2012

Too Many Clients, Too Little Time: How States are Forcing Public Defenders to Violate Their Ethical Obligations

Heather P. Baxter

Too Many Clients, Too Little Time: How States Are Forcing Public Defenders to Violate Their Ethical Obligations

HEATHER BAXTER*

Associate Professor of Law, Nova Southeastern University Shepard Broad Law Center

Ed Olexa began working for Luzerne County, Pennsylvania, as a public defender in 2009.[1] Having been told this position was part-time and that he was free to take private clients, Olexa agreed to a salary of $30,000 a year. Now, three years later, Olexa is up before dawn five days a week, works late into the evening and on weekends, and still cannot find the time to get everything accomplished. He was assigned nearly 260 cases last year, most of which were clients accused of felonies. This excessive caseload has made it impossible to represent the clients in any meaningful way. He does not have time to speak to his clients or explain the proceedings for more than a few minutes before his next case is called before a judge. There is no time to properly investigate the cases he has been assigned, much less build a successful private practice. In the end, Olexa is overworked, underpaid, and overburdened with ethical obligations that are nearly impossible to meet—and he is not alone in this new reality of indigent defense.

In my earlier article, *Gideon's Ghost*,[2] I discussed the devastating effect that budget crises are having on public defenders and the right to counsel.[3] This piece takes that discussion deeper and specifically examines how those cuts, mostly in the form of excessive caseloads, are placing public defenders in an ethical paradox.[4] Many are forced to choose which clients to represent more fully and which to put on the backburner. They have to choose which client's case they should investigate, in which one to propound discovery, in which one to move to suppress the evidence, and which one not to follow through on at all, quite possibly until the day of trial.[5]

Although much attention has been given to the problems facing indigent defense, the problem has recently taken a backseat in the wake of the Civil Gideon movement.[6] The problem has not gone away, however, and has in fact only gotten worse.[7] In Part I of this article, I give an update on the state of budgets for indigent defense. In Part II, I discuss the relevant ethical rules relating to indigent defense by applying them to an ineffective assistance of counsel case, *California v. Edward S.*[8] In Part III, I discuss the special case of a conflict of interest, and explain exactly why that is so relevant in the context of public defenders. In Part IV, I discuss ABA Formal Opinion 06-441, dealing with the ethical obligations of public defenders, and explain why that opinion did nothing to help the ethical quagmires of public defenders. In Part V, I highlight actions that states have taken in response to 06-441 and why they have not been effective. Finally, Part VI discusses some solutions suggested by states and scholars, and why they are not effective.

I. Update: Just How Bad Is It?

As I discussed in detail in *Gideon's Ghost*,[9] the decline in the economy has decimated state treasuries, forcing officials to cut the already modest budgets for public defenders in most states, and there is no relief in sight.[10] The lack of funds has forced more and more states to lay off attorneys or to restrict their hiring, among other things. The fewer number of attorneys is compounded with the fact that the downturn in the economy has actually increased the number of people who qualify for a public defender.[11] The result is a perfect storm of increasing clients and fewer attorneys that pushes public defender caseloads higher and higher.[12]

Specifically, in Minnesota, the Office of the Legislative Auditor (OLA) published a report that found Minnesota public defenders were facing caseloads much higher than the suggested caseload guidelines.[13] Due to budget cuts in the 2008–09 fiscal year, the number of full-time public defenders was reduced in most of the districts.[14] This reduction caused an increase in caseloads in one district, from an already overwhelming 689 cases per full-time attorney to 745 cases per public defender.[15] Even more alarming, the OLA report found that, statewide, the average public defender carried a caseload of 779 cases.[16]

In programs that have no state funding, things are even bleaker. In Utah, one of only two states[17] where all the funding for indigent defense is borne by the counties, public defenders are deluged with cases.[18] In a study conducted by the American Civil Liberties Union of Utah, that organization found that the contract fee for attorneys was $400, or less, in felony cases, and this fee was intended to cover overhead as well as attorney's fees.[19] According to the calculations by the ACLU, most of these caseloads allowed no more than 10 hours per case.[20] The report also pointed out the large discrepancy in the funding between the defense attorneys and the prosecutors, who receive approximately 25–35% more funding per case.[21]

II. Relevant Ethical Rules and Recent Examples of Their Violation

With caseloads as large as described above, it is nearly impossible for public defenders to meet the ethical

Federal Sentencing Reporter, Vol. 25, No. 2, pp. 5–16, ISSN 1053-9867, electronic ISSN 1533-8363.
 DOI: 10.1525/fsr.2012.25.2.5.

standards required of attorneys under the Model Rules. Although all of the Model Rules of Professional Conduct apply to public defenders, there are several that stand out as more difficult to follow when one is burdened with an excessive caseload. For instance, things such as diligence and competence may be sacrificed for caseload reduction and prudence. This section will first describe the facts of a specific case in which a defendant was convicted because of the deficient performance of his attorney. Next, the section will compare the facts of that case to specific ethical rules that were violated, exemplifying how the violation of these rules can be disastrous to the indigent client.

A. Background of *California v. Edward S.*

By seventeen years of age, Edward S. had already lived a rough life.[22] His mother had abandoned him and his father was in prison. After committing several misdemeanors, Edward was declared a delinquent and placed in the home of his aunt by Child Protective Services. During his stay at his aunt's home, Edward was accused of molesting his aunt's ten-year-old daughter, arrested, and brought to trial.

Shane Hauschild, a Mendocino County Deputy Public Defender, was assigned to Edward's case. Just before the trial court was to hold a jurisdictional hearing in the case, Mr. Hauschild requested a week's continuance on the grounds that he wanted to inspect some juvenile court records that may show similar accusations in the past from the victim and her mother. The court held a hearing regarding the records in which a representative of the Mendocino County Department of Social Service testified that there was nothing in the records that would go to the truthfulness of the victim. The court inspected the documents in camera and denied the defendant's motion.

Several days later, the court held the jurisdictional hearing in which four people testified: the victim, T.S.; the aunt, Sherry; a Mendocino County Sherriff, Mike Dygert; and Edward. At the conclusion of the hearing, Edward was found guilty of one attempt "to commit a lewd or lascivious act with a child under the age of 14" and the charge that he "annoyed or molested a minor."

The case was then transferred to a different county because Edward had changed residences. In that county, Edward's newly appointed attorney, Deputy Public Defender Joanne Carter, moved for a new hearing based on the fact that Edward was denied effective assistance of counsel at his previous hearing. Specifically, his new counsel enumerated several allegations of ineffective assistance. First, Carter alleged that Hauschild did not investigate a proper defense for Edward. According to Carter, Hauschild believed he was not "entitled to confidential court experts" to assist in such things as a "psychological evaluation and polygraph examination." Furthermore, Carter opined that Hauschild failed to request extra funds, even though he knew them to be necessary, because he was afraid of being fired, not for tactical reasons.

Carter also alleged numerous other complaints against Hauschild:

- Hauschild failed to voir dire the victim "to determine whether she was capable of understanding the duty to testify truthfully."
- Hauschild failed to ask the victim on cross-examination whether she understood the difference between the truth and a lie and whether she had discussed her testimony with others.
- Hauschild failed to require that the victim take an oath under California Evidence Code section 710.[23]
- Hauschild failed to seek an adequate continuance based on his misunderstanding of the law.
- Hauschild failed to request a continuance when the aunt testified that she was one of only two people in her extended family that wasn't molested as a child.[24]
- Hauschild failed to impeach the victim with discrepancies in prior statements regarding the conduct of the accused.
- Hauschild failed to introduce the transcript of the interview with the defendant that showed his adamant denial of the charges, along with evidence of him being deeply asleep when the police arrived at the home the night the alleged crime occurred.
- Hauschild failed to interview two witnesses who were allegedly contacted by the victim's mother immediately after the alleged attack.

The prosecutor attempted to explain away some of these failures with the long-standing argument that these "mistakes" were, in fact, tactical maneuvers, which are generally an escape clause for ineffective assistance claims.[25] That is mostly disputed, however, by Hauschild's own declaration that he filed in support of the motion for a new hearing, in which he made several surprising admissions:

- Hauschild admitted he needed more than a week to investigate exculpatory evidence received, but he mistakenly believed he could only ask for a one-week continuance.
- His claimed his "excessive caseload" made it impossible to investigate every case he was working on at the time of Edwards's hearing.
- His office lacked an investigator, and he claimed it was impossible for him to investigate every case because of his caseload.
- He was told the public defender's office would not pay for a mental evaluation, and he was told if the court ordered one, it would not be confidential, so he did not request an evaluation.
- He did not request a polygraph because he was told neither the court nor the public defender's office would pay for one.[26]
- He was afraid if he requested funding for a polygraph, his "job would be jeopardized."

- Hauschild claimed that he attempted to speak to his supervisor many times about the case but was rebuffed. In fact, when he complained that his excessive caseload "interfered with his ability to represent [Edward] and his other clients," his supervisor responded: "I'm doing a murder case, do you want to trade?"

Hauschild generally admitted in his declaration "that much more should have been done in defending [Edward's] case."[27] Specifically, Hauschild claimed he did not have the resources, and he did not have "support from more experienced attorneys, proper investigation, [nor] sufficient investigative resources," but he was fearful of losing his job if he pushed for any of those things.

Although the trial court found that Hauschild had made errors, the motion for a new jurisdictional hearing was denied. On appeal, the District Court reversed, finding Hauschild's performance deficient in several respects.[28] First, the court concluded that Hauschild "failed to investigate potentially exculpatory evidence." Second, he "sought an inadequate continuance based on a mistake of law." Last, he "failed to move for a substitution of counsel knowing he was unable to devote the time and resources necessary to properly defend appellant." The court noted that Edward was facing a strike and possible sex offender registration, and as a result, Hauschild should have devoted a more reasonable amount of time to Edward's defense.

B. Applying the Ethical Rules to *Edward S.*

To be clear, the inquiry by the court in *Edward S.* was whether Edward received ineffective assistance of counsel under *Strickland v. Washington*.[29] The court did not inquire into whether Hauschild violated any ethical rules; that question will be taken up here.[30] At the outset, however, it must be noted that the *Strickland* standard is incredibly hard to meet, and an attorney is rarely found to have provided ineffective assistance.[31] To that end, it stands to reason that because Hauschild did not provide effective assistance of counsel to his client, logic follows that he also breached his ethical duties.[32] This section examines the most relevant rules to this context and compares them to the facts of *Edward S.* to exemplify the violation of these ethical rules.

1. MRPC 1.1. Model Rule of Professional Conduct 1.1 requires that a lawyer provide competent representation to a client.[33] Although this language is quite broad, the comments suggest that attorneys should consider "the preparation and study the lawyer is able to give the matter and whether it is feasible to refer the matter to, or associate or consult with, a lawyer of established competence in the field in question."[34] In *Edward S.*, Hauschild claimed that he was lacking adequate supervision from more experienced attorneys and that he was not able to give the matter the attention it deserved.[35] Even the court commented on the seriousness of this case and wondered why a young lawyer was taking it on.[36] Furthermore, Hauschild was mistaken about the length of a continuance he could ask for, showing his incompetence in these matters.[37] The comments to the rule make it clear that an attorney can take on a case outside of his expertise if he has the time to devote to educating himself on the matter.[38] This was not done in Edward S.'s case, and so Hauschild probably violated the first rule of all, that of competence.

2. MRPC 1.3. Furthermore, Rule 1.3 requires that a lawyer act with "diligence and promptness in representing a client."[39] Comment 2 of this rule leaves little room for doubt regarding a lawyer's responsibility to maintain a workable case load, explaining that a lawyer's caseload "must be controlled so that each matter can be handled competently."[40] As such, this rule is probably the most easily violated of all with regard to public defenders. To be diligent, as required by Rule 1.3, cases must be investigated, which includes talking to witnesses and arresting officers, as well as reading police reports and taking depositions.[41] Cases need to be evaluated for weaknesses, and if any are found, motions to suppress or dismiss need to be filed.[42] This requires legal research, drafting, and arguing motions.

Hauschild violated this rule many times over. There was much discussion in the court's opinion regarding relatives that Hauschild did not contact, even though they could have provided him with exculpatory evidence.[43] Further, it is clear that Hauschild did not research this case as he should have, stating himself that "this case required more resources, support from more experienced attorneys, proper investigation, [and] sufficient investigative resources."[44] And then we come to the matter of caseload. It is clear from the court's opinion, and Hauschild's own statement, that his caseload was much bigger than he could handle.[45]

3. MRPC 5.1. Rule 5.1 addresses the ethical responsibilities of a lawyer supervising a public defender.[46] This rule requires supervisors to ensure that the attorneys under them are following all of these rules and providing competent representation.[47] In this case, that chain of supervision broke down. When Hauschild approached his supervisor, he was told to stop complaining, it could be worse for him.[48] Instead, the supervisor should have taken action to find some help for Hauschild, whether in the form of reducing his caseload or providing more guidance to him in preparation for the hearing.

* * *

The comparison above is only one specific example of the ethical violations, and possibly legal malpractice,[49] that is occurring in courts across the country. Hauschild is by no means alone in his inability to represent his clients to the extent that is required.

III. The Special Case of a Conflict of Interest

In a recent attempt to help trim the budget, some states are paying contract attorneys a flat fee to represent any and all indigent defendants.[50] For example, Washoe County, Nevada, the second largest county in the state, paid $80,000 to Washoe Legal Services, a nonprofit firm, to provide legal services to all indigent defendants involved in

the county's early case resolution program.[51] The county estimates that as many as a thousand cases would come through the system during the life of this contract, meaning these attorneys could make as little as $80 per client.[52] This amount must cover attorneys' fees *as well as* investigation, expert witnesses, and any other overhead.[53]

This type of situation encourages attorneys to dispose of cases quickly, whether that is in the best interest of the client or not.[54] Herein lies an inherent conflict of interest in every case: although it may be in the client's best interest for the lawyer to investigate the case and take it to trial, it is most certainly never in the attorney's best interest. Instead, attorneys are encouraged to spend as little time as possible on each case so they can move on to the next defendant "in the box."[55]

Although public defender's offices have long been lauded as the better model for indigent defense,[56] it is arguable that the same conflict of interest concerns that plague flat fee contract attorneys would likewise apply to public defender's offices. Essentially, public defenders are paid a flat fee (in the form of an annual salary) to take on as many cases as are handed to them.[57] Furthermore, public defenders generally have no decision in the type or amount of cases that are handled by their office; such a requirement is generally statutorily mandated.[58] Flat fee contracts, on the other hand, are just that, contracts. As such, attorneys could possibly negotiate the terms of those contracts and set an upper limit on the amount of cases they will handle.[59] As the court said in *California v. Edward S.*, "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing."[60]

IV. The Ineffectiveness of ABA Formal Opinion 06-441

In 2006, presumably before the budget crises in most states had even reached their height,[61] the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants and the National Legal Aid and Defender Association were urging the ABA to issue a formal opinion on the subject of excessive defender caseloads.[62] The organizations got their wish when the ABA issued Formal Opinion 06-441,[63] but the opinion was probably not exactly what they were hoping for. Even more alarming, the solutions offered by the opinion are unrealistic and ineffective.

A. Public Defenders Get No Breaks

The opinion begins by acknowledging the problems that excessive caseloads create for both the attorneys who represent the indigent and the supervisors of those attorneys, but makes it clear, early on, that "[t]he Rules[64] provide no exception for lawyers who represent indigent persons charged with crimes."[65] The ABA does recognize the unique situation that public defenders face because these attorneys are not able to control their caseloads and generally get cases assigned from a supervisor.[66] Nonetheless, the opinion emphasizes an attorney's duty to control his or her workload so that "each matter may be handled competently."[67]

What is considered a reasonable workload is certainly not a black and white issue, as the ABA recognizes.[68] The opinion cites to its own *Ten Principles of a Public Defense Delivery System*,[69] which reiterates the national guidelines for caseloads generally recognized.[70] Those guidelines, which were promulgated by the National Advisory Commission on Criminal Justice Standards and Goals in 1973, state that the maximum caseload for trial-level public defenders should be no more than 150 felony cases per year, 200 juvenile cases per year, or 400 misdemeanor cases per year.[71] The ABA stresses, however, that the numbers cannot be the sole determinative factor of excessive caseload.[72] Instead, one should also view the "case complexity, the availability of support services, the lawyer's experience and ability, and the lawyer's nonrepresentational duties."[73]

Once an attorney has then come to the conclusion that his or her workload is so excessive that the attorney cannot meet the needs of a particular client, the ABA dictates that the attorney must then withdraw from representation of that client or decline representation if it is a new client.[74] The opinion echoes the idea that an attorney's first duty is to existing clients, so the attorney should decline any cases if accepting them would make his or her caseload excessive, rather than withdrawing from existing cases.[75] Of course, this is the crux of the problem for public defenders because they do not usually have the luxury of withdrawing from cases or from declining new cases.

B. The Suggestions for Public Defenders Are Not Tenable

Recognizing that public defenders have very little control over which clients to take, the ABA spends most of its opinion giving advice about what public defenders are to do when they have excessive caseloads.[76] According to the ABA, the public defender could, with the approval of his or her supervisor, consider transferring nonlawyering responsibilities to others, such as managerial responsibilities, could refuse new cases, or could transfer some of his or her current cases to another lawyer.[77]

There are several problems with these suggestions. To begin, the ABA suggests that this must be accomplished with the approval of a supervisor.[78] In other words, the overworked attorney must go to her[79] supervisor, the person who presumably evaluates the attorney, and admit that she cannot competently do her work. The case of Shane Hauschild, discussed above, exemplifies why this is unrealistic.[80] Further, the attorney is expected to ask the supervisor to transfer some of her cases to another attorney. This overlooks the logical problem that if one attorney is overworked, chances are most of the attorneys in the office are overworked. And if those attorneys have the same amount of caseload as the complaining attorney, then the complaining attorney is surely seen as incompetent, especially if the other attorneys are not complaining.

Furthermore, the other suggestion to refuse new cases is just as logically unsound. Under the Sixth Amendment, indigent defendants are entitled to counsel.[81] If one attorney refuses new cases, then another attorney must take those cases, and this only creates more overworked attorneys. Some offices have attempted a carte blanche refusal of a certain type of cases in an effort to ease their workload. These attempts have not been largely successful, as discussed later in this article.[82]

Although the ABA can be applauded for not falling into the trap that public defenders should not be held to the same standards as private attorneys—a comment that would suggest that indigent clients are not entitled to the same benefits as those who can pay—there must be some acknowledgement that public defenders are not in control of their caseloads.

C. The Curious Case of a Reasonable Resolution—Clear as Mud

Assuming arguendo that an attorney has approached her supervisor, albeit against her perfectionist instincts that presumably led her to law school in the first place, and the supervisor makes an effort to alleviate the workload in some fashion, this resolution will constitute a "reasonable resolution of an arguable question of professional duty."[83] So, basically, the attorney is off the hook, ethically, right? Wrong.

1. What is a "reasonable resolution?" The ABA opines that if an attorney has requested assistance from her supervisor, and the supervisor's "resolution is not reasonable, . . . the public defender must take further action."[84] Nowhere in the opinion, however, does the ABA define a "reasonable resolution." It is probably safe to assume that if the supervisor does nothing in the face of the complaint, the resolution is not reasonable. What if the supervisor reassigns one case, two cases, or three cases? Are these reasonable resolutions? It is not clear. Furthermore, who determines if the resolution is reasonable? The supervisor? If so, it is axiomatic that the supervisor would always claim her resolution to be reasonable.[85]

2. What to do with an unreasonable resolution? For argument's sake, let us assume that a public defender has gathered enough courage to go to her supervisor and admit her inability to do her job. The supervisor has placated her in some fashion, but the resolution is not reasonable, according to some undetermined criteria. The ABA requires[86] that the attorney "must [now] take further action."[87] According to the ABA, these actions might include:

- if relief is not obtained from the head of the public defender's office, appealing to the governing board, if any, of the public defender's office; and
- if the lawyer is still not able to obtain relief, filing a motion with the trial court requesting permission to withdraw from a sufficient number of cases to allow the provision of competent and diligent representation to the remaining clients.[88]

Taking these in turn, the first suggestion is to appeal to any governing board of the public defender's office. The opinion does not explain the procedures for approaching the agency's governing board, but does reference Model Rule 1.13 in a footnote, which deals with an attorney's obligation when another person in an organization is in violation of a legal obligation to the organization.[89] So, this suggestion is essentially telling the attorney to go above her supervisor's head and rat out the supervisor. If that does not work, and the attorney still has her job (unlikely), is the attorney then relieved of her responsibility? No. The ABA says the attorney must then file a motion with the trial court requesting that she withdraw from enough cases to bring give her a manageable workload.[90] Assuming that the attorney actually gets to this point—remember, by now, the attorney has had to admit she cannot handle her caseload to her supervisor, her supervisor had to give some sort of resolution that was not reasonable, and then the attorney had to appeal to the agency's governing board for relief and be unsuccessful in seeking that relief—it is unlikely that a trial court would actually grant the attorney's request.[91] So, where does that leave the attorney? Back where she started at MRPC 1.1, with the same duty to provide "competent representation" to every client.[92] In the end, the public defender is left chasing her tail and stuck between a rock and a hard place.

V. Actions Taken as a Result of 06-441: Is There Hope on the Horizon?

The public defenders in several states have taken the advice given by ABA opinion 06-441[93] and filed lawsuits aiming to withdraw from specific cases and from groups of cases as a whole.[94] With the exception of a very recent decision in Missouri, most of these lawsuits have been unsuccessful in alleviating the heavy caseloads of the public defenders involved, further exemplifying why public defenders find themselves in such a quagmire.[95] A recent development may prove hopeful for the future, however. This section discusses a case in Missouri that could change the face of public defender litigation, and also describes litigation in Florida with a more common result.[96]

In 2010, faced with similar excessive caseload problems, several public defenders' offices across the state of Missouri made the controversial move of declining new cases when they had reached a "maximum" for the month.[97] The refusal to accept new cases was instituted in accordance with an administrative rule promulgated by Missouri's Public Defender Commission that allows each district to maintain maximum caseloads.[98] One indigent defendant who applied for a public defender, Jared Blacksher, became caught in the middle of the debate.[99] Blacksher applied for a public defender in July 2010, which was a time period when the Christian County office had declared itself "of limited availability," pursuant to the administrative regulation.[100] One trial judge appointed a public defender to Blacksher anyway, despite the declaration by the public defender, and the office moved to reject the appointment.[101]

The trial judge ordered the public defender to represent Blacksher, and the public defender commission decided to file suit to fight the trial judge's ruling.[102] In the meantime, Blacksher sat in jail for nearly seven months, without an attorney, which is a month longer than he would have served if he had been allowed to plead guilty on the day planned.[103]

In July 2012, the Missouri Supreme Court decided that the trial court had erred in appointing a public defender to Mr. Blacksher.[104] According to the high court, "the trial court exceeded its authority by appointing the public defender's office to represent a defendant in contravention of 18 CSR 10-4.010."[105] The court further concluded that "a judge may not appoint counsel when the judge is aware that, for whatever reason, counsel is unable to provide effective representation to a defendant."[106] The court also made the point that counsel violates the ethical rules by accepting a case that "impairs her ability to provide competent representation. . . . And while the ethical rules do not supplant 'a trial judge's obligation to protect [a] defendant's Sixth Amendment rights,' they do 'run . . . parallel to' that duty and, therefore, can assist both judges and public defenders in ensuring that constitutional rights are protected when appointments are made."[107]

Unlike Missouri, Florida does not have an administrative regulation that allows public defenders to declare their caseload to be too high, but the lawyers there are also facing excessive caseloads. As a result of this problem, the Public Defender's Office in Miami-Dade County, Florida (hereinafter, PD-11) filed a lawsuit asking, essentially, for the trial court to absolve PD-11 of representation of all Class C felonies, a request similar to that of the Missouri public defenders.[108] PD-11 claimed the caseloads of its attorneys were so excessive that they were not able to meet the needs of their clients, nor were the attorneys able to live up to their ethical obligations.[109] The trial court agreed with PD-11 and ordered that all Class C felonies would be assigned to the Office of Criminal Conflict and Civil Regional Counsel for the Third District (hereinafter, CCRC-3).[110] The victory was short-lived, however. The Third District Court of Appeal reversed the trial court and found that the office was obligated to represent all defendants, and such a wholesale withdrawal could not be accomplished.[111] Instead, such a withdrawal must be made on a case-by-case basis.[112]

In a corollary lawsuit, one Miami-Dade public defender made an attempt on the apparently required case-by-case basis. Again, the trial court found for the public defender and agreed that the public defender's representation of the specific client was ineffective, and that the defendant had suffered prejudice.[113] And, again, the Third District Court of Appeal overturned this decision, essentially putting the public defender back at square one.[114]

Both of these separate cases exemplify the problems faced by public defenders throughout the country, albeit with different results. Ethics advisory opinions have urged attorneys not to take on more cases than they can handle,[115] so the attorneys follow the opinion and ask to withdraw from cases. In response, the courts tell the attorneys they cannot withdraw, and they just have to find a way to represent their clients, a conundrum recognized by the Missouri Supreme Court. These attorneys really have no choice at all, except to leave the public defender's office, which, in and of itself, creates another problem, that of constant turnover. This turnover then costs the states more and more money in training and benefits, and creates another group of inexperienced attorneys lacking the skills to carry these increasing caseloads, thus beginning the cycle all over again. The real losers in this, however, are the indigent defendants who are forced to be represented by ineffective lawyers.

VI. Solutions

The only way to alleviate this burden on public defenders, and likewise prevent further ethical and constitutional violations, is to find more money for indigent defense. Many have offered solutions, but none have truly stood out as being the definitive answer to fix the crisis. One cost-cutting measure instituted by Massachusetts entails funneling more of its budget into public defender's offices, and away from contract attorneys.[116] Under an original plan proposed by Governor Deval Patrick for Fiscal Year 2012, the responsibility would shift to a team of 1,000 new public defenders.[117] The governor urged that his plan would mean a cost savings of $45 million.[118] Not surprisingly, the private bar, whose bread is buttered by these state contracts to represent the indigent, vehemently opposed this reform.[119] As a result, some concessions were made, and the final state budget called for a reform that would shift at least 25% of indigent cases to public defenders, as opposed to the 10% that were handled by public defenders at that time.[120] For Fiscal Year 2013, the governor is proposing a larger reform, in which 50% of all cases will be shifted to public defenders.[121] Although there is still much opposition to this reform from the private defense bar, who claim this will not add up to significant savings and could even wind up costing the states more,[122] most indigent defense advocates are most likely pleased to see the responsibility shift to a public defense system, which has long been heralded as a more efficient model for indigent defense.[123]

In another method to recoup revenue lost by budget cuts, some states are charging indigent defendants a fee for using a public defender.[124] Florida is one of the worst offenders of this "cash register" justice, where exorbitant fees are charged, and there is no exemption for indigent defendants.[125] In fact, according to the Brennan Center for Justice, Florida has added twenty new fees since 1996.[126] This includes a mandatory public defender fee of $50.[127] As some have noted, such a fee violates not only the Constitutional right to a free lawyer, as envisioned by *Gideon v. Wainwright*,[128] but also the rules promulgated by the American Bar Association.[129]

One interesting recommendation comes from Professor Jonathan Rapping, who supports more donations to an initiative called the Public Defender Corps (PDC).[130] In

a joint collaboration between Equal Justice Works[131] and the Southern Public Defender Training Center,[132] the PDC would place recent grads in fellowships with nonprofit organizations, presumably public defenders' offices, around the country.[133] In addition to providing "free labor" to these offices, the PDC's goals are to fundamentally change the view of indigent defense and to create a "national movement of public defenders committed to cultural transformation."[134] As Professor Rapping states, "The PDC represents an opportunity for meaningful indigent defense reform that has not existed to date in America. It is the first national proposal that provides a vehicle for changing the assumptions that drive sub-standard representation in many public defender circles."[135] Unfortunately, the funding for this program appears to be in jeopardy, in the wake of federal budget cuts.[136] As a result, the PDC will have to depend on private donations to keep the program running, and it is currently suspending the collection of applications for the class of 2013.[137]

VII. Conclusion

The only real solution that will have a long-lasting effect is a total reform of the criminal justice system in America. "Tough on crime" must give way to "smart on crime."[138] This type of movement includes restructuring criminal codes in states to eliminate some actions that have been wrongly listed as criminal.[139] It also includes prosecutors exercising more discretion in what crimes to charge.[140] Until real reform becomes a reality, indigent defendants are stuck with incompetent lawyers, and public defenders are stuck between a rock and a hard place, being forced to violate their ethical obligations daily.

Notes

* I would first like to thank my family for all the support they give me day after day, and I would like to say thanks to my colleagues at Nova who truly provide a wonderful atmosphere in which to write, teach, and serve. Further, I would not have been able to complete this article without the more than capable research assistance of Maria Albanese, Christopher Brown, Jenna Sobelman, and Kit Van Pelt.

1 Olexa's circumstances are described in John Rudolf, *Pennsylvania Public Defenders Rebel Against Crushing Caseloads*, Huffington Post (May 30, 2012), *available at* http://www.huffingtonpost.com/2012/05/30/pennsylvania-public-defenders_n_1556192.html.

2 Heather Baxter, Gideon*'s Ghost: Providing the Sixth Amendment Right to Counsel in Times of Budgetary Crisis*, 2010 Mich. St. L. Rev. 341 (2010).

3 In Gideon*'s Ghost*, I discussed not only those attorneys who were employed full-time by a public defender's office, but also those who were court-appointed. Unless otherwise noted, most of the attorneys to whom I refer in this article are full-time employees of a public defender's office. For a fuller description of the differences, see Gideon*'s Ghost*. Interestingly enough, research has found that defendants actually receive better representation from public defenders than from assigned counsel. *See generally* Thomas H. Cohen, Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes (July 1, 2011) (unpublished manuscript), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474.

4 And in one state, Maryland, ethics are only one problem. In Maryland, defendants can go free if they are not provided legal representation within 180 days. Janet Stidman Eveleth, *Public Defender Budget Crisis—MSBA Joins Key Players in Push for Funding*, Md. St. Bar Ass'n (Dec. 2008), *available at* http://www.msba.org/departments/commpubl/publications/bar_bult/2008/december/publicdefender.asp.

5 By way of example, in New York, it was found that attorneys recorded no time for discovery in 92% of the homicide cases on which they worked. Monroe H. Freedman, *An Ethical Manifesto for Public Defenders*, 39 Val. U. L. Rev. 911, 913 (2005). The number was even higher, 93.6%, when representing defendants accused of felonies other than murder. *Id.* According to the author, these numbers come from vouchers filled out by attorneys who were paid on the basis of these vouchers, which should provide them with an incentive to be truthful, or even exaggerate in the recording of their time. *Id.* at 912–13. *See also* Sarah Geraghty & Miriam Gohara, Assembly Line Justice: Mississippi's Indigent Defense Crisis 6 (2003) (describing how many Mississippi public defenders never meet their clients until the day of trial).

6 Mark Walsh, *A Sour Note from* Gideon*'s Trumpet*: *Playing the Blues for the Right of Counsel in Civil Cases*, 97 A.B.A. J. 14, 14 (2011); *see generally* Turner v. Rogers, 131 S. Ct. 2507 (2011). These comments do not suggest that I am not a proponent for Civil Gideon. To the contrary, I believe in this movement. However, we must also fix our indigent defense system.

7 Elizabeth Crisp, *Legal Aid Programs for Poor Deal with Deep Cuts*, USA Today, Aug. 30, 2011, *available at* http://www.usatoday.com/news/nation/story/2011-08-29/Legal-aid-programs-for-poor-deal-with-deep-cuts/50179062/1.

8 California v. Edward S., 92 Cal. Rptr. 3d 725, 730 (Cal. Ct. App. 2009).

9 Baxter, *supra* note 2.

10 *Id.* at 343.

11 *Id.*

12 *Id.* at 355. Some of the more egregious examples that I highlighted in Gideon*'s Ghost* are: Kentucky, with caseloads almost 40% above the national standards; Detroit, with caseloads 500–600% above the national standard; and Atlanta, with caseloads that are about six times the national standard. *Id.* at 356–57.

13 Program Evaluation Div., Minnesota Office of the Legislative Auditor, Evaluation Report: Public Defender System 35 (2010), *available at* http://www.auditor.leg.state.mn.us/ped/pedrep/pubdef.pdf. [hereinafter, Ola Full Report].

14 Minnesota Office of the Legislative Auditor, Evaluation Report Summary: Public Defender System 2 (2010), *available at* http://www.auditor.leg.state.mn.us/PED/pedrep/pubdef-sum.pdf [hereinafter, Ola Summary].

15 OLA Full Report, *supra* note 13, at 36.

16 OLA Summary, *supra* note 14, at 3.

17 The other state is Pennsylvania. aclu of Utah, Failing *Gideon*: Utah's Flawed County-By-County public Defender System 4 (2011) [hereinafter, Failing *Gideon*].

18 *Id.* at 7. It must be noted that Utah's system is one of contract counsel in which each court contracts with a law firm or attorney to provide services to its indigent population. *Id.* at 3. As explained earlier, there is much research to show that this type of system is even less beneficial to indigent defendants, as opposed to a public defender system. *See* Cohen, *supra* note 3, at 7–10.

19 Failing *Gideon*, *supra* note 17, at 7.

20 *Id.*

21 *Id.* at 8. The report also sheds light on further discrepancies: "Note, as well, that this already-alarming resource disparity

doesn't take into account the numerous non-budgeted resources available to county attorneys, but not to public defenders, in support of the counties' criminal prosecutions. Those resources include, but are not limited to: ready access to law enforcement; state-funded forensic services; expert witnesses; state-funded prosecutors for juvenile and certain other cases; and free or low-cost continuing legal education classes provided by the Utah Prosecution Council and others. In addition, there are potentially substantial funds available to the various county attorneys' offices through the Utah Statewide Association of Prosecutors." *Id.*

[22] The facts recounted here are derived from *California v. Edward S.*, 92 Cal. Rptr. 3d 725 (Cal. Ct. App. 2009).

[23] "Every witness before testifying shall take an oath or make an affirmation or declaration in the form provided by law, except that a child under the age of 10 or a dependent person with a substantial cognitive impairment, in the court's discretion, may be required only to promise to tell the truth." Cal. Evid. Code § 710 (West 2005).

[24] After this "bombshell" (as described by Carter), Hauschild merely responded with, "Okay, I don't have any more questions." *Edward S.*, 92 Cal. Rptr. 3d at 734.

[25] *Id.* at 737. When it is shown that counsel's error was the result of an informed tactical decision "within the range of reasonable competence," an ineffective assistance claim is nullified. People v. Bunyard, 756 P.2d 795, 811 (Cal. 1988).

[26] Edward's new attorney did obtain a polygraph, which showed the defendant's "denial of the charged offenses was truthful." *Edward S.*, 92 Cal. Rptr. 3d at 735.

[27] *Id.*

[28] *Id.* at 741.

[29] Strickland v. Washington, 466 U.S. 668 (1984).

[30] The appellate court did comment on the ethical issues faced here, however, when it stated that "a conflict of interest is inevitably created when a public defender is compelled by his or her excessive caseload to choose between the rights of the various indigent defendants he or she is representing." *Edward S.*, 92 Cal. Rptr. 3d at 746–47.

[31] Baxter, *supra* note 2, at 346–47.

[32] *Edward S.*, 92 Cal. Rptr. 3d at 750. The court commented on ethical duties, but, of course, did not make any findings to that end. *Id.* at 746–48.

[33] Model Rules of Prof'L Conduct R. 1.1 (2006). In full, the rule reads: "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."

[34] Model Rules of Prof'L Conduct R. 1.1 cmt. 1 (2006).

[35] *Edward S.*, 92 Cal. Rptr. 3d at 735.

[36] *See id.* at 741.

[37] *Id.* at 737.

[38] Model Rules of Prof'L Conduct R. 1.1 cmt. 2 (2006).

[39] Model Rules of Prof'L Conduct R. 1.3 (2011).

[40] Model Rules of Prof'L Conduct R. 1.3 cmt. 2 (2011); *see also* ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006) (citing Model Rules of Prof'L Conduct R. 1.3 (2011).

[41] *See* Model Rules of Prof'L Conduct R. 1.3 cmt. 1 (2011); ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006).

[42] *See* Baxter, *supra* note 2, at 360 (discussing *Strickland*'s failure to address the repercussion from failing to file appropriate motions due to incompetency of counsel (citing Russell A. Weaver, *The Perils of Being Poor: Indigent Defense and Effective Assistance*, 42 Brandeis L.J. 435, 441–44 (2004)).

[43] *Edward S.*, 92 Cal. Rptr. 3d at 736.

[44] *Id.* at 735.

[45] *Id.* at 735, 746–47.

[46] The Rule states:

a. A partner in a law firm, and a lawyer who individually or together with other lawyers possesses comparable managerial authority in a law firm, shall make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct.

b. A lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct.

c. A lawyer shall be responsible for another lawyer's violation of the Rules of Professional Conduct if:

1. the lawyer orders or, with knowledge of the specific conduct, ratifies the conduct involved; or

2. the lawyer is a partner or has comparable managerial authority in the law firm in which the other lawyer practices, or has direct supervisory authority over the other lawyer, and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action.

Model Rules of Prof'l Conduct R. 5.1 (2011).

[47] *Id.* at R. 5.1(b).

[48] *Edward S.*, 92 Cal. Rptr. 3d at 735.

[49] Although legal malpractice is not the focus of this article, it must be acknowledged as its own problem. Ann Peters, Note, *The Model Rules as a Guide for Legal Malpractice*, 6 Geo. J. Legal Ethics 609, 611–15 (1993).

[50] *See* Maggie Clark, *States Beginning to Rethink Indigent Defense Systems*, Stateline (Dec. 1, 2011), *available at* http://www.stateline.org/live/details/story?contentId=616381.

[51] *See id.*

[52] *See id.*

[53] *See id.* Arguably, these flat fee contracts also have other ethical implications. Many times they are awarded to younger attorneys with little experience. For example, in Nevada, an attorney was awarded a public defense contract only weeks after passing the bar exam. *Id.* The contract included 200 felony cases and 400 misdemeanor cases.

[54] Other states also face similar issues with contract attorneys. In Michigan, for example, a company named The Misdemeanor Defender Professional Corporation contracts with Detroit to handle the "state docket." Nat'L Legal Aid & Defender Ass'n, A Race to the Bottom—Speed & Savings Over Due Process: A Constitutional Crisis 23 (2008), *available at* http://www.mynlada.org/michigan/michigan_report_execsum.pdf. Five part-time attorneys carry 2,400–2,800 cases each, and their caseload averages 32 minutes of attorney time per case.

[55] The term "in the box" is a colloquialism used by many public defenders to describe those clients who are usually lined up, coincidentally, in the jury box while they await their arraignment, sentencing hearing, or motion hearing.

[56] Cohen, *supra* note 3, at 5; *see also* James M. Anderson & Paul Heaton, How Much Difference Does the Lawyer Make? The Effect of Defense Counsel on Murder Case Outcomes 3 (Dec. 2011) (unpublished manuscript), *available at* http://www.rand.org/content/dam/rand/pubs/working_papers/2011/RAND_WR870.pdf.

[57] Cohen, *supra* note 3, at 5–6.

[58] Fla. Stat. § 27.51(1) (2012).

[59] Of course, many of these attorneys do not have that much bargaining power, so it is conceded that most are in the same boat as Washoe Legal Aid. For example, Canyon County, Idaho, contracts with a private firm to handle public defense services, and they are given no limit to their annual workload. Nat'L Legal Aid & Defender Ass'n, The Guarantee of Counsel—Advocacy &

Due Process in Idaho's Trial Courts 23 (2010), *available at* http://www.boiseweekly.com/pdf/idaho_report.pdf . Furthermore, the argument could be made that public defenders, unlike contract attorneys, may have more incentives to handle their cases competently because of such things as raises, promotions, and the like within the public defender's office. *See* Anderson & Heaton, *supra* note 56, at 27.

[60] *Edward S.*, 92 Cal. Rptr. 3d at 747 (citing In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So. 2d 1130, 1135 (Fla.1990)).

[61] Many of the true crises occurred in 2008 and 2009. Baxter, *supra* note 2, at 353–54.

[62] Norman Lefstein & Georgia Vagenas, *Excessive Defender Caseloads: ABA Ethics Committee Weighs In*, Champion Magazine, Dec. 2006, at 10, 11.

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

[64] This, of course, refers to the Model Rules of Professional Conduct, on which the opinion is based. Because most states have adopted the Model Rules, in whole or in part, these opinions are considered binding in most states. ABA CPR Policy Implementation Comm., State Adoption of the ABA Rules of Professional Conduct & Comments (2011), *available at* http://www.americanbar.org/content/dam/aba/migrated/cpr/pic/comments.authcheckdam.pdf.

[65] *See* ABA Standing Comm. On Legal Aid & indigent Defendants, *Gideon*'s broken Promise: America's continuing Quest For Equal Justice 43–44 (2004), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_bp_right_to_counsel_in_criminal_proceedings.authcheckdam.pdf. Despite this declaration, there has been some suggestion that public defenders are brought up on ethical charges far less than private attorneys. Indeed, the reported cases regarding this type of violation are few and far between. *See* Stephanie McAlister, *Between South Beach and a Hard Place: The Underfunding of the Miami-Dade Public Defender's Office and the Resulting Ethical Double Standard*, 64 U. Miami L. Rev. 1317 (2010) (stating that a thorough search of Florida resulted in no sanctioning of public defenders). One reason for this could be the general lack of knowledge that indigent defendants have regarding their rights, as well as their ignorance of the Rules of Professional Conduct, but a plethora of evidence and stories shows the violations of the Model Rules throughout this country because of the excessive caseload. A result of this should be numerous ethics charges. An inference could be drawn that such a lack of prosecutions means that many state bars have chosen to slide this problem under the rug and consider it a dirty little secret. On one hand, there is some relief in the fact that public defenders are not generally facing disbarment resulting from a situation that is largely out of their control. On the other hand, the fact that there are fewer of these cases sends a horrible message to the indigent—their representation is not important enough to regulate. To be clear, I am not suggesting that we need to institute more ethical prosecutions against public defenders; the problem needs to be solved to eliminate the need for such prosecutions.

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

[67] *Id.* (citing Model Rules of Prof'l Conduct R. 1.3 cmt. 2 (2006)).

[68] *Id.*

[69] ABA, the Ten Principles of A Public Defense Delivery System (2002), *available at* http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf.

[70] *Id.* at 2; Nat'l Legal Aid & Defender Ass'n, National Advisory Committee On Criminal Justice Standards & Goals: the Defense 9 (1973), *available at* http://www.nlada.net/sites/default/files/nac_standardsforthedefense_1973.pdf.

[71] *Id.* Although these numbers have been cited frequently in the face of excessive caseload studies, many caution against the use of these numbers because there was never any empirical evidence showing why these numbers were chosen, and the standards were written over thirty-five years ago. Nat'l Right to Counsel Committee, the Constitution Project, Justice Denied: America's Continuing Neglect of Our Constitutional Right to Counsel 66 (2009), *available at* http://www.constitutionproject.org/manage/file/139.pdf. The National Right to Counsel Committee posits that these numbers are actually very large because the criminal law has become much more complicated and time consuming. *Id.*

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

[73] *Id.*

[74] *Id.*

[75] *Id.*

[76] *Id.* The opinion also addresses what attorneys who receive appointments can do when they reach the saturation point. Of course, this seems fairly obvious: inform the court that you do not want any more appointments.

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

[78] *Id.*

[79] For grammatical correctness and brevity, I will refer to the attorney as she, rather than he or she. By no means should this choice be interpreted as implying only female attorneys would have to bear this burden.

[80] Most notably, many public defenders are young attorneys eager to impress their supervisors. Even those who are not interested in impressing their supervisors most likely do not want to admit weakness by claiming they cannot handle the cases assigned to them.

[81] Baxter, *supra* note 2, at 345.

[82] *See infra* Section IV.

[83] ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006). Presumably, a reasonable resolution would absolve an attorney of any violation of the Ethical Rules, pursuant to MRPC 5.2, which states: "(b) A subordinate lawyer does not violate the Rules of Professional Conduct if that lawyer acts in accordance with a supervisory lawyer's reasonable resolution of an arguable question of professional duty." Model Rules of Prof'l Conduct R. 5.2(b) (2011).

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

[85] Lefstein & Vagenas, *supra* note 62, at 13.

[86] Note that although the standard is not clear for what a reasonable resolution is, the ABA is very clear that the attorney "must" take further action if the resolution is not reasonable. ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006).

[87] *Id.*

[88] *Id.*

[89] Lefstein & Vagenas, *supra* note 62, at 13 (citing ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006)). Model Rule 1.13(b) reads as follows:

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so,

the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances, to the highest authority that can act on behalf of the organization as determined by applicable law.

Model Rules of Prof'l Conduct R. 1.13(b) (2011).

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

91 Lefstein & Vagenas, *supra* note 62, at 14.

92 Model Rules of Prof'l Conduct R. 1.1 (2011).

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

94 Baxter, *supra* note 2, at 368–79.

95 I discussed the lawsuits from Kentucky, New York, Florida, and Michigan in detail in Gideon*'s Ghost, supra* note 2, at 368–79. This article discusses only the lawsuits in Florida and Missouri.

96 *See* State ex rel. Missouri Pub. Defender Comm''n v. Waters, 2012 WL 3104427 (Mo. 2012). For a look at some other, more recent, lawsuits, as well as legislative measures, go to: Rudolf, *supra* note 1; Nina Shapiro, *Public Defense Almost Non-Existent in Burlington, Mount Vernon, Claims Lawsuit*, Seattleweekly.Com, Feb. 16, 2012, *available at* http://blogs.seattleweekly.com/dailyweekly/2012/02/public_defense_almost_non-exis.php?print=true; and Brian Witte, *Md. bills to avoid higher public defender cost advance*, Herald-mail.Com, Feb. 28, 2012, *available at* http://www.herald-mail.com/news/local/hm-md-bills-to-avoid-higher-public-defender-cost-advance-20120228,0,3516431.story.

97 Report of the Special Master, MSPD v. Hon. John Waters and Hon. Mark Orr, SC91150, *available at* http://www.stltoday.com/pdf_cf153220-3eda-11e0-b344-0017a4a78c22.html. The public defenders believed that an earlier Missouri Supreme Court opinion, State ex rel. Missouri Public Defender Commission v. Pratte, 298 S.W.3d 870, 890 (Mo. 2009), gave them the right to do this. News Release, Missouri State Pub. Defender, Pub. Defender Comm'n Adopts Rule to Limit Availability of Overloaded Offices to Take on More Cases (Nov. 2, 2007), *available at* http://www.publicdefender.mo.gov/Newsfeed/20071102.htm.

98 Mo. Code Regs. Ann. tit. 18, § 10-4.010 (2008). Missouri's Public Defender Commission promulgated this rule "with the express purpose of ensuring 'that cases assigned to the Missouri state public defender system result in representation that effectively protects the constitutional and statutory rights of the accused.'" State ex rel. Missouri Pub. Defender Comm''n v. Waters, 2012 WL 3104427 (Mo. 2012) (quoting Mo. Code Regs. Ann. tit. 18, § 10-4.010 (2008)).

99 Monica Davey, *Budget Woes Hit Defense Lawyers for the Indigent*, N.Y. Times (Sept. 9, 2010), *available at* http://www.nytimes.com/2010/09/10/us/10defenders.html?_r=1; Kathryn Wall, *Suspect Caught in Crossfire of Public Defender Caseload Debate*, News-leader.Com (Sept. 5, 2010, 11:46 PM), *available at* http://www.news-leader.com/article/20100906/NEWS01/9060324.

100 Kathryn Wall, *Stuck for Months in Public Defender Crisis, Blacksher Released from Jail*, News-leader.Com (Feb. 10, 2011, 11:00 PM), *available at* http://www.news-leader.com/article/20110211/NEWS12/102110338/Stuck-months-public-defender-crisis-Blacksher-released-from-jail; *see also* News Release, Missouri State Public Defender, *supra* note 97' (explaining the procedure to allow individual public defenders' offices to declare themselves "of limited availaibility"). *See also* Mo. Code Regs. Ann. tit. 18, § 10-4.010 (2008).

101 *Stuck for Months in Public Defender Crisis*, *supra* note 100.

102 *Id.*

103 *Id.* "Blacksher and prosecutors had hashed out a plea deal where he would spend 120 days in a drug treatment program with the Missouri Department of Corrections." *Id.* Instead, he received no rehabilitation and sat in jail for a month longer than he would have been in rehab. *Id.* Consequently, Blacksher was rearrested in 2011 for charges stemming from burglary and forgery. Tara Muck, *Man in Public Defender Debate Faces New Charges*, News-leader.Com (June 14, 2011, 7:42 AM), *available at* http://www.news-leader.com/article/20110614/NEWS12/106140348/Man-public-defender-debate-faces-new-charges. Apparently, he was afforded a public defender for these charges. *Id.*

104 State ex rel. Missouri Pub. Defender Comm''n v. Waters, 2012 WL 3104427 (Mo. 2012).

105 *Id.*

106 *Id.*

107 *Id.* (quoting State ex rel. Kinder v. McShane, 87 S.W. 3d 256, 265 (Mo. 2002)).

108 *See* Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases Due to Conflict of Interest, Florida v. Munoz, No. F08-2314 (Fla. Cir. Ct. June 24, 2008), *available at* http://www.pdmiami.com/ExcessiveWorkload/Motion_to_Appoint_Other_Counsel_Certificate_of_Conflict-Oscar_Munoz.pdf [hereinafter, Motion to Appoint Other Counsel]. The Eleventh Circuit referred to here is in Florida's state court system. Furthermore, in Florida, third degree felonies are those that do not exceed a term of imprisonment of five years. Fla. Stat. § 775.082(3)(d) (2011). For a more detailed discussion of this case, see Baxter, *supra* note 2 at 368–73.

109 *See* Motion to Appoint Other Counsel, *supra* note 108.

110 *See* Order Granting in Part and Denying in Part Public Defender's Motion to Appoint Other Counsel in Unappointed Noncapital Felony Cases at 4–5 , Admin. Order No. 08-14 (Fla. Cir. Ct. Sept. 3, 2008), *available at* http://www.pdmiami.com/Order_on_motion_to_appoint_other_counsel.pdf. The CCRC-3 is one of five offices created by the State of Florida to handle cases when the public defender has a conflict. This is an alternative to appointing private attorneys as "special" public defenders. *See generally* Florida Senate Bill 1088 (2007), *available at* http://archive.flsenate.gov/data/session/2007/Senate/bills/amendments/pdf/sb1088c1322874.pdf.

111 Florida v. Pub. Defender, 12 So. 3d 798, 806 (Fla. Dist. Ct. App. 2009).

112 *Id.* at 802–03.

113 *See* Order Denying Public Defender's Motion to Declare Section 27.5303(1)(d), Florida Statutes, Unconstitutional and Granting Public Defender's Motion to Withdraw, State v. Bowens, No. F09-019364, at *4 (Fla. Cir. Ct. Oct. 23, 2009), *available at* http://www.pdmiami.com/ExcessiveWorkload/Bowens_Order_10-23-09.pdf.

114 State v. Bowens, 39 So. 3d 479, 482 (Fla. Dist. Ct. App. 2010). One shining ray of hope remains alive in Florida, however. In this case, the Third District certified a question to the Florida Supreme Court, which reads as follows:

> Whether section 27.5303(1)(d), Florida Statutes (2007), which prohibits a trial court from granting a motion for withdrawal by a public defender based on "conflicts arising from underfunding, excessive caseload or the prospective inability to adequately represent a client," is unconstitutional as a violation of an indigent client's right to effective assistance of counsel and access to the courts, and a violation of the separation of powers mandated by Article II, section 3 of the Florida Constitution as legislative interference with the judiciary's inherent authority to provide counsel and the Supreme Court's exclusive control over the ethical rules governing lawyer conflicts of interest?

Id. The Supreme Court heard oral arguments on the consolidated cases on June 7, 2012. Florida Supreme Court, *available at* http://www.floridasupremecourt.org/pub_info/summaries/index.shtml. The forthcoming opinion could have

a major impact on indigent representation in Florida. As I opined in Gideon's *Ghost*:

> The Supreme Court of Florida could find section 27.503 unconstitutional, which would eliminate the need of an individualized showing of prejudice, other than an excessive caseload, to withdraw from a case. Further, the Supreme Court of Florida would also be poised for a holding that the legislature has failed to properly fund the court system. If the Florida legislature was finally forced to fund the court system properly, the benefits to all of Florida's citizens could go above and beyond the indigent defense system.

Baxter, *supra* note 2, at 373. At oral argument, the Justices seemed sympathetic to the problems of the public defender. *See generally* Oral Argument, Public Defender, Eleventh Judicial Circuit v. State, No. SC09-1181, *available at* http://wfsu.org/gavel2gavel/archives/flash/viewcase.php?case=09-1181_10-1349. Justice Rickey Polston commented that at the heart of this matter is "underfunding by the legislature." *Id.* Justice Barbara Pariente commented that the public defenders' asking to withdraw was the "the responsible thing." *Id.* Justice R. Fred Lewis intimated that requiring an individual showing of prejudice in each case was an ineffective use of a court's time. *Id.* It will be quite interesting to see how the Court rules. Based on the oral argument, it would not be surprising if the Court were to remand to the 11th Circuit and require a hearing, and then there is always the possibility that they would say this is all moot.

115 *See, e.g.*, ABA Standing Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-441 (2006); Va. Comm. on Legal Ethics Op. 1798 (2004); Ariz. Comm. on the Rules of Prof'l Conduct, Formal Op. 90-10 (1990).

116 Michael C. Bailey, *Attorneys Prepare to Argue Against Public Defender Reform Proposal*, The Enterprise (Mar. 11, 2011), *available at* http://www.capenews.net/communities/region/news/923.

117 *Id.*

118 *Id.*

119 *Id.* These contract attorneys saw an increase from $30 to $50 an hour for their representation of the indigent. *Id. See also* Gery Tuoti,*New Counsel: Attorneys Brace for Changes in State's Public Defender System*, Taunton Daily Gazette (2011), *available at* http://www.tauntongazette.com/features/x827639843/NEW-COUNSEL-Attorneys-brace-for-changes-in-states-public-defender-system?zc_p=1. As I discussed in *Gideon's Ghost*, many of these types of reforms are blocked by private counsel attempting to hold on to their contracts. Baxter, *supra* note 2, at 364–65. This is in spite of the fact that most every study has found that public defenders' offices are much more efficient and effective for indigent defense. *See* Cohen, *supra* note 3, at 6; Anderson & Heaton, *supra* note 56, at 3.

120 Tuoti, *supra* note 119.

121 The 187th General Ct. of the Commonwealth of Mass., Senate Ways & Means Fiscal Year 2013budget Recommendation (2012), *available at* http://www.malegislature.gov/Content/Documents/Budget/Senate/FY2013/Appropriations.pdf; *see also* PowerPoint, Executive Office for Admin. and Finance, FY13 Public Counsel Services Reform Proposal (on file with author).

122 Tuoti, *supra* note 119.

123 *See* Cohen, *supra* note 3, at 5–6.

124 Kevin Johnson, *Reports: Some States Charge Poor for Public Defenders*, Usa Today (Oct. 3, 2010, 8:05 PM), *available at* http://usatoday30.usatoday.com/news/nation/2010-10-03-feesforjustice_N.htm?loc=interstitialskip. *See also* Alicia Bannon, Mitali Nagrecha, & Rebekah Diller, Brennan Center For Justice, Criminal Justice Debt: A Barrier to Reentry (2010), *available at* http://www.brennancenter.org/content/resource/criminal_justice_debt_a_barrier_to_reentry/.

125 Rebekah Diller, Brennan Center For Justice, the Hidden Costs of Florida's Criminal Justice Fees 7 (2010), *available at* http://www.brennancenter.org/page/-/Justice/FloridaF%26F.pdf?nocdn=1.

126 Diller, *supra* note 125, at 5.

127 *Id.* at 6.

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

129 Diller, *supra* note 125, at 7, quoting an American Bar Association guideline, adopted in 2004, that states:

> An accused person should not be ordered to pay a contribution fee that the person is financially unable to afford. Whenever an order for a contribution fee is under consideration, the accused person or counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded. If a contribution fee is ordered prior to providing counsel to the accused person, the decision to require a contribution fee should be subject to review at the request of counsel and counsel should be given an opportunity to be heard and to present information, including witnesses, concerning whether the fee can be afforded.

Id. at 35 n.51 (quoting ABA, ABA Guidelines On Contribution Fees For Costs of Counsel in Criminal Cases 1 (2004), *available at* http://www.americanbar.org/content/dam/aba/migrated/legalservices/downloads/sclaid/indigentdefense/rec110.authcheckdam.pdf).

130 Jonathan A. Rapping, *National Crisis, National Neglect: Realizing Justice Through Transformative Change*, 13 U. Pa. J. L. & Soc. Change 331, 353 (2010).

131 Equal Justice Works is a national organization that provides "public interest fellowships to law school graduates to provide legal assistance to underserved populations and causes." *Fellowships and Career Development*, Equal Justice Works, *see* http://www.equaljusticeworks.org/post-grad.

132 "The Southern Public Defender Training Center (SPDTC) is a program created to improve the quality of representation for indigent defendants across the Southern United States. Our mission is to provide outstanding public defender training to young lawyers and to develop a community of SPDTC members, graduates, public defender offices, and other organizations, tied together by the mutual objective to advance standards of public defense, and thereby optimize the collective ability to advocate for systemic indigent defense reform." *About Us*, The Southern Public Defender Training Center, *see* http://thespdtc.org/about/#goal.

133 Rapping, *supra* note 130, at 353.

134 *Id.*

135 *Id.* at 354.

136 *Public Defender Corps*, Equal Justice Works, *see* http://www.equaljusticeworks.org/post-grad/public-defender-corps.

137 *Id.*

138 *See generally* Roger Fairfax, *From "Overcriminalization" to "Smart on Crime": American Criminal Justice Reform—Legacy and Prospects*, 7 J. L. Econ. & Pol'y 597 (2011). Professor Fairfax argues for a joining of the overcriminalization movement with the emerging "smart on crime" movement as a way for true criminal justice reform. *Id.* at 597–98.

139 Peter A. Joy, *Rationing Justice by Rationing Lawyers*, 37 Wash. U. J.L. & Pol''y 205, 222 (2011) (discussing the report of the Special Master in the Missouri case); *see* Robert C. Borucho-witz Et Al., Nat'l Ass'n of Crim. Def. Lawyers, Minor Crimes, Massive Waste: the Terrible Toll of America's Misdemeanor Court 11 (Apr. 2009), *available at* http://www.nacdl.org/

public.nsf/defenseupdates/misdemeanor/$FILE/Report.pdf (discussing how misdemeanors drain the budgets and time of public defenders). Of course, one radical solution would be to eliminate drug prohibition entirely, which could be estimated to reduce government expenditures by $41.3 billion. Jeffrey A. Miron & Katherine Waldock, Cato Institute, the Budgetary Impact of Ending Drug Prohibition 1 (2010), *available at* http://www.cato.org/pubs/wtpapers/DrugProhibitionWP.pdf.

[140] Roger A. Fairfax, *Prosecutorial Nullification*, 52 B.C. L. Rev. 1243, 1243–44 (2011). Professor Fairfax goes as far as to suggest a separate form of prosecutorial discretion, which he calls prosecutorial nullification, in which prosecutors simply choose not to prosecute certain laws. *Id.* at 1245.