



Office of the State Public Defender
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October 1, 2013

Dear Governor Nixon,

Enclosed is the 33rd annual budget request of the Missouri State Public Defender System. The need for more staffing to handle the existing caseload is neither new or news to anyone following the challenges of Missouri's public defender system.

What *is* new is that the staffing request found in this budget is based not on MSPD's own guesstimate of its needs nor on the national caseload standard that caused the State Auditor such concern, but upon an independent and Missouri-specific workload study conducted under the auspices of the American Bar Association and RubinBrown, one of the state's leading accounting and business analytics firms. The methodology, which the ABA plans to 'export' to public defender systems across the nation, is the most thorough study of public defense workloads ever conducted, involving detailed time logs maintained by all public defenders as to both task and type of case, as well as the best practices and input, not only of public

defenders, but of many of Missouri's private criminal defense attorneys. The data is unimpeachable, the need is real, and the time for addressing it long overdue.

If you have any doubts about this, I strongly encourage you to request a personal meeting with the RubinBrown staff who conducted the study and obtain your own overview of both their method and their results. It is time to put to bed, once and for all, questions about *whether* the public defender system needs more staff and start turning the discussion to how to address the problem. I think you will find this workload study allows you to do just that.

In addition, there are two new items in this budget that I want to bring to your attention:

- ◆ **Juvenile Justice:** Included in this budget is a request for \$3.2 million for MSPD to assume responsibility for

providing defense representation to 3,900+ juveniles who last year went through the state's juvenile system unrepresented by counsel of any kind. This request is a direct response to the assessment of Missouri's juvenile justice system, released by the National Juvenile Defender Center this past spring, which found that significant numbers of Missouri's children were being processed through the state's juvenile justice system without ever speaking to or being represented by an attorney, in direct violation of the U.S. Supreme Court's decision in *In Re Gault*, 387 U.S. 1 (1967). In addition to the 1,670 cases in which the public defender provided juvenile defense representation, according to data provided by the Office of the State Court's Administrator, only 13% of the 6506 children facing delinquency charges in Missouri's juvenile justice system last year appeared with counsel, leaving the remainder to fend for themselves without legal assistance. Conversations with judicial leaders indicate that judges will appoint public defenders to represent those children if the PD has sufficient staffing to take on the additional cases. The requested funds are thus designed to allow MSPD to fill that gap, hiring sufficient attorney staff, as well as the necessary investigators and support staff, to provide defense representation to these 3,900+ juveniles across the state.

Failure to bridge this gap may have its own consequences for the state. Last year, the Department of Justice, under the leadership of Attorney General Eric Holder, sued Shelby County, TN for its failure to meet its constitutional

obligations toward the state's juveniles. That litigation resulted in a comprehensive out of court Memorandum of Agreement (<http://www.justice.gov/opa/pr/2012/December/12-crt-1511.html>) that required Shelby County to, among other things: establish a dedicated juvenile defender unit in the public defender's office, independent of the court, with the structure and resources to provide independent, ethical, and zealous representation for children; require procedural safeguards against self-incrimination, to provide notice of charges, and to hold transfer hearings; and to appoint counsel before children appear before a magistrate judge for a probable cause determination. If no steps are taken to ensure legal representation for over 5000 children going through Missouri's juvenile justice system, Missouri will be ripe for just such a federal intervention by Attorney General Holder's Justice Department as Tennessee was.

- ◆ ***Supplemental Budget: Return \$700,000 previously moved to OSCA to fund pilot contract programs:*** Last year, the legislature decided to transfer \$700,000 from MSPD's contracting funds to OSCA for the purpose of creating and overseeing two or more pilot 'bulk bid of misdemeanors' contracting projects. In the interim since that transfer, the Supreme Court has determined that it lacks the authority to administer such a program and that direct oversight of such attorney services would create a conflict of interest for the court. As a result, the Court has directed OSCA not to utilize the funds,

but to hold them separate and return them to General Revenue unused. MSPD, with the knowledge and agreement of the Supreme Court, therefore requests that the untouched \$700,000 be removed from OSCA's budget and returned to us, both as part of the FY14 supplemental budget and as part of the FY15 core, so that we may use it contract conflict cases and case overload – a need for which current funds are woefully inadequate.

In her book, *Ordinary Injustice*, Amy Bach described her investigation into the misdemeanor and lower-level felony courts around the country. What she found most troubling, as she watched horrific injustices daily paraded before her eyes in courts across the country, was the fact that the players in that system – defense lawyers, judges, prosecutors, and bailiffs – had become inured to the daily injustices that pervaded their courts. The daily dose of injustice had become so 'ordinary' that no one was even troubled by it anymore – no one except those whose lives were being upended, those with no voice and even less power to effect change. The same ennui can set in for those of us working at statewide policy levels. 'The public defender *always* says they need more resources.' 'The courts *always* need more judges.' Hardly news. Easily disregarded. Until, that is, we know someone caught up in the crush of a system operating in triage and then we are shocked at how unfairly they are treated.

The fact that injustice is 'ordinary' does NOT mean that we are exempted from a responsibility to fix it. History will not forgive us our failure to step in, nor should it. We all took an oath to

support the Constitution when we accepted our positions and we daily pledge our allegiance to 'liberty and justice for all.' These are not simply words in a rote exercise, but the very foundation for which our forefathers gave their lives and on which this nation was built. A foundation that today is crumbling around us. Despite the tight financial times, money was found to repair the crumbling foundations of our magnificent state capitol. Perhaps now we can find the means to repair the crumbling foundations of justice as well? I certainly hope so.

Sincerely,

A handwritten signature in black ink that reads "Cathy R. Kelly". The signature is written in a cursive, flowing style.

Cathy R. Kelly
Director, Missouri Public Defender Commission