

# Sixth Amendment: Protecting the Right to Counsel for Indigent Defendants\*

Jeff Wright, State Public Defender, State of Iowa  
Emily Hughes, Associate Dean, Prof. and Bouma Fellow in Law, UI College of Law

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## Massachusetts

The Committee for Public Counsel Services (CPCS) filed a request for an evidentiary hearing on September 21, 2021, to address the shortages in the Hampden County public defender's office and how the shortages create a negative ripple effect in neighboring counties.

**How the most recent crisis began:** In spring 2018, a decrease in bar advocates willing to take cases in Hampden County due to low pay forced the state public defender office (CPCS) to take on many cases usually assigned to private attorneys. By summer 2019, public defenders were so overburdened by the increase in caseloads the CPCS informed a judge that the increase in new clients made it close to impossible to adequately represent their existing clients. The judge issued an order to the CPCS office to accept all cases as ordered by the Court. CPCS moved to vacate the order, but the motion was denied. Over a three-week period, the office was assigned approximately 113 cases under protest until a Supreme Judicial Court judge issued an order halting the assignments.

To alleviate their attorneys, the CPCS instituted an "emergency duty day rate" of \$424 for private attorneys to take the additional cases. The bar advocates had to be in court and available to accept assignments for a full day but would also bill for actual time worked on the cases assigned.

The higher rate worked. The number of Hampden County defendants without counsel fell from 169 on July 3, 2019 to 72 on August 5, 2019 and on September 10, 2019, there were just three defendants without counsel. The emergency day rate stayed in effect through June 30, 2020. But there was a negative ripple effect on the surrounding counties as attorneys chose to take assignments in Hampden County over other counties.

In September 2021, CPCS again implemented the emergency duty day rate (now \$480) in Hampden County. In their letter to the court about the counsel shortage, CPCS stated that “as of this writing, all defendants incarcerated without counsel are conflicts for the [Public Defender Division].”

References consulted:

- Kyle Stucker, *COVID-19 Spurs ‘Crisis’ for Public Defenders*, WORCESTER TELEGRAM & GAZETTE, Oct. 4, 2021, 2021 WLNR 32529253.
- Letter from Mass. Comm. for Pub. Couns. Servs. to Dahlia Wendlandt, Assoc. J., Sup. Jud. Ct. (Sept. 21, 2021) (on file with author).
- Vaidya Gullapalli, *Massachusetts’ Highest Court is Urged to Address a Crisis in Indigent Defense*, THE APPEAL (Nov. 7, 2019), <https://theappeal.org/massachusetts-highest-court-is-urged-to-address-a-crisis-in-indigent-defense/>.
- Buffy Spencer, *Amid Shortage, Lawyers Offered Temporary Emergency Rate to Represent Poor Clients in Hampden County District Courts*, MASSLIVE, (Jul. 23, 2019, 3:49 PM), <https://www.masslive.com/news/2019/07/amid-shortage-lawyers-offered-temporary-emergency-rate-to-represent-poor-clients-in-hampden-county-district-courts.html>.

### **New Hampshire**

Thirty-two public defenders have left in the last 15 months (from October 2021), about a quarter of the staff. Busy public defender offices have stopped taking new cases, passing them on to private attorneys. In August, the court system sent out urgent calls for more public defenders.

Reference consulted:

- Kyle Stucker, *COVID-19 Spurs ‘Crisis’ for Public Defenders*, WORCESTER TELEGRAM & GAZETTE, Oct. 4, 2021, 2021 WLNR 32529253.

### **Maine**

Maine is the only state in the nation without full-time, government-employed public defenders. The Maine Commission on Indigent Legal Services (MCILS) was established by the legislature in 2009 to provide a statewide service to fund indigent defense by using contracted private attorneys.

Since December, Maine has lost about half of the 430 private attorneys who work defense cases.

In June 2021, a criminal justice reform bill passed both houses of the state's legislature providing \$21.8 million to raise wages for lawyers, add new state employees, and open a public defender office.

In July 2021, the state Appropriations and Financial Affairs Committee reached a compromise of \$18.5 million to support MCILS which includes a rate increase of \$60 per hour to \$80 per hour but did not appropriate money to establish a full-time pilot public defender office. Thus, the state still relies entirely on a network of private attorneys to manage public defender work.

In *United States v. Cronin*, the Supreme Court held that the right to the assistance of counsel means the right to the *effective* assistance of counsel. Fundamentally, that means ensuring that only qualified attorneys are permitted to represent defendants, that those attorneys are well trained, that they are appropriately compensated, and that they are supervised. No other state in the country relies entirely on private attorneys to fulfill this important public role, and for good reason: it is much more challenging to supervise private attorneys scattered throughout the state as compared to public defenders housed in a few well-resourced offices.

*An Act Making Unified Appropriations and Allocations for the Expenditures of State Government, General Fund and Other Funds and Changing Certain Provisions of the Law Necessary to the Proper Operations of State Government for the Fiscal Years Ending June 30, 2021, June 30, 2022 and June 30 2023: Hearing on L.D. 221 Before the Joint Standing Comm. on Appropriations and Fin. Affs., 130th Leg., Spec. Sess. 1 (Me. 2021) (statement of Zachary L. Heiden, Chief Couns., A.C.L.U. Me.).*

#### References Consulted:

- Kyle Stucker, *COVID-19 Spurs 'Crisis' for Public Defenders*, WORCESTER TELEGRAM & GAZETTE, Oct. 4, 2021, 2021 WLNR 32529253.
- Samantha Hogan, *Lawmakers Agree on 'Good Start' to Overhauling State's Troubled Legal Defense System*, ME. MONITOR (June 21, 2021), <https://www.penbaypilot.com/article/lawmakers-agree-good-start-overhauling-state-s-troubled-legal-defense-system/148605>.
- Samantha Hogan, *Gov. Mills Lets Public Defense Changes Become Law*, ME. MONITOR (July 29, 2021), <https://www.penbaypilot.com/article/gov-mills-lets-public-defense-changes-become-law/150042>.
- ME. COMM'N ON INDIGENT LEGAL SERVS., <https://www.maine.gov/mcils/index.shtml> (last visited Oct. 29, 2021).

## Kansas

February 2021, the Kansas Board of Indigent Defense Services (BIDS) provided the Kansas House Judiciary Committee with a summary of the struggles in the state public defense system. The executive director of BIDS reported that 55% of the employees had considered leaving in the last year because of the heavy caseloads and pay. “Current national standards recommend defense attorneys work no more than 150 felonies per year per attorney. At BIDS' 11 trial offices across Kansas, the average in 2020 was 205 cases per attorney.”

Assigned counsel pay is \$80/hr. The 2017 average rate for a private attorney in Kansas was \$225/hr.

Reference consulted:

- Noah Taborda, *Public Defender System in Crisis*, KAN. REFLECTOR, Feb. 10, 2021, 2021 WLNR 4469394.

## Missouri

*February 2016*

The Office of the Missouri State Public Defender System (MSPD) asks for a funding boost of more than \$25 million. Director says the caseloads call for almost twice the number of attorneys the office can employ, and high turnover rate exacerbates the problem.

*June 2016*

Gov. Jay Nixon grants \$4.5 million budget increase to MSPD.

*July 2016*

MSPD and the state's public defender commission file a lawsuit against Gov. Jay Nixon alleging he withheld \$3.5 million in funds for defending the indigent.

*August 2016*

Director of the MSPD assigns Gov. Jay Nixon a public defense case, citing a Missouri state law which gives him authority to “delegate the legal representation of any person to any member of the state bar of Missouri.”

The National Legal Aid and Defender Association (NLADA) ranks Missouri 49th in the U.S. in per capita public defense spending.

*March 2017*

ACLU of Missouri and the MacArthur Justice Center file a class-action lawsuit against the state of Missouri over its unconstitutional system of public defense. They claim the “state's public defenders don't have the time or resources to provide

adequate legal representation and are unable to talk to their clients about possible witnesses, exculpatory evidence, plea negotiations, or trial strategy.” They ask that the court force the state to improve the public defender system.

Annually, the Missouri public defense system has more than 80,000 cases and employs approximately 370 attorneys. The ABA found that Missouri public defenders failed to reach the minimum number of work hours required for constitutional representation in 97% of their cases.

The legal director of the ACLU of Missouri says that Missouri has had a failing public defender system for three decades due to chronic underfunding.

The Legislature passed a bill in 2012 that barred the director of MSPD or its commission from limiting the ability of its attorneys or district offices to take cases.

"The then-head of MSPD was told that if local offices continued to turn away cases, the Legislature would pass a bill to privatize the entire system," the petition reads. Since then, public defenders haven't turned away clients for fear of reprisal, including additional budget cuts.

#### *January 2019*

The 8th Circuit Court of Appeals rules the governor and the state public defender system cannot be sued because of sovereign immunity. The lawsuit continues against the head of the public defender system, Michael Barret, and the public defender commission.

#### *May 2019*

A consent decree between the litigating parties is submitted to the court for review. The proposal limits public defenders to no more than 174 hours of casework a month. Other key aspects of the decree:

- Defendants will be screened within two days of receiving an application for services unless additional financial investigation is necessary;
- Public defenders are directed to make arguments for pretrial release and advise clients not to waive rights or plead guilty at the defendant's initial appearance;
- Public defenders are directed to meet with each client within the first seven days following the assignment of the case, as well as every 30 days thereafter and respond to all correspondence from the client within 10 days.

#### *January 2020*

Judge refuses approval of the decree, saying the agreement is not a solution to the problem because judges would not be bound by the agreement, and public defenders would then be forced to choose between violating the consent decree or being subject to contempt of court.

### *February 2020*

The ACLU of Missouri and the MacArthur Justice Center file a lawsuit to end Missouri's public defender "wait lists," alleging the practice violates the rights to counsel and due process guaranteed by the Missouri Constitution. They approximate around 4,600 people currently on wait lists, 600 of which are being held in pretrial detention without legal representation.

The average number of days indigent defendants are on a wait list while in jail is 114 days.

As of Jan. 9, three indigent defendants have been in held in pretrial detention and on a wait list for more than two years. Another 44 defendants have been waiting for more than one year.

### *February 2021*

Judge finds public defender wait lists violate both state and federal constitutions but grants the state's request to allow the legislature an opportunity to provide enough additional funding for public defense in the budget to eliminate wait lists.

### *June 2021*

The legislature signs off on \$3.5 million in new funds for public defenders.

The director of MSPD, Mary Fox, and her team are in the process of filling 53 new positions with a goal of eliminating the wait lists by January 1, 2022.

### Resources consulted:

- Adam Aton, *Missouri Public Defender Warns Department in Crisis*, ASSOCIATED PRESS (Feb. 21, 2016), <https://plus.lexis.com/api/permalink/228224c1-a80c-4103-8ec0-f69b94881ef1/?context=1530671>.
- *Missouri's Public Defender System Sues Over Funding Cuts*, ASSOCIATED PRESS (July 13, 2016), <https://plus.lexis.com/api/permalink/f142b609-0b6b-41ef-832b-d22c58dc2429/?context=1530671>.
- Katie Reilly, *Missouri's Governor Cut Funding to the State's Public Defenders. So They Assigned Him a Case*, TIME (Aug. 4, 2016), <https://time.com/4439083/missouri-public-defender-governor-jay-nixon/>.

- Celeste Bott, *Missouri Hit with Lawsuit Over ‘Shockingly Inadequate’ funding for Public Defenders*, ST. LOUIS POST-DISPATCH, Mar. 10, 2017, 2017 WLNR 7629413.
- *Court: State, Governor Can’t be Sued Over Public Defenders*, ASSOCIATED PRESS (Jan. 11, 2019), <https://plus.lexis.com/api/permalink/3d261387-17c5-4b81-b1d4-14dea809b9da/?context=1530671>.
- Pat Pratt, *Order Would Set Rules for Public Defenders*, COLUMBIA DAILY TRIB. (July 21, 2019), <https://plus.lexis.com/api/permalink/e3af90f9-cf23-4bf9-a44a-ba33a31c1313/?context=1530671>.
- *Judge Vetoes Plan to Cut Missouri Public Defenders’ Workload*, ASSOCIATED PRESS (Jan. 29, 2020), <https://plus.lexis.com/api/permalink/aee82fa7-6c03-4ada-980a-c3bda13264d7/?context=1530671>.
- Rudi Keller, *Lawsuit: 4,600 on Missouri Public Defender ‘Wait Lists,’* COLUMBIA DAILY TRIB. (Feb. 27, 2020), <https://plus.lexis.com/api/permalink/107c81a9-df76-485b-bcfc-f8119f5f90c3/?context=1530671>.
- Rebecca Rivas, *Public Defenders Set to Hire 53 attorneys with Extra Funds*, JEFFERSON CITY NEWS-TRIB. (June 19, 2021), <https://plus.lexis.com/api/permalink/8892e2c4-8997-4ab2-81ad-8ef13336dfd1/?context=1530671>.



