STATE OF MINNESOTA

IN SUPREME COURT

C8-85-1433

In the Matter of the Petition of the Board of
Public Defense and the State Public Defender
For an Emergency Order Addressing the Crisis
in Public Defense

ORDER

On August 29, 2003, the Board of Public Defense and the State Public Defender filed a petition requesting the court in the exercise of its supervisory powers to issue an order requiring:

> (1) A presumption that continuances will be granted upon request in public defender cases when the defendant is out of custody, to remain in effect until July 1, 2005, or until further order of this court.
>
> (2) A limitation on appointment of public defenders in Child in Need of Protection or Services (CHIPS) cases to one public defender per case and a prohibition on appointing individual public defenders to representation of more than one party in a CHIPS case, to remain in effect until sufficient funding to provide broader representation is obtained or until further order of the court.
>
> (3) No CHIPS case be accepted for filing unless the petitioning party represents that the case has been subject to pre-petition screening, or that an emergency exists requiring the immediate commencement of the judicial process.

On September 12, 2003, the court directed petitioners to file a supplemental memorandum detailing the specific relief requested, how it may be implemented, and the

savings and caseload reduction expected to be achieved by each component of the requested relief. The court scheduled a public hearing and invited particular entities to comment upon the petition and to state whether they agree that public defender caseloads exceed resources. The public hearing took place on October 15, 2003.

Petitioners request this relief to help alleviate what they characterize as a crisis in public defense. Petitioners cite several contributing factors. From 2000 to 2002, the caseloads of public defenders at the trial court level increased over 14% on average, to more than double the caseload standards petitioners follow, which are consistent with caseload guidelines established by the National Advisory Commission on Criminal Justice Standards and Goals. *ABA Standards for Criminal Justice: Providing Defense Services* § 5-5.3 at 72 (3d ed. 1992). Petitioners state that the increasing caseload pressure has eroded the quality of public defense services and has resulted in the resignation of experienced public defenders. Additionally, insurance costs have increased by $1,600,000 annually, and 20 public defender positions have been eliminated due to a hiring freeze and layoffs resulting from the state's budget shortfall. During the 2003 legislative session, petitioners requested funding for additional public defenders at the trial level, but no additional funding was provided.

Several organizations and individuals, including the Commissioner of Human Services, the Minnesota County Attorneys Association, the Conference of Chief Judges (CCJ), and the Attorney General, submitted comments opposing the relief petitioners request. However, none of them disagreed that the public defender system has reached a

crisis in funding. The CCJ states that the lack of sufficient public defender staff and resources has begun to impinge on the ability to process cases at the trial level, raising issues of fairness, constitutionally adequate defense, and the effect delays have on witnesses and victims.

The central role the right to counsel plays in the judicial system cannot be overemphasized. "[I]n our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Gideon v. Wainwright*, 327 U.S. 335, 344 (1963). The assistance of counsel is of such fundamental importance that counsel must be provided for all indigent defendants who face incarceration unless the defendant waives this right. *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972); *State v. Borst*, 278 Minn. 388, 397, 154 N.W.2d 888, 894 (1967). In accordance with this constitutional mandate, the legislature has provided that adults and juveniles who are charged with a felony, gross misdemeanor or misdemeanor offense and are financially unable to obtain counsel are entitled to representation by the public defender. Minn. Stat. §§ 611.14(1), (4); 260B.163, subd. 4(c) (2002). In addition, the legislature has created a statutory right to counsel for parents and juveniles in CHIPS proceedings. Minn. Stat. §§ 611.14(4); 260C.163, subd. 3 (2002).

"[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (citation omitted). Nearly 50 years ago, before the public defender system was created, this court stated that the right to

assistance of counsel "cannot be nullified by the appointment of counsel who merely perform perfunctory or casual representation." *State ex rel. Dehning v. Rigg*, 251 Minn. 120, 122-23, 86 N.W.2d 723, 726 (1957).

Public defenders play a "crucial role" in the state's system of justice. *Kennedy v. Carlson*, 544 N.W.2d 1, 3 (Minn. 1996). As we recognized in *Dziubak v. Mott*, 503 N.W.2d 771, 775 (Minn. 1993), a public defender, unlike a private defense attorney, "may not reject a client, but is obligated to represent whomever is assigned to her or him, regardless of her or his current caseload or the degree of difficulty the case presents."

We acknowledge the fiscal crisis petitioners are experiencing, threatening the ability of public defenders to fulfill their crucial role in the judicial system. Nevertheless, petitioners' requests must be denied. Although requested to identify specific staff savings and caseload reduction expected to be realized from each component of the requested relief, petitioners have not done so. We conclude, for the reasons discussed below, that the relief requested would be ineffectual, and that only the legislature can provide genuine relief.

We cannot see how any measure of relief would be provided by establishing a presumption that continuance requests will be granted in all cases where the defendant is not in custody. Petitioners acknowledge that such a presumption would create a backlog of cases, soluble only by other measures. Even if the presumption were adopted, a motion, affidavit and court appearance would still be required. This is the same

procedure petitioners may follow now, and it is adequate to enable what little measure of relief continuances will provide.

Nor will the court attempt to place any limitation on the statutory provision for the appointment of the public defender to represent indigents who have a statutory right to counsel in CHIPS proceedings. Minn. Stat. §§ 611.14(4); 260C.163, subd. 3 (2002). Federal and state law mandate that if a child has been ordered into out-of-home placement the court must conduct a hearing within 12 months to determine the permanent placement of the child, and within 6 months for children under eight years at the time of the filing of the petition. 42 U.S.C. § 675(5)(c) (1997); Minn. Stat. § 260C.201, subds. 11 and 11a (2002). Prior to making the permanency decision, a series of hearings are required for the court to oversee efforts to rehabilitate and maintain the family or to provide permanent alternative care for the child victim. Minn. Stat. §§ 260C.148, .163, .201 (2002). Lack of counsel for any of the parties at these stages not only contravenes the statutory right to counsel, but also increases the likelihood that the cases will be prolonged, and interferes with the court's ability to make sound and timely decisions so that children can be returned to their families of origin or placed in another permanent, stable and nurturing family. The solution to petitioners' fiscal crisis is not to exacerbate the already difficult legal process for protecting the state's most vulnerable population.

We emphasize that it is for the court, and not the public defender, to appoint counsel in CHIPS proceedings. Minn. Stat. § 260C.163, subd. 3. Any directive by the

State Public Defender or a chief district public defender as to which party the public defender will represent is a nullity.

Finally, the court will not grant petitioners' request to require pre-petition screening in all CHIPS cases. Petitioners are actually asking for an expansion of Alternative Response, which is not a pre-petition screening tool. Alternative Response is a social service response to child maltreatment cases authorized by the legislature for use in low to moderate risk cases only. Minn. Stat. § 626.5551 (2002). It is not designed for families with children at high risk of abuse or neglect, and it is not designed to prevent placement or the need to invoke court jurisdiction. Alternative Response targets those cases that would likely not have resulted in court action; thus, its expansion would have little to no effect on CHIPS filings. In fact, Alternative Response is already in place in 73 counties with no concomitant reductions in CHIPS filings.

There are some steps the court can take to provide relief to petitioners, and we will do so, but the relief the court can provide is not sufficient to meet their true concerns. We will take steps to try to ensure that public defender eligibility screening is completed in all cases, and that scheduling and case management practices continue to be examined in each district to assist public defenders in maximizing the effectiveness of court time. Additionally, we request that the Department of Human Services examine the disparity in CHIPS filings among the various counties. We recognize in making this request that disparities do not necessarily mean that some counties are overly zealous in their prosecution, but rather may suggest that some are less vigilant. We also request that the

Minnesota County Attorneys Association and the Minnesota League of Cities examine the use of pretrial diversion in each county and city in criminal and juvenile delinquency cases.

Only the legislature can provide genuine relief to petitioners. It is imperative for the legislature to provide adequate funding for constitutionally and statutorily mandated legal services provided by public defenders.

In *Dziubak*, we stated that public defender offices are "grossly underfunded." *Id.* We subsequently expressed our "concern[] that adequate funds be available for public defense services to indigent juveniles and adults." *Kennedy*, 544 N.W.2d at 3. We noted that a number of factors had "dramatically increased" the type and severity of cases handled by public defenders, and prevented district public defenders from providing what we referred to as an "ideal" level of defense services. *Id.* Contributing factors included the increasing numbers of juvenile and serious adult crimes, increased statutory penalties, a fluctuating economic climate, and pressures on state budgets. *Id.*

We reiterate these concerns now. Effective relief for petitioners would be for the legislature to match the level of funding for legally mandated public defender services to actual public defender caseloads by increasing funding levels, reducing workloads or a combination of both. In addition to increased appropriations, we suggest that the legislature consider three other areas of potential relief: misdemeanor offenses, public defender eligibility, and pretrial diversion.

Misdemeanor caseloads of district public defenders increased by over 20% between 2000 and 2002, and in 2002 represented 21% of the total public defender caseload. One possible measure of relief would be to make those misdemeanors that are routinely sentenced only by a fine punishable as petty misdemeanors, thereby removing the constitutional requirement for representation.

Additionally, the legislature could take a closer look at the methods by which public defenders are appointed and by which partial payments required of defendants are collected. We have stated that the resources of the public defender must be jealously guarded. *In re Stuart*, 646 N.W.2d 520, 524 (Minn. 2002). The legislature has required all persons desiring public defender representation to undergo eligibility screening and has provided for partial reimbursement by defendants who have some ability to pay.[1] Minn. Stat. §§ 611.17; 611.20 (2002 & Supp. 2003). However, the legislature has not provided funding to enforce these measures. The judiciary has not been provided sufficient funding to verify eligibility information. In 2003, the court requested funding for additional positions to collect reimbursements, but that funding was not provided. If these processes are to be meaningful and effective, the legislature needs to properly fund them.

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[1] The legislature also has required a co-payment by all persons receiving public defender services, but because the constitutionality of the co-payment provision has been challenged and is currently before the court, we make no further reference to it in this order. Minn. Stat. § 611.17, subd. 1(c) (Supp. 2003); *State of Minnesota vs. Shawnatee Marie Tennin*, Case No. A03-1281 (argued Dec. 3, 2003).

Finally, the legislature could provide some relief in the form of pretrial diversion. In the 1990s, the legislature required that all county attorneys establish a diversion program for first-time offenders in an effort to, among other goals, reduce recidivism, provide an alternative to confinement, and reduce caseload burdens on district courts and the criminal justice system. Minn. Stat. §§ 388.24; 401.065 (2002). However, utilization of diversion programs varies widely, and no statute requires city attorneys to consider pretrial diversion in misdemeanor cases. Although the court can request that prosecutors examine their use of diversion programs, the legislature can require it.

Based upon all the files records and proceedings herein,

IT IS HEREBY ORDERED THAT:

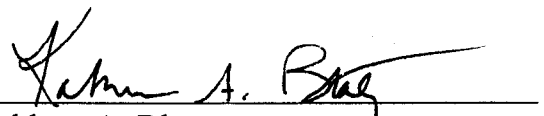
1. The petition is denied.

2. The Conference of Chief Judges shall continue efforts to ensure that public defender eligibility screening is completed in all cases.

3. District court judges shall continue efforts to meet with public defenders, county attorneys, and court staff in each district to examine scheduling and case management practices so as to assist public defenders in maximizing the effectiveness of court time.

DATED: December 26, 2003

BY THE COURT:



Kathleen A. Blatz
Chief Justice