

REMARKS OF STEPHEN F. HANLON
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THE GIDEON DECISION: CONSTITUTIONAL MANDATE OR EMPTY PROMISE?

A FIFTY-YEAR DEAL UNDER FIRE

For 50 years now, with a few notable exceptions, courts, legislatures, governors, the organized bar and, yes, even public defenders, have brokered a deal about how to respond to the U.S. Supreme Court's 1963 decision in *Gideon v. Wainwright*, which established the right to counsel in criminal cases. Here's the deal. Legislatures and other public funders would grossly underfund public defender organizations. Public defenders thus faced with grossly excessive caseloads would then triage these scarce resources, pushing more resources to more serious cases, but providing the illusion of a lawyer for thousands of clients with less serious charges, including misdemeanors and even felonies, in a "meet 'em and plead 'em" assembly line system of justice.

Make no mistake about it, these public defenders were for the most part remarkable lawyers, undertaking the Herculean, yet Sisyphean task of providing counsel to millions of impoverished, primarily black and brown citizens accused of crime. But a deal is a deal. And this particular deal played out in front of trial courts every day. Our courts knew very good and well what was going on right in front of them. Justice Stevens, speaking in a Fourth Amendment context that could well apply to the Sixth Amendment, has described our criminal courts as "loyal...foot

soldier(s) in the Executive's war on crime." *California v. Acevedo*, 500 U.S. 565, 600 (1991), Stevens, J., dissenting.

Until recently, the silence of state bar associations about this complete abandonment of the rule of law has been nothing less than astonishing. The Sixth Amendment aside, Model Rule 1.7(a)(2) provides that a lawyer shall not represent a client if there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client. Model Rule 1.16(a)(1) provides that in that situation the lawyer must decline the representation. Faced with certain knowledge of this virtually universal system of triage in the defense function in our criminal courts, other than plaintive cries for more funding from legislative bodies, the state bar associations did little or nothing.

That same thing could not be said for the American Bar Association. Led by its Standing Committee on Legal Aid and Indigent Defendants ("SCLAID"), the ABA has been in the forefront on this issue for decades. In 1990 The ABA House of Delegates approved "black letter" standards that were published in the *ABA Standards for Criminal Justice: Providing Defense Services*. Standard 5-5.3 provided in pertinent part that public defenders faced with excessive caseloads "...must take such steps as may be appropriate to reduce their pending or projected caseloads, including the refusal of further appointments."

In 2002, the House of Delegates of the American Bar Association approved a resolution sponsored by SCLAID entitled "Ten Principles of a Public Defense Delivery System" ("the Ten Principles"). Principle 5 stated succinctly: "Counsel's workload should never be so large as to lead to breach of ethical obligations, and

counsel is obligated to decline appointments above such levels.” In 2006, the ABA’s Standing Committee on Ethics and Professional Responsibility issued Formal Opinion 06-441, which reiterated that public defenders faced with excessive caseloads must not accept new clients. Finally, in 2009 the ABA’s House of Delegates approved the Eight Guidelines of Public Defense Related to Excessive Workloads (“the Eight Guidelines”), providing a detailed action plan for declining representation in the face of excessive caseloads.

In the midst of all of this ABA attention to this problem, The Missouri Bar joined the effort to repudiate the fifty-year deal. Missouri Bar President Doug Copeland led that bar association’s efforts by appointing a task force to study this problem, composed of judges, legislators, prosecutors, bar leaders and practitioners, and ultimately obtained passage of a bill providing for case refusal for public defenders facing excessive caseloads, unanimously in the Missouri Senate and overwhelmingly in the Missouri House. Unfortunately, the Governor vetoed the bill. But another important party to the deal had disavowed the deal.

Next, the Missouri Public Defender (MPD) challenged the deal. In 2006, all Missouri public defenders kept their time for 12 weeks and based on that timekeeping, the MPD developed a protocol for case refusal and in 2008 promulgated a rule for case refusal, incorporating the protocol into the rule. In 2010, the MPD filed a motion in a trial court in Springfield, Missouri seeking to refuse additional cases. The trial court did not question the fact that the MPD faced excessive caseloads, but appointed the MPD to represent an indigent criminal defendant anyway.

On appeal, the Missouri Supreme Court held that a judge may not appoint counsel when he is aware that counsel is unable to provide effective assistance of counsel because of excessive caseloads. *Missouri Public Defender Commission v. Waters*, 370 So.3d 592 (Mo.banc 2012). The court specifically rejected the *Strickland* standard in a case which seeks prospective, not retrospective relief, and then held that the Sixth Amendment includes a prospective right to effective counsel at all critical stages of the proceeding. The court advised trial courts to manage their dockets by triaging cases so that the most serious offenses and other priority cases take precedence in appointment of the public defender and in scheduling for trial. The court noted that this remedy was not without certain costs, including potentially the release of some offenders because of their rights to speedy trial. *Waters*, at 611-612.¹

So at this point, three of the parties to the 50-year deal, at least in Missouri, had disavowed that deal: the Missouri Bar, the Missouri Public Defender and the Missouri Supreme Court. The legislative response to the *Waters* decision, however, at least initially, was a strong reaffirmation of the 50-year deal, with threats to

¹Nearly half of the states, including Missouri, have constitutional provisions that provide their supreme courts with a power of general superintendence over the state's justice system or its functional equivalent. Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, 75 MO. L. REV. 751, 767, n. 106. A compelling case can be made that in states like Missouri with longstanding systemically unconstitutional criminal justice systems (to the extent, usually about 80%, that they involve the public defender), the state supreme court should direct trial courts to so triage their cases, (not simply so advise them, as the court did in *Waters*), when no lawyer is available because of the excessive caseload of the public defender.

privatize large parts of the defender system and cap compensation for the private bar at unreasonable levels.

Fortunately, the Director of the MPD, Cat Kelly, waged a remarkably effective campaign to persuade the Legislature of the folly of most of its proposals, and in the end, while stripping the MPD of its rule making authority, the Legislature provided a statutory procedure for case refusal when the MPD faces excessive caseloads. That statute attempts to limit relief in excessive caseloads cases to an individual lawyer or lawyers², and to prohibit office-wide relief, but such a limitation has obvious separation of powers problems, which will undoubtedly be litigated in the context of an office attempting to operate at 200% or 300% of capacity. The Governor is not expected to veto this bill, since the prosecutors have voiced no opposition.

Thus, all parties to the 50-year deal in Missouri now appear to have rejected it: the Legislature, the Governor, the Missouri Supreme Court, the Missouri Bar and the MPD. But shortly after the decision of the Missouri Supreme Court in *Waters*, Missouri's Auditor, Tom Schweich, raised an important and principled objection to the MPD's case refusal protocol. In developing that protocol, the MPD had used the 12 weeks of timekeeping it had conducted in 2006, but had also relied in part on the 1973 NAC Standards in adjusting the resulting case weights to arrive at its

² The decision to transfer one or more cases of one public defender facing an excessive caseload to another public defender within that office not so burdened is one for which the judiciary is uniquely unfit. That decision, pursuant to Model Rule 5.1, belongs to the supervising attorney in that office, whose obligations in that regard are spelled out in some detail in Formal Opinion 06-441 at A7. In a state such as Missouri, which ranks 49th out of 50 states in per capita funding for indigent defense, it is precisely office-wide relief that will almost invariably be required.

determination of how many hours should be spent on the various categories of cases it handled.

That was a serious problem. The NAC Standards were not evidence based and did not account for changes in technology, changes in complexity or even different degrees of seriousness; (e.g., the category “felonies” was not broken down into felonies of various seriousness). For those reasons, Norman Lefstein in his recent publication “Executive Summary and Recommendations: Securing Reasonable Caseloads,” available at www.indigentdefense.org, has specifically advised public defenders not to rely on the 1973 NAC Standards, and has more recently described them as “absolutely worthless” for case refusal purposes. (*The National Law Journal*, “Counting the Hours,” May 27, 2013.)

The Missouri Auditor acknowledged that the MPD had a serious excessive caseload problem. That was obvious, since the MPD’s caseload had dramatically increased in the past ten years, while its budget had been essentially flat-lined. But, Auditor Schweich argued persuasively, the MPD did not have reliable data to support its conclusion about where to draw the line at which its workload was excessive. An evidence-based approach was essential, he concluded, and the MPD did not have that.

The MPD and SCLAID took up Auditor Schweich on his conclusion. SCLAID retained the highly respected St. Louis accounting and consulting firm of RubinBrown to develop a Delphi study for the MPD for use in budgeting, operations and case refusal, if necessary. A Delphi study is a structured process for collecting and distilling knowledge from a panel of experts. Here, based on timekeeping (now

in effect permanently for the MPD for all attorneys and staff), the MPD will produce evidence in tenths of an hour, by category of case and by task, as to (a) what the MPD is now doing, (b) what the MPD is not now doing and (c) what the MPD should be doing. Included in the panel of experts will be highly respected members of the private criminal defense bar who do work similar to that of the MPD.

RubinBrown's deliverable will be made available to the MPD by August 31, 2013. Included in the RubinBrown deliverable will be a detailed description of the methodology employed in this study, written in such a way that it can, to the extent practicable, and with appropriate modification, provide a blueprint for how other state and local public defender programs can replicate this methodology in their respective jurisdictions. This blueprint will be widely distributed by SCLAID to public defenders throughout the nation.

A central premise of the ABA's Eight Guidelines is that the evidence-based professional judgment of an experienced public defender is entitled to substantial deference by the courts. The MPD will now take the results of the RubinBrown Delphi study and use it for the budget it will present to the Governor and the Legislature in the fall. This Delphi study, therefore, will not be just another study that winds up on the shelf. On the contrary, the MPD will emerge from this process with the intellectual capacity to incorporate the study's techniques and methodology in its budgeting, its operations and if necessary, its case refusal litigation.

On May 23, 2013, the Florida Supreme Court issued its decision in *Public Defender, Eleventh Judicial Circuit of Florida v. State of Florida*, Case No. SC09-1181

and Case No. SC10-1349, upholding the right – indeed the duty – of Carlos Martinez, the Miami-Dade Public Defender to refuse additional appointments when his defenders were carrying an average of 400-plus felonies. Here again the Florida Supreme Court squarely held that *Strickland* is not the standard in a case seeking prospective relief such as this one. *Strickland* is the standard for cases where the relief sought is to overturn a conviction, and since no such relief is sought in case refusal cases like this and *Waters*, it is inapplicable. In the latter cases, the appropriate standard is the standard articulated in the Eleventh Circuit’s 1988 decision in *Luckey v. Harris*, 860 F.2d 1012 (11th Cir. 1988): likelihood of substantial and immediate irreparable injury.³

This was not the first time that the *Strickland* standard had been rejected in litigation involving prospective relief in the context of indigent defense. In *Lavallee v. Justices in the Hampden Superior Court and others*, 812 N.E. 2d 895 (2004), a case involving chronic underfunding of the Commonwealth’s assigned counsel system of indigent defense seeking prospective relief, the Massachusetts Supreme Judicial Court specifically adopted the *Luckey v. Harris* test and did not require a *Strickland* showing of harm. Likewise, the Iowa Supreme Court in *Simmons v. State Public Defender*, 791 N.W. 2d 69 (Iowa 2010) specifically rejected *Strickland*’s prejudice test and adopted the *Luckey v. Harris* test in a case involving systemic or structural challenges to an indigent defense system.

³ The ABA filed amicus briefs in both the Missouri and Florida cases. The Florida Supreme Court cited the Ten Principles with approval and the Missouri Supreme Court cited the Eight Guidelines with approval. We now have two important state supreme courts articulating a case refusal remedy for excessive caseloads based squarely on the principles set forth in the Ten Principles and the Eight Guidelines.

Public defenders have long and rightly complained of *Strickland's* “malleable” and unenforceable standard. But we now know there is a way out of the *Strickland* forest – case refusal litigation. If public defenders attack the excessive caseload problem prospectively, not waiting for the caseloads to overwhelm them and then asserting ineffectiveness retrospectively in an effort to overturn convictions, there is a vehicle for relief with a reasonable standard that can be met with an evidence-based showing. But public defenders must keep their time in tenths of an hour for the rest of their professional lives if they want this *Strickland*-free relief from excessive caseloads.

There is now a chink in the armor of the 50-year deal. All five parties to the deal in Missouri have rejected it, in whole or in part. We will know more when the first case refusal litigation hits the ground, but there is a way forward now in Missouri, although the statutory response is clumsy at best. In Florida, the Miami-Dade public defender and the Florida Supreme Court have rejected the 50-year deal; again, we will know more when we see the response of the Florida Legislature when case refusal litigation hits the ground.

A new generation of indigent defense litigation is in the making. It will demand enormous cultural changes from public defenders who want to take advantage of this opportunity. Time keeping is admittedly culturally challenging; and at first blush, refusing cases seems contrary to an ethos that rightfully values access to justice for all. But a continuation of the 50-year deal is simply unacceptable.

What about those hundreds, maybe thousands, of indigent defendants who

desperately need but will not have counsel if a public defender's efforts to decline additional clients are successful? There are a number of very important responses to this very important question. The first is that continuing to provide those defendants with the fruits of the 50-year deal – the illusion of a lawyer – is a wholly unacceptable, unethical and unlawful “solution.”

The Rules of Professional Responsibility may provide some helpful guidance here. “A lawyer’s *primary* duty is owed to existing clients,” ABA Formal Opinion 06-441 (emphasis added) advises, suggesting that there may be some duty to those defendants who will not be represented if the public defender obtains the case refusal relief sought. Rule 1.16(d) of the Rules of Professional Responsibility, which covers “Declining or Terminating Representation, arguably alludes to such a duty: “Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client’s interests...”

One reasonably practicable step to protect a rejected indigent defendant's interests is to remind a court granting a public defender's requested case refusal relief of the paramount duty of that court itself to ensure effective assistance of counsel for *all* indigent defendants. In their moving case refusal papers, therefore, public defenders should seriously consider urging the court to specifically provide for administrative procedures and reports to the chief judge and/or court administrator regarding a list of defendants whose speedy trial rights would require dismissal and/or release from custody in the event that the public defender's case refusal motion is granted, at least until such time as the criminal justice system in that jurisdiction is able to provide effective assistance of counsel to all those for

whom it is required. (See n. 1, supra, re the power of general superintendence in half of the nation's state supreme courts.)

The Missouri Supreme Court was not the first state supreme court to make clear that if the state would not adequately fund its indigent defense system, the remedies of dismissal and release based on speedy trial rights could potentially occur. The Florida Supreme Court so held in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So. 2d 1130 (Fla. 1990). The Massachusetts Supreme Judicial Court so held in *Lavallee v. Justices in Hampden Superior Court*, 442 Mass. 228 (2004).

The *Lavallee* experience may be particularly instructive. See, Stephen F. Hanlon, *State Constitutional Challenges to Indigent Defense Systems*, supra, n.1. In Massachusetts the assigned counsel ("bar advocates") provide a substantial part of the Commonwealth's indigent defense services, as much as 70%. The bar advocates had not received any significant increase in compensation in twenty years, and as a result indigent pretrial detainees had no attorneys to represent them due to a shortage of bar advocates, who could no longer stay in business at those rates. Swiftly (perhaps too swiftly) the Massachusetts Supreme Judicial Court ordered that any indigent defendant incarcerated pretrial in the one county that was the subject matter of that case must be released after seven days if counsel was not appointed. Confronted with political pushback, however, the court momentarily retreated, but the dye was cast.

A second lawsuit challenging the statewide assigned counsel system was filed. The court stayed that action to give the Massachusetts legislature time to

respond to the crisis. Nothing happened for a year. Bar advocates across the Commonwealth refused to work. Chaos reigned throughout the criminal courts of the Commonwealth. The petitioners in the second lawsuit filed a motion to lift the stay. Three days before the date set for that hearing, the Massachusetts Legislature passed bills which eventually increased funding for the bar advocates from \$98 million to \$154.5 million.

So it is not a Hobson's choice that confronts a public defender experiencing grossly excessive caseloads. The choice is not simply: continue acting unprofessionally or throw hundreds or thousands of indigent defendants under the bus without a lawyer. Public defenders who have stood up to the other parties to the 50-year deal and said "No" have achieved success for their clients by way of increased funding for the indigent defense system and by way of orders of release and/or dismissal for those whom they could not ethically represent.

The jurisprudential predicate for case refusal relief is firmly in place in Missouri, Florida and Massachusetts. The factual predicate for case refusal relief is being made in Missouri as we speak with remarkable help from a great accounting and consulting firm. The *Luckey v. Harris* test, not the *Strickland* test, for structural challenges to indigent defense systems is the law in Missouri, Florida, Iowa and Massachusetts.

The time for significant evidence-based case refusal litigation is fast approaching.