CRIMINAL LAW — INDIGENT DEFENSE — MISSOURI COURT REFUSES PUBLIC DEFENDER'S DELEGATION OF INDIGENT LEGAL REPRESENTATION TO GOVERNOR. — *State v. Quehl*, No. 15AC-CR00594-01 (Mo. Cir. Ct. Aug. 25, 2016).

In August 2016, the Missouri State Public Defender System (MSPD) grabbed headlines with a bold announcement: with too little funding and too few lawyers to meet his office's caseload, Director Michael Barrett would, for the first time, exercise his office's statutory authority to "[d]elegate the legal representation of any person to any member of the state bar of Missouri."[1] The member in question, the Director wrote in his open letter, "not only created this problem, but is in a unique position to address it"[2] — Missouri Governor Jay Nixon, Bar Number 29603. The story resulted in national media coverage[3] and renewed attention to the sorry state of indigent defense in Missouri[4] and elsewhere. It was of particular relevance, though, to Johnny Dean Quehl. On August 10th, a notice was filed in his case: the Director would be moving to withdraw MSPD from Quehl's case and delegating his representation to Governor Nixon.[5] But two weeks later, a Missouri court denied the motion.[6] While the court's order is understandable for political and pragmatic reasons, it was in no way required: the court could reasonably have found that the statute granted the director a freestanding delegation authority. In fact, in light of the Missouri judiciary's history of aggressive intervention in support of indigent defense, it is possible that the court would agree with the

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[1] Letter from Michael Barrett, Dir., Mo. State Pub. Def., to Jeremiah Nixon, Governor of Mo. 1 (Aug. 2, 2016) (alteration in original) (quoting MO. REV. STAT. § 600.042.5(1) (2013)), http://www.publicdefender.mo.gov/Newsfeed/Delegation_of_Representation.PDF [https://perma.cc/ATV5-DTYS]. The statute has since been amended to read "an *eligible* person," *see* MO. REV. STAT. § 600.042.5(1) (2016) (emphasis added), but this amendment does not affect the following analysis.

[2] Letter from Michael Barrett to Jeremiah Nixon, *supra* note 1, at 1.

[3] *See, e.g.*, Elise Schmelzer, *Missouri Public Defender, Fed Up with Meager Funding, Appoints Governor to Defend Assault Suspect*, WASH. POST (Aug. 4, 2016), https://www.washingtonpost.com/news/morning-mix/wp/2016/08/04/mo-public-defender-blames-governor-for-huge-caseload-problem-appoints-him-to-defend-assault-suspect [https://perma.cc/Y5HQ-B894].

[4] *See, e.g.*, Camila Domonoske, *Overworked and Underfunded, Mo. Public Defender Office Assigns Case — To the Governor*, NPR: THE TWO-WAY (Aug. 4, 2016, 12:34 PM), http://www.npr.org/sections/thetwo-way/2016/08/04/488655916/overworked-and-underfunded-missouri-public-defender-assigns-a-case-to-the-govern [https://perma.cc/FFG2-EBTU]; *see also* Chris Dandurand, Note, *Walking Out on the Check: How Missouri Abandoned Its Public Defenders and Left the Poor to Foot the Bill*, 76 MO. L. REV. 185, 186–87 (2011).

[5] Notice of Director's Delegation of Counsel and Motion to Withdraw, State v. Quehl, No. 15AC-CR00594-01 (Mo. Cir. Ct. Aug. 10, 2016).

[6] State v. Quehl, No. 15AC-CR00594-01 (Mo. Cir. Ct. Aug. 25, 2016) (order denying motion to withdraw).

Director's interpretation in a less politically charged case, supplying a potentially valuable tool for putting pressure on the political branches.

Prior to 1972, Missouri had no public defender system. Instead, indigent defendants were represented by members of the private bar, appointed by the courts without compensation.[7] That year, the legislature created the MSPD, establishing offices, funding staff public defenders, and setting money aside for appointed counsel.[8] The private counsel system was later replaced by contract counsel — "private attorneys who . . . agreed to take on all indigent clients in a particular area for a set fee."[9] In 1982, the MSPD was reorganized, establishing the Office of the Public Defender as an independent judicial department.[10] By 1989, contract counsel were almost entirely replaced with full-time public defenders.[11]

This reorganization, however, never resulted in adequate funding. By 2008, Missouri spent less per capita on indigent defendants than did any state but Mississippi.[12] In 2015, the General Assembly responded by attempting to appropriate an additional $3.4 million for indigent defense, but the Governor vetoed the bill.[13] When the General Assembly overrode the veto, the Governor withheld the funds.[14] In 2016, Missouri continued to rank forty-ninth in the country in the provision of resources to indigent defense.[15] Without the money or the lawyers to defend his office's clients, the Director announced that the representation of one, Quehl,[16] would be delegated to the Governor who had vetoed additional funding.

The Director's letter and notice cited to the statute that laid out the duties and powers of the director of the Missouri Public Defender Commission.[17] The law provided that the director "may . . . [d]elegate the legal representation of any person to any member of the state bar

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[7] Sean D. O'Brien, *Missouri's Public Defender Crisis: Shouldering the Burden Alone*, 75 MO. L. REV. 853, 860 (2010).

[8] *Id.* at 861–62.

[9] ROBERT L. SPANGENBERG ET AL., THE SPANGENBERG GRP. & THE CTR. FOR JUSTICE, LAW & SOC'Y AT GEORGE MASON UNIV., ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 3 (2009).

[10] O'Brien, *supra* note 7, at 863 (citing MO. REV. STAT. §§ 600.011–.101 (2000) (effective Apr. 1, 1982)).

[11] *Id.* at 864.

[12] SPANGENBERG ET AL., *supra* note 9, at 12.

[13] PUB. DEF. COMM'N, STATE OF MO., FISCAL YEAR 2015 ANNUAL REPORT 7 (2015).

[14] *Id.*

[15] Letter from Michael Barrett to Jeremiah Nixon, *supra* note 1, at 1.

[16] Quehl was charged with two counts of second-degree assault. *15AC-CR00594-01 — Charge Information*, YOUR MISSOURI COURTS [hereinafter *Charge Information*], https://www.courts.mo.gov/casenet/cases/searchCases.do?searchType=caseNumber [https://perma.cc/ZL3F-GUE2] (select "19th Judicial Circuit (Cole County)" from dropdown; enter 15AC-CR00594-01 in case number field; click on the case number; and select "Charges, Judgments & Sentences").

[17] MO. REV. STAT. § 600.042 (2013).

of Missouri."[18] This provision, the Director maintained in his letter, placed with his office the authority to delegate a case to any member of the bar,[19] but he stated he had never exercised it out of his "sincere belief that it is wrong to reassign an obligation placed on the state . . . to private attorneys who have in no way contributed to the current crisis."[20] Governor Nixon's own great contribution to the funding crisis,[21] however, assuaged all such concerns.

The State opposed the Director's motion.[22] First, the State argued that the statute's text as a whole granted the director only the power to contract with willing private attorneys. The statute provides that the director shall "[c]ontract for legal services with *private attorneys* . . . for fees,"[23] and the chapter grants courts (rather than the director) the power to "*appoint*[] private counsel."[24] These sections, in isolation or taken together, might imply that the statute created a specific scheme of contract for private legal services that covered only willing counsel.

Next, the State argued that the Missouri Supreme Court had rejected the suggestion that the delegation authority could be used to compel an attorney to represent an indigent defendant. In *State ex rel. Missouri Public Defender Commission v. Pratte*,[25] the Missouri Supreme Court decided a challenge to one of the rules promulgated by the Commission pursuant to its statutory authority. There, in a footnote, the court paused to address the meaning of the statute's section 600.042.5(1), though the question was not presented.[26] After quoting the delegation language, the court continued: "However, section 600.042 states that the director only may assign cases to members of the private bar if the assigned counsel is paid for the work he or she is assigned to do. *Courts have the power to appoint lawyers . . . .*"[27] The State argued that this language held that "the power of appointment

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[18] *Id.* § 600.042.5(1).

[19] *See* Letter from Michael Barrett to Jeremiah Nixon, *supra* note 1. While the Director did not address the rest of the statute, the letter's argument implied that the delegation authority in section 600.042.5(1) was entirely distinct from the appointment authority in section 600.042.1(10) (instructing the director to contract with private attorneys for commission-approved fees). On this argument, the appointment authority would be limited by the requirement of the private attorney's agreement and compensation, while the delegation authority would not be.

[20] *Id.* at 1.

[21] Besides vetoing additional funding, Governor Nixon cut funding to the public defense system in 2015 and 2016. *Id.*

[22] State's Suggestions in Opposition to Defendant's Notice of Director's Delegation of Counsel and Motion to Withdraw, *Quehl*, No. 15AC-CR00594-01 (Aug. 22, 2016) [hereinafter State's Suggestions].

[23] *Id.* at 2 (alteration in original) (citing MO. REV. STAT. § 600.042.1(10)).

[24] *Id.* (citing MO. REV. STAT. § 600.064.1).

[25] 298 S.W.3d 870 (Mo. 2009).

[26] *Id.* at 887 n.35.

[27] *Id.* The court is referring to section 600.042.1(10), discussed *supra* note 19.

rests *solely* with the courts."[28] The director's delegation power was only another way of referring to his powers to contract with private attorneys.[29]

Finally, the State argued that the Director's interpretation would violate the separation of powers.[30] The power to appoint attorneys is one of the "inherent power[s] possessed by courts,"[31] which "[t]he General Assembly could not assume" and "did not attempt to [assume]."[32] Even if the statute meant what the Director argued it did, it would violate the separation of powers. This purported unconstitutionality was reason to think it must mean something else.

The Circuit Court of Cole County denied the motion. In a one-page order, Judge Joyce addressed only one of the State's arguments. The Missouri Supreme Court, she wrote, had "addressed this very issue" in *Pratte*.[33] She then quoted the same section of footnote 35 that the State had, and came to the same conclusion: "*Only* the [c]ourts have the power to appoint lawyers."[34] Therefore, the motion to withdraw was denied.[35] The public defender did not appeal, and the parties reached a plea agreement on December 7, 2016.[36]

The court's interpretation of the statute may well be the correct one, especially as a matter of politics: the Director's "delegation" to the Governor was in the first place likely aimed at provoking a political rather than judicial response. It was certainly not, however, the only meaning that the text could bear: neither the precedent cited, the state constitution, nor the structure and language of the statute compelled the court's conclusion. In fact, given the Missouri courts' history of engaging with the other branches to promote the cause of indigent defense, there is reason to think that the alternative interpretation of the statute is still available in another case (for instance, one in which the appointed lawyer is not the sitting governor). Allowing the director the discretion to conscript private lawyers would give MSPD needed influence on the private bar, a constituency with far more influence on the political branches than indigent defendants enjoy.

While there were sound political reasons not to do so in the case at bar,[37] a court could have interpreted section 600.042.5(1) of the statute

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[28] State's Suggestions, *supra* note 22, at 4 (emphasis added).
[29] *See id.*
[30] *See id.* at 5.
[31] *Id.* (quoting State *ex rel.* Gentry v. Becker, 174 S.W.2d 181, 184 (Mo. 1943)).
[32] *Id.*
[33] *Quehl*, No. 15AC-CR00594-01 (Aug. 25, 2016) (order denying motion to withdraw).
[34] *Id.* (emphasis added).
[35] *Id.*
[36] *Charge Information*, *supra* note 16.
[37] For instance, there would be an obvious conflict of interest in a defendant being represented by the head of the executive branch.

to mean exactly what the Director asserted it did. First, the precedent cited in Judge Joyce's order did not foreclose the Director's interpretation. The footnoted dicta in *Pratte* were footnoted dicta for a reason: the question of the meaning of the particular section was in no way presented and was not actually argued in the parties' briefs.[38] What's more, the *Pratte* court did not go as far as Judge Joyce did. *Pratte*'s assertion that "[c]ourts have the power to appoint lawyers"[39] is undoubtedly true.[40] The language of the order in *Quehl*, that "[*o*]*nly* the [c]ourts have the power to appoint lawyers,"[41] does not necessarily follow.

Another version of this exclusivity argument appeared in the State's constitutional argument. But that argument too fails to show why the courts' ability to exercise a power means that the legislature could not have conferred overlapping authority to the director. The State argued that such an arrangement would violate the separation of powers on its face — regardless of which member of the bar was chosen, the legislature simply could not confer an "inherent power possessed by courts"[42] on another actor. The Missouri Constitution explicitly adopts the separation of powers, providing that "no [department] shall exercise any power properly belonging to either of the others."[43] But the Missouri Supreme Court has acknowledged that the separation is not complete and that powers may overlap.[44] Nor do all powers that courts claim as "inherent" become exclusive. Some inherent judicial powers that the Missouri courts have recognized, like the power to provide for funding of court staff,[45] are necessarily coextensive

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[38] None of the proceedings in *Pratte* concerned an attempt by the director to exercise the delegation power, nor would the exercise of that power have mattered to the outcome. While the court intoned in footnoted text that "[s]ome suggestion has been made that the director of the public defender's office has the ability to appoint members of the private bar to work for free under section 600.042.5(1)," State *ex rel.* Mo. Pub. Def. Comm'n v. Pratte, 298 S.W.3d 870, 887 n.35 (Mo. 2009), the only reference to the section made in the briefs was by the state attorney, who cited it only as concurrent authority for its assertion that the public defender had the authority to contract with private counsel as an alternative means of relieving its caseload, Respondent's Substitute Statement, Brief and Argument at 18, 22, *Pratte*, 298 S.W.3d 870 (No. SC90195), 2009 WL 3025007. No party, therefore, argued that there was a distinct delegation authority.

[39] *Pratte*, 298 S.W.3d at 887 n.35.

[40] *See* MO. SUP. CT. R. 31.02(a); State *ex rel.* Gentry v. Becker, 174 S.W.2d 181, 184–85 (Mo. 1943).

[41] *Quehl*, No. 15AC-CR00594-01 (Aug. 25, 2016) (order denying motion to withdraw) (emphasis added).

[42] State's Suggestions, *supra* note 22, at 5 (quoting *Becker*, 174 S.W.2d at 184).

[43] MO. CONST. art. II, § 1.

[44] *See* Goodrum v. Asplundh Tree Expert Co., 824 S.W.2d 6, 12 (Mo. 1992) ("*[I]t is obvious that some overlap of functions necessarily must occur*." (quoting State Tax Comm'n v. Admin. Hearing Comm'n, 641 S.W.2d 69, 74 (Mo. 1982) (emphasis added)).

[45] *See* State *ex rel.* Weinstein v. St. Louis County, 451 S.W.2d 99, 102 (Mo. 1970) (recognizing that payment of Juvenile Court personnel expenses could be compelled by mandamus).

with the power of the legislature — they might even be thought relevant only when the legislature does *not* exercise its own authority (for example, by failing to provide sufficient resources).[46] On this logic, the statute as the Director interpreted it would raise no more separation of powers problems than would a statute funding court staff.

Nor do the State's textual arguments require the court's conclusion. While the State argued persuasively that the director's *appointment* power is limited by the requirement of the private attorney's consent,[47] it left open the interpretation that the *delegation* power is distinct and not similarly encumbered. In fact, the State's own brief argued that the words "appoint" and "delegate" are not synonymous, going so far as to cite their dictionary definitions.[48] Thus, it would not go beyond the language of the statute to argue that the appointment authority is quotidian and constrained, while the distinct delegation authority is an emergency brake granted with the understanding that it would be used judiciously and rarely.[49] The latter interpretation also offers the advantage of consistency with the presumptions that legislatures use different words intentionally to convey different meanings[50] and do not write sections of statutes that are entirely superfluous.[51]

None of the arguments the State advanced, then, foreclosed the Director's interpretation of the statute. In context, however, the order's reasoning is not at all difficult to understand: the Director had not attempted to delegate Quehl's representation to just any attorney, but to the sitting governor. Faced with the prospect of ordering the Governor to appear in court on behalf of a defendant, the court chose instead to adopt another interpretation of the statute, one at least faintly endorsed by the Missouri Supreme Court. The very case the court cited, however, provides reason to think that Missouri's courts might be open to the Director's interpretation in a future case. *Pratte* is part of a long history of engagement by the Missouri judiciary in en-

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[46] *See* Martin Guggenheim, *The People's Right to a Well-Funded Indigent Defender System*, 36 N.Y.U. REV. L. & SOC. CHANGE 395, 443 (2012) ("[T]he failure to fund indigent defense — when the failure is the responsibility of the legislative or executive branch — constitutes an unconstitutional encroachment on an essential judiciary function.").

[47] *See* MO. REV. STAT. § 600.042.1(10) (2013).

[48] State's Suggestions, *supra* note 22, at 4–5 (citing THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 121, 377 (2d college ed. 1982)).

[49] The director would need to be cautious with a power that, once granted, could just as easily be taken away by amendment of the statute. These concerns might well cause him or her to think carefully before adopting a scorched-earth delegation strategy that would be likely to further alienate the private bar and the General Assembly. Used cautiously, however, the power could make an ally of the private bar in the cause of increased funding for public defenders (and therefore decreased conscription).

[50] *See, e.g.*, Russello v. United States, 464 U.S. 16, 23 (1983).

[51] *See, e.g.*, Hyde Park Hous. P'ship v. Dir. of Revenue, 850 S.W.2d 82, 84 (Mo. 1993).

suring that the political branches provide resources for indigent defense.

In three major cases over thirty years, Missouri's courts have repeatedly demonstrated willingness to support the cause of adequate indigent defense by applying pressure to the legislature and the executive. This judicial history extends at least to *State v. Green*,[52] which the Missouri Supreme Court decided in 1971. *Green* preceded the advent of statutory authority for the appointment (or pay) of private counsel for indigent defendants. Instead, the State had relied on lawyers to fulfill this duty without compensation.[53] But after a trial court allowed appointed counsel reimbursement for fees and expenses, the supreme court took up the question of whether lawyers could fairly be required "to bear this burden alone."[54] Deciding that such a question was not within its authority, the court reversed the judgments and struck the fees.[55] But it went on to address the legislature: after a year from the month of the opinion, the court announced, it would "not *compel* the attorneys of Missouri to discharge *alone* 'a duty which constitutionally is the burden of the State.'"[56] The gauntlet was therefore thrown down — the legislature would have one year "to respond to the position" the court had taken.[57]

The General Assembly responded by establishing what would become the MSPD.[58] Ten years later, however, the political system had again failed to provide adequate funding, and the Missouri Supreme Court was confronted with the same issue in *State ex rel. Wolff v. Ruddy*.[59] In *Wolff*, the court noted the harsh reality that the money appropriated had run out: "[t]he cupboard [was] bare."[60] The court concluded that it could not "permit the administration of criminal justice . . . to grind to a halt."[61] It therefore turned "without apology" to the Missouri Bar,[62] establishing from the court's own judgment "temporary guidelines" for the provision of indigent defense by the private bar.[63] The court again called the other branches to action, including in its guidelines its own commitment to "continue to urge the co-equal Executive and Legislative branches of government to each assume its

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52 470 S.W.2d 571 (Mo. 1971).

53 *Id.* at 572–73.

54 *Id.* at 573.

55 *Id.*

56 *Id.* (quoting State v. Rush, 217 A.2d 441, 446 (N.J. 1966)).

57 *Id.* Notably, the court did not disavow the judiciary's power to appoint counsel without compensation. *See id.* (Seiler, J., concurring).

58 *See, e.g.*, O'Brien, *supra* note 7, at 861.

59 617 S.W.2d 64 (Mo. 1981).

60 *Id.* at 65.

61 *Id.*

62 *Id.*

63 *Id.* at 67.

share of responsibility for solution of the problem of defense of the indigent."[64] In response, the legislature reorganized the public defender system.[65]

Pratte was the court's third major case concerning indigent defense. But like the *Green* and *Wolff* courts, the *Pratte* court did not constrain itself to deciding the question before it. Rather, it again used its platform and authority to urge the other branches to act, expressing its "expect[ation] that presiding judges, prosecutors and the public defender will work together cooperatively"[66] to find solutions, such as the dismissal of certain cases.[67]

While actually ordering a member of one of the other branches of government to appear in court as a defense attorney was a bridge too far, Missouri's courts ought to remain open to the claims of the MSPD on behalf of indigent clients, including the claimed delegation power. Although the Director expressed reluctance to use that power on attorneys who did not share the Governor's responsibility for the embarrassingly dire straits of Missouri's criminal defendants, the careful use (or threat) of the delegation power would give him and future directors substantial influence on the private bar. Elsewhere, private attorneys conscripted as public defenders have become powerful (and self-interested) advocates for increased funding for indigent defense.[68] As the indigent nationwide continue to struggle for adequate representation, courts should take every opportunity to bind their fates to those of groups more likely to have the ears of legislators and governors. If we are to remain faithful to the ideal that "every defendant stands equal before the law,"[69] shared burden should lead to shared relief.

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64 *Id.*

65 *See* O'Brien, *supra* note 7, at 863.

66 State *ex rel.* Mo. Pub. Def. Comm'n v. Pratte, 298 S.W.3d 870, 887 (Mo. 2009).

67 *See id.*

68 *See, e.g.*, *This American Life: Deep End of the Pool*, CHI. PUB. RADIO (Aug. 26, 2016), https://www.thisamericanlife.org/radio-archives/episode/595/transcript [https://perma.cc/DS6A-JHNW] (relating the story of Jack Bailey, a Louisiana personal injury attorney, who was ordered to represent an indigent defendant and has since gone to the State Legislature to advocate for increased funding for public defenders, in part because "[h]e does not want another case like this").

69 Gideon v. Wainwright, 372 U.S. 335, 344 (1963).