuse appointment when mounting caseloads make it impossible to provide competent and diligent representation.[3]

Following the ABA's lead, the Missouri Public Defender Commission enacted rules to control attorney workloads, allowing public defenders to refuse to represent defendants when caseloads exceed pre-determined ratios.[4] Ranked second to last in the nation in appropriations for indigent defense, the state knows the problem all too well.[5] In December 2009, the Missouri Supreme Court upheld the Commission's promulgations;[6] however, the following August, an associate circuit judge overruled the district defender's objections when his office had reached its caseload capacity and appointed a public defender anyway.[7] That matter is pending before the state supreme court.

No doubt all eyes will be on the *Show Me State* as the Missouri Supreme Court ponders a solution. This Note questions what the proper resolution might encompass. First, the Note takes a brief look at the history of the right to counsel and the national indigent-defense system. Section III addresses the current crisis plaguing the nation, while Section IV focuses on litigation making headlines in Missouri, along with the legal and ethical concerns that accompany the dilemma. Finally, Section V weighs possible solutions beyond increased legislative funding. In particular, the section will analyze Judge Michael Wolff's charge in *State ex rel. Missouri Public Defender Commission v. Pratte* for public

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

3. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) [hereinafter ABA Formal Op. 06-441].

4. MO. CODE REGS. ANN. tit. 18, § 10-4.010 (2010).

5. STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2010 ANNUAL REPORT 1 (2010) [hereinafter FISCAL YEAR 2010 ANNUAL REPORT].

6. State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 889–90 (Mo. 2009).

7. Transcript of Proceedings at 3–4, Missouri v. Blacksher, No. 10CT-CR00905 (Mo. Cir. Ct. Aug. 10, 2010).

defenders, judges, and prosecutors to develop a "workable strategy" to reduce demand for public-defender services.[8] The author proposes that it is up to the justice system's three major players to craft a solution, even if that means making difficult choices. Prosecutors could choose not to charge defendants who are not afforded adequate representation. Public defenders could stand their ground and resist appointment when faced with the impossible task of fitting in one more client to an already exhausted caseload. Ultimately, the author concludes that the only real potential for change lies in the hands of the judge—the chief protector of one's constitutional rights—who could compel state legislatures to appropriate more funds or let the accused walk when there is no one to advocate for him.

II. A BRIEF HISTORY

The right to a fair trial, in which "every defendant stands equal before the law," has been fundamental to American beliefs since our nation's infancy.[9] The Sixth Amendment to the U.S. Constitution guarantees every person facing criminal prosecution the opportunity "to have the Assistance of Counsel for his defence."[10] Yet, initially, the states were not required to provide representation to all indigent defendants. In 1932, the Supreme Court ruled that only those facing capital charges that could not afford counsel and were incapable of representing themselves "because of ignorance, feeble-mindedness, illiteracy, or the like" were entitled to state-provided attorneys.[11] Three decades later, in *Gideon v. Wainwright*, the Court noted that while governments appropriated "vast sums of money" to try the accused, the poor man was forced to face his fate alone.[12] Recognizing that attorneys are not luxuries but necessities, the Court ruled that the Sixth and Fourteenth Amendments guarantee representation for indigent defendants charged with a felony in state court, for "any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him."[13] Nine years later, the Supreme Court extended the right to defendants charged with misdemeanor

8. *Pratte*, 298 S.W.3d at 889.
9. Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
10. U.S. CONST. amend. VI.
11. Powell v. Alabama, 287 U.S. 45, 71 (1932).
12. *Gideon*, 372 U.S. at 344.
13. *Id.*

offenses where actual imprisonment was imposed.[14] Noting the ramifications of such a decision, Justice Burger believed the profession was up to the challenge: "The holding of the Court today may well add large new burdens on a profession already overtaxed, but the dynamics of the profession have a way of rising to the burdens placed on it."[15]

Gideon sparked a transformation in the criminal-justice system. State and local governments were forced to modify their systems to accommodate the rising number of indigent defendants.[16] By 1964, more than half of the states had established programs.[17] Today, "public defenders are found in 90 of the nation's 100 largest counties," while "assigned-counsel programs operate in 2900 of the 3100 counties in the United States."[18] Although the structures are in place to ensure all are guaranteed this fundamental right, a glimpse into the heart of the matter reveals a struggling system crying out for reformation. One could argue that the system has failed to rise to the challenge.

III. THE CRISIS

In the forty-eight years since *Gideon*, countless reports, studies, and scholarly journals have addressed the problems plaguing indigent-defense systems, yet the troubles continue. The right to counsel includes the right to effective assistance of counsel.[19] However, today, state indigent systems "often operate at substandard levels and provide woefully inadequate representation."[20] Problems can be traced to severe underfunding and crushing caseloads; "inadequate financial support continues to be the single greatest obstacle to delivering 'competent' and

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

15. *Id*. at 44 (Burger, J., concurring).

16. PAUL B. WICE, PUBLIC DEFENDERS AND THE AMERICAN JUSTICE SYSTEM 9 (2005).

17. *Id.*

18. *Id.* at 10. "Public defender programs can be distinguished from assigned-counsel systems because they are comprised of salaried lawyers who represent nearly all of the indigent defendants within their jurisdictions." *Id.* These programs receive funding from state or local sources. *Id.* Assigned-counsel systems, on the other hand, are administered by a judge who appoints lawyers to indigent defendants on a case-by-case basis. *Id.* at 13. "The judge selects lawyers from a list of available attorneys, who may either volunteer for the work or are appointed simply because they are a member of the local bar." *Id.*

19. Strickland v. Washington, 466 U.S. 668, 687–88 (1984).

20. AM. BAR ASS'N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON'S BROKEN PROMISE: AMERICA'S CONTINUING QUEST FOR EQUAL JUSTICE 7 (2004) [hereinafter GIDEON'S BROKEN PROMISE].

'diligent' defense representation."[21] More than half of the states now fund ninety percent of their indigent-defense programs, but public-defense systems inevitably take a back seat to more politically popular departments.[22] For example, many states that serve as exclusive financiers of their indigent-defense systems decreased monetary support between 2002 and 2005.[23] In 2009, thirty-seven states experienced budget shortfalls.[24] Moreover, the recent economic calamity dealt a blow to departments already strapped for cash while the number of defendants considered indigent increased.[25]

The lack of money makes it impossible for even the best lawyers to mount an adequate defense.[26] A criminal defendant is entitled to more than just a legal advocate; the Sixth Amendment right to counsel requires that the accused have access to experts and transcripts to aid his or her defense.[27] Despite such requirements, the U.S. Supreme Court has said

21. NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 6–7 (2009); *see generally* Darryl K. Brown, *Epiphenomenal Indigent Defense*, 75 MO. L. REV. 907 (2010); Heather Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 MICH. ST. L. REV. 341; Roberta G. Mandel, *The Appointment of Counsel to Indigent Defendants Is Not Enough: Budget Cuts Render the Right to Counsel Virtually Meaningless*, FLA. B.J., Apr. 2009, at 43; Justine Finney Guyer, Note, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335 (2009); Note, *Effectively Ineffectiv*e: *The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005).

22. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 53.

23. *Id.* at 59.

24. *Id.*

25. *Id.* at 59–60. For example, Maryland, faced with tremendous deficits in 2008, was forced to shed $400,000 in public-defender support-staff salaries. *Id.* at 59. Kentucky decreased the budget for indigent defense by 6.4%. *Id.* at 60. Minnesota laid off thirteen percent of its public-defender staff. *Id.* In 2007, the Georgia Public Defender Standards Council "owed hundreds of thousands of dollars to attorneys representing indigent defendants in capital cases and was forced to lay off 41 employees." *Id.*

26. McFarland v. Scott, 512 U.S. 1256, 1257–58 (1994) (Blackmun, J., dissenting).

27. *See id.* at 1258–59. *See also* Ake v. Oklahoma, 470 U.S. 68, 86–87 (1985) (finding that a defendant's right to due process of law requires that the state provide access to a psychiatrist if the defendant cannot afford one when the accused's mental state at the time of the alleged offense is a substantial issue at trial); *see generally* Lisa R. Pruitt & Beth A. Colgan, *Justice Deserts: Spatial Inequality and Local Funding of Indigent Defense*, 52 ARIZ. L. REV. 219 (2010); Cara H. Drinan, *The Revitalization of* Ake*: A Capital Defendant's Right to Expert Assistanc*e, 60 OKLA. L. REV. 283 (2007); Michael James Todd, Case Note, *Criminal Procedure-Due Process and Indigent Defendants: Extending Fundamental Fairness to Include the Right to Expert Assistance* Ake v. Oklahoma, 29 HOW. L.J. 609 (1986); 1 CRIM. PRAC. MANUAL § 10:10 (2011), *available at* Westlaw CRPMAN.

very little about how governments are to finance attorneys and collateral expenses.[28] Furthermore, "public defenders historically have operated with grossly inadequate office equipment and technology as well as insufficient support staff and expert witness funding" as compared to their colleagues in the district attorney's office.[29] Across the nation, public defenders earn far less than prosecutors, as well.[30] In 2002, state and local indigent-defense expenditures equaled $2.8 billion while the prosecutorial counterpart spent $5 billion.[31]

As a result of inadequate funding, public defenders are forced to carry heavy caseloads, diminishing attorney morale and creating a revolving door of professionals that requires inexperienced lawyers to manage cases beyond their expertise.[32] The National Right to Counsel Commission notes that "fairness is served if both sides are represented by lawyers who are evenly matched. . . . When the defense does not measure up to the prosecution, there is a heightened risk of the adversary system of justice making egregious mistakes."[33] Reports indicate that as many as ten thousand defendants accused of serious felonies are wrongfully convicted in the United States every year,[34] and "shrinking funding and access to resources for public defenders and court appointed attorneys is only exacerbating the problem."[35]

Perhaps no state knows the situation better than Missouri, which ranks forty-ninth in the nation in per capita expenditures on indigent

28. Norman Lefstein, *A Broken Indigent Defense System: Observations and Recommendations of a New National Report*, HUM. RTS., Spring 2009, at 11, 12.

29. GIDEON'S BROKEN PROMISE, *supra* note 20, at 10.

30. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 63. For instance, in Missouri, the highest paid prosecutor earned nearly twice as much as the highest paid public defender. *Id.* "Public defender salaries are so low that some attorneys are forced to work second jobs, and the cumulative turnover of public defenders between 2001 and 2005 was an astounding 100%!" *Id.*

31. GIDEON'S BROKEN PROMISE, *supra* note 20, at 13–14.

32. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 65. In 2006, Clark County, Nevada, reported that a public defender's caseload on average included 364 felony and gross misdemeanor cases. *Id.* at 68. In Knox County, Tennessee, an attorney reported managing 240 open cases, while a colleague represented 151 clients between January and February 2008 alone. *Id.*

33. *Id.* at 6. For instance, a Miami, Florida public defender was so strapped for time in 2008 that she did not have an opportunity to discuss a one-year imprisonment plea deal with her client, and the prosecution pulled the offer. *Id.* The client ended up pleading guilty and received a five-year sentence. *Id.*

34. GIDEON'S BROKEN PROMISE, *supra* note 20, at 3.

35. *Id*. at 4.

defense.[36]

IV. FOCUS ON MISSOURI

In 2005, an independent assessment of the Missouri State Public Defender system (MSPD) declared that the state was "operating in a crisis mode and the probability that public defenders [were] failing to provide effective assistance of counsel and [were] violating their ethical obligations to their clients increase[d] every day."[37] The report indicated that "[MSPD] has reached a point where what it provides is often nothing more than the illusion of a lawyer."[38] Not much has changed five years later despite aggressive attempts at reform.[39] In 2010, eighty-four thousand cases graced the desks of the only 348 public defenders on staff.[40] Studies show it would take a minimum of 125 more attorneys to manage a caseload of that capacity.[41]

Even Attorney General Eric Holder has taken note of the dismal state of affairs.[42] In his remarks at the Brennan Legacy Awards Dinner in 2009, Holder made a point to inform the audience that counties in

36. FISCAL YEAR 2010 ANNUAL REPORT, *supra* note 5, at 1.

37. STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2009 ANNUAL REPORT 3 (2009) [hereinafter FISCAL YEAR 2009 ANNUAL REPORT] (internal quotation marks omitted). For more on issues plaguing Missouri's Public Defender System, see Chris Dandurand, *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); Rodney Uphoff, *Forward: Broke and Broken: Can We Fix Our State Indigent Defense System?*, 75 MO. L. REV. 667 (2010); Stephen B. Bright, *Legal Representation for the Poor: Can Society Afford This Much Injustice?*, 75 MO. L. REV. 683 (2010); Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751 (2010); Norman Lefstein, Commentary, *Boots on the Ground: The Ethical and Professional Battles of Public Defenders*, 75 MO. L. REV. 793 (2010); Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853 (2010); Christopher D. Aulepp, Note, *Enslaving Paul by Freeing Peter: The Dilemma of Protecting Counsel's Constitutional Rights While Providing Indigent Defendants with Effective Assistance of Counsel*, 78 UMKC L. REV. 291 (2009); Guyer, *supra* note 21.

38. FISCAL YEAR 2009 ANNUAL REPORT, *supra* note 37, at 68 (internal quotation marks omitted).

39. Eva Dou, *Public Defenders Say They Will Reject Cases*, COLUMBIA MISSOURIAN, Oct. 3–4, 2010, at 3A. Prosecutors and judges have made efforts to reduce caseloads. *Id.* Prosecutors have agreed to forego jail time for some misdemeanor offenses while judges have appointed private attorneys to handle juvenile cases. *Id.*

40. FISCAL YEAR 2010 ANNUAL REPORT, *supra* note 5, at 10.

41. *Id.*

42. *Attorney General Eric Holder at the Brennan Center for Justice Legacy Awards Dinner*, UNITED STATES DEP'T OF JUSTICE (Nov. 16, 2009), http://www.justice.gov/ag/speeches/2009/ag-speech-091161.html.

Missouri were forced to refuse cases and publicly acknowledged that when caseloads were high, mistakes were made.[43] He noted that attorneys in one county averaged 395 cases a year.[44] Furthermore, the dilemma made headlines nationwide during the summer of 2010 when public-defender offices began closing their doors to new cases.[45] By July, public-defender systems in forty Missouri counties warned courts of impending unavailability.[46]

In response to the predicament, the Missouri Public Defender Commission, the seven-member panel that governs MSPD, adopted rules limiting the number of clients a defender could represent in December 2007.[47] For example, 18 C.S.R. § 10-4.010(1)(A) identifies the maximum caseload each public-defender office can be assigned without compromising effective, competent, and ethical representation.[48] When the office reaches its maximum, the public defender must notify the circuit judge of impending unavailability.[49] Once notice has been given, the regulation requires the public defender, prosecutor, and judge to "agree on measures to reduce the demand for . . . services."[50] Possible alternatives include prosecutors limiting the number of cases calling for imprisonment, as well as judges appointing private attorneys to certain categories of cases or even determining not to appoint counsel at all.[51] In absence of an agreement, the public defender may make the office unavailable.[52]

Recently, in *State ex rel. Missouri Public Defender Commission v. Pratte*, the Missouri Supreme Court upheld the Commission's regulations allowing the public defender to "limit when an office is available to serve indigent defendants,"[53] which are consistent with ABA recommendations.[54] In dicta, Judge Michael Wolff charged public

43. *Id.*
44. *Id.*
45. Chris Blank, *Springfield Public Defender Office Turns Away New Cases*, COLUMBIA MISSOURIAN (July 22, 2010, 6:29 PM CDT), http://www.columbiamissourian.com/stories/2010/07/22/mo-public-defender-office-turns-away-new-cases.
46. *Id.*
47. State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 877–78 (Mo. 2009).
48. MO. CODE REG. ANN. tit. 18, § 10-4.010(1)(A) (2010).
49. *Id.* § 10-4.010(2)(A).
50. *Pratte*, 298 S.W.3d at 887.
51. *Id.*
52. *Id.*
53. *Id.* at 884.
54. ABA Formal Op. 06-441, *supra* note 3.

defenders and prosecutors with the task of developing a "workable strategy" to reduce demand for public-defender services.[55] Part C analyzes this proposition in greater detail. However, the force of this ruling now hangs in the balance thanks to a tough decision made in a Christian County courtroom in August 2010.

A. State ex rel. Missouri Public Defender Commission v. Waters

It is probably safe to say that twenty-two-year-old Jared Blacksher never dreamed his case would generate a tidal wave of controversy when he was charged with felony burglary in July 2010.[56] In an initial appearance before Christian County Circuit Judge John S. Waters on July 28, the court found that he qualified as an indigent defendant under Missouri law and appointed a public defender to represent him over the public defender's objection.[57] Nine days prior, MSPD District 31, covering Christian, Taney, and Greene counties, notified the presiding judge that it had reached one hundred percent of its monthly capacity and was unavailable to accept any additional cases pursuant to 18 C.S.R. §

55. *Pratte*, 298 S.W. 3d at 889.

56. Felony Complaint at 1, Missouri v. Blacksher, No. 10CT-CR00905 (Mo. Cir. Ct. July 1, 2010).

57. Transcript of Proceedings, *supra* note 7. Missouri law provides that "[i]f any person about to be arraigned upon an indictment for a felony be without counsel to conduct his defense, and be unable to employ any, it shall be the duty of the court to assign him counsel." MO. REV. STAT. § 545.820 (2000). Likewise, the State Supreme Court Rules recognize a defendant's right in all criminal cases "to appear and defend in person and by counsel." MO. SUP. CT. R. § 31.02(a) (2011).

> If any person charged with an offense, the conviction of which would probably result in confinement, shall be without counsel upon his first appearance before a judge, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. Upon a showing of indigency, it shall be the duty of the court to appoint counsel to represent him. . . . If at any stage of the proceedings it appears to the court in which the matter is then pending that because of the gravity of the offense charged and other circumstances affecting the defendant, the failure to appoint counsel may result in injustice to the defendant, the court shall then appoint counsel. Appointed counsel shall be allowed a reasonable time in which to prepare the defense.

Id. A person is deemed indigent and thus 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." MO. REV. STAT. § 600.086(1).

10-4.010.[58] According to Public Defender Director J. Marty Robinson, the district had been operating beyond capacity for eight months.[59] As a result of the July 28 appointment, District 31 filed a motion to set aside the order appointing the public defender and appeared before Judge Waters on August 10 for an evidentiary hearing.[60]

The parties did not dispute that Mr. Blacksher was indigent.[61] Rather the public defender argued that Blacksher was ineligible for services based on the closing of the public-defender office pursuant to the Code of State Regulations upheld in *Pratte*.[62] The state, on the other hand, disagreed that the MSPD system was in dire straits and contended that the state statute providing that "the public defender shall provide legal services to an eligible person who is detained or charged with a felony" prevailed over the promulgation of rules.[63] To the state, the fact that the system was struggling, thus making an otherwise eligible defendant ineligible, did not "square with the statute."[64] "[I]t's about Mr. Blacksher today, not about the Public Defender System, it's about him and today we've got a guy that's sitting in jail that could face up to 21 years in jail . . . and they are not going to represent him," said Benjamin Miller, attorney for the state.[65]

In his ruling, Judge Waters recognized that he was caught between a rock and a hard place.

> I've got a young man in my county who is indigent and who's in legal trouble. . . . [H]e absolutely needs the services of counsel and protection of a lawyer, there is no question about that.
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> . . . .
>
> . . . If I don't appoint a lawyer for [the indigent], they can't make bond, they can't get out. All flies in the face of our

58. Petition for a Writ of Prohibition, and Suggestions in Support of the Petition, with Attached Exhibits at 5, State *ex rel.* Mo. Pub. Defender Comm'n v. Waters, No. SC91150 (Mo. Ct. App. Sept. 1, 2010).

59. *Id.* at 5–6. District 31 operated at 146.54% capacity in October 2009, 119.91% in November 2009, 131.41% in December 2009, 147.47% in January 2010, 128.71% in February 2010, 131.30% in March 2010, 113.54% in April 2010, 132.46% in May 2010, and 133.83% in June 2010. *Id.*

60. *Id.* at 8.

61. Transcript of Proceedings, *supra* note 7, at 3.

62. *Id.* at 17.

63. *Id.* at 14–15.

64. *Id.* at 105.

65. *Id.* at 105–06.

> system, it flies in the face of our constitution . . . . I'm not saying the Public Defenders aren't over-worked . . . but I appoint the Public Defenders Office in situations exactly like Mr. Blacksher's situation and I don't know how to move his case and how to provide him what the law of the land provides.[66]

Judge Waters took note of the caseloads' "significant impact" on public defenders and recognized that he could dismiss the case and turn Mr. Blacksher loose, but he did not feel that was an "acceptable remedy."[67] Furthermore, he did not believe that appointing private counsel was the answer either, considering that selecting attorneys who are not proficient in criminal defense could be hazardous to the defendant.[68]

To Waters, the Sixth Amendment trumped the state regulation allowing public defenders to refuse cases when their offices had reached their limit.

> We certainly would deprive Mr. Blacksher and people like him of their liberty if they're sitting in a jail waiting for the Public Defender to say, okay, now I guess we can take his case. It's a horrible situation . . . .
>
> . . . I feel that under the Constitution and the 6th Amendment I have no choice but to do what that law requires and appoint the Public Defender to represent Mr. Blacksher. . . .[69]

Following the ruling, the Missouri Public Defender Commission filed a writ of prohibition in the Missouri Supreme Court seeking rescission of the appointment.[70] The state's highest court is not taking the matter lightly. The court appointed Retired Circuit Judge Miles Sweeney to serve as special master and charged him with the tasks of gathering evidence and submitting a report for the court to review.[71]

Sweeney held a public hearing in Springfield, Missouri on

66. *Id.* at 110–11.
67. *Id.* at 111–12.
68. *Id.* at 112.
69. *Id.* at 114–15.
70. *See* Petition for a Writ of Prohibition, and Suggestions in Support of the Petition, with Attached Exhibits, *supra* note 58, at 1–19.
71. Amos Bridges, *Defender Caseloads Subject of Hearing*, SPRINGFIELD NEWS-LEADER.COM (Nov. 12, 2010, 11:00 PM), http://www.news-leader.com/article/20101113/NEWS01/11130346/Defender-caseloads-subject-of-hearing.

November 14, 2010, giving the people a chance to weigh in on the subject.[72] Prosecutors, public defenders, and representatives from the state and local bar were on hand to communicate "a series of attempts to address the alleged shortage of public defenders by internal, cooperative, and legislative means."[73] Public defenders testified that additional state funding in the past several years "had not made a significant difference" while county prosecutors insisted that "caseload calculations used by the public defender system [were] deficient and that its policies for determining indigence also need improvement."[74] Furthermore, a local economics professor argued that the 2009 report conducted by the Spangenberg Group, on which the system relies for statistical support, was "void of analysis" and "really more a piece of advocacy."[75] In addition, the mother of an indigent defendant described how the predicament was affecting her family. "My son has found himself on the wrong side of the law . . . . He is eligible for a public defender but they're overloaded[;] I don't know what to do," she said.[76]

Nearly three months later, the special master issued his findings in an eleven-page report, concluding that "[a] major overhaul of Missouri's criminal code is the 'only true solution' to the caseload problems dogging [the state's] public defender [system]."[77] The Missouri Supreme Court had asked Judge Sweeney to consider three questions:

1. Is the factual basis for the caseload standards protocol referenced in 18 CSR 10-4.010 accurate and appropriate?
2. Were the procedures [in] 18 CSR [10]-4.010(2) followed?
3. If the procedures were followed, identify the reasons why such procedures did not resolve the issue of representation by the public defender.[78]

The Judge found that the regulatory provisions were indeed followed; however, such procedures "do not and cannot address the

72. *Id.*
73. *Id.*
74. *Id.* (internal quotation marks omitted).
75. *Id.* (internal quotation marks omitted).
76. *Id.* (alteration in original omitted) (internal quotation marks omitted).
77. Allison Retka, *Missouri Public Defender Special Master Advocates Redo of State Criminal Code*, MO. LAW. MEDIA, Feb. 9, 2011, *available at* 2011 WLNR 3021373.
78. Report of the Special Master at 2, State *ex rel.* Mo. Pub. Defender Comm'n v. Waters, No. SC91150 (Mo. Feb. 9, 2011).

underlying problem of ever increasing caseload[s] and lack of resources," nor compel judges or prosecutors to assist in resolving the predicament.[79]

He noted that meetings between the three major stakeholders—the prosecutor, public defender, and judge—were understandably fruitless considering "[t]here was no requirement from any higher authority that [the parties reach an agreement]."[80] The judge recognized that "[a] 'meet and confer' type of provision may facilitate resolution of a problem, but [there] is no guarantee of a favorable outcome."[81] Furthermore, the judge determined that while placing a monthly limit on the number of cases a public defender is allowed to take "goes a long way toward solving the public defender dilemma, [it] makes the problem worse for everyone else."[82]

The special master went on to consider a number of alternatives, including volunteer-attorney programs and contract attorneys.[83] He found both to be "unworkable solutions," noting that the administration of such programs would be a nightmare and contract attorneys would only cost the state more in the end.[84] The judge concluded that appointing all attorneys was not the answer either, considering that many members of the bar lack expertise in the field of criminal defense,[85] but it would be inherently unfair to allow the burden to fall on only those practitioners who were qualified to represent criminal defendants.[86] Furthermore, the judge determined that compelling attorney participation would only let the legislature off the hook: "The biggest danger is that the legislature will decide that if they can palm it all off on the lawyers, they will never have to fulfill their fundamental responsibility to properly fund the MSPD."[87]

In the end, the special master found that the only genuine solution is a "[well-funded] and well managed PD system."[88] He proposed that the

79. *Id.* at 3–4.
80. *Id.* at 4.
81. *Id.*
82. *Id.* at 6
83. *Id.* at 8.
84. *Id.* at 8–9.
85. *Id.* at 9. ("The problem with this approach may be summed up in the term 'ineffective assistance of counsel.'").
86. *Id.*
87. *Id*. at 10.
88. *Id.*

real answer lies in the state's criminal code.[89] Since its development in the early 1970s, the Code has undergone almost yearly expansions and is now what Judge Sweeney calls "a Christmas tree of oddball crimes and inconsistent punishments."[90] To Sweeney, "equalizing penalties for similar crimes could reduce the PD caseload along with the court's, the prosecutor's, probation and parole, and the department of corrections"—a move that may not be popular with politicians expected to be "tough on crime."[91]

The ABA filed an amicus curiae brief, imploring the Missouri Supreme Court to consider "the ethical and professional obligations of the legal profession that require all lawyers, including public defenders, to provide competent and diligent representation to each of their clients."[92] The Missouri Public Defender System has some of the nation's leading advocates on its side. Stephen Hanlon, a University of Missouri School of Law graduate who has represented Florida, Massachusetts, and Mississippi in inadequate indigent-defense system disputes, has taken the case pro bono. In oral arguments before the state supreme court on December 13, 2011, Hanlon insisted that the system was "throwing thousands of people under the bus."[93] To him, the fact that all three branches of the Missouri government have acknowledged system limitations is evidence that the state is the one to stimulate change. "The potential for reform in Missouri is greater than any state in the country . . . . We're here for a reason. We want to win," he said.[94]

B. Legal Implications

In denying the public defender's motion to set aside appointment in *Missouri v. Blacksher*, it appears that Judge Waters envisioned the dilemma as involving the system versus the Sixth Amendment, when in reality, one could argue that it is solely a Sixth Amendment concern. The Sixth Amendment to the U.S. Constitution and its Missouri

89. *Id.* at 11.
90. *Id.*
91. *Id.* (internal quotation marks omitted).
92. Brief of ABA as Amicus Curiae in Support of Relators at 1, State *ex rel.* Mo. Pub. Defender Comm'n v. Waters, No. SC91150 (Mo. May 13, 2011).
93. Kathryn Wall, *Public Defender Fight Hits Supreme Court*, SPRINGFIELD NEWS-LEADER, Dec. 14, 2011, at 1A, 6A.
94. Allison Retka, *Holland & Knight Attorneys to Aid Defender System*, MO. LAW. WKLY., Nov. 1, 2010, at 13.

counterpart, article I, section 18(a), do not just guarantee a defendant the right to counsel; they promise the accused *effective assistance of counsel*.[95] Forcing an overburdened attorney to accept additional cases not only puts the professional at risk for ethical violations and malpractice claims but also threatens to infringe upon the defendant's due-process and equal-protection rights.

A defendant's right to effective assistance of counsel imposes obligations on his or her attorneys to advocate for the defendant's cause, demonstrate loyalty to the client, and avoid conflicts of interest.[96] Other responsibilities include consulting with the defendant on important decisions, keeping the defendant informed of developments, and conducting reasonable factual and legal investigations.[97] A glimpse into a day in the lives of public defenders would most likely reveal that their efforts fall short of such demands. Regrettably, it is the client who suffers.

The time constraints make it "humanly impossible" for attorneys to "interview their clients properly, effectively seek their pre-trial release, file appropriate motions, [and] conduct necessary fact investigations."[98]

95. Strickland v. Washington, 466 U.S. 668, 687–88 (1984); MO. CONST. art. I, § 18(a); Blakenship v. State, 23 S.W.3d 848, 849 (Mo. Ct. App. 2000) ("The right to counsel . . . connotes representation by competent counsel.").

96. *Strickland*, 466 U.S. at 688–91. ABA Criminal Justice Standards provide that "[t]he basic duty defense counsel owes to the administration of justice and as an officer of the court is to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation." ABA STANDARDS FOR CRIMINAL JUSTICE PROSECUTION FUNCTION AND DEFENSE FUNCTION § 4-1.2(b) (3d ed. 1993) [hereinafter ABA STANDARDS].

97. *Strickland*, 466 U.S. at 688–91; *see also* ABA STANDARDS, *supra* note 96, § 4-2.1(b) ("Every jurisdiction should guarantee by statute or rule of court the right of an accused person to prompt and effective communication with a lawyer."); *id.* § 4-3.8(a)–(b) (providing that defense counsel has the duty to keep their clients abreast of progress in their case and explain developments "to the extent reasonably necessary to permit the client to make informed decisions regarding representation."); *id.* § 4-4.1 (recognizing defense counsel's duty to investigate facts relevant to the case and obtain discovery from the prosecution).

98. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 7; *see also* ABA STANDARDS, *supra* note 96, § 4-1.3(e) ("Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional obligations."); *see generally* Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systematic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104 (2009); Donald J. Farole, Jr. & Lynn Langton, *A National Assessment of Public Defender Office Caseloads*, 94 JUDICATURE 87 (2010); Lise M. Iwon, *Justice Delayed is Justice Denied*, R.I. B.J., Jan.–Feb. 2011, at 3; Peter A. Joy, *Ensuring the Ethical*

The heavy workload also makes it difficult to "negotiate responsibly with the prosecutor, adequately prepare for hearings, and perform countless other tasks that normally would be undertaken by a lawyer with sufficient time and resources."[99] Not to mention, defenders have virtually no time to bond with their clients, hear their stories, and gain their trust, which is a quality often overlooked but becomes important when one's client's life is on the line.[100] Further, time crunches mean less opportunity to pursue mitigating evidence for sentencing purposes or evaluate mental illness and competency claims.[101] A majority of the time, indigent defendants find themselves on an unlevel playing field with the prosecution in terms of funding and resources.[102] Inadequate representation only widens the gap.[103]

At times, the only exchange public defenders have with their clients is a quick conversation before entering a guilty plea.[104] Frequently, in absence of defense oversight, an aggressive prosecutor improperly obtains such pleas.[105] Even still, those defenders who proceed to trial may very rarely make contact with their clients.[106] Because of crushing caseloads, attorneys simply do not have the time to fully investigate and prepare their cases to advocate vigorously.[107] It does not help that most of their clients are in custody, and public defenders fall victim to the bureaucratic delays at the detention facilities and travel time to and from

Representation of Clients in the Face of Excessive Caseloads, 75 MO. L. REV. 771 (2010); Norman Lefstein, *Excessive Public Defense Workloads: Are ABA Standards for Criminal Justice Adequate?*, 38 HASTINGS CONST. L.Q. 949 (2011); Phyllis E. Mann, *Ethical Obligations of Indigent Defense Attorneys to Their Clients*, 75 MO. L. REV. 715 (2010).

99. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 7.

100. Interview with Brooke Tebow, Assistant Fed. Pub. Defender, W. Dist. of Okla., in Okla. City, Okla. (Jan. 17, 2011); *see also* ABA STANDARDS, *supra* note 96, § 4-3.1 (recognizing defense counsel's obligation to "seek to establish a relationship of trust and confidence with the accused").

101. Tebow, *supra* note 100.

102. Robin Adler, *Enforcing the Right to Counsel: Can the Courts Do It? The Failure of Systemic Reform Litigation*, 2007 J. INST. JUST. & INT'L STUD. 59, 64.

103. *Id.*

104. WICE, *supra* note 16, at 9. For example, forty-two percent of indigent cases in one Mississippi county were resolved by guilty plea. GIDEON'S BROKEN PROMISE, *supra* note 20, at 16. *See also* ABA STANDARDS, *supra* note 96, § 4-5.2(a)(i)–(v) (recognizing the decisions which are ultimately for the accused to make and not his or her attorney, including whether to accept a plea agreement).

105. WICE, *supra* note 16, at 24–25.

106. *Id.*

107. Tebow, *supra* note 100.

the jail.[108]

Defendants are cognizant of their attorneys' limitations. In 1984, one Missouri defendant became so displeased with his public defender that he attempted to act as co-counsel in his own defense.[109] When the judge refused to allow the defendant to sit second chair, the defendant chose to proceed pro se, stating that he felt "strongly . . . that the Public Defender's office [was] unable to represent [him] or anyone else on their present staff situation."[110] He argued that the office's caseload was "detrimental to all clients and the legality [was] very questionable."[111] The defendant was never granted leave to represent himself nor was his public defender granted leave to withdraw.[112] They proceeded to trial where the court found the defendant guilty of selling marijuana.[113] With a new attorney assigned to his case, the defendant filed a motion for a new trial on the grounds he received ineffective assistance of counsel.[114] At a hearing on the motion, his trial counsel testified that he informed the Missouri Public Defender Commission that he was in over his head due to massive caseloads.[115] The U.S. District Court for the Western District of Missouri concluded that the defendant was denied effective assistance of counsel, considering the disgruntled relationship between the defendant and his attorney and "judicial recognition of the Public Defender's excessive caseload and inadequate funding."[116]

Likewise, a time-constrained lawyer in Kentucky almost cost his client, who was serving a life sentence for murder and burglary, a chance to appeal his conviction.[117] In *Cleaver v. Bordenkircher*, the public defender appointed to the case repeatedly asked the court to issue extensions for filing the record on appeal.[118] With forty days remaining to file his appellate brief, the attorney asked the state supreme court for an extension, arguing that "work in other cases assigned to him which he had to accomplish during the time span involved" kept him from

108. *Id.*
109. White v. White, 602 F. Supp. 173, 176–77 (W.D. Mo. 1984).
110. *Id.* at 177.
111. *Id.*
112. *Id*. at 179.
113. *Id.* at 180.
114. *Id.*
115. *Id.*
116. *Id.* at 180–81.
117. Cleaver v. Bordenkircher, 634 F.2d 1010, 1011 (6th Cir. 1980).
118. *Id.*

complying with the deadline.[119] The court granted him a thirty-day extension, but when time was up, the attorney once again requested an extension on the grounds he had seven more briefs due within the next ten days and was "forced to devote a majority of his available time to completing other cases to the detriment of [his client's] appeal."[120] The court denied his motion and dismissed the appeal.[121] The Sixth Circuit found that Cleaver was deprived of equal protection of the law because he was denied a right to appeal his conviction, a right more affluent defendants, who could afford to retain counsel, enjoyed under the Kentucky Constitution.[122] Cleaver's status as an indigent defendant made the overburdened public defender his "only source of legal representation."[123] The public defender's excessive caseload made it impossible to comply with the time limits of the appeal.[124]

The Supreme Court of Indiana has declared that an "appellant's rights cannot be determined by the case load of the public defender."[125] In *Thomas v. State*, the court held that a defendant was ineffectively represented by a public defender who failed to properly investigate the charges and prepare an adequate defense after visiting the defendant only three times prior to trial.[126] The court noted that the attorney was not incompetent nor acted improperly[127]: "Confronted with twice the normal case load, he may well have done all that he possibly had time to do for

119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* at 1012.
123. *Id.*
124. *Id.*; *see also* Dennis v. Dowdle, No. 90-15896, 1991 WL 128074, at *2–3 (9th Cir. 1991) (finding the petitioner's ineffective-assistance-of-counsel claim procedurally barred despite the fact that "trial counsel stated that he could not take the matter to trial because of the case overload in the Public Defender's office, but that [the defendant] should not worry because he and the prosecutor were friends."); *cf.* Harris v. Champion, 15 F.3d 1538 (10th Cir. 1994) (holding that underfunding and mismanagement of resources of the state indigent-defense system were not constitutionally justifiable reasons for delays in the appellate process); United States v. Cronic, 466 U.S. 648, 663 (1984) (holding that despite the fact that witnesses were inaccessible and counsel was young, inexperienced, and granted less than a month to prepare for trial involving complex criminal charges, there was no "basis for concluding that competent counsel was not able to provide [the] respondent with the guiding hand that the Constitution guarantees").
125. Thomas v. State, 242 N.E.2d 919, 925 (Ind. 1969).
126. *Id.* at 920–21.
127. *Id.* at 925.

the appellant."[128] Still, the court recognized that "[i]t is reversible error not to provide a defendant in a criminal prosecution with adequate legal representation at each stage of the proceeding, regardless of the circumstances which cause the public defender's office to become overloaded."[129] It was up to the trial court to appoint additional counsel to assist the public defender in carrying out his duties to the client.[130]

Gaining a client's trust is an important facet, particularly when deciding whether to plead to a charge or go to trial. If a public defender does not have much time with a client, that client may perceive copping a plea as less of their decision and more a result of the defender's busy schedule and need to move on to the next client.[131] Additionally, the stereotype that public defenders are overworked and less motivated because their clients are not paying clients does nothing to alleviate the defendant's fear.[132] It is not uncommon for a public defender to have several cases set on the same jury-trial docket, and clients know this.[133]

Finally, the lack of public defenders often results in delay, violating a defendant's procedural right to a speedy trial.[134] Therefore, those unable to post bond could remain locked up for months.[135] For example, in 2006, the Court of Appeals of New Mexico found that a defendant's right to a speedy trial was violated when he was incarcerated for three years awaiting trial.[136] An overburdened public-defense system was the sole contributor to the delay.[137] The district court recognized that it was "humanly impossible for lawyers to practice law" under the conditions and implored the legislature, governor, and citizens "to wake up and start

128. *Id.*
129. *Id.*
130. *Id.*
131. *Id. See also* Steven Zeidman, *To Plead or Not to Plead: Effective Assistance and Client-Centered Counseling*, 39 B.C. L. REV. 841, 904 (1998).
132. Tebow, *supra* note 100.
133. *Id.*
134. *See* WICE, *supra* note 16, at 22; *see also* Barker v. Wingo, 407 U.S. 514 (1972) (articulating a four-factor ad hoc balancing test for determining whether a defendant's right to a speedy trial has been violated); Vermont v. Brillon, 129 S. Ct. 1283, 1287 (2009) (holding that public defenders' failure to move their client's case forward could not be attributed to the state, yet recognizing that a "State may bear responsibility if there is a breakdown in the public defender system." (internal quotation marks omitted)); Lewis LeNaire, Comment, Vermont v. Brillon*: Public Defense and the Sixth Amendment Right to a Speedy Trial*, 35 OKLA. CITY U. L. REV. 219 (2010).
135. WICE, *supra* note 16, at 27.
136. State v. Stock, 147 P.3d 885, 887 (N.M. Ct. App. 2006).
137. *Id.*

properly funding not only the public defenders' office but also the district attorneys' offices, because otherwise courts would have to continue dismissing cases that were not timely prosecuted."[138]

C. Ethical Implications

Excessive caseloads force public defenders to live in fear of facing malpractice claims or bar complaints for ethics violations. The ABA Standing Committee on Ethics and Professional Responsibility has declared that mounting caseloads is not an excuse for foregoing ethical and professional standards.[139] The ABA's Model Rules of Professional Conduct, governing the conduct of virtually every attorney, demand competence[140] and diligence.[141] To be considered competent, a lawyer must exhibit thoroughness and preparedness through proper "inquiry . . . and analysis of the factual and legal elements of the problem."[142]

Furthermore, an attorney must continually communicate with his or her clients, keeping them informed of their cases' progress and responding promptly to requests for information.[143] The Model Rules demand that a "lawyer's work load must be controlled so that each matter can be handled competently."[144] If representation will result in a violation of the rules, an attorney must decline appointment or withdraw from the case; a responsibility proven to be impossible in practice.[145] In addition, a defense attorney owes the client a duty of loyalty;[146] "[a] lawyer must . . . act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[147]

138. *Id.* at 888 (internal quotation marks omitted).

139. ABA Formal Op. 06-441, *supra* note 3, at 9; MODEL RULES OF PROF'L CONDUCT R. 1.1 (2011); MO. SUP. CT. R. 4-1.1 (2007).

140. MODEL RULES OF PROF'L CONDUCT R. 1.1; MO. SUP. CT. R. 4-1.1.

141. MODEL RULES OF PROF'L CONDUCT R. 1.3; MO. SUP. CT. R. 4-1.3; *see also* ABA STANDARDS, *supra* note 96, § 4-1.3(a).

142. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 5; MO. SUP. CT. R. 4-1.1; *see also* Mann, *supra* note 98; Joy, *supra* note 98.

143. MODEL RULES OF PROF'L CONDUCT R. 1.4(a)(3)–(4); MO. SUP. CT. R. 4-1.4(a)(3)–(4); CRIM. JUST. SEC. STANDARDS § 4-3.1(a).

144. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 2; MO. SUP. CT. R. 4-1.3 cmt. 2. *See also* ABA STANDARDS, *supra* note 96, § 4-1.3(e); Brief of ABA as Amicus Curiae in Support of Relators, *supra* note 92.

145. MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 5; MO. SUP. CT. R. 4-1.16 cmt. 2; *see also* Brief of ABA as Amicus Curiae in Support of Relators, *supra* note 92, at 1.

146. Strickland v. Washington, 466 U.S. 668, 688 (1984).

147. MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1.

However, often, public defenders' extreme caseloads induce them to choose between the rights of the numerous clients they represent, creating a conflict of interest.[148]

Under the Model Rules, a conflict of interest exists if "there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client."[149] As a result, a lawyer may only represent a client if she believes that she can still provide adequate service to each affected client, who in turn consents to the arrangement in writing.[150] Again, that is not always practical.

In 2009, a California public defender became entwined in a professional nightmare. The victim of the unfortunate circumstance was a juvenile found guilty of sexual molestation who moved for a new jurisdictional hearing on the grounds he was denied effective assistance of counsel.[151] In *In re Edward S.*, the defendant's new attorney outlined a number of flaws in his initial defense including "fail[ing] to request a psychological evaluation and other 'ancillary defense services'" and failing to call for a continuance for further investigation after a witness revealed possible exculpatory evidence on the stand.[152] The juvenile's former counsel, a public defender, admitted that his efforts short-changed the defendant.[153] In an extensive declaration in support of his former client, the defender argued that "his 'excessive caseload' made it impossible to 'thoroughly review and litigate each and every case' he was then litigating, including [the] appellant's case."[154] Furthermore, his office did not have the luxury of an investigator on staff.[155] As a result, he was expected to complete his own investigations.[156]

On top of that, attempts to discuss his overwhelming workload with

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

149. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(2); MO. SUP. CT. R. 4-1.7(a)(2). *See also* Brief of ABA as Amicus Curiae in Support of Relators, *supra* note 92, at 9 ("[I]n taking on a new matter, the lawyer must consider the impact of the new representation on current clients. The lawyer must not take on any representation when there is a significant risk that the new representation will be materially limited by the lawyer's responsibilities to another client." (internal quotation marks omitted)).

150. MODEL RULES OF PROF'L CONDUCT R. 1.7(b)(1), (4); MO. SUP. CT. R. 4-1.7; Brief of ABA as Amicus Curiae in Support of Relators, *supra* note 92, at 9.

151. *In re Edward S.*, 92 Cal. Rptr. 3d at 732.

152. *Id.* at 733–34.

153. *Id.* at 735.

154. *Id.*

155. *Id.*

156. *Id.*

his supervisor were "unsuccessful."[157] The attorney's entire investigation consisted solely of conversations with his client and "request[s] that the court inspect [the alleged victim's] confidential juvenile court file, which he was not allowed to . . . review."[158] To the public defender, "much more should have been done in [the appellant's] case."[159] The court agreed, finding that the representation "fell below an objective standard of reasonableness under prevailing professional norms," and because of the attorney's sub-par performance, the proceeding was "fundamentally unfair and unreliable."[160]

Compelling the Christian County public defender to represent Mr. Blacksher puts the attorney in the same position as his Californian colleague—juggling the fundamental rights of his clients. No doubt, he will one day drop the ball. Judge Waters is setting him up for failure. Not only are his clients' constitutional rights on the line, but his rights are also in jeopardy.[161]

157. *Id.* ("For example, when he told [his boss] his unmanageable caseload interfered with his ability to represent [the] appellant and his other clients, [his supervisor] responded: 'I'm doing a murder case, do you want to trade?'" (internal quotation marks omitted)).

158. *Id.*

159. *Id.* (alteration in original omitted).

160. *Id.* at 748, 750.

161. The right to practice law has been held to be a property right within the meaning of the due-process clauses of the Fifth and Fourteenth Amendments. State *ex rel.* Stephan v. Smith, 747 P.2d 816, 837–42 (Kan. 1987). As a result, demanding that an attorney take on cases he or she vehemently refuses raises the potential for violations under the "takings clause." *Id.*; *see* Brown v. Howard, 711 S.E.2d 899, 900 (S.C. 2011) (holding that the "Takings Clause of the Fifth Amendment to the United States Constitution is implicated when an attorney is appointed by the court to represent an indigent [defendant]," for "[i]n such circumstances, the attorney's services constitute property entitling the attorney to just compensation"); *Smith*, 747 P.2d at 842 ("When an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice, the system violates the Fifth Amendment."); *cf.* Williams v. Vardemen, 674 F.2d 1211, 1215–16 (8th Cir. 1982) (holding that while compulsion of an attorney's services without compensation did not violate the Constitution if proper procedures were followed, requiring lawyers to pay necessary expenses of criminal-defense work did raise serious due-process issues); Arnold v. Kemp, 813 S.W.2d 770, 779 (Ark. 1991) (holding that compelling counsel to represent indigent defendants without compensation is "not an unconstitutional taking of property").

V. THE SOLUTION

While the solution to the crisis may have evaded the justice system for nearly a half a century, authorities working in the trenches to those in the upper ranks of our federal government are determined to change that. In fact, the problems plaguing the criminal-defense system were top priority for Attorney General Eric Holder in 2010. In an address at the Department of Justice National Symposium on Indigent Defense, Holder recognized that "no single institution[—]not the federal government, not the Department of Justice, not a single state[—]can solve the problem on its own. Progress can only come from a sustained collaboration with diverse partners."[162]

The obvious resolution would be more funding; however, the reality is the money just is not there. Indigent-defense systems rely on governmental appropriations to survive. Elected officials are reluctant to fork over funds to a system that is not popular with an electorate that demands their representatives take a "tough on crime stance."[163] However, researchers argue that such political excuses lack support. A recent study revealed that Americans overwhelmingly support financing an indigent person's defense.[164]

To have any hope for significant change, it is imperative that members of the bar educate those who control the purse strings as well as their constituents about the vital role criminal-defense attorneys play, for

> [t]he systemic problems of case overload, lack of adequate attorney compensation, insufficient due process costs, and little to no public support for liberty's last champions cannot continue to be accepted as intrinsic in the justice system itself if the Constitution is to remain a meaningful document, defining the foundational value system of American culture.[165]

162. *Attorney General Eric Holder Addresses the Department of Justice National Symposium on Indigent Defense: Looking Back, Looking Forward, 2000–2010*, UNITED STATES DEP'T OF JUSTICE (Feb. 18, 2010), http://www.justice.gov/ag/speeches/2010/ag-speech-100218.html [hereinafter Holder].

163. Cara H. Drinan, *The Third Generation of Indigent Defense Litigation*, 33 N.Y.U. REV. L. & SOC. CHANGE 427, 430 (2009).

164. Lefstein, *supra* note 28, at 13.

165. William L. Summers et al., *Defense Function and Services*, *in* AM. BAR ASS'N CRIMINAL JUSTICE SECTION, THE STATE OF THE CRIMINAL JUSTICE SYSTEM 149, 152 (Myrna S. Raeder ed. 2010).

The truth is when criminal defendants receive subpar representation, we all lose. As Attorney General Holder noted, "[w]hen the justice system fails to get it right the first time, we all pay, often for years, for new filings, retrials, and appeals. Poor systems of defense do not make economic sense."[166]

Public opinion cannot change overnight. If more money cannot be the answer, what should the Missouri Supreme Court choose to do? The impact of its decision will stretch farther than Missouri; it is a problem without borders, one that must be solved.

Unfortunately, it appears that the Special Master's Report provides the court little aid in resolving the dilemma. Instead of making "conclusions of law" the master chose to "raise[] questions of law which are worthy of the Court's consideration."[167] Lacking depth and analysis, the document merely reiterates to the court what it should already know by raising identical arguments to those the parties articulated in their briefs. Ultimately, Judge Sweeney concluded that the only true answer was to rewrite the state's criminal code—a task that seems daunting and possibly wasteful, particularly considering that the judge did not elaborate on how the code could be modified to better meet the system's needs in the long run.[168] His suggestion that one could "equaliz[e] penalties for similar crimes [to] reduce the PD caseload" is vague and overbroad. One could infer that this suggestion raises constitutional concerns of its own, leaving defendants facing serious allegations without representation.[169]

Perhaps, the immediate solution must come from those who know the situation better than anyone. In 2006, the ABA Standing Committee on Ethics and Professional Responsibility issued a monumental opinion advising public defenders on steps they must take when overwhelmed with cases.

> If workload prevents a lawyer from providing competent and diligent representation to existing clients, she must not accept new clients. If the clients are being assigned through a court

166. Holder, *supra* note 162.
167. Report of the Special Master, *supra* note 78, at 2.
168. *Id.* at 11.
169. The Special Master indicated in his report that he attached a memo he had completed "for a state committee studying the problem." *Id.* However, the Missouri Supreme Court Clerk's office did not have a copy of this document available when the author requested it.

> appointment system, the lawyer should request that the court not make any new appointments. Once the lawyer is representing a client, the lawyer must move to withdraw from representation if she cannot provide a competent and diligent representation.[170]

Although the recommendations appear simple, putting them into practice is easier said than done. In *In re Edward S.*, after attempts to discuss his workload and lack of resources with his supervisor turned futile, the public defender gave up out of fear that continued requests would lead to termination.[171] Still, the court said he had "other means . . . to protect appellant's right to effective representation," including filing a motion to withdraw.[172] "When a public defender reels under a staggering workload, he . . . should proceed to place the situation before the judge, who upon a satisfactory showing can relieve him, and order the employment of private counsel at public expense."[173] Because he "failed to take reasonable steps to avoid reasonably foreseeable prejudice to the appellant's rights, . . . representation was deficient [and] fell below standards of . . . professional norms."[174]

The ABA recommendations are worthless without judicial support. In *Pratte*, Judge Michael Wolff proposed that judges, prosecutors, and defenders develop "workable strategies" to reduce demand for public-defender services,[175] a goal that Attorney General Eric Holder believes is plausible:

> Although they may stand on different sides of an argument, the prosecution and the defense can, and must, share the same objective: Not victory, but justice. Otherwise, we are left to wonder if justice is truly being done, and left to wonder if our faith in ourselves and in our systems is misplaced.[176]

170. ABA Formal Op. 06-441, *supra* note 3, at 1. *See also* Brief of ABA as Amicus Curiae in Support of Relators, *supra* note 92, at 11.

171. *In re* Edward S., 92 Cal. Rptr. 3d 725, 743 (Cal. Ct. App. 2009).

172. *Id.* at 745.

173. *Id.* at 747 (alteration in original omitted) (quoting Ligda v. Superior Court, 85 Cal. Rptr. 744, 754 (Cal. Ct. App. 1970)) (internal quotation marks omitted).

174. *Id.* at 748.

175. State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 889 (Mo. 2009).

176. Holder, *supra* note 162.

A. The Role of the Prosecutor

Although the situation is most palpable to those on the other side of the fight, prosecutors cannot turn their back on the dilemma. It is apparent that the prosecutors who charged Mr. Blacksher with felony burglary did not feel that lack of adequate representation was their problem. In their opposition brief to the Missouri Supreme Court, attorneys for the state alleged that the public-defender system was "attempting to bypass the legislature and use [the] Court to get more funding for their offices while at the same time avoiding their clear statutory duty and obligation to represent Mr. Blacksher."[177] In addition, attorney Dan Knight told a local newspaper that his office handled more cases per attorney than the defender's office and had experienced budget cuts while the public defender's budget increased.[178] "As far as their caseloads, I don't think it is a crisis," he said.[179] "I think it would be a crisis if they shut down their offices, because that could bring the criminal justice system grinding to a halt."[180]

The prosecutor's role is unique.[181] A district attorney's job is not to seek convictions but to do justice.[182] A will to win often overshadows this responsibility. Guilty pleas are enticing—they add numbers to a prosecutor's "win column" while relieving the pressure of an overcrowded docket.[183] Prosecutors cannot be allowed to "exploit defense incompetence" in the process.[184] Model Rule 3.8(b) provides that a prosecutor must "make reasonable efforts to assure that the

177. Suggestion's in Opposition to Relators Petition for Writ of Prohibition at 5, State *ex rel.* Mo. Pub. Defender Comm'n v. Waters, No. SC91150 (Mo. Oct. 4, 2010).

178. Dou, *supra* note 39.

179. *Id.* (internal quotation marks omitted).

180. *Id.* (internal quotation marks omitted).

181. Banks v. Dretke, 540 U.S. 668, 696 (2004) ("We have several times underscored the 'special role played by the American prosecutor in the search for truth in criminal trials.'" (quoting Strickler v. Greene, 527 U.S. 263, 281 (1999))); ANGELA J. DAVIS, ARBITRARY JUSTICE: THE POWER OF THE AMERICAN PROSECUTOR 145 (2007).

182. MODEL RULES OF PROF'L CONDUCT R. 3.8 cmt. 1 (2011); *see also* ABA STANDARDS, *supra* note 96, § 3-1.2(b) ("The prosecutor is an administrator of justice, an advocate, and an officer of the court . . . .").

183. Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1085 (2006).

184. *Id.*; *see also Banks*, 540 U.S. at 696 ("Courts, litigants, and juries properly anticipate that 'obligations [to refrain from improper methods to secure a conviction] . . . plainly rest[ing] upon the prosecuting attorney, will be faithfully observed.'" (alterations in original) (quoting Berger v. United States, 295 U.S. 78, 88 (1935))).

accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[185] Recognizing the fact that public defenders often fail to investigate clients' claims adequately, prosecutors have an increased responsibility to screen cases vigorously; they cannot simply allow the police department to control the process.[186] Furthermore, prosecutors could be more willing to share discovery with opposing counsel despite no obligation to do so.[187] Open-file discovery policies "promote [justice] while reducing the workload burden on indigent defense providers" and may lead to early resolution of the case.[188]

Prosecutors are powerful. Once a defendant is arrested, it is the prosecutor who determines whether to press criminal charges that lead to imprisonment; "[t]here is no law that requires an individual to be charged if he commits a crime."[189] Thus, if a prosecutor believes that an indigent criminal defendant's constitutional rights are in jeopardy because there are no available attorneys to represent him, he or she may opt to set the suspect free.[190] Particularly, prosecutors could work with the court to "dismiss[] 'without prejudice' a sufficient number of 'less serious' cases" or not file them at all.[191] It is a bold step, indeed, one that most district attorneys may never dream of exercising for fear it would come back to haunt them in future elections.[192] One could argue that only bold steps can pull the nation out of the crisis.

B. The Role of the Criminal-Defense Attorney

Even when the odds are stacked against them, public defenders cannot use excessive caseloads as an excuse for poor representation. In a follow-up to its 2006 formal opinion, the ABA issued eight guidelines for attorneys to pursue to ensure they comply with ethical

185. MODEL RULES OF PROF'L CONDUCT R. 3.8(b) (2011).

186. Bruce A. Green, *Criminal Neglect*: *Indigent Defense from a Legal Ethics Perspective*, 52 EMORY L.J. 1169, 1192 (2003); ABA STANDARDS, *supra* note 96, § 3-3.1(a).

187. Green, *supra* note 186.

188. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 207.

189. DAVIS, *supra* note 181, at 23; ABA STANDARDS, *supra* note 96, § 3-3.4(a)–(c).

190. DAVIS, *supra* note 181, at 23.

191. John B. Mitchell, *In (Slightly Uncomfortable) Defense of "Triage" by Public Defenders*, 39 VAL. U. L. REV. 925, 932 (2005).

192. *See* DAVIS, *supra* note 181, at 179.

responsibilities.[193] The detailed action plan calls for a supervision program to monitor attorney workload and ensure that indigent clients receive the assistance they deserve.[194] However, the ultimate responsibility for assessing workload lies with the individual attorneys—only they know their skills and limitations.[195]

When caseloads become excessive, public-defense providers may consider various options. "Curtailing new case assignments to affected lawyers, reassigning cases to different lawyers within the defense program with the court's approval," and arranging for private attorneys to take on cases with compensation are possible solutions.[196] "Urging prosecutors not to initiate criminal prosecutions when civil remedies are adequate to address conduct and public safety [and n]otifying courts or other appointing authorities that the Provider is unavailable to accept additional appointments" could also work.[197] In response to overwhelming caseloads and staffing shortages, the MSPD enhanced its contract-attorney system "to reduce the wait time for indigent defendants . . . and increase the monitoring of private attorneys who take cases."[198] Now, an attorney can be assigned to a case within twenty-four hours, decreasing the time defendants spend in jail pending arraignment.[199] In the past, the system had to wait until an attorney agreed to take the case; now appointment is automatic with attorneys selected on a rotational basis.[200]

The ABA also recommends that providers "file motions asking a court to stop the assignment of new cases and to withdraw from current cases" and "resist judicial directions regarding the management of . . . [p]rograms that improperly interfere with . . . professional and ethical duties."[201] If the court refuses to stop the assignment of new cases or

193. AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 1 (2009) [hereinafter GUIDELINES].

194. *Id.* at 2.

195. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 25.

196. GUIDELINES, *supra* note 193, at 3.

197. *Id.*

198. Fedor Zarkhin, *Missouri Public Defender System Hopes Changes Will Alleviate Pressure*, COLUMBIA MISSOURIAN (Sept. 16, 2011, 5:55 PM), http://www.columbiamissourian.com/stories/2011/09/16/public-defender-system-changes.

199. *Id.*

200. *Id.*

201. GUIDELINES, *supra* note 193, at 3; *see also* Brief of ABA as Amicus Curiae in Support of Relators, *supra* note 92, at 13 (asking the Missouri Supreme Court to keep in mind that "[w]hen Providers file motions requesting that assignments be stopped and that withdrawals be permitted, their prayer for relief should be accorded substantial deference

rejects motions to withdraw, public defenders must appeal the decision.[202]

These guidelines should appear familiar to the public defenders who serve District 31 in Missouri. They meticulously followed the bar's recommendations to no avail. Such suggested appeals take time and energy, precious commodities in the lives of public defenders. While the bar prescribes such measures, it does not advise lawyers of what to do when the court tells them they absolutely must take the case. In its 2006 formal opinion, the ethics commission stated that "[i]f the lawyer has sought court permission to withdraw from the representation and that permission has been denied, the lawyer must take all feasible steps to assure that the client receives competent representation."[203]

This demand is consistent with Model Rule 1.16(c), which provides that "[w]hen ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation."[204] Note that the profession's ethical rules "do not condone civil disobedience as a means of protesting a court's decision to provide legal services"; "a lawyer who resists a court's final order to provide representation risks being held in contempt."[205]

What does the bar mean by "feasible steps"? For one, appealing an adverse decision is "essential in pursuit of the client's interest," but such move "appears not to be available anywhere as a matter of right."[206] The attorney must strive to keep the lines of communication between he and his client open, including informing the accused that "competent, [conflict free] representation cannot be provided."[207] If the prosecutor recommends a plea, and the attorney has no time to investigate the case, the defender must advise the client that "counsel is unable to provide competent advice about whether the offer should be accepted."[208] If the case proceeds to trial and counsel feels unprepared, the attorney must "state on the record that he or she is unable to furnish competent representation or the effective assistance of counsel at the ensuing

because Providers are in the best position to assess the workloads of their lawyers." (internal quotation marks omitted)).

202. GUIDELINES, *supra* note 193, at 3.

203. ABA Formal Op. 06-441, *supra* note 3, at 5.

204. MODEL RULES OF PROF'L CONDUCT R. 1.16 (2011); MO. SUP. CT. R. 4-1.16 (2011).

205. Norman Lefstein & Georgia Vagenas, *Restraining Excessive Defender Caseloads: ABA Ethics Committee Requires Action*, CHAMPION, Dec. 2006, at 12.

206. *Id.*

207. *Id.*; ABA STANDARDS, *supra* note 96, § 4-3.1(a).

208. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 204.

trial."[209]

Public defenders may not be as powerless as they think.[210] The National Right to Counsel Commission advocates that "[i]f a judge forces a defender to provide representation in circumstances where the defender cannot provide competent service, the defender's duty is to report the judge to the appropriate authority."[211] When forced to take a case, the attorney can document on the record that they are "furnish[ing] deficient representation in violation of both professional conduct rules and the Sixth Amendment."[212] Perhaps the judge will think twice before allowing defenders to proceed with incompetent representation.

When all else fails, systems must follow the lead of Missouri and take the fight to court. Although litigation is arduous and expensive, there may be no other choice, especially when the rights of the accused are on the line. Litigation has triggered reforms in the past, which may not have occurred but for the threat of suit.[213]

Attorney General Holder has aimed to expand the role of the public defender by encouraging attorneys to "seek solutions beyond our courtrooms and ensure that they're involved in shaping policies that will empower the communities they serve."[214] As mentioned earlier, for any real chance of change, members of the bar must educate the public about the current crisis. This includes public defenders themselves, who know the situation better than anyone. Attorneys should encourage state judicial systems to form committees, ones that will do more than just talk about a solution, to address the situation and take positive action.

C. The Role of the Judge

The trial judge is more than just an *umpire*—he or she is the pivotal protector of a defendant's right to counsel.[215] The men and women of the

209. *Id*. at 37.
210. Lefstein & Vagenas, *supra* note 205, at 19.
211. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 38.
212. Lefstein & Vagenas, *supra* note 205, at 19.
213. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 140; *see generally* Note, *Gideon's Promise Unfulfilled: The Need for Litigated Reform of Indigent Defense*, 113 HARV. L. REV. 2062 (2000); Richard Klein, *The Eleventh Commandment: Thou Shalt Not Be Compelled to Render the Ineffective Assistance of Counsel*, 68 IND. L.J. 363 (1993).
214. Holder, *supra* note 162.
215. Backus & Marcus, *supra* note 183, at 1086; Mary Sue Backus, *The Adversary System Is Dead; Long Live the Adversary System: The Trial Judge as the Great Equalizer in Criminal Trials*, 2008 MICH. ST. L. REV. 945, 951 (2008); ABA STANDARDS,

bench cannot turn a blind eye on the threat of ineffective assistance in an attempt to prevent court congestion and promote speedy resolution.[216] The Supreme Court has demanded that judges remain "cognizant that 'it is the judge, not counsel, who has the ultimate responsibility for the conduct of a fair . . . trial'" and must keep this in mind when "appointing counsel, monitoring pretrial activities[,] evaluating counsel's preparedness . . . and participating in plea bargain negotiations."[217]

Judge Waters was not the first judge to be confronted by a public-defender office that had reached its limit. In June 2008, a Florida public defender filed a motion to stop accepting new noncapital felonies, asserting that excessive caseloads prevented the attorney from "diligently and competently representing the defendant," and a conflict of interest created by the workload would "result in unavoidable prejudice where there is a substantial risk that [the defendant's] representation will be materially limited by [counsel's] responsibilities to other clients."[218] A circuit judge ruled in the public defender's favor, holding that the office could refuse third-degree-felony cases but had to continue to accept first- and second-degree felony clients.[219]

The verdict, however, was short-lived. The Third District Court of Appeals for the State of Florida found that "the trial court departed from the essential requirements of law by granting the . . . motion to withdraw . . . because [the public-defender office] did not demonstrate the requisite conflict or prejudice required for withdrawal."[220] The judge recognized that

> [i]f the trial court's order stands, all that [a public defender] must do to show prejudice is swear that he or she has too many cases or that the workload is so excessive as to prevent him or her from working on the client's case prior to the scheduled trial.[221]

In Florida, the threat of prejudice has to be more than speculative for there to be a "real potential for damage to a constitutional right."[222]

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supra note 96, § 6-1.1(a).

216. Backus & Marcus, *supra* note 183, at 1085.

217. *Id.* (quoting Lakeside v. Oregon, 435 U.S. 333, 341–42 (1978)).

218. State v. Bowens, 39 So. 3d 479, 480 (Fla. Dist. Ct. App. 2010).

219. *Id.* at 481.

220. *Id.* at 480–81.

221. *Id.* at 481.

222. *Id.*

Perhaps the Missouri Court has a harder decision to make. The public-defender office is not asking to decline a small section of cases, such as third-degree felonies. Declining categories of cases was ruled incompatible with state law in *Pratte*.[223] The Commission's rules call for public-defender offices to become unavailable for *all cases* once the workload reaches a certain point.[224]

When public defenders are unavailable due to mounting caseloads, a judge has the option of appointing private counsel. The Model Rules provide that a lawyer must "not seek to avoid appointment by a tribunal to represent a person except for good cause."[225] Good cause would allow one to reject representation if it were "likely to result in violation of the Rules of Professional Conduct," or pose an "unreasonable financial burden on the lawyer."[226] In addition, "[e]very lawyer has a professional responsibility to provide legal services to those unable to pay."[227] Recall that Judge Waters chose not to exercise this option, even though the "Public Defender offered to pay private counsel's reasonable and necessary litigation expenses such as expert witness fees[,] . . . depositions[,] and transcripts, so that private counsel would not have to provide out-of-pocket expenses."[228] Waters believed that appointing an attorney untrained in the criminal-defense arena would be more detrimental to Mr. Blacksher's case.[229]

I would challenge Judge Waters to reconsider. Is an attorney with absolutely no time to devote to a client's case any better than one who may have the time but little experience? Competence does not require expertise: "A lawyer need not necessarily have special training or prior experience to handle legal problems of a type with which the lawyer is unfamiliar."[230] When gauging whether an attorney has the legal knowledge and skill requisite for representation, a judge can consider the "relative complexity and specialized nature of the matter, the lawyer's general experience, the lawyer's training and experience in the field in

223. State *ex rel.* Mo. Pub. Defender Comm'n v. Pratte, 298 S.W.3d 870, 890 (Mo. 2009) ("The provision of the commission rule allowing a public defender office to decline categories of cases is contrary to the statute and is invalid.").

224. *Id.* at 887.

225. MODEL RULES OF PROF'L CONDUCT R. 6.2 (2011); MO. SUP. CT. R. 4-6.2 (2011).

226. MODEL RULES OF PROF'L CONDUCT R. 6.2(a)–(b); MO. SUP. CT. R. 4-6.2(a)–(b).

227. MODEL RULES OF PROF'L CONDUCT R. 6.1; MO. SUP. CT. R. 4-6.1.

228. Relator's Statement, Brief and Argument at 28, State *ex rel.* Mo. Pub. Def. Comm'n v. Waters, No. SC91150 (Mo. May 18, 2011).

229. Transcript of Proceedings, *supra* note 7, at 112.

230. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2; MO. SUP. CT. R. 4-1.1 cmt. 2.

question, the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to . . . a lawyer of established competence in the field in question."[231]

The Model Rules recognize that even recent law-school graduates may be considered "competent,"[232] and a lawyer may accept appointment where proficiency will be attained through "reasonable preparation."[233] With proper judicial oversight, private-practice attorneys may be considerably more effective in handling the less-complicated cases than their public-defender colleagues with virtually no time to devote to the client. Still, appointing private counsel would be little more than a Band-Aid. Furthermore, drafting those in private practice "to fill the rank of public defenders" could raise legal claims of involuntary servitude or taking without compensation.[234]

Perhaps Missouri Chief Justice Laura Stith foreshadowed the only solution that will lead to real change in her State of the Judiciary Speech in 2009.[235] Stith noted that the public-defender crisis raises serious public-safety concerns.[236] "The federal constitution guarantees defendants both speedy trials and competent legal counsel. The inadequate number of public defenders, however, puts in question the state's ability to meet either of these requirements. In short, if not corrected, defendants potentially could be set free without going to trial."[237] Putting the potentially guilty back on the street would certainly send a powerful message to state legislatures and the public at large.

Judges could choose to "simply not allow underfunded cases to move forward."[238] In 2008, a New Mexico district judge pulled the death penalty off the table in the murder trial of a prison guard after the state failed to provide adequate funding for the defense.[239] A year earlier, a Georgia Superior Court judge battled his own state legislature for

231. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 1; MO. SUP. CT. R. 4-1.1 cmt. 1.
232. MODEL RULES OF PROF'L CONDUCT R. 1.1 cmt. 2.
233. *Id.* R. 1.1 cmt. 4.
234. Mitchell, *supra* note 191, at 931; *see also* Jennifer Murray, Comment, *Lawyers Do It for Free?: An Examination of Mandatory Pro Bono*, 29 TEX. TECH L. REV. 1141, 1160 (1998).
235. Chief Justice Delivers 2009 State of the Judiciary Address, YOUR MO. COURTS (Jan. 28, 2009), http://www.courts.mo.gov/page.jsp?id=28987.
236. *Id.*
237. *Id.*
238. Drinan, *supra* note 163, at 476.
239. Scott Sandlin, *Death Penalty Out in Guard Killing*, ABQ JOURNAL, Apr. 4, 2008, at C1.

funding in the trial of infamous courthouse shooter Brian G. Nichols.[240] After postponing the trial once to await appropriations, the judge issued an order that provided "if the state doesn't pay for attorney fees and other expenses deemed necessary by the court, it will be a violation of the defendant's 14th Amendment rights. . . . [T]he trial cannot go forward . . . without significant additional funding."[241] By that time, the trial had already been delayed by more than a year.[242]

Before taking such extreme measures, the Missouri Supreme Court should pressure legislators to consider procedural alternatives. The National Association of Criminal Defense Lawyers recommends that legislatures refrain from "over-criminalizing bad behavior" by reclassifying misdemeanor offenses (such as operating a vehicle with a suspended license, shoplifting, disorderly conduct, etc.) as infractions or civil forfeitures, offenses for which the punishment is a fine instead of incarceration.[243] This will eliminate the need to appoint representation, assuming there are no adverse public-safety consequences.[244] The Sixth Amendment only assures counsel for those facing jail time if convicted. Experts say "[r]emoving the threat of jail . . . is unlikely to significantly affect the way people behave" but will streamline dockets, free up time for judges and prosecutors to devote to more serious matters, decrease jail costs, and reduce the need for funds.[245] Moreover, civil fines would be an added revenue source, meaning more money for other state departments.

States could also consider a collaborative, multi-disciplinary

240. Greg Land, *Judge Confronts State over Nichols Funding*, DAILY REPORT, Oct. 11, 2007, at 1.

241. *Id.* (internal quotation marks omitted).

242. *Id.* at 9.

243. NAT'L RIGHT TO COUNSEL COMM., *supra* note 21, at 198. Missouri Governor Jay Nixon is weighing the options. Dick Aldrich, *Nixon Looks into Reducing Prison Sentences to Save Money*, MONITOR (Aug. 25, 2011) (on file with Law Review). In August 2011, he appointed a study group to make recommendations for reducing prison sentences by "putting a greater emphasis on treatment programs and rehabilitating offenders to return them to society." *Id.* The group's recommendations are expected to be part of the 2012 state legislative agenda. *Id.* Furthermore, in May 2011, the governor signed a bill into law that would reduce penalties for some first-time driving offenses. *Mo. Bill Drops Jail Time for Some Driving Crimes*, KOMU.COM (May 20, 2011, 4:43 AM), http//www.komu.com/news/mo-bill-drops-jail-time-for-some-driving-crimes/. While offenders are rarely jailed for these crimes, because they carry the potential for imprisonment, public defenders are required to represent such defendants. *Id.*

244. *See* KOMU.COM, *supra* note 243.

245. Uphoff, *supra* note 37, at 675.

problem-solving approach by implementing alternative justice programs, such as drug courts, mental-health courts, domestic-violence divisions, and alternative-treatment programs that place the court in a position of advocate instead of adversary.[246] Some offenders may be transformed through rehabilitation, which is better for them and society in the long run.[247]

Still, such efforts would only scratch the surface. To get at the root of the problem, the Missouri state legislature must appropriate more funds. Perhaps it is time for state judges to compel it to do so. A trio of cases in the 1980s and early 1990s—*State v. Smith*,[248] *State v. Lynch*,[249] and *State v. Peart*[250]—appeared promising.[251] In all three opinions, state supreme court justices attempted to induce legislators to set aside more money for indigent-defense systems but "stopped short of directly

246. Backus & Marcus, *supra* note 183, at 1125.

247. *Id.* at 1125–26.

248. State v. Smith, 681 P.2d 1374 (Ariz. 1984).

249. State v. Lynch, 796 P.2d 1150 (Okla. 1990). Here, two court-appointed attorneys petitioned the court for fees and expenses well beyond the statutory amount following a capital-murder trial in which their client was found guilty and sentenced to life in prison. *Id.* at 1153. The trial court granted their request and the state appealed, arguing that compensation "should only exceed the statutory limit when extraordinary circumstances are shown." *Id.* at 1154–55. The Oklahoma Supreme Court affirmed the trial court's ruling and went even further, "invit[ing] legislative attention to [the] problem." *Id.* at 1161. To provide immediate relief, the court set fee guidelines "t[ying] the hourly rate of the counsel appointed for the indigent defendant to the hourly rate of the prosecutor/district attorney and the public defenders." *Id.* It also called for a provision compensating "defense counsel's reasonable overhead and out of pocket expenses" to put defense counsel on equal footing with prosecutors. *Id.*

250. State v. Peart, 621 So. 2d 780 (La. 1993). The trial court appointed a public defender to represent a man charged with robbery, rape, and burglary. *Id.* at 784. At the time, the attorney was representing seventy other clients facing felony charges, so he petitioned the court for relief. *Id.* The trial court found that he "was not able to provide his clients with reasonably effective assistance of counsel because of the conditions affecting his work, primarily the large number of cases assigned to him." *Id.* As a result, the judge ordered that the attorney's caseload be reduced, ordered the legislature to allocate money to improve the library and hire an investigator for the attorney, and ordered the legislature to appropriate funds to allow the public-defender office to hire more attorneys and support staff. *Id.* at 784–85. The state supreme court upheld parts of the lower court's decision, recognizing that indigent defendants were not receiving effective assistance. *Id.* at 790. The court fashioned a rebuttable presumption that clients represented by the attorney were not receiving constitutionally adequate assistance for the court below to apply on remand. *Id.* at 791. It noted that "[i]f legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ . . . more intrusive and specific measures." *Id.*

251. Note, *Effectively Ineffective*, *supra* note 21, at 1736–42.

ordering the expenditure of funds."[252] They were victorious at first, spurring legislative change in their respective states.[253] Those victories proved to be short-lived. Legislative appropriations failed to keep pace with the growing need for public defenders; in due time, attorneys saw themselves overloaded and underfunded.[254]

The Missouri Supreme Court should learn from their colleagues in these cases and make bolder moves, compelling the legislature to take action with specificity.[255] However, one could argue such prodding would constitute an impermissible encroachment upon another governmental branch.[256] Unlike its federal counterpart, the Missouri State Constitution explicitly calls for the branches to be separate and distinct, providing that "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."[257] Still, the Missouri Supreme Court has long held that the Constitution's framers' purpose was not "to make a total separation" of the legislative, executive, and judicial branches[258]; "[f]rom a pragmatic standpoint, it is obvious that some overlap of functions necessarily must occur."[259] While the legislature controls spending, "courts have inherent power 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."[260] One could argue that there is nothing more vital to the administration of justice than ensuring a criminal defendant receives effective assistance of counsel. It is

252. *Id.*

253. *Id.* Following *State v. Peart*, the Louisiana legislature increased funding by five million dollars. *Id.* at 1737–38. In addition, the Oklahoma legislature "created a statewide indigent defender board to oversee appointments . . . and substantially raised fee caps for appointed defense attorneys" after the Oklahoma Supreme Court's decision in *State v. Lynch*. *Id.* at 1739.

254. *Id.* at 1736–41.

255. *See id.* at 1743 ("Judge Lemmon argued that *Peart* majority should have required the legislature to 'enact supplemental funding, within a specified reasonable time, for compensating indigent defender attorneys according to uniform standards and guidelines' to guarantee the operation of programs that are 'minimally adequate.'" (quoting *Peart*, 621 So. 2d at 792 (Lemmon, J., dissenting))).

256. *Id.* at 1744.

257. MO. CONST. art. II, § 1.

258. Rhodes v. Bell, 130 S.W. 465, 468 (Mo. 1910).

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

260. 20 AM. JUR. 2D *Courts* § 40 (2005).

debatable that by failing to fund public defenders, "the legislature infringes upon the judiciary's powers, which flips the separation of powers argument entirely."[261]

Courts have bypassed the separation-of-powers debate to appeal to the legislature before.[262] In *State ex rel. Metropolitan Public Defender Services v. Courtney*, Oregon's principal provider of legal assistance for indigent defendants sought a writ of assistance in the state supreme court directing the state legislature to appropriate adequate funding.[263] A novel issue for this court, it chose to assume for purposes of the opinion that it had the power to order lawmakers to provide funding to keep the judiciary functioning.[264] However, it said that power should only be exercised "sparingly" when the "ability of the judicial branch to perform its core functions is at stake."[265] Here, the problems plaguing the Oregon indigent-defense system fell short, despite the fact that the system alleged that its budget was cut so deeply that it lacked the money to compensate attorneys for their work representing a number of clients in a number of cases from misdemeanors to class C felonies.[266]

Furthermore, the Washington Court of Appeals has recognized that '"[w]hile courts must limit their incursions into the legislative realm in deference to the separation of powers doctrine, separation of powers also dictates that the judiciary be able to insure its own survival when

261. Note, *Effectively Ineffective*, *supra* note 21, at 1745.

262. *See* Commonwealth *ex rel.* Carroll v. Tate, 274 A.2d 193, 198 (Pa. 1971) (noting that the court has the power to compel the legislature to provide such funds as are reasonably necessary for operation); State *ex rel.* Durkin v. City Council of Youngstown, 459 N.E.2d 213, 216 (Ohio 1984) ("The courts' authority to effectuate the orderly and efficient administration of justice without monetary or procedural limitations by the legislature is said to be within the inherent powers of the courts." (citing State *ex rel.* Johnston v. Taulbee, 423 N.E.2d 80, 82 (Ohio 1981))); Folsom v. Wynn, 631 So. 2d 890, 899 (Ala. 1993) ("[T]he inherent power of the Judiciary to assure adequate funding stems from two basics: (1) the position of the Judiciary as a separate and coequal branch of government, and (2) the fact that essential services are required of the Judiciary on behalf of every person by the constitution of each jurisdiction."); *In re* Salary of the Juvenile Dir., 552 P.2d 163, 170–71 (Wash. 1976) ("[S]eparation of powers . . . dictates that the judiciary be able to ensure its own survival when insufficient funds are provided by the other branches. To do so, courts possess inherent power . . . to protect itself in the performance of its constitutional duties."); Gary D. Spivey, *Inherent Power of Court to Compel Appropriation or Expenditure of Funds for Judicial Purposes*, 59 A.L.R.3d 569 (1974).

263. State *ex rel.* Metro. Pub. Defender Servs., Inc. v. Courtney, 64 P.3d 1138, 1139 (Or. 2003).

264. *Id.*

265. *Id.*

266. *Id.* at 1141.

insufficient funds are provided by the other branches.'"[267] It opined that the court has inherent power "to protect itself in the performance of its constitutional duties," meaning that when the legislature fails to appropriate adequate funds, the court has the power to "compel funding."[268] To do so, "the court must show by clear, cogent, and convincing proof that the funds sought are reasonably necessary for the holding of the court, the efficient administration of justice, or the fulfillment of constitutional duties."[269]

In 2004, a county in Washington found itself in similar territory to that plaguing Missouri.[270] Its contract public defender was disbarred, leaving the county with sixty active felony cases and no public defender.[271] Other subcontractors tried to cover the load until it became too significant for them to manage.[272] The county turned first to volunteer attorneys and then to appointing members of the local bar.[273] Soon, officials were caught up in a dispute over proper compensation,[274] with the state "challeng[ing] the trial court's authority to disburse . . . funds to compensate appointed counsel based on the constitutional requirement that the funds must first be appropriated by law."[275] The court of appeals determined that considering the emergency situation and the right of the indigent to representation, "there [was] clear, cogent, and convincing proof that the appointment and compensation of appointed counsel was reasonably necessary for the holding of court, the administration of justice, and the fulfillment of constitutional duties."[276]

Similarly, in *Kennedy v. Carlson*, the chief public defender for Minnesota's Fourth Judicial District challenged the statutory funding system for public defenders, arguing it violated an indigent defendant's

267. State v. Perala, 130 P.3d 852, 862 (Wash. Ct. App. 2006) (quoting *In re Salary of Juvenile Dir.*, 552 P.2d at 170–71).
268. *Id.*
269. *Id.*
270. *Id.* at 857.
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.* at 858.
276. *Id.* at 862; *see also* N.Y. Cnty. Lawyers Ass'n. v. State, 745 N.Y.S.2d 376, 388 (Sup. Ct. 2002) (noting "[w]hen legislative appropriations prove insufficient and legislative inaction obstructs the judiciary's ability to function, the judiciary has the inherent authority to bring the deficient state statute into compliance with the Constitution," yet it found that an injunction forcing the state to review compensation for court-appointed attorneys would usurp the legislative function).

constitutional right to effective assistance of counsel by failing to allocate sufficient funds.[277] The district court agreed, finding the statute unconstitutional.[278] Under Minnesota state law, the State Board of Public Defense was required to "recommend to the legislature a budget for statewide public defense services, and then distribute the funds to all public defender offices."[279] That was the extent of the state contribution to indigent defense.[280] The chief public defender alleged that the Board's failure to obtain adequate funds and comply with self-imposed caseload standards[281] culminated in attorneys who were "significantly underfunded, understaffed, and therefore unable to adequately and completely fulfill the scope of their representation to their clients."[282] Despite these allegations, the state supreme court ruled that "claims of constitutional violations [were] too speculative and hypothetical to support jurisdiction in [the] court," especially considering that the public defender had not shown his attorneys were delivering substandard representation.[283]

Judges must not forget what is at stake. When exercising its power, the court is enforcing a fundamental right to effective representation. Even if a court is determined only to use its inherent right to compel payment "sparingly," there is arguably no better time to flex the judicial muscle than this.[284] When lives and justice are on the line, judges "should not shy away from their position as the primary enforcer of [the] right" to counsel.[285]

After considering the various roles and responsibilities of the major players, one must ask whether Judge Wolff's recommendation for "cooperative decision making" is logical. One author believes such call will "fall on unreceptive ears."[286] Rodney Uphoff writes that "[a]dversarial battle scars and practical realities of the criminal justice system make it unlikely that the actors in most jurisdictions will be able

277. Kennedy v. Carlson, 544 N.W.2d 1, 3 (Minn. 1996).
278. *Id.*
279. *Id.* (citing MINN. STAT. § 611.215, sub. 2(a) (1994) (amended 2007)).
280. *Id.* at 4.
281. The Board's standards limited public defenders to 100 to 150 felony cases a year. *Id.*
282. *Id.*
283. *Id.* at 8.
284. *See also* Guyer, *supra* note 21, at 360.
285. Note, *Effectively Ineffective*, *supra* note 21, at 1748.
286. Uphoff, *supra* note 37, at 677.

to craft cooperative solutions."[287] Missouri's track record supports this view. Judges, prosecutors, and public defenders in District 31 attempted to develop solutions to the caseload predicament before it all came to a head in August 2010.[288] In a series of meetings in the spring of that year, leaders discussed a number of alternatives, including waiving jail time, appointing private counsel on a pro bono basis, and putting those defendants who are not incarcerated on a waiting list pending further reduction in caseload, but no specific agreements were reached.[289]

For any meaningful changes to occur, prosecutors, judges, and public defenders must view themselves as justice seekers and not rivals. It will take a community to reform the system.[290] Sadly, even if the three key players develop "workable strategies" to reduce crushing caseloads, such measures will be only the beginning. A successful indigent-defense program demands more. The true answer is multi-faceted. Programs need additional funding, attorney compensation, better training, and a "comprehensive system of oversight to ensure the provision of uniform, adequate services for all indigent defendants."[291] The system has fallen short of Justice Burger's lofty expectations. It is time we change that.

VI. CONCLUSION

No doubt, the Missouri Supreme Court has a tough decision to make. The men and women on the bench are now caught between a rock and a hard place as one of the most fundamental rights granted to American citizens is in jeopardy. While the ruling will reverberate from a Jefferson City courthouse, it could make a lasting impression on the country at large. The judges have the power to make a bold statement; they were put on the bench to make hard choices. The national indigent-defense system is counting on it.

The justices could compel the Missouri legislators to appropriate

287. *Id.*
288. Transcript of Proceedings, *supra* note 7.
289. *Id.* at 29–30.
290. *See* Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293 (2002) (proposing that in absence of legislative action, it is up to the criminal-justice community and the courts to formulate a solution).
291. Jessica Hafkin, *A Lawyer's Ethical Obligation to Refuse New Cases or to Withdraw from Existing Ones When Faced with Excessive Caseloads that Prevent Him from Providing Competent and Diligent Representation to Indigent Defendants*, 20 GEO. J. LEGAL ETHICS 657, 668 (2007).

more funds, like their colleagues in Georgia and New Mexico attempted in the past. However, history and the present economic crisis make it an unpopular, unlikely source. They could pressure prosecutors to reduce felony charges to simple misdemeanors, relieving the system of the duty to represent but inciting separation-of-powers concerns. Judges could push prosecutors to use civil penalties or fines for minor infractions. Or they could let defendants like Mr. Blacksher go free, sending a powerful message to lawmakers and the public. Perhaps the best solution rests with the public defender herself. If anyone is going to speak up for the defendant it is going to be his own attorney.

Leaving criminal defendants without an advocate is clearly not a solution. That would destroy almost fifty years of progress in protecting a defendant's right to counsel. The legal and ethical implications will only get worse with time. While clients will always demand more of their attorneys' attention, efforts to communicate should not be ignored. With the way things stand now, defendants and their counsel cannot make informed decisions, and this is particularly concerning given the end result could be time away from their families and a stint behind bars.

As the Missouri Supreme Court ponders the dilemma, the toll the debate has taken on Mr. Blacksher's case is evident. At one point, he and prosecutors had reached a plea agreement that would have allowed him to seek treatment for his drug addiction; however, plans were put on hold when the public-defender office's caseload forced it to turn away indigent defendants.[292] When the Supreme Court allowed Blacksher to plead guilty to his charges, the defendant was released from prison, "one month after the 120-day treatment program would have ended."[293] Merely four months after his release, Blacksher was arrested once again, accused of committing burglary while under the influence of narcotics.[294] Assistant Prosecutor Ben Miller told a local newspaper that "[o]ne of the reasons we made that recommendation in the first place back before this whole public defender situation began is because we believed that he did have a substance abuse problem and hoped that treatment would have rehabilitated him to the point where this wouldn't have happened again."[295] One must ask whether Mr. Blacksher's story would have

292. Tara Muck, *Man Caught in Middle of Statewide Public Defender Debate Back in Jail*, SPRINGFIELD NEWS-LEADER (June 13, 2011, 4:16 PM), http://www.news-leader.com/article/20110613/NEWS01/110613032/-1/RSS.

293. *Id.*

294. *Id.*

295. *Id.*

ended differently had he not been subjected to the blunders of a broken system.

No matter what the Court determines the solution to be, prosecutors, public defenders, and trial judges must accept Judge Wolff's challenge to craft cooperative solutions. They must remember that their ultimate duty is to seek justice, not victory. The nation cannot go another half a century in search of a solution. When an accused's constitutional rights are taken from him, we are all defeated.