

No. 11-9953

IN THE
Supreme Court of the United States

JONATHAN BOYER,

Petitioner,

v.

STATE OF LOUISIANA,

Respondent.

On Writ of Certiorari to
The Louisiana Third Circuit Court of Appeal

**BRIEF OF THE NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS AND PASCAL F.
CALOGERO, JR., FORMER CHIEF JUSTICE,
LOUISIANA SUPREME COURT, AS *AMICI CURIAE*
IN SUPPORT OF PETITIONER**

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INTEREST OF THE *AMICI CURIAE*¹

The National Association of Criminal Defense Lawyers (“NACDL”), a non-profit corporation, is the preeminent organization advancing the mission of the criminal defense bar to ensure justice and due process for persons accused of crime or wrongdoing. A professional bar association founded in 1958, NACDL’s approximately 10,000 direct members in 28 countries – and 90 state, provincial, and local affiliate organizations totaling up to 40,000 attorneys – include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges committed to preserving fairness and promoting a rational and humane criminal justice system. The American Bar Association recognizes the NACDL as an affiliate organization and awards it representation in the ABA’s House of Delegates.

NACDL was founded to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving the right to speedy trial. In furtherance of this and its other objectives, NACDL files approximately 50 *amicus curiae* briefs each year, in this Court and

¹ No counsel for any party had any role in authoring this brief, and no one other than the *amici curiae* and their counsel made any monetary contribution to its preparation or submission. The parties have consented to the filing of this brief in letters of consent on file with the Clerk.

others, addressing a wide variety of criminal justice issues. NACDL has a particular interest in this case because the decision of the court below misconstrues and misapplies this Court's speedy trial jurisprudence in refusing to weigh against the State of Louisiana its failure to provide funding for Petitioner's defense for over five years.

Pascal F. Calogero, Jr., was elected to the Louisiana Supreme Court in 1972, became its Chief Justice on April 9, 1990, and served in that capacity until his retirement at the end of 2008. As Chief Justice, he served as the Chief Administrative Officer of the Louisiana Court System, Chairman of the Judicial Ethics Committee, the Judicial Council, and the Human Resources Committee, and as a member of the Conference of Chief Justices. He was instrumental in the creation of the Louisiana Indigent Defense Board and is deeply familiar with the history of Louisiana's funding of counsel for indigent defendants.

This case raises an important issue concerning an indigent criminal defendant's right to a speedy trial. *Amici* submit this brief to provide an overview of the funding of indigent defense in Louisiana in general and in Calcasieu Parish in particular, and the consequences that system has had on indigent defendants' speedy trial rights.

SUMMARY OF ARGUMENT

The question presented in this case is whether Louisiana's failure to fund counsel for an indigent defendant for five years should be weighed against the State for speedy trial purposes. In *Barker v. Wingo*, 407 U.S. 514, 530 (1972), the Court held that

courts assessing delay should balance the “[l]ength of delay, the reason for the delay, the defendant’s assertion of his right, and prejudice to the defendant.” More recently, the Court ruled that “[d]elay resulting from a systemic breakdown in the public defender system could be charged to the State.” *Vermont v. Brillon*, 129 S. Ct. 1283, 1292 (2009) (internal citations and quotation marks omitted).

We show below that the lack of funding that caused Petitioner’s prosecution to be delayed for five years did indeed reflect a systemic breakdown in the public defender system – in Louisiana in general and in Calcasieu Parish in particular. That breakdown was the direct and foreseeable result of deliberate decisions made and actions taken over a period of years by state and local officials. Hence those five years not only could but should be charged to the state under *Barker* and *Brillon*. A contrary ruling would encourage states to disregard indigent defendants’ Sixth Amendment rights, including their right to a speedy trial.

ARGUMENT

Part I below sets out an overview of the Louisiana indigent defense system, describing the historic reliance on local actions and local funding of counsel, efforts of the Louisiana judiciary to ameliorate the system’s shortcomings, and the failing grades consistently given to the system by independent observers. Part II discusses the indigent defense system in Calcasieu Parish, where Petitioner was prosecuted, showing that the five year delay in his trial caused by the lack of funding for defense counsel

was a result not only of the State's irresponsible reaction to the need for funding but also of the Parish's refusal to allocate available funds to the defense function.

I.

An Overview of Louisiana's Indigent Defense System.

Louisiana's indigent defense system has been chronically underfunded from its inception because of Louisiana's historic practice of funding and managing indigent defense solely at the local level and its refusal to use public money to pay for indigent defense.

Although the Louisiana Supreme Court repeatedly tried to remedy the situation—both by pressuring the Legislature to act and by acting on its own—real change did not occur until 2007, too late for Jonathan Boyer.

A. The Overall State Structure.

1. Local Appointment of Counsel.

The indigent defense system that kept Jonathan Boyer waiting five years for a trial dates from 1966.² Before then Louisiana judges appointed counsel for felony defendants from an informal list of local attorneys who were typically expected to do the work pro bono. Drew at 956-57. After *Gideon v. Wainwright*, 372 U.S. 335 (1963), the Louisiana Legislature formalized this appointment system,

² Richard Drew, *COMMENT: Louisiana's New Public Defender System: Origins, Main Features, and Prospects for Success*, 69 La. L. Rev. 955, 956 (2009) ["Drew"].

creating local indigent defense boards and giving them control of the attorney lists and assignments.³

At the same time, the state Legislature created a source of funding in the form of set fees to be assessed against criminals upon conviction.⁴ These fees were not pooled by the State or by region but instead remained in the local district in which they were collected.⁵ This method of funding indigent defense remained substantively unchanged for the next forty years.

2. Localities Given Choice of System.

In 1976, to comply with a new state constitutional requirement for a “uniform system” of indigent defense, the State enacted the Uniform Indigent Defender Act.⁶ In fact, however, the new law did not impose greater uniformity but instead permitted less. It empowered local indigent defense boards to choose between appointing private attorneys, as they had been doing, or creating a local public defender agency and hiring salaried public defenders.⁷

The 1976 law also did not change the method of funding indigent defense, although it did increase the amount of the fee to be paid by convicted criminals and required all those convicted of more than a parking violation to pay it.⁸ The bulk of the fee

³ 1966 La. Acts No. 366; Drew at 956-57.

⁴ 1966 La. Acts No. 366, § 8; Drew at 956-57.

⁵ 1966 La. Acts No. 366, § 8; Drew at 959.

⁶ 1976 La. Acts No. 653, § 141; Drew at 957.

⁷ 1976 La. Acts No. 653, § § 141, 144; Drew at 957-59.

⁸ 1976 La. Acts No. 653, § 146; Drew at 957-58.

revenue thereafter came from the assessment of traffic tickets.⁹

The 1976 law also created a state board to “coordinate” and “facilitate” the activities of the local indigent defense boards, and allocate up to \$10,000 to each one,¹⁰ but the Legislature never funded the board and formally abolished it a few years later.¹¹

Local indigent defense boards were given a third option in 1986—contracting with private attorneys.¹² This proved to be popular: many districts contracted with a group of local attorneys who would, collectively, agree to handle all indigent defense cases in the district for a flat annual fee. *See* NLADA at 30.

3. State-Level Body Created.

Concerned by years of inaction from the State Legislature, the Louisiana Supreme Court took the initiative in 1994 and created a state-level regulatory body: the Louisiana Indigent Defense Board (the Board). Drew at 964-65. But the Board had no real power. It could promulgate standards and distribute money to the local indigent defense boards from

⁹ Drew at 958; National Legal Aid & Defender Association, *In Defense of Public Access to Justice, An Assessment of Trial-Level Indigent Defense Services in Louisiana 40 Years After Gideon*, at 13 (2004) [“NLADA”].

¹⁰ 1976 La. Acts No. 653, § 149; Drew at 958-59.

¹¹ Drew at 959; 1981 La. Acts No. 873 (abolishing the state board).

¹² 1986 La. Acts No. 94, § 145; Drew at 958.

whatever funds the Legislature chose to appropriate to it.

The Board's theoretical power to enforce compliance with its standards by withholding funds from districts that failed to meet them was defeated by dramatic underfunding at both the state and local levels. *Id.* at 966. The Board was reluctant to withhold funds from districts that lacked a minimally adequate level of funding, and the Board's funds were not enough to provide even that level of funding, much less incentive grants over and above it. *Id.* at 968. Although the Judiciary had requested \$10 million in funding, the Legislature initially appropriated only \$5 million. *Id.* at 965. The amount increased the next year to \$7.5 million, where it remained for the next ten years. *Id.* (citing NLADA).

Until a major reform of the system in 2007,¹³ state oversight of indigent defense remained at this anemic level.

B. Problems in Funding Indigent Defense.

1. Insufficient Local Funding.

Local funding through fees assessed against offenders—a structure unique to Louisiana—

¹³ See Louisiana Public Defender Act, 2007 La. Acts No. 307. The law abolished the local indigent defense boards and created a stronger state body to administer indigent defense. See also Erwin Lewis, *Review of Management and Organization of the Public Defender's Office in Calcasieu Parish (Lake Charles), Louisiana: Observations and Recommendations*, American University BJA Criminal Courts Technical Assistance Project: TA Report No. 4-145, at 6 (2010) ["Lewis Report"].

presented two main problems: the fees did not generate adequate revenue, and the localized nature of the revenue led to discrepancies in funding. NLADA at 20.

Inadequate Revenue. The revenue generated by the fee system has always been inadequate. It failed from the outset to cover defense counsel's *expenses*, let alone pay for their time. Drew at 957.

The revenue mechanism contributed to underfunding because the need for indigent defense funding is tied to the crime rate, and factors that lead to higher crime frequently lead to an inability to pay fees. High unemployment may provoke greater criminal activity but simultaneously mean that fewer people convicted of a crime are able to pay the assessed fee. Thus, "the need for indigent defense funding is in fact *inversely* correlated with the ability to generate revenues" under this system. NLADA at 22.

The revenue stream was also subject to unforeseeable disruption. The Louisiana Supreme Court gave the following example:

[W]hen the city of East Baton Rouge ran out of pre-printed traffic tickets in the first half of 1990, the indigent defender program's sole source of income was suspended while more tickets were being printed.

State v. Peart, 621 So. 2d 780, 789 (La. 1993) (Calogero, J.) (citing The Spangenberg Group, *Study of the Indigent Defender System in Louisiana*, at 25 (1992)).

The system has been further stressed over time by increasing crime rates and correspondingly "more

punitive crime control policies.” Drew at 959-60. This national trend is particularly evident in Louisiana. For example, in 2009, the year of Boyer’s trial, Louisiana had “the highest incarceration rate in the nation by a substantial margin.” *Id.*

Disparate Funding Levels. Because revenue is not pooled and shared at any level, “there was no way to redistribute funds from districts with a surplus to those facing severe shortfalls.” *Id.* at 959. As Judge Cooks of the Louisiana Third Circuit Court of Appeal put it in 2004: “This method of funding has created wide discrepancies in the funding of each district’s indigent defender office and, correspondingly, wide discrepancies in the quality of service provided.”¹⁴ The Louisiana Supreme Court similarly noted that “the system has resulted in wide variations in levels of funding, both between different [local indigent defense boards] and within the same [indigent defense board] over time.” *Peart*, 621 So. 2d at 789. Other observers, including the President of the Louisiana Bar Association, have identified the same problem.¹⁵ As a concrete example: “[a]t the close of

¹⁴ Sylvia R. Cooks & Karen K. Fontenot, *The Messiah is Not Coming: It’s Time for Louisiana to Change Its Method of Funding Indigent Defense*, 31 S.U. L. Rev. 197, 205 (2004) [“Cooks”].

¹⁵ Wayne J. Lee, *Indigent Defense — A Failed Promise*, 51 La. B.J. 174, 174 (2003) [“Lee”] (“[T]he reliance upon court costs and tickets results in widely disparate funding among the district indigent defender offices.”). *See also* Drew at 959 (“[T]here was no guarantee in any district that the level of traffic fines would track the caseload of felony defendants that make up the bulk of indigent defense work. Further, since the local fine money stayed in that area, there was no way to redistribute funds from districts with a surplus to those facing severe shortfalls.”).

2002, as many parishes struggled to provide adequate representation to the poor, over \$9 million of unused indigent defense funding sat in [local indigent defense board] bank accounts across the state.” NLADA at 24.

2. Insufficient State Funding.

As noted above, the only state-level component of Louisiana’s indigent defense system got little funding and could not fill the gaps in locally-raised revenue. From 1995 to 2005, the Legislature did not even increase the Board’s funding to keep pace with inflation, much less meet the modest amount initially recommended to fund the Board in 1994. Drew at 965-66.

Moreover, even as the Legislature held the appropriation level flat, it added to the Board’s responsibilities and thereby reduced the money available for direct distribution to local indigent defense boards.¹⁶ As the President of the Louisiana Bar Association noted in 2004:

While [the Board] has been assigned additional duties over the years, the increase in state funding for programs administered by [it] has not kept pace with the needs. Indeed * * * the

¹⁶ “Significantly, the expansion of * * * [the Board’s] responsibilities to include appellate and post-conviction capital programs was not matched with additional state funding. As such, the total dollars available for [direct] assistance to districts has decreased over the past decade. As recently as 1999, \$3.5 million dollars were disseminated to local parishes * * *. In fiscal year 2003, that total had decreased by more than 16% (down to slightly more than \$2.9 million).” NLADA at 16.

Board] has lacked the funding even to collect and verify statistical data on indigent defense caseloads and costs or to monitor district performances for accountability.

Lee at 174. Consequently, as Judge Cooks put it, “the amount allocated by the State is far from adequate and local indigent defender offices often operate on shoe-string budgets.” Cooks at 206.

C. The Response of Louisiana’s Courts.

Several Louisiana Supreme Court rulings have addressed the underfunding of indigent defense in Louisiana and pressed for change. Thus, in 1993 the Court held that private attorneys cannot be made to represent indigent defendants without pay: “If the district judge determines that funds are not available to reimburse appointed counsel, he should not appoint members of the private bar to represent indigents.” *State v. Wigley*, 624 So. 2d 425, 429 (La. 1993).

In *Peart*, the Court had earlier rejected another strategy used by underfunded districts: overburdening salaried public defenders with too many cases. That case was filed by a public defender in Section E of Orleans Parish Criminal Court, arguing that he was so overburdened that none of his clients got adequate representation. He had been assigned 400 cases in the first seven months of 1991 alone, and given no support staff. Drew at 962-63. The Court agreed that, due to “excessive caseloads and the insufficient support” given defense counsel, “indigent defendants in Section E are generally not provided with the effective assistance of counsel the constitution requires.” *Peart*, 621 So. 2d at 790.

Peart went on to hold that a defendant could bring a preemptive challenge to the adequacy of his representation and benefit from “a rebuttable presumption” in the defendant’s favor on this point. *Id.* at 790-91. If a trial court found inadequate representation and could not remedy the problem, the prosecution could not go forward “until the defendant is provided with reasonably effective assistance of counsel.” *Id.* at 791-92.

The *Peart* Court also issued a warning to the Legislature:

If legislative action is not forthcoming and indigent defense reform does not take place, this Court, in the exercise of its constitutional and inherent power and supervisory jurisdiction, may find it necessary to employ the more intrusive and specific measures it has thus far avoided to ensure that indigent defendants receive reasonably effective assistance of counsel.

Id. at 791. The warning was not heeded.

In May of the following year, the Louisiana Supreme Court ruled that, based on two Louisiana statutes, local parish governments could be ordered to pay certain expenses of an indigent’s defense (although not attorney’s fees).¹⁷ The Legislature responded by amending the statutes to explicitly immunize local parish governments from the costs of indigent defense : “Nothing in this Section shall be construed to make the parishes or the city of New

¹⁷ *State v. Craig*, 637 So. 2d 437, 439-40, 442-47 (La. 1994) (citing La. Rev. Stat. Ann. §§ 15:304 and 15:571.11).

Orleans responsible for the expenses associated with the costs, expert fees, or attorney fees of a defendant in a criminal proceeding.”¹⁸

A trial court subsequently held that the amendments were unconstitutional because they deprived indigent defendants of their right to counsel, but the Louisiana Supreme Court reversed, ruling that “[t]he statutes do not declare that indigent defense costs will not be paid, they simply place this burden on the state.” *Citizen*, 898 So. 2d at 334-35 “[T]o assure timely representation” in future cases, the Court revised an earlier rule predicating appointment of counsel on funding, and directed trial courts instead to appoint counsel at an indigent defendant’s first court appearance regardless of funding. *Id.* at 338. The Court noted that such appointed counsel could then file a motion to identify a source of funding. *Id.*

D. Evaluations of Louisiana’s Indigent Defense System.

As a consequence of the structural failings of Louisiana’s locally-funded indigent defense system and the Legislature’s refusal to ameliorate the problem, neutral observers have consistently found Louisiana’s indigent defense system to be inadequate:

- A 1992 report by the Spangenberg Group, commissioned by the Louisiana Supreme

¹⁸ 1994 La. Acts, 3rd Ex. Sess. 81 (amending La. Rev. Stat. Ann. §§ 15:304 and 15:571.11). *See also State v. Citizen*, 898 So. 2d 325, 336 (La. 2005) (holding that it “could not be clearer” from the 1994 amendment that “the State, not the parishes, will pay for indigent defense”).

Court, “found systemic and grave deficiencies” with the state’s indigent defense system. Drew at 961.

- A 2002 study found that Louisiana contributed several times less money to indigent defense than similarly populous states. Cooks at 209; NLADA at 32. For example, Minnesota spent \$10.47 per capita, Colorado spent \$9.36, and Alabama spent \$6.40, whereas Louisiana spent \$1.70. NLADA at 32. Oregon, with a nearly 40% smaller population than Louisiana, spent 874% more on indigent defense than Louisiana (\$76 million to \$3.3 million), or \$23.09 per capita. *Id.*
- In 2002, “[o]n average, Louisiana prosecutors outspent their indigent defense counterparts by nearly 3 to 1,” and this comparison does not take account of investigative resources that prosecutors receive, free, from local police, sheriffs, or the FBI. *Id.* at 53.
- In a 2003 article in the Louisiana Bar Journal, the President of the Louisiana Bar Association called the system “broken and in need of an overhaul.” Lee at 174. He noted that some of the key elements of an adequate criminal defense, such as expert witnesses, are routinely foregone for lack of funding.¹⁹

¹⁹ *Id.* at 175 (“When LIDAB [Louisiana Indigent Defense Assistance Board] was directed to implement a program for capital post-conviction defense, the Legislature provided no new funding resulting in a reallocation of sparse dollars largely from the Expert Witness Fund. The LIDAB awards for the retention
(continued next page)

- In a four year period prior to 2004, while the amount spent on indigent defense in Alabama (with a population and indigent defense funding structure similar to Louisiana's) increased by 80%, the amount spent in Louisiana increased by 5.3%. That was despite—not because of—state funding: while Alabama increased state aid to counties by 129% during the four years, Louisiana *decreased* aid to local districts by roughly 16%. NLADA at 31.
- In a 2004 article, Judge Cooks of the Louisiana Third Circuit Court of Appeal concluded that “Louisiana can no longer hide the fact that its current method of funding indigent defense is constitutionally deficient,” Cooks at 207, blaming this, in part, on “[t]he current system which relies on local revenue generated by court costs, fines and forfeitures.” *Id.* at 217.
- The NLADA 2004 report noted that “[r]esearch conducted in Louisiana over the past thirty years consistently indicates that [its local, fee-based] funding structure threatens the integrity of the state’s system of justice.” NLADA at 2.²⁰ It concluded: “The indigent

of expert witnesses declined from nearly \$800,000 in 1998-99 to only \$9,911 in 2001-02.”).

²⁰ *See also id.* at n.4 (“Though research has been conducted by various study groups, some of whom were only studying indigent defense tangentially and some of whom were authorized by governmental agencies to study the right to counsel specifically, and though the research was conducted at various times, all unanimously concluded that the indigent defense funding
(continued next page)

defense system in Louisiana is beyond the point of crisis and is so weakened in relation to the other criminal justice system components that it calls into question the ability of the entire criminal court system to dispense justice accurately and fairly.” *Id.* at 19. NLADA also noted that “all national standards call for 100% state-funding” of indigent defense—the opposite of Louisiana’s approach. *Id.* at 63.

- In a 2004 hearing in a case strikingly like this one (the defendant was indicted for a capital crime in 2002 in Calcasieu Parish), the trial court struggled to find funding for defense counsel and “expressed its frustration with the continued lack of funding and the fact that it faces some version of the same funding dilemma in virtually every criminal case before it.” *Citizen*, 898 So. 2d at 329.

II.

The Case of Calcasieu Parish.

The systemic dysfunction of the State’s indigent defense system is no better illustrated than in Calcasieu Parish in Southwest Louisiana, where one study showed that the average length of time from arrest to disposition was approximately two years, compared to a national average of approximately seven months.²¹

system fails to uphold the intent of the *Gideon* decision and should be changed.”) (citing studies).

²¹ A comprehensive study funded by the American Bar Association Gideon Initiative, undertaken in 2001 and finished in 2003, assessed the indigent criminal defense system in
(continued next page)

Numerous factors combine to create one of the most broken judicial systems in the Nation, but the most important are inadequate funding of the indigent defense system and a correlating gross overload of cases carried by the lawyers in the Calcasieu Parish Public Defender's Office ("CPDO").

A. Insufficient Funding.

The CPDO handles 90-95% of the criminal cases in Calcasieu Parish. Lewis Report at 52. In 1999, the U.S. Department of Justice undertook two studies to evaluate its funding. The first showed that the average expenditure per case was \$110,²² as compared to \$258 in Public Defender's Offices ("PDOs") in the nation's hundred most populated counties.²³ The second study showed that the cost per capita of financing indigent defense in Calcasieu Parish was \$6.12 per resident per year, as compared to \$10 per resident for the hundred largest counties in the country.²⁴

Another way to view the CPDO's budget is to compare it to that of the Calcasieu Parish District Attorney's Office ("CDAO"). The American Bar Association's Ten Principles of a Public Defense

Calcasieu Parish. Michael M. Kurth & Daryl V. Burckel, *Defending the Indigent in Southwest Louisiana*, NCJ 202934 (2003) ["Kurth Report"].

²² Kurth Report at 21.

²³ See Carol J. DeFrances & Manka F.X. Litras, *Indigent Defense Services in Large Counties, 1999*, Bureau of Justice Statistics Bulletin (U.S. Dept. of Justice), Nov. 2000, at 1.

²⁴ *Id.*

Delivery System calls for parity between a district attorneys' office and the local public defender's office.²⁵ Data from the U.S. Department of Justice shows that in 2001, when Boyer was originally charged with a capital offense, the CDAO budget was \$3.7 million while the CPDO's was \$1.2 million even though it was serving the same community. Lewis Report at 52.²⁶ This disparity has continued if not worsened over time. *See id.* at 35.

One reason why the CDAO has historically enjoyed an annual operating budget of about three to four times that of the CPDO²⁷ is the source of each office's funding. Since 1985, Calcasieu Parish has collected an *ad valorem* tax specifically dedicated to maintaining a Criminal Court Fund that is used for paying witness and jury fees (20%), funding the CDAO (60%), and providing assistance to the courts (40%). *See Citizen*, 898 So. 2d at 328. Any surplus in the witness and jury fees portion of the fund is divided equally between the courts and the CDAO. *Id.* This criminal justice tax has consistently provided the CDAO with reliable funds, and indeed has allowed it to operate with a surplus for a number of years. *Id.*; Lewis Report at 35 (as of 2010, there may be \$4 million in the CDAO's bank account not being used to prosecute criminal cases). "Whatever

²⁵ American Bar Association, *Ten Principles of a Public Defense Delivery System*, at 3 (2002); Kurth Report at 10.

²⁶ The Lewis Report in 2010 reexamined the Kurth Report and conducted additional research on the Calcasieu indigent defense system.

²⁷ Kurth Report at 15, Table 4 (3.29 times); Lewis Report at 35 (4 times).

the problems elsewhere in the state, Calcasieu Parish appears to have secured ample funding of its criminal justice system with substantial monies in reserve.” *Citizen*, 898 So. 2d at 328 n.5.

In contrast, the CPDO receives *nothing* from the Criminal Court Fund but instead must rely on an inconsistent funding source. As shown above, before the 2007 amendments, funds for indigent representation came almost exclusively from fees assessed on criminal and traffic violations (excluding parking tickets). *Peart*, 621 So. 2d at 784 n.1. Funding for the CPDO was “inherently unreliable” because criminal and traffic violations vary from year to year. Lewis Report at 22. Justice Lemmon’s dissenting opinion in *Peart* attributes Louisiana’s generally underfunded indigent representation system to the Legislature’s exclusive reliance on criminal fees. *Peart*, 621 So. 2d at 792 (Lemmon, J., dissenting).

The funding shortage in Calcasieu Parish has been felt acutely by those, like Jonathan Boyer, who have been charged with a capital offense. The CPDO was too overworked to adequately litigate the case (see below) but, in addition, it represented Jonathan Boyer’s brother Anthony, who had agreed to testify against Jonathan.²⁸ Although the Parish contracted with local attorneys to handle non-capital felony cases on which the CPDO is conflicted, it apparently had no such agreement for capital cases.²⁹ Thus,

²⁸ Petitioner’s Brief at 10. *See also State v. Boyer*, 56 So. 3d 1119, 1127 (La. Ct. App. 2011).

²⁹ Lewis Report at 16; Kurth Report at 13. *See also* Petitioner’s Brief at 28 n.13.

charged with a capital crime, Jonathan Boyer was appointed private counsel who, as was their right, insisted that a source of funding be identified to pay for the defense before they began spending time and money on it. With no source of funding, the defense, and thus the case, could not proceed.

The 2007 Louisiana Public Defender Act has not fixed the funding problem. Today the CPDO budget still depends in large part on criminal fees. In 2009-10, almost 60% of the budget came from fees assessed on traffic tickets. Lewis Report at 21. The amount available may vary by as much as hundreds of thousands of dollars from year to year according to Calcasieu District Defender Michael Bergeron. *Id.* at 22.

In 2010, the CPDO was given an operating budget of about \$1.9 million, an increase over prior years but still about \$1.5 million less than what is needed. The CPDO's "desired budget" request of \$3.4 million would have added nineteen additional attorneys, seven additional staff, and one investigator for life without parole cases at the enhanced salary required by the Louisiana Public Defender Board. Lewis Report at 22. This budget would have resolved most of the underfunding issues, diminished the disparity between the CPDO and CDAO, and addressed the excessive caseload issues discussed below. *See id.*

B. Excessive Caseload.

Inadequate funding means inadequate staffing which means excessive caseloads. In 2001—the year before Boyer was indicted— a Department of Justice survey showed that the CPDO had only seventeen staff members, of which only eight were attorneys, to

handle 5,100 cases consisting of 2,550 felony cases, while the national median for district attorneys' offices was eighty-two staff members consisting of twenty-seven attorneys, to handle more cases overall, but fewer felony cases (only 2,313). Kurth Report at 15, Table 4. The CDAO had significantly more staff than the CPDO: eighty-eight total members and seventeen attorneys. *Id.*

The numbers for other support staff, such as investigators, are similarly disparate: the CPDO employed two investigators while the CDAO had fourteen. *Id.*³⁰ The CDAO (but not the CPDO) also has access to the investigative and forensic resources of the police department and the Southwest Regional Criminalistics Laboratory based in Lake Charles, free of cost. Kurth Report at 22.

Moreover, the CPDO has a difficult time attracting qualified candidates. The salary in 2010 for an experienced defender with eleven years of experience was \$44,000, Lewis Report at 20, "contributing to a reduced morale and high staff turnover." Kurth Report at 16. Additionally, the CPDO does not provide for a retirement plan. Lewis Report at 25. In contrast, an 11-year attorney at the CPAO will receive \$110,000 in salary as well as a pension plan. *Id.* at 20.

Because they are so few in number, the handful of public defenders in Calcasieu Parish must handle

³⁰ Even this data is misleading: due to the lack of basic level support staff, the two nominal investigators were being used "more as runners or assistants for the attorneys." Kurth Report at 35.

caseloads far in excess of state and national standards. The Louisiana Indigent Defense Assistance Board (“LIDAB”) set a standard that no attorney may handle more than 150-200 felony cases per year. Kurth Report at 18. The National Advisory Commission on Criminal Justice Standards and Goals stated that the caseload of a public defender attorney should not exceed more than 150 felonies per attorney per year.³¹ Yet in 2002, the average caseload in the CPDO exceeded 600 cases—more than 3 times the LIDAB standard and more than 4 times the national standard. Kurth Report at 20. In November 2009, each CPDO attorney handling felonies still had over 400 active cases. Lewis Report at 9. These overwhelming workloads mean that some defendants inevitably get neglected³² and “[c]ases just linger.” *Id.* at 10.

Funds already exist that could ameliorate the difficulties detailed above. The Calcasieu Parish Criminal Court Fund could be shared with the

³¹ National Advisory Commission on Criminal Justice Standards and Goals, Task Force on Courts, *Standard 13.12: Workload of Public Defenders*, at 276 (1973).

³² A 2009 survey revealed that, of 214 public defender clients, a majority—168—had never received a visit from their attorney. Louisiana Justice Coalition, *Behind Bars in Calcasieu Parish: An Assessment of the Legal Needs of Pre-trial Defendants Appointed to the Calcasieu Public Defender’s Office*, at 20 (2009). The situation was exacerbated by the CPDO’s policy—common among Louisiana parishes—of allowing public defenders to maintain a private practice in an effort to attract qualified attorneys. Kurth Report at 16. This further diminished the amount of time and effort indigent defendants could expect from their counsel.

CPDO; the \$4 million surplus enjoyed by the CDAO could be reallocated; and/or the \$400 million in the State Sheriff's fund or the \$52 million in the Calcasieu Parish Sherriff's fund could be tapped. Lewis Report at 35. That these funds have not been made available for indigent defense—and that the delay in the trials of indigents, especially those charged with capital offenses, has not been ameliorated—is the result of conscious decision-making by state and local officials. Hence Louisiana's failure to fund Petitioner's defense for five years should be weighed against the State for speedy trial purposes. A contrary result would permit states to disregard the Sixth Amendment rights of indigent defendants.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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