**IN THE**
**MISSOURI SUPREME COURT**
**EN BANC**

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| STATE ex rel. MISSOURI STATE PUBLIC DEFENDER COMM'N, J. MARTY ROBINSON, and ROD HACKATHORN, | ) | |
| *Relators*, | ) | |
| v. | ) | No. **SC91150** |
| THE HON. JOHN S. WATERS & THE HON. MARK ORR, | ) | |
| *Respondents*. | ) | |



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# BRIEF OF AMICUS CURIAE MISSOURI ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

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## Statement of Interest

Amicus curiae Missouri Association of Criminal Defense Lawyers (MACDL) is a voluntary association of criminal defense lawyers, organized to ensure justice and due process for persons accused of crime or other misconduct. Membership includes private criminal defense lawyers, public defenders, active U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system.

MACDL promotes study and research in the field of criminal law to disseminate and advance knowledge of the law in the area of criminal practice. The organization seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in insuring that legal proceedings are handled in a proper and fair manner. An organizational objective is promotion of the proper administration of justice. In furtherance of that objective, at times the organization files amicus briefs in both federal and state courts.

MACDL's interest in this proceeding is to inform the Court of the limitations of the state judiciary's authority to appoint members of the private bar to represent indigent defendants without compensation. This is a concrete matter: in the discrete case out of which this original proceeding arises, the relators argue that "Respondent Judge Waters abused his discretion in ***not appointing a private***

***counsel*** to represent Blacksher." Relator's Brief at 32. Relators argue that under precedents of this Court, *id.* at 27, a trial judge may appoint private counsel without compensation for private counsel's time and office overhead, and argue that the trial court here should have done so as long as the trial court or the lead relator tendered limited expense reimbursement as its defines in 18 CSR 10-4.010(5)(A) as being within its discretion to grant or withhold after the fact. *Id.* at 11-12, 27, 32. *See also id.* at 6, 8, 25, 26,

MACDL is concerned that the resolution of this case may lead to the adoption of a system of coerced, uncompensated representation or a decentralized hybrid that incorporates coerced, uncompensated representation by private attorneys in lieu of adequate funding for the existing indigent-defense entity in the state. MACDL believes that such a result would have extremely negative consequences, leading to recurring violations of the fundamental rights of criminal defendants and members of the Missouri Bar alike. MACDL believes that although the most comprehensive solution involves constitutionally-adequate funding for the Missouri State Public Defender System (MSPDS) and greater care in the employment of the criminal sanction generally, any remedy should avoid the uncompensated coercion of Missouri attorneys, confiscation of their property, and burdens on their conscience and their professional competence.

MACDL recognizes that the expenditure of public funds to support MSPDS and/or to compensate private counsel to represent persons accused of crime is not popular. Centuries of experience with fickle kings and electorates have made it part of the Anglo-American tradition that some rights are too important to be left to the political masters of the day. Written constitutions and judges insulated from electoral politics are the sling and five smooth stones on which MACDL's members rely in protecting their clients' rights to fair and accurate treatment every day. It is a sad state of affairs that MACDL must now rely on the same sling and five smooth stones to protect its members' ability to continue serving their clients today.

## Consent of the Parties

Relators and the respondents have consented to the filing of this Brief of Amicus Curiae Missouri Association of Criminal Defense Lawyers.

## Argument

In 2009, this Court discussed but did not reach the question whether coerced, uncompensated service by private attorneys was an option for dealing with the General Assembly's continued failure to fund the Missouri State Public Defender System (MSPDS) adequately to allow MSPDS to provide representation to indigent accused citizens in cases where constitutional and statutory law require it to do so.[1] Like the Report of the Special Master in this case,[2] the very same opinion acknowledged concerns about the constitutional implications of such a policy.[3] Whether an instrumentality of the state may coerce private attorneys to represent persons accused of crime without payment for the attorneys' time, office

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[1] *State ex rel. Missouri Public Defender Com'n v. Pratte*, 298 S.W.3d 870 (Mo. banc 2009).

[2] *State ex rel. Missouri Public Defender Commission v. Waters and Orr*, SC91150, Report of the Special Master (Feb. 9, 2011) at 9, referring to the appointment of attorneys in small counties as having "constitutional implications as a taking of services without compensation." *Id.*

[3] *Id.* at 889, stating that "[t]he prerogative of the state, through its courts or otherwise, to dictate how an individual lawyer's professional obligation is to be discharged may be limited by principles that apply to regulatory takings and other deprivations of property without due process of law." *Id.*

overhead, and full case-related expenses is not a new question. There is no consensus among highest state courts that in any circumstances or class of cases, the state or its instrumentalities may so coerce attorney services. This brief addresses whether private attorneys can be coerced for the uncompensated representation of indigent defendants in any circumstance. In this state, it is already settled law that attorneys may not be so coerced to represent indigents in civil cases,[4] that public defenders may not be coerced to assume the representation

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[4] *Pratte*, *supra* n.1, at 889, stating that "Missouri courts have no power to compel attorneys to serve in civil actions without compensation. *State ex rel. Scott v. Roper*, 688 S.W.2d 757, 769 (Mo. banc 1985). In [deciding that case], the Court noted that requiring lawyers to take civil cases as members of a profession was unsupported in the most recent draft of the Model Code of Professional Responsibility, in which a mandatory provision for pro bono representation had been rejected. The Court further discerned 'that courts have [no] inherent power in civil cases to [compel] representation without compensation[;]' to do so, the Court reasoned would allow courts to infringe on the constitutional right of Missouri citizens to ' "have a natural right to ... the enjoyment of the gains of their own industry."""

of indigents in criminal cases over and above their duties as public defenders,[5] and that when a court has appointed private counsel because MSPDS was not equipped to defend a particular accused citizen, the state must provide for the payment of appointed counsel's expenses.[6] MSPDS's regulation does not promise, let alone guarantee, payment of the expenses in fact incurred in the independent professional judgment of the attorney actually handling the case, but depends on the availability of funds when the point of getting the court to appoint counsel was that MSPDS can't afford to represent the client:

> If a court appoints a member of the private bar to represent an indigent defendant because the district office is unavailable to accept such case, private counsel may ***request*** the Missouri state public defender to pay for ***reasonable and necessary*** litigation costs including expert witness fees, deposition fees, and transcript costs ***to the extent funds are available to do so***. Requests for payment of

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[5]Mo. Rev. Stat. § 600.021.2 mandates that public defenders cannot be appointed in their private capacity; as lawyers, they do not have private capacities.

[6]*State v. Brown*, 722 S.W.2d 613, 619-20 (Mo. Ct. App. W.D. 1986). *Cf. Williamson v. Vardeman*, 674 F.2d 1211, 1215-16 (8th Cir.1982) (emphasis supplied).

litigation costs ***must be approved*** by the MSPD director or the director's designee ***in advance of costs being incurred***.[7]

The requirement of preclearance of expenses in order to have any hope of their reimbursement denies appointed counsel the ability to exercise their independent professional judgment unless they are willing to do so at their own expense. This portion of "The Protocol" is so shot full of weasel-speak that coerced, uncompensated counsel cannot count on receiving a dime of the case-specific out-of-pocket expenses it in fact takes to represent MSPDS's client. When stacked on the complete refusal to pay for office overhead that attorneys typically roll into their hourly rate, this language is a formula for confiscation of personal property over and above personal services.

Coerced uncompensated representation is an unlawful exercise of the state's limited power to take or damage private property under art. I, § 26, of the Missouri Constitution and a taking of private property without just compensation under the Fifth and Fourteenth Amendments of the United States Constitution. Coerced, uncompensated representation by ***all*** private members of the Bar, or by ***only*** attorneys whose pre-existing practice is concentrated on criminal defense, would be equally impermissible under the Assistance of Counsel Clause of the Sixth

[7] 18 CSR 10-4.010(5)(A).

Amendment and Mo. Const. art. I, § 18(a), the Equal Protection Clause of the Fourteenth Amendment and Mo. Const. art. I, § 2.

**I. Coerced, uncompensated service of private attorneys as counsel for indigent persons entitled to the assistance of counsel is an unlawful damaging of private property without just compensation in violation of article I, § 26, of the Missouri Constitution and a taking of private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments of the United States Constitution or, in the alternative, an unlawful taking of private property without a public purpose in violation of the article I, § 28, of the Missouri Constitution and the Due Process Clause of the Fourteenth Amendment.**

Under the facts and circumstances of this case, and the law as this state has defined it and the applicable federal courts have construed it, judicial or other state action to coerce, uncompensated service of private attorneys is an unlawful taking. The Fifth Amendment of the United States Constitution provides: "nor shall private property be taken for public use, without just compensation."[8] The Missouri Constitution provides even broader protection: "private property shall not be taken or ***damaged*** for public use without just compensation."[9] This added

[8]U.S. Const. amend. V.

[9]Mo. Const. art. I, § 26 (emphasis added).

protection applies because (a) lawyers' services are ***property*** under Missouri's provision, (b) coerced, uncompensated representation of indigent criminal defendants ***damages*** that property, and (c) state-mandated representation of indigent defendants with legal services can under no circumstance be justified unless the representation qualifies as a "***public use***."

First, lawyers' services are property under article I, § 26, of the Missouri Constitution. Several states, including Missouri, have addressed this question. In *State ex rel. Scott v. Roper*, this Court spoke directly to the issue, explaining that "[s]ince the colonial period, a lawyer's services have been recognized as a protectable property interest."[10] In *Scott*, the Court quoted an explanation from Indiana in 1854: "To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock. His professional services are no more at the mercy of the public, as to remuneration, than are the goods of the merchant, or the crops of the farmer, or the wares of the mechanic."[11] This would have been about the same time that Abraham Lincoln said, "A lawyer's time and advice are his stock in trade." The Supreme Court of Kansas explained that this principle applied similarly to every profession: "[l]abor is property. The laborer ha[s] the same

[10] *State ex rel. Scott v. Roper*, *supra* n. 4 at 768

[11] *Webb v. Baird*, 6 Ind. 13, 17 (1854).

right to sell his labor, and to contract with reference thereto, as any other property owner."[12] Other courts echo this view.[13]

Lawyers' property in their services is damaged by the coerced, uncompensated expropriation of their time and attention. In *Pratte*, this Court explicitly recognized that there are limits to how many cases an attorney can

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[12]*Coffeyville Vitrified Brick & Tile v. Perry*, 69 Kan. 297, 76 P. 848, 950 (1904).

[13]*See e.g.*, *McDougall v. Hazelton Tripod-Boiler Co.*, 88 F. 217 (6th Cir. 1898) ("the labor and the money expended are equally the property of the lawyer, and alike necessary to the prosecution of the suit. In substance, they are intrinsically connected, -- the service, and the expenses incurred in rendering it"), *Arnold v. Kemp*, 306 Ark. 294, 302 (1991) ("the core question before us is whether the services of an attorney are a species of property subject to Fifth Amendment protection. The answer is yes"), *State v. Ball*, 114 Miss. 505 (1917) ("It cannot be successfully argued that the property must be something tangible. The services of a lawyer, or of a doctor, are just as much property as a stock of goods or any other kind of property that might be mentioned"), *Madden v. Delran*, 126 N.J. 591, 602 (1992), *State v. Lynch*, 1990 OK 82 (1990), *Peoples Nat'l Bank v. King*, 697 S.W.2d 344, 347 (Tenn. 1985).

ethically take at one time.[14] At the end of the opinion, Appendix A sets out the National Advisory Counsel Standards.[15] Therefore, any appointment causes the inability to take on some other case or cases for which the attorney would be paid—or which the attorney would take on pro bono with ***knowledge*** of his or her caseload, abilities, and attitudes, as has occurred from 1821 through the present—and in which the attorney and the other client or clients ***chose*** to enter into an attorney-client relationship. In *DeLisio v. Alaska Superior Court*, the Supreme Court of Alaska explains that "[w]hen the court appropriates an attorney's labor, the court has prevented the attorney from selling that labor on the open market and has thus denied to the attorney the economic benefit of that labor."[16] Further, appointment may damage an attorney's future professional life: "In some cases conscription[17] could affect . . . the attorney's ability to procure future business.

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[14]*Pratte*, *supra* n.1.

[15]*Id.*, Appendix A (stating that no more than 12 non-capital homicides, 150 felonies, 400 misdemeanors, 200 juvenile cases, or 25 appeals should be taken per lawyer per year).

[16]*DeLisio v. Alaska Super. Ct.*, 740 P.2d 437, 443 (Alaska 1987).

[17]"Conscription" is Mr. Aulepp's metaphor for coerced, uncompensated representation by counsel: it is an unduly charitable characterization. When this country last had conscription, draftees received a salary, uniforms, food at a mess

For example, representing a client who is particularly despised by the community might damage the attorney's reputation."[18] Requiring an attorney to undertake a representation when he or she has not been able to evaluate his or her fitness for the particular case—even among attorneys who concentrate their practice on criminal defense—will lead to disadvantageous resolutions, which will create an impression of incompetence, inefficiency, or hubris that he or she could have avoided if the market or professional networking rather than Big Brother had dictated who would take a specific case. The same could be said for the fact that the client is having counsel forced on them—a circumstance that one takes for granted in evaluating the record of a publicly-employed attorney, who by definition does not have to compete for willing clients. These detriments to an

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hall, shelter at a barracks, health care at an infirmary (followed by the V.A. hospital system after their service), sales-tax-free shopping at the PX, training calculated to lead to advancement in the military and employment on discharge, and the GI Bill for education and veterans' preferences for employment in the future. Appointed counsel cannot count on ***even*** the case-specific expenses to which *Brown* holds them to be entitled without litigating for them.

[18]Christopher D. Aulepp, *Enslaving Paul by Freeing Peter: The Dilemma of Protecting Counsel's Constitutional Rights While Providing Indigent Defendants With Effective Assistance of Counsel*, 78 UMKC LAW REV. 291, 311 (2009).

attorney's ability to support his or her practice during and after a coerced, uncompensated representation of an indigent criminal defendant may seem like acceptable collateral damage to some set apart from the need to attract and retain solvent clients. But this Court explained in 2000 that "the taking of only part of plaintiff's property by a public entity may cause consequential damage to plaintiff's remaining property. The consequential damage is in addition to the value of plaintiff's property actually [permanently or temporarily] taken or damaged."[19]

Time-management considerations are also a concern when discussing how uncompensated, coerced representation of an indigent criminal defendant would damage a lawyer's property. For example, an attorney who is assigned to a case would not only have their own time expropriated, but their secretary's, paralegal's, or investigator's as well—when the attorney is paying salaries and benefits for all of their support staff. Turning away paying clients in order to maintain a manageable caseload may be merely "consequential" for attorneys with established, successful practices; but for attorneys who are struggling to maintain their practice or to limit it to criminal defense or another area of their choice, the

[19]*Byrom v. Little Blue Valley Sewer Dist.*, 16 S.W.3d 573, 577 (Mo. banc 2000).

damage is extreme and will foreseeably reduce the opportunity for anyone in their vicinage to obtain legal services at any price.

If it can be justified under any set of circumstances and under any other principles of law, coerced, uncompensated representation of an indigent accused must qualify as a "public use." Reflecting centuries of constitutional law forbidding the government's "taking from A and giving to B,"[20] Mo. Const. art. I, § 28, provides: "That private property shall not be taken for private use with or without compensation."[21] In *DeLisio*, the Alaska Supreme Court resolved the threshold question whether coerced, uncompensated representation of an indigent accused is for a "public" purpose:

> Counsel is appointed not out of a desire to benefit any individual defendant, but to ensure that all defendants are treated equally before the law, that all defendants will receive a fair trial before an impartial tribunal. Because the appointment thus benefits all persons equally, the cost of providing such representation must be equally borne rather

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[20] *E.g., Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (seriatim opinion).

[21] *See Centene Plaza Redevelopment Corp. v. Mint Properties*, 225 S.W.3d 431, 435 n.3 (Mo. banc 2007).

than shunted to specific persons or specifically identified classes of persons."[22]

The opinion in *DeLisio* is unusually persuasive authority here because like Missouri's, the Alaska Constitution's taking provision protects against the ***damaging*** of private property.[23] *DeLisio* held that coerced, uncompensated representation is a constitutionally proscribed damage: "Alaska's constitution will not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden."[24] The sister highest state court's decision was based on the language of the Alaska Constitution's analogue to Mo. Const. art. I, § 26: "the term 'damages' [in the Alaska Constitution] affords the property owner broader protection than that

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[22]*DeLisio*, *supra* n. 16, citing *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). See also *Brown v. Legal Found. of Wash.*, 538 U.S. 216 (2003) (stating that "[t]he fact that public funds might pay the legal fees of a lawyer representing a tenant in a dispute with a landlord who was compelled to contribute to the program would not undermine the public character of the 'use' of the funds" in reference to the use of a special tax or user fees to generate funds for legal services). *Id* at 232.

[23]Alaska Const., art. I, § 18 ("[p]rivate property shall not be taken or damaged for public use without just compensation"). *Id.*

[24]*Id* at 438.

conferred by the Fifth Amendment of the Federal Constitution."[25] Likewise, Missouri's Constitution—which has a taking provision identical to Alaska's—prohibits the uncompensated taking ***or damage*** of private property. *DeLisio's* holding and reasoning are therefore particularly relevant to the issue of coerced, uncompensated representation for indigent defense in Missouri. Alaska is not alone in requiring the compensation for the coerced service of attorneys representing indigent defendants. Several other states require compensation for appointed counsel.[26]

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[25]*Id* at 439. *See also State v. Doyle*, 735 P.2d 733 (Alaska 1987) (stating that "the inclusion of the term 'damage' [in Alaska's eminent domain section] affords the property owner broader protection than that conferred by the fifth amendment of the federal constitution."). *Id* at 736; *State v. Hammer*, 550 P.2d 820, 823-24 (Alaska 1976)(observing that state constitutional guaranty is more emphatic because United States Constitution "does not expressly require compensation for ***damage*** to property") (emphasis supplied). *Id* at 824.

[26]*Zarabia v. Bradshaw*, 912 P.2d 5, 7 (Ariz. 1996), stating that a "compensation scheme that allows lawyers significantly less than their overhead expense is obviously unreasonable"); *Sacandy v. Walther*, 413 S.E.2d 727 (Ga. 1992) (semble) (even under limited circumstances); *Sholes v. Sholes*, 760 N.E.2d 156 (Ind. 2001), *State ex rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987),

Amicus MACDL is aware of a substantial number of decisions holding that by becoming a lawyer, when there is a tradition of pro bono representation and court appointment without compensation for one's professional time, attorneys have "consented" to such service. Many of these opinions are collected in *Williamson v. Vardeman*,[27] in which the United States Court of Appeals for the

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*Bradshaw v. Ball*, 487 S.W.2d 294, 299 (Ky. 1972) (Kentucky's "system of court-appointed uncompensated counsel does not meet the constitutional standards of either the Constitution of the United States or the Constitution of this State"); *State v. Wigley*, 624 So. 2d 425, 428 (La. 1993), quoting *State v. Clifton*, 172 So.2d 657, 668 (La. 1965) ("[t]o require that attorneys represent indigents with no recompense while bearing the expenses of the representation, when the attorneys must maintain their own practices and continue to meet their other professional and financial obligations in today's changed legal marketplace, 'is so onerous that it constitutes an abusive extension of their professional obligations'"); *Crowley v. Duffrin*, 855 P.2d 536 (1993); *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989).

[27]*Supra* n.6, 674 F.2d at 1214-15, citing *Tyler v. Lark*, 472 F.2d 1077, 1078-79 (8th Cir.), *cert. denied*, 414 U.S. 864 (1973); *United States v. Dillon*, 346 F.2d 633, 635-36 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966); *Daines v. Markoff*, 92 Nev. 582, 555 P.2d 490, 493 (1970); *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky.1967); *Warner v. Commonwealth*, 400 S.W.2d 209, 211-12 (Ky.), *cert. denied*,

Eighth Circuit ***distinguished*** the cases for the latter general proposition, and ruled in favor of the attorney in the concrete case before it. One of the opinions was *Jackson v. State*, 413 P.2d 488, 489-90 (Alaska 1966), a previous Alaska decision which *DeLisio* abrogated or overruled. Two of them were in the Kentucky cases *Jones v. Commonwealth*, 411 S.W.2d 37 (Ky. 1967), and *Warner v. Commonwealth*, which the Eighth Circuit acknowledged ***in the same opinion*** was contradicted by the subsequent Kentucky *Bradshaw v. Ball* opinion that the amicus here cites as reflecting a rule it advances before this Court.[28] As the Eighth Circuit did in *Williamson*, the amicus acknowledges that one can find technically persuasive authority that coerced, uncompensated representation is not a taking under the Just Compensation Clause of the Fifth Amendment, but distinguishes all of the latter authority on the basis of the state-created guaranties in Missouri law

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385 U.S. 858 (1966); *Jackson v. State*, 413 P.2d 488, 489-90 (Alaska 1966); *Weiner v. Fulton County*, 113 Ga.App. 343, 148 S.E.2d 143, 146, *cert. denied*, 385 U.S. 958 (1966); *State v. Superior Court*, 2 Ariz.App. 466, 409 P.2d 750, 755 (1966); *State v. Clifton*, 247 La. 495, 172 So.2d 657, 667 (1965); *Scott v. State*, 216 Tenn. 375, 392 S.W.2d 681, 685-87 (1965); *Bibb County v. Hancock*, 211 Ga. 429, 86 S.E.2d 511, 518 (1955); *Ruckenbrod v. Mullins*, 102 Utah 548, 133 P.2d 325 (1943); *Presby v. Klickitat County*, 5 Wash. 329, 31 P. 876 (1892).

[28] *Supra* at 31 n.26.

and the specific facts of this case. Whether this Court needs to modify or reverse any outstanding law,[29] insofar as it lies within the Court's power—the bulk of it being out-of-state and therefore nonmandatory in any event—is a question this Court need not reach. Existing Missouri precedent does not address (1) the application of the stronger-than-federal taking clause in the Missouri Constitution, (2) the Sixth Amendment and Mo. Const. art. I, § 18(a), consequences of uncompensated, coerced representation as a substitute for an adequately-funded indigent-defense entity demonstrated in this brief, and (3) the unreliability of any expense reimbursement that depends on a purely discretionary decision by an underfunded agency as set forth in 18 CSR 10-4.010(5)(A).

Uncompensated coercion of private attorneys to represent indigent defendants is damage under the Missouri Constitution, and is therefore unconstitutional.

Although the Missouri Constitution's provision is more protective of the rights of attorneys not to be forced to represent indigent criminal defendants without compensation, the Taking Clause of the Fifth Amendment also applies.[30]

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[29]Mo. S. Ct. R. 55.03(c)(2)

[30]*Penn Central Transp. Co. v. City of New York,* 438 U.S. 104, 122 (1978) (Taking Clause of Fifth Amendment "of course" made applicable to the States through the Fourteenth Amendment), *citing with approval Chicago, B. & Q. R. Co.*

Damage as a matter of Missouri law is a pro tanto taking as a matter of federal law. Therefore the uncompensated coercion of a lawyer's representation of an indigent criminal defendant violates both federal and state constitutional law.

Even assuming, arguendo, that—as a ***general proposition***—uncompensated coerced representation for indigent defense could be rendered constitutional by reference to a rule of state law regarding a lawyer's "professional obligation to represent [indigent clients] as part of his duties as an officer of the court," or any other rule of state law,[31] such a position raises constitutional concerns in ***concrete cases*** and would generate a flood of satellite litigation if this Court were to adopt it as part of a ramshackle remedy that avoids the General Assembly's obligations under the Sixth & Fourteenth Amendments and Mo. Const. art. I, §§ 2, 10, 18(a), 26 & 28.[32] ***Twenty years ago***, this Court addressed the issue of the appointment of private attorneys to represent the indigent in ~~civil~~ criminal actions in *State ex rel. Wolff v. Ruddy*.[33] It established ***temporary*** guidelines including individual evidentiary

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*v. Chicago*, 166 U.S. 226, 239 (1897); *see also City of Excelsior Springs v. Elms Redevelopment Corp.*, 18 S.W.3d 53 (Mo. Ct. App. W.D. 2000) (semble).

[31] *See* U.S. Const. art. VI, cl. 2 (Supremacy Clause).

[32] *State ex rel. Scott v. Roper*, 668 S.W.2d at 758 (Mo. 1985).

[33] *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64 (Mo. 1981).

hearings where counsel could challenge the appointment as applied to their practice:[34]

> In this and any similar case, the respondent circuit judge should provide [the appointed attorney] when requested with an evidentiary hearing as to the propriety of his appointment, taking into consideration his right to earn a livelihood for himself and his family and to be free from involuntary servitude. If respondent judge determines that the appointment will work any undue hardships, he should appoint another attorney.

Although the Eighth Circuit allowed that the "compulsion of ***services*** without compensation ***under the procedure set forth in Wolff*** does not contravene the federal Constitution," it held that ***expenses*** are "constitutionally distinct" because "[c]ompelling individual attorneys to bear [the costs of representing indigent clients] raises serious due process issues."[35] The procedure set forth in *Wolff* is "the minimal protection necessary to satisfy the requirements of the fourteenth amendment" and thus constitutionally mandated.[36] If this Court were to determine that attorneys can under any circumstances be compelled to serve as counsel

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[34] *Id.* at 66.

[35] *Williamson v. Vardeman*, 674 F.2d at 1213-16 (emphasis supplied).

[36] *Id.*

without compensation, there must be a procedure in which individual attorneys can demonstrate to the appointing court why—under their particular circumstances—the burden of such service will amount to a substantial taking or damaging of property, or an undue hardship that amounts to a violation of due process. There must also be a guaranty of reimbursement of case-related expenses, which MSPDS's Protocol, 18 CSR 10-4.010(5)(A), is ***not***.

As long as the General Assembly does not properly fund MSPDS and/or fully adequate adjunct counsel, jurisdictions across the state will be tempted to rely increasingly on coerced, uncompensated representation to handle criminal caseloads, in light of the political unpopularity of dismissing cases or ordering public expenditures as necessary to satisfy the requirements of the Sixth Amendment and Mo. Const. art. I, § 18(a) Assuming that local courts yield to this unconstitutional temptation, private attorneys—particularly sole practitioners in rural circuits—would face growing numbers of uncompensated appointments. Economic reality and fidelity to the same constitutions they invoke on behalf of their clients would require them to challenge these appointments through the procedure of individual evidentiary hearings which this Court and the Eighth Circuit have mandated and recognized to reflect the constitutionally minimal procedural due process protecting attorneys. Although these hearings would be necessary for attorneys to protect their livelihood and professional viability,

numerous hearings on a regular basis would be a self-inflicted wound on the orderly administration of justice.

Most attorneys' claims of hardship would be meritorious, because the competent, constitutionally-adequate defense of criminal charges not only consumes a great deal of time, but also involves a wide array of substantial expenses including investigatory services, the costs of transcribing and copying depositions of witnesses, cost of foreign-language and sign-language interpreters and translators, electronic legal research services, court reporting and transcription services, laboratory fees, photographic services, travel expenses, witness fees, and payment of expert witnesses and consultants.

Given the high cost of criminal defense, it would be an act of faith rather than an exercise of reason to posit that a system of coerced, uncompensated representation will save the state any money whatsoever: instead of funding MSPDS, the General Assembly would be required to appropriate sufficient funds to cover the costs associated with appointed cases. [37] If the same entity that refuses

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[37] *See e.g.*, Radha Iyengar, *An Analysis of the Performance of Federal Indigent Defense Counsel*, National Bureau of Economic Research Working Paper, available at http://graphics8.nytimes.com/packages/pdf/national/20070712_indigent_defense.p

to fund MSPDS refuses to appropriate sufficient funds, and the state cannot reimburse appointed counsel for the expenses associated with representation, the trial court would be obliged to relieve counsel ***and to discharge the accused person***. Neither the best interests of the State of Missouri nor the efficient administration of justice will be served if the state cannot prosecute cases due to its deliberate choice of unconstitutional machinations for putting warm bodies at counsel table.

In smaller counties, where only a handful of attorneys are available for appointment, it will not take long for time-constraints to present a serious limitation. As these caseloads increase, the considerable amount of time necessary to defend a criminal case infringes on an attorney's "right to earn a livelihood".[38] This, in turn, creates a hardship that would merit the attorney being granted relief at an individual evidentiary hearing as to the propriety of his or her appointment. The result looks uncannily familiar: a growing docket of indigent accused, with no one available to represent them.

**II. Any coerced, uncompensated representation of indigent accused persons would raise the dilemma whether it would apply only to attorneys**

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df (finding the court appointed counsel are generally less efficient and more expensive overall than public defenders.)

[38] *Webb v. Baird*, 6 Ind. 13, 17 (1854).

**actually qualified to practice criminal defense, or would extend to attorneys generally—a guaranty of ineffective assistance of counsel at a systemic level.**

Simply levying coerced representation by attorneys generally in criminal cases raises a second, and equally important, issue of constitutional proportions: whether all private attorneys or only qualified criminal defense attorneys would be subject to coerced, uncompensated representation notwithstanding the damage to their property rights in their practice of a learned profession as their livelihood. Decades of experience before the creation of public defender systems shows that the indiscriminate appointment of private attorneys would lead to unjust executions and imprisonments for some indigent defendants, and repeated (unnecessary, but for the policy at issue here) trials, plea negotiations and proceedings, and appeals for others. The appointment of only qualified criminal defense attorneys is equally undesirable, because it would place an unjust burden on certain members of the bar and would also raise separate constitutional concerns. Neither option is legitimate under the state and federal constitutions. Coerced, uncompensated representation of indigent accused persons should therefore play no part in the remedy in this case.

**A. The appointment of all private members of the Missouri Bar would subject indigent defendants to substandard representation, guarantying ineffective assistance of counsel to them and denying a**

**reasonable expectation of repose to victims of crime and to the public generally.**

As Special Master J. Miles Sweeney explained in his Report in this case, "[t]he problem with [the appointment of all attorneys] may be summed up in the term 'ineffective assistance of counsel'."[39] The concept of ineffective assistance of counsel is well-established.[40] The United States Supreme Court has described the Sixth Amendment right to effective counsel as a "fundamental right [that] assures the fairness, and thus the legitimacy, of our adversary process."[41] "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have."[42] For our criminal justice system to function properly, the criminally accused must have access to legal representation that is robust and unhindered by incompetence or

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[39]*Report of the Special Master*, supra n. 2 at p. 9.

[40]U.S. Const. amend. VI, stating that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." *Id.* See also *McCann v. Richardson*, 397 U.S. 759 (1970), stating that "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." *Id.* at 771, n.14.

[41]*Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

[42]*United States v. Cronic*, 466 U.S. 648, 653 (1984).

conflicts of interest. Well-founded concerns raised by widespread ineffective assistance of counsel claims undermine confidence in our state's judiciary and in the criminal justice system as a whole. Thus, this Court must make every effort to protect this vital right by ensuring that zealous criminal defense representation in the State of Missouri is not compromised by the appointment of attorneys inexperienced in the defense of criminal cases, or conflicts of interests from both (1) attitudes adverse to the robust discharge of defense counsel's role in the adversary system and (2) positions of having been victims of prior crimes against oneself or against the attorney's loved ones.

**1. Attorneys without substantial experience relevant to the effective representation of an accused citizen present a certainty of instances of ineffective assistance of counsel.**

Attorneys recently admitted to the bar and their seniors who have simply never become familiar with the practice of criminal defense—as well as those unfamiliar with the rules of the court or folkways of the jurisdiction in which they are dragooned to practice outside their established area or areas of concentration—cannot provide effective assistance to their appointed clients. The Missouri State Public Defender System (MSPDS) provides significant training for new attorneys, a resource which is unavailable to these classes of attorneys.

The appointment of attorneys without substantial, relevant experience as counsel for the criminally accused would dovetail with the unconstitutional taking and damage demonstrated in the first point of this brief by creating significant additional burdens on their practices. This additional work, which would need to take place before the first act or omission in their representation, would be to learn the rules of the court applying to criminal case and, often more importantly, the unwritten practices that the greenest criminal defense lawyer in the jurisdiction would have a sixth sense for after a few weeks on the job. Appointed counsel new to criminal practice would need to refresh their knowledge of criminal procedure which one may presume to have atrophied since they passed the bar examination; this labor would amount to further damage and an additional taking as demonstrated in Point I.

The practical hurdles to putting themselves in the place of a well-funded public defender or a retained private practitioner who concentrates in criminal defense increase the likelihood that appointed attorneys will ***not*** learn the rules and folkways, will fail to provide their clients with effective assistance, will violate those clients' constitutional rights, and will occasionally be found ineffective—requiring the prosecution and the victims to return to "GO" without collecting an additional $200. "[A] lawyer inexperienced in criminal law should not handle cases where jail time is a possibility until the lawyer has gained enough experience

to competently represent the defendant because the risk of injuring the defendant is too great."[43] The Supreme Court of Kansas has explained that licensure is far from a guaranty of effectiveness when the life or liberty of the client is at stake:

> While law schools teach criminal law and procedure, and graduates who take the bar examination must have some basic knowledge about criminal law and procedure, many attorneys do not regularly practice criminal law. New developments in the area of criminal law occur frequently, and one must keep up with these changes to be competent to practice in this area. Simply because one has a license to practice law does not make one competent to practice in every area of the law.[44]

Using the power of the state to require attorneys without relevant experience or any at all, and at the same time denying them the resources which just compensation would afford to give them a sporting chance to bring themselves into compliance with the special norms applying to criminal defense, creates a significant risk that adequate indigent defense services will not be provided at the front end of the criminal justice system, making the need for indigent representation at post-conviction relief

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[43]Aulepp, *supra* n. 18 at 301.

[44]*State ex rel. Stephan v. Smith*, 747 P.2d 816, 831 (Kan. 1987).

proceedings all the more urgent. Yet this Court has held that there is no right to the effective assistance of counsel in post-conviction relief.[45] Because this Court has ***designed*** a post-conviction relief scheme that it acknowledges to require the assistance of counsel,[46] the state-created ineffectiveness will go unremedied the bulk of the time, unless the indigent victim somehow obtains it in federal court under 28 U.S.C. § 2254 or 42 U.S.C. § 1983. This Court has held that it should not stall aggrieved persons to the federal courts after constitutional violations have occurred.[47] This case is a situation in which it can prevent the violations proactively that it does not wish to drop on the doorstep of courts of a coordinate sovereign.

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[45]*E.g., Smith v. State*, 887 S.W.2d 601, 602 (Mo. 1994) (en banc), *cert. denied*, 514 U.S. 1119 (1995).

[46]*E.g., Fields v. State*, 572 S.W.2d 477, 482 (Mo 1978) (en banc).

[47]*Reuscher v. State*, 887 S.W.2d 588, 591 (Mo. banc 1994), *cert. denied*, 514 U.S. 1119 (1995).

### 2. Conflict of interests from attitudes common among attorneys who do not practice criminal defense are a pernicious threat arising from indiscriminate appointment of counsel.

Perhaps the most common question asked of actual criminal defense lawyers is, "How can you defend ***those*** people?"[48] With disappointing frequency, the question is posed by attorneys[49] who have chosen to avoid criminal defense as a practice area, frequently representing interests more in line with the prosecution. These attorneys ask, presumably, because they themselves would be unable to represent criminal defendants who at least might be guilty. For these attorneys, compensation is a collateral issue, because they would not willingly take an appointment even if they were assured of reasonable payment, and were asked—rather than told—to take it. Counsel who open the letter appointing them with a bias or prejudice in favor of the other side could not fulfill their ethical duty of loyalty to their client, and their appointment would likely precipitate constitutional violations of indigent defendants' rights.

For example, many attorneys believe that all criminal defendants who confess are guilty, whereas a generation of social science has demonstrated the

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[48] *See* Abbe Smith, *Defending the Unpopular Down-Under*, 30 MELB. U. L. REV. 495 (2006).

[49] *Id.*

existence of multiple grounds for false confessions—some of which cannot immediately be laid at the feet of the state.[50] In recent years, psychologists and other researchers have systematically studied false confessions and have produced a substantial empirical literature concerning their causes, characteristics, and consequences.[51] Among the 245 DNA-based exonerations recorded between 1989

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[50] *See also* Leigh Bienen, *The Quality of Justice in Capital Cases: Illinois as a Case Study*, 61-AUT Law & Contemp. Probs. 193, 213 (1998), Gail Johnson, *False Confessions and Fundamental Fairness: The Need for Electronic Recordings of Custodial Interrogations*, 6 B.U. PUB. INT. L.J. 719, 741 (1997), Richard A. Leo, et al., *Bringing Reliability Back In: False Confessions and Legal Safeguards in the Twenty-first Century*, 2006 WIS. L. REV. 479, 486, 522-25 (2006), Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1127-28 (2005).

[51] *See generally* Gisli H. Gudjonsson, *The Psychology of Interrogations and Confessions: A Handbook* (2003); Saul M. Kassin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3 (Feb. 2010) (Official White Paper of the American Psychology-Law Society); Saul M. Kassin & Gisli H. Gudjonsson, *The Psychology of Confessions: A Review of the Literature and Issues*, 5 PSYCH. SCI. IN THE PUB. INT. 33 (2004).

and 2009 nearly a quarter of the cases involved false confessions.[52] It is naïve to make decisions about representation of the indigent without acknowledging that many attorneys outside the criminal bar would laugh out loud at the proposition these authorities have established.

More generally, it is difficult, if not impossible, for a defense attorney to provide vigorous representation while secretly hoping that the prosecution puts on a slam-dunk case that puts the guilty criminal sitting at the defense table away for good. Even the attitudinally-conflicted attorney appointed outside his or her practice area who ***tries*** to put their bias or prejudice aside and accepts criminal appointments could ***subconsciously*** do a sub-par job in discrete cases out of sympathy for the victims or revulsion for their client. In an adversarial system of justice, such interference is not only detrimental, but it also directly impacts on

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[52] *See* INNOCENCE PROJECT, LESSONS NOT LEARNED 3 (2009), available at http://www.innocenceproject.org/docs/NY_Report_ 2009.pdf, The Innocence Project, Facts on Post-Conviction DNA Exonerations, http://www.innocenceproject.org/Content/351.php# (last visited May 13, 2011), Innocence Project, False Confessions, http://www.innocenceproject.org/understand/False-Confessions.php (last visited May 13, 2011).

U.S. Const. amend. VI's and Mo. Const. art. I, § 18(a)'s guaranties of the effectiveness of counsel.

3. **Conflicts of interest for victims of prior crimes against themselves or their loved ones, though more consistent with a proper understanding of the rule of law, pose an additional threat of ineffective assistance of counsel arising from indiscriminate appointment of private counsel.**

Attorneys who have chosen not to practice criminal defense for economic or personal as opposed to political reasons would similarly be unable to fulfill their duty of loyalty to their client in numerous situations.

If an actual rape victim, for example, were appointed to represent a client accused of one of the many "sex offenses" the General Assembly has created, it might be impossible for that attorney to put her past experiences aside—and even unfair and inhumane to ask her to do so. The former victim, now in the role of advocate, may not investigate as thoroughly or negotiate as diligently on their client's behalf. In fact, it is even possible that such an attorney would do the ***minimum*** amount of work possible—rushing the accused toward a plea of guilty regardless of whether any credible defenses to the charge exist. The client, then, would suffer the consequences. Further, it would be unfair to make an attorney/victim relive painful past experiences by representing such a client.

In the case of an attorney whose husband was—for example—sexually abused as a child, it would be plainly unfair to force that attorney to come home at night and retraumatize her loved one with news that she was representing a client accused of the same type of conduct. Few contemporary families are untouched by substance abuse, and even the most zealous practitioner outside the community of committed criminal-defense advocates may be trammeled against their best intentions at representing an accused drug-dealer. Attorneys should not be subjected to voir dire of their personal or family experience as victims of crime as a cost of doing their real-estate, insurance-defense, tax, or probate business.

Appointment of attorneys who honestly cannot conceive that a government's breaking the law is more dangerous than an individual's doing so (especially when his involuntary client comes from the other side of the tracks), and of attorneys whose personal or family histories would make them subject to retraumatization from accepting MSPDS's surplus cases, would also violate the constitutional rights of the attorney in addition to the ways the amicus has identified in Point I. Although the text of the United States Constitution does not expressly mention controlling or interfering with the rights of conscience, the United States Supreme Court knows it does.[53] In addition, once more the text of the Missouri Constitution

[53] *See, e.g., West Virginia State Board of Education v. Barnette*, 319 U.S. 624, (1943) (during darkest days of World War II, Supreme Court upholds right of

provides broader protection, stating that "no human authority can control or interfere with the rights of conscience."[54] This conscience is only to be limited "when there is a reasonable expectation that not doing so will damage the public order which the government should maintain."[55] This Court's Rules protect the right of lawyers to resist appointment without fear of sanctions when "the client or the cause is so repugnant to the lawyer as to be likely to impair the client-lawyer

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public-school children not to salute the flag, because doing so offended their conscience: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein"). Anyone who has even seen—let alone conducted—a dispositive criminal proceeding knows that trying a criminal case (even poorly) or representing an accused citizen in a guilty plea competently is far more invasive of one's personhood than requiring a child to raise their arm toward a flag.

[54]Mo. Const. art. I, § 5.

[55]David Richards, *Conscience, Human Rights, and the Anarchist Challenge to the Obligation to Obey the Law*, 18 GA. L. REV. 771, 780 (1984).

relationship or the lawyer's ability to represent the client."[56] Indiscriminate appointment of practitioners who choose not to do criminal cases would lead to hardships for the trial courts, counsel, and accused citizens, and delay for the prosecution and the victims, while grievances under this rule were resolved on a case-by-case basis—for the attorneys with sufficient candor to raise them rather than selling their appointed clients short.

Discussing these issues, Christopher Aulepp analogizes what he calls "the danger of conscripting attorneys without allowing for the attorney's biases and beliefs" to jury selection,[57] which "seeks to exclude jurors whose biases and past experiences make it unlikely that they can be fair and impartial."[58] Lawyers, he continues, must be more than "merely fair and impartial; [they] must be an advocate for the defendant's cause."[59] Although a system to allow attorneys to withdraw based on their political biases or personal traumas could be put in place, it would be subject to abuse, and it would be unduly burdensome on all concerned to investigate these (often private) objections. This would pose an acute problem

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[56]Mo. S. Ct. R. 4-6.2(c) (receiving in pertinent part Model Rules of Professional Conduct).

[57]*Supra* note 18 at 299.

[58]*Id*, referencing *Joy v. Morrison*, 254 S.W.3d 885, 890 (Mo. banc 2008).

[59]*Id*, citing *Strickland v. Washington*, 466 U.S. 688, 688 (1984).

for rural jurisdictions where there are not very many lawyers to begin with. In these circumstances, the Court would be essentially faced with the situation in which the only lawyers who do ***not*** have a political bias against the rights of the accused or a personal or family history that would substantially impair their adversarial zeal are those ***already*** practicing criminal defense.

### B. The appointment of only presently-qualified criminal defense lawyers would be unfair to these attorneys and unconstitutional.

The Missouri Constitution implicitly provides attorneys the right to practice criminal defense, and to do so without discrimination based on that choice: "All persons have a natural right to . . . the enjoyment of the gains of their own industry."[60] Requiring ***only*** presently-qualified criminal-defense attorneys to bear the burden of coerced, uncompensated representation of the indigent would exacerbate the damage to such attorneys' property. Their ability to continue their practice would be limited specifically because of their choice become proficient in criminal defense. The Oklahoma Supreme Court similarly found that the First Amendment to the United States Constitution[61] protected an attorney's choice to

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[60]Mo. Const., art. I, § 2.

[61]U.S. Const. amend. I, stating that "Congress shall make no law...abridging the freedom of speech." *Id.* Yet once again, Missouri's Constitution has a more complete protection, stating that "no law shall be passed impairing the freedom of

practice criminal law without such a burden, stating that "lawyers cannot be targeted for expressing their First Amendment rights to advertise[.]"[62] There, an attorney argued that because he advertised his services in telephone directories distributed by the court, he was unfairly targeted for unpaid appointments.[63] The court upheld his right not to be discriminated against for such a practice.[64]

Special Master Sweeney puts the predicament the most simply: Appointment of qualified attorneys . . . is inherently unfair as it visits the obligation on some but not others. Actually, it would affect a fairly small proportion of the attorney population.[65] To require the relatively few private

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speech, no matter by what means communicated: that every person shall be free to say, write or publish, or otherwise communicate whatever he will on any subject, being responsible for all abuses of that liberty[.]" Mo. Const., art. I, § 8.

[62]*Taylor v. District Court in and for Washington County*, 798 P.2d 611, 612 (Okla. 1990). Such a right has been "granted by *Bates v. State Bar of Arizona*, 433 U.S. 350, 383, 97 S.Ct. 2691, 2708-09, 53 L.Ed.2d 810, 835 (1977), reh'g denied 434 U.S. 881, 98 S.Ct. 242, 54 L.Ed.2d 164 (1977), and *Shapero v. Kentucky Bar Assoc.*, 486 U.S. 466, 476 (1988)." *Id.*

[63]*See id* generally.

[64]*Id.*

[65]*Report of the Special Master, supra* n. 2 at p. 9.

criminal defense attorneys (as compared to the number of private attorneys as a whole) to bear such a burden, one discourages law students determined to practice in Missouri from practicing criminal law, and discourages those determined to practice criminal law from practicing in Missouri. Further, in smaller circuits with only one or two private criminal defense attorneys, unpaid, involuntary service may become the majority of such attorneys' work, effectively forcing them to change professions or leave the state because uncompensated coercion in the name of the Sixth Amendment deprives them of a livelihood devoted to making that Amendment a reality. Lowering the number of practicing criminal defense attorneys will in fact increase the burden and problem that brought this case to a head. A practice of coerced, uncompensated representation of indigent criminal defendants imposed only on presently qualified attorneys is both counterproductive and ineffective. The results would be unacceptable as a matter of policy and a violation of multiple state and federal constitutional provisions as a matter of law.

Here, there are ineffective-assistance issues over and above the matter of caseload. For example, if only one or two attorneys in a circuit are getting all of the unpaid appointments, they would only have so many resources to devote to their caseload; with each new case, the resources would be spread more thinly. Eventually, the problem the Court seeks to avoid—overloaded attorneys who just physically cannot provide effective representation because their case load is too

high—would arise anew. An unpaid appointment "remedy" would simply export MSPDS's overload to the few attorneys in many rural jurisdictions who would be the usual suspects for such appointments.

**III. Uncompensated coercion of private attorneys as counsel for indigent criminal defendants is not a remedy for the lack of resources for MSPDS to conduct its work consistently with the Sixth Amendment and Mo. Const. art. I, § 18(a).**

The uncompensated coercion of private attorneys as counsel for indigent criminal defendants is inappropriate and unlawful for multiple reasons. Missouri's Constitution provides special protections which, as in Alaska, "will not permit the state to deny reasonable compensation to an attorney who is appointed to assist the state in discharging its constitutional burden" of providing effective assistance of counsel for indigent defendants.[66] Uncompensated, involuntary appointment constitutes an unlawful damaging and taking of private property. Placing that burden on all private members of the bar would create the likelihood of recurring constitutional violations stemming from lack of preparation and lack of objectivity. Placing that burden solely on presently qualified attorneys would be an equally inappropriate damage and taking, which would discourage the practice of criminal law in Missouri, especially in smaller circuits.

[66] *DeLisio*, *supra* n. 16 at 438.

In *Pratte*, this Court acknowledged that private counsel have since the creation of the State of Missouri performed pro bono service: "Lawyers, as members of a public profession, accept the duty to perform public service without compensation."[67] Real pro bono representation—which attorneys render voluntarily, with knowledge of their abilities, their limitations, their caseloads, their attitudes, and their personal histories—offends no constitutional norms. Amicus MACDL's members perform at least their share of true pro bono representation.

In addition, MACDL ***awards*** attorneys for service for no fees or for the submarket fees, irregular payments, and after-the-fact denials of payment associated with federal court appointments. On April 15, 2011, it presented an appellate advocacy award to an attorney for his pro bono representation in *Smith v. Pace*.[68] For the past four years, and several times in the past, it has presented its highest honor—the Atticus Finch award—to attorneys who have performed federal court appointed service in capital cases. A previous Atticus Finch awardee won *State ex rel. Simmons v. Roper*[69] before this Court on behalf of the client a federal court had appointed her to represent; the appointing federal court denied her any

[67]298 S.W.3d at 889.

[68]313 S.W.3d 124 (Mo. banc 2010).

[69]112 S.W.3d 397 (Mo. banc 2003), *aff'd*, 543 U.S. 551(2005).

compensation whatsoever for the work that saved her client's life and changed the law throughout the entire country. One Atticus Finch awardee won the stay of execution that led to a reform of the state's lethal-injection practices, including the elimination of a dyslexic physician from the execution team and the discontinuation of the unnecessarily invasive and execution-prolonging "central line access" procedure;[70] for counsel's pains the appointing court reduced his compensation by over fifty percent. The original Atticus Finch awardees received some payment as well, but also death threats.

The discrete acts of all of these MACDL awardees are real; but the person for whom MACDL named the award is ideal—a character in a work of fiction. This Court cannot appoint Atticus Finch to handle every case the General Assembly isn't willing to pay for MSPDS or a properly-compensated and fully-reimbursed substitute to handle.

If the ideal of pro bono representation were to be hijacked as a pretext for taking and damaging attorneys' property and watering down the involuntary clients' right to the effective assistance of counsel, it would not only violate the affected constitutional rights in the near term: it would ***enable*** the General Assembly in refusing to fund MSPDS and to make serious cost-benefit decisions

[70] *Taylor v. Crawford*, 487 F.3d 1072, 1082-84 (8th Cir.), *cert. denied*, 553 U.S. 1004 (2008).

about how to employ the criminal sanction in a time of austerity. We must not forget that the reason Missouri, other states, and the federal government have all adopted indigent defense entities is that pro bono service proved inadequate to satisfy the constitutional right to the effective assistance of counsel.

This Court is not without recourse. The constructive, long-term solution is adequate funding for MSPDS coupled with a hard look at what ***should*** be crimes. In the present session, the General Assembly has declined to fund MSPDS adequately or to pass proposed legislation to abolish it. Past sessions have rejected bills to forbid the appropriation of funds to comply with court orders. In a Missouri appeal brought by the prosecutors' association, Judge Wolff has put his finger on it: "Just as in the recent public defender case, *State ex rel. Missouri Public Defender Comm'n v. Pratte* . . . , we should acknowledge that the state's interest in its criminal justice system exceeds its willingness to pay the costs."[71]

Ten other states have at least temporarily found another solution. The courts in those ten states have ruled that the court "has the power to compensate court-

[71] *Missouri Prosecuting Attorneys v. Barton County*, 311 S.W.3d 737, 748 (Mo. banc 2010) (concurring opinion).

appointed attorneys for indigent defendants, even though no statute or court rule provides for compensation."[72]

Or perhaps the solution lies in this Court's own forty-year old jurisprudence from *State v. Green*, where the Court simply announced that it would start dismissing cases if the legislature did not fix the problem within a year, which, naturally, the legislature did.[73] Additional courts have similarly announced that they would issue conditional writs of habeas corpus if the political branches did not provide sufficient resources for indigent defense entities in their jurisdictions.

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[72]*Knox County Council v. State ex rel. McCormick*, 217 Ind. 493, 29 N.E.2d 405 (1940); *State ex rel. White v. Hilgemann*, 218 Ind. 572, 34 N.E.2d 129 (1941); *State ex rel. Grecco v. Allen Circuit Court*, 238 Ind. 571, 153 N.E.2d 914 (1958); *McNabb v. Osmundson*, 315 N.W.2d 9 (Iowa 1982); *Ferguson v. Pottawattamie County*, 224 Iowa 516, 278 N.W. 223 (1938) (for indigent juveniles); *State v. Wigley*, 624 So. 2d 425 (La. 1993) (attorneys must be compensated for reasonable expenses and overhead costs); *Kovarik v. Banner County*, 192 Neb. 816, 224 N.W.2d 761 (1975); *State v. Horton*, 34 N.J. 518, 170 A.2d 1 (1961); *Honore v. Washington State Bd. of Prison Terms and Paroles*, 77 Wash. 2d 660, 466 P.2d 485 (1970) (counsel appointed on appeal from denial of writ of habeas corpus); *Carpenter v. Dane County*, 9 Wis. 274, 1859 WL 2840 (1859).

[73]*State v. Green*, 470 S.W.2d 571 (Mo. 1971).

Like this Court's suggestion that if the state does not wish to bear the cost of providing counsel for an indigent, it can forego the threat of imprisoning them, these decisions ultimately rely on the power of the courts to mitigate a punishment as the remedy for legislative failure to provide sufficient resources for appropriate representation for the indigent.

In *In re Order on Prosecution of Criminal Appeals*,[74] the Florida Supreme Court considered a case in which an intermediate appellate court had found that the state legislature had "woefully underfund[ed]" the indigent-defense entity responsible for briefing cases before it, and the intermediate appellate court had ordered the trial judges within its territorial jurisdiction to have the trial public defenders brief their own appeals instead of sending them to the appellate indigent-defense entity responsible for the appeals by applicable statutes and regulations. The state supreme court agreed on the existence of a problem, finding that for the underfunded, understaffed appellate office to prioritize appeals on the basis of the severity of the sentence placed the appellants' attorney in conflict of interest:

> When excessive caseload forces the public defender to choose between the rights of the various indigent criminal defendants he represents, a conflict of interest is

[74] *In re Order on Prosecution of Criminal Appeals,* 561 So.2d 1130 (Fla. 1990) (per curiam).

> inevitably created. As the court below stated, "The rights of defendants in criminal proceedings brought by the state cannot be subjected to the fate of choice no matter how rational that choice may be because of the circumstances of the situation."[75]

Although the Florida Supreme Court found that the remedy of shifting the briefing responsibility to the trial offices insupportable as a matter of Florida law, it chastised the legislature for creating the problem,[76] noted the authority of the intermediate appellate court to appoint counsel to pick up the slack from the appellate indigent-defense office with legislative appropriation of funds to pay the attorneys appointed,[77] and warned that if the legislature had not appropriated the funds to pay appointed counsel within sixty days, the state courts would commence releasing "otherwise bondable" appellants under writs of habeas corpus and considering mandamus petitions to appoint counsel for nonbondable appellants with briefs sixty days overdue.[78]

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[75] *Id.* at 1135.

[76] *E.g., id.* at 1132.

[77] *Id.* at 1133-38.

[78] *Id.* at 1139 & n.11.

In *United States ex rel. Green v. Washington*,[79] an adjacent federal court dealt with a similar situation in which a state had created an indigent-defense entity but had committed more cases to it than it was willing to pay for attorneys to handle. *Green* was a court-certified representative habeas-corpus action on behalf of a class of petitioners whose state criminal appeals were backlogged in an appellate indigent-defense entity.[80] After a hearing and briefing, the court found that the state legislature had actually cut the funding for the entity as the number of cases assigned to it were increasing.[81] On the basis of empirical evidence and expert testimony, the court found that

> the delays in the processing and hence the disposition of the [affected state intermediate appellate court]'s criminal appeals caused by underfunding and consequent understaffing in [the Office of the State Appellate Defender]'s First District are excessive and inordinate, and those delays will increase substantially unless prompt action is taken to reverse the trend that has existed for the

[79] *United States ex rel. Green v. Washington*, 917 F.Supp. 1238 (N.D. Ill. 1996).

[80] *Id.* at 1240-41.

[81] *Id.* at 1242-47.

past several years.[82]

The court rejected the indigent-defense entity's proposals for methods of deciding which cases would be handled and which would not, holding that prioritizing cases with short terms of imprisonment or with issues the attorneys believed to have the best chance of winning illustrate impermissible conflicts of interest:[83] "conflicts of interest are necessarily created as a surfeit of clients compete for the scarce resources of available attorney time and attention."[84]

The *Green* court held that "[p]etitioners have established a clear violation of their constitutional rights and are entitled to an appropriate remedy for that violation."[85] It identified the state legislature as the main cause of the constitutional violations, by its "continued underfunding" of the indigent-defense entity that was under consideration in the case.[86] In light of the applicable state appellate court's failure to respond to its cautious invitation that the state court use its statutory and "inherent" powers to appoint counsel to address the backlog without sacrificing the effectiveness of counsel's representation, it issued an order

[82] *Id.* at 1250-61.

[83] *Id.* at 1253, 1263, 1280.

[84] *Id.* at 1275.

[85] *Id.* at 1278.

[86] *Id.* at 1287.

that the respondent provide it information on the basis of which it could issue conditional writs of habeas corpus for the petitioners who were being denied appeals.[87] It pointed out that this remedy was consistent and in fact normal for the writ structure in which the case arose, and typical of the remedies other courts had imposed when faced with the same problem.[88]

In *People v. Jones*,[89] a man was convicted in two drug cases based on evidence seized as the result of a traffic stop (for alleged failure to stop at a stop sign at an intersection). He informed his contract public defender that two witnesses saw him come to a full stop, gave the attorney their names and numbers, and produced them himself at the suppression hearing. He told the attorney that the intersection was irregularly configured, and the narcotics officer who stopped him could not have seen whether he had come to a stop at the intersection from where the officer said he was. The attorney did not contact, interview, or call the witnesses who saw the stop—even though they were present for the suppression

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[87] *Id.* at 1282.

[88] *Id.*, citing *Harris v. Champion*, 48 F.3d 1127, 1132 (10th Cir. 1995); *Coe v. Thurman*, 922 F.2d 528, 532 (9th Cir. 1990); *Cameron v. LeFevre*, 887 F.Supp. 425, 434-35 (E.D.N.Y. 1995); *Jackson v. Duckworth*, 844 F.Supp. 460, 465 (N.D. Ind. 1994).

[89] 186 Cal. App. 4th 216, 111 Cal. Rptr. 3d 745 (1st Dist. 2010).

hearing. He did not attempt to demonstrate that the police officer could not have seen the intersection from where he was at the time of the alleged traffic violation. The attorney did not seek what was an established remedy in the state to ascertain whether "there were other complaints about this officer fabricating evidence and not telling the truth."[90] The attorney sought to excuse his failures by saying there was only one investigator for twelve contract public defenders, and the investigator had to prioritize cases in favor of murder and other violent-offense cases.

The state court of appeals reversed a trial judge's finding of no ineffective assistance of counsel. It held that the attorney should have filed a motion for leave to withdraw based on the unavailability of investigative services, and should have appealed any denial of the motion, in order to put the Board of Supervisors—the state entity responsible for funding indigent defense in the venue of the case—to the choice of hiring private investigators (and paying to house and feed the defendant as a result of the continuance necessary to do so) or providing adequate funding for investigators for its public defenders in the first place.[91]

It found deficient performance; it found that the conflict (resulting from the state's unwillingness to fund the investigation) removed the need for a finding of

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[90] 186 Cal. App. 4th at 230 & n.7, 111 Cal. Rptr. 3d at 755 & n.7.

[91] 186 Cal. App. 4th at 242-43, 111 Cal. Rptr. 3d at 765, quoting *Ligda v. Superior Court*, 5 Cal. App. 3d 811, 828, 85 Cal. Rptr. 744, 754 (1st Dist. 1970).

prejudice; and it found that the prejudice existed in any event.[92] It said that fiscal concerns could create a cognizable conflict of interest, not in the traditional sense, but no less real; it concluded that the entity responsible for indigent defense could not subject indigents to substandard representation by denial of investigative services any more than by overloading attorneys: "The danger of such a conflict, which bears on the integrity of the judicial system itself, cannot be brushed aside."[93] It noted the threat of class action litigation looming in "a growing number of states" from their unwillingness to pay for indigent representation.[94]

It vacated the accused citizen's sentence directly arising from the "stop sign" stop and remanded the cause for a new suppression hearing, and for possible resentencing in the other case as well.[95]

Although there are so many accused citizens like Jared Blacksher until he pleaded guilty who are in the maws of the present, failing, system who are unlikely to be helped by it, there is an added element besides constitutional funding for MSPDS and voluntary indigent defense counsel. In his annual State of the

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[92]186 Cal. App. 4th at 241-44 & n.12, 111 Cal. Rptr. 3d at 765-67 & n.12.

[93]186 Cal. App. 4th at 241-42, 111 Cal. Rptr. 3d at 764-65.

[94]186 Cal. App. 4th at 240-41 & nn.9-10, 111 Cal. Rptr. 3d at 763-64 & nn.9-10.

[95]186 Cal. App. 4th at 245, 111 Cal. Rptr. 3d at 767.

Judiciary address to the General Assembly last spring, Chief Justice William Ray Price, Jr., urged the decriminalization of nonviolent offenses:[96]

> There is a better way. We need to move from anger-based sentencing that ignores cost and effectiveness to evidence-based sentencing that focuses on results—sentencing that assesses each offender's risk and then fits that offender with the cheapest and most effective rehabilitation that he or she needs. We know how to do this. States across the nation are moving in this direction because they cannot afford such a great waste of resources. Missouri must move in this direction, too.[97]

Only when the General Assembly has to confront the consequences of its actions by paying the bills it is running up under the Sixth Amendment and Mo. Const. art. I, § 18(a) is it likely to respond seriously to the Chief Justice's admonition. As long as everyone understands that calling up Central Casting for another Atticus Finch every time a public defender's office gets overworked is a false option, this case holds the potential for requiring the General Assembly to meet its obligations.

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[96] William Ray Price, Jr., *2010 State of the Judiciary Address* transcription available online at *http://www.courts.mo.gov/page.jsp?id=36875* (last visited May 8, 2011).

[97] *Id* at ¶ 37.

## Conclusion

WHEREFORE, for the reasons and on the authorities cited in this brief, the amicus prays the Court that the writ of prohibition be made absolute, and that in addition its order not direct or permit the uncompensated, coerced appointment of private counsel to represent indigents accused of crime.

Respectfully submitted,

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## Certificate of Compliance

The undersigned certifies that a copy of the computer diskette containing the full text of Brief of Amicus Curiae Missouri Association of Criminal Defense Lawyers in support of Relators Missouri Public Defender Commission, J. Marty Robinson and Rod Hackathorn is attached to this Brief and has been scanned for viruses and is virus-free.

Pursuant to Rule 84.06(c), the undersigned hereby certifies that: (1) this Brief includes the information required by Rule 55.03; (2) this Brief complies with the limitations contained in Rule 84.06(b); and (3) this Brief contains 13,291 words, as calculated by the Microsoft Word 2007 used to prepare this brief.

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