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## Postconviction Remedies under Missouri Rule 27.26: Problems and Solutions

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# POSTCONVICTION REMEDIES UNDER MISSOURI RULE 27.26: PROBLEMS AND SOLUTIONS

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## I. INTRODUCTION

In a state faced with more demands on funds than funds available, legal representation for indigent defendants and sentenced criminals may not be an attractive candidate for increased public funding.<sup>1</sup> The least attractive proposal—to anyone except a prisoner—would probably be to increase free legal services for those who want to get out of prison by attacking the validity of their trial, guilty plea, or sentence. Legal representation for indigents engaging in such collateral attacks is addressed in Missouri Supreme Court Rule 27.26.

Rule 27.26 establishes the Missouri procedure for exercising the writ of habeas corpus,<sup>2</sup> a right granted by the United States and Missouri

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1. Burton Shostak, former head of the Public Defender Commission, calls the public defender and appointed counsel program “unpopular.” *Hearings before the Joint Public Defender Committee of the Missouri Senate and Missouri House* 3 (Kansas City, Mo. Sept. 23, 1981) [hereinafter cited as *Hearings*].

2. “This Rule does not suspend the rights available by habeas corpus but rather prescribes the procedure to be followed in seeking the enforcement of those rights.” MO. SUP. CT. R. 27.26(a). *See also* *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 716-21 (Mo. En Banc 1976)(Rule 27.26 not a suspension of habeas corpus). For a brief history of the writ of habeas corpus, see *Fay v. Noia*, 372 U.S. 391, 399-411 (1963).

Constitutions.<sup>3</sup> The problem is making the writ available to those persons deprived of liberty in violation of due process without inviting abuse by frivolous claims.<sup>4</sup>

In 1978, the Missouri Supreme Court ordered that every indigent prisoner who files a Rule 27.26 motion must have the aid of an attorney.<sup>5</sup> Named for the case from which it arose, this requirement is known as the *Fields* amendment to Rule 27.26. But in the new public defender law<sup>6</sup> signed by Governor Bond on March 11, 1982, the legislature does not mention appointing or paying counsel. Nor does it appear that the legislature intended that public defenders represent Rule 27.26 movants.<sup>7</sup> The result is an apparent conflict between the *Fields* amendment, which mandates immediate appointment of counsel in Rule 27.26 cases, and the new legislation, which does not provide for state-paid representation. This conflict could be corrected by a minor amendment to the new public defender legislation, which this Comment recommends.

This Comment is divided into three parts: first, a brief history of Rule 27.26, along with its problems of expense and lack of finality; second, an overview of the new public defender system, which provides a framework for quality, cost-effective representation for indigent Rule 27.26 movants; and third, proposals that would change the functioning of Rule 27.26 itself, including Chief Justice Donnelly's proposal to integrate direct appeals and Rule 27.26 appeals into a unitary review procedure.

To avoid possible misunderstandings, the term "appointed counsel" in this Comment refers to private attorneys appointed by courts to represent indigents. "State-paid attorneys" refers to private attorneys and public defenders.

## II. A BRIEF HISTORY OF RULE 27.26

Rule 27.26 is designed "to provide all relief heretofore available in any court by habeas corpus, when used for the purpose of vacating, setting aside or correcting a sentence."<sup>8</sup> Prior to 1953, Missouri had no Rule 27.26, though the writ of habeas corpus was available. One problem with the writ was that "by its very nature [it] was little understood by those people most likely to utilize it, i.e., the person [sic] in confinement."<sup>9</sup> In 1953, the

3. U.S. CONST. art. 1, § 9, cl. 2; MO. CONST. art. 1, § 12.

4. A related but less recognized problem is that *deserving* Rule 27.26 movants will go unrecognized—that the wheat will get lost in all the chaff—as judges become jaded from hearing too many meritless motions. Telephone interview with Boone County Circuit Judge Frank Conley (Oct. 27, 1981).

5. MO. SUP. CT. R. 27.26(h). This change was mandated in *Fields v. State*, 572 S.W.2d 477 (Mo. En Banc 1978).

6. MO. REV. STAT. §§ 600.010-.900 (Cum. Supp. 1983).

7. See Part V.B. *infra*.

8. *Wiglesworth v. Wyrick*, 531 S.W.2d 713, 716 (Mo. En Banc 1976).

9. Pelofsky & Purdon, *Rule 27.26: A Study in Post-Conviction Remedies*, 39 UMKC L. REV. 1, 3 (1970).

Missouri Supreme Court adopted a one-paragraph Rule 27.26;<sup>10</sup> the significant change it made was that the proper court to petition for postconviction relief became the *sentencing* court, not the court in the jurisdiction where the prisoner was confined as under habeas corpus.<sup>11</sup> Since the rule contained no form that a prisoner could use to aid in drafting his motion,<sup>12</sup> it is questionable how much more comprehensible Rule 27.26 was to prisoners than was the old writ.<sup>13</sup> There was no right to counsel in the original Rule 27.26.<sup>14</sup>

The next significant development occurred outside Missouri, in a 1963 trilogy of United States Supreme Court cases on postconviction relief.<sup>15</sup> The Court emphasized that, in the absence of appropriate state proceedings, there was a need for federal habeas corpus review to prevent deprivations of liberty without due process: "If the States withhold effective remedy, the federal courts have the power and duty to provide it."<sup>16</sup> In the wake of the Court's decisions, state courts had to choose between revising inadequate postconviction procedures or suffering federal courts to provide more frequent postconviction remedies for state prisoners.

In 1967, the Missouri Supreme Court responded with a vastly expanded Rule 27.26 that would "provide a post-conviction procedure in accord with the principles in the so-called trilogy."<sup>17</sup> Among the new provisions was one titled "Right to Counsel," which stated, "If a motion presents questions

10. MO. SUP. CT. R. 27.26 (1959).

11. Pelofsky & Purdon, *supra* note 9, at 3.

12. The present rule has a form attached as an appendix. A Rule 27.26 motion "must be substantially in compliance" with that form. MO. SUP. CT. R. 27.26(c).

13. The addition of the easy-to-understand form has not met universal acclaim: "A passerby might think that monsters are only made in movies or on television. Prior to September 1, 1967, Missouri jurists were safe in so assuming . . . . Then the megaton-proportioned judicial bomb exploded when Missouri Supreme Court Rule 27.26 opened the floodgates to postconviction proceedings and even included a 'how-to-do-it manual' for inmates." Bishop, *Guilty Pleas in Missouri*, 42 UMKC L. REV. 304, 304 (1974).

14. In 1953, even the right to counsel for indigents in felony trials was still ten years away. *See Gideon v. Wainwright*, 372 U.S. 335 (1963).

15. *Sanders v. United States*, 373 U.S. 1 (1963); *Fay v. Noia*, 372 U.S. 391 (1963); *Townsend v. Sain*, 372 U.S. 293 (1963).

16. *Fay v. Noia*, 372 U.S. 391, 441 (1963). In *Townsend v. Sain*, the Court said that a federal court *must* grant a hearing if:

- (1) the merits of the factual dispute were not resolved in the state hearing;
- (2) the state factual determination is not fairly supported by the record as a whole;
- (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing;
- (4) there is a substantial allegation of newly discovered evidence;
- (5) the material facts were not adequately developed at the state-court hearing; or
- (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.

372 U.S. at 313.

17. *State v. Stidham*, 415 S.W.2d 297, 298 (Mo. En Banc 1967).

of law or issues of fact, the court shall appoint counsel immediately to assist the prisoner if he is an indigent person . . . .”<sup>18</sup> But Missouri appellate courts were inconsistent in applying the conditional phrase, “[i]f a motion presents questions of law or issues of fact.”<sup>19</sup> Under the Missouri Supreme Court’s decision in *Smith v. State*,<sup>20</sup> counsel was to be appointed only if the movant filing a pro se Rule 27.26 motion had pleaded facts, not just conclusions, that would warrant relief if proved true. Most Rule 27.26 motions were filed pro se, and this resulted in motions that often were “inarticulate and inartful expressions of frustration.”<sup>21</sup> Appeals from the resulting summary denial of these motions were, and still are, by right. The state paid the costs and provided counsel.<sup>22</sup> This meant that indigents who were denied counsel in preparing their original motions automatically received counsel when they appealed their denials. The results of *Smith* were “delay and confusion . . . and an excessive number of appeals . . . from summary denials of pro se motions to vacate sentence or judgment without the appointment of counsel.”<sup>23</sup>

The Missouri Supreme Court, hoping to improve the quality of petitions filed and decrease the burgeoning number of appeals from dismissals of these petitions without a hearing, overruled *Smith* in *Fields v. State*.<sup>24</sup> The court announced its intention to abandon the case-by-case approach in favor of a per se rule on appointment of counsel for indigents.<sup>25</sup> The resulting amendment to Rule 27.26 became effective December 14, 1978. It provides: “When an indigent files a pro se motion, the court shall immediately appoint counsel to represent the prisoner.”<sup>26</sup> This amendment expressed the court’s belief that “[t]he proper agent to assist the court in the search to determine whether a claimed ground for relief is meritorious and deserving of relief or not meritorious or perhaps even frivolous is an attorney.”<sup>27</sup>

Originally, Missouri lawyers bore the burden of serving as appointed counsel for indigent Rule 27.26 movants without pay. Then, in 1971, the Missouri Supreme Court stated that it would no longer “compel the attorneys of Missouri to discharge *alone* a duty which constitutionally is the burden

18. MO. SUP. CT. R. 27.26(h) (1969).

19. See *Fields v. State*, 572 S.W.2d 477, 481 (Mo. En Banc 1978).

20. 513 S.W.2d 407, 411 (Mo. En Banc 1974), cert. denied, 420 U.S. 911 (1975).

21. *Fields*, 572 S.W.2d at 481-82. See also Popper, *Recent Developments in Missouri: Criminal Law (The Sixth Amendment)*, 48 UMKC L. REV. 601, 608-09 (1980).

22. *Fields*, 572 S.W.2d at 481 (citing MO. SUP. CT. R. 27.26(j), (k), (l). Appellate review should be “as of right” for applicants or respondents in postconviction litigation, according to the American Bar Association Standards approved August 9, 1978. IV ABA STANDARDS FOR CRIMINAL JUSTICE, *Postconviction Remedies* § 22-5.1(b) (1980) [hereinafter cited as ABA STANDARDS].

23. *Fields*, 572 S.W.2d at 480.

24. 572 S.W.2d 477 (Mo. En Banc 1978).

25. *Id.* at 483. See also Popper, *supra* note 21, at 608-09.

26. MO. SUP. CT. R. 27.26(h).

27. *Fields*, 572 S.W.2d at 482.

of the state.”<sup>28</sup> The legislature established the public defender system the next year, with legislation granting reimbursement for “actual expenses” and a “reasonable fee.”<sup>29</sup> In 1974, the Missouri Supreme Court set the fee schedule under which these lawyers worked at \$15.00 an hour for out-of-court time and \$20.00 an hour for in-court time.<sup>30</sup> In many cases this did not even cover the lawyer’s overhead.<sup>31</sup> What funds there were sometimes ran out, and lawyers had to wait to be paid from the appropriations for the following year.<sup>32</sup>

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28. *State v. Green*, 470 S.W.2d 571, 573 (Mo. En Banc 1971).

29. MO. REV. STAT. § 600.065.1 (Cum. Supp. 1975) (repealed 1982).

30. Office of State Courts Administrator, Missouri’s Public Defender and Appointed Counsel Program: Annual Statistical Report 13 (1978-1979) [hereinafter cited as Annual Statistical Report].

31. See Popper, *Forced Labor Without Apology*, 37 J. MO. B. 446, 446 (1981). A Texas lawyer did analyze his court-appointed salary (\$20.55 per hour) and his overhead (\$31 per hour) in Perini, *Defending the Poor: Who Pays the Price?*, 16 DOCKET CALL 3 (1982).

32. After the state funds appropriated for fiscal 1981 to pay appointed counsel were depleted, a lawyer appointed to defend an accused in a criminal case challenged the court order that he do so without pay. *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. En Banc 1981), cert. denied, 102 S. Ct. 1000 (1982). The Missouri Supreme Court lamented, “The cupboard is bare.” Citing the constitutional prohibition that, “[n]o money shall be withdrawn from the state treasury except by warrant in accordance with an appropriation made by law,” MO. CONST. art. IV, § 28, the court asked, “What are we to do?” The court concluded that it must turn to the Missouri Bar for assistance and added, “We do so without apology.” *Id.* at 65. For a critical response to the court’s position, see Popper, *supra* note 31. The court did offer emergency guidelines, however, including a provision that nonpayment for 120 days for prior appointed counsel services could constitute grounds for excusing a lawyer from additional appointment. The court also said that defendants might have to be discharged if no funds were provided to pay a lawyer for the expense involved in building a defense case, for lawyers could not be required to advance their personal funds for such expenses. 617 S.W.2d at 67. See also *Williamson v. Vardeman*, 674 F.2d 1211, 1216 (8th Cir. 1982)(habeas corpus granted on due process grounds to Missouri attorney jailed for contempt for refusal to serve as appointed counsel and pay \$500 in necessary criminal defense expenses).

The lawyer in *Wolff* subsequently explained his position in terms of fairness, saying he didn’t think it fair that a licensed attorney had to do pro bono work when other licensed persons did not:

Doctors have licenses. They’re not required to do anything for the poor, not even in the criminal cases . . . . I have a case right now, in which I represent a very poor person. I need an expert to come into court to testify. That doctor won’t even come to court. He’s only going to testify for about twenty minutes. Won’t come to court unless I give him \$500.00 . . . . I can’t say to him, “Hey, I’m working for nothing. I need you to work for nothing, or your license is going to be in danger like mine. You may go to jail, like I may go to jail.

*Hearings, supra* note 1, at 53 (St. Louis, Mo. Oct. 7, 1981) (testimony of Donald Wolff). The reaction to the court’s conscription of attorneys was strong among some

In 1981, the court reiterated the importance of appointed counsel under the *Fields* amendment: "It was and is believed that the amendment to Rule 27.26(h) would contribute substantially to an expeditious, less expensive, and more final resolution of postconviction constitutional issues and make effective the prohibition of Rule 27.26(d) against successive motions . . . . The amendment has been effective for these purposes."<sup>33</sup>

### III. THE COSTS OF POSTCONVICTION RELIEF

#### A. *Expenses Under the Fields Amendment*

The state, in times of financial stress, is concerned about expense. Has the *Fields* amendment cut down on Rule 27.26 expense? A simple observation on the practical effect of the amendment is that it increases the number of attorneys representing Rule 27.26 movants.<sup>34</sup> The greater the number of appointed attorneys, the greater the expense. But the answer is not that simple. As one public defender said, "It may first appear that the *Fields* decision has resulted in more work for the bar. However, the actual effect should be to bring the true issues before the court at the earliest instance."<sup>35</sup> The American Bar Association in its *Standards for Criminal Justice* is more blunt: "It is a waste of judicial resources and an inefficient method of treating the substantive merits of applications for postconviction relief to proceed without counsel for applicants."<sup>36</sup>

Unfortunately, Missouri has not kept separate records on the number of attorneys appointed to represent persons at trial and how many were appointed to aid prisoners seeking postconviction relief. All payments to appointed counsel have come from the same fund, no matter what the purpose of appointment.<sup>37</sup> Still, a look at the total increase in demand for appointed counsel in general is perhaps valuable. Since the hourly rate paid to appointed attorneys has remained constant since 1974,<sup>38</sup> the increase in cost per year

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members of the Missouri Bar. An advertisement by an organization of criminal lawyers trumpeted, "LAWYER ORDERED TO JAIL FOR REFUSING TO TAKE COURT-APPOINTED CASE," and called on lawyers to "help us fight this injustice." 37 J. MO. B. 520 (1981); 38 J. MO. B. 197 (1982). The 1982 advertisement ran subsequent to the effective date of the new public defender legislation which eliminated any mention of court-appointed counsel. Courts would seem to retain the inherent power to appoint counsel, however. See note 171 and accompanying text *infra*.

33. State *ex rel.* Smith v. Tillman, 623 S.W.2d 242, 245-46 (Mo. En Banc 1981) (footnote omitted).

34. Wolff & Lemp, *A New Test for Ineffective Assistance of Counsel*, 36 J. MO. B. 92 (1980).

35. Daley, *A Guide for Appointed Counsel for Indigent Movants Under Rule 27.26*, 37 J. MO. B. 41 (1981).

36. ABA STANDARDS, *supra* note 22, § 22-4.3 Commentary.

37. See MO. REV. STAT. § 600.150 (1978) (repealed 1982) (reimbursement of expenses and compensation for appointed attorneys).

38. See note 30 and accompanying text *supra*.

of appointed counsel represents an increase in attorney time.<sup>39</sup> The Office of State Courts Administrator reports that appointed counsel fees rose from a little over \$400,000 in fiscal 1976 to over \$1,100,000 in fiscal 1980.<sup>40</sup> The State Auditor shows appointed counsel fees for 1981 at over \$1,380,000.<sup>41</sup> For fiscal 1982, more than \$1,380,000 was appropriated for appointed counsel, not including an additional request for over \$440,000 to pay expenses for appointed counsel accrued in 1981.<sup>42</sup>

Using 1982 funds to pay 1981 bills was not a solution; it was merely "robbing Peter to pay Paul." In effect, 1982 appointed counsel funds started off \$444,000 behind.<sup>43</sup> Between 1978 and 1981, demand for earned appointed

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39. Increase in attorney time can be attained by more cases, more time spent per case, or a combination of both. Figures for appointed counsel per case fluctuated but generally went up:

Fiscal Year	Appointed Counsel Cost per Case
1975-76	\$186
1976-77	\$296
1977-78	\$218
1978-79	\$235
1979-80	\$353

Annual Statistical Report, *supra* note 30, at 7-8 (1979-1980). The increase in cost per case, however, is insufficient to explain the overall rise in appointed counsel costs. See notes 40-42 and accompanying text *infra*.

40. Here is the annual breakdown:

Fiscal Year	Appointed Counsel Costs
1975-76	\$411,754
1976-77	\$865,485
1977-78	\$735,000
1978-79	\$776,000
1979-80	\$1,126,820

Annual Statistical Report, *supra* note 30, at 7 (1979-1980).

41. State Auditor of Missouri, Report 81-115, Public Defender Commission—Two Years Ended June 30, 1980, at 7 (Sept. 21, 1981) [hereinafter cited as Auditor's Report]. The figures, it should be noted, vary slightly between governmental agencies and sometimes even within a single agency.

42. At the close of fiscal 1981, appointed counsel bills totaling \$444,458 remained unpaid. When the state legislature appropriated money to the Public Defender Commission for fiscal 1982, it sent an accompanying letter of intent which authorized the paying of those bills. Judicial Dep't Budget, Fiscal Year 1982-83, at 271. According to that budget, the \$444,458 is in addition to an original appropriation for appointed counsel of \$1,381,657. *Id.* at 269.

43. See *id.* at 271. As a "temporary emergency rule," the Public Defender Commission, using the power first granted it under MO. REV. STAT. § 600.165 (1978) (repealed 1982), issued Administrative Rule 10 on July 9, 1981. Stating that appropriations to the public defender system for fiscal year 1981-1982 might be insufficient to cover appointed counsel costs, the Commission set a schedule of maximum fees allowable for appointed counsel in misdemeanor, juvenile, and criminal cases. Maximum fees for Rule 27.26 cases were not mentioned. See MoBar Bull. Aug. 1981, at 1.



counsel fees and expenses outstripped legislative appropriations every year, and on two occasions the state legislature responded with emergency appropriations.<sup>44</sup> The federal government did not pick up the slack.<sup>45</sup>

In short, total cost of appointed counsel more than tripled in the five-year period between fiscal 1976 and fiscal 1981. Because of the lack of separate recordkeeping, it would be difficult to determine exactly what percentage of the cost was attributable to counsel in Rule 27.26 cases. For fiscal 1981, however, \$42,131.32 in 1982 funds was spent on appointed counsel in 121 Rule 27.26 cases.<sup>46</sup> An additional \$34,690.66 in 1982 funds was spent on

44. Auditor's Report, *supra* note 41, at 22. In each of those years, the Public Defender Commission requested emergency appropriations with these results:

Fiscal Year	Emergency Appropriation
1978	\$223,745
1979	0
1980	\$193,396
1981	0

*Id.* Shortfalls in both the budget requests and appropriations for the appointed counsel program can be seen in the following figures:

Fiscal Year	Initial Budget Request	Initial Appropriation	Expenditures Incurred
1978	\$735,000	\$511,255	\$844,313
1979	\$776,000	\$776,000	\$875,084
1980	\$955,280	\$936,558	\$1,106,944
1981	\$936,558	\$1,129,954	\$1,387,557
1982	\$1,450,000	\$1,381,657	—

*Id.* Appropriations from the State General Revenue Fund to the public defender system also were insufficient to meet demands in fiscal 1979 and 1980. Expenses of \$214,381 for fiscal 1979 were paid from appropriations for fiscal 1980, and expenses of \$194,130 for fiscal 1980 were paid from appropriations for fiscal 1981. *Id.* at 12. Of the excess obligations for 1979, \$209,165 were for the appointed counsel program and \$5,216 were for public defender offices. For 1980, \$186,657 in excess obligations were for appointed counsel, \$7,473 for public defenders. *Id.* at 21.

45. For fiscal 1977-78, federal resources for Missouri's public defender and appointed counsel program totaled \$29,382.03. Kansas City received \$23,235.65 of those funds, and St. Louis received \$6,146.38. Annual Statistical Report, *supra* note 30, at 1 (1977-1978). For fiscal year 1978-79, federal funding amounted to \$66,343.31, or roughly 3% of Missouri's expenditures on the public defender and appointed counsel program for that year. Jackson County received \$35,196.39, and St. Louis County and the city of St. Louis received \$11,661.79 and \$19,485.13 respectively. *Id.* at 7-8 (1978-1979). The Office of State Courts Administrator makes no mention of any federal funding for fiscal year 1979-80. *Id.* (1979-1980).

46. Missouri Supreme Court, Financial Accounting System Accounts Payable Disbursement Register (July 1, 1980-Aug. 31, 1981). None of the payment due dates for Rule 27.26 appointed counsel in the report was later than the end of fiscal 1981. Though the records for all appointed counsel were contained in one report, each individual billing contained a description; Rule 27.26 cases were denoted as such, and thus the figures for Rule 27.26 cases were separable. Where two separate fee listings were made under the same document number, they were counted as two separate cases.

1981 appointed counsel bills for 76 postconviction cases.<sup>47</sup> Thus, the 1981 total for appointed counsel in Rule 27.26 cases was \$76,821.98. When the cost is divided by the number of cases it represents, the price tag for legal fees in each Rule 27.26 case was approximately \$390.00.

Attorneys' fees are only a portion of the costs involved in Rule 27.26 motions. When a hearing on a motion is held, there are also the costs of transporting the prisoner to and from the circuit court in which the case originally was heard,<sup>48</sup> subpoena costs,<sup>49</sup> court clerk fees,<sup>50</sup> and often the cost of keeping a sheriff's deputy in the courtroom.<sup>51</sup> In appeals, there are transcript costs.<sup>52</sup> In every case, there are the costs of the prosecutor's time in opposing the motion,<sup>53</sup> the judge's time, and general courtroom overhead.<sup>54</sup>

47. This figure was obtained by searching files in the Office of State Courts Administrator, 1105 R. Southwest, Jefferson City, Missouri.

48. Transportation costs, paid by the county in which the hearing is held, are now 20¢ per mile. MO. REV. STAT. §§ 57.280, 222.120 (1978 & Cum. Supp. 1981).

49. Subpoena costs, paid to the sheriff by the county, are 20¢ per mile for each mile traveled in serving the subpoena in excess of five miles from the courthouse and \$2.50 for summoning a witness or for return of *non est* on a subpoena. *Id.* § 57.280.

50. Court clerk costs are \$25.00 for every civil case instituted. *Id.* § 483.530.10. Rule 27.26 proceedings are civil in nature. MO. SUP. CT. R. 27.26(a).

51. The sheriff or his deputy receives \$10.00 per day in court. MO. REV. STAT. § 57.280 (Cum. Supp. 1981).

52. Transcripts cost 70¢ per page and 20¢ per copy of a page. *Id.* § 485.100 (1978). Rule 27.26(k) mandates the furnishing of transcripts for indigents on appeal. MO. SUP. CT. R. 27.26(k). In federal habeas corpus cases, fees for transcripts are paid from federal funds. 28 U.S.C. § 753 (1976). Where appellate or postconviction procedures are afforded prisoners, a state must provide its indigents with the necessary transcripts. *Griffin v. Illinois*, 351 U.S. 12 (1955).

53. If the prosecutor and his assistant have a disqualifying interest in a case, a special prosecutor must be appointed. MO. REV. STAT. § 56.110 (1978). Instead of the \$15.00 out-of-court and \$20.00 in-court hourly fee set for appointed counsel, however, the special prosecutor is entitled to "a reasonable fee" fixed by the court. *Id.* § 56.130. "Reasonable fee" can be translated as a lawyer's regular fee. *See, e.g., Grady v. State*, No. CV180-1590CC (Boone County Mo. Cir. Ct. Feb. 6, 1981) (7 hours at \$50.00 per hour).

Appeals of decisions in Rule 27.26 cases are handled for the state by the Office of the Attorney General. The Attorney General has a small office in Kansas City which handles appearances at appeals in the Missouri Court of Appeals for the Western District, but if appearances must be made in the Missouri Court of Appeals for the Southern or Eastern Districts, expenses per trip average roughly \$100. Interview with Kristie Green, Chief Counsel, Criminal Division, Missouri Attorney General's Office, in Jefferson City, Missouri (Aug. 24, 1981).

54. Because Rule 27.26 motions represent a small proportion of the total caseload in Missouri's circuit courts, however, the cost of judges' time and general courtroom overhead for Rule 27.26 motions is relatively small. In fiscal 1978, a total of 490,000 cases were filed in Missouri circuit courts, with 456,000 dispositions. Missouri Executive Budget § 6-6 (1980). In fiscal 1979, 600,000 cases were Published by University of Missouri School of Law Scholarship Repository, 1982

Even with appointed counsel fees currently running at \$390.00 per Rule 27.26 case, the *Fields* amendment actually could be reducing expenses if the number of Rule 27.26 cases being filed and heard or being appealed has been reduced. The figures, however, show that the number, and hence the cost, of dispositions and hearings in the circuit courts of Rule 27.26 cases has increased slightly since *Fields*. Available statistics for the three years prior to *Fields* show an average of 329 dispositions of Rule 27.26 cases in circuit courts per year with an average of 157 hearings. The two years following *Fields* show an average of 336 dispositions with an average of 170 hearings per year.<sup>55</sup>

But another variable must be considered. The number of inmates in the state penitentiary and other state correctional institutions also has increased since *Fields*. More inmates mean more Rule 27.26 petitions. In the five-year period from 1975 to 1980, the Missouri prison population increased by over 1,500 inmates; the population stabilized between 1980 and 1981.<sup>56</sup> This was

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filed in circuit courts, with 545,000 dispositions. *Id.* § 6-8 (1981). The 439 filings of Rule 27.26 cases in circuit courts in fiscal 1979 thus constituted only .073% of the total filings during that year, and the 279 dispositions were a mere .05% of total dispositions.

55. The figures for available years are shown on the following table:

Missouri Supreme Court Rule 27.26 Cases,  
Missouri Circuit Courts

Fiscal Year	Filings	Dispositions	With Hearing	Without Hearing
1974	*	290	150	140
1975	*	291	140	151
1976	*	406	181	225
1977	*	*	*	*
1978	*	*	*	*
1979	439	279	109	170
1980	512	392	231	161

\*Data not available.

Letter from Linda McGinnis, Planning and Statistics Analyst, Office of State Courts Administrator (Aug. 24, 1981).

56. The average daily prison population in Missouri has grown steadily, as the following table indicates:

Year	Number of Prisoners
1975	3882
1976	4404
1977	4880
1978	5247
1979	5318
1980	5421

MISSOURI DIVISION OF CORRECTIONS, BIENNIAL REPORT, Introduction (1979-1980). In 1981, the prison population was approximately 5423. Missouri Executive Budget §§ 9-77, 9-80 to 9-88 (1982). Figures for the Ozark Correctional Center were derived by multiplying the number of correction officers by the correction-officer ratio. *Id.* § 9-83.

nearly a forty percent increase in prisoners. In light of this increase, it can be argued that the increase in Rule 27.26 filings in circuit court would have been greater but for the reduction of successive motions caused by *Fields*.

### B. *Appellate Costs of Rule 27.26*

While the increase in the number of filings of Rule 27.26 motions has not been great,<sup>57</sup> the increase in the number of appeals is striking. In 1975, there were 86 Missouri appellate decisions handed down in Rule 27.26 cases; in 1976, the number was 95; and in 1977, it reached 100. In 1978, the year the *Fields* amendment went into effect in mid-December,<sup>58</sup> 117 appellate decisions were rendered. In 1979, the number jumped to 137. In 1980, the number of appellate decisions was 137; and in 1981, it climbed to 173.<sup>59</sup> In this six-year period, which saw a forty percent increase in prisoners,<sup>60</sup> there was a more-than one hundred percent increase in the number of Rule 27.26 appellate decisions. In the years following *Fields*, there was a two percent increase in prisoners and a twenty-six percent increase in the number of appellate decisions. The number of appeals increased much more rapidly than the size of the prison population.

The vast bulk of Rule 27.26 appeals are now heard by the Missouri courts of appeals instead of the Missouri Supreme Court.<sup>61</sup> While the ratio of dispositions of Rule 27.26 cases compared to total case dispositions in Missouri circuit courts remains low—one-twentieth of one percent in 1979<sup>62</sup>—the ratio jumps dramatically in the courts of appeals. In 1978, Rule

57. See note 55 and accompanying text *supra*.

58. MO. SUP. CT. R. 27.26(h).

59. The Lexis© computer system was used in gathering these figures. There is room for error in these statistics, but the figures are, at the least, fairly representative. Figures for 1977 and 1981 include two writ of prohibition cases that were consolidated with Rule 27.26 appeals. *State ex rel. Smith v. Tillman*, 623 S.W.2d 242 (Mo. En Banc 1981); *State ex rel. Reece v. Campbell*, 551 S.W.2d 292 (Mo. App., St. L. 1977). Figures for 1980 do not include a writ of prohibition case merely filed in regard to a Rule 27.26 motion. *State ex rel. Carver v. Whipple*, 608 S.W.2d 410 (Mo. En Banc 1980). Figures for 1979, 1978, and 1976 do not include three aborted Rule 27.26 cases. *State v. Lumsden*, 589 S.W.2d 226 (Mo. En Banc 1979); *Plant v. Haynes*, 568 S.W.2d 947 (Mo. App., K.C. 1978); *Wiglesworth v. Wyrick*, 531 S.W.2d 713 (Mo. En Banc 1976). Figures for 1975 do include a putative coram nobis case which was held to be a Rule 27.26 case and treated accordingly. *Blackwell v. State*, 520 S.W.2d 659 (Mo. App., K.C. 1975).

60. See note 56 and accompanying text *supra*.

61. The number of cases heard by the Missouri Supreme Court is quite small—10 in 1978, 7 in 1979, 4 in 1980, and 5 in 1981. In the early years under amended Rule 27.26, 1967 through 1972, the Missouri Supreme Court was averaging 60 opinions a year in Rule 27.26 appeals. But under an amendment to MO. CONST. art. V, § 3, effective in 1972, courts of appeals now have jurisdiction in Rule 27.26 appeals unless the cases involve constitutional construction or a capital crime. See *Anderson, Post-Conviction Relief in Missouri—Five Years Under Amended Rule 27.26*, 38 MO. L. REV. 2-3 (1973).

62. See note 55 *supra*.

27.26 cases accounted for 10.7 percent (107 of 1002) of all opinions issued by the courts of appeals.<sup>63</sup> In 1979, the figure rose to 12 percent (130 of 1082).<sup>64</sup> In 1980, it dropped to 10.2 percent (133 of 1301),<sup>65</sup> but it climbed to 11.2 percent (168 of 1498) in 1981.<sup>66</sup> In short, an average of eleven percent of Missouri court of appeals cases from 1978 through 1980 were Rule 27.26 cases.

Appellants in Rule 27.26 cases generally have not fared well.<sup>67</sup> An exception is Rule 27.26 movants who had been given an additional sentence of three years for the crime of armed criminal action. Sentences that were not reduced by the circuit courts were routinely reduced by three years in accord with the holding in *Sours v. State*<sup>68</sup> that the additional three-year penalty

63. Missouri Court of Appeals for the Western District, 317 opinions. Missouri Court of Appeals for the Eastern District, 489 opinions. Missouri Court of Appeals for the Southern District, 196 opinions. Missouri Executive Budget §§ 6-10, 6-11, 6-12 (1980).

64. Missouri Court of Appeals for the Western District, 415 opinions. Missouri Court of Appeals for the Eastern District, 500 opinions. Missouri Court of Appeals for the Southern District, 167 opinions. *Id.* §§ 6-5, 6-6, 6-7 (1981).

65. Missouri Court of Appeals for the Western District, 461 opinions. Missouri Court of Appeals for the Eastern District, 520 opinions. Missouri Court of Appeals for the Southern District, 320 opinions. *Id.* §§ 6-9, 6-10, 6-11 (1982).

66. Missouri Court of Appeals for the Western District, 440 opinions. Missouri Court of Appeals for the Eastern District, 622 opinions. Missouri Court of Appeals for the Southern District, 436 opinions. *Id.* §§ 6-13, 6-14, 6-15 (1983).

67. A "clearly erroneous" standard of review is used in Rule 27.26 cases. MO. SUP. CT. R. 27.26(j). For success rates in the early years of amended Rule 27.26, see Anderson, *supra* note 65, at 2-4.

68. 593 S.W.2d 208 (Mo. En Banc), *vacated*, 446 U.S. 962, *on remand*, 603 S.W.2d 592 (Mo. En Banc 1980), *cert. denied*, 449 U.S. 1131 (1981). Appeals involving the *Sours* case explain, in part, the jump in the number of Rule 27.26 appeals cases from the years 1979 and 1980 to 1981. In 1981, 14 out of 16 such appeals were brought by the state, which lost in its attempts to overturn three-year reductions in sentences for armed criminal action. *See, e.g.*, Anderson v. State, 629 S.W.2d 421 (Mo. App., E.D. 1981); Burse v. State, 626 S.W.2d 394 (Mo. App., E.D. 1981); Triplett v. State, 624 S.W.2d 115 (Mo. App., E.D. 1981). Two successful *Sours*-type appeals were brought by appellant-movants. Dunn v. State, 624 S.W.2d 102 (Mo. App., W.D. 1981); Brown v. State, 619 S.W.2d 68 (Mo. En Banc 1981). In 1980, there were four reported *Sours*-type cases, all brought by appellant-movants and all successful. Davis v. State, 611 S.W.2d 230 (Mo. App., E.D. 1980); Vaughn v. State, 610 S.W.2d 657 (Mo. App., E.D. 1980); Bullock v. State, 608 S.W.2d 480 (Mo. App., E.D. 1980); Lacy v. State, 607 S.W.2d 810 (Mo. App., E.D. 1980). In addition, there was a successful double jeopardy case involving drug violations which relied on *Sours*. Parker v. State, 608 S.W.2d 543 (Mo. App., W.D. 1980) (vacating a five-year concurrent sentence, upholding other sentences).

Movants seeking new trials subsequent to *Duren v. Missouri*, 439 U.S. 357 (1979) and *Lee v. Missouri*, 439 U.S. 461 (1979), on the ground that their jury panels failed to have the requisite cross-section of the population due to a lack of women, failed. In 1981, there were twelve such unsuccessful cases reported, further helping to explain the jump in Rule 27.26 appeals for that year. *See, e.g.*, Sivils v. State,

for armed criminal action violated the double jeopardy prohibition of the Missouri Constitution. Double jeopardy cases aside, relief was granted to only five Rule 27.26 appellants in 1981. Appellate courts granted evidentiary hearings to two of the five<sup>69</sup> and required appointment of counsel for another.<sup>70</sup> In the other two cases, the only relief was a directive to the lower court to make findings of fact and conclusions of law.<sup>71</sup> The state had one case overturned in its favor.<sup>72</sup>

In 1980, relief was granted to seven movants. One was permitted to refile his Rule 27.26 motion because of clerical error and procedural muddle in the trial.<sup>73</sup> In three cases, the lower courts were directed to make a change of judge,<sup>74</sup> and in one a movant was granted a hearing on the question of the trial court's subject matter jurisdiction in his criminal proceeding.<sup>75</sup> One case was remanded for further evidence on whether Rule 27.26 was the proper remedy,<sup>76</sup> and another was remanded for findings of fact and conclusions of law.<sup>77</sup> Again, the state had one case overturned.<sup>78</sup>

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627 S.W.2d 661 (Mo. App., W.D. 1981); Taylor v. State, 624 S.W.2d 170 (Mo. App., W.D. 1981); Larrabee v. State, 616 S.W.2d 542 (Mo. App., W.D. 1981). In 1980, there were six of these unsuccessful cases. See, e.g., Champion v. State, 605 S.W.2d 510 (Mo. App., S.D. 1980); Stamps v. State, 603 S.W.2d 59 (Mo. App., E.D. 1980). Missouri courts repeatedly rejected *Duren* claims on the ground that failure to make a timely objection at trial bars review in either direct appeals or Rule 27.26 cases. See, e.g., Benson v. State, 611 S.W.2d 538, 541-42 (Mo. App., W.D. 1980). Likewise, claims of ineffective assistance of counsel were rejected for failure to timely object. See, e.g., *id.* at 542-45.

69. Quillun v. State, 626 S.W.2d 414, 415-16 (Mo. App., W.D. 1981) (record did not conclusively show counsel was effective); Flowers v. State, 618 S.W.2d 655, 657 (Mo. En Banc 1981) (issue whether counsel abandoned movant on Rule 27.26 appeal).

70. Johnson v. State, 622 S.W.2d 27, 28 (Mo. App., W.D. 1981) (*Fields* not followed).

71. Gaines v. State, 620 S.W.2d 402, 403 (Mo. App., E.D. 1981); Brauch v. State, 611 S.W.2d 406, 407 (Mo. App., E.D. 1981). MO. SUP. CT. R. 27.26(i) states, "The court shall make findings of fact and conclusions of law on all issues presented, whether or not a hearing is held."

72. Rogers v. State, 625 S.W.2d 184, 185 (Mo. App., E.D. 1981) (second degree murder lesser included offense when charged with first degree murder).

73. Brame v. State, 597 S.W.2d 665, 668, 672-73 (Mo. App., W.D. 1980) (circuit court directed to "proceed anew").

74. Yeager v. State, 602 S.W.2d 478, 479 (Mo. App., E.D. 1980); Davis v. State, 598 S.W.2d 582, 584-86 (Mo. App., W.D. 1980); Moore v. State, 594 S.W.2d 355, 356 (Mo. App., W.D. 1980).

75. Russell v. State, 597 S.W.2d 694, 696, 698 (Mo. App., W.D. 1980) (movant not brought to trial within 180 days in accordance with MO. REV. STAT. § 222.100 (1978)).

76. Dixon v. State, 594 S.W.2d 360, 362 (Mo. App., W.D. 1980).

77. Carns v. State, 598 S.W.2d 157, 158 (Mo. App., S.D. 1980).

78. Abell v. State, 606 S.W.2d 198, 201 (Mo. App., E.D. 1980) (ruling reducing 50-year sentence for marijuana sale to ten-year sentence reversed).

Relief was granted to eleven Rule 27.26 movants in 1979, and some of the relief was significant. A new trial was granted in a case where the movant was denied assistance of counsel to file his motion for a new trial.<sup>79</sup> A finding that no conflict of interest existed for the attorney of a movant who pleaded guilty was held clearly erroneous, reversed, and remanded.<sup>80</sup> Another judgment was vacated where a movant had been convicted on one charge and sentenced on another.<sup>81</sup> As for other relief, a judge was directed to disqualify himself in one case;<sup>82</sup> evidentiary hearings were specifically ordered in four cases;<sup>83</sup> and more specific findings of fact and conclusions of law were ordered in two cases.<sup>84</sup> In one case, the judgment was reversed and remanded for the trial court to determine, in its discretion, whether sentences should run consecutively or concurrently.<sup>85</sup> In summary, excluding double jeopardy cases, at least some degree of relief was granted to five appellants in 1981, seven in 1980, and eleven in 1979. No prisoners were released from custody.

Statistics are not available for relief accorded to Rule 27.26 claimants in circuit courts. It may be hoped, however, that the most egregious violations of due process would be recognized and the movants offered relief at the circuit court level.

By far the most frequently used ground for relief in Rule 27.26 cases is ineffective assistance of counsel. In 1979 and 1980, nearly fifty percent of Rule 27.26 petitioners claimed ineffective assistance of counsel. The percentage fell to thirty-five percent in 1981.<sup>86</sup>

79. *Morse v. State*, 591 S.W.2d 726, 727 (Mo. App., E.D. 1979) (sentence and judgment vacated, order to relieve trial counsel set aside, and movant given permission to file motion for new trial).

80. *LaFrance v. State*, 585 S.W.2d 317, 323 (Mo. App., W.D. 1979).

81. *Green v. State*, 581 S.W.2d 478, 481-82 (Mo. App., S.D. 1979) (movant pleaded guilty to stealing motor vehicle, but sentenced for first-degree burglary).

82. *Jackson v. State*, 585 S.W.2d 495, 497 (Mo. En Banc 1979).

83. *Chambers v. State*, 592 S.W.2d 542 (Mo. App., W.D. 1979) (ineffective assistance of counsel); *Andrews v. State*, 581 S.W.2d 436, 438 (Mo. App., E.D. 1979) (whether movant who pleaded guilty understood sentences were consecutive); *DeClue v. State*, 579 S.W.2d 158, 159-60 (Mo. App., E.D. 1979) (newly discovered evidence); *Richardson v. State*, 577 S.W.2d 653, 654-55 (Mo. En Banc 1979) (alleged violation of due process).

84. *Fowler v. State*, 588 S.W.2d 249, 249 (Mo. App., E.D. 1979); *Wilson v. State*, 585 S.W.2d 243, 244 (Mo. App., S.D. 1979).

85. *Baker v. State*, 584 S.W.2d 65, 69 (Mo. En Banc 1979).

86. According to the Lexis© computer system, 47% (65 of 137) of the Rule 27.26 cases in both 1979 and 1980 involved ineffective assistance of counsel. For 1981, 35% (61 of 174) of the cases cited by Lexis© involved ineffective assistance of counsel. Involuntary plea of guilty was the most frequent ground for motions in the early years of amended Rule 27.26. See *Anderson*, *supra* note 61, at 6.

It should be noted that Missouri courts do not recognize ineffective assistance

of counsel in handling a direct appeal as a ground for Rule 27.26 motions. *See, e.g.*, *Fields v. State*, 596 S.W.2d 776 (Mo. App., S.D. 1980); *Starr v. State*, 564 S.W.2d 335 (Mo. App., St. L. 1978). The proper motion to make in such a case is a "motion to recall the mandate." Daley, *supra* note 35, at 42 (citing *Hemphill v. State*, 566 S.W.2d 200, 208 (Mo. En Banc 1978)). Nor do the courts recognize ineffective assistance of counsel in Rule 27.26 motions as a ground for appeal of Rule 27.26 denials:

Were a prisoner permitted to challenge the effectiveness of his legal counsel at the first 27.26 hearing by means of filing a second 27.26, then he could likewise challenge his representation at the second hearing by filing a third 27.26, and so on ad infinitum. That patent absurdity would intolerably clutter the courts and would reduce the whole legal process to ridicule.

*Williams v. State*, 507 S.W.2d 664, 666 (Mo. App., K.C. 1974). *See also* *McCormick v. State*, 502 S.W.2d 324, 326 (Mo. 1973); *Duncan v. State*, 524 S.W.2d 140, 142 (Mo. App., St. L. 1975).

Rule 27.26 appointed attorneys can be held liable for malpractice: "[D]efense counsel who is appointed by the court . . . has exactly the same duties and burdens and responsibilities as the highly paid, paid-in-advance criminal defense lawyer." Burger, *Counsel for the Prosecution and Defense—Their Roles Under the Minimum Standards*, 8 AM. CRIM. L.Q. 2, 6 (1969). On the related question of lack of immunity against prosecution for malpractice in state court of an attorney appointed by a federal judge for a federal trial, see *Ferri v. Ackerman*, 444 U.S. 193, 201 (1979).

The standard for effective assistance of trial counsel was reworked recently in *Seales v. State*, 580 S.W.2d 733 (Mo. En Banc 1979). The "fair trial" standard used in Missouri, the Missouri Supreme Court said, was "expressed differently" than the standard used in the United States Court of Appeals for the Eighth Circuit. In order to ensure uniformity between state and federal courts, the Eighth Circuit standard was adopted prospectively. *Id.* at 736-37. It has two parts. First, "[t]he accepted standard for effectiveness of trial counsel is now established as that degree of performance which conforms to the care and skill of a reasonably competent lawyer rendering similar services under the existing circumstances." *Id.* at 735 (quoting *United States v. Easter*, 539 F.2d 663, 666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844 (1977)). Second, the petitioner must show that his attorney's behavior prejudiced the petitioner. *Id.* at 735. *See also* *McQueen v. Swenson*, 498 F.2d 207, 218 (8th Cir. 1974). Whether there is much difference between the old and new standards is debatable. For a discussion of the new standard, see Popper, *supra* note 21, at 604-08; Wolff & Lemp, *supra* note 34. The "fair trial" standard replaced the older Missouri standard of "farce and . . . mockery of justice, shocking to the conscience of the Court." *Cardarella v. United States*, 375 F.2d 222, 230 (8th Cir.), *cert. denied*, 389 U.S. 882 (1967). *See* MO. BAR C.L.E., POST-CONVICTION REMEDIES § 32.15 (1978).

Missouri Supreme Court Chief Justice Donnelly says that the United States Supreme Court has not told the states what ineffective assistance of counsel is, even though *Powell v. Alabama*, 283 U.S. 45 (1932), says that it must be prevented. Interview with Missouri Supreme Court Chief Justice Robert Donnelly, in Jefferson City, Missouri (Aug. 12, 1981). The Missouri Court of Appeals for the Western District notes that "[w]hatever the formulation of the standard, its application to given fact situations will be difficult." *Benson v. State*, 611 S.W.2d 538, 544 (Mo. App., W.D. 1980).



#### IV. CONSIDERATIONS IN PROVIDING POSTCONVICTION RELIEF

##### A. *Finality: Federal Habeas Corpus Cases*

Although *Fields* states that “[f]inality is a central aspect of Rule 27.26,”<sup>87</sup> it is not necessarily achieved even after appeal of a Rule 27.26 case. As one author says, “Perhaps the primary reason for appeal is the hope of obtaining federal habeas corpus relief after the prisoner has exhausted his Missouri post-conviction remedies, which include a 27.26 appeal.”<sup>88</sup> Federal law requires that a prisoner exhaust state remedies prior to pursuing federal habeas corpus relief.<sup>89</sup>

Habeas corpus petitioners in Missouri federal district courts did not fare well, either. In thirty-six of thirty-eight reported cases from 1978 to 1981, relief was denied or the case was dismissed.<sup>90</sup> In sixteen of these cases, a failure

87. 572 S.W.2d at 483. The court also quoted a passage from one of the trilogy of cases that precipitated the 1967 revision of Rule 27.26:

Both the individual criminal defendant and society have an interest in insuring that there will at some point be the certainty that comes with an end to litigation, and that attention will ultimately be focused not on whether a conviction was free from error but rather on whether the prisoner can be restored to a useful place in the community. It is with this interest in mind, as well as the desire to avoid confinements contrary to fundamental justice, that courts and legislatures have developed rules governing the availability of collateral relief.

*Id.* at 481 (quoting *Sanders v. United States*, 373 U.S. 1, 24-25 (1963)). The Missouri Supreme Court added, “Our experience in Missouri is no exception.” 572 S.W.2d at 481.

88. *Anderson*, *supra* note 61, at 4 (footnote omitted).

89. The relevant federal statute provides:

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

28 U.S.C. § 2254 (1976). The exhaustion of state remedies requirement “gives state courts the opportunity to pass upon and correct errors of federal law in the state prisoner’s conviction.” *Fay v. Noia*, 372 U.S. 391, 437-38 (1963).

90. As in their Missouri predecessors, the most frequent ground cited in federal postconviction relief petitions was ineffective assistance of counsel. Grounds for petition listed in order of frequency are as follows: (1) **Ineffective assistance of counsel:** *Veneri v. Circuit Court*, 528 F. Supp. 496 (E.D. Mo. 1981); *Dunn v. Wyrick*, 528 F. Supp. 448 (E.D. Mo. 1981); *Johnson v. Wyrick*, 501 F. Supp. 174 (E.D. Mo. 1980), *cert. denied*, 102 S. Ct. 1013 (1981); *Brown v. Wyrick*, 496 F. Supp. 177 (E.D.

to exhaust state remedies was cited as the reason for denial or dismissal.<sup>91</sup> The closely related principle of comity also was invoked to deny relief or

Mo. 1980); *Frankoviglia v. Wyrick*, 495 F. Supp. 167 (E.D. Mo. 1980); *McLallen v. Wyrick*, 494 F. Supp. 138 (W.D. Mo. 1980); *Agee v. Wyrick*, 480 F. Supp. 24 (W.D. Mo. 1979); *Cody v. Missouri Board of Probation and Parole*, 468 F. Supp. 431 (W.D. Mo. 1979); *Boothe v. Wyrick*, 452 F. Supp. 1304 (W.D. Mo. 1978). (2) **Insufficiency of evidence:** *Simpson v. Wyrick*, 527 F. Supp. 1144 (W.D. Mo. 1981); *Moore v. Wyrick*, 510 F. Supp. 1214 (E.D. Mo. 1981); *Cole v. Wyrick*, 505 F. Supp. 69 (E.D. Mo. 1980); *Greenhaw v. Wyrick*, 472 F. Supp. 730 (W.D. Mo. 1979); *Boothe v. Wyrick*, 452 F. Supp. 1304 (W.D. Mo. 1978). (3) **Conspiracy by public officials:** *Seltzer v. Missouri*, 517 F. Supp. 1253 (E.D. Mo. 1981); *Franklin v. Webb*, 510 F. Supp. 812 (E.D. Mo. 1981); *McClain v. Kitchen*, 505 F. Supp. 862 (E.D. Mo. 1981); *Frankoviglia v. Wyrick*, 495 F. Supp. 167 (E.D. Mo. 1980); *United States ex rel. Tyler v. Hall*, 444 F. Supp. 104 (E.D. Mo. 1978). (4) **Involuntary guilty plea:** *Dunn v. Wyrick*, 528 F. Supp. 448 (E.D. Mo. 1981); *Greenhaw v. Wyrick*, 472 F. Supp. 730 (W.D. Mo. 1979). (5) **Improper jury selection:** *Conley v. White*, 470 F. Supp. 1 (W.D. Mo. 1979); *Ross v. Wyrick*, 446 F. Supp. 178 (E.D. Mo. 1978). (6) **Statutory attacks:** *Moore v. Wyrick*, 510 F. Supp. 1214 (E.D. Mo. 1981) (construction of statute); *Green v. Wyrick*, 462 F. Supp. 357 (W.D. Mo. 1978) (statute unconstitutional); *Boothe v. Wyrick*, 452 F. Supp. 1304 (W.D. Mo. 1978) (statute erroneously applied). (7) **Double jeopardy:** *Simpson v. Wyrick*, 527 F. Supp. 1144 (W.D. Mo. 1981); *Burnside v. Wyrick*, 501 F. Supp. 1389 (W.D. Mo. 1980); *Turner v. Wyrick*, 452 F. Supp. 397 (E.D. Mo. 1978). (8) **Improper jury instructions:** *Cole v. Wyrick*, 505 F. Supp. 69 (E.D. Mo. 1980); *Boothe v. Wyrick*, 452 F. Supp. 1304 (W.D. Mo. 1978); *Young v. Wyrick*, 451 F. Supp. 576 (W.D. Mo. 1978). (9) **Excessive sentence:** *Jenkins v. Wyrick*, 480 F. Supp. 301 (E.D. Mo. 1979); *Brooks v. Wyrick*, 486 F. Supp. 939 (E.D. Mo. 1979). (10) **Petitioner not given informants' names:** *Johnson v. Wyrick*, 501 F. Supp. 174 (E.D. Mo. 1980), *cert. denied*, 102 S. Ct. 1013 (1981); *Turner v. Wyrick*, 452 F. Supp. 397 (E.D. Mo. 1978). (11) **Miscellaneous grounds:** *Dunn v. Wyrick*, 528 F. Supp. 448 (E.D. Mo. 1981) (lack of jurisdiction); *Cox v. Wyrick*, 528 F. Supp. 363 (E.D. Mo. 1981) (defendant prevented from testifying); *United States ex rel. Cummings v. Wyrick*, 525 F. Supp. 142 (E.D. Mo. 1981) (prejudicial evidence allowed); *Thomas v. Wyrick*, 520 F. Supp. 139 (E.D. Mo. 1981) (character witnesses not allowed); *Lee v. Wyrick*, 499 F. Supp. 310 (E.D. Mo. 1980) (lack of jurisdiction, no probable cause); *Franco v. Wyrick*, 465 F. Supp. 679 (W.D. Mo. 1979) (denial of right to cross-examine witness).

91. *Veneri v. Circuit Court*, 528 F. Supp. 496 (E.D. Mo. 1981); *Dunn v. Wyrick*, 528 F. Supp. 448 (E.D. Mo. 1981); *Moore v. Wyrick*, 510 F. Supp. 1214 (E.D. Mo. 1981); *Franklin v. Webb*, 510 F. Supp. 812 (E.D. Mo. 1981); *McClain v. Kitchen*, 505 F. Supp. 862 (E.D. Mo. 1981); *Johnson v. Wyrick*, 501 F. Supp. 174 (E.D. Mo. 1980), *cert. denied*, 102 S. Ct. 1013 (1981); *McLallen v. Wyrick*, 494 F. Supp. 138 (W.D. Mo. 1980); *Jenkins v. Wyrick*, 480 F. Supp. 301 (E.D. Mo. 1979); *Greenhaw v. Wyrick*, 472 F. Supp. 730 (W.D. Mo. 1979); *Conley v. White*, 470 F. Supp. 1 (W.D. Mo. 1979); *Green v. Wyrick*, 462 F. Supp. 357 (W.D. Mo. 1978); *Boothe v. Wyrick*, 452 F. Supp. 1304 (W.D. Mo. 1978); *Gregg v. Wyrick*, 449 F. Supp. 969 (W.D. Mo. 1978); *Thompson v. White*, 442 F. Supp. 1269 (E.D. Mo. 1978); *United States ex rel. Tyler v. Goins*, 444 F. Supp. 95 (E.D. Mo. 1978).

Failure to exhaust state remedies, however, was held not fatal to two habeas corpus petitions. See *Thomas v. Wyrick*, 520 F. Supp. 139, 140 (E.D. Mo. 1981)

dismiss petitions.<sup>92</sup> In two cases, writs of habeas corpus were granted, but even in these cases the effects were stayed to allow Missouri courts an opportunity to retry the petitioners.<sup>93</sup>

The reluctance of federal courts to overturn state postconviction determinations was emphasized in 1981 and 1982 by the United States Supreme Court. In *Sumner v. Mata*,<sup>94</sup> the Court reiterated its position that determinations of fact, made by a state court of proper jurisdiction and "evidenced in writing," are to be presumed correct in federal habeas corpus cases.<sup>95</sup> In *Rose v. Lundy*,<sup>96</sup> the Court held that federal district judges must dismiss habeas corpus cases brought by state prisoners if state procedures were not exhausted with regard to some of the claims, even though they were exhausted for other claims in the petition.<sup>97</sup> This raises some questions about the decision of the United States Court of Appeals for the Eighth Circuit in *Seemiller v. Wyrick*,<sup>98</sup> which held that if the state courts were too slow in deciding habeas corpus claims, the federal courts could proceed although state remedies had not been exhausted.<sup>99</sup> In short, Missouri's federal district courts and the United States Supreme Court show little eagerness to interfere with state court decisions in postconviction cases.

Perhaps partly in response to this unwillingness, the number of federal habeas corpus petitions is decreasing,<sup>100</sup> and the trend is evident in

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(federal district court to hear claim because pending in that court since 1979); *Burnside v. Wyrick*, 501 F. Supp. 1389, 1390 (W.D. Mo. 1980) (exhaustion not required, petitioner's claim without merit). The validity of these decisions is doubtful in light of a 1982 United States Supreme Court decision. See text accompanying notes 96-97 *supra*.

92. "One well known tenet [sic] of federalism is the policy against interfering with state court proceedings." *Seltzer v. Missouri*, 517 F. Supp. 1253, 1254 (E.D. Mo. 1981). The United States Supreme Court has said, "The rule of exhaustion in federal habeas corpus actions is rooted in considerations of federal-state comity." *Preiser v. Rodriguez*, 411 U.S. 475, 491 (1973).

93. *McLallen v. Wyrick*, 498 F. Supp. 137, 139 (W.D. Mo. 1980) (involuntary confession due to promise of leniency); *Toliver v. Wyrick*, 469 F. Supp. 583, 607-08 (W.D. Mo. 1979) (violations of sixth amendment and *Miranda*).

94. 449 U.S. 539 (1981).

95. *Id.* at 547-48. See also *Townsend v. Sain*, 372 U.S. 293, 312-13 (1963); *McQueen v. Swenson*, 498 F.2d 207, 213 (8th Cir. 1974); 28 U.S.C. § 2254(d) (1976).

96. 102 S. Ct. 1198 (1982) (plurality).

97. *Id.* at 1199.

98. 663 F.2d 805 (8th Cir. 1981).

99. *Id.* at 807-08.

100. The following table categorizes petitions filed by state prisoners in United States District Courts in recent years:

Year	Total Petitions	Habeas Corpus	Mandamus Etc.	Civil Rights
1975	14,260	7,843	289	6,128
1976	15,029	7,833	238	6,958

Missouri.<sup>101</sup> The number of filings for appeal in federal habeas corpus cases is increasing, however, in the Eighth Circuit.<sup>102</sup> It seems that, while fewer prisoners are filing federal habeas corpus petitions, more are appealing denials or dismissals.

Since the 1963 trilogy of United States Supreme Court cases,<sup>103</sup> there has been some tightening of the reins on federal habeas corpus review. *Fay v. Noia* took a strong stand on the necessity of federal review, speaking of the "power and duty" of the federal courts to provide effective remedies to those deprived of liberty without due process.<sup>104</sup> The Court stressed that conventional notions of finality would not be allowed to defeat federal review:<sup>105</sup> "[W]e have consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by anything that may occur in the state court proceedings. State procedural

Year	Total Petitions	Habeas Corpus	Mandamus Etc.	Civil Rights
1977	14,846	6,866	228	7,752
1978	16,969	7,033	206	9,730
1979	18,502	7,123	184	11,195
1980	19,574	7,031	146	12,397
% change (1980/1975)	37.3	-10.4	-49.5	102.3

ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF DIRECTOR 62 (1980). Federal public defender offices likewise show a downward trend in demand for their services. Thirty-two federal public defender and seven community defender organizations existed in mid-1980, up one from 1979. The volume of cases assigned to federal public defenders, however, decreased 1.2% from 1979 to 13,913 cases in fiscal 1980. Interestingly, the number of hours in court per closed case spent by federal public defenders in the United States District Court for the Western District of Missouri is the lowest in the nation at .7 hours. *Id.* at 117.

101. Federal habeas corpus filings by state prisoners in Missouri district courts were as follows:

Fiscal Year	Western District	Eastern District
1978	105	101
1979	106	79
1980	66	84

Telephone interview with Lorraine Jenkins, Administrative Office of U.S. Courts, Washington, D.C. (Sept. 22, 1981).

102. The figures for the United States Court of Appeals for the Eighth Circuit are as follows:

Fiscal Year	State Prisoner Petitions	Total Filings
1978	86	986
1979	87	970
1980	114	1147

ADMINISTRATIVE OFFICE OF U.S. COURTS, ANNUAL REPORT OF DIRECTOR 46 (1980); *id.* at 48 (1979); *id.* at 47 (1978).

103. See notes 15-16 and accompanying text *supra*.

104. 372 U.S. at 441.

105. *Id.* at 424.

rules plainly must yield to this overriding federal policy."<sup>106</sup> In 1977, the United States Supreme Court reassessed this "overriding federal policy" and rejected the sweeping language of *Fay*.<sup>107</sup> Citing the well-established principle of federalism that a decision made by a state court and grounded on adequate state substantive law is not amenable to federal review,<sup>108</sup> the Court extended this principle to preclude habeas corpus review of federal constitutional issues when an independent and adequate state procedural ground exists.<sup>109</sup> In the previous year, the Court held in *Stone v. Powell*<sup>110</sup> that where a state has afforded a state prisoner an opportunity for full and fair litigation of a fourth amendment claim that trial evidence was gained by an unconstitutional search and seizure, federal habeas corpus relief is not constitutionally required.<sup>111</sup> These decisions may indicate that *Fay* and its companion cases<sup>112</sup>—and federal review in general—have indeed had the salutary effect of improving state records and postconviction procedures.

### B. *The Need for State Postconviction Review*

Federalism is a prime reason for maintaining an effective postconviction relief system. With effective procedures, a state can preclude, to some degree, interference by federal district courts in state criminal cases. As one commentator concluded, "Missouri courts should be masters of their own criminal proceedings; they should maximize the finality of Missouri convictions."<sup>113</sup> A related interest promoted by effective state procedures is having decisions made by local judges: "[T]he trial court, familiar with the prior proceedings, generally represents the better and more expeditious forum for post-conviction proceedings."<sup>114</sup>

Postconviction relief procedures are also needed, regardless of the forum, because some constitutionally significant trial or pleading infirmities cannot be recognized in time for direct appeal. Such infirmities often will not

106. *Id.* at 426-27.

107. *Wainwright v. Sykes*, 433 U.S. 72, 88-89 (1977).

108. *Id.* at 82.

109. *Id.* The adequate state procedural ground in *Wainwright* was failure, under Florida law, to make a timely objection at trial to admission of a confession. *Id.* at 87-88. The Court said that when federal courts refuse to honor a state's contemporaneous objection rule, it "tends to detract from the perception of the trial of a criminal case in state court as a decisive and portentous event." *Id.* at 90. The procedural default rule is in effect in Missouri Rule 27.26 cases: "It is . . . settled law in Missouri that in our post-conviction relief practice under Rule 27.26, a procedural default bars review of even a constitutional claim in a 27.26 proceeding." *Benson v. State*, 611 S.W.2d 538, 541 (Mo. App., W.D. 1980).

110. 428 U.S. 465 (1976).

111. *Id.* at 481-82. *See* 42 MO. L. REV. 127 (1977).

112. *See* notes 15-16 and accompanying text *supra*.

113. *Anderson, supra* note 61, at 46.

114. *Tyler v. Swenson*, 427 F.2d 412, 417 (8th Cir. 1970). The American Bar Association agrees that the trial court is the preferable forum. *See* note 247 *infra*.

appear in trial or guilty plea records, and evidentiary hearings are required. Ineffective assistance of counsel, for example, is an infirmity that can best be resolved by a postconviction remedy.<sup>115</sup> It can affect the validity of a trial or guilty plea without being apparent during the proceedings. A prisoner might not even discover that his lawyer had a conflict of interest or failed to interview witnesses until the statutory period for appeal had lapsed.<sup>116</sup> The major hurdle for a direct appeal would be the lack of a complete record for review.<sup>117</sup> Missouri appellate courts almost invariably refuse to hear ineffective assistance of counsel claims on direct appeal except where adequate records exist for determining the merits.<sup>118</sup> Generally, an evidentiary hearing is required on a claim of ineffective assistance of counsel, and the appellate courts insist on Rule 27.26 as the appropriate procedure for the hearing.<sup>119</sup> Other constitutional infirmities, for the same reasons, may also require evidentiary hearings.<sup>120</sup>

In summary, postconviction review is necessary to protect constitutional rights to due process. The Missouri and United States Constitutions say habeas corpus must not be suspended,<sup>121</sup> and the United States Supreme Court has, in effect, said that if state courts do not provide adequate postconviction procedures, the federal courts will.<sup>122</sup> In the interests of justice, federalism, and finality, state courts need to provide effective postconviction review. It must be available to all if it is to be effective. It should be cost-effective. Thus, the question essentially becomes: How can the state provide quality review for all prisoners in the most cost-effective manner?

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115. Ineffective assistance of counsel is currently the most common ground for relief cited in postconviction petitions. See note 86 and accompanying text *supra*.

116. Even if the prisoner finds out in time to raise the issue on direct appeal, there is the complicating factor that the same lawyer who handles the trial generally handles the appeal. A different lawyer, of course, could be appointed and an extension of time for filing the appeal could be granted.

117. "In most cases the issue of ineffective assistance of counsel can best be raised in a postconviction motion under Rule 27.26 . . . because the issue usually arises after the trial has concluded and the facts pertinent thereto are not fully developed." *State v. McClain*, 541 S.W.2d 351, 357 (Mo. App., Spr. 1976) (citations omitted).

118. See, e.g., *State v. Larrabee*, 572 S.W.2d 250, 252 (Mo. App., K.C. 1978); *State v. Goodson*, 558 S.W.2d 318, 319 (Mo. App., St. L. 1977); *State v. Lindley*, 545 S.W.2d 669, 671 (Mo. App., St. L. 1976); *State v. Burns*, 537 S.W.2d 860, 863 (Mo. App., K.C. 1976).

119. See, e.g., *State v. Umfleet*, 587 S.W.2d 612, 615 (Mo. App., E.D. 1979); *State v. Crockett*, 543 S.W.2d 314, 322 (Mo. App., K.C. 1976).

120. Among these circumstances are denial of assistance of counsel during a critical stage, denial of the right to confront witnesses, incompetence to stand trial, and use of perjured testimony by the state. For a more complete list, see *McCrary v. State*, 529 S.W.2d 467, 483 (Mo. App., St. L. 1975).

121. See note 3 *supra*.

122. See note 16 and accompanying text *supra*.

## V. THE NEW PUBLIC DEFENDER SYSTEM

Regardless of the precise procedure used for postconviction review, the public defender system should be an integral part of it. Appointed counsel have proved too expensive,<sup>123</sup> and the quality of representation from conscripted, inexperienced attorneys has been questioned.<sup>124</sup> The newly enacted public defender system is a starting point for effective postconviction relief.

A. *An Overview*

On March 11, 1982, Governor Bond signed into law a bill that makes broad and much-needed changes in the public defender and appointed counsel system.<sup>125</sup> Because of the financial crisis in that system, the law went into effect on April 1, 1982.<sup>126</sup>

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123. See notes 40-47 and accompanying text *supra*.

124. See note 145 *infra*.

125. House Comm. Substitute for H.R. 1169, 81st Gen. Assem. Res. Sess. (1982). The public defender system will continue to operate under a seven-member, unsalaried commission. MO. REV. STAT. § 600.015.1, .5 (Cum. Supp. 1982), but no longer will a member of the Missouri Supreme Court automatically sit on the commission:

[T]he recommendation of the Commission is that no Justice of the Supreme Court should sit on the Commission. We say that for the very good reason that those people should not be put in the comprising [sic] position of having to help run a legislative program dealing with matters which severely affect constitutional rights and, at the same time, have to hear cases and decide cases in which those constitutional rights come in the [sic] question.

*Hearings, supra* note 1, at 5 (Kansas City, Mo. Sept. 23, 1981) (testimony of Burton Shostak). Nor did the Missouri Bar, in its proposal submitted as Senate Bill No. 790, want a supreme court judge on the commission. Its proposal said, "Judges, prosecutors and law enforcement officials shall not serve on the commission." S. 790, 81st Gen. Assem., 2d Sess. § 600.015.1 (1982). The judges also agreed that it would be better not to have one of their number on the commission. *Hearings, supra* note 1, at 25-26 (Kansas City, Mo. Sept. 23, 1981) (testimony of Missouri Supreme Court Judge John Bardgett).

All seven members of the commission will be selected by the "governor with the advice and consent of the senate." MO. REV. STAT. § 600.015.1 (Cum. Supp. 1982). Having the governor appoint all seven members is a new wrinkle in the system added by the legislature and not proposed by either the Public Defender Commission or the Missouri Bar. The Missouri Bar had proposed a 13-member commission. S. 790, 81st Gen. Assem., 2d Sess. § 600.015.1 (1982).

126. MO. REV. STAT. §§ 600.010-.900 (Cum. Supp. 1982). The public defender system was established to handle felony cases in 14 of Missouri's 43 judicial circuits in 1972. The system expanded to 18 circuits in 1976 and its scope of service was enlarged to include juvenile and misdemeanor cases. The Public Defender Commission also was established in 1976. Annual Statistical Report, *supra* note 30, at 1 (1979-1980). In 1980, the General Assembly added six additional judicial circuits to the public defender program. *Id.* at 1-2. Public defender services thus were available to roughly 76% of Missourians, or 3.7 million persons. *Id.* at 2.

Under the prior law, the Public Defender Commission administered the budget

Costs for appointed counsel quadrupled in the five years after 1976, and legislative appropriations did not keep pace.<sup>127</sup> In response to the financial crisis created by inadequate funding, the Missouri Supreme Court set temporary guidelines for the appointment of counsel to indigents,<sup>128</sup> and the Public Defender Commission put ceilings on the amounts appointed counsel could charge regardless of the number of hours spent on a case.<sup>129</sup> Perhaps Chief Justice Donnelly best summed up the public defender system; he called it “undernourished and overworked.”<sup>130</sup>

On a per-case basis, it has been more than twice as expensive for the state to have appointed counsel represent an indigent client than to have a public defender do so.<sup>131</sup> Therefore, the Public Defender Commission has

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and operations of the public defender and appointed counsel system. It appointed public defenders for four-year terms, while the court could appoint private counsel if there was no public defender or if the public defender was disqualified. MO. REV. STAT. §§ 600.015.1, .020.2, .075 (1978) (repealed 1982). Separate funds were appropriated for the public defender program and for appointed counsel, as shown below:

Fiscal Year	Public Defender	Appointed Counsel	Total
1975-76	\$1,365,733	\$411,754	\$1,777,487
1976-77	\$1,417,636	\$ 865,485	\$2,283,121
1977-78	\$1,817,473	\$ 735,000	\$2,552,473
1978-79	\$1,948,234	\$ 776,000	\$2,724,234
1979-80	\$2,280,347	\$1,126,820	\$3,407,167

Annual Statistical Report, *supra* note 30, at 7 (1979-1980). The figures of the Missouri State Auditor vary slightly. *See* Auditor’s Report, *supra* note 41, at 8. For 1981, the auditor lists public defender expenditures as \$2,273,262 and appointed counsel expenditures as \$1,387,557 for a total of \$3,660,819. *Id.* at 43. The entire public defender and appointed counsel system operated under a statutory budget ceiling, which was set at \$5,000,000 for fiscal 1981 and 1982. Annual Statistical Report, *supra* note 30, at 2 (1979-1980). For fiscal years 1977 and 1978, the ceiling was \$2.8 million dollars. *Id.* at 1 (1977-1978). For fiscal years 1979 and 1980, the ceiling was \$3.5 million. *Id.* at 2 (1979-1980).

127. *See* notes 40-44 and accompanying text *supra*.

128. *See* note 32 *supra*.

129. *See* note 43 *supra*.

130. Address by Robert Donnelly, Chief Justice of the Missouri Supreme Court, to the 102nd Annual Meeting of the Missouri Bar Association in Kansas City, Missouri (Sept. 24, 1981), *reprinted* in Donnelly, *The State of the Judiciary in Missouri*, 37 J. MO. B. 515, 517 (1981). According to Howard Eisenberg, Executive Director of the National Legal Aid and Defender Association, “Nationally \$1.49 is spent per capita for indigent defense in the United States on an average of all 52 jurisdictions including the District of Columbia and Puerto Rico. Missouri is 46th on that list at 79¢ per capita.” *Hearings, supra* note 1, at 83 (Kansas City, Mo. Sept. 23, 1981).

131. A comparison of costs between public defenders and appointed counsel appears in the following table:



maintained that "appointed counsel to the greatest extent possible should be eliminated from the system."<sup>132</sup> The new public defender system accomplishes this goal.

While formerly there were statutorily-mandated area restrictions for public defender offices, the new law allows offices to be established, or in some cases eliminated, where needed.<sup>133</sup> To meet needs in areas where public

Fiscal Year	Public Defenders		Appointed Counsel	
	Cases	Cost/Case	Cases	Cost/Case
1975-76	13,968	\$98	2,216	\$186
1976-77	24,136	\$59	2,932	\$296
1977-78	22,963	\$79	3,374	\$218
1978-79	28,338	\$69	3,305	\$235
1979-80*	20,810	\$110	3,194	\$353

\*For 1979-80, a new method was used to gain greater uniformity in reporting caseloads. Some public defender offices previously had reported their caseloads by counts filed, causing some inflation in the figures. Annual Statistical Report, *supra* note 30, at 7-8 (1979-1980). The costs per case for public defenders, however, do not include the hidden costs of staff support. *Hearings, supra* note 1, at 102 (St. Louis, Mo. Oct. 7, 1981) (testimony of Judge Richardson).

132. *Hearings, supra* note 1, at 8 (Kansas City, Mo. Sept. 23, 1981) (testimony of Burton Shostak). The State Auditor agrees: "[A]ny changes in procedures which shift representing the indigent from appointed counsel to public defenders appear to be moves in the right direction." Auditor's Report, *supra* note 41, at 37.

133. MO. REV. STAT. § 600.021.4 (Cum. Supp. 1982). Gone from the statute is the exclusion of Judicial Circuit 31, Greene County, from having a public defender. *See* MO. REV. STAT. § 600.010 (1978 & Cum. Supp. 1981) (repealed 1982). Both the Public Defender Commission and Missouri Bar had proposed elimination of the Greene County exclusion. S. 790, 81st Gen. Assem., 2d. Sess. (1982); Public Defender Commission Proposal 1, Draft 1 (1981). The State Auditor also recommended that a public defender office be established in Greene County. Auditor's Report, *supra* note 41, at 37. Some Greene County attorneys had been making as much as \$10,000 a year as appointed counsel. One attorney, for example, made \$10,819.50 on 25 cases in fiscal 1981 prior to use of fiscal 1982 funds to pay any further obligations owed to court-appointed attorneys. Missouri Supreme Court, Financial Accounting System Accounts Payable Disbursement Register (July 1, 1980-Aug. 31, 1981). Another attorney collected \$9,656.75 for 21 cases. Half-a-dozen other attorneys earned between \$5,230.50 and \$8,355.25 as appointed counsel in Greene County. *Id.* Greene County had a volunteer system for court appointment to represent indigents; if a lawyer was not on the list of volunteers, he or she would not be appointed. *Hearings, supra* note 1, at 24 (Kansas City, Mo. Sept. 23, 1981) (testimony of Senator Bradshaw); telephone interview with Senator Bradshaw (Oct. 21, 1981). But Senator Bradshaw noted that because of scant funding, the volunteer system was not working as well in 1981 as it had in 1980. Telephone interview, *supra*.

On the other hand, in sparsely populated areas where public defender offices are not cost-effective, the Commission can now eliminate those offices altogether. For example, the public defender office in Judicial Circuit 40, Newton and McDonald Counties, has not been cost-effective. *Hearings, supra* note 1, at 5 (St. Louis, Mo.

defenders are not cost-effective or where there are conflict cases, the Commission may contract with private attorneys to provide representation.<sup>134</sup> Contracting with counsel is greatly facilitated by the centralization and autonomy that the new office of the director will provide.<sup>135</sup> The director has the power to contract with private attorneys on a case-by-case basis “as

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Oct. 7, 1981) (testimony of Burton Shostak). But since it has a population over 75,000, MO. REV. STAT. § 600.010 (1978) (repealed 1982) mandated that it have a public defender office.

134. It may do so “in such areas of the state and on such terms as it deems appropriate.” MO. REV. STAT. § 600.021.6 (Cum. Supp. 1982). Conflicts arise, for instance, in cases involving co-defendants. The number of conflict cases has been substantial. In fiscal 1980, 848 appointed counsel billings came from circuits which have public defenders. That number constituted roughly one-fourth of the total billings for appointed counsel and accounted for 44% of the total cost of appointed counsel. Annual Statistical Report, *supra* note 30, at 23 (1979-1980). The price tag was \$499,013. In fiscal 1979, 37% of the total cost for appointed counsel came from public defender circuits, amounting to \$326,192. Auditor’s Report, *supra* note 41, at 36. On an average, public defender circuits spent 17.9% of their total outlays for appointed counsel in fiscal 1980 and 14.3% in fiscal 1979. *Id.* Due to a high number of conflict cases, some of the highest costs for appointed counsel in the 43 judicial circuits were incurred in circuits which had public defenders. In 1980, the highest total cost for appointed counsel in any circuit was for Judicial Circuit 22, St. Louis City, with a total cost of \$167,981. Judicial Circuit 16, Jackson County, was third on the list at \$120,382, while Judicial Circuit 21, St. Louis County, was fourth with a cost of \$96,805. *Id.* at 44. It should be noted that these three areas combined provide almost half of the prisoner population in Missouri and thus offer many opportunities for co-defendant conflicts. MISSOURI DIVISION OF CORRECTIONS, BIENNIAL REPORT 43, 48 (1976-1978); *id.* at 67 (1978-1980).

135. MO. REV. STAT. § 600.019 (Cum. Supp. 1982). The autonomy of the state public defender is apparent from the language of the statute: “The office of state public defender is hereby created and established as an independent department of the judicial branch of state government.” *Id.* § 600.019.1. The Public Defender Commission is to appoint a lawyer experienced in criminal defense as the director. *Id.* § 600.019.2. The director will devote full time to his office, serving a four-year term at a salary set by the commission but not to exceed the salary of a circuit judge. *Id.* § 600.019.3, .4.

Gone from the public defender and appointed counsel system is the Office of State Courts Administrator, which in the past provided support staff. *See* MO. REV. STAT. § 600.015.6 (1978) (repealed 1982). The Public Defender Commission will now select its own staff, providing more autonomy for the new system. *Id.* § 600.017.2 (Cum. Supp. 1982). The old system was “burdensome” to the Office of State Courts Administrator, and the new system should be “better served” by its own staff and people. *Hearings, supra* note 1, at 7 (Kansas City, Mo. Sept. 23, 1981) (testimony of Burton Shostak). *See also id.* at 26 (testimony of Judge Bardgett). The budget will be “submitted directly to the governor and general assembly by the director,” after approval by the Commission. MO. REV. STAT. § 600.040.2 (Cum. Supp. 1982). The budget formerly was submitted by the Office of State Courts Administrator as part of the Judicial Budget.

the commission deems necessary considering the needs of the area."<sup>136</sup> Fees will be established by the Commission.<sup>137</sup>

Public defenders will continue to serve four-year terms. The Commission was hampered in the past by low, inflexible, statutorily set wages, but no longer are specific wages mandated by statute. Wage flexibility should help alleviate the earlier recruitment and turnover problems.<sup>138</sup> The provi-

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136. MO. REV. STAT. § 600.042.1(10) (Cum. Supp. 1982). *See also id.* § 600.011.1. For the prior statute on contracting, see *id.* § 600.080 (1978) (repealed 1982). The Executive Director of the National Legal Aid and Defender Association had advised against a contract system where one lawyer or a group of them agrees either to represent all indigents or a certain number of them for a specified fee. Although contract systems have appeal as being cheap, they do not have a "suitable track record." H. Eisenberg, Remarks to the Joint Judiciary Committees of the Missouri Senate and House of Representatives, at 18-20 (Sept. 23, 1981)(memorandum circulated to Committee members during *Hearings, supra* note 1). Experiments with contract systems in San Diego, California, and Vancouver, Washington show an initial low bid followed by a great increase in costs in the second and third years. Vancouver subsequently abandoned its contract system. *Id.*

Another organization warns that "in no event should the state's contract for defender services be let on the basis of competitive bidding, since the inevitable result of such a practice is to undermine the quality of services." National Study Commission on Defense Services, *Model State Defender Act*, in GUIDE TO ESTABLISHING A DEFENDER SYSTEM 104 (National Institute of Law Enforcement and Criminal Justice, 1978).

137. MO. REV. STAT. § 600.042.1(10) (Cum. Supp. 1982).

138. The compensation for public defenders will now be set by the Commission. *Id.* § 600.021.3. The Commission should be able to close some of the gap between public defenders' and prosecuting attorneys' salaries. Statutorily set salaries for public defenders have lagged far behind those for prosecuting attorneys, as has the number of assistants statutorily permitted. In circuits with a population exceeding 500,000, public defenders received an annual salary of \$29,500; in all other circuits the annual salary was \$24,000. *Id.* § 600.030 (1978) (repealed 1982). This represented a raise, effective July 1, 1979, from \$22,000 in the metropolitan areas and \$17,500 elsewhere. From 3 to 21 assistant public defenders could be appointed, depending on the description and size of the circuit, at pay ranging from \$10,000 to \$23,000 per year. Assistants were appointed by and served at the pleasure of a circuit's public defender. *Id.* § 600.035.

Prosecuting attorneys do not have their salaries statutorily set in St. Louis County or Jackson County (Kansas City), which have charter forms of government. The pay in St. Louis County is \$40,000 per year and will be raised to \$55,000 on January 1, 1983. Telephone interview with Alice Griner, secretary to St. Louis County Prosecuting Attorney Buzz Westfall (Mar. 23, 1982). In Jackson County, the pay is \$42,500 per year. Telephone interview with Vicky Maxon, Jackson County Supervisor of Classification and Compensation (Mar. 23, 1982). The maximum salary set by statute in non-charter counties is \$45,000.

Turnover was a problem under the old system: "I get a tremendous turnover. As soon as the lawyers know how to try a case, they're being gobbled up by law firms or they're out in private practice," says William Shaw, Public Defender of the 21st Judicial Circuit (St. Louis County). *Hearings, supra* note 1, at 35 (St. Louis,

sion that had set a maximum equivalent to 137 full-time employees<sup>139</sup> is also eliminated from the new statute. Without that limit, there will be more flexibility to ease public defenders' caseloads.<sup>140</sup>

Along with the power to expand public defender services into new areas, hire new personnel, and increase wages of public defenders, the new law removes the rigid spending ceiling that formerly hampered the system.<sup>141</sup> With elimination of the statutory ceiling, the legislature has granted some financial flexibility to match the new flexibility in staffing and wages.

Changes were also made in the determination of indigency and in recoupment. Indigency will now be determined in the first instance by public defenders instead of courts, but an appeal may be made to the court having jurisdiction.<sup>142</sup> Recoupment of amounts paid for legal representation by the

Mo. Oct. 7, 1981). Tim Braun, public defender for the 11th Judicial Circuit, testified that the average turnover in his office for assistants being paid \$10,000 per year was roughly eight months. *Id.* at 120. The low salaries paid to public defenders were certainly a cause for this turnover. *Id.* at 84 (testimony of Judge Carl Gaertner). Public defenders have received only one pay raise in nine years and have received no cost-of-living adjustments. *Id.* at 38 (testimony of William Shaw). Burton Shostak says the public defender system lost personnel because of an inability to raise salaries, and he requested flexibility in salaries. *Id.* at 8.

139. MO. REV. STAT. § 600.035 (1978) (repealed 1982).

140. The public defenders' caseload and its effect on the quality of their work has been a matter of some concern. In an exchange between Joe Downey, Public Defender for the 22nd Judicial Circuit (St. Louis County) and Senator Bradshaw from Springfield, Downey said that his office, with one part-time and twenty full-time lawyers, handled 9118 cases in fiscal 1980-81, at an average cost of \$65.02 per case. The felony lawyers in his office averaged 240 cases per year, which as Senator Bradshaw stated, is "about six short of being one-a-day felony cases." Senator Bradshaw questioned whether any lawyer could competently handle a felony case a day. The statistics, to him, indicated that, through no fault on the part of the public defenders, "indigents are not being adequately defended." *Hearings, supra* note 1, at 128-29 (St. Louis, Mo. Oct. 7, 1981). In another exchange, the public defender from the 11th Judicial Circuit, Tim Braun, who quoted 262 as the number of cases per full-time lawyer handled in his office, agreed with Senator Bradshaw that the only way so many cases could be handled was through a "phenomenal number" of them being plea bargained. *Id.* at 120, 124.

An imbalance also was perceived in the use of investigators by prosecuting attorneys while public defenders had none. Interview with Betty Wilson, member of the Public Defender Commission (Oct. 13, 1981). *See* MO. REV. STAT. § 56.151 (1978). Under the new statutes, the director of the public defender system, with the approval of the Commission, will have the power to appoint investigators. *Id.* § 600.042.1(3) (Cum. Supp. 1982). *See also id.* § 600.021.5.

141. MO. REV. STAT. § 600.160 (Cum. Supp. 1981) (repealed 1982) (maximum expenditures of \$5 million). The Public Defender Commission had proposed eliminating the ceiling in its first proposal but maintained the ceiling in Proposal 2. Public Defender Commission, Proposal 2, Draft 1 (1981).

142. MO. REV. STAT. § 600.086.3 (Cum. Supp. 1982). The statute has expanded the determination of indigency from a consideration of the "circumstances  
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state has a new set of teeth.<sup>143</sup> Contribution can now be required as a precon-

of the case” to a more explicit listing of considerations—“including his ability to make bond, his income and the number of persons dependent on him for support.” *Id.* § 600.086.1. The Commission will, as it previously did, provide further guidelines for determining indigency. *Id.* § 600.086.2. An innovation is that the director or those serving under him are empowered to make investigations into the financial status of anyone seeking a public defender’s services. *Id.* § 600.086.5. The Public Defender Commission believed that the statutes should contain no definition of indigency, but that the Commission instead should define it. *Hearings, supra* note 1, at 10 (Kansas City, Mo. Sept. 23, 1981) (testimony of Burton Shostak).

The problem of who should determine indigency and what criteria should be used in appointing counsel has been much debated. Shostak thinks that public defenders should determine indigency. *Id.* at 10. Judge Bardgett, a member of the Missouri Supreme Court who served on the Public Defender Commission, agrees. *Id.* at 30-33. Judge Mauer from Jackson County disagreed, fearing it could be damaging to the attorney-client relationship. *Id.* at 74. The Model State Defender Act has the defender determine indigency. *See* National Study Commission on Defense Services, *supra* note 136, at 110. State Auditor James Antonio, in a report critical of indigency determination in Missouri, used Delaware’s standards, established by a public defender administrative rule, to evaluate Missouri’s practice. Auditor’s Report, *supra* note 41, at 28. Antonio claimed that the study his office conducted showed that 19% of the determinations of indigency were inaccurate. *Id.* at 32. In his words, “I think it’s clear from the report . . . that the system . . . is significantly being abused . . .” *Hearings, supra* note 1, at 41 (Kansas City, Mo. Sept. 23, 1981). This finding of “significant abuse,” however, did not go unchallenged. *See id.* at 67, 70-71 (testimony of Bill Peters, Jackson County Circuit Judge). Further, it was pointed out that if costs of judge, clerk, bailiff, and prosecutor time had been considered, the cost for determining indigency would have been “rather staggering,” although those costs would not have been included in a budget. *Id.* at 90 (testimony of Howard Eisenberg). *See also id.* at 61 (testimony of Bob Berry, Associate Circuit Judge).

143. Recoupment only occurs, however, if a person is determined able to provide part or all of the costs of the state public defender services. MO. REV. STAT. § 600.090.1(a), (b) (Cum. Supp. 1982). An ability to pay was also required by *id.* § 600.130 (1978) (repealed 1982). Ability to pay also applies to parents or guardians of minors. *Cf. id.* § 600.086.5 (Cum. Supp. 1982) and *id.* § 600.110 (1978) (repealed 1982). Automatic recoupment was struck down by the United States Supreme Court as an impermissible burden on the right to counsel, *James v. Strange*, 407 U.S. 128 (1972), but recoupment conditioned on the ability to pay was sustained, *Fuller v. Oregon*, 417 U.S. 40 (1974).

From their passage in 1976, Missouri’s former recoupment statutes had less than glowing success:

Fiscal Year	Recovered Fees
1977	\$2,997
1978	\$4,604
1979	\$10,409
1980	\$16,091

dition of representation for those who are able to bear part of the cost.<sup>144</sup>

All in all, the new public defender system is a bold step forward in making quality legal representation available in the most cost-effective manner. Lawyers who handle many cases of the same type can develop an expertise which those unaccustomed to such work do not possess.<sup>145</sup> A public defender accustomed to the relevant law and procedure can process a case more quickly than an appointed counsel who must first familiarize himself with the basics. Perhaps more important, a person with expertise will be less likely to make

Annual Statistical Report, *supra* note 30, at 6 (1979-1980). Only .5% of the state's expenditures on public defenders and appointed counsel was recovered in 1980, and only .4% was recovered in 1979.

144. MO. REV. STAT. § 600.090.1(a) (Cum. Supp. 1982). The new statutes are broader than the old recoupment statutes, which only applied to criminal proceedings. *Id.* § 600.100 (1978) (repealed 1982). Rule 27.26 proceedings are civil in nature. MO. SUP. CT. R. 27.26(a). Thus if a person determined to be indigent had been able to pay all or part of the cost of his representation in a Rule 27.26 proceeding, he could not have been ordered to do so. As a practical matter, most prisoners can honestly qualify as indigents. Broadening the statute to cover postconviction proceedings, however, cannot harm real indigents and can plug the loophole which would exist if Rule 27.26 movants are provided representation under the new system. Repayment can still be made a condition of probation. MO. REV. STAT. § 600.093 (Cum. Supp. 1982). This is similar to *id.* § 600.135.3 (1978) (repealed 1982). Defaults in payments are no longer listed as grounds for contempt citations, however. *See id.* § 600.140.

Another change in the recoupment provision is that the "reasonable value of the services . . . may in all cases be a lien on any and all property to which the defendant shall have or acquire an interest." *Id.* § 600.090.2(a) (Cum. Supp. 1982). That part of the claim approved by the court will then be a judgment at law, which the prosecuting attorney may enforce, compromise, or, with the director's concurrence, forego. *Id.* § 600.090.2(b), (c), (d). The former public defender statutes had only said, "A default in the payment of a fine or costs or any installment thereof may be collected by any means authorized by law for the enforcement of a judgment." *Id.* § 600.145 (1978) (repealed 1982). The statutes did have a provision for remission of payments by the court if the payments were creating an undue hardship. *Id.* § 600.135. Although the Public Defender Commission had hoped to retain these funds for its own use, money so collected will continue to go into the general revenue. *Id.* § 600.090.4 (Cum. Supp. 1982).

145. One lawyer put the issue graphically:

A pediatrician is not incompetent, but I don't want him operating on my brain, if I have a brain tumor. A neurosurgeon is not incompetent, but I don't want him messing with my children if they're running a 106° temperature and they're throwing up. There are lawyers who are experienced and extraordinarily competent in securities work, and in corporate work, but I would not want them in a court room for any purpose whatsoever. And, that's what's happening. We are finding that approximately a third of the names that we are getting are . . . substantially inex-

mistakes that come back to haunt the courts and future counsel in the form of Rule 27.26 motions.<sup>146</sup>

There is, however, an unfortunate exception to the new public defender law—Rule 27.26 movants.

### B. Rule 27.26 Representation

The new public defender statute states:

The director and defenders shall provide legal services to an eligible person:

(a) who is detained or charged with a felony, including appeals from a conviction in such a case;

(b) who is detained or charged with a misdemeanor which will probably result in confinement in the county jail upon conviction, including appeals from a conviction in such a case;

(c) who is detained or charged with a violation of probation or parole;

(d) for whom the federal constitution or the state constitution requires the appointment of counsel; and

(e) for whom, in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel.<sup>147</sup>

The first three categories are clearly inapplicable to Rule 27.26 motions. The fourth category would only apply if counsel were constitutionally required in Rule 27.26 cases, but it is not.<sup>148</sup> The last category would only

perienced in any criminal trial work whatsoever . . . .

*Hearings, supra* note 1, at 20-21 (St. Louis, Mo. Oct. 7, 1981)(testimony of Anthony Sestric). See also *id.* at 142 (testimony of Joyce Armstrong).

146. *Id.* at 144 (testimony of Joyce Armstrong).

147. MO. REV. STAT. § 600.042.3 (Cum. Supp. 1982).

148. The Missouri Supreme Court acknowledges that the United States Supreme Court has not announced any specific postconviction requirements for state prisoners. *State ex rel. Smith v. Tillman*, 623 S.W.2d 242, 244 (Mo. En Banc 1981). The United States Supreme Court has required states to appoint counsel for indigents, if requested, where appeal is of right. *Douglas v. California*, 372 U.S. 353 (1963). The Court, however, refused to extend the right to appointed counsel where appeal is discretionary, saying, “[T]he fact that a particular service might be of benefit to an individual does not mean that the service is constitutionally required.” *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). A state prison regulation banning “jailhouse lawyer” use by fellow inmates was struck down unless alternative assistance in drafting legal papers was provided. *Johnson v. Avery*, 393 U.S. 483 (1969). The Court also found that prisons must provide prisoners with either a law library or legal assistance adequate for preparing legal papers in order to meet the fundamental right of access to the court system. *Bounds v. Smith*, 430 U.S. 817 (1977). Federal courts are not required to automatically appoint counsel for indigents seeking postconviction relief in federal courts. Appointment of counsel is

seem to apply to a future loss of liberty by one not in custody. Perhaps, however, a court could construe the last subsection to mean a continued loss of liberty in the future. The question then becomes whether “any law of this state” requires appointment of counsel in Rule 27.26 cases.

The Missouri Constitution says that “[n]o law shall be passed except by bill.”<sup>149</sup> That passage makes it appear that only the General Assembly may enact “laws.” If the legislature meant “statute” when it used the word “law” in the new public defender legislation, then no Missouri “law” now requires that Rule 27.26 movants receive appointed counsel.

An amendment to the Missouri Constitution says, “The supreme court may establish rules relating to practice, procedure and pleading for all courts and administrative tribunals, which shall have the force and effect of law. The rules shall not change substantive rights . . . Any rule may be annulled or amended . . . by a law limited to the purpose.”<sup>150</sup> If the term “law” is broad enough to cover statutes *and* Missouri Supreme Court Rules, then arguably Rule 27.26 movants are required to have counsel by state law. This amendment does not say that the Missouri Supreme Court can pass laws, but that its rules “shall have the force and effect of law.” A limitation is also placed on the court’s rule-making power: its “rules shall not change substantive rights.” Even if the Missouri Supreme Court can make “laws,” the question next must be asked whether the putative law affects substantive rights. “In consequence of that limitation it would seem that any rule which attempted to change or create a substantive right would come within the purview of the constitutional prohibition.”<sup>151</sup> Rule 27.26(h), which mandates appointment of counsel for all Rule 27.26 movants, appears to be procedural, not substantive, but the question has not been litigated. Regardless, the General Assembly if it so chose could annul or amend Rule 27.26(h), but only “by a law limited to the purpose.”<sup>152</sup>

The question of whether Rule 27.26(h) creates a substantive right would

discretionary. Amicus Curiae Brief of the Missouri Bar at 14-15, *State ex rel. Smith v. Tillman*, 623 S.W.2d 242 (Mo. En Banc 1981) (citing 18 U.S.C. § 3006A(g) (1976)).

149. MO. CONST. art. III, § 21.

150. *Id.* art. V, § 5 (amended 1976).

151. *Molasky ex rel. Clayton Corp. of Delaware v. Lapin*, 396 S.W.2d 761, 765 (Mo. App., St. L. 1965). The Missouri Supreme Court has defined procedural rules as those that “do not create, destroy or modify anyone’s primary rights.” *State ex rel. Peabody Coal Co. v. Powell*, 574 S.W.2d 423, 426 (Mo. En Banc 1978). Substantive rights have been defined as “the rights guaranteed by the Constitution of this state and of the nation. The rights that have been established by custom and by common law—they shall not be abridged, enlarged nor modified.” *State v. Duren*, 556 S.W.2d 11, 21-22 (Mo. En Banc 1977) (Bardgett, J., dissenting) (quoting former Governor Guy Park, 13 Debates of the Missouri Constitution 3824 (1945)), *reversed*, 439 U.S. 357 (1978).

152. MO. CONST. art. V, § 5.



have been academic under the public defender legislation first passed in 1972<sup>153</sup> and amended in 1976.<sup>154</sup> These statutes clearly gave the courts the power to appoint counsel for indigent Rule 27.26 movants. The law was amended, however, in 1980, to explicitly preclude the use of public defenders in Rule 27.26 cases. The amendment stated that "no public defender shall be appointed to represent a defendant who has filed a motion seeking relief pursuant to Rule 27.26 of the Missouri rules of court, except when a defendant is entitled to appointed counsel by constitutional requirement."<sup>155</sup> Similar language concerning appointed counsel was included,<sup>156</sup> but in *State ex rel. Smith v. Tillman*,<sup>157</sup> it was found not to bar representation by appointed counsel of Rule 27.26 movants. The Missouri Supreme Court was able to make that finding because of the paragraphing in the statute involving appointment of counsel in Rule 27.26 cases. The court held that the prohibition of counsel except where constitutionally required applied only to parole revocations.<sup>158</sup> Thus, the situation for a short time in Missouri was that only

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153. MO. REV. STAT. § 600.045 (Cum. Supp. 1975) (repealed 1982) said that public defenders would represent indigents who had "filed within the circuit a petition for habeas corpus or other post conviction motion alleging his liberty to be unlawfully restrained by public authority." *Id.* § 600.060 gave judges in circuits lacking public defenders the power to appoint lawyers to represent indigents "in all cases and situations where the public defender would have a duty to provide representation."

154. MO. REV. STAT. § 600.071 (1978) (repealed 1982). The statute prior to 1980 had stated that the court could appoint counsel for a defendant filing a Rule 27.26 motion in circuit court, but did not add "or the public defender." *Id.* § 600.071.1. The statute also said that the court could appoint counsel to represent a defendant who had filed a habeas corpus petition. *Id.* § 600.071.2. Appellate courts, however, were explicitly authorized to appoint counsel or public defenders in Rule 27.26 appeals. *Id.* § 600.066. Because the statute did not state that the court could appoint a public defender to represent a Rule 27.26 movant in circuit court, the conclusion could be drawn that circuit court judges could not appoint public defenders in Rule 27.26 cases. As a matter of practice, however, all judicial circuits with public defenders had public defenders representing Rule 27.26 movants, for a total of 231 cases assigned and 187 cases disposed of in fiscal 1979. During this same time period, public defenders were assigned 21,621 cases and disposed of 20,810 cases. Annual Statistical Report, *supra* note 30, at 17 (1979-1980). Thus, roughly 1% of the public defenders' cases handled were postconviction relief cases.

155. MO. REV. STAT. § 600.066 (Cum. Supp. 1981) (repealed 1982).

156. *Id.* § 600.071.

157. 623 S.W.2d 242 (Mo. En Banc 1981). A circuit judge had refused to appoint counsel for a Rule 27.26 movant on the ground that § 600.071 of the Missouri Revised Statutes as amended in 1980 prohibited such an appointment. *Id.* at 243.

158. *Id.* at 246. According to the session laws, the statute said:

A court may appoint counsel to represent a defendant who:

- (1) Has filed within the circuit a motion seeking relief pursuant to rule 27.26 of the Missouri rules of court;

...

- (4) If subject to revocation of parole, whenever the court determines

appointed counsel could represent Rule 27.26 movants.

In the 1982 public defender legislation, no mention is made of using public defenders or counsel hired by the public defender director in Rule 27.26 cases.<sup>159</sup> Nor does it acknowledge the requirement of the *Fields* amendment that courts appoint counsel for indigent Rule 27.26 movants. The 1982 legislation also does not mention court-appointed counsel. It does mention "assigned counsel," but that is not the same thing: "'Assigned Counsel' means private attorneys who are hired by the state public defender director to handle the cases of eligible persons from time to time on a case basis . . . ."<sup>160</sup> Thus, although the new public defender statutes do not empower the courts to appoint counsel in Rule 27.26 cases, as they did from the inception of the public defender system until 1980,<sup>161</sup> neither are the courts specifically *prohibited* from using public defenders in Rule 27.26 cases, as they were under 1980 legislation.<sup>162</sup>

Both the Public Defender Commission proposal and the Missouri Bar proposal, which were submitted for legislative consideration as models for public defender legislation, explicitly included legal representation for Rule 27.26 movants.<sup>163</sup> It therefore appears that omission of Rule 27.26 movants

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that the interests of justice so require and that such person is indigent. No counsel shall be appointed except when a defendant is entitled to appointed counsel by constitutional requirement.

1980 Mo. Laws 502-03. The court says, "The above is reproduced accurately in 1980 Laws of Missouri 502-03. Section 600.071 as set out in Missouri Revised Statutes 1980 Cumulative Supplement does not comport with either S.S.S.C.S.H.B. 1665 or Laws of Missouri." 623 S.W.2d at 243 n.1. The 1980 and 1981 cumulative supplements set off the last sentence of § 600.071.4 as a separate paragraph. *See* MO. REV. STAT. § 600.071.4 (Cum. Supp. 1981)(repealed 1982). Thus, "No counsel shall be appointed except when a defendant is entitled to appointed counsel by constitutional requirement" had appeared to apply to appointment in Rule 27.26 cases as well.

159. *See* note 147 and accompanying text *supra*.

160. MO. REV. STAT. § 600.011.1 (Cum. Supp. 1982).

161. *See* notes 153 & 154 *supra*.

162. MO. REV. STAT. § 600.066 (Cum. Supp. 1980) (repealed 1982).

163. The Public Defender Commission's proposal had stated that the director was to

Provide legal services . . . [a]t the request of any person determined by the director to be indigent or upon referral of any court to prosecute the civil remedies of writ of error, appeal, writ of habeas corpus or other post-conviction . . . remedy on behalf of such person before any court, if the director is first satisfied there is arguable merit to such proceedings.

Public Defender Commission, Proposal 1, § 600.042.14(f) (1981). The Public Defender Commission would also have provided public defender services for involuntary mental detention cases. *Id.* § 600.042.14(b), (f). The new public defender statutes expressly prohibit such representation. MO. REV. STAT. § 600.043 (Cum. Supp. 1982). The Missouri Bar Proposal would have provided legal services for anyone eligible "who is entitled to take and process an appeal, or apply for an extraordinary remedy." S. 790, 81st Gen. Assem., 2d Sess. § 600.046(e) (1982).

by the Missouri General Assembly was not an oversight. The legislature may have actually intended to deny free legal representation in Rule 27.26 cases unless it is constitutionally required. Representative Joe Holt, a co-sponsor of the new public defender legislation, confirms legislative discussion that the legislation would provide for state-paid attorneys only where it was constitutionally required.<sup>164</sup>

Although the Missouri Supreme Court has repeatedly said that legislative intent must control in interpreting legislation, it has also emphasized that statutory language is the evidence of that intent.<sup>165</sup> The court expressed its opinion on the language of the 1982 legislation in *State ex rel. Robards v. Casteel*,<sup>166</sup> a writ of prohibition case made moot by the repeal of the 1980 amendment to the public defender statutes: "We are not aware of any provision in the newly enacted Public Defender Law which would require change or modification of our existing Rule 27.26(h), nor are we aware of any restrictions against appointment of the public defender in his official capacity."<sup>167</sup> A writ of prohibition challenging the power of a court to appoint a public defender in Rule 27.26 cases<sup>168</sup> was denied by the Missouri Court of Appeals for the Western District in an opinion citing *Robards*.<sup>169</sup>

Assuming the Missouri Supreme Court upholds Rule 27.26(h) against all attacks and requires that counsel be provided for all indigent Rule 27.26 movants, the problem of paying such counsel could still develop because of legislative control of the purse strings. The Missouri Constitution is explicit that "[n]o money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law."<sup>170</sup> It would thus appear that if there are to be state-paid attorneys for Rule 27.26 movants, the legislature must appropriate the funds.

## VI. SOLUTIONS

A conflict may exist under the new public defender system between the Missouri Supreme Court, which mandates court appointment of counsel

164. Telephone interview with Rep. Joe Holt (June 10, 1982).

165. "This Court's primary responsibility is to ascertain the intent of the general assembly from the language used, and to give effect to that intent." *Goldberg v. Administrative Hearing Comm'n*, 609 S.W.2d 140, 144 (Mo. En Banc 1980). *Accord* *City of Willow Springs v. Missouri State Librarian*, 596 S.W.2d 441, 445 (Mo. En Banc 1980); *State v. Kraus*, 530 S.W.2d 684, 685 (Mo. En Banc 1975).

166. 630 S.W.2d 583 (Mo. En Banc 1982). The public defender of Jasper County brought this action against the Circuit Judge of Jasper County under MO. REV. STAT. § 600.066 (Cum. Supp. 1980) (repealed 1982).

167. 630 S.W.2d at 584.

168. *State ex rel. Dodson v. Adolf*, No. 45776 (Mo. App., W.D. May 28, 1982).

169. *Id.* The case is being appealed. Telephone interview with Joe Downey, Public Defender, City of St. Louis (June 10, 1982). In writ of prohibition cases, the hurdle for the relator may well be the language in the new statute which says representation may be provided by the public defender system where "any law" of Missouri so requires. See notes 147-51 and accompanying text *supra*.

170. MO. CONST. art. IV, § 28.

to represent indigents seeking postconviction relief, and the General Assembly, which may have intended to legislatively mandate state-paid counsel only if constitutionally required.

#### A. *Some Options*

Courts appear to have the inherent power to appoint attorneys.<sup>171</sup> Unpaid appointed counsel could be one answer to a conflict, but it would be no real solution. It would be unfair to attorneys and would precipitate more suits of the same genre as *State v. Green*<sup>172</sup> and *State ex rel. Wolff v. Ruddy*.<sup>173</sup> Further, the indigent Rule 27.26 movant may be stuck with an unpaid, conscripted attorney who likely would be neither experienced in Rule 27.26 work nor highly motivated to learn its intricacies.

A second answer would be to turn back the clock to the pre-*Fields* amendment days when more affluent prisoners hired attorneys to draw up their Rule 27.26 motions, while indigent prisoners were left to file "inarticulate and inartful" pro se petitions.<sup>174</sup> These petitions, and the appeals from summary denials of hearings they created, would be upon Missouri courts once again.<sup>175</sup> And there is certainly no lack of appeals from denials and dismissals in Rule 27.26 cases as it is.<sup>176</sup> Yet this second option seems to be what the Missouri General Assembly prefers.

A third answer would be to amend the new statutes to permit representation of indigent Rule 27.26 movants by the new public defender system.<sup>177</sup>

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171. This position is taken in a Missouri Bar brief:

Amicus here urges that the trial courts have discretionary authority to appoint counsel if it appears to the courts after an initial judicial evaluation that a serious and substantial or material violation of constitutional rights may have transpired which would vitiate the conviction under attack [sic] in the motion. Such discretionary authority in the state courts is believed necessary to protect the rights of persons, a responsibility which is generally vested in the state courts under the general obligation to protect the constitutional rights of citizens which arise under both the state and federal constitutions.

Amicus Curiae Brief of the Missouri Bar at 19, *State ex rel. Smith v. Tillman*, 623 S.W.2d 242 (Mo. En Banc 1981). The brief also recommended that appointment of counsel in Rule 27.26 cases be discretionary as it is in federal habeas corpus cases. *Id.* at 22-23. But this would seem a return to the *Smith* case-by-case method and the problems the Missouri Supreme Court tried to correct by adopting its per se rule on appointed counsel in *Fields*. See notes 17-27 and accompanying text *supra*.

172. 470 S.W.2d 571 (Mo. En Banc 1971). See text accompanying note 28 *supra*.

173. 617 S.W.2d 64 (Mo. En Banc 1981), *cert. denied*, 102 S. Ct. 1000 (1982). See note 32 *supra*.

174. *Fields v. State*, 572 S.W.2d 477, 481 (Mo. En Banc 1978).

175. See notes 21-23 and accompanying text *supra*.

176. See Part III.B. *supra*.

177. Of course, amending the new public defender statutes to provide for legal representation of indigent Rule 27.26 movants would not preclude also amending postconviction procedure itself. See Parts IX. & X. *infra*.

This would prevent a representation gap which could otherwise develop between affluent and indigent prisoners in constitutionally mandated habeas corpus cases if either (1) the court decided that the new public defender legislation precluded state-paid counsel for Rule 27.26 movants so long as such representation was not constitutionally required, or (2) the legislature decided not to fund representation for Rule 27.26 movants and the Missouri Supreme Court, in the absence of such funding, decided not to compel pro bono representation. Even if the Missouri Supreme Court ultimately decides that the new public defender legislation does permit representation in Rule 27.26 cases and the legislature continues the funding, an amendment would be desirable to make clear that the Missouri legislature stands behind the state's highest court on postconviction representation for indigents. The vast positive changes in the public defender system could be extended to provide quality, cost-effective representation for indigent prisoners seeking postconviction relief. The legislature has already provided the framework; only a one-sentence addition to Missouri Revised Statutes section 600.086.1<sup>178</sup> would be needed.

There is a problem in trying to extend public defender services to Rule 27.26 movants that does not exist when the state provides public defenders for criminal defendants. One-third of Rule 27.26 movants claim ineffective assistance of counsel as their ground for relief.<sup>179</sup> In such cases the original defense attorney could not represent the movant in the Rule 27.26 motion. If the public defender originally represented him, the Public Defender Commission or the director might well be forced to hire a private attorney to avoid ethical problems.<sup>180</sup> Visions of the past, with lawyers' fees of \$390 per Rule 27.26 case, might seem to militate against providing representation for Rule 27.26 movants.<sup>181</sup> But those costs should not occur under the framework of the 1982 legislation.

Under the new system, which permits contracting by the Public Defender Commission, the director would contract for Rule 27.26 representation.<sup>182</sup> Contracting has some advantages over appointment: (1) unwilling lawyers who know nothing about Rule 27.26 procedure will not be coerced into taking Rule 27.26 cases;<sup>183</sup> and (2) the director, in contracting, does not have to pass on what is viewed as a burden the way the courts seemed to do. The director can seek to contract with lawyers who know, or who are at least willing to learn, Rule 27.26 procedure. Lawyers who repeatedly handle Rule 27.26 cases will gain expertise. The director can avoid the expense created when the state had to pay court-appointed attorneys who were unfamiliar with Rule 27.26 procedure to learn the basics. With expertise comes effi-

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178. (Cum. Supp. 1982). For its content, see text accompanying note 147 *supra*.

179. See note 86 and accompanying text *supra*.

180. See MO. REV. STAT. §§ 600.021.6, .042.1(10) (Cum. Supp. 1982). See also notes 134-37 and accompanying text *supra*.

181. See notes 30, 46 & 47 and accompanying text *supra*.

182. See note 136 and accompanying text *supra*.

183. See note 32 *supra*.

ciency; with efficiency comes a reduction in cost per case. Expertise also leads to quality representation. In short, under the contracting framework provided by the legislature, quality cost-effective representation of Rule 27.26 movants could be provided even in ineffective assistance of counsel cases.

Eliminating appointed attorneys from Rule 27.26 cases is a positive step. Eliminating representation in Rule 27.26 cases for all but those who can afford it is not. The Public Defender Commission proposed that Rule 27.26 movants be represented by the public defender system. So did the Missouri Bar.<sup>184</sup> The American Bar Association *Standards for Criminal Justice* call for such representation.<sup>185</sup> The Missouri Supreme Court mandates representation, though it calls for the courts to appoint counsel.<sup>186</sup> The need for postconviction representation is recognized by those most familiar with postconviction relief procedure.

The legislature should amend its new public defender statutes to permit the new system to handle Rule 27.26 cases. Similarly, the Missouri Supreme Court should amend Rule 27.26(h) to reflect the fact that courts will no longer conscript private attorneys in Rule 27.26 cases but will appoint public defenders or attorneys who have contracted with the director of the public defender system.

#### B. *The Donnelly Plan*

Beside the questions of whether and how to provide state-paid attorneys, another major question concerning postconviction review is how to attain finality. Chief Justice Robert T. Donnelly of the Missouri Supreme Court says that for all of the fifteen years since *Fay v. Noia*,<sup>187</sup> there has been talk about finality, but the federal courts will not let it be achieved. Amendment of habeas corpus to preclude review by federal courts would, he believes, eliminate the problem.<sup>188</sup>

Chief Justice Donnelly's dislike of federal habeas corpus is not new.<sup>189</sup>

184. See note 163 *supra*.

185. ABA STANDARDS, *supra* note 22, § 22-4.3 provides:

(a) Counsel should be provided for applicants unable to afford adequate representation. For such applicants confined in prison, legal assistance should be available in the first instance through services provided to inmates of the institution. Such services should extend to representation in judicial proceedings. If, for any reason, applicants are proceeding without counsel, an attorney should be appointed for those unable to afford to retain their own attorneys. When private attorneys are appointed to represent applicants, their services should be compensated from public funds.

(b) Appointed counsel should continue to serve through any appellate proceeding available to the applicant as a matter of right.

186. MO. SUP. CT. R. 27.26(h).

187. 372 U.S. 391 (1963).

188. Interview with Chief Justice Donnelly, *supra* note 87.

189. Referring to 28 U.S.C. § 2254(a) (1976), Chief Justice Donnelly said in 1969, "[T]he people of Missouri are entitled to know that the effect of this statute

He sees a “retreat”<sup>190</sup> from *Stone v. Powell*<sup>191</sup> in the Supreme Court’s 1979 ruling in *Jackson v. Virginia*:<sup>192</sup>

[I]n a challenge to a state criminal conviction brought under 28 U.S.C. § 2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no *rational* trier of fact could have found proof of guilt beyond a reasonable doubt.<sup>193</sup>

This power of federal judges to act as a “superjury”<sup>194</sup> was, according to the chief justice, the “coup de grace” that rendered Rule 27.26 useless and made the burden placed by Rule 27.26 on Missouri lawyers “unconscionable.”<sup>195</sup> As a result of *Jackson*, he has proposed replacing Rule 27.26 with new rules.<sup>196</sup>

Chief Justice Donnelly makes it clear that he believes the failure of Rule 27.26 is not due to the rule itself but to the federal court intervention that makes state court review futile: “On reflection, we must recognize that we provided a viable state postconviction remedy but that we failed dismally in our attempt to ward off the federal judiciary . . . .”<sup>197</sup> Although his pro-

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. . . is to make . . . [the Missouri Supreme Court] subservient to the *trial courts* of the Federal judicial system in cases involving violations of the criminal laws of the State.” *State v. Brizendine*, 445 S.W.2d 827, 828 (Mo. En Banc 1969) (emphasis in original). Donnelly subsequently said that “the *Brizendine* prediction has proved alarmingly accurate.” Donnelly, *The State of the Judiciary in Missouri, 1982*, 38 J. MO. B. 81, 83 (1982).

190. See *State v. Handley*, 585 S.W.2d 458, 466 (Mo. 1979) (Donnelly, C.J., concurring).

191. 428 U.S. 465 (1976).

192. 443 U.S. 307 (1979). In *Jackson*, the Court listed as prerequisites that “state remedies have been exhausted . . . and that no independent and adequate state ground stands as a bar.” *Id.* at 321.

193. *Flowers v. State*, 618 S.W.2d 655, 658 (Mo. En Banc 1981) (Donnelly, C.J., dissenting) (quoting *Jackson v. Virginia*, 443 U.S. at 324) (emphasis in original). By using the word “rational,” Donnelly has said, the United States Supreme Court is giving “carte blanche” to federal habeas corpus courts to use their own judgment of a petitioner’s guilt instead of the trial jury’s. *State v. Handley*, 585 S.W.2d 458, 466 (Mo. 1979) (Donnelly, C.J., concurring).

194. 585 S.W.2d at 467.

195. *Flowers*, 618 S.W.2d at 658 (Donnelly, C.J., dissenting). *Jackson* also renders *United States v. MacCollum*, 426 U.S. 317 (1976), “ineffectual,” says Donnelly. Interview with Chief Justice Donnelly, *supra* note 87. According to *MacCollum*, the fifth amendment guarantee of due process does not create a right to appeal a conviction, let alone the right to wage a collateral attack on a conviction. 426 U.S. at 323.

196. Interview with Chief Justice Donnelly, *supra* note 87. See *Flowers*, 618 S.W.2d at 658-62 (Donnelly, C.J., dissenting), for the text of Donnelly’s proposed rules.

197. *Handley*, 585 S.W.2d at 467.

posed Rules 27.26 and 27.27 are similar to current Rule 27.26 in many respects, there are significant differences. Proposed Rule 27.26 would apply to postconviction relief after a trial,<sup>198</sup> while proposed Rule 27.27 would deal with postconviction relief after a plea of guilty.<sup>199</sup>

The current rule provides the "exclusive procedure" for "a prisoner in custody," which includes prisoners who pleaded guilty or were convicted after trial.<sup>200</sup> It also applies to both felonies and misdemeanors. Proposed Rule 27.26 is intended to be the "exclusive procedure" for a "defendant sentenced *after trial*" for a felony.<sup>201</sup> Only about fifteen percent of Missouri's prisoners are incarcerated after sentencing based on a trial conviction.<sup>202</sup>

While current Rule 27.26 lists "violations of the Constitution and laws

198. *Flowers*, 618 S.W.2d at 658-59 (Donnelly, C.J., dissenting).

199. *Id.* at 661. Chief Justice Donnelly has become disenchanted with the United States Supreme Court's view of habeas corpus following guilty pleas. He was hopeful that after the decision in *Boykin v. Alabama*, 395 U.S. 238 (1969), guilty pleas could be insulated from challenges under Missouri Supreme Court Rules 27.25 and 27.26 and from federal habeas corpus review. *See Flood v. State*, 476 S.W.2d 529, 537 (Mo. 1972). In two separate opinions, he used exactly the same language:

It appears from the majority opinion in *Boykin* that an on the record examination conducted by the trial court accepting a guilty plea which includes, *inter alia*, an attempt by that Court to satisfy itself that the defendant understands the nature of his charges, his right to trial by jury, the acts sufficient to constitute the offenses for which he is charged and the permissible range of sentences is sufficient to insulate the plea from subsequent attack in collateral proceedings.

*Colbert v. State*, 486 S.W.2d 219, 221 (Mo. 1972); *Flood v. State*, 476 S.W.2d 529, 537 (Donnelly, C.J., concurring) (both cases citing *Boykin v. Alabama*, 395 U.S. at 244 n.7). The following year came the United States Supreme Court's per curiam decision in *Fontaine v. United States*, 411 U.S. 213 (1973). *Fontaine* involved a federal prisoner who acknowledged that his plea of guilty was knowing and voluntary. The federal district court had made a record, but the United States Supreme Court concluded that it was not sufficient to preclude a hearing under 28 U.S.C. § 2255 (1976). 411 U.S. at 215. Donnelly calls cases like *Fontaine* "destroyers." Interview with Chief Justice Donnelly, *supra* note 87. For the rule of the Missouri Supreme Court on in-court questioning of a defendant concerning the voluntariness of the plea and on guilty plea transcription, see MO. SUP. CT. R. 24.02.

200. MO. SUP. CT. R. 27.26.

201. 618 S.W.2d at 659 (Donnelly, C.J., dissenting) (emphasis in original).

202. The percentage of prisoners in Missouri correctional institutions who pleaded guilty has remained fairly stable:

Fiscal Year	Guilty Plea	Trial Conviction
1977	85.05%	14.95%
1978	82.96%	17.04%
1979	86.45%	13.55%
1980	85.83%	14.17%

MISSOURI DIVISION OF CORRECTIONS, BIENNIAL REPORT 43, 48 (1976-1978); *id.* at 66 (1978-1980).



of this State or the United States” as grounds for relief,<sup>203</sup> the proposed rule is more limited. Any violation of “the Constitution and Laws of this State” would trigger proposed Rule 27.26.<sup>204</sup> The proposed rule makes no mention of the Constitution and laws of the United States.

The proposed and current rules agree on two occasions for postconviction relief: when the court imposing sentence lacked jurisdiction to do so, and when the sentence imposed exceeds the statutory maximum.<sup>205</sup> A fourth, more nebulous ground for relief in the current rule is omitted from the proposed rule—that the sentence “is otherwise subject to collateral attack.”<sup>206</sup>

Perhaps the most significant change proposed by Chief Justice Donnelly concerns the timing of a motion for postconviction relief. The current rule permits the filing of a motion at any time provided the movant is still in custody, an appeal is not pending, and time for perfection of an appeal has elapsed.<sup>207</sup> This can result in motions being filed years after a prisoner has begun serving his term.<sup>208</sup> The chief justice proposes ruling on any Rule 27.26 motion before the prisoner goes to the penitentiary.<sup>209</sup> Time is of the essence under proposed Rule 27.26. Immediately after pronouncement of

203. MO. SUP. CT. R. 27.26. Current American Bar Association Standards advocate state postconviction procedures broad enough to encompass violations of the United States Constitution. ABA STANDARDS, *supra* note 22, § 22-2.1 (a)(i), (ii).

204. 618 S.W.2d at 659 (Donnelly, C.J., dissenting). *See also Handley*, 585 S.W.2d at 467, for a discussion of restricting Rule 27.26 claims to violations of the Missouri Constitution.

205. MO. SUP. CT. R. 27.26; proposed Rule 27.26, 618 S.W.2d at 658-59 (Donnelly, C.J., dissenting).

206. MO. SUP. CT. R. 27.26.

207. MO. SUP. CT. R. 27.26(b). If the sentence and parole period has been completed, the remedy for correcting sentence is a writ of coram nobis. Daley, *supra* note 35, at 42 (citing *Eaton v. State*, 586 S.W.2d 792, 794 (Mo. App., W.D. 1979)).

208. *See, e.g., Miller v. State*, 603 S.W.2d 29 (Mo. App., S.D. 1980) (prisoner sought to vacate two life sentences imposed in 1952 on grounds of ineffectiveness of counsel and involuntary guilty pleas).

209. Interview with Chief Justice Donnelly, *supra* note 87. Proposed Rule 27.26(f) specifies that persons invoking it may be out on bail. 618 S.W.2d at 659 (Donnelly, C.J., dissenting). Current American Bar Association Standards for Criminal Justice agree with Chief Justice Donnelly that postconviction relief should not be conditioned on incarceration. The right to seek relief from an invalid conviction and sentence ought to exist:

- (a) even though the applicant has not yet commenced service of the challenged sentence;
- (b) even though the applicant has completely served the challenged sentence; or
- (c) even though the challenged sentence did not commit the applicant to prison, but rather a fine, probation, or suspended sentence.

ABA STANDARDS, *supra* note 22, § 22-2.3. The Standards also recognize the desirability of empowering courts to set bail during the pendency of postconviction procedures. *Id.* § 22-4.4(c).

sentence and entry of judgment, each defendant would be notified that Rule 27.26 procedures are available. The court would then question the defendant on the record to ensure that he understood the nature, availability, and time table for a Rule 27.26 motion.<sup>210</sup> After effective notice, the defendant would only have ten days to file a motion for postconviction relief, but the time period could be extended for another ten days.<sup>211</sup>

Both the current and proposed rules require the filing of a motion form listing all known grounds for the motion. Both require verification of the motion by the movant.<sup>212</sup> Proposed Rule 27.26, however, contains an additional provision requiring an acknowledgment by the movant that he understands that he waives any grounds not specified in the motion. Softening this requirement is a provision that the motion can be amended with leave.<sup>213</sup> Both the present and proposed rules prohibit successive Rule 27.26 motions.<sup>214</sup>

While both rules provide that the motion is to be filed with the court that imposed sentence,<sup>215</sup> proposed Rule 27.26 is more specific as to when the court shall set the hearing. The proposed rule requires the judge to set a hearing “not more than fifteen . . . days from the date the motion is filed.”<sup>216</sup> Given the ten days from sentencing that a defendant would have to file his motion plus the possible ten-day extension and the fifteen days

210. Proposed Rule 27.26(c), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

211. Proposed Rule 27.26(d), 618 S.W.2d at 659 (Donnelly, C.J., dissenting). On timing, the Donnelly plan and the American Bar Association Standards differ. The Standards state, “A specific time period as a statute of limitation to bar post-conviction review of criminal convictions is unsound.” ABA STANDARDS, *supra* note 22, § 22-2.4(a). A time limitation of sorts is recognized under the Standards, however, as an applicant who waits so long that he commits an “abuse of process” may be denied relief:

A person with a tenable or meritorious claim for postconviction relief who deliberately or inexcusably withholds presentation of that claim until occurrence of an event that he or she believes prevents successful reprosecution or correction of the vitiating error commits an abuse of process. Abuse of process ought to be an affirmative defense to be specifically pleaded and proved by the state. An applicant who commits an abuse of process may be denied relief.

*Id.* § 22-2.4(b). The Standards do agree with the Donnelly plan in that “[e]arly presentation . . . should be encouraged.” *Id.* § 22-2.2 Commentary. The difference is between encouraging and strictly enforcing early presentation.

212. MO. SUP. CT. R. 27.26(c); proposed Rule 27.26(d), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

213. Proposed Rule 27.26(d), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

214. MO. SUP. CT. R. 27.26(d); proposed Rule 27.26(n), 618 S.W.2d at 660 (Donnelly, C.J., dissenting). “Untimely or successive motions” may be filed in some cases under proposed Rule 27.26(n). *See* note 231 *infra*.

215. MO. SUP. CT. R. 27.26(a); proposed Rule 27.26(a), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

216. Proposed Rule 27.26(g), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

within which a hearing must be held, a maximum of thirty-five days would elapse from sentencing to a hearing on postconviction relief. A continuance could be granted, however, for "good cause."<sup>217</sup> Under the current rules, the petitioner is entitled to a "prompt" hearing. "Prompt" means "as soon as reasonably possible considering other urgent business of the court." But there is a proviso in the current rule that the proposed rule does not contain: a prompt hearing must be held "[u]nless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief."<sup>218</sup> Under the proposed rule, a hearing would be held in all cases.

Under both rules the hearings are of record,<sup>219</sup> and the movants have the right to be present.<sup>220</sup> Indigent movants under both rules have a right to appointed counsel,<sup>221</sup> but the Donnelly plan adds a new twist. Under current practice, Rule 27.26 appointed counsel is new counsel. Under the chief justice's plan, an indigent would retain the appointed attorney who represented him at trial unless that attorney is relieved by the court. If charged with ineffectiveness, counsel would be relieved.<sup>222</sup> Since over one-third of the recent Rule 27.26 cases included a charge of ineffectiveness of counsel,<sup>223</sup> at least that percentage of counsel turnover can be predicted under proposed Rule 27.26.

The burden of proof remains on the defendant in the Donnelly plan, and the standard—a preponderance of the evidence—is retained.<sup>224</sup> If the defendant meets his burden, the court can vacate the judgment and discharge or resentence the movant, grant the movant a new trial, or correct the sentence. Under the current and proposed rules, the court must make "find-

217. Proposed Rule 27.26(h), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

218. MO. SUP. CT. R. 27.26(e). For a comparison of the numbers of cases disposed of with and without hearings in circuit court, see note 55 *supra*. Under a 1967 United States Supreme Court decision involving a direct appeal, an appointed lawyer may, in effect, recommend to the court that no hearing be granted. *Anders v. California*, 386 U.S. 738, 744 (1967). After "conscientious examination" of the case, the lawyer may inform the court that he considers it "frivolous." *Id.* But the lawyer must also supply the court and client with a brief containing anything that might possibly support the appeal. The Court added that "such handling would tend to protect counsel from the constantly increasing charge that he was ineffective." *Id.* at 745.

219. MO. SUP. CT. R. 27.26(e); proposed Rule 27.26(h), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

220. MO. SUP. CT. R. 27.26(g); proposed Rule 27.26(j), 618 S.W.2d at 660 (Donnelly, C.J., dissenting).

221. MO. SUP. CT. R. 27.26(h); proposed Rule 27.26(e), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

222. Proposed Rule 27.26(e), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

223. See note 86 and accompanying text *supra*.

224. MO. SUP. CT. R. 27.26(f); proposed Rule 27.26(i), 618 S.W.2d at 659-60 (Donnelly, C.J., dissenting).

ings of fact and conclusions of law” on every issue presented, but the proposed rule specifically requires findings to be written.<sup>225</sup>

A “clearly erroneous” standard of review is to be used on appeal under both rules,<sup>226</sup> but the procedures for appeal are quite different. Under the current rule, Rule 27.26 appeals are separate procedures, and the civil appeal procedure established under Missouri Revised Statutes section 512.020<sup>227</sup> is followed. The Donnelly proposal, on the other hand, would consolidate Rule 27.26 appeals with direct appeals. Upon the filing of a Rule 27.26 motion, the movant would be granted a stay of delivery into custody of the Department of Corrections. Filing of the motion would waive the movant’s right to appellate review until the issues in the Rule 27.26 motion were decided and would extend the deadline for filing a notice of direct appeal until after the trial court’s final determination on the Rule 27.26 motion. After a ruling on the motion, the defendant would have ten days to appeal the court’s ruling on the motion, the court’s judgment of conviction, or both, by filing a single notice of appeal.<sup>228</sup>

For those sentenced after a guilty plea, Chief Justice Donnelly proposes a separate Rule 27.27. Roughly eighty-five percent of Missouri’s prisoners are incarcerated after sentencing subsequent to guilty pleas.<sup>229</sup> Proposed Rule 27.27 tightens postconviction procedures for those who plead guilty. Although the proposed rule does not establish a deadline by which Rule 27.27

225. MO. SUP. CT. R. 27.26(i); proposed Rule 27.26(k), 618 S.W.2d at 660 (Donnelly, C.J., dissenting).

226. MO. SUP. CT. R. 27.26(j); proposed Rule 27.26(l), 618 S.W.2d at 660 (Donnelly, C.J., dissenting). Provisions for providing indigents with transcripts are similar. MO. SUP. CT. R. 27.26(k); proposed Rule 27.26(m), 618 S.W.2d at 660 (Donnelly, C.J., dissenting).

227. (Cum. Supp. 1982). See MO. SUP. CT. R. 27.26(j).

228. Proposed Rule 27.26(l), 618 S.W.2d at 660 (Donnelly, C.J., dissenting). The American Bar Association Standards have been revised to encompass unitary review such as that proposed by Chief Justice Donnelly:

When an application for postconviction relief is filed before the time for appeal from the judgment of conviction and sentence has lapsed, the trial court should have the power to extend the time for taking such appeal until the conclusion of the postconviction proceeding. When an application for postconviction relief is filed while an appeal from the judgment of conviction and sentence is pending, the appellate court should have the power to suspend the appeal until the conclusion of the postconviction proceeding or to transfer the postconviction proceeding to the appellate court immediately. The trial court or appellate court should exercise these powers to enable simultaneous consideration of the appeal, if taken, from the judgment of conviction and sentence and an appeal, if taken, from the judgment in the postconviction proceeding, where joinder of appeals would contribute to orderly administration of criminal justice.

ABA STANDARDS, *supra* note 22, § 22-2.2(a).

229. See note 202 *supra*.

motions must be filed,<sup>230</sup> it would require leave of the sentencing court to even file a motion. Discretion would be vested in the sentencing court to grant leave if it believes that there has been a significant retrospective change in the substantive or procedural law applied in the movant's case or that there has been a "miscarriage of justice."<sup>231</sup> Upon a grant of leave, the court would schedule a hearing date no more than fifteen days later.<sup>232</sup> If the motion is denied after hearing, there would be no right to appeal unless the court that would hear the appeal issued a "certificate of probable cause."<sup>233</sup>

Proposed Rules 27.26 and 27.27 both provide that the appointed counsel who represented an indigent before sentencing will represent him on the postconviction motion "unless relieved by order of court."<sup>234</sup> Proposed Rule 27.26 adds, "Counsel shall be relieved if ineffectiveness of counsel at trial is alleged."<sup>235</sup> Proposed Rule 27.27, however, does not mention relieving counsel when ineffectiveness at the time of the guilty plea is alleged. This omission is deliberate.<sup>236</sup>

Chief Justice Donnelly proposed his new rules with some modesty. In his words, "No one knows the magic formula."<sup>237</sup> Some elements of his proposal are undesirable. The rigid, twenty-day maximum time limit for filing a Rule 27.26 motion imposed on movants convicted at trial seems unworkable. Many grounds for Rule 27.26 relief, such as use of perjured testimony by the state or ineffective assistance of counsel, might not be discovered within twenty days. Such a rigid time limitation means some state prisoners could not get effective relief in Missouri courts. Under the Donnelly plan, prisoners with claims arising under the laws or constitution of the United States could not be heard under Rule 27.26, which would be limited to state claims. With state remedies exhausted, prisoners could have their petitions heard in federal court, and no Missouri court would have a chance to review state procedures.

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230. Proposed Rule 27.26(b), 618 S.W.2d at 661 (Donnelly, C.J., dissenting).

231. Proposed Rule 27.27(d), 618 S.W.2d at 661 (Donnelly, C.J., dissenting). The grounds for gaining leave of court to file a Rule 27.27 motion after a guilty plea are the same grounds that a person convicted after trial may use under proposed Rule 27.26 in order to file an "untimely or successive" Rule 27.26 motion. From denial of such leave under proposed Rule 27.26, there is no appeal unless the court which would hear the appeal issues a "certificate of probable cause." Proposed Rule 27.26(n), 618 S.W.2d at 660-61 (Donnelly, C.J., dissenting). Proposed Rule 27.27 on successive motions is brief. It provides simply that, "The circuit court shall not entertain successive motions." Proposed Rule 27.27(m), 618 S.W.2d at 662 (Donnelly, C.J., dissenting).

232. Proposed Rule 27.27(e), 618 S.W.2d at 661 (Donnelly, C.J., dissenting).

233. Proposed Rule 27.27(k), 618 S.W.2d at 662 (Donnelly, C.J., dissenting).

234. Proposed Rules 27.26(e), 27.27(i), 618 S.W.2d at 659, 661-62 (Donnelly, C.J., dissenting).

235. Proposed Rule 27.26(e), 618 S.W.2d at 659 (Donnelly, C.J., dissenting).

236. Interview with Chief Justice Donnelly, *supra* note 87. The reason for that omission was not divulged.

237. *Id.*

Perhaps this is what the chief justice wants. It is consistent with the attitude that, if federal courts are going to rehear postconviction cases anyway, they may as well hear them sooner instead of later, sparing the state time and expense and reaching finality more quickly.

Chief Justice Donnelly's proposal seems internally inconsistent in its twenty-day statute of limitations for filing Rule 27.26 motions, for that limit only applies to movants convicted at trial. Movants who plead guilty have no such time limitation. That distinction does not seem warranted, for it may be just as difficult to learn of constitutionally significant circumstances affecting a trial as those affecting the validity of a guilty plea. Indeed, the circumstances could be precisely the same. The proposal's provision of a change of counsel for the movant if ineffective assistance of counsel *at trial* is claimed, while deliberately omitting that provision for movants who plead guilty, is also not warranted.

On the positive side, Chief Justice Donnelly's provision for consolidating direct appeals with postconviction proceedings is well worth consideration by the Missouri Supreme Court. The commentary of the American Bar Association on unitary review is favorable.<sup>238</sup> Decisions on the postconviction motion may make an appeal unnecessary, or, if an appeal is still warranted, consolidation of the appeal on the motion and the direct appeal may give the appellate court a better perspective on the case as a whole. Consolidation of appeals also saves time, energy, and expense for courts and attorneys. Consolidation would be a net gain. As a more efficient system contributes to earlier finality of convictions, the idea of consolidation, where possible, of postconviction proceedings and direct appeals is one that may well deserve implementation.

While Chief Justice Donnelly's plan is neither workable nor desirable in its entirety, it does address the very real problem of the timing of postconviction review.

### C. *Miscellaneous Proposals*

Several other formulas for solving, or at least ameliorating, problems created by Rule 27.26 have been proposed. The major problem with appointment of counsel for all indigent Rule 27.26 movants is financial; there is not enough money to adequately pay counsel.<sup>239</sup> Financing has been a major problem in the whole area of indigent defense, and appointing counsel for all Rule 27.26 movants has increased the costs. State Auditor James Antonio has suggested tightening the procedure for determining indigency, pursuing greater recoupment of state funds spent for state-paid attorneys, and increasing court fees in *all* cases. Antonio says that "each additional \$1 of court costs imposed per case apparently would generate at least \$350,000 to \$400,000 annually."<sup>240</sup> Against this proposal, it is argued that requiring

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238. ABA STANDARDS, *supra* note 22, § 22-2.2 Commentary.

239. Interview with Kristie Green, *supra* note 53.

240. Auditor's Report, *supra* note 41, at 38.

civil litigants to help defray the costs of providing defense attorneys in criminal cases is unfair.<sup>241</sup> While Rule 27.26 cases are civil, they result from criminal litigation.

The American Bar Association suggests another method for reducing the cost of postconviction relief—detering frivolous claims by recovering court costs from petitioners who persist with claims for postconviction relief after legal advice to the contrary.<sup>242</sup>

State Senator Ralph Uthlaut has proposed reducing prisoner travel by holding postconviction hearings, at the discretion of the judge, at the prison.<sup>243</sup> Presently, prisoners return for hearings to their sentencing courts. This proposal would cut down on travel expenses of prisoners but would entail travel time for judges. Uthlaut believes that his proposal would eliminate some of the nuisance motions from prisoners who merely want a change of scenery or a chance to escape.<sup>244</sup>

Terry Daley, a former public defender, has proposed a variation of Uthlaut's plan—holding postconviction hearings in the circuit court nearest the prisoner's correctional institution. She also proposed that the public defender nearest the correctional institution assist in preparing Rule 27.26 motions. This would cut down on travel costs and communication problems for counsel, as well as the costs of inmates' travel and incarceration. Daley notes that "the attractive trips away from the penitentiary would be limited."<sup>245</sup> Trips are lengthy in some cases, as the prisoner may be incarcerated hundreds of miles from the site of his criminal prosecution. Fur-

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241. *Hearings, supra* note 1, at 68 (Kansas City, Mo. Sept. 23, 1981) (testimony of Circuit Judge Peters). Howard Eisenberg, Executive Director of the National Legal Aid and Defender Association, says that an effort to adopt assessment of a "surcharge or suit tax" in civil cases to pay for representation of indigents in both civil and criminal cases is being made now in "a number of states." Eisenberg, *supra* note 136, at 26.

242. ABA STANDARDS, *supra* note 22, § 22-4.3 Commentary. Elsewhere the Standards say, "The power to assess costs and expenses should be used sparingly and with discretion so as not to deter applicants with litigable claims. Assessment is appropriate when it appears that an applicant, having had access to competent legal advice, pursued a claim that wholly lacked basis in law or factual support." *Id.* § 22-4.7(a)(iii). Missouri inmates may have income from which to pay assessed costs from, for instance, the prison industries and farm program. MISSOURI DIVISION OF CORRECTIONS, BIENNIAL REPORT 17-21 (1978-1980). An inmate who totally lacked funds would seem undeterred by this provision.

243. See H.R. 223, 81st Gen. Assem., 1st Sess. (1981). H.R. 223 provides:

1. When a person committed to the Division of Corrections is a defendant at a preliminary hearing, or pretrial or posttrial motion or proceeding, or the movant in a post-conviction proceeding, such proceeding may in the discretion of the judge be heard within a facility of the Division of Corrections.
2. Jury trials shall not be heard within a facility of the Division of Corrections.

244. Telephone interview with Senator Ralph Uthlaut (Oct. 1, 1981).

245. Daley, *supra* note 35, at 45.

ther, this plan would allow courts and public defenders near correctional institutions to develop special expertise in handling postconviction matters.<sup>246</sup>

Neither Uthlaut's nor Daley's proposal provides for postconviction hearings at the sentencing court.<sup>247</sup> There are several advantages to holding hearings at the sentencing court. First, witnesses are more likely to be near the sentencing forum than the incarceration site. Second, the sentencing judge is familiar with the case and may be in a position to make a better and more expeditious ruling on a Rule 27.26 motion. Third, the judge would have the opportunity to rectify constitutional infirmities that occurred either at the trial over which he presided or in the guilty plea he accepted.

Daley's plan could be modified by holding the Rule 27.26 hearing at the sentencing court while still assigning to the indigent movant the public defender nearest the site of incarceration. Although potential movants would have the incentive of a trip home to spur frivolous claims, the public defenders nearest correctional institutions, who have developed special expertise in Rule 27.26 cases through heavy exposure, could help screen out unmeritorious claims. With the flexibility of the new public defender system, an additional assistant public defender could be hired in a particular area—Cole County, for example, the site of Missouri's largest prison<sup>248</sup>—if the volume of Rule 27.26 cases so warranted. In cases disposed of without a hearing, relatively little travel time or cost would be created and initial communication with the prisoner would be facilitated. Copies of records from the sentencing court could be forwarded to the public defender assigned to the case. If investigation of witnesses at the sentencing site were needed, the assigned public defender perhaps could contact the public defender from the sentencing site or that defender's investigator.<sup>249</sup> In cases requiring a hearing, no excess travel time or cost would be created for the public defender system as a whole. There would be no significant difference between the public defender nearest the prison traveling to the sentencing court for the hearing and the public defender nearest the county court traveling to the correctional institution to visit the inmate prior to the hearing. A public defender probably would need to travel to the prison at least once in order to prepare adequately. The increase in efficiency and quality that could result from having only a very few public defender offices handle all Rule 27.26 cases merits consideration.<sup>250</sup>

246. *Id.* at 44-45.

247. The American Bar Association Standards, which originally called for a single, state-wide court to handle postconviction cases, now favors having hearings held at the site of the original criminal proceedings. ABA STANDARDS, *supra* note 22, §§ 22-1.4, 22-4, 22-5.

248. In 1982, the Missouri State Penitentiary had a population of over 2000 inmates. Missouri Executive Budget § 9-7 (1983). Total prison population that year was approximately 5423. *See* note 56 *supra*.

249. Under the 1982 legislation, public defenders may have investigators. *See* note 140 *supra*.

250. An additional effect of having the public defender nearest a correctional institution represent a movant whose home is distant might appear in ineffective  
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## VII. CONCLUSION

While accepting Chief Justice Donnelly's view that "no magic formula" exists for postconviction relief, the following suggestions, it is hoped, would improve postconviction procedures:

*First.* The new public defender legislation should have a one-sentence addition to section 600.042.3 to authorize use of that system to represent indigent Rule 27.26 movants. This would help ensure quality, cost-effective representation for them. It also would make the legislation consistent with Missouri Supreme Court Rule 27.26(h), which mandates appointment of counsel to represent indigent movants. Rule 27.26(h) also should be modified by the Missouri Supreme Court to reflect the change from a court-appointed counsel system to one in which all state-paid attorneys are either public defenders or attorneys with whom the public defender system contracts.

*Second.* The public defender office nearest the prison where the movant is incarcerated should represent him. Concentrating the bulk of Rule 27.26 work on a few public defenders would further increase their expertise in handling postconviction cases. With this expertise, they could both help screen out nonmeritorious Rule 27.26 claims and provide experienced representation for meritorious ones.

*Third.* Rule 27.26 should be revised to allow consolidation of direct appeals and Rule 27.26 appeals, where possible. This unitary review would save time, money, and energy.

These modifications are aimed at improving postconviction procedures; they will not produce a flawless system. Even under the best of circumstances, man-made systems are not perfect. When dealing with prisoners seeking freedom, the circumstances are far from the best. There will always be some abuse of the postconviction system, for persons using it have little to lose. Yet postconviction review must be provided to ensure that abuse has not occurred in another less-than-perfect system—the criminal justice system. The question then is how to design the *best* postconviction relief system, one that operates efficiently and creates the fewest problems of its own.

In the past, Missouri has experienced the problems created by pro se motions for postconviction relief and by conscripted attorneys—unpaid or underpaid—representing Rule 27.26 movants. Missouri now has the framework for improving the representation of movants in its new public defender system. By adopting the steps outlined above, Missouri's postconviction relief system could provide quality representation for all Rule 27.26 movants in the most cost-effective manner.

SANDRA DAVIDSON SCOTT

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assistance of counsel cases—it might be easier psychologically for the public defender to press charges of misperformance against an attorney with whom he or she shares no community ties.