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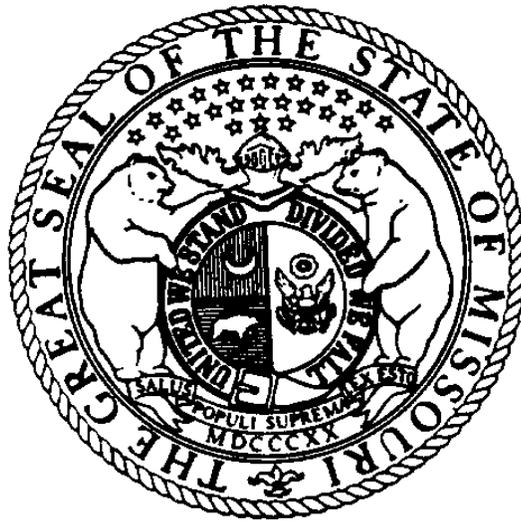
REPORT

OF

SENATE INTERIM COMMITTEE

ON

THE MISSOURI STATE PUBLIC DEFENDER SYSTEM



January 2007

Prepared by
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January 2006

The Honorable Michael Gibbons, President Pro Tem of the Senate
State Capitol Building, Room 326
Jefferson City, MO 65101

Dear Mr. President:

The Senate Interim Committee on the Missouri State Public Defender System, has met, taken testimony, deliberated, and concluded its study on issues confronting the Public Defender System in Missouri. The undersigned members of the Committee are pleased to submit the attached report.

Senator Jack Goodman, Chair

Senator Michael Gibbons

Senator Luann Ridgeway

Senator Joan Bray

Senator Chuck Graham

I. Charge to the Committee

Pursuant to Article III, Section 22 of the Missouri Constitution, Senate President Pro Tem Michael Gibbons established the Senate Interim Committee on the Missouri State Public Defender System. The committee is charged with reviewing the current effectiveness of the Missouri State Public Defender System. Specifically, the duties shall be:

- (1) To study the causes and implications of the significant increase in caseloads and to develop proposals to reduce the number of cases;
- (2) To review the standards and eligibility requirements for those to whom a public defender might be assigned;
- (3) To study attorney turnover rates, staffing and personnel issues, and compensation practices;
- (4) To evaluate the Missouri Public Defender System's organizational practices including, but not limited to, overhead, office location, technology, and distribution of resources.

II. Committee Activities

The President Pro Tem appointed Senator Jack Goodman, Senator Michael Gibbons, Senator Luann Ridgeway, Senator Joan Bray, and Senator Chuck Graham, with Senator Goodman selected as the chair.

Over the course of several weeks, the Senate Interim Committee on the Missouri State Public Defender System held public hearings and solicited testimony. Hearings were held on the following dates:

- August 10, 2006 - Senate Lounge, Capitol Building
- August 25, 2006 - Senate Lounge, Capitol Building
- September 14, 2006 - Senate Lounge, Capitol Building

A. Summary of the August 10th, 2006 Meeting

On August 10, 2006, the interim committee met to familiarize the interested parties and committee members with the charge of the committee, to hear testimony from the Acting Director of the Missouri State Public Defender System, and for Senator Goodman, as the committee chair, to pose possible tactics to address the issues plaguing the system.

Cathy Kelly, Acting Director of the Missouri State Public Defender System,

testified extensively and presented information to the committee. The presentation was provided to the committee members in written format in the "Senate Interim Committee Resource Manual". The Director highlighted issues the Public Defender System is currently facing and the effects of such issues on the attorneys, staff, clients, and state government. As provided by the Director, the most severe and concerning issues are as follows:

- Caseload Crisis - Without an increase in staff in six years, the caseload of the Public Defender System has risen by over 12,000 cases. The Missouri Public Defender System provides representation in approximately 80% of the criminal cases in the state. Currently, there are approximately 350 attorneys with a total caseload of 88,532 cases. This has led to issues regarding the quality of representation provided by the attorneys and the retention rate of attorneys in the system.
- Retention Crisis - The Public Defender System has an extremely high turnover rate. Over the last five years, the system has experienced the equivalent of 100% turnover in its attorney staff, averaging a 20% turnover each year. Several of the reasons attorneys raised for leaving the system were excessive caseload, low salary, and lack of training.
- Management Crisis - Currently, almost all of the District Defenders, those attorneys in supervisor positions, carry full caseloads. With the demands of such cases, the result is inadequate training, mentoring, and supervising of personnel. The Director stated that this issue increases the risk of liability of the state, leads to a high turnover rate for attorneys, and decreases the quality of representation for clients.
- Office Space Crisis - Missouri statutes require counties to provide office space for public defender offices. Because the offices serve multiple counties, the counties must agree on leases and changes in space. This situation causes conflict and tension amongst the counties and the state. In turn, the office space is often inadequate.¹

When concluding the meeting, Senator Goodman proposed general ideas to address the issues of the public defender system to interested parties attending the meeting in order to receive feedback on the ideas as the committee continues to meet. The ideas are as follows:

- (1) Create a hybrid system that utilizes the current public defender system as

¹See Appendix. Summary of Issues Facing Missouri State Public Defender System, provided by Cathy Kelly, August 10th, 2006.

well as contracting certain cases out to attorneys in private practice;

- (2) Reduce certain unnecessary court costs that are unrelated to the judicial process and replace them with a court cost that would fund the public defender system and provide revenue to pay such contract attorneys;
- (3) Create or modify relevant court rules regarding docket management.

B. Summary of the August 25th Meeting

On August 25th, 2006, the interim committee met to hear public testimony from various interested parties. The following is a summary of the testimony.

- Doug Copeland - President of the Missouri Bar Association.

Mr. Copeland testified that the Missouri Bar has three main concerns regarding the public defender system's situation. First, there is a fear that the public defender members of the Bar are currently required to violate the ethical code of attorneys because their caseload is so great. As a result, the Bar is also concerned that indigent criminal defendants might not be adequately represented. Lastly, concern exists that the criminal justice system is not working for all people. He stated that when one branch of the three arms of the judicial system, the prosecutor, the court or the defense, is not operating correctly, the entire system is broken.

The Missouri Bar first began addressing this issue in 2005. It responded by asking volunteers to help with the overwhelming caseloads of the public defenders, knowing that this was a short term response. The Bar also created a task force to verify that there was a problem with the Public Defender System, fix the current problem, and ensure that long term solutions were implemented. After talking to numerous interested parties, the Bar determined that it would be approximately 3-4 years before the problem could be adequately addressed. It also decided that an independent analysis and comparison with other states was needed in order to demonstrate the problem in Missouri. The study was conducted by the Spangenberg Group and the crisis was confirmed by the Group's final report prior to the end of the 2006 legislative session. The immediate goal was to have public defenders' salaries increased. Specifically, the goal was to increase the budget for current employees' salaries by two million dollars.

As of July, 2006, the Missouri Bar determined that a caseload study needed to be conducted in order to determine an appropriate caseload standard. By doing so, it would be possible to quantify the current need for additional staff and to measure the needs in future years. Due to the cost concerns, the study has been halted because the Public Defender System is fearful of the legislature viewing the study as a misuse of funding.

The Bar hopes to continue with the study and have a proposal for next session regarding a caseload standard. Additionally, the Bar is considering the reclassification of crimes, looking at staffing issues, and office restructuring, as possible solutions to the Public Defender System crisis.²

- Brett Berri - Missouri Assistant Attorney General.

Mr. Berri came to the hearing to make himself available for questions from the interim committee members. He also said that he could supply information about the Attorney General Office's program that coordinates volunteer attorneys without malpractice insurance for certain services.

- Judge Charles Atwell - Circuit Judge for Division 10 of the 16th Judicial Circuit Court for Jackson County.

Judge Atwell spoke highly of the Public Defender System and came to testify as a show of his support. However, he testified that the high turnover rate and caseloads affect the relationship that public defenders can have with their clients as well as adversely affecting the crime victims. For example, public defenders are not always able to notify victims of information such as hearing dates in as timely manner as desired because they are handling so many cases at the same time.

Judge Atwell also testified in response to Senator Goodman's inquiry regarding the use of contract counsel to reduce caseloads. He stated that in some past instances the use of contract counsel in Jackson County cost more than using the public defenders. Also, the judge did not feel that making changes to the statutes or rules regarding severance and joinder, with the hopes of reducing caseloads, would have a very significant financial impact on the system. He did state that the large probation violation dockets in the cities remain a problem for public defenders because of the time and focus that is taken away from other cases.

- Jarrett Johnson - former assistant public defender who is currently in private civil practice.

Mr. Johnson was an assistant public defender IV, which is the highest available position in the public defender system at the trial level, when he resigned in 2002. His starting salary during the mid-1990s was \$23,000 per year. When he received his last promotion in 1999, his salary reached a plateau at \$51,000. Without any prospect of a salary increase, Mr. Johnson left to pursue private civil practice and earn more money to support his family. He believes that mid-level attorneys leave the system because of a

²See Appendix. Written Summary of Mr. Copeland's August 25, 2006 testimony.

lack of guidance and assistance while upper-level attorneys leave because of the poor salary.

When asked about possible solutions, Mr. Johnson stated that the large caseloads could potentially be cured by substantially decreasing the length of probation granted to individuals and using a suspended imposition or execution of sentence more frequently. Also, diverting offenses which rarely result in jail time from the Public Defender System would ease the exploding caseloads.

- Justin Carver - assistant public defender in Fulton, Missouri.

As the supervising attorney in his office, Mr. Carver's testimony focused on the difficulties of maintaining his own heavy caseload while attempting to mentor, supervise, and evaluate the other attorneys in his office. Because the Public Defender System employs many new attorneys, it is critical that they receive guidance in order to become more familiar with the practice of law and improve their skills. Also, evaluations are important when justifying or denying promotions of attorneys and staff. However, it is difficult to complete these tasks when a heavy individual caseload exists for the supervising attorney. There are 5 attorneys, one secretary, one legal assistant, and one investigator in the Fulton office. Last year, the office closed 1664 cases, including 298 cases closed by Mr. Carver.

Mr. Carver expressed the frustration of trying to balance management and representing clients. If he focuses on his own cases and does not supervise the new attorneys, clients suffer from their inexperience. If he focuses on management issues, his own clients do not receive proper representation. However, Mr. Carver expressed that proper management and feedback are essential elements that would help with attorney retention and improve performance.

Mr. Carver offered some solutions to address the caseload crisis of the Public Defender System. Specifically, he stated that using TeleVideo conferencing would be helpful by allowing attorneys to meet with clients in other counties without spending hours driving to meet with them face-to-face at the jail. Also, increasing the number of support staff would help the attorneys focus on their jobs instead of getting bogged down in paper work. On a broader scale, Mr. Carver believes that probation violation cases are too numerous and take up too much of the public defenders' time. If the number of such cases under the public defenders' jurisdiction could be reduced, there would be more time to focus on more complicated cases.

- William Raymond - assistant public defender in Kansas City, Missouri.

Mr. Raymond is an assistant public defender IV, which is the highest level an attorney may reach at the trial level in the Public Defender System. He described the

financial strains of being a public defender while taking on the growing responsibilities of a family. In order to save money for a down payment on a house, he and his wife are currently living in the attic of a friend's house. He qualified for economic hardship forbearance for his federal student loans for a certain period of time, but is currently paying on both private and federal loans. With a take-home pay of \$3200 per month, he pays approximately \$1300 per month in student loans. Currently, there is no loan forgiveness program for public defenders.

To demonstrate the high turnover rate, Mr. Raymond stated that the Kansas City office has lost 9 attorneys since January 2006. Of the remaining 31, 12 of the attorneys are new to the system. Unfortunately, he said that there is not enough time to adequately supervise and advise newer and less experienced attorneys. Overall, there is a 25% turnover rate each year in this office.

In order to increase attorney retention, Mr. Raymond believes that a student loan forgiveness program is needed along with the opportunity to use accumulated vacation. He also stated that an increase in salary and a decrease in caseload would improve retention. He suggested removing certain actions that are more civil in nature from the public defenders' jurisdiction in order to decrease the caseloads.

- Christopher Hatley - assistant public defender in Springfield, Missouri.

Mr. Hatley discussed the overwhelming caseload of the Springfield public defender office and the lack of adequate support staff. Last year the Springfield office, which is staffed by 15 attorneys and 6 support staff members, opened 5,561 cases. In comparison, the Greene County prosecutor's office has 30 attorneys and 40 support staff members. As a result of the overwhelming caseload, the public defenders spend a great percentage of their time in court, which leaves them little time for visit clients, trial preparation, or legal research.

At the Springfield public defender office, the support staff spends all of their time opening and closing files and taking telephone calls. This leaves numerous tasks and paperwork for the attorneys to complete. Having more support staff would allow the public defenders to spend more of their time tending to legal research and representation. At the Springfield prosecutor's office, there are specialized units with secretaries assigned to specific areas such as probation violations, check charges, or minor in possession charges. A large amount of the paperwork, such as motions, jury instructions, notices, or dockets, are completed by support staff at the prosecutor's office.

In addition, Mr. Hatley stated that removing probation violations from the jurisdiction of the Public Defender System would significantly decrease the caseload.

- Edward Duff - member of the Governor's Council on Disabilities.

Mr. Duff told the story of his mentally ill brother's incarceration. He expressed concern that the caseload of public defenders is so great that they only have time to focus on the specific legal questions at hand while other issues and concerns regarding their client, such as the person's mental health, are not adequately addressed.

C. Summary of the September 14th Meeting

On September 14, 2006, the interim committee met to hear public testimony from various interested parties. The following is a summary of the testimony.

- Rodney Uphoff - Professor at the University of Missouri-Columbia School of Law.

Mr. Uphoff was unable to attend the meeting and submitted written testimony to the committee. See Appendix.

- Robert Spangenberg - President of the Spangenberg Group.

Mr. Spangenberg's testimony focused on the "Assessment of the Missouri State Public Defender System." The assessment was prepared by the Spangenberg Group at the request of the Missouri State Bar Public Defender Task Force for an independent analysis of the situation. The final report was published on October 26, 2005.

The overall initial assessment stated, "The Missouri State Public Defender Program is currently operating in a crisis mode. Public defenders throughout the state are struggling on a daily basis with a frequent exodus of colleagues, low salaries, and low morale. There appears to be no relief in sight. In fact, as new cases continue to be assigned, and serious cases of departing attorneys continue to be transferred to a diminishing number of senior attorneys or to less experienced attorneys, the crisis deepens. In short, the probability that public defenders are failing to provide effective assistance of counsel and are violating their ethical obligations to their clients increases every day."³

The assessment found that the Missouri Public Defender System fails to meet seven of the ten principles of a public defense delivery system established by the American Bar Association. In the report, the Spangenberg Group made 54 separate findings regarding the system. The findings included numerous issues and problems, such as an extremely high level of turnover among staff attorneys, a small amount of

³Assessment of the Missouri State Public Defender System, Final Report, Prepared by The Spangenberg Group, October 26, 2005, page 2.

hands-on supervision of the staff attorneys, salaries that are too low and lead to the major turnover rates, and excessive caseload levels.⁴ The findings also included proposed solutions, including withdrawing from a large number of minor cases, decriminalizing minor misdemeanors, seeking a large increase in funding, and filing a systematic lawsuit.⁵

The Spangenberg Group concluded, "In our opinion, the Missouri Public Defender System is on the verge of collapse. We believe that there is an extremely high risk that public defender attorneys can no longer assure that their indigent clients will be provided adequate and meaningful representation at this time."⁶

According to the Spangenberg Group's report, the following findings support this conclusion: 1) salaries for public defenders in Missouri are pathetic, 2) the turnover rate of public defenders exceeds that of any other public defender system, 3) due to low salaries and lack of resources, 4) when experienced attorneys leave, they are replaced with new attorneys and recent graduates, 5) Missouri ranks 47th in cost-per-capita for indigent defense, 6) the public defender system is mandated by law to provide representation to any eligible person but fails to do so with representation of juveniles charged with delinquent acts, 7) the public defender system has not received an increase in its yearly budget for five years, and 8) no further action has been taken to address the problems as of the time of the report.⁷

- Miller Leonard - member of the Public Defender Commission appointed by Governor Blunt.

Mr. Leonard discussed the issues facing the system and potential ways to address such issues. He stated that excessive caseload, salaries, and the inability to adequately visit clients in jail are some the problems faced by public defenders.

While he does not support the reclassification of misdemeanor offenses, he did propose an idea used by a judge in Platte County. He stated that as an alternative for persons charged with writing a bad check, the judge allows the person the opportunity to pay the amount of the bad check and places the individual on probation with a time to return to court for an appearance and allows the person to sign a waiver for no representation. He also believes that requiring the prosecutor to state that he or she is seeking jail time would ease the caseload issue and free the public defenders from those cases where time in jail is not going to be sought.

⁴Id, pages 5-7.

⁵Id, pages 23-24.

⁶Id, page 24.

⁷Id, page 24-25.

Mr. Leonard has been urging the Public Defender Commission to issue a statement of the inability of the public defenders to accept new cases to the Supreme Court.

He believes the Commission should make the following finding, "Due to the severe caseload facing the Missouri State Public Defender System, the Commission finds that the Missouri State Public Defender System, as a whole, is no longer able to provide the assistance of counsel required by the Supreme Court of the United States in *Strickland v. Washington* and *Gideon v. Wainwright*. The Commission further finds that The Missouri State Public Defender System is unable to meet the obligations of Chapter 600 and accordingly the Commission hereby advises the Supreme Court of Missouri of the inability of the Missouri State Public Defender System to ethically accept new cases."⁸ Mr. Leonard also noted in his written testimony that the American Bar Association stated in a July 20, 2006 ethics opinion that public defenders must refuse new cases if their workload is excessive.

- Courtney Wachal - assistant public defender in Ava, Missouri.

Mrs. Wachal discussed the overwhelming caseload of a new attorney in the Public Defender System. She has been with the system for one year and has already accumulated a caseload of 165 open cases. Because she lives in a rural area, the commute from the office to visit inmates in jail is 30 minutes. Mrs. Wachal's clients who are in jail often have the most serious charges and require the most time. She attempts to find alternatives to prison sentences for these individuals because of the cost of incarceration. Also, she feels that many of their addiction problems and mental health issues are not appropriately addressed in prison. However, because of the heavy caseload of the alternative sentencing specialist (a social worker) for southern Missouri, all of the individuals cannot receive such sentencing. Instead, these people are placed on probation without treatment or go directly to prison. It appears that most individuals under this circumstances return to the Public defender System for representation in the future.

She also expressed frustration with the overwhelming workload resulting from clients who are not in jail. She estimates that she spends 3 days of the week, and frequent weekends, dealing with these clients. Unfortunately because of the constant influx of work, she is not able to pursue alternative sentencing for most of these individuals. Mrs. Wachal expressed guilt over not being able to have adequate discussions and contact with all of her clients before going to court. Instead, she only has a brief conversation with them after reviewing their file before entering court. Frequently these individuals plead guilty.

⁸Written Testimony of Miller Leonard, September 14, 2006.

In her written testimony, she summarizes the overwhelming feelings that come with being a novice public defender, "At work I feel like I am always treading water and about to drown. This feeling carries over to my home. I cannot unwind. I think about my caseload constantly. I have problems sleeping, waking up at nights..".⁹

Mrs. Wachal offered three solutions in her written testimony that would help the public defender system. First, increase public defender resources expended on alternative sentencing programs. She believes this would reduce the need to hire more attorneys and decrease the number of inmates in the Department of Corrections. Secondly, decriminalizing passing bad checks, criminal non-support, and driving while revoked, since each of these offenses have adequate civil and administrative remedies. Lastly, develop a program for complete loan forgiveness. She described her own family's need for loan forgiveness because she and her husband, a fellow public defender, have almost \$250,000 in student loans debts.¹⁰

III. Findings and Recommendations of the Committee

A. Sizeable Caseloads

1. In *Gagnon v. Scarpelli*, 411 U.S. 778 (1973), the United States Supreme Court acknowledged the per se rule establishing the right to counsel in any felony prosecution established in *Gideon v. Wainwright*, 372 U.S. 335 (1963). However, the Court stated, "there are critical differences between criminal trials and probation or parole revocation hearings, and both society and the probationer or parolee have stakes in preserving these differences." Because of this distinction, the Court decided, "We thus find no justification for a new inflexible constitutional rule with respect to the requirement of counsel. We think, rather that the decision as to the need for counsel must be made on a case-by-case basis in the exercise of a sound discretion by the state authority...".

In *Mempha v. Rhay*, 389 U.S. 128 (1967), the U.S. Supreme Court invalidated the sentences that were imposed at probation revocation hearings because the defendants were not represented by counsel. However, this case concerned Washington law, which provides defendants with different legal rights than the state of Missouri. In 1978, the Missouri Supreme Court held in *Abel v. Wyrick*, 574 S.W.2d 411 (1978), that the basic constitutional requirements for a probation revocation were set out by the U.S. Supreme Court in *Gagnon*. Although there are contradictory cases, the Missouri Courts of Appeals

⁹Written testimony of Courtney Wachal, September 14, 2006.

¹⁰Id.

have generally adopted these same requirements.¹¹

Based on the U.S. and Missouri constitutional cases, and their lack of a definitive requirement regarding the necessity of counsel at probation revocation hearings, the Committee recommends that further research and consideration be given to specifying circumstances that would trigger the right to be represented by a public defender in probation violation cases.

2. In 1989, Governor Ashcroft's administration expanded the Missouri public defender system. As part of the expansion, the administration established a caseload standard in order to determine the staffing of the Missouri Public Defender System. Assuming each attorney would have a blended caseload of misdemeanors, felonies, and/or probation violations, it was determined that 235 cases per attorney per year was an appropriate caseload. After finding the caseloads of public defenders too large, the Committee recommends that efforts be taken to return the caseloads of Missouri Public Defenders to this caseload standard. With the current number of cases in the system, additional attorneys, whether employed by the state or retained by contract, are necessary to attain this goal.¹²

3. The Committee also recommends that certain cases involving misdemeanors, traffic violations, and probation violations be contracted out to private attorneys when economically feasible in order to reduce the numbers of cases for which each public defender is responsible.

4. To eliminate undue, duplicative clerical and legal work, the Committee recommends that the Missouri Supreme Court promulgate a rule requiring prosecuting attorneys to file all charges against the same defendant arising out of the same transaction or occurrence in a single document.

B. Financial Strains on the Missouri State Public Defender System

To address the financial strains on the Missouri State Public Defender System, the Committee recommends that certain unconstitutional court costs be eliminated and replaced with a lesser court cost to help fund the Public Defender System and provide revenue to pay contract attorneys. This court cost would be used within the Public Defender System to fund:

¹¹ *Moore v. Stamps*, 507 S.W.2d 939 (Mo. App. E.D. 1974); *Reiter v. Camp*, 518 S.W.2d 82 (Mo. App. W.D. 1974).

¹² Missouri State Public Defender System, Senate Interim Committee Resource Manual, Prepared Summer 2006.

- (a) an increase in support staff. Time constraints due to large caseloads allow very little time for public defenders to perform their own clerical and office tasks while adequately completing the legal aspects of their job. An increase in support staff would allow public defenders to dedicate more time to performing legal research, communicating with clients, and to generally be more prepared in the performance of their duties. The Committee finds that an increase in funding for support staff is a priority.
- (b) an increase in base salary for public defenders. A critical problem affecting the Missouri State Public Defender System is attorney retention. Low salaries and large caseloads discourage many attorneys from becoming a public defender and encourage those persons already in the system to seek more lucrative positions with manageable caseloads elsewhere. The first step in correcting this growing problem is to increase the salaries for public defenders based on merit and on-the-job performance, rather than solely on a promotional basis.

C. Attorney Retention

1. The Committee recommends researching the feasibility of creating a student loan forgiveness program. Due to the heavy financial burden on public defenders incurred as a result of their required education and low base salaries, the Committee finds that it is in the best interest of the state to create and fund a loan forgiveness program. Such program would be based on a set number of years of service in the system. The program would help the Public Defender System retain attorneys as well as create an experienced staff with the capability of properly training new attorneys. The Committee believes the benefits of a loan forgiveness program would be two-fold because the system would have experienced, well-trained public defenders and also have a viable incentive program that is appealing to prospective attorneys. In order to create such a program, the Committee requests that the General Assembly be provided information regarding various government agency loan forgiveness programs of government agencies within the state as well as a list and assessment of loan forgiveness programs implemented in other states from the Missouri State Public Defender System.

2. The Committee recognizes that public defenders are expected to travel extensively to meet with their clients. In order to conserve time and make the public defenders more readily available to their clients, the Committee recommends that technology be made available to the counties of Missouri to allow attorneys to meet with their clients via videoconference or teleconference. Doing so would prevent public defenders from continuously traveling to and from client meetings, allow them to spend a more equitable amount of time with each client, and provide them more time to focus on their other duties.

D. Conclusion

The Senate Interim Committee on the Public Defender System recommends that the caseloads of public defenders be reduced, support staff be increased, the number of public defenders be increased, whether through FTE or contract counsel, along with the base salary of public defenders being increased and funding being added through supplanting unconstitutional court costs and providing additional appropriations. The Committee believes that these goals can be attained using or implementing the aforementioned programs and recommendations.