

Summer 2010

Missouri's Public Defender Crisis: Shouldering the Burden Alone

Sean D. O'Brien

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

Recommended Citation

Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 Mo. L. REV. (2010)
Available at: <https://scholarship.law.missouri.edu/mlr/vol75/iss3/10>

This Conference is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact bassettcw@missouri.edu.

Missouri's Public Defender Crisis: Shouldering the Burden Alone

*Sean D. O'Brien**

I. INTRODUCTION

In 1984, public defender John M. “Jack” Walsh watched a jury sentence his client, Mose Young, to die for a triple homicide during the robbery of a St. Louis pawn shop.¹ Although Walsh was an experienced public defender, he presented no mitigating evidence on Young’s behalf. He had conducted no investigation and had given no thought to the punishment phase of Young’s trial. He did virtually nothing to attempt to save his client’s life.² He had inherited the case at the last minute. Walsh had just tried a major rape trial and another murder trial, back to back.³ No investigation had been done into Young’s defense. Walsh had not visited the crime scene. He had given no thought to the penalty phase of Young’s case. His workload did not permit it. In this respect, Walsh was in good company; his fellow public defender described herself and her colleagues as “veritable walking violations of the right to effective assistance of counsel.”⁴

The day after the verdict against Young, as Walsh awoke sick and coughing up blood,⁵ he was called to trial in *State v. Harvey*, another case in which the state sought the death penalty.⁶ Again, he was unprepared – he had neither investigated the case nor conferred with his client, who had moved to have Walsh taken off the case. Walsh told the circuit judge that he was “totally unprepared to begin with th[e] case” and begged for a continuance, which was denied.⁷ In what he described as a moment of clarity, Walsh told his young second chair, James McKay, to leave the courtroom and not come back.⁸ He then informed the court that he could not give Harvey a fair trial, warning, “[I]f we are going ahead with this trial . . . I will be physically present because I am sure the [c]ourt would require that, but I do not in any

* Sean O'Brien is an Associate Professor at University of Missouri-Kansas City School of Law and served as Public Defender for the Sixteenth Judicial Circuit from 1984 through 1989.

1. *State v. Young*, 701 S.W.2d 429, 431 (Mo. 1985) (en banc).

2. Application for a Stay of Execution and Appointment of a Board of Inquiry at 11-12, *In re Mose Young* (directed to Missouri Governor Mel Carnahan, Apr. 1, 2001) [hereinafter Application for Stay] (on file with the author).

3. *Id.* at 11.

4. *Id.* at 12.

5. *Id.* at 11.

6. 692 S.W.2d 290, 290 (Mo. 1985) (en banc).

7. *Id.* at 291.

8. Application for Stay, *supra* note 2, at 14.

way intend to participate in the trial of this matter.”⁹ Walsh again asserted that he was “unprepared due to his involvement in an earlier capital murder case [Mose Young], and physically exhausted.”¹⁰ Walsh attended the trial but did not make opening statements, cross-examine any witnesses, object to or present any evidence, submit proposed jury instructions, or make closing arguments on Harvey’s behalf.¹¹ He submitted no evidence or argument in mitigation of punishment.¹² Harvey was convicted and sentenced to death.¹³

Although the prosecution conceded on appeal that Walsh “effectively boycotted the trial proceedings,” it urged that Harvey’s death sentence be carried out because Walsh’s lack of defense was “a matter of trial strategy.”¹⁴ The Supreme Court of Missouri granted Harvey a new trial because he was deprived of his Sixth Amendment right to counsel.¹⁵ As for Walsh, the court pointedly noted that “the court’s contempt power or the attorney disciplinary mechanism may be invoked.”¹⁶ Indeed, the court wasted no time initiating disciplinary proceedings against Walsh, permanently ending his legal career.¹⁷

Walsh’s supervising attorney described him as a tragic hero who failed miserably and collapsed under the weight of an oppressive system.¹⁸ Because of the high turnover in the defender system, Walsh had inherited a heavy docket of aging cases involving serious charges. Years later, as my co-counsel Joseph Margulies¹⁹ and I worked on Young’s last appeal, Walsh told us that he regretted that his moment of clarity came a week too late to save Mose Young. Young was executed just after midnight on April 25, 2001.²⁰

Walsh and Young are both victims of Missouri’s unrelenting refusal to address the problems of its indigent defense system. Unfortunately, they are not alone. Their cases are not even rare. University of Missouri-Kansas City Sociology Professor Cathleen Burnett examined the first fifty post-*Furman*²¹

9. *Harvey*, 692 S.W.2d at 291.

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at 292-93.

14. *Id.*

15. *Id.* at 293.

16. *Id.*

17. Application for Stay, *supra* note 2, at 15.

18. *Id.* at 12.

19. Now a professor at Northwestern University School of Law, Joseph Margulies was a lawyer in private practice in Minneapolis, Minnesota who volunteered to represent Mr. Young on his final appeals. See Northwestern Law: Joseph Margulies, <http://www.law.northwestern.edu/faculty/profiles/JosephMargulies/> (last visited July 5, 2010).

20. Tim O’Neil, *Missouri Executes Man Who Killed Three People at St. Louis Pawn Shop*, ST. LOUIS POST-DISPATCH, Apr. 26, 2001, at B2.

21. In *Furman v. Georgia*, the Court struck down the death penalty, as then administered in America, because of its concern that death penalty statutes gave capital

executions in Missouri and found serious allegations of ineffective assistance of counsel in thirty-seven of them.²² Ineffective representation by public defenders is also a contributing factor to the conviction of innocent defendants. Former Cole County Circuit Judge Richard G. Callahan, sworn in December 24, 2009 as the United States Attorney for the Eastern District of Missouri,²³ found two men actually innocent and released them from prison terms of life without parole in cases involving meritorious allegations of ineffective representation by their public defenders.²⁴ In the last twenty-five years, at least seventeen people were released from Missouri prisons because of evidence establishing innocence, and it is likely that ineffective assistance of trial counsel was a factor in many of those wrongful convictions.²⁵ It is well past time to fix Missouri's broken system.

sentencers unbridled discretion, which resulted in a pattern of arbitrary and discriminatory imposition of the death penalty. 408 U.S. 238, 239-40 (1972) (per curiam).

22. CATHLEEN BURNETT, *JUSTICE DENIED: CLEMENCY APPEALS IN DEATH PENALTY CASES* 63-99 (2002). Mose Young's case was not included in her sample, nor were those of Joe Amrine and Eric Clemmons, who were sentenced to death because of their public defenders' inept defense but were later exonerated. *State ex rel. Amrine v. Roper*, 102 S.W.3d 541, 543-44 (Mo. 2003) (en banc); *Clemmons v. Delo*, 124 F.3d 944, 945-46 (8th Cir. 1997). In several cases, courts found that trial public defenders were ineffective, but those findings were vacated because of procedural mistakes by appellate and post-conviction defenders, and the clients were executed. *See, e.g., Nave v. Delo*, 62 F.3d 1024 (8th Cir. 1995); *Bolder v. Armontrout*, 921 F.2d 1359 (8th Cir. 1990); *Laws v. Armontrout*, 836 F.2d 1377 (8th Cir. 1988); *Boliek v. Bowersox*, 96 F.3d 1070 (8th Cir. 1996).

23. Richard G. Callahan, United States Attorney, United States Attorney's Office for the Eastern District of Missouri, http://www.justice.gov/usao/moe/usaattorney_bio.html (last visited May 10, 2010).

24. *See Kezer v. Dormire*, Cole County No. 08AC-CC00293 (filed Feb. 17, 2009), where Judge Callahan observed that,

[t]here is little about this case which recommends our criminal justice system. The system failed in the investigative and charging stage, it failed at trial, it failed at the post trial review, and it failed during the appellate process. . . . Tragically for the family of Mischelle Lawless, the real killer or killers remain at large.

Id. at 2. *See also* *Burton v. Dormire*, Cole County No. 06AC-CC00312 (filed Aug. 18, 2008), where Judge Callahan found Burton innocent but decided it was unnecessary to reach Burton's claim that his public defender was ineffective. The same lawyer had previously been found ineffective for failing to be aware of exculpatory evidence in her own file. *State v. Wells*, 804 S.W.2d 746, 748 (Mo. 1991) (en banc).

25. *See, e.g.,* Tim Bryant, *Freed From Prison, Amrine Now Speaks Against Death Penalty*, ST. LOUIS POST-DISPATCH, Aug. 17, 2003, at D3 (Joseph Amrine); *Critics of Executions Cite Exoneration of Death Row Inmate; They Call for Freeze on Capital Punishment*, ST. LOUIS POST-DISPATCH, Feb. 29, 2000, at B4 (Eric Clemmons); *Earlier Case of Confession Repudiated*, ST. LOUIS POST-DISPATCH, July 25, 1991, at 1C (Melvin Reynolds); Editorial, *An Apology Isn't Enough*, ST. LOUIS POST-DISPATCH, Aug. 6, 2002, at B6 (Larry Johnson); Editorial, *When the System Fails*, ST.

Twenty-five years after the unfortunate circumstances surrounding the disbarment of Jack Walsh, the system remains deep in crisis. The report of a recent in-depth study of the Missouri Public Defender System paints a picture of a system that has been beleaguered with heavy workloads, a lack of resources, and staff turnover for so long that many attorneys do not even know what competent representation is.²⁶ Salaries are so low that attorneys take second jobs to keep up with student loan payments.²⁷ Justice inevitably suffers because cases are delayed, mistakes are made, trials are unfair, and public confidence in the judicial system is eroded when indigent people are poorly defended.

At the outset, it must be understood that the deficiencies in the present structure and operation of the public defender system exist in spite of many public defenders who are dedicated professionals. I share James McKay's respect and admiration for our former colleagues in the Public Defender System:

What held the System together were the efforts of a small but dedicated group of public defenders and administrators who simply would not let the system fail. Sacrificing family, free time, and fi-

LOUIS POST-DISPATCH, July 27, 2006, at D10 (Johnny Briscoe); *Finding the Innocent*, ST. LOUIS POST-DISPATCH, Sept. 5, 2003, at B8 (Lonnie Erby); *Free After 11 Years, Man Dies of Heart Attack*, CHI. TRIB., Mar. 5, 1997, at N10 (Russell Hadley); Bill McClellan, *Reasonover Win of Lawsuit Raises Some Old Questions*, ST. LOUIS POST-DISPATCH, Sept. 20, 2004, at B1 (Ellen Reasonover); Bill McClellan, *DNA Cleared Him, Earned His Release; Now He Needs Job*, ST. LOUIS POST-DISPATCH, June 20, 2004 (Steven Toney); Tony Messenger, *After Wrongful Conviction, Kezer is Seeking More Than an Apology*, ST. LOUIS POST-DISPATCH, Feb. 20, 2009, at B1 (Joshua Kezer); Steve Mills, *14-Year Nightmare Ends for Ex-officer - Once on Death Row, Now Totally Free*, CHI. TRIB., Feb. 27, 2004, at C1 (Steve Manning); Sarah Overstreet, *Faith, Love, Simple Things Sustain Newly Freed Man*, SPRINGFIELD NEWS-LEADER, Feb. 16, 2005, at 1B (Theodore White, Jr.); Robert Patrick, *Missouri Pays Man Imprisoned for Rape He Didn't Commit*, ST. LOUIS POST-DISPATCH, Aug. 27, 2005, at A8 (Anthony D. Woods); Heather Ratcliffe, *Ex-inmate Says He Pleaded Case*, ST. LOUIS POST-DISPATCH, Mar. 23, 2009, at A3 (Darryl Burton); Heather Ratcliffe, *'This Feels Strange to Have My Freedom,' Man Cleared on DNA Evidence is Freed*, ST. LOUIS POST-DISPATCH, Mar. 30, 2007, at A1 (Antonio Beaver); Will Sentell, *After Nine Years, Freedom: Carnahan Pardons Inmate Serving a Murder Sentence*, KAN. CITY STAR, Sept. 30, 1995, at A1 (Johnny Wilson); Benita Y. Williams, *Lost Evidence a Ticket to Freedom for Husband Accused of Murder: Clay County Continues to Look for Items*, KAN. CITY STAR, June 8, 1999, at A1 (Clarence Dexter). In total, these men spent over 250 years in prison. Four of them (Manning, Amrine, Clemmons, and Dexter) spent a combined total of fifty-three years on death row.

26. THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW & SOC'Y, ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 30 (2009), available at <http://members.mobar.org/pdfs/public-defender/2009-report.pdf> [hereinafter ASSESSMENT OF THE MSPD SYSTEM].

27. *Id.* at 7.

nancial security, these (our) public servants kept at it year after year, working through their weekends and into the wee hours of the night just to make sure that the poor people of our society might not be treated like widgets or second class citizens, and that justice might still be done despite the desperate circumstances of their efforts. They knew that basic human dignity, the kind we want for our own kids and loved ones, is not automatic and that if they didn't do it, it wouldn't get done.²⁸

Though this Article criticizes the quality of defense provided by overburdened defenders, it is written with the hope that adequate resources may one day make it possible for them to perform their vital function effectively. Public defenders perform socially and legally significant work every day. They are not to blame when the conditions under which they labor make it impossible to do their jobs.

To fix this broken system, Missouri must first understand the scope and roots of the problem. Part II of this Article discusses Missouri's reluctant implementation of right to counsel since *Gideon v. Wainwright*²⁹ and the State's chronic post-*Gideon* funding deficiencies. Part III examines the depth of the current crisis and discusses the impact of the Public Defender System's long-standing funding deficiencies on the quality of criminal justice. Part IV discusses permanent and temporary solutions to the public defender's perpetual funding problems.

II. MISSOURI'S FAILURE TO IMPLEMENT *GIDEON*'S RIGHT TO COUNSEL

A. *Gideon's Mandate*

The right to counsel is a fundamental component of due process of law in criminal cases. In *Powell v. Alabama*, thirty years before its decision in *Gideon*, the Supreme Court of the United States explained that “[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel.”³⁰ Technical and complex rules of pleading and evidence are beyond the skills and knowledge of “[e]ven the intelligent and educated layman,” and such a person typically “lacks both the skill and knowledge adequately to prepare his defense, even though he [has] a perfect one.”³¹ Therefore, “[h]e requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his inno-

28. James McKay, *The Bar Speaks*, 62 J. MO. B. 162, 162 (2006).

29. 372 U.S. 335 (1963).

30. 287 U.S. 45, 68-69 (1932).

31. *Id.* at 69.

cence.”³² Of course, the Court observed, if this is true of the intelligent layman, “how much more true is it of the ignorant and illiterate, or those of feeble intellect.”³³

The Court emphasized that Powell and his companions were entitled to counsel “from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation, and preparation were vitally important.”³⁴ Because no counsel appeared for the defendants before the morning of trial, “the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.”³⁵

Notwithstanding the “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him,”³⁶ it took many years for the Court to extend the Sixth Amendment right to counsel to all people facing felony prosecution. In *Betts v. Brady*, the Court ruled that *Powell* only applied under special circumstances, such as cases involving complex charges or impaired defendants.³⁷ The oral argument in the Supreme Court by Gideon’s counsel, Abe Fortas, suggests that pre-*Gideon* limitations on the right to counsel resulted from elevating concerns for states’ rights over concerns for fairness and reliability:

MR. FORTAS: And the basic difficulty with *Betts* against *Brady* is that no man, certainly no layman, can conduct a trial in his own defense so that the trial is a fair trial.

THE COURT: Well, *Betts* and *Brady* did not proceed on that basis; it did not deny the obvious. Obviously, a man who is not represented is not as, hasn’t had as good a shake in court as the man who is represented. *Betts* and *Brady* didn’t go on any such basis as that.

32. *Id.*

33. *Id.*

34. *Id.* at 57.

35. *Id.*

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

37. 316 U.S. 455 (1942), *overruled by Gideon*, 372 U.S. at 342-45. Justice Black dissented, noting:

[i]f this case had come to us from a federal court, it is clear we should have to reverse it, because the Sixth Amendment makes the right to counsel in criminal cases inviolable by the federal government. I believe that the Fourteenth Amendment made the [S]ixth applicable to the states. But this view, although often urged in dissents, has never been accepted by a majority of this Court and is not accepted today.

Id. at 474-75 (Black, J., dissenting).

MR. FORTAS: Are you suggesting, Mr. Justice Harlan – which I believe to be the case – that the real basis for *Betts* against *Brady* is the following: *That a man does not get a fair trial if he is not represented by a lawyer, but that the demands of federalism outweigh the absence of a fair trial?*

THE COURT: That's what I understood the basis of *Betts* and *Brady* to be, yes.³⁸

The Court's decision in *Gideon* finally swept away the politics of federalism and held unequivocally that the U.S. Constitution mandates the appointment of counsel for indigent persons too poor to afford to hire an attorney for their defense.³⁹ The Court concluded that the Constitution's "noble ideal" of equality and fairness before impartial tribunals "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."⁴⁰

In holding that the Due Process Clause of the Fourteenth Amendment requires the appointment of counsel in all felony prosecutions, the Court cautioned that "rights protected against state invasion by the Due Process Clause of the Fourteenth Amendment are not watered-down versions of what the Bill of Rights guarantees,"⁴¹ so that the right to counsel includes the right to a lawyer with undivided loyalty who performs competently.⁴² The Court cautioned that "if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and . . . judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."⁴³ Unfortunately, Missouri consistently has fallen short of implementing *Gideon*'s promise. The staff and resources necessary to ensure adequate representation to all poor persons accused of crimes have never kept pace with the growing complexity and volume of criminal litigation, and Missouri courts have done little to maintain proper standards of performance by indigent defense counsel.

38. Transcript of Oral Argument, *Gideon v. Wainwright*, 372 U.S. 355 (1963) (No. 155), available at http://www.rashkind.com/Gideon/Gideon_v_%20Wainwright_oral_argument_transcript.htm (last visited July 25, 2010) (text version) (emphasis added); Transcript of Oral Argument, *Gideon*, 372 U.S. 355 (No. 155), available at http://www.oyez.org/cases/1960-1969/1962/1962_155/ (last visited July 5, 2010) (audio version).

39. *Gideon*, 372 U.S. at 344.

40. *Id.*

41. *Id.* at 347.

42. *Glasser v. United States*, 315 U.S. 60, 75 (1942).

43. *McMann v. Richardson*, 397 U.S. 759, 771 (1970) (emphasis added).

B. Missouri's Attempts to Implement Gideon

Seven years after *Gideon* in *State v. Green*, Missouri prosecutors asked the Supreme Court of Missouri to overturn a trial court judgment directing the state to pay fees and expenses for lawyers appointed to represent indigent defendants.⁴⁴ The court responded that “[t]he lawyers of Missouri, as officers of the [c]ourt, have fulfilled this State obligation, without compensation, since we attained statehood, although other persons essential to the administration of criminal justice (e.g. prosecuting attorneys, assistants to the Attorney General, psychiatrists, et al.) have not been asked to furnish services gratuitously.”⁴⁵ Noting the growing complexity of criminal litigation and the corresponding demands on the time and resources of uncompensated appointed counsel, the court concluded that the burden of representing poor people facing criminal charges was “more than the profession *alone* should shoulder” and felt “compelled to relieve the profession of it.”⁴⁶

Despite its recognition of the necessity to fund indigent defense, the Supreme Court of Missouri reversed the trial court’s order awarding attorney fees, expressing the view that a “permanent solution to the problem presented is an appropriate subject for the legislature.”⁴⁷ The court also made clear that it was prepared to act if the legislature refused, warning that “this [c]ourt, after September 1, 1972, will not compel the attorneys of Missouri to discharge alone ‘a duty which constitutionally is the burden of the State.’”⁴⁸

Chief Justice James Finch dissented from the order reversing the award of attorney fees, pointing out that, in 1970, Missouri was one of only three states that had not funded a mechanism to provide legal representation to

44. *State v. Green*, 470 S.W.2d 571, 572 (Mo. 1971) (en banc).

45. *Id.* at 572-73. Missouri’s statute always has required the appointment of counsel, although no provision existed for the payment of fees and expenses. *Id.* at 574 (Finch, C.J., dissenting). “The predecessor of [section] 545.820 was first enacted in 1825 (Laws 1825, Ch. II, s 22, p. 319) and the statute has been carried forward virtually unchanged to the present time. A similar provision was in force in territorial days.” *Id.* Representation of indigent persons accused of crimes was considered the pro bono obligation of the Bar:

A better reason for not allowing counsel compensation in such cases is that “when a lawyer takes his license he takes it burdened with certain honorary obligations. He is a sworn minister of justice, and when commanded by the court he cannot withhold his services in cases prosecuted in forma pauperis.”

State ex rel. Gentry v. Becker, 174 S.W.2d 181, 184 (Mo. 1943) (quoting 1 EDWARD M. THORNTON, ATTORNEYS AT LAW 143-44 (1914)).

46. *Green*, 470 S.W.2d at 573 (quoting *State v. Rush*, 217 A.2d 441, 448 (N.J. 1966) (emphasis added)).

47. *Id.* (quoting *People ex rel. Conn. v. Randolph*, 219 N.E.2d 337, 340 (Ill. 1966)).

48. *Id.* (quoting *Rush*, 217 A.2d at 446).

indigent defendants.⁴⁹ He was concerned that the court was abdicating its duty too quickly, and he did not trust the legislature to rise to the occasion.⁵⁰ Legislation creating a public defender system and authorizing fees for private appointed counsel had been proposed in every legislative session since 1967, yet “[n]o public defender system and no other method providing for compensating counsel for indigent defendants [was] forthcoming.”⁵¹ In Chief Justice Finch’s view, ordering adequate funding for a mechanism to represent indigent defendants was well within the power of the court. The Supreme Court of Missouri had previously held that courts have the inherent power to expend funds to hire the personnel essential to its functioning.⁵² Attorneys are essential, Chief Justice Finch argued, because “[w]ithout them, there would be a complete breakdown in the administration of criminal justice in the State of Missouri.”⁵³ He could not imagine “a more serious threat to the very existence of the judicial branch of government and the performance of its constitutionally mandated functions.”⁵⁴ Chief Justice Finch contended that “[t]he arm which holds the scales of justice cannot be shackled or made impotent by either restraint, circumvention or denial by another branch of that government.”⁵⁵ The majority apparently agreed on this point; it did, after all, issue the legislature the explicit ultimatum to act by September 1, 1972, or the court itself would take action to pay lawyers for their services on behalf of indigent defendants.⁵⁶

Green had the desired effect of spurring the General Assembly in 1972 to enact legislation to create the Missouri Public Defender System.⁵⁷ For the first time in Missouri’s history, public defender offices were established in Kansas City and St. Louis, and funds were available to pay private attorneys

49. *Id.* at 579 n.3 (Finch, C.J., dissenting).

50. *See id.* at 579.

51. *Id.*

52. *Id.* at 577. Justice Finch cited cases authorizing Missouri courts to hire essential personnel, such as staff for the Juvenile Division of a circuit court. *Id.* (citing cases); *see, e.g.*, *State ex rel. Weinstein v. St. Louis County*, 451 S.W.2d 99 (Mo. 1970) (en banc); *State ex inf. Anderson v. St. Louis County*, 421 S.W.2d 249 (Mo. 1967) (en banc); *Pogue v. Swink*, 284 S.W.2d 868 (Mo. 1955); *State ex rel. Gentry v. Becker*, 174 S.W.2d 181 (Mo. 1943); *Clark v. Austin*, 101 S.W.2d 977 (Mo. 1937) (en banc).

53. *Green*, 470 S.W.2d at 577-78 (Finch, C.J., dissenting).

54. *Id.* at 578.

55. *Id.* at 578 (quoting *Noble County Council v. State ex rel. Fifer*, 125 N.E.2d 709, 713 (Ind. 1955)).

56. *Id.* at 573 (majority opinion). The court did not explain why it chose this particular date, but it coincides with the first day of the month following the effective date of legislation that would have been enacted in the following term of the General Assembly – essentially allowing the legislature one full term in which to take action and thereby avoiding a constitutional showdown with the court.

57. H.B. 1314, 76th Gen. Assem., 2d Reg. Sess. (Mo. 1972).

to represent indigent defendants.⁵⁸ The legislation was undoubtedly a step in the right direction, but still public defender salaries were meager, hourly rates were stingy, and workloads were oppressive. Further, even at hourly rates that were well below the market value for legal services, the fund from which private lawyers were paid frequently dried up well before the end of the fiscal year, resulting in many lawyers being pressed into service for no pay.⁵⁹

Fewer than eight years after the creation of the Missouri Public Defender System, the issue of adequate funds found its way back to the Supreme Court of Missouri. In March of 1981, a St. Louis County circuit judge appointed attorney Donald Wolff to represent an indigent defendant, noting in his order that “[u]nder the present status of the appointed counsel fund, said attorney will not be paid or reimbursed for any of his expenses.”⁶⁰ Wolff then petitioned the Supreme Court of Missouri in *State ex rel. Wolff v. Ruddy* for a writ of prohibition ordering the circuit court to withdraw the appointment, arguing that the uncompensated appointment violated the Thirteenth Amendment’s prohibition of involuntary servitude and deprived him of his right to earn a living.⁶¹ The Supreme Court of Missouri noted that, by the date of its May 27, 1981 opinion, all of the funds appropriated by the legislature had been spent; “[t]he cupboard [was] bare.”⁶²

Unlike its earlier decision in *Green*, this time the court specifically disavowed the power to impose a fiscal solution. Noting that it lacks the power of the purse reserved to the legislature,⁶³ the court nevertheless resolved not to allow Missouri’s criminal justice system to grind to a halt. Instead, the court said, “[W]e must turn again to the Bar of Missouri. We do so without apology.”⁶⁴ The court quashed the preliminary writ, ruling that lawyers can

58. These steps were made possible by a Law Enforcement Assistance Grant administered by the Department of Justice. THE MO. PUBLIC DEFENDER COMM’N, FISCAL YEAR 2009 ANNUAL REPORT: ASSURING THE PUBLIC DEFENSE 2 (2009), available at <http://publicdefender.mo.gov/about/FY2009AnnualReport.pdf> [hereinafter MO. PUB. DEF. COMM’N, 2009 ANNUAL REPORT].

59. See, e.g., *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981) (en banc); *State v. Brown*, 722 S.W.2d 613, 620 (Mo. App. W.D. 1986). Three years after the public defender system was created, Chief Justice Robert Seiler of the Supreme Court of Missouri expressed concern about the adequacy of funding. See Robert E. Seiler, *The State of the Judiciary in Missouri*, 31 J. MO. B. 541, 542 (1975).

60. *Wolff*, 617 S.W.2d at 64.

61. *Id.* at 66.

62. *Id.* at 65.

63. *Id.* (“No money shall be withdrawn from the state treasury except by warrant drawn in accordance with an appropriation made by law.” (quoting MO. CONST. art. IV, § 28)). But see Justine Finney Guyer, Note, *Saving Missouri’s Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335, 356-59 (2009) (persuasively arguing that the court has the power and the duty to compel adequate funding for indigent defense).

64. *Wolff*, 617 S.W.2d at 65.

be pressed into *pro bono* service by appointment in criminal cases.⁶⁵ While the court made allowances for counsel to avoid appointments upon a determination “that the appointment will work any undue hardships,”⁶⁶ it advised that refusal of such service “may be the subject of disciplinary action.”⁶⁷ However, the court stated that no rule of law or professional ethics requires an attorney to advance costs or expenses of preparing a proper defense of an indigent client and imposed a meaningful sanction for the state’s failure to pay litigation expenses.⁶⁸ A Missouri circuit court had the power to order the state to advance “reasonable and necessary costs” of a proper defense, and upon the state’s failure to comply with such an order in a timely fashion, “the court should on proper motion where necessary to protect the constitutional rights of the accused, *order discharge of the accused.*”⁶⁹ The court urged the “co-equal Executive and Legislative branches of government to each assume its share of responsibility for solution of the problem of defense of the indigent accused.”⁷⁰

In response to *Wolff v. Ruddy*, the Missouri legislature in 1982 reorganized the public defender system to avoid the potential consequences of the court’s decision, establishing the Office of the Public Defender as an independent department of the judicial branch of state government.⁷¹ While the previous statute had authorized the court to pay fees and expenses of private counsel,⁷² the new system provided for a combination of full-time attorneys employed by the public defender system and private attorneys who contract with the state public defender to provide representation in rural areas or in conflict of interest cases.⁷³ Special Public Defender Offices were created in

65. *Id.* at 68.

66. *Id.* at 67. See generally Christopher D. Aulepp, *Enslaving Paul to Free Peter: The Dilemma of Protecting Counsel’s Constitutional Rights While Providing Indigent Defendants With Effective Assistance of Counsel*, 78 UMKC L. REV. 291 (2009).

67. *Wolff*, 617 S.W.2d at 67.

68. *Id.*

69. *Id.* (emphasis added). The United States Supreme Court subsequently ruled in *Ake v. Oklahoma* that the Due Process Clause of the Fourteenth Amendment requires the state to provide indigent defendants with the “basic tools of an adequate defense.” 470 U.S. 68, 77 (1985); see also *Williamson v. Vardeman*, which granted habeas corpus relief to Kansas City attorney J.D. Williamson, who had been held in contempt of court and sentenced to ten days in jail for refusing an appointment in a criminal case. 674 F.2d 1211, 1213, 1216 (8th Cir. 1982). The Eighth Circuit found that appointing Williamson, without assuring reimbursement for out-of-pocket litigation expenses, “would constitute a ‘taking’ of counsel’s property without just compensation in violation of the due process clause of the fourteenth amendment.” *Id.* at 1216.

70. *Wolff*, 617 S.W.2d at 67.

71. See MO. REV. STAT. §§ 600.011-.101 (2000) (effective Apr. 1, 1982).

72. See *Wolff*, 617 S.W.2d at 65 (quoting MO. REV. STAT. § 600.150 (1978)).

73. MO. PUB. DEF. COMM’N, 2009 ANNUAL REPORT, *supra* note 58, at 2.

Kansas City and St. Louis to represent indigent persons in cases in which the primary defender office had a conflict of interest.⁷⁴ Court-appointed private attorneys were essentially written out of the system, thus keeping a lid on the cost of representation and avoiding the dismissal sanction of *Wolff v. Ruddy* in the inevitable event of inadequate funding.⁷⁵

In 1989, the public defender system was again reorganized to provide full-time defender offices in every judicial circuit, relying only occasionally on the services of contract counsel for conflict of interest cases.⁷⁶ Creating full-time defender offices in jurisdictions that had previously relied entirely upon unpaid and under-paid private lawyers for indigent defense was undoubtedly a step in the right direction. An adequately funded staff of skilled specialists can handle the bulk of the criminal docket without compromising the quality of representation. Indeed, there is no question that in some areas of Missouri, the quality of representation available to indigent defendants was greatly enhanced by this measure.⁷⁷ However, by replacing courts' appointment powers with the state public defender's authority to contract with private attorneys,⁷⁸ the system lost an important safety valve with which to relieve the pressure of over-burdened defender offices.⁷⁹ Even a defender office staffed with skilled specialists will cease to be effective under impossible

74. See *State ex rel. Pub. Def. Comm'n v. Bonacker*, 706 S.W.2d 449 (Mo. 1986) (en banc) (finding that government-employed lawyers are less likely to be influenced by conflicts of interest). This ruling facilitated the elimination of appointed counsel in cases where a prisoner claimed that his public defender was ineffective and in other cases where the primary institutional defender was disqualified by a potential conflict of interest. Cf. *Cannon v. Mullin*, 383 F.3d 1152, 1173-74 (10th Cir. 2004).

75. *State v. Brown*, 722 S.W.2d 613 (Mo. App. W.D. 1986). In a complex securities fraud case, the Jackson County Circuit Court allowed the public defender to withdraw and appointed a private firm to represent the defendant. *Id.* at 614. Private counsel moved for advancement of expenses, which the trial court ordered the state to pay. *Id.* at 615. When the General Assembly refused to allocate the money, the charges were dismissed, and the dismissal was affirmed on appeal. *Id.* at 621. "The Missouri legislature was responsible for appropriating the monies necessary for Brown's defense. It failed to do so. Following the guidelines of *Wolff*, the trial court had no choice but to dismiss the charges." *Id.* at 620. The court noted that the issue might have been avoided by leaving the public defender on the case. *Id.*

76. MO. PUB. DEF. COMM'N, 2009 ANNUAL REPORT, *supra* note 58, at 2.

77. The reorganized structure of the public defender system was "designed to maximize both effectiveness and efficiency through specialization." ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 3.

78. MO. REV. STAT. § 600.042.1(10) (2000).

79. While the Supreme Court of Missouri had ruled in *Wolff* that counsel could be appointed to serve without compensation, the power of the state public defender to assign cases to private attorneys is dependent entirely on the availability of funds with which to hire them. See *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 888-89 (Mo. 2009) (en banc). Such funds are simply not available in the system's current financial crisis. See *id.* at 873.

workloads.⁸⁰ It is no longer the state bar association but a very small subclass of the bar – public defenders – who must shoulder this burden alone.

III. THE CURRENT CRISIS

A. *The Depth of the Crisis*

A recent in-depth study of the Missouri Public Defender System (MSPD) paints a bleak picture of a system on the verge of collapse:

Our findings lead to the inescapable conclusion that MSPD is confronting an overwhelming caseload crisis, one of the worst of its kind in the nation – a crisis so serious that it has pushed the entire criminal justice system in Missouri to the brink of collapse. The severity of this crisis has been forecasted for years, by those closest to it, but next to nothing has been done. And now the situation is as urgent as it is dire.⁸¹

In 2005, a Missouri state public defender reported that he would have to hire 100 more attorneys to reduce caseloads to 235 cases per attorney per year, “a standard that had been established by Governor John Ashcroft *in 1989*.”⁸² Although a dozen attorney positions were added to the system in 2009, “there had been no increase in the number of [full-time employees] for six years, though MSPD’s caseload had risen by over 12,000 cases.”⁸³ Presently, the Public Defender Commission estimates that 176 additional trial attorneys and more than 21 additional appellate defenders, plus corresponding support staff, are needed to bring the system within maximum caseload standards.⁸⁴ Then-Chief Justice of the Supreme Court of Missouri Laura Denvir Stith informed a recent judicial conference that “Missouri ranks dead last in the amount of per capita funding for its public defenders.”⁸⁵ A study commissioned by the Missouri Bar concluded that the public defender system has

80. When caseloads exceed national standards, it is “impossible for even the most industrious of attorneys to deliver effective representation in all cases.” AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, GIDEON’S BROKEN PROMISE: AMERICA’S CONTINUING QUEST FOR EQUAL JUSTICE 18 (2004), available at <http://www.abanet.org/legalservices/sclaid/defender/brokenpromise/fullreport.pdf> [hereinafter GIDEON’S BROKEN PROMISE].

81. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 66.

82. *Id.* at 34.

83. *Id.* at 15.

84. *Pratte*, 298 S.W.3d at 888 (citing MO. PUB. DEF. COMM’N, 2009 ANNUAL REPORT, *supra* note 58, at 70, 72).

85. Laura Denvir Stith, *Chief Justice Laura Denvir Stith Addresses the Missouri Bar, Judicial Conference*, 64 J. MO. B. 280, 282 (2008).

deteriorated to the point where it often provides “nothing more than the illusion of a lawyer.”⁸⁶

What does a system on the brink look like? Low salaries cause high turnover, low morale, and recruitment difficulties.⁸⁷ Some defenders work second jobs to pay student loans.⁸⁸ Between 2001 and 2005, the cumulative turnover rate was nearly 100%.⁸⁹ The Spangenberg Group⁹⁰ observed that “[t]he turnover problem was made worse by the fact that there appeared to be little hands-on supervision of the staff attorneys, particularly the new attorneys. Supervision was very limited because most supervisors were carrying their own heavy caseloads.”⁹¹ High turnover contributes to a vicious cycle that adversely affects the clients:

With many experienced attorneys leaving, cases were being distributed among either a small number of remaining experienced attorneys or to new attorneys who were not yet ready for either a significant caseload or serious felony cases. The turnover problem was causing the remaining staff to shoulder the burden, contributing to a sense of overload and burnout. In addition, the turnover problem was creating a serious risk that newly-assigned attorneys would be unprepared or inexperienced. *Judges in some areas expressed a real concern over the experience of the public defenders handling serious cases.*⁹²

A past president of the Missouri Bar Association described the compound effects of high turnover: “As more experienced attorneys leave the public defender system, less and less experienced attorneys are having to handle more and more serious cases for which they are unprepared, and there are few if any more senior attorneys with time available to provide help and advice.”⁹³ One senior public defender told the Spangenberg Group that, with

86. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 66.

87. *Id.* at 7.

88. “[F]or attorneys at the lower and mid-levels of the pay scale, who also face staggering law school debt, present salaries simply are not high enough to cover all expenses. In addition to the pizza delivery, retail, bartending and truck driving that the Public Defender has previously reported, the site visit revealed other jobs maintained by these full-time attorneys.” *Id.* at 15.

89. *Id.*

90. The Spangenberg Group is a private criminal justice research firm that has conducted research in all fifty states and provided consultative services to developing and developed countries that are reforming their legal aid delivery programs. *Id.* at 3 n.4. Its study of the Missouri Public Defender System was undertaken in conjunction with the George Mason University Center for Justice, Law and Society. *See id.*

91. *Id.* at 7.

92. *Id.* at 6-7 (emphasis added).

93. Douglas A. Copeland, *The President's Page: Missouri's Public Defender System*, 62 J. MO. B. 10, 11 (2006).

high turnover, “there are always many new attorneys, but due to caseloads, they get next to no supervision; what results is a crop of attorneys faced with crushing caseloads who ‘do not know what effective representation is’ due to a crippling lack of experience and supervision.”⁹⁴ With an indigent defense system run by lawyers who never had an opportunity to become competent, the quality of justice in Missouri will inevitably continue to sink even lower.

Excessive workload is an even greater threat to the quality of representation than is high turnover. The Spangenberg Group reported that “[i]nterviews with public defenders revealed a growing sense of frustration, at times desperation, at the sheer volume of cases they are asked to handle.”⁹⁵ Workloads are so heavy that performance standards are not only violated routinely, but violations of performance and ethical standards have been institutionalized. Defenders admit that they triage cases, literally rationing justice.⁹⁶ The Spangenberg Group found that “[w]ork on some cases would not begin until the trial date was near.”⁹⁷ The practice of “meet ‘em and plead ‘em” is not only commonplace but is also expected.⁹⁸ The typical public defender client gets very little, if any, individualized attention to his or her case. “The statewide public defender system . . . had the capacity [in fiscal year 2009] to spend only 7.7 hours per case, including trial, appellate and capital cases.”⁹⁹

Although communication with clients is an essential ethical obligation of lawyers, public defenders reported that inadequate client communication “may be the single most problematic consequence” of their unconscionable workloads.¹⁰⁰ Assistant public defenders estimate that the typical initial client interview takes less than five minutes, making it impossible to gather the kind of information critical to any meaningful release determination or case assessment.¹⁰¹ The failure to communicate regularly and effectively with clients causes irreparable damage to the attorney-client relationship, which only leads to more problems, “because when attorneys finally make it out to see their clients, clients express frustration that they have been ignored, skepticism that the lawyer has been doing anything with the time, and a gen-

94. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 30. Recently, poor economic conditions have made it more difficult for defenders to find other employment; the Spangenberg Group found that “many disgruntled lawyers stayed on essentially against their will.” *Id.* at 16.

95. *Id.* at 16.

96. Public defenders use the word “triage” to describe the necessity to neglect some clients in order to attempt adequate representation of others. *Id.* at 8.

97. *Id.*

98. *Id.* at 23.

99. State *ex rel.* Mo. Pub. Defender Comm’n v. Pratte, 298 S.W.3d 870, 873 (Mo. 2009) (en banc).

100. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 18.

101. *Id.* at 19.

eral lack of trust in the attorney.”¹⁰² The oppressive workload creates a vicious cycle: the attorney-client relationship can only be repaired by spending more time with the client, but the lack of sufficient time is what creates the problem in the first place.¹⁰³

The rationing of investigative time and resources is as problematic as the shortage of lawyers. Most cases are never investigated; the Spangenberg Report found that investigation is limited to some “serious” felonies, while low-level felonies are rarely investigated, and misdemeanors are never investigated.¹⁰⁴ Investigators reported that attorneys rarely accompany them on witness interviews, and investigators often fail to locate and interview essential witnesses.¹⁰⁵ Public defenders interviewed by the Spangenberg Group agree that the Missouri State Public Defender “fails to complete satisfactory investigation in many cases.”¹⁰⁶ Discovery practice is also deficient, typically consisting of a one-time boilerplate written request with virtually no follow-up.¹⁰⁷ Motions to compel are rarely, if ever, filed; discovery is limited to what the prosecutor voluntarily hands over.¹⁰⁸ Although the vast majority of cases are disposed of by guilty plea, “very little preparation goes into sentencing.”¹⁰⁹ Not surprisingly, the Spangenberg Group study was able to document specific instances of outright legal malpractice by public defenders, including failing to file essential motions, failing to investigate cases, and losing track of clients languishing in jails.¹¹⁰ One attorney in St. Louis admitted that “the caseload makes me forget to do important tasks, like one instance when I forgot to file a motion for a new trial.”¹¹¹

Such instances of malpractice might be remedied through Missouri’s post-conviction review process, but post-conviction defenders are equally overwhelmed. Further, the malpractice of a post-conviction defender can forfeit the client’s remedy for malpractice by his trial attorney.¹¹² A poignant

102. *Id.* at 18.

103. *Id.*

104. *Id.* at 22. “Rather than going to interview witnesses in person, investigators tend to conduct phone interviews and do not typically take written statements.” *Id.*

105. *Id.* at 22-23.

106. *Id.* at 22.

107. *Id.* at 23-24.

108. *Id.*

109. *Id.* at 26.

110. *Id.*

111. *Id.* at 27.

112. *See* *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991) (holding that indigent defendants have no remedy for claims that are barred by a post-conviction lawyer’s malpractice). One prosecutor has suggested that if the Spangenberg Group’s findings were accurate, “one would expect to see a dramatic increase in post-conviction relief based on ineffective assistance of counsel in public defender cases.” Dean Dankelson, *Missouri’s Public Defender System Not Alone in Struggle*, MISSOURIAN, Mar. 22, 2010, available at <http://www.columbiamissourian.com/stories/2010/03/22/column-entire-criminal-justice-system-needs-resources/>. That conclu-

example is Eric Clemmons, who was convicted of murder and sentenced to death after his public defender failed to discover persuasive evidence of Clemmons' innocence.¹¹³ His post-conviction defender failed to raise the claim, but Clemmons won a retrial in federal court because he had preserved the issue in a pro se post-conviction motion.¹¹⁴ Clemmons was cleared of the crime on his retrial by pro bono efforts of counsel from outside the system.¹¹⁵ Had Clemmons not filed pro se pleadings supplementing the work of his public defender, he would have been executed rather than exonerated.

The caseload pressures that result in the denial of effective representation also result in the outright denial of representation. As high as the Missouri defender system's caseload is, the Spangenberg Group found that it ought to be higher because poor people are being denied representation.¹¹⁶ To reduce their caseloads, defenders make questionable findings of non-indigence, turning away poor people who need representation. System-wide, 8-9% of the people who apply for public defender services are found non-indigent; in half a dozen districts, that rate exceeds 20%.¹¹⁷ The Spangenberg Report concluded that Missouri public defenders have wrongfully denied representation to "a substantial class of indigent persons" through questionable findings of non-indigence.¹¹⁸

B. Desperate Measures: Just Say "No"

Taking a page from Jack Walsh's playbook, the Missouri Public Defender Commission in December 2007 promulgated a rule establishing a procedure by which district defenders could declare themselves overburdened, and thereafter decline to accept additional cases.¹¹⁹ The operation of the district defender system returns to normal when the defender's caseload reaches a predetermined level of acceptability.¹²⁰ The basic concept of the regulation has a strong foundation in the Code of Professional Responsibility, which states that "[a] lawyer shall provide competent representation to a client.

sion only follows if representation in post-conviction proceedings is adequate, which is highly unlikely.

113. *Clemmons v. Delo*, 124 F.3d 944, 947 (8th Cir. 1997).

114. *Id.*

115. Clemmons was not represented by public defenders at his retrial; he was defended on his acquittal by Charles M. Rogers and Cheryl Pilate, private attorneys appointed to represent Clemmons in his federal habeas proceedings. *Id.* at 945.

116. "It now appears that, as each and every effort to stem the tide of the caseload crisis failed, indigency determinations became a backdoor method of case disposal." ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 53.

117. *Id.* at 57.

118. *Id.* at 58.

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

120. The operation of 18 C.S.R. § 10-4.010 is described in detail in *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (en banc).

Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”¹²¹ Though somewhat more orderly and less abrupt than Mr. Walsh’s morning-of-trial pronouncement that he would not participate in his client’s trial,¹²² the end result is the same: indigent defendants are left unrepresented.¹²³

Pursuant to the commission’s regulation, three public defenders challenged court orders appointing them to represent indigent defendants after the defenders had notified the courts of their unavailability due to excessive workloads.¹²⁴ Those cases were consolidated on petitions for writs of prohibition in the Supreme Court of Missouri in which the commission alleged that the court orders appointing the public defenders violated 18 C.S.R. § 10-4.010.¹²⁵ The court concluded that the regulation was invalid to the extent that it was inconsistent with a Missouri statute,¹²⁶ which instructs that public defenders “shall” provide legal services to eligible indigent persons and mandates representation by the defender in all such cases.¹²⁷ Therefore, the court invalidated the regulation authorizing the defender to turn away categories of cases because it exceeded the commission’s statutory authority.¹²⁸

121. MO. SUP. CT. RULES OF PROF’L CONDUCT R. 4-1.1 (2007); *see also id.* at R. 4-1.3 (“A lawyer shall act with reasonable diligence and promptness in representing a client.”); *id.* at R. 4-1.16 (a lawyer shall decline representation if “the representation will result in violation of the rules of professional conduct or other law.”).

122. *See supra* notes 1-13 and accompanying text.

123. In its 2009 session, the Missouri legislature passed Senate Bill 37, which tracked the design of 18 C.S.R. § 10-4.010. S.B. 37, 95th Gen. Assem., 1st Reg. Sess. (Mo. 2009). Governor Jay Nixon vetoed the bill, stating, “. . . in no way does it actually address the problem. Those cases will still exist, those defendants will still be waiting for their day in court, and those crime victims will continue to await justice.” Memorandum to the Secretary of the State of Missouri (July 13, 2009) *available at* <http://governor.mo.gov/actions/pdf/2009/SBVL37.pdf> (last visited Feb. 20, 2010).

124. *Pratte*, 298 S.W.3d at 874.

125. In two cases, the court appointed the public defender in his official capacity; in the third case, the court appointed the defender in his personal capacity. *Id.*

126. MO. REV. STAT. § 600.042.4 (2000).

127. *Pratte*, 298 S.W.3d at 882. Eligible persons are those charged with felonies, misdemeanors, probation, or parole violations, and others for whom the federal or state constitution requires appointment of counsel. *See id.* at 875. In addition, the statute requires defenders to represent a person when, “in a case in which he faces a loss or deprivation of liberty, any law of this state requires the appointment of counsel.” MO. REV. STAT. § 600.042.4(6) (2000). This provision has been interpreted to require representation in civil contempt proceedings for non-payment of court-ordered support obligations. *See, e.g., State ex rel. O’Brien v. Ely*, 718 S.W.2d 177, 180 (Mo. App. W.D. 1986).

128. *Pratte*, 298 S.W.3d at 882. Pursuant to this conclusion, the writs prohibiting the appointment of two of the public defenders were quashed. *Id.* at 890. The writ was made absolute as to the third defender, who was appointed in his individual capacity, because section 600.021.2 provides that “[p]ublic defenders, assistant public defenders, and deputy public defenders . . . shall not otherwise engage in the practice

The court's invalidation of the defenders' plan to refuse certain categories of cases did not reflect a rejection of the regulation's underlying purpose. The American Bar Association holds indigent defenders to the same standard as other attorneys under the Model Code of Professional Responsibility,¹²⁹ and the Supreme Court of Missouri agreed.¹³⁰ Writing for the court, Judge Michael Wolff expressed concern that the excessive workload of the public defender system "calls into question whether *any* public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned."¹³¹ However, the court's analysis of the plight of defenders and their clients was constricted by Missouri's statutory framework for delivering indigent defense services.

The Supreme Court of Missouri considered and rejected the suggestion that the state public defender had the statutory authority to appoint members of the bar to work for free, thus closing the door on the commission's attempt to devise a regulatory remedy for the workload crisis.¹³² However, in closing one door, the court may have opened another, albeit reluctantly, in its reaffirmation of the holding in *Wolff v. Ruddy* that "[l]awyers, as members of a public profession, accept the duty to perform public service without compensation."¹³³ Given the scale of the problem and the corresponding burden to the private bar, the court confessed that it was reluctant to require private attorneys to take on indigent defense cases without compensation.¹³⁴ Instead, the court endorsed caseload-reducing measures described in the commission's regulation, including asking prosecutors to agree not to seek jail time in certain cases, determining cases or categories of cases in which private lawyers will be appointed, and removing cases from the trial docket until counsel is available.¹³⁵ In language considerably less coercive than the court used in *State v. Green* and *Wolff v. Ruddy*, the court merely expressed the expectation that presiding judges, prosecutors, and the public defender would cooperate to implement voluntary solutions to the problem of defender workloads.¹³⁶

of law except as authorized by this chapter or by commission rule." *Id.* at 885, 890 (quoting MO. REV. STAT. § 600.021.2 (2000)). Of course, nothing prevented the circuit court from subsequently appointing the defender's office.

129. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006) (discussing the ethical obligation of lawyers who represent indigent criminal defendants).

130. *Pratte*, 298 S.W.3d at 880.

131. *Id.* (emphasis added).

132. *Id.* at 887 n.35. Section 600.042.5(1) provides that "[t]he director may . . . [d]elegate the legal representation of any person to any member of the state bar of Missouri." MO. REV. STAT. § 600.042.5(1) (2000). The court found that this authority is contingent upon the director's payment of counsel pursuant to the director's authority to enter into contracts with private counsel. *Pratte*, 298 S.W.3d at 876.

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

134. *Id.* at 888.

135. *Id.* at 887.

136. *Id.* at 889 n.41.

Thus, Missouri's criminal justice crisis remains unresolved, with no meaningful remedy on the horizon. Even though the U.S. Supreme Court held more than twenty-five years ago that "[t]he Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results,"¹³⁷ Missouri defenders have long since been disabled from performing that role. As one assistant defender reported in the Spangenberg Group Report, "[w]e are constantly being forced into being ineffective; it affects morale and how the lawyers view the adversary system. Everything becomes eroded."¹³⁸

IV. FIXING A BROKEN SYSTEM

In Douglas Adams' science fiction spoof, the *Hitchhiker's Guide to the Galaxy* series, protagonist Arthur Dent encounters a "Somebody Else's Problem" field, or SEP.¹³⁹ Adams' character, Ford Prefect, explains that "[a]n SEP is something we can't see, or don't see, or our brain doesn't let us see, because we think that it's somebody else's problem The brain just edits it out, it's like a blind spot."¹⁴⁰ Because an SEP "relies on people's natural predisposition not to see anything they don't want to," it can run for over a hundred years on a single flashlight battery.¹⁴¹

Missouri's public defender system is caught in a classic SEP, in the form of a separation of powers standoff.¹⁴² The core problem is lack of resources, which, according to the Supreme Court of Missouri, is the responsibility of the legislative and executive branches of government.¹⁴³ After the state supreme court in *Pratte* invalidated the Public Defender Commission's case-dumping regulation, the Missouri legislature passed a bill based on the regulation, but Governor Jay Nixon vetoed it.¹⁴⁴ The Missouri legislature refuses to approve any meaningful increase in public defender resources, even though the MSPD annual report acknowledges that its workload may require it to refuse cases, "throwing the state of Missouri into federal court for constitutionally violating the right of indigent clients to effective assistance of

137. *Strickland v. Washington*, 466 U.S. 668, 685 (1984).

138. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 27.

139. DOUGLAS ADAMS, LIFE, THE UNIVERSE AND EVERYTHING 27-28 (1982).

140. *Id.* at 28.

141. *Id.* at 36-37.

142. *See State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 873 (Mo. 2009) (en banc); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. 1981) (en banc); *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971) (en banc).

143. *Pratte*, 298 S.W.3d at 873. "The executive . . . holds the sword of the community. The legislature . . . commands the purse The judiciary, on the contrary, has no influence over either the sword or the purse" *Wolff*, 617 S.W.2d at 65 (quoting THE FEDERALIST NO. 78 (Alexander Hamilton)).

144. *See supra* note 123 and accompanying text.

counsel.”¹⁴⁵ Federal jurisprudence, however, presents serious obstacles to defendants seeking vindication of their right to effective assistance of counsel in federal courts,¹⁴⁶ which must defer to state decisions on the issue.¹⁴⁷ As then-Chief Justice Stith advised in her State of the Judiciary address to the legislature, “So far, a long-term solution has proved elusive.”¹⁴⁸

In spite of the lack of action, there is no shortage of rhetoric on the issue. According to judges of the Supreme Court of Missouri, if we do not adequately fund the public defender system, defendants will be released without trial:

There is a serious public safety aspect of the public defender crisis as well. The federal constitution guarantees defendants both speedy trials and competent legal counsel. The inadequate number of public defenders, however, puts in question the state’s ability to meet either of these requirements. In short, if not corrected, defendants potentially could be set free without going to trial.¹⁴⁹

Despite the warning, the state supreme court has always taken the position “that a ‘permanent solution to the problem presented is an appropriate subject for the legislature.’”¹⁵⁰ Unquestionably, legislative action adequately addressing the crisis promises a more orderly and long-term solution. Both the judiciary and the Missouri Bar Association have lobbied vigorously for more resources for the public defender system. As Douglas Copeland, a past President of the Missouri Bar Association, observed, the problem is obvious and the message is clear: neither the governor nor the legislature can say, “We didn’t understand that there’s a problem.”¹⁵¹

Given the legislature’s history of persistent neglect of indigent defense, as *Gideon*’s fiftieth anniversary approaches, alternative solutions must be considered and implemented with all deliberate speed. Multiple measures must be taken to save Missouri’s criminal justice system. However, anything short of a massive retooling of Missouri’s criminal justice system will fall short of implementing *Gideon*’s promise. As then-State Public Defender J.

145. MO. PUB. DEF. COMM’N, 2009 ANNUAL REPORT, *supra* note 58, at 4.

146. Incompetent representation during state appeal or post-conviction proceedings erects procedural bars to federal review. *See generally* *Coleman v. Thompson*, 501 U.S. 722 (1991).

147. *See Knowles v. Mirzayance*, 129 S.Ct. 1411 (2009).

148. Stith, *supra* note 85, at 285.

149. Laura Denvir Stith, *Chief Justice Delivers 2009 State of the Judiciary Address*, 65 J. MO. B. 62, 63 (2009).

150. *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971) (en banc) (quoting *People ex rel. Conn v. Randolph*, 219 N.E.2d 337, 340 (Ill. 1966)).

151. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 34.

Marty Robinson advised the governor, the legislature, and the judiciary in his fiscal year 2009 annual report, “The fix is resources and the time is now.”¹⁵²

A. Long-Term Strategies to End Missouri’s Rationing of Criminal Justice

1. Mandate and Fund Workload and Resource Parity Between Public Defenders and Prosecutors

Former Director Robinson was correct – only with a massive injection of resources can the courts even begin to dig out of the current mess. Given the large number of cases, keeping up with the current workload will require increasing the defender’s budget by \$30,547,304 phased in over several years.¹⁵³ This seems like a lot of money, but it represents the cumulative effect of decades of neglect.¹⁵⁴ As the Spangenberg Group study found,

(1) Missouri had the lowest per-capita annual indigent defense expenditure of all the southern states (except Mississippi, where data were not available); (2) Missouri had the lowest per capita expenditure of all statewide public defender systems; (3) Missouri had the lowest Attorney Unit Cost of any jurisdiction in TSG’s recent experience; (4) in order to reach the average per capita expenditure for all southern states, Missouri would need an additional appropriation of almost \$16 million; and (5) between 1993 and 2005, Missouri appeared to have fallen from 42nd to 47th in the nation in per-capita expenditure.¹⁵⁵

The Spangenberg Group further noted that preliminary data from all fifty states showed that in 2008, Missouri had the lowest per capita expenditures on indigent defense except for Mississippi.¹⁵⁶ The Spangenberg Group concluded that the Missouri Public Defender System is “the most poorly funded of all the state public defender systems in the country.”¹⁵⁷ Because the sys-

152. MO. PUB. DEF. COMM’N, 2009 ANNUAL REPORT, *supra* note 58 (J. Marty Robinson’s Memorandum to Governor Nixon and others).

153. *Id.* at 60-75.

154. *See Green*, 470 S.W.2d at 573; *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. 1981) (en banc); ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 3-6.

155. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 11-12 (citing THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW & SOC’Y, ASSESSMENT OF THE MISSOURI PUBLIC DEFENDER SYSTEM (2005)).

156. *Id.* at 12.

157. *Id.* at 33 (quoting THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW & SOC’Y, REPORT ON THE MISSOURI PUBLIC DEFENDER SYSTEM 20 (1993)). Although Mississippi spends less per capita than Missouri on indigent defense, it continues to

tem is so underfunded, only by adding substantial new resources and support staff can lawyers begin to comprehend what adequate representation entails.

Of course, the funding must include support staff and resources. The lack of adequate investigative and support staff services is a significant problem at the current woefully deficient staffing levels. The Spangenberg Group found that the Missouri Public Defender System has the lowest staff-to-attorney ratio of any jurisdiction it has recently studied; because attorneys were spending time doing things that should be performed by support staff, they were “unable to provide effective representation in all of their cases.”¹⁵⁸ The Spangenberg Report recommended adding support staff as a first step in reforming the system, so that lawyers are functioning as advocates for their clients and not also doing the work of investigators, paralegals, and secretaries.¹⁵⁹ An increase in the number of support staff and investigative resources of at least 50% is necessary “before a case weighting study would be able to provide a measure of attorney representation in a functioning indigent defense system.”¹⁶⁰

In his explanation for his veto of Senate Bill 37, which would have capped public defender caseloads, Governor Nixon agreed that “the problem is one of resources, not only for the Public Defender System, but [for] all participants in the criminal justice system.”¹⁶¹ Indeed, the judiciary and prosecuting attorneys are facing budget cuts of their own in the recent economic downturn.¹⁶² To address the inevitable competition for scarce resources, the

rely on a county-by-county system of appointed counsel; it has no state-wide public defender system. GIDEON'S BROKEN PROMISE, *supra* note 80, at 35.

158. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 45. The Spangenberg Group has conducted criminal justice research in all fifty states and has conducted in-depth assessment of indigent defense systems in more than half of them. *Id.* at 3-4 n.4.

159. *Id.* at 45.

160. *Id.* at 52. Marie Kenyon, a member of the Missouri Bar Board of Governors, has criticized the most recent Spangenberg study of the Missouri Public Defender System not because of any flaw in its findings but because it “didn’t deliver on the No. 1 goal,” which was to “create a Missouri-specific caseload standard so system leaders and legislators would have a concrete goal in mind as they tackle the state’s public defender problem.” Allison Retka, *Missouri State Public Defender System Study Criticized as Inadequate*, MO. LAWYER’S MEDIA, Nov. 23, 2009, available at http://findarticles.com/p/articles/mi_7992/is_20091123/ai_n42272760/. Spangenberg, on the other hand, cautioned that “the results only provide an accurate description of a system in crisis. Any reliance on these numbers, even as a baseline from which to develop appropriate caseload standards, would only serve to institutionalize an already crippled system.” ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 41.

161. Memorandum to the Secretary of the State of Missouri, *supra* note 123.

162. Dankelson, *supra* note 112. Of course, there is a significant difference between an underfunded prosecutor and an underfunded defender: the prosecutor is able to compensate for shortfalls. As Douglas Copeland, past President of the Missouri Bar Association, pointed out, prosecutors have the option of declining prosecution,

American Bar Association recommends “parity between defense counsel and the prosecution with respect to resources” and that the public defender be included “as an equal partner in the justice system.”¹⁶³ The ABA’s concept of parity between prosecution and defense includes workload, salaries, and other resources such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts.¹⁶⁴

Twenty-five years after he witnessed the destruction of Jack Walsh’s legal career¹⁶⁵ as Walsh’s assistant, James McKay now works as a public defender in Connecticut, where the legislature mandated parity between prosecutors and defenders when it created its public defender system thirty years ago.¹⁶⁶ McKay says that the Connecticut system works because parity enables the defender to retain experienced lawyers with the same skill levels as their counterparts in the prosecution.¹⁶⁷ “The playing field is equal, which is a pretty important goal if we are to remain confident that the results in our criminal justice system are dictated by what is right rather than by which side has more might.”¹⁶⁸ Connecticut’s implementation of parity included corresponding limits on defender workloads with the result that “the Connecticut system has been recognized nationally for its excellence and professionalism in making sure that the criminal justice system works.”¹⁶⁹

Implicit in the concept of parity is that the prosecution should be adequately funded “so that securing parity will mean that defense counsel is able to provide quality legal representation.”¹⁷⁰ As former U.S. Attorney General Janet Reno explained, “Our criminal justice system is interdependent: if one leg of the system is weaker than the others, the whole system will ultimately falter.”¹⁷¹ If the Missouri legislature does nothing else this year but mandate

offering plea bargains, or asking a friendly legislature to fund more judges and lawyers. Copeland, *supra* note 93, at 10. “On the other hand,” he asked, “where is the safety valve for an overloaded public defender?” *Id.* The defender cannot decline cases, and an appeal to the legislature for more money to defend persons accused of crime “just doesn’t have the same appeal that the prosecutors and courts can muster.” *Id.*

163. AM. BAR ASS’N STANDING COMM. ON LEGAL AID & INDIGENT DEFENDANTS, TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM (2002), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/tenprinciplesbooklet.pdf> [hereinafter ABA, TEN PRINCIPLES].

164. *Id.* at 3.

165. See *supra* notes 1-13 and accompanying text.

166. James S. McKay, *The Bar Speaks*, 62 J. MO. B. 162, 162 (2006).

167. *Id.*

168. *Id.*

169. *Id.*

170. ABA, TEN PRINCIPLES, *supra* note 163, at 3.

171. OFFICE OF JUSTICE PROGRAMS, U.S. DEP’T OF JUSTICE, 1999 NAT’L SYMPOSIUM ON INDIGENT DEFENSE: IMPROVING CRIMINAL JUSTICE THROUGH EXPANDED STRATEGIES AND INNOVATIVE COLLABORATIONS xiii (1999).

and fund the concept of parity, beginning with salaries and support staff, it would be a major step in the right direction.

2. Moderate Criminal Sanctions

The public defender crisis presents an opportunity to rethink Missouri's overall criminal justice crime policy, particularly the heavy reliance on harsh punishment. Missouri could save substantial sums of money, not just on indigent defense but also in other departments of government, by reducing the severity of criminal sanctions. The late Jackson County Circuit Judge William J. Peters frequently remarked that public defenders were the most cost-effective employees in Missouri government because they saved the taxpayers substantial costs for every year they shaved off each client's sentence.¹⁷² As state supreme court Judge Michael Wolff wrote in the *Pratte* opinion, Missouri has dramatically increased its rate of incarceration:

When the state established the public defender system in the early 1980s, one in 97 Missourians was under correctional control – either in jail or prison or on probation or parole. In 2007, by contrast, one in 36 was under correctional control, and 32 percent of those were incarcerated in prison or jail.

During the decade of the 1990s, the population of Missouri grew by 9.3 percent, while the prison population grew by 184 percent. Recent data show more than 56,000 individuals on probation; nearly 20,000 on parole (supervision that follows a prison term); more than 10,000 in Missouri jails (many of whom are awaiting trial) and about 30,000 in state prisons.¹⁷³

Judge Wolff noted in *Pratte* that felony sentencing has tripled in the last twenty-five years, sentences are longer, and there has been a 650% increase in the number of drug related convictions, “while non-drug sentencing has increased by nearly 230 percent.”¹⁷⁴ During my service as a public defender in the 1980's, the only driving offenses on the Jackson County public defender's docket involved alcohol-related fatalities. Virtually all misdemeanor offenses, and many cases that could have been prosecuted as low-level felonies, were channeled into the municipal court. Contempt of court charges for failure to pay child support were brought as civil actions, seeking financial

172. The Missouri Division of Adult Institutions estimates incarceration costs for a prisoner at \$45.09 per day, or \$16,457 per year. MO. DEP'T CORRECTIONS, ANNUAL REPORT, 2009 (2009), available at <http://doc.mo.gov/documents/publications/AR-2009.pdf>.

173. State *ex rel.* Mo. Public Defender Comm'n v. Pratte, 298 S.W.3d 870, 877 (Mo. 2009) (en banc).

174. *Id.*

remedies rather than incarceration. Jackson County public defenders are now handling entire classes of cases that never before required counsel because the defendants were not facing jail time.¹⁷⁵ Missouri's increasing incarceration rate tracks the national trend, and it is very expensive.¹⁷⁶

Then-Chief Justice Stith suggested to members of the bar that defenders work with prosecutors to rule out jail time for certain types of offenses or probation violation hearings as a way to diminish the burden on public defenders.¹⁷⁷ Specialty dockets aimed at particular classes of offenses or defendants can effectively provide treatment, such as therapy for drug and alcohol dependence, community service, and restitution in lieu of incarceration, often serving the community's interests far better than incarceration. Since the creation of Jackson County's drug court, more than 1,200 people have been through the treatment program, and 96% remain conviction free within five years of their graduation.¹⁷⁸ In the Kansas City Municipal Court's Operation Stand-Down, prosecutors work with veterans who run afoul of municipal ordinances to avoid jail time.¹⁷⁹ A similar treatment docket for drunk drivers in Greene County, Missouri has had a remarkable success rate: of its 156 graduates since 2003, only four have been convicted of subsequent driving under the influence offenses.¹⁸⁰ Greene County Prosecuting Attorney Darrell Moore has used restorative justice principles as a form of alternative dispute resolution in criminal cases with good results.¹⁸¹ These and other treatment-

175. See *Argersinger v. Hamlin*, 407 U.S. 25, 36-37 (1972) (stating that if the defendant does not face jail time, the Sixth Amendment does not require the appointment of counsel).

176. See JENS SOERING, *AN EXPENSIVE WAY TO MAKE BAD PEOPLE WORSE: AN ESSAY ON PRISON REFORM FROM AN INSIDER'S PERSPECTIVE* (2004), for an insightful discussion of the subject from an insider's point of view. The death penalty is another expensive luxury that New York, New Jersey, and New Mexico have repealed, largely due to the expense, although issues of fairness enter into the decision as well. See Tom Precious, *State Death Penalty Law Dies in Assembly Committee Vote*, BUFFALO NEWS, Apr. 13, 2005, at A12; Jeremy W. Peters, *Corzine Signs Bill Ending Executions, Then Commutes Sentences of 8*, N.Y. TIMES, Dec. 18, 2007, at B3; The Associated Press, *Death Penalty Is Repealed in New Mexico*, N.Y. TIMES, Mar. 19, 2009, at A16.

177. Stith, *supra* note 85, at 285.

178. See Jackson County Drug Court, <http://www.jacksongov.org/content/5243/5-249/5292/default.aspx> (last visited July 5, 2010).

179. Stith, *supra* note 85, at 281; see also Adam Caine, *Fallen From Grace: Why Treatment Should Be Considered for Convicted Combat Veterans Suffering From Post Traumatic Stress Disorder*, 78 UMKC L. REV. 215 (2009).

180. Stith, *supra* note 85, at 282.

181. Nina Balsam, Editorial, *Restorative Justice Can Cut Caseloads for Defense, Prosecutors*, ST. LOUIS POST-DISPATCH, Dec. 1, 2009, at A12. Restorative justice is a dialogue between the victim and offender that focuses on healing the victim and holding the offender accountable for repairing the harm done by the crime:

It is used increasingly in many states and in other countries because restorative justice practices have better outcomes than the retributive system

oriented programs can offer alternatives to incarceration that are less costly to the taxpayers and less destructive of families and neighborhoods.

B. Restore the Role of Private Counsel

The Missouri Public Defender System lost a valuable resource when the mainstream private bar was written out of the system.¹⁸² The Spangenberg Group noted that Missouri is one of only two defender programs in the country that does not use private lawyers for conflict-of-interest cases.¹⁸³ A public defender's representation of conflicting interest cases in-house creates "an appearance of a conflict in the same manner that attorneys from the same law firm handling conflict cases would create such an appearance."¹⁸⁴ Although the Supreme Court of Missouri rejected such an argument in *State ex rel. Public Defender Commission v. Bonacker*,¹⁸⁵ at least one federal court – the United States Court of Appeals for the Tenth Circuit – has found that public defenders are subject to the same rules on imputed conflicts and screening that apply to a private law firm in a similar situation and that the culture of an office can make a substantial difference in the litigation of ineffective assistance of counsel claims against a fellow defender.¹⁸⁶ While it is cheaper to handle conflict cases in-house, the intangible cost – including the large-scale exclusion of private lawyers from the criminal justice system – is high. The ABA advocates a coordinated assigned counsel program that utilizes the active and substantial participation of the private bar.¹⁸⁷ By limiting the pool of eligible defenders to those employed by the defender system, the exclusion of the private bar deprives the defender system of an important safety valve for excessive caseloads, compounding the potential for conflicts.¹⁸⁸

The Spangenberg Group pointed out another conflict of interest: the use of public defenders to make indigency determinations. The study found that:

on which our criminal justice system is based. Victims experience more healing and less post-traumatic stress disorder, offenders are less likely to recidivate and communities save money and are stronger and safer.

Id.

182. See *supra* notes 57-59 and accompanying text.

183. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 9.

184. *Id.* at 9-10.

185. 706 S.W.2d 449 (Mo.1986) (en banc).

186. Cannon v. Mullin, 383 F.3d 1152, 1173-74 (10th Cir. 2004) (citing Martinez v. Sullivan, 881 F.2d 921, 930 (10th Cir. 1989)).

187. AM. BAR ASS'N, EIGHT GUIDELINES OF PUBLIC DEFENSE RELATED TO EXCESSIVE WORKLOADS 4 (2009).

188. "When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is inevitably created." *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130, 1135 (Fla. 1990).

[U]sing public defenders to make indigency determinations regarding prospective clients created at the very least an appearance of a conflict of interest, given that public defenders had an incentive to not find a person indigent, since their caseloads were already too high. In line with that analysis, TSG found that many public defenders were quick to find a defendant ineligible for counsel if, for example, they had posted a bond. In addition, valuable attorney time had to be spent interviewing potential clients regarding indigency and making eligibility determinations.¹⁸⁹

Not surprisingly, the current system results in unrealistic guidelines and wrongful determinations that defendants are ineligible for services. Overall, defenders find applicants ineligible for their services in nearly 9% of the cases, but some district defenders refused representation to as many as 48% of the applicants.¹⁹⁰ In most states, defenders handle 75% or more of all criminal defendants;¹⁹¹ Missouri defenders represent at most only 55% of the docket and only 35% of juvenile criminal defendants.¹⁹² The Spangenberg Group concluded that it is clear that “MSPD’s indigency determinations have resulted in the wrongful denial of counsel to a substantial class of indigent persons.”¹⁹³

C. Interim Measures Should Be Implemented Immediately

1. Appoint Private Counsel

Even if adequate funding were forthcoming tomorrow, which is not likely due to the economic downturn, it would take time to recruit and train the lawyers and provide the related staff and support structures necessary to tackle the caseload problem. The cruel reality is that people are being poorly represented, even unrepresented, while the executive, legislative, and judicial branches debate what should be done. As Douglas Copeland put it, there must be a “safety valve for an overloaded public defender.”¹⁹⁴ Indeed, attempting to run a system of indigent defense without the involvement of the private bar is inconsistent with ABA principles, which provide that, where the caseload is sufficiently high, the public defense system should consist of “both a defender office and the active participation of the private bar.”¹⁹⁵

There is but one safety valve capable of immediate deployment: appointment of the private bar. The Supreme Court of Missouri held in *Pratte*

189. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 9.

190. *Id.* at 57.

191. *Id.*

192. *Id.* at 57-58.

193. *Id.* at 58.

194. Copeland, *supra* note 93, at 10.

195. ABA, TEN PRINCIPLES, *supra* note 163, at 2.

that trial judges have the power to appoint almost any lawyer from the Missouri Bar to represent indigent defendants.¹⁹⁶ The court pointed out that lawyers, as members of a public profession, have a duty to perform pro bono public service.¹⁹⁷ As a previous state supreme court judge lamented in the 1971 case of *State v. Green*, “It would be a sad day for the courts and the profession if we get to the point where there is no obligation for a lawyer to serve as an officer of the court unless he is first assured of a fee.”¹⁹⁸

An emergency relief program is underway in Greene County, where the Springfield Metropolitan Bar Association and the courts have begun a “Public Defender Project,” in which more than fifty private practitioners, mainly civil lawyers, have attended training sessions in preparation for appointments to probation violation matters.¹⁹⁹ Lawyers expected that the project would be disbanded at the end of 2009, but the public defender system recently announced that the Springfield public defender’s office is closed to all new cases in Greene, Christian, and Taney Counties because of high caseloads and overworked lawyers.²⁰⁰ The issue is now back in front of the Supreme Court of Missouri, which issued a preliminary writ of prohibition on September 6, 2010, temporarily enjoining judges in Christian County from appointing the public defender pending further proceedings.²⁰¹ The public defender argues that *Pratte* struck down a plan by which local defenders refused *categories* of cases, but upheld the authority of the Public Defender Commission to apply the caseload management provisions of its rule, and thus “manage its offices and control its caseload.”²⁰² The court may once again turn to the private bar for help.

The appointed counsel option has the added advantage of involving the mainstream bar in the criminal justice system. According to Springfield law-

196. *State ex rel. Mo. Pub. Defender Comm’n v. Pratte*, 298 S.W.3d 870, 886 (Mo. 2009) (en banc) (citing MO. SUP. CT. R. 31.02, which provides in relevant part, “Upon a showing of indigency, it shall be the duty of the court to appoint counsel to represent him.”).

197. *Id.* at 888.

198. *State v. Green*, 470 S.W.2d 571, 574 (Mo. 1971) (en banc) (Seiler, J., concurring).

199. Dirk Vanderhart, *Missouri Likely to Add Public Defenders*, SPRINGFIELD NEWS-LEADER, Apr. 27, 2009, at A-1. Vanderhart points out, “Not all public defenders have received such help,” *id.*, but there is no obstacle to implementing similar projects in other circuits.

200. Kathryn Wall, *No End in Sight for Defender Gridlock*, SPRINGFIELD NEWS-LEADER, Sept. 1, 2010, available at <http://www.news-leader.com/article/20100901/NEWS01/9010408/1007/No-end-in-sight-for-defender-gridlock>.

201. *State ex rel. Mo. Pub. Defender Comm’n v. Waters & Orr*, No. SC91150 (Mo. Sept. 3, 2010); see also Kathryn Wall, *Clear Ruling Sought in Public Defender Caseload Debate*, SPRINGFIELD NEWS-LEADER, Sept. 6, 2010, available at <http://www.news-leader.com/article/20100906/NEWS01/9060325/Clear-rulingsought-in-public-defender-caseload-debate>.

202. *Pratte*, 298 S.W.3d at 887.

yer Lincoln Knauer, not only does appointing private counsel benefit the system and give lawyers new experiences, but it also gives “the bar as an institution a set of eyes and knowledge” about how the system is performing.²⁰³ This added knowledge and insight, together with enlightened self-interest, adds a vital dimension to the bar’s legislative and public policy advocacy on behalf of the criminal justice system.

Although the Supreme Court of Missouri clearly said that trial and appellate courts have the authority to appoint private lawyers without pay in order to cope with the existing crisis, it expressed reluctance to invoke this option because such appointments “may be oppressive or confiscatory,” and appointment of lawyers in large numbers “raises the prospect of the state being sued under the federal civil rights law, 42 U.S.C. section 1983, in either a state or federal court, for violation of the individual lawyer’s right not to be deprived of his or her livelihood.”²⁰⁴ Another possible scenario is that lawyers would sue for their out-of-pocket expenses, and, upon the state’s failure to pay, assert *Wolff v. Ruddy*’s dismissal sanction.²⁰⁵ There is no dispute as to the scope and urgency of the crisis, and such lawsuits may provide the legislature the needed incentive to appropriate funds. This is exactly why the courts *should* invoke the option of appointing private counsel sooner rather than later. Similar prospects raised by the decisions in *Green v. State* and *Wolff v. Ruddy* had the desired effect of spurring the Missouri state legislature to action.²⁰⁶ Like the civic-minded lawyers of the Springfield Metropolitan Bar Association, members of the Missouri bar can be counted upon to donate their time and resources for a limited time to preserve the criminal justice system.

2. Assert the Client’s Right to Speedy Trial

One casualty of the caseload crisis is the right to speedy trial; defendants languish in jail awaiting trial for absurd lengths of time. Ronald Allison is a case in point.²⁰⁷ He spent three birthdays in jail awaiting trial before being acquitted by a jury of manslaughter charges.²⁰⁸ The delay was “a direct result of relying on an overbooked public defender.”²⁰⁹ Justice is also delayed for victims of crime, who often must wait months or years to have their cases resolved.²¹⁰

203. Vanderhart, *supra* note 199.

204. *Pratte*, 298 S.W.3d at 888-89.

205. *See supra* notes 60-70 and accompanying text.

206. *See supra* notes 44-56 and 60-70 and accompanying text.

207. Mark Morris, *Verdict: Missouri Public Defender System Needs a Fix*, KAN. CITY STAR, Mar. 22, 2009, at A-1.

208. *Id.*

209. *Id.*

210. Stith, *supra* note 85, at 281.

The Supreme Court of Missouri recently gave effect to a public defender client's pro se assertion of his right to speedy trial, finding that the trial court and lawyers for both the prosecution and defense erred when they simply ignored McKee's requests to assert his constitutional right to a speedy trial.²¹¹ Perhaps because pretrial incarceration is "neither experienced nor directly shared by defense counsel," Missouri courts allow represented defendants to assert their speedy trial rights pro se.²¹² The court suggested that pretrial release or dismissal of cases based on speedy trial grounds may be a likely result of the public defender workload crisis,²¹³ and the Spangenberg Group found that many clients of the defender system "routinely" file pro se pleadings, particularly after the Supreme Court of Missouri's opinion granting relief based on defendant's pro se demand for speedy trial.²¹⁴ As then-Chief Justice Stith warned, if Missouri fails to comply with defendants' rights to competent counsel and speedy trial, defendants potentially could be set free without a trial,²¹⁵ thus providing a potentially effective avenue of relief for some defendants.

The *McKee* decision is not the first case to draw a sharp distinction between the Sixth Amendment speedy trial clause and Missouri's statutory right to speedy trial. The Missouri statute requires trial courts to commence trial "as soon as reasonably possible" after the defendant files a request for speedy trial announcing that he is ready for trial.²¹⁶ Defenders should take note of *State v. Knox*, where the sanction of dismissal was warranted when the defendant was not brought to trial within three months of his statutory demand.²¹⁷ Just as the trial court has the "inherent authority to dismiss a case for failure to prosecute with due diligence," that same inherent power is "implicit in the statutory requirement for a reasonably prompt trial setting."²¹⁸ An organized defender office can strategically assert speedy trial rights to protect the interests of all clients.

211. *State ex rel. McKee v. Riley*, 240 S.W.3d 720, 722 (Mo. 2007) (en banc).

212. *Id.* at 728. The court distinguished between the Sixth Amendment right to speedy trial, which can be invoked by the defendant, and the statutory right to speedy trial under Missouri Revised Statutes section 545.780, which can only be invoked by counsel because it requires the defendant to announce that he is ready for trial. *Id.* at 727.

213. "If a defendant does not waive the right to speedy trial, the state's inability to bring the defendant to trial in a timely manner may result in dismissal." *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 887 n.36 (Mo. 2009) (en banc); see also *State v. Brown*, 722 S.W.2d 613, 620 (Mo. App. W.D. 1986) (the court dismissed a criminal prosecution because the expenses of appointed counsel were not forthcoming within a reasonable time).

214. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 20-21 (discussing *McKee*, 240 S.W.3d 720).

215. Stith, *supra* note 149, at 63.

216. MO. REV. STAT. § 545.780.1 (2000).

217. 697 S.W.2d 261, 262 (Mo. App. W.D. 1985).

218. *Id.* at 263.

V. CONCLUSION

The crisis in the Missouri public defender system was not created overnight; it is the product of decades of neglect and will require a cooperative effort by the bar and all three branches of government to repair. There are many possible solutions, and every lawyer in Missouri is capable of making some contribution of time or resources to help bear the burden public defenders have been forced to carry alone. The bar has a special responsibility to protect the right to counsel, which is “necessary to insure fundamental human rights of life and liberty. . . . The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not ‘still be done.’”²¹⁹ As the Spangenberg Group study concluded, “[A] solution must come from outside [of] the [current s]ystem and it must come soon.”²²⁰

219. *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938).

220. ASSESSMENT OF THE MSPD SYSTEM, *supra* note 26, at 36.