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## COMMENT

### BUCKING CONVENTIONAL WISDOM: THE MONTANA PUBLIC DEFENDER ACT

JESSA DESIMONE\*

*Since Gideon v. Wainwright, the United States Supreme Court has held that indigent defendants have a constitutional right to legal representation in state felony prosecutions. Forty years after Gideon, many indigent defense systems are in a state of crisis. Therefore, this Comment will examine one state's complete overhaul of its indigent defense system from a disparate, locally controlled system to a statewide system based on nationally recognized standards of indigent defense. By examining the factors that led the Montana legislature to pass a Public Defender Act, this Comment will shed light on ways activists concerned with indigent defense should use their limited resources. It will show that while litigation alone is not enough to bring transformative change, litigation can be the catalyst for change.*

#### I. INTRODUCTION

In 1963, the United States Supreme Court's landmark decision in *Gideon v. Wainwright* held that indigent defendants have a constitutional right to legal representation in state felony prosecutions.<sup>1</sup> In 1972, the Court in *Argersinger v. Hamlin* extended this right to any criminal trial—whether classified as petty, misdemeanor, or felony.<sup>2</sup> In 2005, the Supreme Court continued to uphold *Gideon's* “right to counsel revolution” in *Halbert v. Michigan*.<sup>3</sup> Justice Ginsburg, writing for the majority, stated “[t]he Due Process and Equal Protection Clauses require the appointment of

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\* I would like to thank the JCLC staff and my husband, Rob Wilcox.

<sup>1</sup> 372 U.S. 335 (1963).

<sup>2</sup> 407 U.S. 25 (1972).

<sup>3</sup> 125 S. Ct. 2582 (2005).

counsel for defendants, convicted on their pleas, who seek access to first-tier review in the Michigan Court of Appeals.”<sup>4</sup>

While, forty years after *Gideon*, the basic right to counsel is firmly entrenched, the word commonly used to describe indigent public defense systems is “crisis.”<sup>5</sup> For example, the American Bar Association (ABA) has described the system as in a “state of crisis,” “a system that lacks fundamental fairness,” and “shamefully inadequate.”<sup>6</sup>

While the problems of indigent public defense systems frequently appear as the topic of law review comments and symposia,<sup>7</sup> what appears less frequently is an analysis of the litigation and legislative victories that have improved state public defense systems and the factors that led to these improvements. Therefore, this Comment will examine a recent victory in Montana—a complete overhaul of its indigent public defense system from a disparate, locally controlled system to a statewide system based on nationally recognized standards for indigent defense systems, such as parity in resources and funding between the state prosecutors and public defenders.<sup>8</sup> In fact, Montana’s system is the first state system of indigent defense that meets national standards for delivering high-quality representation.<sup>9</sup>

Section II of this Comment gives an overview of the right to counsel for indigent defendants and common structures of indigent defense systems.<sup>10</sup> It then describes the current crisis in indigent defense systems and examines national standards and studies that describe effective indigent defense systems.<sup>11</sup> Section III examines past attempts at bringing change to indigent defense systems through various state courts.<sup>12</sup> These changes have not been particularly successful; therefore, in Section IV, this Comment examines a recent successful transformation of a state indigent

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<sup>4</sup> *Id.* at 2586.

<sup>5</sup> AM. BAR ASS’N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *GIDEON’S BROKEN PROMISE* (2004) [hereinafter *GIDEON’S BROKEN PROMISE*].

<sup>6</sup> *Id.*

<sup>7</sup> See, e.g., Symposium, *Gideon Introduction: Debate: Gideon at 40: Facing the Crisis, Fulfilling the Promise*, 41 AM. CRIM. L. REV. 131 (2004) (“[A] major focus of the Symposium was on the existing deficiencies in the indigent defense process.”).

<sup>8</sup> See AM. BAR ASS’N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, *ABA TEN PRINCIPLES OF A PUBLIC DEFENSE DELIVERY SYSTEM* (2002) [hereinafter *ABA TEN PRINCIPLES*].

<sup>9</sup> Leonard Post, *Montana Upgrades Indigency Defense System*, 27 NAT’L L.J. P4 (June 6, 2005); see also Mike Dennison, *Public Defender System Cited as National Model*, GREAT FALLS TRIB. (Mont.), June 8, 2005, at A1.

<sup>10</sup> See *infra* Section II.A.

<sup>11</sup> See *infra* Sections II.B-D.

<sup>12</sup> See *infra* Section III.

defense system through the legislature, instead of through the courts.<sup>13</sup> While conventional wisdom says that trying to change indigent public defense systems through the legislature is political suicide,<sup>14</sup> the Montana Legislature passed a transformative bill without a mandate from a court, but with a push from litigators, hopefully ensuring that the political will required to fund and maintain this new public defense system is sustained. By examining the factors that led the Montana Legislature to pass this bill, this Comment will clarify how activists concerned with indigent defense should focus their limited resources, and it will show that while litigation alone is not enough to bring transformative change, it can be the catalyst for change.

## II. BACKGROUND

The Sixth Amendment to the United States Constitution states, “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.”<sup>15</sup> Until the 1960s, the Supreme Court construed this amendment to mean that in *federal* courts, counsel must be provided for defendants unable to employ counsel unless they waive that right.<sup>16</sup> In 1963, the Court held that the Sixth Amendment right to the assistance of counsel was “fundamental and essential to a fair trial” and was also binding upon the states under the Fourteenth Amendment.<sup>17</sup>

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<sup>13</sup> See *infra* Section IV.

<sup>14</sup> Note, *Effectively Ineffective: The Failure of Courts to Address Underfunded Indigent Defense Systems*, 118 HARV. L. REV. 1731 (2005) [hereinafter *Effectively Ineffective*]; see also DAVID COLE, NO EQUAL JUSTICE 92 (1999) (“Providing genuinely adequate counsel for poor defendants would require a substantial infusion of money, and indigent defense is the last thing the populace will voluntarily direct its tax dollars to fund. Achieving solutions to this problem through the political process is a pipedream.”); Adele Bernhard, *Take Courage: What the Courts Can Do to Improve the Delivery of Criminal Defense Services*, 63 U. PITT. L. REV. 293, 294 (2002) (“[F]ederal and state legislatures have largely ignored wide-spread and acute deficiencies in the programs that ensure representation for the vast majority of individuals accused of crime, . . .”); Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor when Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 787 (1997) (“[M]ost state and local governments have been more concerned with keeping costs low than with providing quality defense services or with ensuring fair trials. When they have examined factors other than costs, many evaluate indigent defense programs not from the standpoint of ensuring fair trials, but with an eye to increasing administrative convenience in moving dockets and securing convictions.”).

<sup>15</sup> U.S. CONST. amend. VI.

<sup>16</sup> *Gideon v. Wainwright*, 372 U.S. 335, 340 (1963) (explaining *Johnson v. Zerbst*, 304 U.S. 458 (1938)).

<sup>17</sup> *Id.* at 342.

Thus, post-*Gideon*, states were required to use their own resources to provide counsel for indigent defendants in felony criminal proceedings.<sup>18</sup>

*Gideon*, however, was just the beginning of the Court's attempt to define the scope and meaning of this Sixth Amendment right as applied to the states. In the past four decades, the Supreme Court has determined that states must appoint counsel in state juvenile delinquency proceedings,<sup>19</sup> in any criminal proceeding in which the defendant faces the loss of liberty upon conviction,<sup>20</sup> and in a first appeal as of right.<sup>21</sup> However, the state need not appoint counsel in discretionary appeals to the state's highest court or to the U.S. Supreme Court.<sup>22</sup> In addition, the right to counsel attaches at critical stages that occur before trial, such as custodial interrogations,<sup>23</sup> post-indictment lineups,<sup>24</sup> and preliminary hearings.<sup>25</sup> Thus, the Supreme Court has expanded the rights of indigent defendants in a variety of contexts.

#### A. COMMON STRUCTURES OF INDIGENT DEFENSE SYSTEMS

Since *Gideon* and its progeny did not specify a particular model for organizing or funding indigent defense systems, "each state has defined the right to counsel through its own respective constitutional provisions, judicial opinions, and legislation."<sup>26</sup> The three most common systems of organization are: (1) the public defender model, in which salaried attorneys provide representation on indigent cases; (2) the assigned counsel model, in

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<sup>18</sup> Norman Lefstein, *In Search of Gideon's Promise: Lessons from England and the Need for Federal Help*, 55 HASTINGS L.J. 835, 843 (2004) ("[*Gideon*] constitute[d] an enormous unfunded mandate imposed upon the states.").

<sup>19</sup> *In re Gault*, 387 U.S. 1 (1967).

<sup>20</sup> *Argersinger v. Hamlin*, 407 U.S. 25 (1972); *see also* *Alabama v. Shelton*, 535 U.S. 654 (2002) (ruling that a "suspended" sentence with probation cannot be imposed unless the defendant was represented by counsel). *But see* *Scott v. Illinois*, 440 U.S. 367 (1979) (holding that the state is not required to appoint counsel in a trial court where imprisonment for the offense was authorized but not actually imposed).

<sup>21</sup> *Douglas v. California*, 372 U.S. 353 (1963); *see also* *Swenson v. Bosler*, 386 U.S. 258 (1967) (deciding that a transcript and motion by trial counsel are not adequate substitution for an appellate lawyer's review of the record and legal research).

<sup>22</sup> *Ross v. Moffitt*, 417 U.S. 600 (1974).

<sup>23</sup> *Miranda v. Arizona*, 384 U.S. 436 (1966) (articulating the *Miranda* right to counsel that arises from the Fifth Amendment).

<sup>24</sup> *Gilbert v. California*, 388 U.S. 263 (1967); *United States v. Wade*, 388 U.S. 218 (1967).

<sup>25</sup> *Coleman v. Alabama*, 399 U.S. 1 (1970).

<sup>26</sup> Cait Clarke, *Problem-Solving Defenders in the Community: Expanding the Conceptual and Institutional Boundaries of Providing Counsel to the Poor*, 14 GEO. J. LEGAL ETHICS 401, 419 (2001).

which the court assigns indigent cases to private attorneys who are compensated on a case-by-case basis; and (3) the contract model, in which there is a private bar contract with an attorney or a group of attorneys that will provide representation in some or all of the indigent defense cases in the jurisdiction.<sup>27</sup> Many states employ a combination of these three approaches.<sup>28</sup> Systems may be organized at the state, county, region, or judicial district level,<sup>29</sup> and funding can come from a combination of state funds, county funds, user fees, and court costs.<sup>30</sup>

#### B. INEFFECTIVE ASSISTANCE OF COUNSEL

While the Supreme Court has not specified exactly what type of indigent defense systems states must provide, it has ruled that the right to counsel requires “effective assistance of competent counsel.”<sup>31</sup> The seminal case on this issue, *Strickland v. Washington*,<sup>32</sup> established a two-prong test to determine when there has been ineffective assistance of counsel: (1) the defendant must prove that her counsel’s performance was deficient; i.e., the performance fell below an objective standard of reasonableness; and (2) this deficient performance must prejudice the defendant so as to deprive her of a fair trial; i.e., there was a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.<sup>33</sup> It seems that *Strickland* should be a tool to ensure that a state’s indigent defense system is “effective.” In practice, however, courts have seldom utilized the *Strickland* doctrine to overturn cases based on incompetent counsel.<sup>34</sup> In particular, many courts have been hesitant to apply the ineffective assistance of counsel standards to public defenders assisting indigent defendants. For example, courts have not used *Strickland* even when public defenders were unaware of current governing law, were

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<sup>27</sup> Robert L. Spangenberg & Marea L. Beeman, *Indigent Defense Systems in the United States*, 58 LAW & CONTEMP. PROBS. 31, 32 (1995). “The National Association of Criminal Defense Lawyers, which represents some 10,000 criminal lawyers, has condemned the use of fixed-price contracts. It says they’re designed ‘to process the maximum number of defendants at the lowest cost, without regard to truth, justice or innocence.’” Alan Berlow, *Requiem for a Public Defender*, AM. PROSPECT, June 5, 2000.

<sup>28</sup> Spangenberg & Beeman, *supra* note 27, at 32.

<sup>29</sup> *Id.* at 37.

<sup>30</sup> *Id.* at 41.

<sup>31</sup> See *McMann v. Richardson*, 397 U.S. 759, 771 (1970).

<sup>32</sup> 466 U.S. 668 (1984).

<sup>33</sup> *Id.* at 687.

<sup>34</sup> Marc L. Miller, *Wise Masters*, 51 STAN. L. REV. 1751, 1786-87 (1999) (book review) (“The simple restatement of the *Strickland* standard, as it has emerged in practice, is that a lawyer with a pulse will be deemed effective.”).

intoxicated at the trial, or slept through the trial.<sup>35</sup> Moreover, as one author noted, “the *Strickland* standard is applied individually and retrospectively.”<sup>36</sup> Thus, it is difficult to challenge whole systems of indigent defense that “seem repulsive under *Gideon* [but] may not amount to *Strickland* ineffectiveness.”<sup>37</sup> Indigent defense systems do not fail under *Strickland*, even when they are so short on funding that public defenders carry “caseloads that make it difficult, if not impossible, to provide effective representation.”<sup>38</sup> Thus, federal courts have so far been unwilling to provide recourse to inadequate funding of indigent defense systems.<sup>39</sup>

### C. CRISIS IN STATE INDIGENT DEFENSE SYSTEMS

The current state of crisis in indigent defense systems has been acknowledged by everyone from academics,<sup>40</sup> practitioners,<sup>41</sup> journalists,<sup>42</sup> and advocacy organizations<sup>43</sup> to the ABA.<sup>44</sup> The ABA, for example, held a series of public hearings in 2003 and then commissioned a report on the broken promise of *Gideon*.<sup>45</sup> Summarizing the testimony of the expert witnesses at the public hearings, this report concluded:

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<sup>35</sup> Bright, *supra* note 14, at 783; *see id.* at 785-86 & nn.7-9.

<sup>36</sup> Nicole J. De Sario, *The Quality of Indigent Defense on the 40th Anniversary of Gideon: The Hamilton County Experience*, 32 CAP. U. L. REV. 43, 47 (2003).

<sup>37</sup> *Id.*; *see also* Bernhard, *supra* note 14, at 304 n.69; William S. Geimer, *A Decade of Strickland's Tin Horn: Doctrinal and Practical Undermining of the Right to Counsel*, 4 WM. & MARY BILL RTS. J. 91 (1995).

<sup>38</sup> Spangenberg & Beeman, *supra* note 27, at 37.

<sup>39</sup> This is especially true in light of the federal abstention doctrines. *See* *Younger v. Harris*, 401 U.S. 37 (1971) (holding that federal courts should not interfere with the operation of state and local criminal prosecutions); Bernhard, *supra* note 14, at 332 (“Federal courts have been prevented largely from engaging in the reform of state indigent defense systems by abstention doctrine.”); *id.* at 332 n.237 (citing *Gardner v. Luckey*, 500 F.2d 712 (5th Cir. 1974) (denying relief for a claim that the Florida public defender systematically failed to meet minimum constitutional standards in the representation afforded to indigents because the federal abstention doctrine prevented the federal court from intervening in state judicial processes)).

<sup>40</sup> Lefstein, *supra* note 18.

<sup>41</sup> THE NAT'L LEGAL AID & DEFENDER ASS'N, AN ASSESSMENT OF INDIGENT DEFENSE SERVICES IN MONTANA (2004) [hereinafter NLADA ASSESSMENT].

<sup>42</sup> Anthony Lewis, *The Silencing of Gideon's Trumpet*, N.Y. TIMES, April 20, 2003, at 50.

<sup>43</sup> Press Release, ACLU, ACLU Argues in Supreme Court that the Poor Have a Right to Counsel (Oct. 4, 2004), available at <http://www.aclu.org/scotus/2004/13959prs20041004.html>.

<sup>44</sup> *GIDEON'S BROKEN PROMISE*, *supra* note 5.

<sup>45</sup> *Id.*

[C]urrent indigent defense systems often operate at substandard levels and provide woefully inadequate representation. . . . Witnesses described programs bereft of the funding and resources necessary to afford even the most basic tools essential for an effective defense. As a result, literally thousands of accused poor persons who are unable to afford counsel are denied, either entirely or in part, meaningful legal representation.<sup>46</sup>

The ABA divided the problems of most indigent defense systems into three distinct parts: lack of adequate funding, inadequate legal representation, and structural defects in indigent defense systems.<sup>47</sup> Inadequate funding is most frequently cited as one of the major problems of indigent defense systems,<sup>48</sup> and that lack of funding is the greatest factor adversely affecting quality of representation.<sup>49</sup> During the ABA's public hearings, witnesses representing twenty-two states reported "grave inadequacies" in the available resources for indigent defense.<sup>50</sup> This lack of funding precipitated inadequate attorney compensation<sup>51</sup> and a lack of essential resources such as expert, investigative, and support services,<sup>52</sup> and often led to a sizable resource disparity between the prosecution and the defense.<sup>53</sup>

Problems with inadequate legal representation include the fact that client/lawyer interactions often begin minutes before the trial and end moments later when the defense attorney tells the client what plea deal has been negotiated,<sup>54</sup> and the attorney's lack of investigation, research, and zealous advocacy.<sup>55</sup> Structural defects in indigent defense systems include lack of attorney independence,<sup>56</sup> excessive caseloads,<sup>57</sup> absence of oversight to ensure uniform quality services,<sup>58</sup> and failure to provide counsel beyond the minimum required by the Supreme Court.<sup>59</sup> The U.S.

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<sup>46</sup> *Id.* at 7.

<sup>47</sup> *Id.* at 7, 14, 20.

<sup>48</sup> Bernhard, *supra* note 14, at 308 (noting that lack of funding is such a problem with indigent defense that several academics claim that "no matter how effective the structure, inadequate funding adversely affects all defense systems"). For further materials on inadequate funding, see Lefstein, *supra* note 18, at 846 n.53.

<sup>49</sup> Bernhard, *supra* note 14, at 309.

<sup>50</sup> *GIDEON'S BROKEN PROMISE*, *supra* note 5, at 8.

<sup>51</sup> *Id.* at 9.

<sup>52</sup> *Id.* at 10.

<sup>53</sup> *Id.* at 13.

<sup>54</sup> *Id.* at 16.

<sup>55</sup> *Id.* at 19.

<sup>56</sup> *Id.* at 20.

<sup>57</sup> *Id.* at 17.

<sup>58</sup> *Id.* at 21.

<sup>59</sup> *Id.* at 22.



Department of Justice commissioned a report in 2000 which highlighted several similar problems in state indigent defense systems.<sup>60</sup> The problems found included a lack of adequate resources, insufficient attorney compensation, excessive caseloads for public defenders, and lack of attorney independence.<sup>61</sup>

Moreover, studies have found that inadequate legal representation is a major contributing factor to wrongful convictions.<sup>62</sup> The final report of the 2000 National Symposium on Indigent Defense sponsored by the U.S. Department of Justice, stated: "There are many ways that innocent people may be drawn into the criminal justice system. . . . But there is one overarching way that innocent indigent people can be extricated from the system: by furnishing competent legal representation."<sup>63</sup> Thus, both the private bar and the federal government have found many problems within existing indigent defense systems.

While there has been a tendency to dwell on the crisis in indigent defense systems, there has also been a recent wave of standards and structural ideas put forth on what constitutes an effective indigent defense system.<sup>64</sup>

#### D. DEFINING AN EFFECTIVE INDIGENT PUBLIC DEFENSE SYSTEM

Research has demonstrated two primary factors that determine the quality of indigent defense services: (1) the sufficiency of funding; and (2) compliance with nationally recognized standards for the delivery of indigent defense services.<sup>65</sup> The necessity of adequate funding of indigent

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<sup>60</sup> OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, NAT'L SYMPOSIUM ON INDIGENT DEF. 2000: REDEFINING LEADERSHIP FOR EQUAL JUSTICE (2000) [hereinafter OFFICE OF JUSTICE PROGRAMS].

<sup>61</sup> *Id.* at 3-5.

<sup>62</sup> Lefstein, *supra* note 18, at 860 n.135; *see also* Bernhard, *supra* note 14, at 294 n.3.

<sup>63</sup> OFFICE OF JUSTICE PROGRAMS, *supra* note 60, at 75; *see also* Innocence Project: Poor Defense Lawyering, <http://www.innocenceproject.org/causes/badlawyering.php> ("[I]neffective or incompetent defense counsel have allowed men and women who might otherwise have been proven innocent at trial to be sent to prison. . . . The shrinking funding and access to resources for public defenders and court appointed attorneys is only exacerbating the problem.").

<sup>64</sup> *See* ABA TEN PRINCIPLES, *supra* note 8; INST. FOR LAW AND JUSTICE, COMPENDIUM OF STANDARDS FOR INDIGENT DEFENSE SYSTEMS (Neal Miller ed., 2000) (describing national, state, and local standards relating to five functions of indigent defense); THE NAT'L LEGAL AID & DEFENDER ASS'N, PERFORMANCE GUIDELINES FOR CRIMINAL DEFENSE REPRESENTATION (1995).

<sup>65</sup> *Wiggins v. Smith*, 539 U.S. 510 (2003) (holding that national standards should stand as guideposts in assessing ineffective assistance of counsel claims); NLADA ASSESSMENT, *supra* note 41, at 4, 7 (concluding that standards-based assessments have become the

defense systems is obvious. States that adequately finance the entire indigent defense system tend to have better indigent defense systems than ones dependent on local county financing.<sup>66</sup>

Because local funding is primarily derived from property taxes, the amount available for defender services tends to constrict in inverse proportion to the demand for such services (i.e., a weakened local economy causes increases in unemployment, worker flight, demands for other county services, and crime). As a result, the quality of public defender representation in a state that relies upon local funding generally fluctuates widely from locality to locality. A system that metes out justice in proportion to the availability of limited local resources cannot assure victims, the accused, and the general public that resulting verdicts are fair . . . .<sup>67</sup>

Adequate state funding alone, however, cannot guarantee a quality defense system.<sup>68</sup> Right to counsel “requires the promulgation and enforcement of standards for attorney competency.”<sup>69</sup> In addition, the combination of the lack of adequate funding and the lack of standards results in sub-par representation, as measured by failure to adequately investigate charges, communicate regularly with clients, hire experts, maintain current legal knowledge, and preserve viable issues for appeal.<sup>70</sup>

The ABA established the most widely accepted and used set of national standards for indigent defense.<sup>71</sup> The ABA claims that these principles “constitute the fundamental criteria necessary to design a system that provides effective, efficient, high quality, ethical, conflict-free legal representation for criminal defendants who are unable to afford an attorney.”<sup>72</sup> The ABA’s principles focus on public defender independence, manageable caseloads, adequate time spent with clients, defender training, education, supervision, and parity with the state prosecutors.<sup>73</sup>

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recognized norm for guaranteeing the adequacy of criminal defense services provided to the poor).

<sup>66</sup> NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE LEGAL DEFENSE AND EDUC. FUND, INC., ECONOMIC LOSSES AND THE PUBLIC SYSTEM OF INDIGENT DEFENSE: EMPIRICAL EVIDENCE ON PRE-SENTENCING BEHAVIOR FROM MISSISSIPPI (2003); NLADA ASSESSMENT, *supra* note 41, at 4.

<sup>67</sup> NLADA ASSESSMENT, *supra* note 41, at 4.

<sup>68</sup> *Id.* (citing independent reports from seventeen states to point out that “assessments from around the country demonstrate that those states that adopt and enforce standards . . . and provide adequate statewide funding” are the best at providing a meaningful right to counsel).

<sup>69</sup> *Id.*; see also Bernhard, *supra* note 14 (discussing the importance of standards).

<sup>70</sup> NLADA ASSESSMENT, *supra* note 41, at 5.

<sup>71</sup> *Id.* at 7; see also ABA TEN PRINCIPLES, *supra* note 8. These principles were sponsored by the ABA Standing Committee on Legal and Indigent Defendants and were approved by the ABA House of Delegates in February 2002. *Id.* at Introduction.

<sup>72</sup> ABA TEN PRINCIPLES, *supra* note 8, at Introduction.

<sup>73</sup> *Id.* The ten principles are: (1) the public defense function is independent; (2) the

Unfortunately, effective indigent defense systems are rare, especially in predominately rural states. Thus, while it is important to conduct research and formulate standards that describe effective systems, it is just as necessary to examine successful strategies to accomplish these goals.

### III. ATTEMPTS TO BRING JUDICIALLY MANDATED CHANGE

In the face of this acknowledged crisis, it is important to examine different strategies on how to effect substantive change to indigent defense systems. The conventional wisdom on strategies for bringing change to indigent defense systems is that because of the political unpopularity of criminal defendants, coupled with indigent defendants' lack of financial and political capital, state legislatures are unlikely to allocate significant attention or resources to the problem of indigent defense.<sup>74</sup> Thus, some scholars claim that state court litigation<sup>75</sup> and judicial activism are the proper avenues for those who want to bring about structural change.<sup>76</sup> State litigation, however, is a narrow, limited solution because of traditional notions of separation of powers and problems with judicial enforcement.<sup>77</sup>

#### A. STATE LAWSUITS

In response to the above mentioned problems with indigent defense systems, several scholars have argued that systemic Sixth Amendment litigation addressing a jurisdiction's mechanism for providing indigent criminal defense will be the most successful strategy in precipitating change.<sup>78</sup> Systemic litigation, however, is extremely difficult.<sup>79</sup> Even if a

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public defense consists of a defender office and the active participation of the private bar if the caseload is "sufficiently high"; (3) the defense counsel is assigned and notified "as soon as feasible" after clients' arrest, detention, or request for counsel; (4) the defense counsel is provided sufficient time and a confidential space within which to meet the client; (5) the defense counsel's workload is controlled to permit the rendering of quality representation; (6) the defense counsel's ability, training, and experience match the complexity of the case; (7) the same attorney represents the client until the completion of the case; (8) a parity in resources between the defense counsel and the prosecution; (9) the defense counsel is provided with and required to attend continuing legal education; and (10) the defense counsel is supervised and systematically reviewed for quality and efficiency. *Id.*

<sup>74</sup> See *supra* note 14 for discussion of conventional wisdom.

<sup>75</sup> Federal suits are typically not an option because of the abstention doctrine. See *Younger v. Harris*, 401 U.S. 37 (1971); Bernhard, *supra* note 14, at 332 ("Federal courts have been prevented from engaging in the reform of state indigent defense systems by abstention doctrine.").

<sup>76</sup> Bernhard, *supra* note 14, at 346.

<sup>77</sup> See *infra* Section III.a.

<sup>78</sup> See Bernhard, *supra* note 14, at 322 n.173; Margaret H. Lemos, *Civil Challenges to the Use of Low-Bid Contracts for Indigent Defense*, 75 N.Y.U. L. REV. 1808 (2000); Richard

case is brought and adjudicated on the merits, there are two major difficulties. First, structural limitations inherent in state courts—such as jurisdictional issues,<sup>80</sup> separation of power notions,<sup>81</sup> and the related concern of a judiciary that lacks democratic authority and institutional capacity to “spend funds, create government entities, and craft enforceable rules”<sup>82</sup>—often lead to narrow remedies or remedies that are difficult to enforce. Second, even if a case challenging the entire indigent defense system could be brought and won, courts, especially those handing down big structural changes, may face a major problem with enforcement.<sup>83</sup> These problems are exemplified in the three state cases typically regarded as ones that brought “far-reaching” reforms:<sup>84</sup> *State v. Peart*,<sup>85</sup> *State v. Smith*,<sup>86</sup> and *State v. Lynch*.<sup>87</sup>

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J. Wilson, *Litigative Approaches to Enforcing the Right to Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 203, 216-17 (1986); *Effectively Ineffective*, *supra* note 14, at 2062. See generally Robert A. Schapiro, *The Legislative Injunction: A Remedy for Unconstitutional Legislative Inaction*, 99 YALE L.J. 231 (1989) (arguing that courts should be able to create “legislation” in the school desegregation context).

<sup>79</sup> Bernhard, *supra* note 14, at 322 (successful litigation requires “egregious conditions . . . , allegations of actual injury to clients, litigation support from a law reform organization or bar organization, and public favor”); see also GERALD N. ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE* 334 (1990) (“The Court . . . was unable to achieve its goals [of providing effective indigent defense counsel] because political support was often lacking . . .”).

<sup>80</sup> If an indigent defense system is funded and structured by the county then any remedies brought from a successful suit will only apply to the county. See *State v. Smith*, 681 P.2d 1374 (Ariz. 1984).

<sup>81</sup> *State v. Peart*, 621 So. 2d 780, 791 (La. 1993) (“We decline at this time to undertake these more intrusive and specific measures because this Court should not lightly tread in the affairs of other branches of government and because the legislature ought to assess such measures in the first instance.”).

<sup>82</sup> Miller, *supra* note 34, at 1807.

<sup>83</sup> See THE FEDERALIST NO. 78 at 483 (Alexander Hamilton) (Henry Cabot Lodge ed., 1888) (The judiciary “has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment . . .”); ROSENBERG, *supra* note 79, at 18-19 (“A further obstacle for court effectiveness . . . is that significant social reform often requires large expenditures. Judges, in general prohibited from actively politicking and cutting deals, are not in a particularly powerful position to successfully order the other branches to expend additional funds. ‘The real problem’ in cases of reform, Judge Bazelon wrote, ‘is one of inadequate resources, which the courts are helpless to remedy.’ . . . [C]ourts ‘ultimately lack the power to force state governments to act.’”) (citations omitted).

<sup>84</sup> De Sario, *supra* note 36, at 60; *Effectively Ineffective*, *supra* note 14, at 1735.

<sup>85</sup> 621 So. 2d 780.

<sup>86</sup> 681 P.2d 1374 (Ariz. 1984).

<sup>87</sup> 796 P.2d 1150 (Okla. 1990).

*I. State v. Peart*

*State v. Peart* is a case on appeal to the Louisiana Supreme Court from a trial judge's ruling that Louisiana's "system for securing and compensating qualified counsel as a whole [is] unconstitutional as applied in the City of New Orleans."<sup>88</sup> An Orleans Indigent Defender Program attorney represented a defendant charged with armed robbery, aggravated rape, aggravated burglary, attempted armed robbery, and first-degree murder.<sup>89</sup> During the trial, counsel for the defendant made a "Motion for Relief to Provide Constitutionally Mandated Protection and Resources."<sup>90</sup> In response to this motion, the trial court held a series of hearings on the defense services provided to Peart and other defendants in Section E of the criminal district court.<sup>91</sup>

After the hearings, the trial court held that the indigent defense system in New Orleans was unconstitutional.<sup>92</sup> On appeal, the Supreme Court of Louisiana partially agreed and held that the services being provided to indigent defendants in one particular section of the Orleans Parish Criminal Court "do not in all cases meet constitutionally mandated standards for effective assistance of counsel."<sup>93</sup> The remedy provided by the court, however, did not require great expenditure of funds by the legislature or the creation of a different statutory or funding scheme, even for the one particular section, Section E, of the local criminal justice system (Orleans Parish).<sup>94</sup> Instead, the court remanded the case with instructions for the trial court to apply a "rebuttable presumption that indigents are not receiving assistance of counsel sufficiently effective to meet constitutionally required standards."<sup>95</sup> However, subsequent ineffective assistance of counsel cases brought in Louisiana demonstrate that *Peart* has been an unsuccessful mechanism for criminal defendants to obtain relief.<sup>96</sup> For instance, in *State v. Hughes* and *State v. Jeff*, cases brought when there were no funds available to pay the court-appointed attorney, courts did not find that there

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<sup>88</sup> *Peart*, 621 So. 2d at 783.

<sup>89</sup> *Id.* at 784.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 783.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* (discussing indigent defense services in New Orleans operated under a public defender model).

<sup>96</sup> See *Effectively Ineffective*, *supra* note 14.

was ineffective assistance of counsel on the record, even with the *Peart* presumption applied.<sup>97</sup>

## 2. State v. Smith

In *Smith*, a defendant was found guilty of burglary and sexual assault.<sup>98</sup> The Arizona Supreme Court granted review to consider if Smith received adequate assistance of counsel at trial.<sup>99</sup> In determining if Smith received adequate assistance of counsel, the Supreme Court of Arizona examined how one Arizona county selected attorneys for its contract system of indigent defense.<sup>100</sup> Smith's attorney, as part of the contract system of providing indigent defense, handled on a part-time basis 149 felonies, 160 misdemeanors, 21 juvenile cases, and 33 other cases in the first eleven months of the year that Smith's case went to trial.<sup>101</sup> The court agreed with Smith that this caseload was "excessive, if not crushing."<sup>102</sup> The court held that since the funding and appointment system did not take into account the time and costs spent by the attorney and the competency of the attorney in respect to the complexity of the case, it did not meet the requirements of guidelines proposed by the National Legal Aid and Defender Association (NLADA). Therefore, there would be an inference in each future case that this system results in ineffective assistance of counsel.<sup>103</sup> While the court's decision did establish guidelines that the state must follow to maintain its

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<sup>97</sup> *Id.* at 1737 (citing *State v. Hughes*, 653 So. 2d 748 (La. Ct. App. 1995), and *State v. Jeff*, 761 So. 2d 574 (La. Ct. App. 1999), as examples of cases where the court did not find that there was ineffective assistance of counsel on the record, even with the *Peart* presumption). After Hurricane Katrina, the entire criminal justice system of Orleans Parish is the focus of intense scrutiny, particularly the indigent public defense system. See Press Release, ACLU, National Prison Project Calls for Immediate Action by President, Congress and Justice Department (Aug. 10, 2006), available at <http://www.aclu.org/prison/conditions/26421prs20060810.html>. It will be interesting and important to examine how the parish rebuilds its defender system.

<sup>98</sup> *State v. Smith*, 681 P.2d 1374, 1376 (Ariz. 1984).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1376, 1379. The procedure for providing indigent defense counsel is that each year the presiding judge of Mohave County sends out a letter to all attorneys in the county requesting bids to be assigned to *all* indigent criminal cases in the superior court, justice of the peace courts, juvenile courts, and all appeals and mental evaluations. *Id.* at 1379. After the judge receives the bids, the judge sends the bids with a cover letter summarizing the dollar sums bid to the County Board of Supervisors. *Id.* With only one exception in the four years prior to this case, the Board accepted the lowest bid offered. *Id.*

<sup>101</sup> *Id.* at 1380.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 1381 (however, in this specific case the court did not find ineffective assistance of counsel).

contract system, such systems were relatively rare in Arizona.<sup>104</sup> Thus, this holding had little practical effect, since it only applied to one county and only to the few indigent defendants represented through the contract system.<sup>105</sup>

### 3. State v. Lynch

In *State v. Lynch*, the Supreme Court of Oklahoma examined whether the trial court erred in declaring an Oklahoma statute that governed the court appointment of counsel unconstitutional as applied, since appointed counsel were forced to represent indigent defendants without the assurance of receiving adequate, speedy, and certain compensation.<sup>106</sup> This case began when the Oklahoma District Court appointed two attorneys to represent an indigent defendant charged with first degree murder.<sup>107</sup> Following the defendant's sentencing, the attorneys petitioned the court for fees and expenses of \$17,073.03 and \$10,995.00, respectively.<sup>108</sup> However, Oklahoma passed a statute which placed a \$3,200 restriction on indigent defender attorney fees.<sup>109</sup> In response, the attorneys filed suit claiming that the statute was unconstitutional in that it violated their due process rights by forcing them to represent indigent defendants without the assurance of receiving adequate compensation.<sup>110</sup> The court held that the statute was unconstitutional in application and handed down a remedy in regards to indigent defense funding: it established an *interim* set of guidelines for funding; adopted a principle of parity between indigent defense attorneys and prosecutors; and required reimbursement for defense counsel's overhead and out-of-pocket expenses.<sup>111</sup> While *Lynch* was a good initial

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<sup>104</sup> Miller, *supra* note 34, at 1795 n.213.

<sup>105</sup> *Id.* at 1795 n.214 (citing Larry A. Hammond & John A. Stookey, *New Rules on Indigent Representation: A Step in the Right Direction or an Invitation that an Ethical Attorney Should Reject*, ARIZ. ATT'Y, Feb. 1997, at 21; Michael L. Piccarreta, *The Promise of Gideon*, ARIZ. ATT'Y, Mar. 1997, at 10; John A. Stookey & Larry A. Hammond, *Rethinking Arizona's System of Indigent Representation*, ARIZ. ATT'Y, Oct. 1996, at 28). Also, the holding in this case may have spurred the legislature to increase funding; however, by 1992 the system "was again under a tremendous strain." *Effectively Ineffective*, *supra* note 14, at 1741 (citing Dean Trebesch, *New Challenges in Indigent Defense*, ARIZ. ATT'Y, Nov. 1992, at 25-26).

<sup>106</sup> *State v. Lynch*, 796 P.2d 1150, 1152 (Okla. 1990).

<sup>107</sup> *Id.* at 1153.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.* at 1154.

<sup>110</sup> *Id.* at 1156. It is striking that *Lynch*, the case that has the most far-reaching overturns, is the case in which the court held that "the constitutional right of the indigent is not at issue—the due process rights of appointed counsel are." *Id.*

<sup>111</sup> *Id.* at 1161-62.

step, its remedy is limited in regards to its ability to precipitate transformative change, as the court could have demanded a higher level of funding for appointed counsel or taken measures to establish a statewide public defender system.<sup>112</sup> *Lynch* also exemplifies courts' problems with enforcement: this opinion did spur the legislature into action, to create the Oklahoma Indigent Defense System. However, since this remedy did not stem from the political will of the legislature, the legislature continuously failed to provide sufficient funding for the program.<sup>113</sup>

These three cases demonstrate that courts typically hand down very narrow holdings, and if litigants actually succeed in compelling the legislature to act with short-term additional funding, the courts are unable to enforce funding in the long-term.<sup>114</sup> This conclusion is demonstrated by the fact that the Supreme Court of Louisiana did not apply the *Peart* presumption in *State v. Hughes* and *State v. Jeff*;<sup>115</sup> by the fact that in Arizona by 1992, the indigent defense system "was again under tremendous strain";<sup>116</sup> and, by the fact that in Oklahoma, the public defender system faced repeated financial crisis.<sup>117</sup>

Moreover, other state courts have been reluctant to follow even these "cautious first steps" toward judicial reform of the defense system,<sup>118</sup> and the few that have tried have had mixed results. In 2000, the New York County Lawyers' Association successfully sued the state to raise the rates paid to appointed counsel.<sup>119</sup> For almost two decades, their pay rates had not increased from between \$25 and \$40 an hour.<sup>120</sup> This pay rate was the

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<sup>112</sup> Miller, *supra* note 34, at 1799 ("[The court] might have evaluated the resources for prosecution and defense and demanded a higher level of funding for appointed counsel. . . . The court might have gone well beyond parity and established a new statewide public defender system, or at least taken measures consistent with such a step.").

<sup>113</sup> *Effectively Ineffective*, *supra* note 14, at 1739 (citing BENJAMIN CURTIS ET AL., OKLA. INDIGENT DEF. SYS., ANNUAL REPORT 2 (2002)). This report includes a list of many of the other problems Oklahoma's indigent defense system has faced due to lack of legislative action. *Id.*

<sup>114</sup> *Effectively Ineffective*, *supra* note 14, at 1742.

<sup>115</sup> See *supra* Section III.A.1.

<sup>116</sup> *Effectively Ineffective*, *supra* note 14, at 1741.

<sup>117</sup> *Id.* at 1739.

<sup>118</sup> Miller, *supra* note 34, at 1753.

<sup>119</sup> Press Release, N.Y. County Lawyers' Ass'n, NYCLA Settles Lawsuit Against N.Y. State and City Challenging Constitutionality of Compensation Rates for Assigned Counsel (Nov. 12, 2003), available at [http://www.nycla.org/siteFiles/Publications/Publications116\\_0.pdf](http://www.nycla.org/siteFiles/Publications/Publications116_0.pdf) [hereinafter NYCLA Settlement Press Release].

<sup>120</sup> Press Release, N.Y. County Lawyers' Ass'n, New York County Lawyers' Association Sues Pataki on Behalf of Children and Adults Who Cannot Afford Counsel (Feb. 18, 2000), available at <http://www.nycla.org/publications/18blawsuit.htm>.



second-lowest paid by any state and fell far short of meeting the cost of representation.<sup>121</sup> In 2002, an injunction was issued by the trial judge that more than doubled the rates.<sup>122</sup> The state appealed, staying the raise.<sup>123</sup> In 2003 the legislature acted, setting the rates between \$60 and \$75 per hour—more than 30% less than what the plaintiffs had sought.<sup>124</sup> Elsewhere, plaintiffs in the Detroit area who sued for an increase in indigent defender attorney fees lost outright in the Michigan Supreme Court in 2003.<sup>125</sup> Thus, state lawsuits are not by any means guaranteed to be successful. Moreover, even when successful, state lawsuits do not appear to be the ideal manner of bringing truly transformative change that applies to the entire state, or even of enforcing the limited change that they have brought.<sup>126</sup> However, as the next section demonstrates, a complete overhaul of indigent public defense systems is possible when the legislature, rather than the judiciary, acts.

#### IV. MONTANA

Recent legislative activity in Montana shows that change that comes from the legislature, rather than the courts, is more likely to be transformative. The questions, then, are twofold: how was it possible to overcome the conventional wisdom<sup>127</sup> that legislatures do not act on fixing indigent defense, *and* is there still a role for litigation? However, prior to examining how and why change occurred in Montana, it is useful to examine the crisis in Montana's system of indigent defense that precipitated legislative action.

##### A. CRISIS IN MONTANA

Like many other states, Montana had problems with its indigent defense system.<sup>128</sup> Until 2003, Montana's structure of indigent defense was

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<sup>121</sup> *Id.*

<sup>122</sup> NYCLA Settlement Press Release, *supra* note 119.

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Wayne County Crim. Def. Bar Ass'n v. Chief Judges of Wayne Circuit Court, 663 N.W.2d 471, 472 (Mich. 2003).

<sup>126</sup> In addition, other courts have not followed the limited success of *Peart, Smith, and Lynch*. See *Miller, supra* note 34, at 1801-03 (citing *Kennedy v. Carlson*, 544 N.W.2d 1 (Minn. 1996); *Wilson v. State*, 574 So. 2d 1338 (Miss. 1990)).

<sup>127</sup> See *supra* note 14 for discussion of conventional wisdom.

<sup>128</sup> NLADA ASSESSMENT, *supra* note 41, at 58 ("Attorneys failed to conflict themselves out of even the clearest cases of conflicts of interest, waived probable cause and preliminary hearings with inordinate frequency, failed to meet regularly and meaningfully with their clients, failed to investigate their clients' cases, made motions and went to trial only rarely, prioritized speedy dispositions over the best interests of their clients, improperly

a patchwork of county-employed public defenders, private attorneys who worked on contract with counties, and private attorneys appointed by judges for individual cases.<sup>129</sup> The NLADA characterized this system as:

[An] indigent defense [system] in Montana [of] a rugged individualism in which attorneys go it alone, without the funding, resources, training, supervision and oversight that other indigent defense providers and criminal defense attorneys consider essential to the provision of constitutionally adequate legal representation. . . . Montana delivers ineffective, inefficient, unethical, conflict-ridden, representation to the poor.<sup>130</sup>

Montana delegated primary responsibility for the funding and administration of its indigent defense systems to its counties.<sup>131</sup> Counties could choose to either establish a public defender office, a contract system, an assigned counsel system, or a combination of systems.<sup>132</sup> Montana reimbursed counties for the costs of providing defender services to adults charged with felonies in the district courts.<sup>133</sup> However, reimbursement was dependent on the availability of funding, and annual fluctuations in funding resulted in a dearth of money with which counties could consistently pay their public defense attorneys.<sup>134</sup> Counties had to self-finance indigent defense services in juvenile delinquency proceedings and adult misdemeanor proceedings in the justice and city courts.<sup>135</sup> State self-financing resulted in low salaries for attorneys representing indigent defendants.<sup>136</sup>

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waived their clients' speedy trial rights, and seldom made appeals on behalf of their clients.").

<sup>129</sup> See Second Amended Complaint, *White v. Martz*, No. CDV-2002-133 at 3 (1st Jud. Dist. Ct. Mont. filed Dec. 2003). For example, Butte-Silver Bow, Flathead, Lake and Raavalli Counties contracted with local attorneys, Missoula County had a public defender office, and Glacier and Teton Counties relied on the District Court Judge for the Ninth Judicial District to assign counsel on a case-by-case basis. *Id.*

<sup>130</sup> NLADA ASSESSMENT, *supra* note 41, at 13, 14.

<sup>131</sup> *Id.* at 11.

<sup>132</sup> *Id.* Pursuant to the 1985 District Court Reimbursement Program, counties could seek reimbursement for some of the costs associated with the delivery of indigent defense services in the district courts from the State. *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Second Amended Complaint, *supra* note 129, at 26. "The State relied on the motor vehicle licensing tax to fund [public defense attorneys] . . . Because the amount of tax collected varied from year to year, the State only guaranteed reimbursement to the extent that funding was available." *Id.* In 2002, pursuant to Senate Bill 176, the funding structure changed, but Montana "continued to refuse to guarantee full reimbursement." *Id.*

<sup>135</sup> NLADA ASSESSMENT, *supra* note 41, at 11.

<sup>136</sup> See *id.*

After legislation passed in July 2003,<sup>137</sup> the state assumed funding for all proceedings in state trial courts (except those incurred in jurisdictions in which the county had created a public defender's office) while the counties continued to finance indigent defense in state misdemeanor courts.<sup>138</sup> Funding for indigent defense systems, however, remained inadequate. For example, in fiscal year 2003, Montana set aside \$6.15 million to reimburse the counties for their indigent defense spending.<sup>139</sup> However, three months prior to the end of the fiscal year, this money was drained, and the state had nothing left to distribute to the counties.<sup>140</sup> Moreover, in 2004, the state reduced its indigent defense funding to \$5.4 million.<sup>141</sup> Not only was there a dearth of funding, but, in response to the legislation, four counties terminated or refused to renew their indigent defense contracts and declined to exercise ongoing administrative or supervisory authority over the delivery of indigent defense.<sup>142</sup>

Montana also continued to have several structural problems in its system of indigent defense.<sup>143</sup> There were no statewide written standards that defined a counselor's obligation to her client or that outlined the parameters of the defense function (except with respect to capital representation).<sup>144</sup> Similarly, there were no statewide written procedures regarding conflicts of interest, attorney/client contact, the use of investigators and experts, the right to a speedy trial, plea bargaining, or requests for continuances.<sup>145</sup>

Moreover, Montana had no statewide policies or procedures limiting the number or type of indigent defense cases to which an attorney could be assigned, and no uniform policies or procedures for collecting, maintaining, or analyzing caseload data.<sup>146</sup> For example, Montana put no limits on the number of private clients part-time public defenders could represent while simultaneously accepting court appointments.<sup>147</sup> There were no formal guidelines defining excessive workloads or procedures instructing attorneys

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<sup>137</sup> S. 490, 2003 Leg., Reg. Sess. (Mont. 2003).

<sup>138</sup> NLADA ASSESSMENT, *supra* note 41, at 12.

<sup>139</sup> *Id.* at 15.

<sup>140</sup> *Id.* (citing Deposition of Supreme Court Administrator, R. James Oppedahl 47 (Mar. 25, 2004)).

<sup>141</sup> LAW AND JUSTICE PUBLIC DEF. SUBCOMM., MINUTES (Apr. 30, 2004).

<sup>142</sup> NLADA ASSESSMENT, *supra* note 41, at 12.

<sup>143</sup> *Id.* at 13-14.

<sup>144</sup> See Patricia Manson, *Effective Counsel Not Assured, Panel Told*, CHI. DAILY L. BULL., Feb. 10, 2003, at 1.

<sup>145</sup> NLADA ASSESSMENT, *supra* note 41, at 54.

<sup>146</sup> *Id.* at 49.

<sup>147</sup> *Id.*

with excessive workloads how to seek assistance or relief.<sup>148</sup> In fact, many attorneys stated that they were not permitted to decline cases, regardless of how overwhelmed they were, unless they could demonstrate a conflict of interest.<sup>149</sup>

Montana also did not require that those responsible for administering indigent defense programs hire providers on merit, train them in criminal defense, issue written practice standards, and monitor and limit excessive workloads.<sup>150</sup> The majority of Montana counties had no orientation program for newly hired indigent defense attorneys, no systematic and comprehensive training, and no technical assistance.<sup>151</sup> Attorneys who were thought to be too vigorous in their defense of clients had been denied appointments.<sup>152</sup> In addition, some defenders reported that judges pressured them to pursue plea bargains, to handle their cases in a manner that was convenient to the court, or to refrain from vigorously pursuing justifiable defense strategies.<sup>153</sup>

The lack of funding and structural problems exacerbated the disparity between publicly-funded prosecutors and public defenders. For example, Montana law mandated that the state Attorney General direct and supervise all of the county prosecutors; however, there was no centralized public-defender supervisor.<sup>154</sup> State law also required that prosecutors in large counties work full-time, have at least five years of experience, and receive a base salary, yet did not include any description of defender qualifications or compensation.<sup>155</sup> In addition, state law provided for a County Attorney Assistance Program, but did not provide any training or technical assistance to public defenders.<sup>156</sup> In Missoula County, for instance, the prosecutor's office had twelve full-time attorneys, four paid interns, three paralegals and seven secretaries, in addition to the use of the resources of the police and sheriff's department,<sup>157</sup> while the county public defender had nine part-time attorneys, one paralegal, one law clerk, one investigator and three secretaries.<sup>158</sup>

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<sup>148</sup> *Id.* at 49-50.

<sup>149</sup> *Id.* at 50.

<sup>150</sup> *Id.* at 22.

<sup>151</sup> *Id.* at 37.

<sup>152</sup> *Id.* at 26.

<sup>153</sup> *Id.* at 30.

<sup>154</sup> MONT. CODE ANN. § 2-15-501 (2003).

<sup>155</sup> *Id.* § 7-4-2503.

<sup>156</sup> NLADA ASSESSMENT, *supra* note 41, at 19 (citing Deposition of John Connor (Aug. 21, 2002)).

<sup>157</sup> *Id.* at 20.

<sup>158</sup> *Id.*

A plethora of anecdotal horror stories stemmed from this crisis. For instance, attorneys contracted by counties to provide indigent defense work made eighteen dollars an hour.<sup>159</sup> The chief contract public defender in Flathead County, Montana, did not present a single case to a jury between 1994 and 1999 and filed no motions to suppress evidence or have cases dismissed.<sup>160</sup> A Montana public defender testified that in Silver Bow County, the prosecutor's office had a budget four times larger than that allotted to the public defender.<sup>161</sup> There were also many stories about those directly impacted by Montana's dismal indigent defense system. For example, a woman accused of possessing methamphetamine sat in jail for ten months before she could enter a guilty plea.<sup>162</sup> During this time her house was repossessed and sold at auction.<sup>163</sup> These stories exemplified the need for Montana to fix its system of indigent defense.

#### B. CHANGE IN MONTANA

As recently as 2000, the Montana legislature had not even contemplated transforming the state's locally-focused indigent defense system.<sup>164</sup> An ACLU lawsuit challenging the constitutionality of Montana's indigent system is often cited as the catalyst that precipitated legislative consideration of this issue.<sup>165</sup> The ACLU filed this suit on behalf of indigent criminal defendants from seven counties challenging the adequacy of the public defender systems in their counties and the state.<sup>166</sup>

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<sup>159</sup> Berlow, *supra* note 27.

<sup>160</sup> *Id.*

<sup>161</sup> AM. BAR ASS'N STANDING COMM. ON LEGAL AID AND INDIGENT DEFENDANTS, HEARINGS ON RIGHT TO COUNSEL (2003), available at <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/gidhearlexcerptcaughlan.pdf>. This testimony is from Deirdre Caughlan, a public defender in Silver Bow County, Montana, who works under the contract system. *Id.* In addition, she testified that her contract rate had not increased from 1995 to 2003, while the prosecutors' budget had increased by 33% in that same time period. *Id.*

<sup>162</sup> Dennison, *supra* note 9, at A1.

<sup>163</sup> *Id.*; see also Maurice Possley, *Montana Aims to Fix Public Defender System: State's Effort Is 1st to Use Guidelines Suggested by ABA*, CHI. TRIB., June 21, 2005, at C11 ("One defendant waited 23 months to get to court on a charge that carried a maximum sentence of 13 months. Not a single indigent defendant in the misdemeanor courts had a defense lawyer. A public defender was assigned a rape case where the defendant faced a life prison sentence even though the lawyer had never handled such a case before. A former public defender said conducting a defense investigation of the charges before trial was an 'aspirational' activity.").

<sup>164</sup> Telephone Interview with Scott Crichton, Executive Dir., ACLU of Mont., in Chicago, Ill. (Nov. 18, 2005) [hereinafter Crichton interview].

<sup>165</sup> *Id.*

<sup>166</sup> Second Amended Complaint, *supra* note 129. See *infra* Section IV.C for discussion

The ACLU filed suit against the Governor of Montana, the Supreme Court Administrator, the Appellate Defender Commissioners, the state district court council members, and district court judges in Montana's First Judicial District Court in Lewis and Clark County.<sup>167</sup> While this suit proceeded through discovery and depositions,<sup>168</sup> it was never adjudicated on the merits.<sup>169</sup> Instead, on May 7, 2004, the ACLU of Montana entered into a stipulation with the Montana Attorney General's Office in which they agreed to postpone the lawsuit in order to seek a legislative solution to problems within Montana's public defender system.<sup>170</sup>

Thus, in Montana change did not result from a judicially mandated remedy, but rather through the legislature.<sup>171</sup> There are substantial benefits to such legislative change: the new system is not restricted by the limits inherent in judicial remedies; and since this change came from the political will of the legislature, the legislature should have incentive to continue to fund and enforce it.<sup>172</sup> Thus, those individuals concerned with the continuing crisis in indigent defense will be better served by attempting to bring change through the legislature rather than by focusing solely on lawsuits. Through an examination of the factors that led to change in Montana, academics, politicians, and practitioners concerned about indigent defense can focus on how best to use often scarce resources.

### *1. How Did this Change Occur?*

In analyzing the factors that led to this change, there are three important questions: (1) why did the legislature decide to address this issue; (2) what led the legislature to bring such transformative change; and (3) what role should an attorney play in bringing this change.

First, one of the main reasons the legislature acted is that the legislature and the Attorney General believed that they were going to lose

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of the crisis in Montana's indigent defense system.

<sup>167</sup> Second Amended Complaint, *supra* note 129, at 1.

<sup>168</sup> Crichton interview, *supra* note 164.

<sup>169</sup> The only controversy adjudicated before the court involved the defendants', Governor Martz, Supreme Court Administrator Rick Lewis, and Appellate Defender Commissioners, motion for a protective order to prevent the plaintiffs from taking the depositions of Governor Martz and the Chief Justice of the Montana Supreme Court. *White v. Martz*, 2002 ML 3743 (1st Jud. Dist. Ct. Mont. 2002).

<sup>170</sup> Scott Crichton, *Guest Opinion: Legislation Must Guarantee Legal Defense for all Montanans*, BILLINGS GAZETTE (Mont.), Jan. 22, 2005, available at <http://www.billingsgazette.net/articles/2005/01/22/opinion/export190592.txt>.

<sup>171</sup> Dennison, *supra* note 9.

<sup>172</sup> ROSENBERG, *supra* note 79, at 15-21; *see also* THE FEDERALIST, *supra* note 83, at 465.

the suit against the ACLU.<sup>173</sup> Several factors caused the legislature and the Attorney General to share this belief. First, the suit was brought with the backing and resources of the local ACLU affiliate and the national ACLU, and had the financial backing and resources of the national law firm Cravath, Swaine, & Moore, LLP.<sup>174</sup> The ACLU also involved the NLADA in the lawsuit, commissioning the NLADA to conduct site visits and interviews throughout Montana's indigent defense system.<sup>175</sup> Second, the Attorney General may have realized the far-reaching ramifications of an ACLU victory.<sup>176</sup> Thus, the legislature was motivated to keep matters of public policy within its control.<sup>177</sup> This motive is especially likely considering that the Montana legislature had experienced a recent legal loss regarding school funding.<sup>178</sup> After that legal defeat, the legislature had a difficult time crafting education legislation that the Montana Supreme Court agreed would amount to equitable funding.<sup>179</sup>

Further, the state began to believe that it was in their financial interest to have a state, as opposed to a local, system of indigent defense. For example, State Representative John Parker said that the new system should enable the state to control costs and, "[w]ith a state system, costs can be managed, because the brunt of the work will be done by state employees on

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<sup>173</sup> Crichton interview, *supra* note 164; e-mail from Ron Waterman, lead counsel in ACLU lawsuit, to author (Dec. 20, 2005, 11:56 CST) (on file with the author) [hereinafter Waterman e-mail].

<sup>174</sup> Crichton interview, *supra* note 164 (noting that not only were the financial backing and legal resources of these two organizations behind the lawsuit, but they were able to deploy people to rural courthouses to evaluate the indigent defense systems).

<sup>175</sup> NLADA ASSESSMENT, *supra* note 41, at 1.

<sup>176</sup> See LAW & JUSTICE INTERIM COMM., FOR THE DEFENSE: ENACTING A STATEWIDE PUBLIC DEFENDER SYSTEM IN MONTANA, 59th Leg., at 37 (2004) ("All individuals who had already been convicted of a felony and who were still within the system would potentially have grounds for appeal contending that they had been convicted by a system which was constitutionally deficient. Essentially this would adversely affect the sentences of thousands of individuals who were in the prison system and still on probation and parole. Further, once the system was found to be deficient, all prosecutions would have to come to an end until a new system could be passed and put in place, with resulting delays and possible speedy trial considerations. This would have caused a special session in the middle of 2004 and there would have been considerable political fallout from such a development.").

<sup>177</sup> See *id.* ("[T]he legislature is the only body with the authority or power to set public policy in this area [indigent public defense] and provide state funding.").

<sup>178</sup> See Crichton interview, *supra* note 164; Waterman e-mail, *supra* note 173 ("We had just gone through litigation over school funding, which has proven to now be difficult to address legislatively because the Court is constantly overseeing all efforts to achieve equitable funding and I believe that the AG and the Legislature did not want that to occur with regard to the public defender system.").

<sup>179</sup> Waterman e-mail, *supra* note 173.

a salaried basis,” since more than half the costs of the current system are for private attorneys working on their own, with no supervision or coordinated manner for controlling costs.<sup>180</sup>

Yet, the legislature went to great lengths to ensure that they were not perceived to be acting only in response to the lawsuit. State Senator Dan McGee, the future sponsor of the legislation, stated that the “unanimous committee vote [to work on legislation] . . . [wa]s not part of a deal to settle the lawsuit.”<sup>181</sup> In addition, statements on presentations used by the Law and Justice Interim Committee (LJIC), a joint committee between the Montana House and Senate, contained warnings such as, “CAUTION: Remember systematic study process shouldn’t be driven by the lawsuit.”<sup>182</sup>

Thus, for a variety of reasons, in October 2003, the LJIC agreed to make the public defender issue its top priority<sup>183</sup> and initiated a thorough study of the issues and policy options.<sup>184</sup> On March 20, 2004, the LJIC voted to draft a bill to create a statewide system of indigent defense.<sup>185</sup> This leads to the second question: why did the legislature draft such sweeping legislation?

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<sup>180</sup> Dennison, *supra* note 9, at A1.

<sup>181</sup> *Id.*

<sup>182</sup> Powerpoint Presentation, Law and Justice Interim Comm., Meeting (Oct. 23, 2003), at slide 44. *But see* Mike Dennison, *Panel Approves Statewide Public Defender System*, GREAT FALLS TRIB. (Mont.), Apr. 2, 2004, at A2-A3 (Senator McGee saying “[our vote] accomplished what [the Attorney General] was looking for, which was some sort of statement from the Legislature that this issue is going to be looked at and addressed”).

<sup>183</sup> In fact, during the 2003 session, a state senator introduced Senate Bill 218, which would have created a statewide system of indigent defense. Dennison, *supra* note 182, at A3. The bill died, however, when lawmakers could not agree how or whether to fund it. *Id.* In addition, Scott Crichton, Executive Director of the Montana ACLU, said that the legislation proposed in 2003 would not have been sufficient for the ACLU to drop their lawsuit. Crichton interview, *supra* note 164.

<sup>184</sup> LAW & JUSTICE INTERIM COMM., *supra* note 176, at 18, 19. The LJIC studied the public defender issue for more than ten months. *Id.* at 11. At each meeting staff presented research reports, and stakeholders; experts, including the Chief Justice of the Montana Supreme Court, the District Court Council, the Appellate Defender Commission, the Chief Appellate Defender, the Montana Association of Criminal Defense Lawyers, the Attorney General, the County Attorney Association, the Supreme Court Administrator, the Montana Association of Counties, and the ACLU; national public defender research groups, including the NLADA and the Spangenberg Group; and interested persons provided testimony and exhibits. *Id.* The LJIC also examined a national *Compendium of Standards for Indigent Defense Systems*, which pulled together model language and sample statutes related to public defender system design, administration, and quality standards. *Id.* at 12.

<sup>185</sup> *Id.* at 30.



## 2. *Why Was Legislation So Transformative?*

One major reason that the legislature drafted such sweeping legislation is that the ACLU did not settle its lawsuit with the Attorney General even after the legislature began to work on the issue of public defense. The case was still scheduled to go to trial in May 2004.<sup>186</sup> Thus, the legislature knew that it needed to draft legislation that would satisfy the ACLU to settle the lawsuit.<sup>187</sup> Moreover, the ACLU did not exclusively focus on litigation, but used other means to keep pressing for a statewide indigent defense system based on nationally-recognized standards.<sup>188</sup> The ACLU worked to form coalitions and partnered with other organizations who were interested in the same goals.<sup>189</sup> They also received a grant to hire a lobbyist to work for the passage of a public defense bill.<sup>190</sup>

In addition, the ACLU and other groups strived to educate the legislators and the public. For example, an organization of for-profit criminal defense attorneys trained the members of LJIC on the differences in the quality of representation they would receive if they could afford to hire a for-profit criminal defense attorney, compared to the type of service they would receive if they were indigent defendants.<sup>191</sup>

The ACLU also attempted to influence public opinion in Montana and nationally<sup>192</sup> to persuade the legislature to pass the bill.<sup>193</sup> The coalition in Montana worked with NLADA to focus on what types of messages made

<sup>186</sup> Dennison, *supra* note 9, at A1.

<sup>187</sup> Crichton interview, *supra* note 164; Waterman e-mail, *supra* note 173.

<sup>188</sup> This was particularly important because it was not clear if the LJIC was going to “overhaul” the current system or just “tweak” it. Powerpoint Presentation, *supra* note 182, at 51.

<sup>189</sup> Crichton interview, *supra* note 164.

<sup>190</sup> *Id.* As their lobbyist, they hired one of the best insurance lawyers in the state. *Id.* She had a disparate array of contacts and was experienced in bill drafting. *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> Trying to harness public opinion to one’s side seems to be a good strategy to attempt to transform indigent public defense. Recent polling data has revealed that the public strongly supports providing effective defense counsel to people accused of crimes who cannot afford lawyers. See *GIDEON’S BROKEN PROMISE*, *supra* note 5, at 3 (citing NLADA ASSESSMENT, *supra* note 41); see also BELDEN, RUSSENELLO & STEWART, AMERICANS CONSIDER INDIGENT DEFENSE: ANALYSIS OF A NATIONAL STUDY OF PUBLIC OPINION 5 (2002). Eighty-eight percent of respondents found the statement “[p]roviding competent legal representation is one of our most fundamental rights in the US” convincing; sixty-five percent found it very convincing. *Id.* Ninety-four percent of those polled believed that “[a] lawyer with a small enough caseload to provide the time necessary to prepare a defense for each person” is either an important or guaranteed right. *Id.* at 3. Ninety-one percent of people polled found that “[r]esources to hire investigators to check evidence and find witnesses” is either important or guaranteed. *Id.*

the public understand the importance of indigent defense,<sup>194</sup> resulting in a focus on the economic efficiency of statewide legislation.<sup>195</sup> The coalition also tried to humanize the individuals actually impacted by the indigent defense system by hiring a freelance writer, Michele Corriel, to write a continuing series for the ACLU's website to provide greater insight into the lives of those denied their rights by the Montana justice system.<sup>196</sup> Corriel's stories were then posted on the ACLU website and sent out to Montana newspapers.<sup>197</sup>

For many of the reasons discussed above, especially the backing of the lawsuit by the national ACLU and Cravath, Swaine & Moore, LLP, the Attorney General also agreed to help the ACLU lobby the legislature to pass a bill comprehensive enough to convince the ACLU to drop their suit.<sup>198</sup> The Attorney General's office, for its part, agreed to advocate alongside the ACLU during the 2005 legislative session for a statewide system that would be overseen by a newly created public defender commission, and that would establish standards to be followed by all public defenders in the state.<sup>199</sup> The Attorney General's office also committed to advocate for adequate funding.<sup>200</sup> In fact, the Attorney General spoke to the LJIC and said that movement toward creating a statewide system could help resolve the suit.<sup>201</sup> The Attorney General also stressed that if the Montana legislature failed to pass a bill meeting the goals to the satisfaction of the plaintiffs, the litigation would likely resume in May 2005.<sup>202</sup>

Additionally, there was local support on the ground for the legislature to work on this issue. For example, the Montana Association of Counties

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<sup>194</sup> Crichton interview, *supra* note 164.

<sup>195</sup> Press Release, ACLU, Statewide Public Defender Becoming a Reality (June 8, 2005), available at <http://www.aclu.org/crimjustice/indigent/10249prs20050608.html> (citing lead counsel in the ACLU lawsuit Ron Waterman as saying, "experienced attorneys, coupled with economies of scale, will produce an efficient and cost-effective public defense system").

<sup>196</sup> E-mail from Michele Corriel, freelance writer, to author (Nov. 20, 2005, 04:34 CST) (on file with author).

<sup>197</sup> As of November 19, 2005, there are six stories posted on the ACLU's website. ACLU of Montana, available at <http://www.aclumontana.org/Legislature/Issues.htm> (last visited Oct. 1, 2006).

<sup>198</sup> Press Release, ACLU, ACLU Agrees to Postpone Trial Over Lack of Legal Defense for Montana's Poor While Attorney General Seeks Legislative Remedy (May 7, 2004), available at [http://www.aclumontana.org/NewsEvents/PressReleases/05\\_07\\_04.htm](http://www.aclumontana.org/NewsEvents/PressReleases/05_07_04.htm) ("[T]he Attorney General has pledged to take a leadership role in advocating for meaningful legislative reform designed to fix the deficiencies in the current system.").

<sup>199</sup> *Id.*

<sup>200</sup> *Id.*

<sup>201</sup> Dennison, *supra* note 182, at A1.

<sup>202</sup> FOR THE DEFENSE, *supra* note 176, at 7.

(MACo) urged the legislature to establish a statewide public defender system.<sup>203</sup> State judges, prosecutors, and public defenders also attended roundtable discussions with the LJIC to urge the development of a state system of indigent public defense to represent indigent criminal defendants.<sup>204</sup> The media stressed the wide support from the public and every sector of Montana society in favor of creating a new statewide system of indigent defense.<sup>205</sup>

Finally, approximately one month before the trial on the merits was to occur, the state Attorney General approached the ACLU one last time with the legislature's draft bill seeking a settlement.<sup>206</sup> On May 5, 2005, the Montana Legislature passed the Montana Public Defender Act.<sup>207</sup>

The ACLU and their partners did not stop working on the issue of indigent defense because the litigation was on hold. Instead, these groups used traditional organizing techniques of coalition building and educating legislators and the public. The strengths of this approach—working to create the requisite political will in the legislature to pass legislation addressing the indigent defense problem—are shown in the transformative bill that passed in Montana.

### C. THE MONTANA PUBLIC DEFENDER ACT

The ACLU called the Montana Public Defender Act “groundbreaking,”<sup>208</sup> but what is actually so groundbreaking about it? While parts of the legislation are simple enough,<sup>209</sup> what is so striking is that the legislation establishes a statewide public defense system<sup>210</sup> that will

<sup>203</sup> *Id.*; MONT. ASS'N OF COUNTIES, MINUTES, 93RD ANNUAL CONFERENCE (Sept. 25, 2005), available at <http://maco.cog.mt.us/pages/93rdANNUALCONFERENCEMINUTES.htm> (MACo passing a resolution for a state public defender system.).

<sup>204</sup> Mike Dennison, *Judicial Minds Push for Creating Statewide System of Public Defenders*, GREAT FALLS TRIB. (Mont.), Oct. 24, 2003, at A16.

<sup>205</sup> Emily Metzgar, *Justice Delayed in Court System*, SHREVEPORT TIMES (La.), June 15, 2005, at A9 (“This bill received extremely wide support from state government to county and city government, from judges and prosecutors to members of the defense community and advocates for the mentally ill. Everyone worked together to make this happen.”).

<sup>206</sup> Robin Troy, *Trial By Fire*, MISSOULA INDEP. (Mont.), Dec. 23, 2004, at 17.

<sup>207</sup> Montana Public Defender Act of 2005, § 3 (codified as amended at MONT. CODE ANN. §46-8-211-213 (2005)).

<sup>208</sup> Press Release, ACLU, ACLU Hails Montana's Public Defense Bill as Leading National Trend 1 (June 8, 2005), available at <http://www.sado.org/fees/aclumontana.pdf>.

<sup>209</sup> For example, “[d]uring the initial appearance before the court, every defendant must be informed of the right to have counsel, and must be asked if the aid of counsel is desired.” MONT. CODE ANN. § 46-8-101(1). The commentary to this statute says that this line is loosely modeled after the 1987 code. *Id.*

<sup>210</sup> Montana Public Defender Act of 2005 (codified as amended at MONT. CODE ANN. §

ensure that counsel is qualified and competent,<sup>211</sup> and that adequate funding is provided by the state.<sup>212</sup> Moreover, this legislation creates the first state system of indigent defense that meets national standards for delivering high-quality representation.<sup>213</sup>

The heart of the Act is the public defender commission: eleven members appointed by the governor, who will supervise the entire indigent defense system.<sup>214</sup> The commission is responsible for establishing qualifications, duties, and compensation for the chief public defender.<sup>215</sup> The commission will also be responsible for appointing the chief public defender and regularly evaluating his or her performance.<sup>216</sup> In addition, this commission is charged with reviewing and approving the strategic plan and budget proposal submitted by the chief public defender.<sup>217</sup>

Furthermore, the commission is charged with promulgating statewide standards for the qualification and training of all indigent defense attorneys. This will ensure that all indigent defense services are provided by competent counsel and are "fair and consistent throughout the state."<sup>218</sup> These standards will establish, among other things, the level of education and experience needed for an attorney to try certain types of cases, acceptable caseload and workload levels, practice standards, and performance evaluation protocols.<sup>219</sup> The commission is also responsible

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47-1-102(1)).

<sup>211</sup> MONT. CODE ANN. § 47-1-102(3).

<sup>212</sup> *Id.* § 47-1-102(5).

<sup>213</sup> Post, *supra* note 9; see also Dennison, *supra* note 9, at A1 (quoting Vince Warren, senior staff attorney for the American Civil Liberties Union as saying, "I think Montana has really put itself as a national leader by passing this legislation. This is the first legislation of its kind that actually was crafted with the intent of addressing national standards for indigent defense.").

<sup>214</sup> MONT. CODE ANN. § 2-15-1028. The commission will be comprised as follows: two attorneys from nominees submitted by the supreme court; three attorneys from nominees submitted by the president of the state bar, one who has served a minimum of one year as a full-time public defender, one experienced in the defense of juvenile delinquency, and one who represents criminal defense lawyers; two members of the general public; one person who is a member of an organization that advocates on behalf of indigent people; one person who advocates on behalf of racial minority populations; one person who advocates on behalf of people with mental illnesses and developmental disabilities; and one person who works for an organization that provides addictive behavior counseling. *Id.*

<sup>215</sup> *Id.* § 47-1-105(1).

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* § 105(3).

<sup>218</sup> *Id.* § 105(2).

<sup>219</sup> *Id.*

for submitting a biennial report on the status of the indigent public defense system to the governor, supreme court, and the legislature.<sup>220</sup>

The legislation also established an office of the state public defender, which includes an administrative director, a chief public defender, a chief appellate defender, a training coordinator, deputy public defenders, assistant public defenders, and other necessary support staff.<sup>221</sup> The chief public defender's duties include preparing a regional strategic plan, supervising deputy directors, ensuring that detailed expenditure and caseload data is kept, managing caseloads, supervising a training program, and establishing performance and evaluation criteria.<sup>222</sup>

The Public Defender Act, passed in 2005, is still in its implementation stage, and the true success of the program will have to be evaluated in subsequent years. However, it appears that the Montana Legislature has succeeded in transforming the state's indigent defense system. First, the Act abides by the ABA's principles of independence, training, supervision, standards, and parity.<sup>223</sup> Moreover, Montana has already begun putting its new legislation into practice. On April 21, 2006, the State Public Defender Commission approved a strategic plan for implementing the Montana Public Defender Act.<sup>224</sup> This strategic plan defines how the state public defender system will provide services to clients, provides a cost estimate for the proposed system, and proposes an organization structure to operate and manage the system.<sup>225</sup> Additionally, by August 2006, the office of the state public defender had already promulgated a one hundred page document of public defender standards.<sup>226</sup> This document sets the standards for counsel representing indigent defendants pursuant to the Montana Public Defender

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<sup>220</sup> *Id.* § 105(9). The report will detail "all policies or procedures in effect for the operation and administration of the statewide public defender system" including: all standards established; "the number of deputy public defenders and the region supervised by each"; "the numbers of public defenders employed or contracted with in [sic] the system . . ."; the number of staff supervised by each deputy public defenders; "the number of new cases in which counsel was assigned to represent a party"; the total number of people represented; "the annual caseload and workload of each public defender"; the training programs conducted; "the continuing education courses on criminal defense or criminal procedure"; and "detailed expenditure data by court and case type." *Id.*

<sup>221</sup> *Id.* § 47-1-201.

<sup>222</sup> *Id.* § 201-02.

<sup>223</sup> See *supra* note 73.

<sup>224</sup> OFFICE OF THE STATE PUB. DEFENDER, STRATEGIC PLAN (2006), available at [http://publicdefender.mt.gov/docs/strategic\\_plan\\_2006\\_new.pdf](http://publicdefender.mt.gov/docs/strategic_plan_2006_new.pdf).

<sup>225</sup> *Id.*

<sup>226</sup> STANDARDS FOR COUNSEL REPRESENTING INDIVIDUALS PURSUANT TO THE MONTANA PUBLIC DEFENDER ACT (2006), available at <http://publicdefender.mt.gov/docs/NewGeneralStandardsforCounselmaster.pdf>.

Act; standards for appellate advocacy and post-conviction proceedings; standards for representation of youth; as well as a plethora of other standards.<sup>227</sup> Statewide public defense trainings have also begun. On July 12-14, 2006, Montana held its first annual Montana Public Defender Training Conference.<sup>228</sup>

#### V. CONCLUSION

Activists advocating on behalf of indigent defendants often have very limited resources with which to work. Thus, to fix indigent defense systems, strategic choices must be made about which type of advocacy will most efficiently allow indigent defense activists to reach their goals of a better system. In examining changes brought to indigent defense systems from court cases spurring judicially sanctioned remedies, as demonstrated in *Peart*, *Smith*, and *Lynch*, or passed by the legislature without a judicial mandate, as recently occurred in Montana, the legislative option is much more transformative. Furthermore, since the legislation was passed through political will, funding and enforcement should not be as much of a concern. However, as seen in Montana, a lawsuit, especially one with the backing of national organizations and well-financed law firms, can be the one catalyst that sets the whole process of change in motion. Accordingly, it is important that lawyers not only continue to bring lawsuits, but also that they work to forge a coalition of groups on all sides of the political and legal spectrum, to demonstrate to the legislature that it is in their best interest to pass legislation that provides indigent defense programs adequate funding, statewide administration, and parity of resources.

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<sup>227</sup> *Id.*

<sup>228</sup> MONT. PUBLIC DEFENDERS, THE MONTANA PUBLIC DEFENDERS ORIENTATION CONFERENCE (2006), available at <http://publicdefender.mt.gov/docs/newtrainingorientationbrochure.pdf>. Randi Hood, the Chief Public Defender, stated:

This orientation conference is intended to assist all of us in developing a clear understanding of the goals and objectives of the Montana Public Defender Act and to demonstrate to each of you that the central office staff and I are fully committed to providing you with every resource you need to achieve the highest possible level of confidence and proficiency as you undertake to represent Montana's indigent clientele.

*Id.*

