FEATURES

Starved of money for too long, public defender offices are suing—and starting to win

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Derwyn Bunton. Photograph by Kathy Anderson.

In November 2015, word spread through New Orleans' Lower 9th Ward that people were DJing and shooting a music video at the neighborhood's Bunny Friend Park. Soon, several hundred people were packed into the one-square-block park, held in by a chain-link fence.

But when two groups started to fire guns at each other through the crowd, the merriment turned to chaos. Witnesses said people ran from one side of the park to the other, toppling part of the fence as they scrambled to get away. No one died, but 17 people were injured, including a 10-year-old boy. The city was outraged. Within a week, the New Orleans police had arrested their first suspect, 32-year-old Joseph "Moe" Allen, based on eyewitness identification.

Allen was charged with 17 counts of attempted first-degree murder—but his family insisted that he'd been in Houston at the time,

shopping for baby clothes with his pregnant wife. They hired a private defense attorney, who was able to track down security camera footage to prove it. The day prosecutors dropped the charges, Allen's family and defense lawyer Kevin Boshea celebrated with a press conference on the courthouse steps.

Watching this in the news, Orleans Parish Chief District Defender Derwyn Bunton was happy to see the exoneration—and the good work from a fellow defense lawyer—but also concerned about what it might mean for his office.

Sidebar: When Public Defenders Become Plaintiffs

(http://www.abajournal.com/magazine/article/when_public_defenders_become_plaintiffs)

After years of cuts, his budget was down from $9 million to about $6 million, and he had just eight investigators for 21,000 cases per year. If Allen had been represented by a public defender, Bunton was sure an investigator would have sought out the security footage—but those videos typically are erased and overwritten within a few weeks. With such high caseloads, the PD investigator likely might not have gotten there in time, and Allen could have wrongly gone to prison.

"So I said, 'We will not be complicit in that kind of injustice,' " Bunton says. "And we began to refuse cases at limits and at points where we could not ethically, constitutionally or within standards handle those cases."

That meant putting certain serious cases on a waiting list—trying to find alternative counsel or asking defendants to wait until a public defender was free. Just days later, the American Civil Liberties Union and the ACLU of Louisiana sued, arguing that this violates defendants' Sixth Amendment right to counsel and 14th Amendment right to due process and equal protection of the laws. Although the official defendants are Bunton and Louisiana State Public Defender James T. Dixon Jr., the complaint places the blame squarely on the Louisiana government.

That lawsuit might be the most high-profile indigent defense case of 2016. But it has competition. Indigent defense advocates are increasingly suing regarding inadequate funding for public defenders. Although past efforts have yielded decidedly mixed results, the latest round has seen some victories.

"There's always been an enormous amount of litigation about public defense," says Norman Lefstein, a professor at Indiana University's Robert H. McKinney School of Law in Indianapolis and author of *Securing Reasonable Caseloads: Ethics and Law in Public Defense*, published by the ABA in 2011.

At least five lawsuits have reached successful decisions or settlements over the past five years—with a powerful ally in the Department of Justice. More are coming. In 2016, at least six states were sued—two in state supreme courts—regarding funding of indigent defense.

A *CRONIC* ISSUE

More than 50 years ago, the U.S. Supreme Court ruled in *Gideon v. Wainwright* that the Sixth Amendment requires appointed counsel for people who can't afford an attorney on their own and face felony charges. In *Argersinger v. Hamlin in* 1972, the court extended that right to counsel to those charged with any crime punishable with imprisonment.

But the justices left it up to the states to determine how—and how much—to pay for indigent defense.

"The *Gideon* decision was a huge unfunded mandate," says Lefstein, a special adviser to the ABA's Standing Committee on Legal Aid and Indigent Defendants and a past chair of the Criminal Justice Section. "Supreme Court decisions don't come with a legislative appropriation."

Because not much political upside to helping criminal defendants exists, many jurisdictions end up with a perennial funding problem. In 1983 and 2003, the ABA's standing committee marked the 20th and 40th anniversaries of *Gideon* with hearings on indigent defense funding. In both cases, the committee heard about extreme funding shortfalls, excessive caseloads and insufficient pay. Four years later, in 2007, the Bureau of Justice Statistics found that only about a quarter of county-based public defender offices reported having enough attorneys to handle their caseloads.

This has real consequences for defendants. Numerous studies that stretch from the 1980s to recent years show that public defenders meet with clients less quickly, file fewer motions, plea-bargain more often, and get charges dismissed less often than private attorneys do.

That's reflected in the complaints for many of the recent indigent defense funding lawsuits. In *Tucker v. Idaho*, the ACLU of Idaho says plaintiff Tracy Tucker was jailed for three months pending trial, partly because his public defender was not present when it was time to argue for a reduction in bail.

From jail, he tried unsuccessfully to call his public defender 50 times. Two of the three meetings he did get with the attorney were in courtroom hallways with no privacy. Tucker's attorney hadn't conducted any meaningful investigation into the case 10 days before trial on a felony domestic violence charge, the complaint reads.

This matters because the majority of defendants—a 2014 study put it at 80 percent—use some kind of indigent defense. That means most Americans charged with a crime are at risk of bad outcomes partly caused by the quality of representation that they can afford.

But in the past few years, several developments have encouraged hope among indigent defense advocates. Chief among those developments, advocates say, is the increasing involvement of the DOJ. Since 2013, the department has filed at least five statements of interest and at least two amicus briefs in lawsuits that argued that local public defender funding is inadequate.

"That's a big difference, [when] the nation's top law enforcement agency says that the people suing the states are on the right side of history," says David Carroll, executive director of the Sixth Amendment Center in Boston.

In addition, Carroll says, people who challenge indigent defense funding have started to rely on a 1984 Supreme Court decision, *U.S. v. Cronic*, which dealt with ineffective assistance of counsel. When legal observers think of ineffective assistance of counsel, he says, they most often think of *Strickland v. Washington*, the 1984 case that established standards for when attorneys have been so ineffective that their client's Sixth Amendment right to counsel has been violated. But *Strickland* deals with single defendants who bring post-conviction motions over completed trials. That makes it a poor tool for challenges to entire indigent defense systems and a favorite tool of defendants in those challenges.

But these days, Carroll says, plaintiffs increasingly look to *Cronic*. Decided on the same day as *Strickland, Cronic* lays out tests for when circumstances are so bad that courts may presume there will be ineffective assistance of counsel in the future.

The court said you can presume ineffectiveness if there were no counsel at all at a critical stage of the trial, or if there were a complete "breakdown in the adversarial process that would justify a pre-sumption" of an unreliable conviction. The court referred to the situation in *Powell v. Alabama*, in which an out-of-state lawyer had less than a week to prepare for a death penalty trial, as an example of such a time. Then the court gave counterexamples of situations in which limited time did not create a presumption of ineffective assistance. The language is so unclear that it means whatever the trial judge wants it to mean.

Although the case is more than 30 years old, Carroll says it might not have been on attorneys' radars because the criminal defendant in *Cronic* lost his ineffective assistance claim. But in 2010, the DOJ filed a statement of interest in *Hurrell-Harring v. State of New York*, a systemic challenge to indigent defense as it was then

practiced in much of New York. In that statement, Carroll says, the

Novella Coleman. Photograph by Jayms Ramirez.

department explained the tests created by *Cronic's* line of cases: Courts may consider "structural limitations" to representation, such as underfunding of an indigent defense office, and absence of the "traditional markers of representation," such as meaningful attorney-client contact.

"The focus on *Cronic* is opening up a lot of different possibilities because courts are deciding—rightfully in my mind—that the types of systemic deficiencies we see around the country are *Cronic* violations," Carroll says. "And it really is, I think, largely due to the Department of Justice clarifying what *Cronic* means."

Perhaps because of that, observers say a few lawsuits are starting to see success in the courts. One of the most important such cases is *Hurrell-Harring*, arguably a direct predecessor to many of the currently pending crop of lawsuits. (Two other cases, from the Florida and Missouri supreme courts, were important but legally divergent; see sidebar, "When Public Defenders Become Plaintiffs (http://www.abajournal.com/magazine/when_public_defenders_become_plaintiffs)."")

In *Hurrell-Harring*, the New York Civil Liberties Union sued on behalf of 20 indigent defendants, arguing that the state's failure to adequately fund or oversee their local indigent defense offices violated their Sixth Amendment rights by leaving them with extremely poor representation. For example, the attorney for lead plaintiff Kimberly Hurrell-Harring advised her to plead guilty to a felony that could have been a misdemeanor. The attorney later was disbarred for falsifying documents when he couldn't keep up with his workload.

The New York Court of Appeals, the state's highest court, ruled in 2010 that the plaintiffs could sue regarding systematic problems that amounted to constructive denial of counsel. It expressly cited *Cronic* and rejected the defendants' argument that plaintiffs should bring individual *Strickland* claims after conviction.

Hurrell-Harring settled on the eve of trial in 2014, with an agreement that the state would, among other things, fully fund and staff indigent defense in the five defendant counties. In summer 2016, the state of New York passed a law that extended that decision to every county, requiring full funding from the state by 2023. According to Robert Perry, legislative director for the NYCLU, current indigent defense costs in New York total $460 million to $480 million, suggesting that the state would pay that much if it assumed full responsibility for indigent defense spending. Gov. Andrew Cuomo has yet to sign this.

"We think it's of historic significance," Perry says. "This bill essentially takes the framework of the settlement in *Hurrell-Harring* and treats it something as a template for statewide reform of public defense services."

Similar lawsuits are now popping up around the country. In addition to the New Orleans litigation, indigent defense lawsuits are pending in the Idaho Supreme Court; Fresno, California; Luzerne County, Pennsylvania; and the state of Utah.

In fact, Utah has a state lawsuit filed by the ACLU of Utah and a federal lawsuit from private attorney Mike Studebaker. Typically, these cases cite the Sixth and 14th Amendments, state constitutions and sometimes statutory rights. "Eventually, my hope is that we will get one of these cases before the United States Supreme Court," Lefstein says.

BLUE STATE BLUES

Carroll describes Louisiana as ground zero of recent public defender litigation. But many of Louisiana's problems can be traced to the state's unusual funding structure, which combines state money with local funding generated by fines and fees. Most indigent defense funding, although it might be insufficient, is directly appropriated from local or state government budgets and therefore more stable.

Perhaps a more typically funded office is in Fresno County, California. With half a million people in the city and about a million in the county, Fresno might be the biggest city you've never heard of. Though it's overshadowed by the twin behemoths of Los Angeles and the San Francisco Bay Area, it's the largest city in California's San Joaquin Valley and also is an agricultural center.

The county has a 27.5 percent poverty rate, which is about double the national rate of 13.5 percent as of 2015 statistics. And that sets its indigent defense system up for trouble, according to the complaint in *Phillips v. California*, filed in July 2015 by the ACLU of Northern California. The large population means high demand for public defenders, but the tax base in the county is less able to shoulder the cost. And the state of California provides little financial help and no oversight, according to the lawsuit.

As a result, the lawsuit claims, indigent defense in Fresno has been underfunded since at least the 2008 recession. By 2012, the Fresno County Public Defender's Office lost more than half its staff to budget cuts. In fiscal year 2013-2014, the ACLU estimated that Fresno County public defenders were handling 40 to 80 hearings per day on court days, with caseloads of 418 felonies or 1,375 misdemeanors per year.

Those are staggeringly high caseloads, even for an indigent defense lawsuit. In the Idaho case *Tucker*, the complaint says Kootenai County public defenders handled about 300 to 400 cases of mixed type, which included felonies, misdemeanors and juvenile cases, in 2014. The ACLU of Utah alleges in *Remick v. Utah* that felony caseloads in the state can be as high as 250 to 300 per year. Another Utah case, *Cox v. Utah*, alleges that two public defenders in Washington County handled 350 felonies each in fiscal year 2015. And standards developed by the federal government in the 1970s—more on those later—suggest a maximum of 150 felonies or 400 misdemeanors per year.

But back in California, Fresno County's problems go beyond caseloads, the *Phillips* lawsuit says. The attorney's office has extremely high turnover—almost the entire legal staff was replaced between 2010 and 2014. Because attorneys who leave tend to be higher ranking, the remaining attorneys skew toward the less experienced. That means they routinely handle cases more serious than their job specifications say they should handle. That's exacerbated by a lack of time or budget for training, the complaint says.

These problems extend to support staff, as well. Cuts to administrative staff and investigators in Fresno County have gone so deep, according to *Phillips*, that public defenders are expected to perform many administrative tasks themselves. That adds to their burden, and in the case of investigative work, this sets up a potential conflict for attorneys who could be called as witnesses in their own cases. And with just 10 investigators for more than 42,000 cases in 2013-2014, Fresno's indigent defendants are at risk of losing crucial evidence.

Just ask Bunton, the lead Orleans public defender. “Oh, my God. Any good defense attorney will tell you if you have a choice as a client of a really good investigator or a really good lawyer, get the really good investigator,” he says. “That is where cases are made, is where they’re won and lost.”

Fresno County’s many problems constructively deny any meaningful representation to defendants, the ACLU of Northern California says. As in New Orleans, the ACLU places the blame not on the public defender’s office but on the county and state governments, which it says have abdicated their responsibilities under *Gideon*.

The case already has survived a demurrer (a California filing that argues failure to state a claim), although a Fresno County Superior Court judge dismissed the ACLU of Northern California’s petition for a writ of mandate. Among other things, the court rejected arguments that plaintiffs must bring individual *Strickland* motions.

More importantly, the demurrer ruling preserved the state of California as a defendant, says Novella Coleman, a staff attorney for the ACLU of Northern California. That means California can be accountable even though it has delegated indigent defense responsibilities to its counties.

While Coleman’s team is focused on Fresno’s problems, a victory against the state could open the door to challenges elsewhere in California. Carroll of the Sixth Amendment Center says it’s important to draw attention to those problems in a very “blue” state. “A lot of people think California is doing this right,” he says. “Too many people think this is a Southern problem.”

CONSULTING THE ORACLE

In many ways, the debate about public defender funding is a debate about caseloads: How many cases can attorneys take before they can’t possibly be effective? And glaringly absent from that debate are references to recent, well-respected national standards.

Stephen Hanlon, a former chair of the Indigent Defense Advisory Group of the ABA Standing Committee on Legal Aid and Indigent Defendants, saw that personally when he represented Missouri State Public Defender Cat Kelly.

The case, *Missouri Public Defender Commission v. Waters in 2012*, was a showdown between Kelly, who had stopped taking new cases in certain parts of the state, and trial judges who thought they had no choice under the Sixth Amendment but to appoint public defenders.

Michael Barrett. Photograph by Travis Duncan.

Kelly's office ultimately won that fight (see sidebar (http://www.abajournal.com/magazine/when_public_defenders_become_plaintiffs)). But the case got Hanlon, who spent 23 years as partner in charge of pro bono at Holland & Knight, thinking about standards. Although many think the ABA maintains numeric standards, it's not true. The ABA's *Ten Principles of a Public Defense Delivery System* includes statements such as: "Defense counsel's workload is controlled to permit the rendering of quality representation."

State laws and local standards exist, but only national, numeric caseload standards for public defen-ders were developed in 1973 by the National Advisory Commission on Criminal Justice Standards and Goals, a project organized by the DOJ. The national advisory commission's standards called for 150 felonies or 400 misdemeanors per year—numbers that many think are now too high, thanks to advances in forensic science, Supreme Court jurisprudence and more.

Lefstein would go further. "Nobody should give them the time of day because they not only are more than 40 years old, but they never had any basis in any form of data-gathering or empirical study," he says. "They were basically drawn up by a small group of public defenders who said, 'Well, probably the caseloads should not be any more than that.' "

Hanlon, now general counsel for the National Association for Public Defense, thought there was a better way. In *Securing Reasonable Caseloads*, Lefstein proposes that public defense organizations study their caseloads using Delphi methods, in which an expert panel determines what lawyers should be doing and how much time it should take, using a series of online questions followed by an in-person meeting. Hanlon wanted to try it, and he wanted to combine it with tracking public defenders' time—as private law firms do—to generate reliable data on what they actually do.

Hanlon says Kelly "about fell off the table" when he suggested that her office would start tracking attorneys' time permanently. That would be a radical cultural shift for public defenders, Hanlon says, but necessary to demonstrate that defenders' time really is strained by high caseloads. Hanlon got Kelly's blessing, then began to look for a Missouri accounting firm to perform the Delphi arm of the study. Despite a considerable funding shortfall—he had a grant from the ABA standing committee for about a fourth of what he thought the study would cost—he enlisted accounting firm RubinBrown in St. Louis to complete the work at a considerable discount.

The 2014 study, *The Missouri Project: A Study of the Missouri Defender System and Attorney Workload Standards*, disrupted the usual patterns of Missouri indigent defense funding. It gave the commission hard data to back up funding requests that had been ignored for a decade. For example, it found that the average time public defenders actually spent on a noncapital murder case was 84.5 hours; experts estimated that it should take 106.6 hours.

The data was a "game-changer," Hanlon says, in the Missouri State Public Defender Commission's relationship with the state legislature, which hadn't increased indigent defense funding in years.

"Up until that time, we in the public defender system were using an old standard, an old caseload-capacity standard that was not tied to data or evidence. And so it was not convincing the legislature," says Michael Barrett, Kelly's successor as Missouri state public defender. "Now, armed with this Missouri project, it was compelling to the legislature."

The first year the legislature saw that data, Barrett says, it voted to increase his office's budget by $3.5 million. This was specifically targeted at conflicts of interest, which the state had been handling by bringing in lawyers from neighboring offices. With the Missouri project, the office was able to show how financially inefficient it was to pay attorneys to drive long distances, making the case to hire local private attorneys instead. The result was the largest increase in appropriations for the Missouri State Public Defender Commission in 15 years.

But it didn't stick; Missouri Democratic Gov. Jay Nixon vetoed the budget increase. When the legislature overrode that veto, Nixon simply didn't release the money, which state law permits when revenues don't match projections. (Nixon's office notes that he eventually released $500,000, and that the indigent defense budget has risen 9 percent over the past seven years.) The next year, Barrett says, Nixon actually cut the indigent defense budget by $3.47 million, the same amount as the increase the legislature approved.

In 2016, the legislature again voted to increase indigent defense funding, this time by $4.5 million. Nixon released only $1 million. In July, Barrett's office sued Nixon in state court, alleging he exceeded his authority because public defenders are part of the judicial branch. In August, Barrett appointed Nixon to represent an indigent defendant, a power given to Barrett by Missouri law.

"Shame on him. It's outrageous," Hanlon says. "He's a lawyer. He knows that that system is systemically unconstitutional and unethical."

But Nixon is termed out. Even if all the funds had been released, they would largely fund conflict counsel—not all the new attorneys and investigators Missouri needs. But the project still helps Barrett argue for more resources, he says.

"We can demonstrate that there is no waste, that our attorneys are working as hard as they can on these cases," he says. "And that bodes well for us."

Hanlon adds that it also permits indigent defense leaders, such as Barrett, to manage their own offices more efficiently. And if litigation is necessary, he says, the data will be there.

Notwithstanding the lackluster start in Missouri, Hanlon has become an evangelist for this type of workload study as well as the ABA's project director for multiple studies in other states. In late 2016, he expected to publish statewide time-tracking and Delphi studies of indigent defense systems in Colorado, Louisiana, Rhode Island and Tennessee. He's also completed a study in Texas without ABA involvement and was in talks with at least four more states.

"We have finally gotten our hands around a viable way of convincing legislatures, with reliable data and analytics, that additional funding is needed," he says.

'A HORRIBLE LEGACY'

After Bunton's office in New Orleans stopped taking cases in January 2015, his attorneys got some pushback. "Some of the judges threatened us with contempt: 'Take these cases, or I'm going to put you in jail,' " Bunton says. "They basically ignored ethics."

As the financial crisis in Louisiana indigent defense has spread—14 of the state's 42 public defender offices had service restrictions—more of that has been going on. Judges have ordered private attorneys to take cases for very low pay, leading to litigation from the attorneys. In Lafayette, a judge advertised for volunteer public defenders, Bunton says, expressly saying "no experience necessary."

“When you see folks saying, ‘Come take a criminal case; no experience required,’ ‘Here, you’d better take this case, or I’m going to put you in jail,’ ... it seems to suggest that there are [people] in power who don’t believe poor people’s justice is worth much,” Bunton says.

Hanlon thinks that could come to an end soon, if data like the Missouri project’s gets traction with more state legislatures. Public defender offices now can generate reliable data that shows they are too overworked to provide effective assistance of counsel, he says.

Under the ABA Model Rules of Professional Conduct—which have been adopted by every state but California—public defenders have a responsibility as attorneys to turn down workloads that they can’t constitutionally, ethically and within standards handle.

“We’ve basically gone about the process of establishing systemic and ongoing violation of the Rules of Professional Conduct,” Hanlon says. “I’ve been practicing law 50 years now, and this is probably the legacy of my generation to the next generation of lawyers, unless we can turn it around now. And it’s a horrible legacy. We’ve all known about this.”

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