

IN THE CIRCUIT COURT OF SAINT LOUIS COUNTY
STATE OF MISSOURI

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)	
IN RE:)	
)	Cause No. 18SL-CC00129
)	
MISSOURI STATE)	
PUBLIC DEFENDER,)	
Dist. 21,)	
St. Louis County Trial Office)	
)	

Motion to implement a wait list of indigent defendants pursuant to RSMO 600.063

Comes now, Stephen Reynolds, District Defender of the St. Louis Trial Office of the Missouri State Public Defender (“Dist. 21 MSPD”), and requests this Court to implement a wait list of defendants who qualify for public defender services. RSMO 600.063.3(5) (West 2019).

Dist. 21 MSPD makes this motion at this time for three reasons. First, in March 2018, this Court found that 16 of the 21 attorneys in the office have excessive caseloads which prohibit them from providing effective assistance of counsel to criminal defendants as required under the sixth amendment of the United States Constitution. *See* Order/Judgment of March 19, 2018 (hereinafter “Order/Judgment”). Second, caseloads for individual attorneys within the office have remained substantially similar over the past 18 months. The caseload relief found to be necessary in March of 2018 is equally necessary in October 2019 (*see infra* Sec. 2). Finally, a waitlist can be implemented and managed without endangering community safety or causing disruption to other stakeholders in the St. Louis County Criminal Justice community (i.e. the St. Louis County Prosecutor, the Courts, the Department of Justice Services, etc.).

In further support of this motion, counsel states the following:

- 1. This Court has found that nearly all attorneys within the Dist. 21 MSPD office have caseloads which violate defendants' rights to effective assistance counsel. This Court has also found that caseload relief under RSMO 600.063 is appropriate and necessary.**
- 2. Excessive caseloads persist in October 2019. Despite the Missouri Public Defender System adding four attorney positions to the office since 2015, excessive caseloads are expected to continue for the foreseeable future.**
- 3. The wait list will be managed with minimal disruption to other stakeholders in the St. Louis County justice system.**

1. This Court has found that nearly all attorneys within the Dist. 21 MSPD office have caseloads which violate defendants' rights to effective assistance counsel. This Court has also found that caseload relief under RSMO 600.063 is appropriate and necessary.

On March 18, 2018, the presiding judge of this circuit entered an order finding that nearly every attorney in Dist. 21 MSPD had a caseload which prevented them from providing effective assistance of counsel under the 6th amendment to the United States Constitution.

Order/Judgment, p. 7-9. The order resulted from a "conference" pursuant to RSMO 600.063 where the District Defender for Dist. 21 MSPD presented evidence that attorneys, given their excessive caseloads, could not meet their ethical and constitutional duties to their clients.

The harbinger of the conference had been a recent Missouri Supreme Court ruling which upheld the disciplinary suspension of a public defender who had violated the professional rules of conduct by not working on cases with diligence and not communicating with clients (Mo. Sup. Ct. R. 4-1.3 (diligence) and 4-1.4(a) (communication)). *In Re Hinkebein*, SC96089, Sept.

12, 2017. The court upheld the suspension despite the fact that the public defender had more cases and clients than he could reasonably handle.¹ The suspension was also upheld despite the fact that his supervisor could not decline incoming cases and stop assigning cases to him. Ironically, the attorney was not only failing to meet his ethical obligations but was also the most productive attorney in the office.² See also e.g. *State ex rel Missouri Public Defender Commission v. Pratte*, 298 S.W.3d 870 (Mo. en banc 2009)(individual attorneys MSPD “risk their professional lives” due to the size of their caseloads);³ *State ex rel Missouri Public Defender Commission v. Waters*, 370 S.W.3d 592 (Mo. en banc 2012).

The District Defender for Dist. 21 MSPD had requested the conference to find solutions to lowering excessive caseload numbers in the St. Louis County trial office. The caseload numbers per attorney placed individual public defenders in jeopardy of having their law licenses suspended or revoked due to ethical lapses beyond their control. The workloads per attorney were also likely to violate criminal defendants’ rights to effective assistance of counsel regardless of whether or not the violations were ever captured in an ineffective assistance of counsel action.

¹ See *In Re Hinkebein*, SC96089, Sept. 12, 2017 (Mo. 2017), Respondents’ brief p. 10-13 for a complete description of the factual record (accessed October 1, 2019 at <https://www.selfrepresent.mo.gov/file.jsp?id=115189>).

² *Id.*

³ *Pratte*, 298 S.W.3d at 880:

Beyond the constitutional problems this may be creating for indigent defendants in Missouri, the public defenders themselves are risking their own professional lives. The American Bar Association has stated that there is “no exception [to the Model Rules of Professional Responsibility] for lawyers who represent indigent persons charged with crimes.”²⁶ Nor has this Court created an exception in the Code of Professional Responsibility, Rule 4, which governs all Missouri lawyers.

The excessive number of cases to which the public defender’s offices currently are being assigned calls into question whether any public defender fully is meeting his or her ethical duties of competent and diligent representation in all cases assigned. The cases presented here to this Court show both the constitutional and ethical dilemmas currently facing the Office of State Public Defender and its clients.

Data presented at the conference demonstrated that nearly every attorney in the office had more cases/clients than could be handled competently under the Missouri Rules of Professional Conduct and constitutional requirements of effective assistance of counsel. The data was consistent with the factual finding which the *Pratte* court had made nearly 10 years prior when it determined every office of the Missouri Public Defender had more cases than could be ethically handled by existing attorney staff. *Pratte*, 298 S.W.3d at 880. Data was presented in the form of raw caseload numbers per attorney for the year prior to the date of the conference. See Exhibit A (attached). The raw caseload numbers were then converted into a “weighted caseload” per attorney following a methodology specifically designed to evaluate the labor capacity for public defenders in Missouri⁴ and developed by the national accounting firm Rubin-Brown.⁵ The Rubin-Brown methodology has since become the accepted national template for measuring public defender workloads.⁶

⁴ Weighted caseloads designate an hourly unit per type of case. I.e. an average homicide case takes 106 hours of work. See Exhibit B of the February 16, 2019 RSMO 600.063 conference, “The Missouri Project: A study of Missouri Public Defender System and workload standards,” p. 6. The caseload per attorney within a given period (a year) can then be converted into a number of work hours per attorney. This number is then compared to what is a reasonably expected number of work hours per attorney per year (2080). This results in a percentage which describes labor capacity and relative workloads per attorney. A specific example from the conference is attorney Donnelly. Exhibit A p.1; Transcript, February 16, 2018 Conference, p. 19. Donnelly had 306 cases assigned to him within the year preceding the conference. The cumulative weighted hours were 7500. Dividing 7500 by 2080 gives a percentage of 360%, meaning Donnelly had 3.6 times more work than could be reasonably be expected to be completed in a year under normal professional standards.

⁵ See Exhibit B of the February 16, 2019 RSMO 600.063 conference, “The Missouri Project: A study of Missouri Public Defender System and workload standards”. The Missouri Public Defender engaged the services of Rubin-Brown, a national accounting firm, to develop a caseload standard for public defenders specific to Missouri. This became known as the “Missouri Project” and was the first time that an analytically reliable method had been used to determine acceptable public defender workload standards. Rubin-Brown utilized the Delphi method developed by the Rand Corporation. Since its development in the early sixties for military planning, the Delphi method has been used for strategic forecasting throughout major industries such as healthcare and engineering.

⁶ See e.g. Texas A& M, Public Policy Research Institute, “Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission pursuant to House Bill 1318, 83rd Texas Legislature,” p. vi:

This Texas study – the first ever mandated by a state legislature – is similar in its methodology to “The Missouri Project” published in 2014 by the public accounting firm of Rubin-Brown on behalf of the American Bar Association Standing Committee on Legal Aid and Indigent

The weighted caseloads showed that Dist. 21 MSPD attorneys had two to three times the amount of work which a reasonably diligent and professional attorney could handle. Exhibit A; Transcript, February 16, 2018 conference, p. 5-42. The negative consequences were numerous. Clients were detained in the St. Louis County jail for six months to a year without communication from their attorney or any work being done on their case. T. p. 34-35. Attorneys were not able to work on cases with the expected diligence under Mo. Sup. Ct. R. 4-1.3. *Id.* The result was a *de facto* waitlist. *Id.* Client files would accumulate with no work being done. *Id.* Public defender attorneys were violating professional obligations and placing their licensure at risk.

In order to resolve the problem of unconstitutional workloads, the Court requested Dist. 21 MSPD to determine a caseload capacity for individual attorneys. Order/Judgment, p. 9. The Court also authorized the implementation of a wait list for qualifying defendants pursuant RSMO 600.063.3(5). *Id.* Dist. 21 MSPD responded. *See* Response dated April 2, 2018. It was estimated that a caseload which conforms to Rubin-Brown/Missouri Project standards would be less than 65 pending cases per attorney at any given time.⁷ *Id.* at p. 2. To reach this number,

Defendants (SCLAID). The Missouri Project was the first of this new breed of defense workload studies in which, as in this study, my colleague, Steve Hanlon, played a major advisory role. The Missouri Project focused on the caseloads of the Missouri State Public Defender program, which furnishes the vast majority of indigent defense representation in that state. Much like this study, the Missouri Project used a well-designed Delphi methodology. Thus, in Missouri the expertise of both full-time public defense providers and experienced private defense practitioners was used to determine how much time lawyers should devote to providing effective and competent representation of indigent clients charged in various kinds of cases. And, again much like this Texas study, the Missouri Project compared the amount of time that should be devoted to representation of different kinds of cases against the amount of time actually being spent, utilizing recent time records maintained by defense providers. Accessed April 2, 2018 at http://tidc.texas.gov/media/31722/150114_WCL-Final_Reduced-file-size.pdf.

⁷ Rubin-Brown/Missouri Project standards measure yearly capacity per attorney. Under a proposed consent decree in federal court where the Missouri State Public Defender is a defendant to a civil rights suit (*Dalton v. Barrett*, 17-04057-cv-c-NKL (W.D. Mo.), p. 30), attorney workloads are limited to incoming assignments of no more than 173.3 hours of work per month.

individual caseloads would have needed to be reduced from levels as high as 161 cases pending cases per attorney. *See* Exhibit A.

Dist. 21 MSPD suggested that the wait list be targeted to defendants with low level felonies who were released from custody. This limitation would reduce any adverse impacts. It would also serve as the most reasonable basis for the appointment of private counsel⁸ as the cases on the wait list would be relatively less serious than cases for confined defendants.

2. Excessive caseloads persist in September 2019. Despite the Missouri Public Defender System adding four attorney positions to the office since 2015, excessive caseloads are expected to continue for the foreseeable future.

While this Court anticipated initiating caseload relief pursuant to RSMO 600.063 in April of 2018, an appeal of this Court's order by the prosecutor at the time, Robert McCulloch, delayed implementation. In January of 2019, the newly elected prosecutor, Wesley Bell, withdrew the appeal filed by his predecessor. The Court's March 19, 2018 order is now in effect.

Current caseload data per attorney, though the numbers have decreased, indicate that individual attorneys within Dist. 21 MSPD still work on more cases than a reasonable, diligent and ethically responsible attorney can handle. Caseload data from April 2019 (Exhibit B (attached)) show 11 attorneys with caseloads between 2 and 2.8 times the amount of cases they should have under Rubin-Brown/Missouri project standards. Four other attorney had numbers above or close to 100% of capacity even though they had been employed with Dist. 21 MSPD

⁸ The Court's March 19, 2018 order p. 8 said it would investigate creating a private appointment system for cases which the public defender cannot handle due to caseload numbers. Since that time, the Circuit has passed a private appointment rule (Local Rule 21.6).

for less than nine months or had returned to work from leave.⁹ Caseload data from September 2019 is similar. *See* Exhibit C (attached). It shows 14 attorneys have 1.7 to 2.5 the amount of cases they should have under Rubin-Brown/Missouri Project standards. While these numbers are down from February 2018, when most attorneys had nearly three times or more the workload capacities that they should, the same ethical and constitutional violations exist today. Client cases are not worked on. Phone calls are not returned. Confined clients are not visited. The only difference is that slightly fewer clients are having their cases ignored through no fault of their overburdened public defenders.

The excessive numbers persist in light of MSPD taking action to move attorney positions from elsewhere in the state to the St. Louis County trial office. In 2015, Dist. 21 MSPD had 16 staff attorneys and two management attorneys. Since December of that year, MSPD has re-allocated three full time employee positions to St. Louis County, the most recent being in August of 2019 when the office was allowed to shift its dedicated juvenile attorney position to serve adult criminal clients. As a result of these reallocations, Dist. 21 MSPD does not have any office space for any additional attorney positions (should they materialize in the future). Additionally, this year MSPD has contracted with the MacArthur Foundation to fund a fourth new attorney position. The funding for this public defender will expire in October of 2020, leaving the office with 19 staff attorneys and two management attorneys.

Even with the additional attorneys, individual caseloads remain high. The number of initiated cases for fiscal years 2014 through 2018 has been relatively constant, fluctuating up or down within 10%. In fiscal 2014, Dist. 21 MSPD initiated 4913 new cases.¹⁰ In fiscal 2015, it

⁹ Beverly Hauber (returned from leave November 2018), Derek McAnnar (hired October 2018), Erika Sams (hired march 2019), Buddy Stratton (hired October 2018), Joe Wilson (hired February 2019).

¹⁰ State of Missouri Public Defender Commission Annual Fiscal Year 2019 Report p. 27.

initiated 4407 new cases (an 11% decrease from the past year); fiscal 2016, the number was 4273 (a 3% decrease from the past year); fiscal 2017, it was 4722 (a 10% increase); in fiscal 2018, it was 4486 (a 5% decrease), and in 2019, it was 4,018 (an 11% decrease).¹¹ Equally significant, violent crime in the region has increased in 2018-19.¹² From July 1, 2018 to June 30, 2019, Dist. 21 MSPD initiated representation in 40 homicides.¹³ Since July 1 of this year, the office has initiated representation in 15 additional homicides.¹⁴ Experienced attorneys now carry 2-6 homicide cases.¹⁵ Attorneys with only one to two years of experience have been assigned a homicide case due to the excessive workloads of all attorneys within the office.¹⁶

For all of these reasons, Dist. 21 MSPD attorneys require the same caseload relief today which the Court ordered eighteen months ago.

¹¹ *Id.*

¹² *See e.g.* St. Louis Post Dispatch, “Crime Summit at St. Louis City Hall as governor, mayor and County executive discuss policing, September 10, 2019 (accessed October 3, 2019 at https://www.stltoday.com/news/local/govt-and-politics/crime-summit-at-st-louis-city-hall-as-governor-mayor/article_765f71d9-e644-5b1c-bbef-386841fd953b.html).

¹³ Internal caseload data of Dist. 21 MSPD.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

3. The wait list will be managed with minimal disruption to other stakeholders in the St. Louis County justice system.

As it did in April of 2018, Dist. 21 MSPD moves this Court to implement a wait list pursuant to the Court's March 19, 2018 order and RSMO 600.063.3(5). If the Court grants this motion, Dist. 21 MSPD will do the following in order to minimize disruption to potential clients and other stakeholders in the criminal justice system:

1. The wait list will be comprised of qualifying defendants¹⁷ who are released from custody;
2. The wait list will only include defendants charged with C, D and E felonies;
3. Wait listed defendants who hire private counsel will be removed from the list;
4. Dist. 21 MSPD will make monthly reports to the Court regarding caseload numbers for individual attorneys based upon open pending cases and Rubin-Brown/Missouri Project weighted caseloads;
5. Dist. 21 MSPD will track court appearances of wait listed defendants and will accept defendants as clients when individual attorneys' workloads permit;
6. Dist. 21 MSPD will maintain a list of wait listed defendants whose cases are relatively simple and who are possible candidates for appointment of private counsel under Local Rule 21.6, and;
7. The wait list will conform to any additional parameters as set by the Court.

¹⁷ Only defendants who qualify for public defender services under RSMO 600.042-086 will be placed on the wait list.

WHEREFORE, for all of the above stated reasons, Dist. 21 MSPD requests this Court to:

- A. Authorize the implementation of a wait list pursuant to RSMO 600.063.3(5), and
- B. Any other relief which is just under the circumstances.

Respectfully submitted,

/s/ Stephen Reynolds

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Certificate of Service

I certify that a true copy of the above and foregoing was served by the court's electronic filing system and by e-mail to:

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on the 28th day of October 2019

/s/ Stephen Reynolds
Stephen Reynolds