The 2019 RAND Michigan Public Defender Study

In 2019 The RAND Corporation published a public defender workload study for the Michigan Public Defender.[1] In my view, the RAND Michigan study presents a remarkably accurate and fair summary of the public defender workload studies done to date, including our ABA workload studies.

After reviewing all of these studies in considerable detail, RAND concluded: "We felt that the studies described in Table 1.1 generally provided well-tested models for the work we would conduct on behalf of the MIDC." Having RAND, the developer of the Delphi Method, validate this body of work changed the game, in my view.

The Potential Opportunity Presented by Rand's Entry into The Field

The RAND summary of existing studies in the Michigan report also led me to believe that we were now at the place that I wanted us to be when I started my work in this area with The Missouri Project in 2012, shortly after our victory in the Missouri Supreme Court in *State v Waters*, 370 S.W.3d 592 (Mo. 2012) (en banc); (ABA Amicus Brief critical to decision; ABA Eight Guidelines cited with approval).[2]

Waters held that when a public defender office can demonstrate that it has so many cases that its lawyers cannot provide reasonably effective and competent representation to all of their clients, public defenders may – indeed, must – refuse additional assignments, and judges may not appoint them to represent additional indigent defendants.

Our efforts in these matters were significantly strengthened by the Missouri Supreme Court's 2017 decision five years after *Waters* in *In re Karl William Hinkebein*, No. SC96089, MO. COURTS (Sept. 12, 2017), in which a public defender with excessive caseloads was disciplined for violating ABA Model Rule and Missouri Rule of Professional Conduct 1.7, the rule on concurrent conflicts at the heart of *Waters*.

After *Waters* and *Heinkebein*, public defenders can no longer do what they have been doing for the past half century – that is, processing far more cases than they can handle with reasonable effectiveness and competence. Nor may state criminal courts order public defenders to do that. Every public defender now works every day with the fear that their license to practice law may be on the line if they keep carrying the grossly excessive caseloads that they have been carrying, as these workload studies conclusively prove.

In the ensuing eight years since *Waters*, I have engaged in a sustained effort to extend and enforce the *Waters* ruling throughout the nation by providing reliable data and analytics to public defenders to substantiate their claims of excessive workloads. I have been the ABA Project Director on seven public defender

workload studies – Missouri, Louisiana, Colorado, Rhode Island, Indiana, New Mexico and Oregon, and I consulted on the study done in Texas.

These public defender workload studies give public defenders – for the first time ever – the reliable data and analytics needed to prove their claims of grossly excessive workloads to their legislatures and in their state courts. I have now been qualified and testified as an expert witness in two of these proceedings, one in Kansas City, Missouri and the other in Baton Rouge, Louisiana.

From the very beginning, my goal has been to develop a critical mass of reliable data and analytics for public defender workload studies across the nation to support a meta-study that would produce reliable national numerical caseload and workload standards. These standards will replace the long discredited and out of date 1973 NAC Standards (e.g., 150 undifferentiated felonies and 400 misdemeanors per year, per public defender).

After the RAND Michigan study, we are now at that place[3].

<u>The Problem</u>

For a half century now, we have had a systemically unethical and unconstitutional criminal processing system for indigent defendants, and we can now prove that proposition with reliable data and analytics. All of us in our profession, with one exception, bear the responsibility for this sordid state of affairs.

The one exception is the ABA and its Standing Committee On Legal Aid and Indigent Defendants ("SCLAID"), which has been the primary institution in our profession to stand up and speak out about this unfortunate failure of our entire profession – bar associations, bar disciplinary committees, judges, prosecutors, and yes, public defenders. I can say that because I had nothing to do with it. Led by the late Norman Lefstein, the architect of the modern indigent defense reform movement, ABA/SCLAID has provided the basic infrastructure for the substantial structural change required to end this national tragedy.[4]

This half-century criminal *processing* system has coincided roughly with our nation's unfortunate experiment with mass incarceration. Indeed, a compelling argument can be made that the lawyers and judges in our criminal processing system have been the principal facilitators of mass incarceration in this country. In the words of the late Justice John Paul Stevens, we became "loyal foot soldier(s) of the Executive's fight against crime," *California v. Acevedo,* 500 U.S. 565, 600 (1991), Stevens, J., dissenting.

This sordid state of affairs will become the principal legacy of my generation of lawyers to the next generation of lawyers if we do no act now.

Agreement to do the Meta-Study

I am happy to report that RAND, the National Center for State Courts, the American Bar Association and Lawyer Hanlon have all agreed to do the meta-study of all existing public defender workload studies and then conduct a Delphi-study with an expert panel of public and private criminal practitioners using the work of the meta study to determine new national public defender workload and caseload standards to replace the 1973 NAC Standards.

I will have more to report on this important development shortly.

Developing A Compelling National Narrative

State criminal court judges are going to have to grant public defenders the caseload relief they are entitled to under the relevant ABA Model Rules of Professional Conduct ("MRPC,") now in force in nearly every state. That is so because after the publication of this meta-study – again, for the first time ever -- public defenders across the country will be able to establish their entitlement to relief from excessive caseloads with reliable data and analytics. Failure to grant that kind of relief will now be clearly and provably violative of both the Model Rules of Professional Conduct and the Sixth Amendment.

To be successful, this effort will require much judicial, legislative, bar association, public defender and public education. The transformative changes required by all players in the criminal justice system as a result of the meta-study will not happen overnight. It took us 50 years to dig this hole, and we are not going to dig our way out of it in one year (see below).

We will need a very compelling national narrative to convince bar associations, judges, public defenders, prosecutors, lawmakers and the public that our work is credible and reliable, and thus requires this kind of transformational change in our criminal justice system that we will seek.

Implications Of The Meta-Study For The State Courts

As I have written elsewhere[6], faced with grossly excessive caseloads, after *Waters* and *Hinkebein*, chief public defenders have a duty under the Model Rules of Professional Conduct (MRCP) 5.1 (Responsibilities of a Supervisory Lawyer), 1.7 (Concurrent Conflict) 1.16 (Mandatory Withdrawal) and Model Rule 5.1 (Duties of Supervisory Lawyers) to move for withdrawal from many of their existing cases and to decline appointments to any future cases until their caseloads will allow them to be reasonably competent and effective for all of their clients. The basis for these motions will no longer be the long-discredited 1973 NAC Standards, which had no data-based support whatever. It will be this 2021 Meta-Study, based on reliable 21st century data and analytics.

Again, as I have written elsewhere,[7] without reasonably effective and competent counsel for every indigent defendant, a court must dismiss all such cases without prejudice until such counsel can be found, and defendants then in custody must be released.

That leaves the question of what should happen to those unrepresented indigent defendants after their public defender has been allowed to withdraw. As the Missouri Supreme Court held in *Waters*, and as I have written elsewhere,[8] judges should then prioritize cases on their docket in the interest of public safety, so that the most serious cases are assigned to public defenders.

If no competent, adequately funded lawyer can be found to represent those charged with less serious crimes, those cases must be dismissed without prejudice, and the defendants in custody must be released, until such a lawyer can be found for each of those indigent defendants. Wolff v Ruddy, 617 S.W. 2d 64, 67 (Mo. 1981).

State supreme courts in Florida and Massachusetts have similarly required this release and dismiss remedy in this situation. Lavallee v Justices in the Hampden Superior Court, 812 N.E.2d 895 (Mass. 2004); In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender, 561 So.2d 1130 (Fla. 1990).

Lawyers are required to seek such relief under MRPC 1.16.[9] Why is such drastic relief, which will need to be phased in over a relatively short period of time, perhaps five years, (see below), both justified and required in these circumstances?

Abe Fortas' brief and his oral argument in *Gideon v Wainwright*[10], based on the Supreme Court's 1938 decision in *Johnson v Zerbst,*[11] makes it clear that *a criminal court is not properly constituted* unless there is a judge, and unless there is a counsel for the prosecution, and unless there is a [reasonably effective][12] counsel for the defense. Lacking such a lawyer for the defendant, the Sixth Amendment is a *jurisdictional bar* to a valid conviction and sentence, due to *failure to complete the court* by providing such counsel for the accused. Id. At 468. (Emphasis mine.)

This new reality has and will continue to come as a stark and frankly, frightening development for all stakeholders in the criminal justice system, particularly state criminal court judges. What are we to do with all these criminally charged indigent defendants?

For one answer to that question, I have reached out to Dr. James Austin, a veteran prison and jail conditions expert I have worked with in Mississippi and elsewhere. Dr. Austin was the principal investigator in the Brennan Center's recent exhaustive study of America's prisons and jails.[5] Their principal conclusion: about 40% of America's prisoners could be released from prison and jail now without any significant public safety consequences.[13]

Dr. Austin can offer invaluable assistance to this project in formulating some of the public policy recommendations that will come out of the Meta-Study, relying upon the extraordinary data he has developed from his extensive work on America's prisons and jails over the course of the last 40 years. Dr. Austin began his career as a prison guard.

This 40% of our prison system is now filled with the homeless, the impoverished, the addicted and those with serious mental health problems. Black and brown people are grossly over- represented in this population. These are not people we should be scared of. These are people who, at best, we should be concerned about, and at worst, we should be upset with. Putting these people in cages for the last forty years has been an enormously expensive and completely ineffective public policy disaster. It has destroyed entire communities. These people need social workers, not lawyers; treatment, not cages. There is an emerging left/right consensus on this issue. Dr. Austin's work has been instrumental in forging that consensus.

<u>The Equal Defense Act</u>

In addition to the encouraging developments that I have described above, there has been another very important development in the Congress. In 2019, then Senator Kamala Harris introduced the Equal Defense Act (EDA) in the Senate, and cited the New York Times article earlier in the year on our ABA workload studies[14] in the press release that she issued with the filing of the bill. I worked very hard with various indigent defense organizations and with Senator Harris' office in the drafting of this bill. I also found a co-sponsor for the Harris bill in the House, Congressman Ted Deutch. Congressman Deutch has reintroduced the EDA in the House in the current session of Congress.

The bill provides for $1.25 billion to be disbursed over 5 years in $250 million increments, directly to the states for public defense, as long as the states agree to produce certain data that we need to reliably analyze public defender workloads, and as long as the state accepts the test for reasonably effective assistance of counsel that I have advocated for in my law review articles. I am quite pleased with both of these sections in the bill. The bill provides for phased in relief to address this problem over a five-year period.

The case for federal funding of state public defender systems is overwhelming, by any standard. Gideon is an unfunded federal judicial mandate on the states. With rare exception (e.g., Washington, DC, San Francisco), the states have a half century record of abject refusal to adequately fund this absolutely essential defense function for their criminal justice systems. Public trust in state judicial systems has been significantly eroded, especially after Ferguson.

Our plan is to get a hearing this year in the House. Rep. Deutch is a highly respected member of the House Judiciary Committee. Chairman Nadler has approved

hearings in the Crime Subcommittee of the House Judiciary Committee in 2021, probably late in the fall. Senator Booker will soon reintroduce the EDA in the Senate.

My old law firm, Holland & Knight, has agreed to provide pro bono lobbying for the Equal Defense Act in Congress. Holland & Knight, working together with The Lawyers' Committee for Civil Rights Under Law, has also agreed to provide pro bono litigation work around the country for the kind of litigation we have instituted in Missouri and Louisiana. We believe we now have a very replicable litigation model that is both efficient and effective.

A New Chapter in My Life

I no longer have any official portfolio in either the ABA or the National Association for Public Defense ("NAPD,") and that is as it should be. It is time for old white guys like me, who have had a wonderful time working in the ABA for the last 30 years and in the NAPD for the last 6 years, to turn it over to the next generation of lawyers.

I have recently taken appropriate steps to facilitate those changes. My last and only remaining obligation to the ABA is that of an independent contractor and Project Director for its remaining public defender workload studies in New Mexico and Oregon, which we expect to publish in the third quarter of 2021. I want to make sure that my only fiduciary duty is to the reliability of the work product of this meta-study and the success of our efforts to secure the kinds of transformational changes in our criminal justice system that it portends.

So I have decided to open up a new chapter of my life, and I have started a new firm called "Lawyer Hanlon."[15] In that capacity, I'd like to do as much as I can to further both of these projects: the Meta-Study and the Equal Defense Act.

Our goal is to amend the Equal Defense Act to include achieving the Meta-Study national numerical caseload limits for public defenders, as well as eliminating most misdemeanor offenses and doing significant sentencing reform over the five-year period provided in the EDA, all as a condition for federal funding for state indigent defense systems.

I will also continue in my role in initiating and structuring potentially successful litigation in various states to enforce the EDA caseload limits and in testifying as an expert witness in those cases. I am very much looking forward to working with Holland & Knight and The Lawyers' Committee for Civil Rights Under Law in this national litigation effort.

1 https://michiganidc.gov/wp-content/uploads/2019/09/Final-RAND-Report-Caseloads-September 2019.pdf **See** Table 1.1 at pp. 12-14.

2 I was lead counsel for the Missouri Public Defender in the Waters case.

3 As soon as the ABA issues its report in Indiana, expected in late March, and completes its Delphi panel work in New Mexico and Oregon sometime later this year, there will be 12 post-2010 public defender studies, which has been our goal from the beginning.

4 ABA's 2002 Ten Principles of a Public Defense System; ABA's 2006 Formal Opinion 06-441; ABA's 2009 Eight Guidelines of Public Defense Related to Excessive Workloads, available at www.indigentdefense.org.

5 2016 Brennan Center for Justice Report: "How Many Americans Are Unnecessarily Incarcerated?" See also ABA Resolution 102C, urging governments at all levels to allow imposition of civil fines or nonmonetary civil remedies instead of criminal penalties for offenses currently classified as misdemeanors.

6 Stephen F Hanlon, "Case Refusal: A Duty for a Public Defender and a Remedy for All of a Public Defender's Clients, 51 Indiana Law Review 59 (2018), at 85-86.

7 Id., at 72.
8 Stephen F Hanlon, "The Appropriate Legal Standard Required To Prevail In A Systemic Challenge To An

Indigent Defense System, 61 St. Louis U. L.J., 625, 2017, at 638.
9 That is precisely the relief we obtained in the First Circuit Court of Appeal in Louisiana. See link for Litigation elsewhere on this website.

10 Gideon v Wainwright, 83 S. Ct. 792 (1963)
11 Johnson v Zerbst, 303 U.S.458, 468 (1938)
12 Strickland v Washington, 466 U.S. 668, 684 (1984)

13 2016 Brennan Center for Justice Report: "How Many Americans Are Unnecessarily Incarcerated?". See also, ABA Resolution 102C, urging governments at all levels to allow imposition of civil fines or nonmonetary civil remedies instead of criminal penalties for offenses currently classified as misdemeanors.

14 I have been the Project Director for the ABA on all seven of those studies and a consultant to an eighth public defender workload study.

15 See link to "A New Chapter in My Life," elsewhere on this website.