The RAND Corporation recently published its first public defender workload study in the state of Michigan. 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).

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 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 will produce reliable national numerical caseload and workload standards (e.g., in Louisiana, for high felonies, average 70 hours, maximum cases 30, per public defender, per year). These standards will replace the long discredited and out of date 1973 NAC Standards (e.g., 150 undifferentiated felonies per year, per public defender).

After the RAND Michigan study, we are now at that place. I am not at liberty now to publish the names of all of the principals in the effort to produce a meta-study based on the existing public defender workload studies that RAND reviewed in its Michigan study, but I will be shortly and I will update this paper then.

**The Problem**

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.

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.

Developing A Compelling Narrative

For The Public and All Of The Stakeholders

In The Criminal Justice System, Including Lawmakers

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, 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 violative of both the Model Rules of Professional Conduct and the Sixth Amendment.

To be successful, this effort will require a lot of judicial and public defender 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 significant change in our criminal justice system that we will seek.

Moreover, we will need to convince all of these constituencies that we can answer the question that every one of them will have: what do we do with the people accused of crimes that public defenders can no longer represent?

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. Their principal conclusion: about 40% of America’s prisoners could be released from prison and jail now without any significant public safety consequences.

Implications Of The Meta-Study For The State Courts

As I have written elsewhere, 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 Supervisory Lawyer), 1.7
(Concurrent Conflict) and 1.16 (Mandatory Withdrawal) 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 2020 Meta-Study, based on reliable 21st century data and analytics.

Again, as I have written elsewhere, 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, 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. Lawyers are required to seek such relief under MRPC 1.16.

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, based on the Supreme Court’s 1938 decision in Johnson v Zerbst, 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 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 frightening development for all stakeholders in the criminal justice system, particularly state criminal court judges. For that reason, as noted above, I have reached out to Dr. James Austin.

Dr. Austin was the principal investigator in the Brennan Center’s recent exhaustive study of America’s prisons and jails. Their principal conclusion: about 40% of America’s prisoners could be released from prison now without any significant public safety concerns. 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 extensive data he has developed from his extensive work on America’s prisons and jails. 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.
The Fair Defense Act

In addition to the encouraging developments I have described above, there has been another very important development in the Congress. Last year, Senator Kamala Harris introduced the Fair Defense Act in the Senate, and cited the New York Times article earlier in the year on our ABA workload studies in the press release that she issued with the filing of the bill. I worked very hard with various indigent defense groups 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.

The bill provides $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 do reliable public defender workload studies, 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 function for their criminal justice systems. Public trust in state judicial systems has been significantly eroded, especially after Ferguson.

Recently, I again met with Sen. Harris’ people and Rep. Deutch’s people and facilitated a meeting of both of them in Sen. Harris’ office. This is a “marker” bill for future legislation; of course, it has no chance of passage in the current Congress and in the current political atmosphere. Our plan is to get a hearing this year in the House. Rep. Deutch is a highly respected member of the House Judiciary Committee. We will then wait to see what happens in the elections in
November, but we want to be ready for the first 100 days if those elections go our way. For the time being, both Sen. Harris and Rep. Deutch are actively seeking additional co-sponsors for this legislation.

My old law firm, Holland & Knight, has agreed to represent me pro bono in lobbying for the Fair Defense Act in Congress.

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 Indiana, New Mexico and Oregon. 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 am starting a new firm called “Lawyer Hanlon.” In that capacity, I’d like to do as much as I can to further both of these projects: the Meta-Study and the Fair Defense Act. Our goal is to amend the Fair Defense Act to include achieving the Meta-Study national numerical caseload limits for public defenders over the five-year period provided in the bill as a condition for federal funding of state indigent defense systems.
I was lead counsel for the Missouri Public Defender in the Waters case.

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.


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.


Id., at 72.


That is precisely the relief we have now obtained in Louisiana. See link for Litigation elsewhere on this website.

Gideon v Wainwright, 83 S. Ct. 792 (1963)

Johnson v Zerbst, 303 U.S.458, 468 (1938)


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.

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.

See link to “A New Chapter in My Life,” elsewhere on this website.