

75 Mo. L. Rev. 751

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Boots on the Ground: The Ethical and Professional Battles of Public Defenders  
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## STATE CONSTITUTIONAL CHALLENGES TO INDIGENT DEFENSE SYSTEMS

### I. Introduction

For many years, the primary vehicle that advocates used to protect the fundamental right of the accused to the effective assistance of counsel was the Sixth Amendment to the United States Constitution, as incorporated to the states by the Fourteenth Amendment. For some time, most obviously during the Warren Court years, this federal strategy proved fruitful; indeed, it resulted in a series of landmark decisions by the United States Supreme Court that impact indigent defense systems to this day. A subsequent sea change in the Court's jurisprudence, however, which placed great emphasis on federalism, particularly the doctrines of justiciability and abstention (or constitutional avoidance), made it increasingly difficult for litigants to secure basic constitutional protections.

Justice William J. Brennan, Jr., who foresaw the turning tide, advised civil rights advocates to consider an alternative strategy: using state constitutional guarantees as the means to provide greater protections to citizens. This Article picks up where Justice Brennan left off, identifying some of the barriers presented by the new federalism, specifically in the context of indigent defense systems, and outlining how some states have managed to successfully circumvent these barriers in order to secure constitutional protections for their citizens - protections more expansive than the basic guarantees in analogous provisions of the federal Bill of Rights.

### II. Justice Brennan's Modest Proposal

In 1977, Justice Brennan published an article in the Harvard Law Review that was as powerful as it was brief. In it, he considered the role that state constitutions play in the protection of individual rights.<sup>1</sup> Justice Brennan explained that during the Warren Court years, as federal protection of individual rights was expanded, neither litigants nor judges were compelled to base their claims or decisions on state constitutional grounds.<sup>2</sup> Justice \*752 Brennan argued, however, that given subsequent trends in the Court's jurisprudence, civil rights advocates should not rest on their laurels. Instead, he advised them to lessen their reliance on federal constitutional interpretation and look to state constitutional law.<sup>3</sup> Justice Brennan was especially concerned with the post-Warren Court trend of retreating from prior interpretations of the federal Bill of Rights, as well as the Due Process and Equal Protection Clauses of the Fourteenth Amendment. This retreat occurred in a series of

STATE CONSTITUTIONAL CHALLENGES TO INDIGENT..., 75 Mo. L. Rev. 751

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decisions involving the doctrines of jurisdiction, justiciability, and remedy, which operated to bar the federal courthouse door to litigants “in the absence of showings probably impossible to make.”<sup>4</sup> Justice Brennan especially lamented *Younger v. Harris*<sup>5</sup> and its resulting doctrine, which he envisaged would have a particularly adverse effect on “litigants most in need of judicial protection of their rights - the poor, the underprivileged, the deprived minorities.”<sup>6</sup>

Justice Brennan devised a strategy premised on the belief that state constitutions could provide more expansive protections than those available under analogous provisions of the Bill of Rights.<sup>7</sup> Because principles of federalism shield independent and adequate decisions by state courts from federal court review, advocates could achieve greater relief in state court - and secure it - even in the face of the Court’s shifting jurisprudence on identical issues.<sup>8</sup>

Describing state constitutions as “a font of individual liberties, their protections often extending beyond those required by the Supreme Court’s interpretation \*753 of federal law,”<sup>9</sup> Justice Brennan examined the United States Supreme Court’s remarkable series of decisions from 1962 to 1969. These decisions expanded the guarantees of the Bill of Rights with respect to equal protection and due process, and in particular, guarantees binding upon the states and limiting state action.<sup>10</sup> In Justice Brennan’s view, the Court’s decisions reflected “the enforcement of the Boyd principle with respect to application of the federal Bill of Rights and the restraints of the [D]ue [P]rocess and [E]qual [P]rotection [C]lauses of the [F]ourteenth [A]mendment.”<sup>11</sup> Concluding his analysis of the jurisprudential thread in these decisions, Justice Brennan articulated a theory that would drive constitutional debate for the next several decades:

[T]he genius of our Constitution resides not in any static meaning that it had in a world that is dead and gone, but in the adaptability of its great principles to cope with the problems of a developing America. A principle to be vital must be of wider application than the mischief that gave it birth.<sup>12</sup>

This principle would impact not only federal constitutional debate but also drive state constitutional interpretation. What Justice Brennan detected was an emerging trend among state courts to construe state constitutional provisions in a manner that would guarantee state citizens even greater protections than they would have under identically phrased federal provisions. Several then-recent rulings of the supreme courts of California, New Jersey, Hawaii, Michigan, South Dakota, and Maine, rejecting decisions of the United States Supreme Court as unpersuasive in interpreting corresponding provisions in the various state constitutions, served to illustrate Justice Brennan’s point.<sup>13</sup>

\*754 According to Justice Brennan, these decisions underscored the tremendous power that state courts have to ensure that avenues remain open for litigants to redress violations of their civil rights and liberties.<sup>14</sup> Most importantly, state courts grounding their decisions in state law need not apply federal justiciability principles of standing, mootness, or ripeness, principles consistently employed to deny litigants access to the federal courts. Such state court decisions cannot be overturned by, and will not even be reviewed by, the United States Supreme Court, which is utterly without jurisdiction to review state decisions resting on independent and adequate state law grounds.<sup>15</sup>

### III. Justice Brennan’s Concerns Materialize in the Context of Indigent Defense Funding

In 1986, a plaintiff class comprised of indigent defendants and their attorneys brought a lawsuit challenging the constitutionality of Georgia’s criminal defense system.<sup>16</sup> The certified class consisted of all indigent persons charged, or who would be charged in the future, with criminal offenses in Georgia state courts, as well as all attorneys who represented, or would represent, such indigent defendants in Georgia courts.<sup>17</sup> The plaintiffs claimed “that systemic deficiencies including inadequate resources, delays in the appointment of counsel, pressure on attorneys to hurry their clients’ cases to trial or to enter a guilty plea, and inadequate supervision in the Georgia indigent defense system,” all operated “to deny indigent criminal defendants their [S]ixth [A]mendment right to counsel, their due process rights under the [F]ourteenth [A]mendment, their right to bail under the [E]ighth and [F]ourteenth [A]mendments, and [their right to] equal protection of the laws guaranteed by the [F]ourteenth [A]mendment.”<sup>18</sup> Plaintiffs sought an order \*755 enjoining the governor and all Georgia judges responsible for providing assistance of counsel to indigents criminally accused in the Georgia courts to “meet minimum [federal] constitutional standards in the provision of indigent criminal defense services.”<sup>19</sup>

Siding with the state defendants, the district court dismissed the complaint, finding that the plaintiffs failed to satisfy their burden of proving deficiency and prejudice consistent with the constitutional minima set forth in *Strickland v. Washington*.<sup>20</sup> On appeal, the United States Court of Appeals for the Eleventh Circuit reversed, holding that as to the prospective protection of the Sixth Amendment right to counsel, as opposed to retroactive efforts to vacate final convictions or sentences, the *Strickland* performance-and-prejudice inquiry is inapposite.<sup>21</sup>

Rather than requiring a showing that ineffective assistance of counsel would be inevitable for each member of the class under the *Strickland* test, the Eleventh Circuit held that in this type of civil action seeking prospective injunctive relief, “the plaintiffs’ burden is to show ‘the likelihood of substantial and immediate irreparable injury, and the inadequacy of remedies at law.’”<sup>22</sup> Applying this standard, the Eleventh Circuit held that the plaintiffs’ allegations of deficiencies were sufficient to state a claim for prospective injunctive relief.<sup>23</sup>

The Eleventh Circuit’s decision was a tremendous victory and brought the class one step closer to securing landmark reform in the Georgia criminal justice system. Yet, just when it appeared that litigants would secure another victory in the protection of civil rights in federal court, Justice Brennan’s 1977 concerns about the evolution of the abstention, or avoidance, doctrine in federal courts began to materialize. On remand following denial of certiorari to the United States Supreme Court, the district court once again dismissed the complaint, this time on the grounds that *Younger* abstention was appropriate.<sup>24</sup> The Eleventh Circuit affirmed the district court’s decision on appeal.<sup>25</sup> The *Younger* abstention doctrine not only undid the Luckey plaintiffs’ 1988 victory but also went on to plague every attempt in subsequent decades to \*756 address the nation’s growing problem with grossly underfunded state indigent defense systems in the federal judicial system. Overcoming *Younger* abstention would prove to be a daunting task.<sup>26</sup>

#### IV. State Court Indigent Defense Litigation

##### A. The Florida Model

The Florida Supreme Court has a long and distinguished history of dealing with the persistent problem of chronic legislative underfunding of its indigent defense system. That court has employed several important doctrines to address this problem.

In *Rose v. Palm Beach County*, the Florida Supreme Court invoked the principle of inherent judicial power.<sup>27</sup> It articulated the principle, which would become central to its subsequent jurisprudence surrounding challenges to the legislature’s inadequate funding of the justice system, as follows:

Every court has inherent power to do all things that are reasonably necessary for the administration of justice within the scope of its jurisdiction, subject to valid existing laws and constitutional provisions. The doctrine of inherent judicial power as it relates to the practice of compelling the expenditure of funds by the executive and legislative branches of government has developed as a way of responding to inaction or inadequate action that amounts to a threat to the courts’ ability to make effective their jurisdiction. The doctrine exists because it is crucial to the survival of the judiciary as an independent, functioning and co-equal branch of government. The invocation of the doctrine is most compelling when the judicial function at issue is the safe-guarding of fundamental rights.<sup>28</sup>

The Florida Supreme Court would apply the *Rose* principal of inherent judicial power twelve years later in *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*.<sup>29</sup> In that case, the \*757 court confronted “woefully inadequate funding of the public defenders’ offices, despite repeated appeals to the legislature for assistance.”<sup>30</sup> Relying on *Rose v. Palm Beach County*, the court invoked its inherent power but recognized its limits, noting that, while the legislature’s failure to adequately fund the public defenders’ offices was “at the heart of [the] problem, and the legislature should live up to its responsibilities and appropriate an adequate amount for this purpose, it is not the function of this [c]ourt to decide what constitutes adequate funding and then order the legislature to appropriate such an amount.”<sup>31</sup> The court

STATE CONSTITUTIONAL CHALLENGES TO INDIGENT..., 75 Mo. L. Rev. 751

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emphasized that the “[a]ppropriation of funds for the operation of government is a legislative function.”<sup>32</sup>

Despite its clear respect for the legislature’s special funding role, the court concluded that the judiciary was not without a remedy and advised the Florida legislature as much:

[A]lthough this [c]ourt may not be able to order the legislature to appropriate those funds, we must advise the legislature that if sufficient funds are not appropriated within sixty days from the filing of this opinion, and counsel hired and appearances filed within 120 days from the filing of this opinion, the courts of this state with appropriate jurisdiction will entertain motions for writs of habeas corpus from those indigent appellants whose appellate briefs are delinquent sixty days or more, and upon finding merit to those petitions, will order the immediate release pending appeal of indigent convicted felons who are otherwise bondable.<sup>33</sup>

In the aftermath of the court’s order, the Florida legislature significantly increased funding for the office of the public defender.<sup>34</sup> Disaster was averted.

Nine years later there was a similar crisis in the capital indigent defense system in Florida that the Florida Supreme Court addressed in *Arbelaez v. Butterworth*.<sup>35</sup> In *Arbelaez*, the offices of the Capital Collateral Regional Counsel (CCRC), a public law firm representing indigent death row inmates, petitioned the Florida Supreme Court to exercise its all writs jurisdiction<sup>36</sup> “to impose a general moratorium on the imposition of the death penalty until the \*758 CCRC[] [offices were] adequately funded pursuant to a caseload methodology.”<sup>37</sup> The CCRC offices relied on *In re Order on Prosecution of Criminal Appeals* by the Tenth Judicial Circuit Public Defender as authority for the proposed remedy. Two legislative sessions were complete before the court issued its opinion in which it found that, since the filing of the *Arbelaez* lawsuit, “the funding [of the CCRC offices] ha[d] significantly changed and increased,” therefore concluding the case was then moot.<sup>38</sup> The crisis in funding the CCRC offices was resolved, at least for a time.

More importantly, perhaps, than the majority’s decision in *Arbelaez* was Justice Anstead’s concurring opinion, which was joined by Justice Kogan.<sup>39</sup> Justice Anstead agreed “that affirmative relief should be denied in view of the actions taken by the legislature in the two sessions during which [the case] ha [d] been pending,” but he announced that he would “formally acknowledge that the right to postconviction relief in capital cases is meaningless without a right to counsel.”<sup>40</sup> In support, Justice Anstead cited various provisions of the Florida Constitution as well as the 1992 decision of the Florida Supreme Court in *Traylor v. State*,<sup>41</sup> which gave primacy to provisions of the Florida Constitution rather than the federal Constitution in resolving issues of fundamental rights.<sup>42</sup>

Since the United States Supreme Court had declined to find a constitutional right to post-conviction counsel in *Murray v. Giarratano*,<sup>43</sup> resort to the Florida Constitution would be essential to any such holding. The Florida Supreme Court’s decision in *Traylor* was also a critical jurisprudential underpinning of Justice Anstead’s concurring opinion in *Arbelaez*.<sup>44</sup> The *Traylor* court made clear that “[w]hen called upon to decide matters of fundamental rights, Florida’s state courts are bound under federalist principles to give primacy to [its] state Constitution and to give independent legal import to every phrase and clause contained therein.”<sup>45</sup>

Justice Anstead’s concurrence in *Arbelaez* enunciated three principles, which provide a jurisprudential predicate for indigent defense litigation under \*759 state constitutions: (1) inherent judicial power; (2) the primacy of state constitutions with regard to fundamental rights; and (3) the judiciary’s primary, uniquely judicial responsibility for the fair administration of justice in each state, notwithstanding necessary deference to legislative authority.<sup>46</sup> This third principle is the most critical: while under separation of powers principles, courts must certainly defer to the legislative power to appropriate, when the legislature refuses to fund indigent defense systems adequately, the judiciary is not powerless. Rather, it remains the primary obligation of the judiciary to ensure the fair administration of justice, particularly with respect to the state constitutional right to the effective assistance of counsel. The court’s duty persists, irrespective of how analogous provisions of the United States Constitution have been or will be interpreted by the federal judiciary.

While several state constitutions provide for a power of “general superintendence” over the lower state courts by the state’s

highest court, the Florida Constitution does not. Instead, [article V, section 3\(b\)\(7\) of the Florida Constitution](#) provides that the Florida Supreme Court “[m]ay issue all writs necessary to the complete exercise of its jurisdiction.”<sup>47</sup> Under the judicially created doctrine of inherent judicial power and the provision for all writs jurisdiction, the Florida Supreme Court has effectively exercised what many other state constitutions describe as the power of general superintendence over the state’s justice system. These cases reflect the deep and abiding commitment of the Florida Supreme Court to the fundamental rights of the accused on the one hand, and to the sanctity of the state constitution on the other.

## B. The Massachusetts Model

In 2004, the Commonwealth of Massachusetts experienced a crisis in its indigent defense system.<sup>48</sup> Indigent pretrial detainees had no attorneys to represent them due to a shortage of lawyers in the Massachusetts bar advocates program.<sup>49</sup> The shortage had been caused by the low rate of attorney compensation authorized by the annual budget appropriation.<sup>50</sup> Rates had not significantly changed in almost twenty years.<sup>51</sup> Several indigent pretrial detainees in Hampden County and the statewide public defender filed a petition seeking relief pursuant to the general superintendence power of the Massachusetts **\*760** Supreme Judicial Court.<sup>52</sup> The court ordered that any indigent defendant incarcerated pretrial in Hampden County must be released after seven days if counsel was not appointed, and any case pending against such a defendant be dismissed after forty-five days if no attorney filed a court appearance on that defendant’s behalf.<sup>53</sup> Then-Governor Mitt Romney, in an adroit political move, suggested that if the Massachusetts Supreme Judicial Court wished to release violent felons onto the streets of Massachusetts, that would be its prerogative.<sup>54</sup> Thus confronted, on August 17, 2004, a single judge of the Massachusetts Supreme Judicial Court entered an order allowing judges in Hampden County to assign counsel from the private bar even if such private counsel were unwilling or not certified to accept such cases.<sup>55</sup>

However, a second lawsuit challenging the statewide assigned counsel system was filed in July of 2004.<sup>56</sup> Just one month after the lawsuit was filed, the Massachusetts legislature passed a bill increasing hourly rates for court-appointed counsel (by a mere \$7.50 per hour) and establishing a commission to study the provision of counsel to indigent persons.<sup>57</sup> In response to that legislative action, the Massachusetts Supreme Judicial Court stayed the Arianna S. action to give the legislative commission an opportunity to carry out its work.<sup>58</sup>

The commission issued its final report in April 2005. It recommended: (1) substantial increases in rates for all court-appointed counsel, (2) that the state hire more public defenders, and (3) that the state decriminalize certain misdemeanor offenses and implement stricter indigency standards.<sup>59</sup> Nonetheless, in late June 2005, the fiscal year 2006 budget passed without any additional appropriation for increased compensation rates, and no bills were **\*761** passed implementing the commission’s recommendations.<sup>60</sup> The legislature adjourned.

“On July 1, 2005, many bar advocates across [Massachusetts] declined to renew their annual contracts to provide representation in indigent defense” and some civil and family law cases.<sup>61</sup> Courts across the Commonwealth felt the effects of the “shortage of attorneys, particularly in criminal cases.”<sup>62</sup> “[A]t one point, nearly 500 defendants who were entitled to appointed counsel were without counsel.”<sup>63</sup>

The petitioners in Arianna S. then filed a motion in the Massachusetts Supreme Judicial Court to lift the stay, and the judge assigned to the case scheduled the hearing to take place immediately.<sup>64</sup> Three days before the date set for that hearing, both houses of the Massachusetts legislature unanimously passed separate bills providing for an increase in counsel rates and other reforms.<sup>65</sup> When the hearing was held on the Arianna S. petitioners’ motion to lift the stay, the judge noted that, since the petitioners had filed their motion for a stay, both houses of the legislature had passed reform legislation, that details with respect to the differences in the two bills needed to be worked out in conference, and that the court would therefore give the legislature some additional time to resolve the differences between the two houses and produce reform legislation.<sup>66</sup> Within two days, those differences were resolved, and each house unanimously passed reform legislation that was immediately signed into law.<sup>67</sup>

The new law substantially increased the rates of compensation for assigned counsel. The legislative appropriation for counsel

was increased from \$98 million in 2004 to \$154.5 million in 2006.<sup>68</sup> In sum, the Massachusetts indigent defense system reaped great rewards, but not without cost: namely, an arguably premature confrontation between the legislature and the judiciary that unnecessarily expended judicial capital that would be needed for future funding crises.

### \*762 C. The Missouri Model

Missouri's experience with indigent defense reform may well be a model for the rest of the nation. As of 2009, the Missouri Public Defender (MSPD) had not had significant increases in its budget for almost ten years.<sup>69</sup> In addition, Missouri's per capita spending for indigent defense ranks near the bottom of the states.<sup>70</sup> For many years, this dire situation was brought to the attention of both the legislative and executive branches of government by the Missouri Public Defender to little or no avail. This effort was led by Missouri Public Defender and Director J. Marty Robinson, Deputy Director Cat Kelly, Chief Counsel Peter Sterling, and Commission Member and former Missouri Bar President Doug Copeland ("the advocates"). After years of arduous work, their efforts finally resulted in a decision by the Supreme Court of Missouri which has the potential to remedy one of the most poorly funded public defender systems in the country.<sup>71</sup>

These advocates persisted with almost every approach known in this field. The advocates lobbied the legislature and the governor each and every year.<sup>72</sup> They also persuaded the Missouri Bar to appoint a Bar Task Force on the MSPD comprised of judges, legislators, prosecutors, bar leaders, and private practitioners.<sup>73</sup> The advocates were able to persuade state Senate leadership to appoint an interim committee on the public defender that held public hearings and issued a report.<sup>74</sup> The Missouri Bar arranged media tours \*763 around the state with the bar president, and the hearings that followed provided even greater opportunities for influential press coverage.

When these efforts proved unsuccessful, the Missouri Public Defender Commission promulgated an administrative rule providing that when the director of the MSPD determined that a particular office had exceeded the maximum case load standards set forth by the Commission for three consecutive calendar months, "the director [could] limit th[at] office's availability to accept additional cases by filing a certification of limited availability with the presiding judge of each circuit or chief judge of each appellate circuit affected."<sup>75</sup> The rule further provided that once such a certification was filed with the circuit court each district defender should file with the court a final list of categories of cases that would no longer be accepted by that district office until the office was reinstated to full availability.<sup>76</sup> Moreover, while an office was certified as "limited availability," it would not accept any of the cases on the list of excluded case types.<sup>77</sup>

But the advocates did not stop there. They went to the Missouri legislature in 2009 and obtained a unanimous vote in the Missouri Senate and a vote of 139 to 16 in the Missouri House of Representatives for a statute that essentially codified the regulation authorizing the Missouri Public Defender Commission to establish maximum caseload standards.<sup>78</sup> According to the new statute, when the number of eligible cases exceeded the maximum caseload standards, the MSPD director would contract the excess cases to private counsel to the extent that funds were available to do so.<sup>79</sup> If available funds were insufficient, the director was required to notify the court from which the caseload stemmed, whether trial, appellate, or the supreme court, that the public defender was unavailable.<sup>80</sup>

The statute provided procedures to be implemented in the event that the public defender was unavailable to accept additional cases because the established maximum caseload standard had been reached. These alternative procedures included: (1) consulting with the prosecuting attorney and the court to determine if a case could be disposed of without the imposition of a jail or prison sentence, (2) placing the case on a wait list for defender services if a jail or prison sentence remained a possible disposition, (3) allowing the courts to prioritize cases on the public defender wait list, and (4) providing for payment \*764 of litigation expenses for private pro bono counsel, but not counsel fees.<sup>81</sup>

The statute also authorized the state public defender commission and the supreme court to make such rules and regulations to implement the statute in the most effective and efficient manner consistent with the constitutional guarantees of the right to counsel and the laws of Missouri.<sup>82</sup> Although Governor Jay Nixon vetoed the bill creating the statute, in the statement explaining his veto he acknowledged that "the public defender system is operating under significant stresses" and that "the



STATE CONSTITUTIONAL CHALLENGES TO INDIGENT..., 75 Mo. L. Rev. 751

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problem is one of resources.”<sup>83</sup> Importantly, the governor committed himself to “working with the General Assembly to identify additional resources” for the entire criminal justice system.<sup>84</sup>

The director of the Missouri Public Defender Commission determined that several district public defender offices had exceeded the maximum case load standard for a period of three consecutive months and certified each district to be in limited availability status.<sup>85</sup> In one certified district, the director informed the court that the office would not accept a particular category of cases - Suspended Execution of Sentence (“SES”) probation violations - until the office was reinstated to full availability.<sup>86</sup> After being notified of the public defender’s unavailability for SES probation violations, a circuit judge nonetheless appointed the public defender to represent an indigent defendant facing that exact charge.<sup>87</sup> The Missouri Public Defender Commission and the District Public Defender filed a petition for a writ of prohibition with the Missouri Court of Appeals, Western District.<sup>88</sup>

On April 14, 2009, the Missouri Court of Appeals for the Western District issued its opinion.<sup>89</sup> The court found that the rule authorizing the public defender to certify unavailability and to refuse to accept cases in a particular category of cases was flatly inconsistent with the Missouri statute creating the MSPD, which provided that “[t]he director and defenders shall provide legal services to an eligible person.”<sup>90</sup> Accordingly, the court held that this agency regulation providing for the unavailability of the public defender for certain \*765 categories of cases was void because it conflicted with the statute.<sup>91</sup> The court held that, given the clear mandate of the statute, the director simply could not use his discretion to refuse to accept appointments in particular categories of cases emphasizing that “[t]he primary authority and responsibility for relieving the problem of limited public defender resources remains with the General Assembly.”<sup>92</sup>

In its conclusion, the court of appeals acknowledged that “serious issues exist concerning the caseloads the public defender system is asked to shoulder.”<sup>93</sup> While the court recognized that “the right to counsel is the right to the effective assistance of counsel,” it nevertheless concluded that neither the commission nor the director had the statutory authority to adopt these measures and therefore could not unilaterally refuse to accept appointments in a category of cases.<sup>94</sup>

Perhaps most telling, the court of appeals emphasized, in a final footnote, that, as an intermediate appellate court, it was bound to follow the law established by the Supreme Court of Missouri.<sup>95</sup> Moreover, it noted that it was a court of error and not a policy-making court and that it was therefore obliged to follow those Supreme Court of Missouri decisions clearly holding that a director cannot refuse to represent persons who are entitled to representation under the statute.<sup>96</sup>

In October 2009, the Spangenberg Group issued a lengthy report on its assessment of the MSPD. The Spangenberg Group found that MSPD “is confronting an overwhelming caseload crisis, one of the worst of its kind in the nation,” and that Missouri’s criminal justice system is headed for a disaster that is both “predictable” and “preventable.”<sup>97</sup>

The commission appealed the decision of the court of appeals to the Supreme Court of Missouri. In a unanimous opinion authored by Judge Michael Wolff, the supreme court held that the commission did not have authority to promulgate the rule to the extent that the rule eliminated a category of indigent defendants whom Chapter 600 required the public defender to represent.<sup>98</sup> Nonetheless, relying on its “supervisory authority” and “superintending control” of proceedings in the circuit courts, as authorized by [article V, section 4 of the Missouri Constitution](#), the court addressed the appropriate remedy for “[w]hen current state funding is inadequate to provide the effective representation to all of Missouri’s indigent defendants that the United \*766 States and Missouri constitutions require.”<sup>99</sup> The court held that under the caseload management portions of the rule the proper remedy for the public defender is to certify the offices having limited availability once their maximum caseloads are exceeded for three consecutive months.<sup>100</sup> The court further held that when such certification occurs, the rule requires the public defender to notify the presiding judge and the prosecutors of the impending unavailability of services.<sup>101</sup> Finally, the court stated that, when the public defender, prosecutors, and presiding judge confer, they are to consider “measures to reduce the demand for public defender services,” including:

- [T]he prosecutor’s agreement to limit the cases in which the State seeks incarceration;
- [Those] cases or categories of cases in which private attorneys are to be appointed;
- [A] determination by the judges not to appoint any counsel in certain cases (which would result in the cases not being available for trial or disposition); or

- [I]n the absence of an agreement by prosecutors and judge[s] to any resolution, the rule authorizes the public defender to make the office unavailable for any appointments until the case load falls below the Commission's standard.<sup>102</sup>

There are a number of remarkable facets to this ruling. The first, of course, is that it is a unanimous decision by a state's highest court.<sup>103</sup> It was preceded by years of hard work by the advocates through the promulgation of the administrative rule, and most importantly, the passage of the statute. Now, the rule, the statute, and the supreme court's remedy all march in unison. Those who will be called upon to defend the decision can truthfully assert that the court took its guidance from the legislature.<sup>104</sup> While the governor vetoed the statute before the court's ruling, the fact that the bill creating \*767 the statute was overwhelmingly passed by both houses of the Missouri legislature augurs well for the potential of this judicial remedy.

## V. Some Reflections

The author's work in indigent defense litigation in Florida, Massachusetts, and Missouri suggests the following conclusions.<sup>105</sup> Justice Brennan was on to something. State courts provide a rich opportunity for this kind of constitutional litigation. Indeed, state courts are ideally suited to address this issue, because it is the state judiciary that must confront, day to day, the seemingly intractable problems posed by grossly underfunded indigent defense systems. By contrast, the federal public defender offices are almost uniformly better funded than their state counterparts.

Moreover, nearly half of the states have constitutional provisions which either provide their supreme courts with original jurisdiction to "superintend" the justice system or permit the issuance of all writs necessary to the complete exercise of their jurisdiction.<sup>106</sup> Often, these actions can be filed directly in the state supreme court with a request for the appointment of a special master or commissioner to do fact finding. That happened in both Florida<sup>107</sup> and Massachusetts.<sup>108</sup>

Though there is no state constitutional power of general superintendence in Florida,<sup>109</sup> its supreme court has developed a robust doctrine of inherent judicial power in its place. Moreover, the constitutional grant of all writs jurisdiction to the Florida Supreme Court, along with that court's powerful authority regarding the primacy of state constitutional provisions regarding \*768 fundamental rights, has given it the tools necessary to deal with persistent legislative underfunding of the state's indigent defense system.

In Massachusetts, the constitutional grant of general superintendence power to the Massachusetts Supreme Judicial Court provides a vehicle for a direct challenge to the constitutionality of that state's indigent defense system. The Massachusetts experience teaches us, however, that caution is in order with respect to the speed with which both the litigants and the court trigger the ultimate confrontation between judicial and legislative power. It is the court's capital that is at issue here. Those who seek it must proceed cautiously, giving legislative bodies time to respond and develop supportive public and editorial opinion along the way.

Missouri's experience also teaches us the importance of building support for the court's exercise of its superintendence power in the bar, the legislature, and public and editorial opinion. It is a model that should be looked to in the many other state actions that will likely unfold in the near term, particularly as state legislatures all over the country are faced with budget crises of sometimes unprecedented proportions.

All of these powers - inherent, all writs, and general superintendence - provide jurisdictional vehicles to present state constitutional claims directly to the state's highest court. These claims have the potential to result in decisions that will be unreviewable by the federal courts because they will be grounded on independent and adequate analyses of state constitutional provisions. And, most importantly, these decisions can secure expansive protections of fundamental individual rights - especially the right to counsel - regardless of the limits placed on federal constitutional interpretation.



STATE CONSTITUTIONAL CHALLENGES TO INDIGENT..., 75 Mo. L. Rev. 751

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Moreover, as my good friend and mentor Dean Norman Lefstein<sup>10</sup> counsels, state supreme courts have the authority and the responsibility to ensure competent representation under the Rules of Professional Responsibility<sup>11</sup> - not simply the effective representation required by Strickland.<sup>12</sup> The Strickland two-part test, after all, has been only half-facetiously described by advocates as being in reality a three-part test consisting of:

(1) a lawyer with a bar card;

(2) a breathing lawyer; and

\*769 (3) after substantial litigation and over strong dissent in a federal court of appeals in the sleeping lawyer cases in Texas, a lawyer who is conscious during trial.<sup>13</sup>

Indeed, considering the federal constitutional floor for competent counsel, I trust Justice Brennan would find some consolation in the fact that the states may aim higher.

Footnotes

<sup>a1</sup> Pro bono partner at Holland & Knight. The author gratefully acknowledges the work of Holland & Knight Chesterfield Smith fellow Laura Fernandez in editing this Article.

<sup>1</sup> William J. Brennan, Jr., [State Constitutions and the Protection of Individual Rights](#), 90 HARV. L. REV. 489 (1977).

<sup>2</sup> [Id. at 492-95](#) (“I suppose it was only natural that when during the 1960’s our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions.”).

<sup>3</sup> [Id. at 495-98](#) (describing a shift in the Burger Court’s constitutional jurisprudence that “pull[ed] back from, or at least suspend[ed] for the time being, the enforcement of the Boyd principle with respect to application of the federal Bill of Rights and the restraints of the [D]ue [P]rocess and [E]qual [P]rotection [C]lauses of the [F]ourteenth [A]mendment”).

<sup>4</sup> [Id. at 498](#).

<sup>5</sup> 401 U.S. 37, 54 (1971) (holding that the potential facial unconstitutionality of a state statute does not alone allow for enjoining a “good-faith” prosecution). The “abstention doctrine” that grew out of *Younger* prompts federal courts to avoid deciding questions on the constitutionality of state court action where the result would appear to impermissibly intrude on the state’s ability to enforce its laws in state court.

<sup>6</sup> Brennan, *supra* note 1, at 498.

<sup>7</sup> [Id. at 495-98](#) (suggesting that the revival of state court constitutional interpretation emphasizing protections under the states’ own bills of rights was in response to shifting jurisprudence by the Burger Court).

<sup>8</sup> [Id. at 491](#) (“[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. The legal revolution which has brought federal law to the fore must not be allowed to inhibit the independent protective force of state law - for without it, the full realization of our liberties cannot be guaranteed.”).

STATE CONSTITUTIONAL CHALLENGES TO INDIGENT..., 75 Mo. L. Rev. 751

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9 Id.

10 Id. at 491-95.

11 Id. at 495. Under the Boyd principle, ““ constitutional provisions for the security of person and property should be liberally construed [as] [i]t is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.”” Id. at 494 (quoting [Boyd v. United States](#), 116 U.S. 616, 635 (1886)).

12 Id. at 495.

13 Id. at 498-501 & nn.62-76 (“We pause to reaffirm the independent nature of California citizens despite conflicting decisions of the United States Supreme Court interpreting the Federal Constitution.” (citing [People v. Disbrow](#), 545 P.2d 272, 280 (Cal. 1971)); see also [State v. Johnson](#), 346 A.2d 66, 66-68 (N.J. 1975) (recognizing that the United States Supreme Court’s decision in [Schneckloth v. Bustamonte](#), 412 U.S. 218 (1973), which rejected the waiver standard as necessary for the validity of consent to search under the Fourth Amendment, was binding on the states, but nonetheless concluding that an identically phrased provision in the New Jersey Constitution “should be interpreted to give the individual greater protection than is provided” by the federal provision); [State v. Kaluna](#), 520 P.2d 51, 56-58 (Haw. 1974) (holding that a reasonableness test governs searches incident to lawful arrest which are not automatically valid under the state constitution in contrast to the holding in [United States v. Robinson](#), 414 U.S. 218 (1973)); [People v. Brisendine](#), 531 P.2d 1099, 1105 (Cal. 1975) (same), superseded by CAL. CONST. art. I, § 28(d), as recognized in [People v. Dann](#), 207 Cal. Rptr. 228 (Cal. Ct. App. 1984); [People v. Jackson](#), 217 N.W.2d 22, 27 (Mich. 1974) (holding that suspects are entitled to assistance of counsel at pre-trial lineup or photo-identification procedure, in contrast to the Supreme Court’s decision in [United States v. Ash](#), 413 U.S. 300 (1973)); [Parham v. Municipal Court](#), 199 N.W. 2d 501, 504-05 (S.D. 1972) (upholding a right to trial by jury for misdemeanors and petty offenses in contrast with [Baldwin v. New York](#), 399 U.S. 66 (1970) and [Duncan v. Louisiana](#), 391 U.S. 145 (1968)); [State v. Sklar](#), 317 A.2d 160, 164-65 (Me. 1974) (same); [Baker v. City of Fairbanks](#), 471 P.2d 386, 391-92, 403 (Alaska 1970) (same).

14 Brennan, supra note 1, at 501-02.

15 Id. at 501 (citing [Murdock v. City of Memphis](#), 87 U.S. 590 (1874); [Fox Film Corp. v. Muller](#), 296 U.S. 207 (1935)).

16 [Luckey v. Harris](#), 860 F.2d 1012 (11th Cir. 1988).

17 Id. at 1013.

18 Id.

19 Id.

20 Id. at 1016 (citing [Strickland v. Washington](#), 466 U.S. 668 (1984)). Strickland set forth a two-part test for establishing a claim of ineffective assistance of counsel. [Strickland](#), 466 U.S. at 687. Under the Strickland test, a criminal defendant may not obtain relief without showing that: (1) defense counsel’s performance fell below an objective standard of reasonableness and (2) the performance was so deficient that there is a reasonable probability that, had counsel performed adequately, the result of the proceeding - the trial, sentencing hearing, or appeal - would have been different. Id.

21 [Luckey](#), 860 F.2d at 1017.

22 Id. (quoting [O’Shea v. Littleton](#), 414 U.S. 488, 502 (1974)).

23 Id. at 1018.

24 [Luckey v. Miller](#), 976 F.2d 673, 676-79 (11th Cir. 1992).

25 Id. at 674.

26 Plaintiffs challenging the constitutionality of grossly underfunded indigent defense systems in federal court have struggled to find ways around Younger abstention. See generally THE CONSTITUTION PROJECT, NAT’L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL (2009), available at <http://www.constitutionproject.org/manage/file/139.pdf>. This report contains the most exhaustive treatment of the case law in this area. The reporters, Dean Norman Lefstein and Professor Robert L. Spangenberg, have made an enormous contribution to this previously largely ignored area of the law.

27 [361 So. 2d 135](#) (Fla. 1978).

28 Id. at 137 (internal citations omitted).

29 [561 So. 2d 1130](#) (Fla. 1990).

30 Id. at 1132.

31 Id. at 1136.

32 Id. (citing [FLA. CONST. art. VII, § 1\(c\)](#)).

33 Id. at 1139.

34 BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, IMPROVING STATE AND LOCAL CRIMINAL JUSTICE SYSTEMS 6 (1998), available at <http://www.ncjrs.gov/pdffiles/173391.pdf> (discussing Florida’s budget increases in 1996).

35 [738 So. 2d 326](#) (1999).

36 As discussed in more detail below, [article V, section 3\(b\)\(7\) of the Florida Constitution](#) provides that the Florida Supreme Court “may issue all writs necessary to the complete exercise of its jurisdiction[0].”

37 [Arbelaez](#), 738 So. 2d at 326.

38 Id. at 326-27.

<sup>39</sup> [Id. at 327 \(Anstead, J., concurring\).](#)

<sup>40</sup> [Id.](#) The Florida Supreme Court would eventually hold that “[a]s long as the [capital indigent defense] statutes are being interpreted and applied in a way that ensures effective and competent representation in complex and unusual capital postconviction proceedings, Florida’s death row inmates are being afforded meaningful access to counsel in their collateral proceedings.” [Maas v. Olive](#), 992 So. 2d 196, 205 (Fla. 2008); see also [Olive v. Maas](#), 811 So. 2d 644 (Fla. 2002); [Olive v. Maas](#), 911 So. 2d 837 (Fla. Dist. Ct. App. 2005).

<sup>41</sup> [596 So. 2d 957 \(Fla. 1992\).](#)

<sup>42</sup> [Arbelaez](#), 738 So. 2d at 327 & n.1 (Anstead, J., concurring).

<sup>43</sup> [492 U.S. 1 \(1989\).](#)

<sup>44</sup> [Arbelaez](#), 738 So. 2d at 327 n.1 (Anstead, J., concurring).

<sup>45</sup> [Traylor](#), 596 So. 2d at 962.

<sup>46</sup> See [Arbelaez](#), 738 So. 2d at 327-32 (Anstead, J., concurring).

<sup>47</sup> [FLA. CONST. art. V, § 3\(b\)\(7\).](#)

<sup>48</sup> See generally [Lavallee v. Justices in the Hampden Superior Court](#), 812 N.E.2d 895 (Mass. 2004).

<sup>49</sup> [Id. at 899.](#)

<sup>50</sup> [Id.](#)

<sup>51</sup> See [id.](#)

<sup>52</sup> [Id. at 900.](#) This case was instituted with a direct filing in the Massachusetts Supreme Judicial Court on May 6, 2004. [Id.](#) The case was argued on June 30, 2004, and decided on July 28, 2004.[0] [Id. at 895.](#)

<sup>53</sup> [Id. at 909.](#)

<sup>54</sup> Michael Levenson, [Officials Told to Testify in Public Defender Dispute](#), BOSTON GLOBE, Aug. 19, 2004, at B4 (reporting that Governor Romney said it was “the judiciary [who] was putting the public’s safety at risk”) (emphasis added).

<sup>55</sup> [Cooper v. Reg’l Admin. Judge of the Dist. Court for Region V](#), 854 N.E.2d 966, 969 (Mass. 2006). Several detainees were released pursuant to the Massachusetts Supreme Judicial Court’s order. See [id. at 968.](#)

<sup>56</sup> Arianna S. ex rel. Weber v. Massachusetts, No. SJ 2004-0282 (Mass. filed June 28, 2004).

<sup>57</sup> H.B. 5038, 183d Leg., Reg. Sess. (Mass. 2004); see also THE SPANGENBERG GROUP, INDIGENT DEFENSE IN MASSACHUSETTS: A CASE HISTORY OF REFORM 1 (2005), available at <http://www.sado.org/fees/MAindigdefreform2005.pdf>.

<sup>58</sup> Civil Rights Litigation Clearinghouse, [http://www.clearinghouse.net/detail.php?id=11196&search=source\\$general;caseName\\$Arianna%20S.;searchState\\$MA;orderby\\$caseState,%20caseName](http://www.clearinghouse.net/detail.php?id=11196&search=source$general;caseName$Arianna%20S.;searchState$MA;orderby$caseState,%20caseName) (last visited July 17, 2010); see also THE SPANGENBERG GROUP, supra note 57, at 7.

<sup>59</sup> THE SPANGENBERG GROUP, supra note 57, at 4.

<sup>60</sup> Id. at 5.

<sup>61</sup> Id.

<sup>62</sup> Id.; see also Sydney Hanlon, Lack of Public Defenders Overwhelming Courts, BOSTON GLOBE, July 19, 2005, at A15.

<sup>63</sup> THE SPANGENBERG GROUP, supra note 57, at 5; see also Hanlon, supra note 62, at A15.

<sup>64</sup> See THE SPANGENBERG GROUP, supra note 57, at 7.

<sup>65</sup> See id.

<sup>66</sup> See generally id.

<sup>67</sup> See Jonathan Saltzman, Pay-Raise Measure for Court-Appointed Attorneys Becomes Law, BOSTON GLOBE, July 30, 2005, at A3.

<sup>68</sup> THE SPANGENBERG GROUP, supra note 57, at 6.

<sup>69</sup> THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW, & SOC'Y AT GEORGE MASON UNIV., ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 2 (2009), available at <http://members.mobar.org/pdfs/public-defender/2009-report.pdf> [hereinafter ASSESSMENT OF MSPD].

<sup>70</sup> Id. at 11-12.

<sup>71</sup> See *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (en banc).

<sup>72</sup> Doug Copeland convinced The Missouri Bar to provide funding to retain The Spangenberg Group and the Center for Justice,

Laws, and Society at George Mason University (“TSG”) to conduct a detailed assessment of the Missouri state public defender system. ASSESSMENT OF MSPD, *supra* note 69, at 4-5.

The Spangenberg Group is a nationally and internationally recognized criminal justice research and consulting firm that specializes in indigent defense services TSG has conducted comprehensive statewide studies of indigent defense systems in more than half of the states, and has worked with many jurisdictions in evaluating public defender systems. In February of 2009, TSG joined George Mason University to form the Spangenberg Project.

*Id.* at 3-4 n.4.

<sup>73</sup> *Id.* at 4-5.

<sup>74</sup> CORRECTED REPORT OF SENATE INTERIM COMMITTEE ON THE MISSOURI STATE PUBLIC DEFENDER SYSTEM (2007), available at [http:// www.senate.mo.gov/06info/comm/interim/publicdefenderReport.pdf](http://www.senate.mo.gov/06info/comm/interim/publicdefenderReport.pdf).

<sup>75</sup> MO. CODE REGS. ANN. tit.18, § 10-4.010(2)(A) (2010).

<sup>76</sup> *Id.* § 10-4.010(2)(E).

<sup>77</sup> *Id.* § 10-4.010(2)(A).

<sup>78</sup> S.B. 37, 95th Gen. Assem., Reg. Sess. (Mo. 2009), available at <http://www.senate.mo.gov/09info/pdf-bill/tat/SB37.pdf>; see also Missouri House of Representatives, Daily Activity Register, <http://house.mo.gov/content.aspx?info=/bills091/actreg/05142009.htm> (last visited Sept. 4, 2010).

<sup>79</sup> S.B. 37, at 8.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 9.

<sup>82</sup> *Id.* at 9-10.

<sup>83</sup> Letter from Jeremiah W. (Jay) Nixon, Governor of Missouri, to the Secretary of the State of Missouri (July 13, 2009), available at [http:// governor.mo.gov/actions/pdf/2009/SBVL37.pdf](http://governor.mo.gov/actions/pdf/2009/SBVL37.pdf).

<sup>84</sup> *Id.*

<sup>85</sup> State ex rel. Mo. Pub. Defender Comm’n v. Hamilton, Nos. WD 70327, WD 70349, 2009 WL 987468, \*1 (Mo. App. W.D. Apr. 14, 2009).

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at \*2.



88 Id.

89 See id. at \*1.

90 Id. at \*3 (quoting [MO. REV. STAT. § 600.042.4](#) (2000)).

91 Id. at \*8.

92 Id. at \*6 (quoting [Sullivan v. Dalton](#), 795 S.W.2d 389, 390-91 (Mo. 1990) (en banc)).

93 Id. at \*8.

94 Id. (quoting [Strickland v. Washington](#), 466 U.S. 668, 686 (1984)).

95 Id. at \*8 n.11.

96 Id.

97 ASSESSMENT OF MSPD, *supra* note 69, at 64-66.

98 [State ex rel. Mo. Pub. Defender Comm'n v. Pratte](#), 298 S.W.3d 870, 890 (Mo. 2009).

99 [Id.](#) at 873 n.1, 886.

100 [Id.](#) at 879.

101 [Id.](#) at 887.

102 [Id.](#) (footnotes omitted).

103 Judge Stith did not participate. [Id.](#) at 890.

104 The court's ruling also is squarely grounded in its own precedent in [State ex rel. Wolff v. Ruddy](#), 617 S.W.2d 64, 67 (Mo. 1981) (en banc) (where the court had earlier faced legislative refusal to adequately fund the indigent defense system). There, the court unambiguously held: "[W]here the court is unable to find and appoint counsel for the indigent accused who can prepare for trial within the time required by law, the court should on proper motion where necessary to protect the constitutional rights of the accused, order discharge of the accused." [Id.](#)

105 I was counsel for the plaintiffs in [Arbelaez](#) and [Arianna S.](#) and a pro bono consultant to the Missouri Public Defender Commission.

STATE CONSTITUTIONAL CHALLENGES TO INDIGENT..., 75 Mo. L. Rev. 751

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In Missouri, great credit should be given to Antwaun Smith at the law firm of Shook, Hardy & Bacon for the firm's exceptional pro bono representation in *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, discussed above. Id. at 872.

- <sup>106</sup> Professor John Amman, Director of Legal Clinics at St. Louis University School of Law, undertook the supervision of clinical students in a survey of state constitutions. Based on their research, we concluded that nearly half of the states contain such constitutional provisions (i.e., Alabama, Arkansas, Florida, Idaho, Illinois, Indiana, Iowa, Louisiana, Massachusetts, Michigan, Missouri, Montana, New Mexico, North Dakota, Oklahoma, Oregon, South Carolina, Texas, Vermont, Washington, West Virginia, Wisconsin, and Wyoming). The author wishes to offer his sincere thanks to St. Louis University School of Law, and particularly Professor Amman, for the time and effort invested in this research.
- <sup>107</sup> [In re Certification of Conflict in Motions to Withdraw Filed by the Public Defender of the Tenth Judicial Circuit](#), 636 So. 2d 18 (Fla. 1994) (noting that Florida Supreme Court appointed a retired judge to sit as Special Commissioner, and a four-day evidentiary hearing was held).
- <sup>108</sup> *Arianna S. ex rel. Weber v. Massachusetts*, No. SJ 2004-0282 (Mass. filed June 28, 2004).
- <sup>109</sup> See *supra* note 47 and accompanying text.
- <sup>110</sup> See Norman Lefstein, [Commentary](#), 75 MO. L. REV. 793 (2010).
- <sup>111</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2006).
- <sup>112</sup> See generally THE CONSTITUTION PROJECT, MANDATORY JUSTICE: THE DEATH PENALTY REVISITED (2005), available at <http://www.constitutionproject.org/pdf/MandatoryJusticeRevisited.pdf>.
- <sup>113</sup> See Stephen B. Bright, Death in Texas, CHAMPION, July 1999, at 16; [Burdine v. Johnson](#), 231 F.3d 950, 964 (5th Cir. 2000) (concluding that it was "impossible to determine - instead, only to speculate - that counsel's sleeping was at a critical stage of the trial"); [Burdine v. Johnson](#), 262 F.3d 336, 395-96 (5th Cir. 2001) (en banc) (overruling panel's opinion and concluding that counsel's sleeping during a capital murder trial warranted a presumption of prejudice, with dissent arguing that prejudice had not been presumed in cases where "counsel's alleged impairment [was] because of alcohol, drug use, or a mental condition" and complaining that the majority assumed that counsel "was always so deeply and soundly asleep that he was always 'unconscious'" (emphasis added)).

75 MOLR 751

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