

Exhibit 4

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**Assessment of the Missouri State
Public Defender System**

FINAL REPORT
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Introduction

Background

The Spangenberg Group (TSG) was informed in March of 2005 that the Director of the Office of the Missouri State Public Defender J. Marty Robinson had contacted the Missouri Bar concerning the crisis existing within the program. The discussions that ensued resulted in an effort by the Missouri Bar to urge its members across the state to sign up to accept public defender appointments on a pro bono basis because of a serious case overload within the Public Defender System.

The incoming president of the Missouri Bar Douglas A. Copeland agreed to appoint a Public Defender Task Force charged with working with the Public Defender Commission, the bench, and the bar to identify and solve short and long-term needs related to the defense of indigent criminal defendants. The Public Defender Task Force was appointed by Mr. Copeland and met in St. Louis for the first time in July. Robert Spangenberg also met with the Task Force at this time. Subsequent to that meeting, the Missouri Bar contracted with The Spangenberg Group of Newton, Massachusetts to “conduct a limited assessment of the Missouri Public Defender System and to report to the Task Force prior to October 15, 2005.”

The Spangenberg Group is a nationally and internationally recognized criminal justice research and consulting firm that specializes in indigent defense services. TSG has conducted research in all 50 states and provides consultative services to developing and developed countries that are reforming their legal aid delivery programs. TSG has conducted comprehensive statewide studies of indigent defense systems in more than half of the states, and has worked with many jurisdictions in evaluating public defender systems.

The Spangenberg Group is very familiar with Missouri’s indigent defense system. In 1993, TSG conducted a study under the auspices of the ABA Bar Information Program (ABA-BIP) of the State Public Defender System for the Missouri State Public Defender and its Commission. The focus of the study and our resulting report was on the operation of the Public Defender System, the internal allocation of resources, the overall budgeting and staffing situation, and information as to where Missouri stands in relation to comparable states in terms of caseload and funding of statewide programs. During the course of the study, TSG conducted site work in Columbia, Jefferson City, St. Louis, Clayton, and Kansas City. Prior to this study, TSG provided technical assistance through ABA-BIP to a statewide committee that was mandated to consider the adequacy of funding for the public defender system and the establishment of a death penalty post-conviction office. This work was instrumental in the establishment of the Post-conviction Death Penalty Representation Project and increased appropriations in FY 1989-1990 for the Missouri State Public Defender.

The focus of the current study is the operation of the Public Defender System, overall budgeting, staffing, allocation of resources, caseloads and where Missouri stands in relation to other comparable states.

Methodology

During the week of August 29, 2005, Robert Spangenberg, President, and Jennifer Riggs, Senior Research Associate, visited nine Public Defender Districts across the state: District 19 (Jefferson City, Administrative Office); District 13 (Columbia); District 7 (Liberty); District 6 (Kansas City Juvenile); District 16 (Kansas City Trial); District 21 (St. Louis County); District 22 (St. Louis City); District 24 (Farmington); and District 25 (Rolla). During our visits, we met with District Defenders, Assistant Public Defenders¹, staff investigators, paralegals, and clerical staff, judges, prosecutors, private attorneys, and other individuals responsible for participating in the state's criminal justice system. We met with two Public Defender Commission members, the Public Defender Director, the Trial Division Director, the Deputy Trial Director, the Appellate Division Director and the Capital Division Director. We also conducted court observation.

TSG also reviewed an extensive amount of cost and caseload data provided to us by the Public Defender. We reviewed other written material including memoranda and other written correspondence, Missouri case law, Missouri Supreme Court Rules of Professional Conduct, Public Defender Guidelines, pleadings and exhibits filed by the Public Defender in St. Louis City litigation, and other documents provided to us during our site visit. We appreciate the thoroughness and timely manner in which this material was provided to us by the Public Defender and staff.

Given this work, our prior experience in Missouri and our recent work in a number of other states (e.g., Virginia, South Carolina, Alabama, Arkansas, Georgia, Kentucky, Texas and Tennessee), and our initial meeting with the Missouri Bar Public Defender Task Force in July, we felt comfortable providing the Task Force with initial findings in a draft form on September 27, 2005. On September 30, 2005, we attended a meeting of the Task Force in St. Louis in which we presented our initial findings to the Task Force, answered questions and received comments.

Overall Initial Assessment

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.

In 2002, the American Bar Association (ABA) issued *The Ten Principles of a Public Defense Delivery System (Ten Principles)*(see Attachment A). These principles have been generally accepted and used to assess indigent defense systems across the country. In our opinion, the Missouri State Public Defender system fails this litmus test. We believe the system currently fails to meet the following seven principles:

¹ We met with at least nine District Defenders, one Assistant District Defender, six APD IV's, four APD III's, and two APD II's.

- Principle 2 – Where caseload is sufficiently high, the public defense delivery system consists of both a defender office and the active participation of the private bar.
- Principle 4 – Defense counsel is provided sufficient time and a confidential space with which to meet with the client.
- Principle 5 – Defense counsel’s workload is controlled to permit the rendering of quality representation.
- Principle 6 - Defense counsel’s ability, training, and experience match the complexity of the case.
- Principle 7 – The same attorney continuously represents the client until completion of the case.
- Principle 8 – There is parity between defense counsel and the prosecution with respect to resources and defense counsel is included as an equal partner in the justice system.
- Principle 10 – Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards.

Under the current conditions of the Missouri State Public Defender System, some public defender attorneys are faced with violating both the Missouri Rules of Professional Conduct and Public Defender Guidelines for Representation each day. But we are not the first to warn of this crisis. The Public Defender and the Public Defender Commission have each sounded their own alarm.

On April 20, 2005, the Public Defender Director wrote to Representative Richard Byrd on behalf of the Public Defender Commission following a hearing on House Bill 796 as it related to the right to counsel in misdemeanor cases. The Director enclosed with the letter a spreadsheet detailing the Missouri Public Defender System’s misdemeanor caseload for calendar year 2004. He wrote of this data: “Our department handled 29,429 misdemeanors in 2004. By far, Driving While Suspended/Revoked accounted for more cases than any other single charge, 6,243 cases or 21% of all misdemeanors. In fact, when considering all traffic cases, the Public Defender System handled just over 10,400 traffic matters, or 35% of all misdemeanors.” The Director then proposed several actions that could be taken with regard to certain misdemeanors. The Director wrote:

Obviously, if there is going to be meaningful caseload relief, it must come from where there are meaningful numbers of cases...I suggest all traffic cases under RSMO Chapters 300 to 307 as a good first step, even though this would not amount to a solution. If by legislation, Court Rule, or by Missouri Bar volunteers, the State Public Defender were out of the traffic business altogether, the average caseload would still exceed any recognized standard. However, we would be in a

better position to provide competent representation in all cases, especially the more serious cases.

In April 2005, the Public Defender sought the assistance of the Missouri Bar. In turn, the Bar sought volunteer attorneys to handle minor traffic cases in an effort to temporarily ease the caseloads of the overburdened public defenders. While these minor cases amount to a small percentage of the public defender workload, the call for help alerted the Bar to the fact that the Public Defender system was in trouble.

On June 3, 2005, the Deputy Director of the Missouri State Public Defender well described the situation in an article published in the Missouri Bar's weekly newsletter called "*Living Double in a World of Trouble*" – *The Indigent Criminal Defense Crisis in Missouri*.² The Deputy Director did not mince words, calling the situation a "crisis [that] directly affects the ability of the Public Defender System to fulfill its primary mission of providing quality criminal defense services to indigent clients. In its wake, public defenders often find themselves forced to choose between conflicting ethical demands." As referenced in some of our findings, the piece further describes some of the ethical dilemmas with which public defenders are faced.

On June 10, 2005, the Public Defender Commission adopted the strongly worded *Findings and Directive on Caseload Standards in Accordance With Professional and Statutory Obligations*. The last finding states: "The Commission finds that, with increasing caseloads and without increased staffing, there is no effective control over the Missouri State Public Defender caseloads. The Commission further finds the situation is already at a crisis level, with trends pointing to an impending disaster in Missouri's criminal justice system." The Commission then directed the Public Defender Director to review the caseloads of the offices and to determine whether "attorneys are meeting their ethical duties of competence and diligence by adherence to the Guidelines for Representation. The Director shall report his findings to the Commission and take corrective actions necessary, including but not limited to declining representation in specific cases or case classifications."

In response to the Commission's Directive, the Director recently reported, "We have found that 32 of 36 Trial Division Offices exceed the caseload standard. We are discussing strategies to correct the same, as contained in the Directive." At this time, we are not aware of any specific action that has been taken in any of the 32 trial offices.

Given this recent history, many of our findings that follow will be of no surprise to the Public Defender or the Commission.

Findings

The Missouri Public Defender System is struggling to survive. It is marked with continuous turnover of staff, loss of experienced attorneys, extremely low salaries (with little hope of increase or advancement after several years), low morale, and a real perception of case overload. The system's struggle is also a plight of the indigent citizens of Missouri. As

² Dan Gralike, Deputy Director, Missouri State Public Defender, "*Living Double in a World of Trouble*" – *The Indigent Criminal Defense Crisis in Missouri*, The Missouri Bar weekly electronic newsletter, *ESQ*. (June 3, 2005).

discussed in our findings below, there are a number of reasons to believe that some public defender attorneys are not providing effective assistance of counsel to their clients or complying with the Public Defender Guidelines for Representation or the Missouri Supreme Court Rules of Professional Conduct.³

Current Status of the Missouri State Public Defender System

1. An extremely high level of turnover among staff attorneys creates serious problems at the Public Defender. With many experienced attorneys leaving, cases must be distributed among either a small number of remaining experienced attorneys or to new attorneys who are not yet ready for either a significant caseload or serious felony cases. The turnover problem causes the remaining staff to shoulder the burden, which contributes to a sense of overload and to burnout. In addition, the turnover problem creates a serious risk that newly-assigned attorneys will be unprepared or inexperienced. Judges in some areas expressed a real concern over the experience level of the public defenders handling serious cases.⁴ Some judges also noted that attorneys are not getting needed trial experience as few cases are being tried.
 - a. Between FY 2001 and FY 2005, the Public Defender experienced a cumulative attorney turnover rate of approximately 100%.⁵
 - b. Experience levels in some of the offices are very low. Of the 36 trial division offices, aside from the District Defender or Assistant District Defender, only 22 have one or more APD IVs on staff. Nine offices have one or more APD IIIs, and four offices have APD IIs as the most experienced attorneys in the office.
 - c. Last year, almost 15% of the Assistant Public Defender (APD) IV's (the highest level for trial attorneys) left the program. Because it has become almost impossible to hire an experienced private criminal lawyer who can fill an open APD IV position, an APD I is frequently hired to replace an APD IV, causing many of the serious felony cases left behind to be handled by the remaining APD IV's or by less experienced attorneys.
 - i. In the Columbia office, we were told that four APD IV's had left in the last 18 months and had been replaced by one APD IV, two APD II's, and one APD I.

³ See, e.g., Missouri Supreme Court Rule 4-1.1 Competence; Rule 4-1.3 Diligence; Rule 4-1.4 Communication; and Rule 4-1.7 Conflict of Interest: General Rule.

⁴ See Public Defender Guidelines for Representation, General Principle 1.3(b) (“Prior to undertaking the defense of one accused of a crime, a Public Defender should have sufficient experience to provide competent representation for that case. A Public Defender should handle the more serious and complex cases only after having had experience and/or training in less complex criminal matters. Where appropriate, a Public Defender should consult with more experienced attorneys to acquire knowledge and familiarity with all facets of criminal representation”); and Missouri Rule of Professional Conduct 4-1.1 Competence (“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonable necessary for the representation.”)

⁵ State of Missouri Public Defender Commission Fiscal Year 2005 Annual Report (Draft), p. 6 (October 1, 2005).

- ii. In St. Louis City, we were told that the office experienced a 50% turnover last year, with many experienced attorneys leaving. Most attorneys in the office now have two years of experience; after two years, attorneys are handling complex A-B felonies.
 - d. Some judges reported that the high turnover negatively affects the running of the court dockets, as new lawyers take longer to dispose of cases. In addition, clients remain in custody longer if their cases are continued after a transfer to a new attorney.
 - i. In the Rolla office, which has reportedly experienced a 60% turnover in the last two years, we were told that trials have become backlogged due to the continuances that result from the turnover and resulting transfer of cases.
- 2. The turnover problem is made worse by the fact that there appears to be little hands-on supervision of the staff attorneys, particularly the new attorneys. Supervision is very limited because most supervisors carry their own heavy caseloads. In Farmington, we were told that all Assistant Public Defenders but one have approximately one year of experience or less, and some are carrying 12-17 open A-B felonies, the District Defender is carrying 127 open cases (including one murder and 20 A-B felonies).
- 3. Public Defender salaries are far too low and are a major cause of the high turnover, low morale, and recruitment difficulties of the Public Defender System.
 - a. Salary increases have not been adequate to prevent turnover and increase morale. There were no raises in FY 2002 or FY 2003. In FY 2004, staff earning less than \$40,000 received a raise of \$600. In FY 2005, all staff except the Director received a raise of \$1,200.
 - b. Salaries start at \$33,792 and are capped at \$52,452 for all trial attorneys so that attorneys have no financial incentive to stay long-term. The salary of \$52,452 for the most experienced trial attorneys (APD IV's) is the lowest that we have encountered in the country.
 - c. Some staff, including attorneys, have second jobs. This is demoralizing and creates additional stress.
 - d. Recent law school graduates are entering the practice with increasing amounts of law school debt (e.g., \$50,000 - \$100,000), making the low salaries an even greater detriment to attorney recruitment and an even greater cause of stress and frustration for new public defenders.
 - e. Because of the low public defender salaries, some offices lose public defenders to the prosecutor's office.

4. Recruitment and retention is especially difficult in the rural offices where few attorneys wish to be placed. In the Farmington office, at least three attorneys are currently commuting from St. Louis.
5. Despite the many challenges facing the Missouri Public Defender System, the public defenders we interviewed are the overall strength of the program. They are hard-working and some are overloaded with cases, but they are underpaid, have little hope for advancement and are not optimistic about the future improvement of the public defender system.
6. Public defenders are uniformly of the opinion that the Public Defender training program is excellent.
7. The Public Defender Commission recently found that “excessive caseloads can and do prevent Missouri State Public Defenders from fulfilling the statutory requirements of Chapter 600, the Guidelines for Representation, and their ethical obligations and responsibilities as lawyers.”⁶ The Public Defender Deputy Director has stated that “[FY 2004] caseloads require every public defender in the trial division to dispose a case every 6.6 hours of every working day.”⁷
 - a. One APD IV in Kansas City reported during our site visit that his open caseload broke out as follows: seven homicides; 26 felony A-B’s; 20 misdemeanors; and 15 other cases. Another APD IV in Kansas City reported that last year he had closed 120 felony cases and conducted five jury trials, and that he normally handles 50 open serious cases at any one time and that most of his clients are in custody.
 - b. One APD III in Rolla reported 183 open cases, including 32 A/B felonies (two or three of which were serious sexual assault cases) and 84 C/D felonies.
8. There are no effective written caseload standards in place for public defender trial attorneys handling non-capital cases. A standard of 235 cases per attorney per year that was agreed to by Governor Ashcroft in 1989 is frequently used by the Public Defender as a guideline. However, the standard was not based on any quantitative assessment, is 16 years old and has never been used as a means of refusing or transferring cases outside of the program. The Public Defender Commission itself has stated: “The Commission, recognizing the evolving complexity in the practice of criminal law and that historical standards may be too high for today’s environment, finds a need for continuous review and updating of the appropriate caseload standard for Missouri’s Public Defenders.”⁸

⁶ *Missouri State Public Defender Commission’s Findings and Directive on Caseload Standards in Accordance With Professional and Statutory Obligations*, Finding 9 (Adopted June 10, 2005)(Draft copy).

⁷ Dan Gralike, *supra*.

⁸ Missouri State Public Defender Commission, *supra*, Finding 8.

9. There appears to be no written or informal policy or procedure for dealing with case overload. Open caseloads of attorneys are not consistently monitored in all offices. Attorneys do not withdraw from cases and offices do not seek to refuse cases when they feel they are overloaded.
 - a. As the Public Defender Deputy Director has stated: “By not withdrawing, an overworked lawyer violates at least two disciplinary rules: Rule 4-1.1 forbids a lawyer from handling a legal matter without adequate legal preparation; and rule 4-1.7 forbids a lawyer from representing a client if that representation will be directly adverse to another client.”⁹
 - b. The Public Defender Commission has stated that its concern over excessive caseloads “has yet to be addressed in any meaningful way and the trend continues to be of great concern. It has been and remains an unanswered crisis, particularly as caseloads increase without increased staffing.”¹⁰ In addition, “[t]he Commission finds that, with increasing caseloads and without increased staffing, *there is no effective control over Missouri State Public Defender caseloads*. The Commission further finds the situation is already at a crisis level, with trends pointing to an impending disaster in Missouri’s criminal justice system” (emphasis added).¹¹
10. Some public defenders describe their practice as “triage.” Public defenders are forced to choose between providing adequate assistance to some clients and neglecting others. Work on some cases does not begin until the trial date is near. The Public Defender Deputy Director has said of the situation: “The present M.A.S.H. style operating procedure requires public defenders to divvy effective legal assistance to a narrowing group of clients.” Further, “[f]or individual public defenders to choose among clients as to who will receive effective legal assistance undermines professionalism and commitment.”¹² Similarly, a District Defender stated to us that the volume of cases is so high that some public defenders cannot provide effective assistance of counsel to many clients.
11. Some public defenders do not meet with clients until they are in court.¹³ In some courts, attorneys must speak with in-custody clients when they are shackled to other defendants in violation of the attorney-client privilege and Public Defender Guidelines.¹⁴ In addition, many attorneys do not consult with in-custody clients on a monthly basis as required by

⁹ Dan Gralike, *supra*.

¹⁰ Missouri State Public Defender Commission, *supra*, Finding 4.

¹¹ *Id.*, Finding 11.

¹² Dan Gralike, *supra*.

¹³ Public Defender Guidelines for Representation, General Principle 1.4(d) (“A Public Defender should make every effort to arrange for prompt and timely consultation with the client in an appropriate and private setting. Such consultation should occur within a week after representation of the client is undertaken, and must occur prior to the conduct of any preliminary hearing in the case.”)

¹⁴ *Id.*, General Principle 1.4(d) (“The Public Defender, as any attorney, has a duty of confidentiality as concerns any attorney-client communications.”)

Public Defender Guidelines because of the overwhelming workload.¹⁵ One attorney commented that although he may have clients in more than ten different correctional facilities, he only visits two facilities that are near the office. One judge commented that the court has a difficult time accepting pleas from public defender clients because, during the plea colloquy, defendants often complain about the lack of contact from the public defender.

12. Some public defenders conduct little investigation in violation of their guidelines¹⁶ and spend much time suggesting pleas to their clients. According to the Deputy Director, “The less significant the charge, the more likely it is for a defender to ignore the duty to adequately investigate the case. Too often in these cases the defenders lead clients to take the deal rather than delay the disposition pending further investigation.”¹⁷
13. The 2005 Annual Report of the Public Defender shows that only 377 cases were tried to a jury across the state. This translates to a jury trial rate for felony cases of less than one and one-half percent.
14. Public Defender clients may be represented by two or more different public defender attorneys throughout the life of their case. A felony client may have one public defender represent him through the preliminary hearing and another public defender represent him thereafter and through trial. In addition, as turnover continues, there is a significant chance that a client may have two or more different attorneys before final disposition.
15. The Missouri State Public Defender has gone through several budget cycles without an increase in full-time equivalent (FTE) positions. The state has provided a total of 563 FTE Public Defender positions which breaks out as follows: 342.5 attorneys; 73 paralegal investigators; 81.25 clerks or secretaries; and 62.75 legal assistants and other non-lawyer positions.¹⁸ While this is the authorized staffing level, due to the substantial turnover rate and other personnel reasons, the positions are never completely filled at any given time.
16. Non-attorney support staff is inadequate in many offices throughout the state. In the trial division, there are 288 full-time attorneys and 150 non-attorneys, of which only 60.25 are secretaries.¹⁹ If all positions were filled, the overall statewide ratio of secretaries to attorneys in the trial division would be one secretary for approximately five attorneys. However, in looking at the 36 trial offices individually, 24 of them have only one secretary. In three district offices, one secretary supports between seven and eight attorneys. In one district office, one secretary supports eleven attorneys. In St. Louis City, one secretary reportedly supports 12-13 felony attorneys. These ratios result in

¹⁵ *Id.*, General Principle 1.4(b) (“The Public Defender should maintain frequent contact with the client and keep the client apprised concerning developments in the case. At a minimum, the Public Defender must have contact with the client once per month during the pendency of the representation.”)

¹⁶ *Id.*, Trial Preparation 6.1(a) (“In advance of trial, the Public Defender should take all steps necessary for complete discovery, investigation and legal research.”)

¹⁷ Dan Gralike, *supra*.

¹⁸ Staffing data source: Public Defender, Staffing of Local Offices - June 23, 2003.

¹⁹ Staffing data source: Public Defender, Staffing of Local Offices - June 23, 2003.

many attorneys performing clerical tasks such as writing letters, copying documents, filing, and answering phones. The obvious result is attorneys having less time for legal work and client contact. Similarly, investigator staff is inadequate in many offices. For example, in Farmington we learned that there is one investigator for 10 attorneys, and some attorneys are serving subpoenas and interviewing witnesses. In addition, five other district offices have one investigator supporting between seven and eight attorneys.

17. Many public defender staff feel demoralized and isolated. For the most part, their contact is confined to their regional office, and they do not feel that they are part of a statewide system. Morale is low, and it is clear that turnover will continue to be a problem without significant changes. There is also a general pessimism about the willingness of the state to provide additional resources.

Public Defender Budget Requests

18. We have reviewed each of the legislative budget requests for Missouri State Public Defender System since FY 2002. Each request begins with a rough draft that is typically developed by the Public Defender Commission in September of the previous year.²⁰ Each request also projects statewide annual caseload and staffing needs; below we discuss the FY 2002 – FY 2007 requests in which different formulas are used to determine these needs.
19. In its FY 2002 Proposed Legislative Budget Request, the Public Defender projected that the FY 2002 statewide caseload for the Trial Division, which had 253.50 FTE attorneys, would be 81,712 cases. This number of projected cases was then divided by the total number of trial attorneys to determine an average number of projected cases per trial attorney of 322. According to the budget request, “If the caseload exceeds 334 cases per attorney FTE per fiscal year a decision item is warranted.” The base year for this logic is FY 1996, when the Trial Division had 285 attorneys and that statewide trial caseload was 68,396, and therefore an average caseload per attorney of 334 cases. Following this logic, the FY 2002 budget requests stated of the projected 322 per attorney caseload: “Although greater than the previous years, the projections do not warrant a decision for additional staffing for the trial division.” Thus, the Public Defender did not request

²⁰ Each year’s budget request must contain core requests for each of the appropriation categories that were funded in the previous year; these core decision items are required for continued funding and are the base with which the program begins its next fiscal budget request. The dollar requests in the core items reflect the appropriations received in the current fiscal year less any one-time equipment expenditures or core reductions. Every other item in the budget request is a separate and distinct decision item that is considered for funding by the Governor and the Legislature. As an example, in the Proposed Fiscal Year 2002 Legislative Budget Request, the Public Defender set its FY 2002 core budget at \$30,981,247 and staffing positions not to exceed 558.13 full-time equivalent (FTE) positions. First, the Public Defender asked for salary increases. In addition, the Public Defender asked for a decision item request of \$2,320,445 for purposes of creating a new unit to represent persons charged as sexual predators under legislation enacted in 1998. The second decision item asked the state for an additional appropriation of \$1,054,645 for the state to take over from the counties the funding for office space requirements. The third decision request sought additional appropriated funds available for public defender attorneys to assist them in the payment of existing student loans. The Public Defender also requested additional appropriations to replace vehicles that had accumulated mileage of over 100,000 miles. Further, it requested an increase in appropriations for their training account. It also deals with projected caseload and staffing needs, as discussed above.

additional attorney positions,²¹ and the assumption was that the existing level of attorney staffing was sufficient to provide effective client representation. It is our understanding that the Legislature did not provide any additional funding for the Public Defender in FY 2002 beyond the core budget.

20. In the Proposed FY 2003 Legislative Budget Request, the Public Defender projected that the FY 2003 statewide caseload for the Trial Division, which had 260 FTE attorneys, would be 79,857. Therefore, the projected caseload per trial attorney was 307 cases. Since this projected caseload did not exceed the 1996 caseload of 334, no additional public defenders were requested in the FY 2003 budget request.
21. In the Proposed FY 2004 Legislative Budget Request, the Public Defender projected that the FY 2004 statewide caseload for the Trial Division, which had 268 attorneys, would be 90,929. From this, the projected caseload per trial attorney was calculated to be 339, five cases above the 1996 caseload of 334 used in previous years. Therefore, an additional 4.25 attorneys were requested to keep the average attorney caseload from exceeding 334, at a total cost of \$685,666, including required support staff and other overhead and administrative costs. For the third successive year, the Legislature did not fund any of the additional Public Defender requests beyond the core budget.
22. In the Proposed FY 2005 Legislative Budget Request, the Public Defender abandoned all reference to the 1989 Ashcroft standard of 235 cases per attorney as well as the 334 caseload standard that was used as the decision base for requesting additional attorney positions at least since the FY 2002 budget request. Instead, the FY 2005 request states: “The Director of the State Public Defender appointed a Caseload Standards Committee to develop caseload standards for the various categories of cases handled by the System. The Committee determined that 225 weight units is a reasonable standard workload for a competent attorney in a single jurisdiction office.”²² However, the budget request provides no detail as to how these weights were developed. This method of determining workload and staffing needs appeared for the first time in the FY 2005 budget request.
 - a. The FY 2005 caseload projection for the Trial Division was 94,102 cases. This projection was then applied to the adjusted weights developed by the Caseload Standards Committee, and the total weighted caseload for the Trial Division was calculated at 71,608.64. This weighted projected caseload was then divided by the weighted standard of 225 to conclude that “the Trial Division should have 318 attorneys to meet these caseload demands.” Since 291 attorneys were assigned to the Trial Division, the Public Defender requested an additional 27 attorney positions, along with necessary support staff and overhead in order to bring the Trial Division up to the weighted caseload standards. This amounted to a total of \$1,966,865 in additional requested appropriations.

²¹ Rather, the budget request states that additional attorney and support staff positions would be requested “via an expansion decision item” should the caseload exceed 84,700 (253.50 attorneys x 322 cases = 81,627).

²² There is no discussion of how the Committee developed adjusted case weights for all types of trial division cases, although we do know that the category of cases in which adjusted weights were developed were: murder/death; murder 1/life without parole; A-B felonies; C-D felonies; misdemeanor; juvenile; and probation violations.

- b. The projected Appellate Division caseload of 1,747 was applied to a similar formula for a weighted projected appellate caseload of 12,238. The Public Defender then applied the appellate weighted standard and stated that it would need an additional 17 appellate attorneys to meet the caseload demands. This translated into a request for \$1,287,301 in additional requested appropriations.
 - c. In addition, the proposed FY 2005 budget repeated several of the proposed increases for additional decision items from prior budget requests.
23. In the Proposed FY 2006 Legislative Budget Request, the Public Defender abandoned the use of the 225 weighted caseload standard and returned to the 1989 Ashcroft standard of 235 cases per attorney in determining caseload and staffing needs.
- a. The projected caseload for the Trial Division for FY 2006 is 98,336 cases. With 287 trial division attorneys currently on staff, applying the Ashcroft standard of 235 cases per attorney, the Trial Division would need a total of 418.5 attorneys. Therefore, the Public Defender requested an additional 138.5 attorneys along with necessary support staff and overhead items. This led to a request for an additional \$10,081,086 in appropriations.
 - b. The Public Defender also returned to the 1989 Ashcroft standard in terms of appellate cases, stating that the 1989 plan provided for 40 appellate cases for a full-time attorney. The Public Defender projected that there would be 1,636 new appellate cases in 2006. With 29.5 attorneys currently in the Appellate Division, the Public Defender requested an additional 11.4 appellate attorneys to maintain the Ashcroft standard. This led to a request of an additional \$891,623 in appropriations.
 - c. Once again, the Public Defender asked for a number of additional decision appropriations; but once again, the Legislature did not provide for any additional FTE's or resources.
24. Finally, in the FY 2007 Proposed Legislative Budget Request, the Public Defender again used the 1989 Ashcroft standard to determine caseload and staffing needs.
- a. The Public Defender projected that there would be 99,280 new cases assigned in the Trial Division. With 288 FTE attorneys employed in FY 2006, the Public Defender would need a total of 411.66 Trial Division attorneys to maintain the 1989 Ashcroft standard of 235 cases per attorney. Thus, this decision point would require 123.66 additional trial attorneys, along with the necessary non-attorney staff, expenses and overhead. This led to a request for an additional \$9,239,811²³ in appropriations. The Public Defender also offered a three-year phased-in plan to reach this level.

²³ This is an erratum correction from the figure originally stated in this report, \$9,239.11.

- b. Once again, using the same Ashcroft standard of 40 cases per appellate attorney, the Public Defender indicated that it needed another 13.98 additional attorneys in the appellate division based upon a projection of 1,699 new cases in FY 07. The cost for this decision item including other staff and overhead is \$1,075,854.
- c. In the FY 07 budget request, the Public Defender for the first time suggested an alternative way to fund the additional resource needs. This plan suggests that the number of additional staff attorneys required (123.75) could be reduced by adding 99 additional legal assistants and paralegals investigators who would be heavily involved in handling “administrative matters” (e.g., traffic and bad check cases). The projected caseload for such cases to be prepared by legal assistants was 20,626, and the total cost for this program was set out at \$3,792,902. However, the proposed FY 2007 budget does not set out the potential savings from this alternative plan; nor does it address the ethical concerns of partial representation by legal assistants and a defendant’s right to counsel.
- d. Finally in the Proposed FY 2007 Legislative Budget Request, the discussion was held about the necessity of providing additional representation in drug court. The public defender in this part of the proposal asks for an additional 32.75 public defender FTEs. Including non-attorney personnel cost and other overhead, the total cost of the program would be \$2,512,552.

25. The following table illustrates the methods used in budget requests for projecting staffing needs based on the various caseload standards:

PROPOSED FISCAL YEAR LEGISLATIVE BUDGET REQUESTS						
	2002	2003	2004	2005	2006	2007
Core Budget	\$30,981,247	\$31,498,456	\$31,590,808	\$29,802,608	\$30,156,416	\$30,906,416
Trial Division Caseload						
Projected	81,712	85,197	90,929	94,102	98,336	96,741
Actual Opened	80,163	83,691	86,695	85,821		
Trial Division FTEs	253.5	260	268	291	287	288
Proj.Caseload per FTE	322	327*	339	not used**	342	336
Caseload Stand. Used	334	334	334	225	235	235
Add'l Atty FTE Requested	0	0	4.25	27	131.5	123.75

Actual Opened Trial Cases reported in FY 2005 Annual Report (p.9)

*2003 Budget Request calculates an FY 2002 updated projection of 79,857 cases with 260 FTEs, for an avg. caseload per attorney of 307

**In the 2005 Budget Request, a weighted caseload standard of 225 was used with the projected caseload to calculate the need for additional FTEs, rather than a projected caseload per FTE.

2005: Average weighted caseload of 225 determined by the Commission; NAC standards considered.

26. We are concerned about the various budget requests made by the Public Defender since FY 2002. Using the same formula to determine additional attorney needs, at one point, the Public Defender states in its fiscal year budget that as long as the number of projected trial cases does not exceed 344 per attorney, then the Public Defender assumes that the quality of representation is satisfactory. However, in FY 2005, the Public Defender abandons the 235 Ashcroft standard from 1989 and develops a new case weighting system calling for over a 100 new lawyers. Then in the FY 2006 request, the Public Defender goes back to the Ashcroft standard and abandons the case weighting formula, and asks again for over 100 attorneys. This formula and request is repeated for FY 2007; but in this request, an alternative plan using paralegals is suggested for the first time, as well as a request for over 20 public defender attorneys to handle drug court cases.

Use of Caseload Standards and Case Data

27. We find the caseload standards and formulas used by the Public Defender to be rather confusing, and we do not believe that a solid case weighting standard has been developed yet for the Missouri State Public Defender System. Further, we have problems with the assumption that the Ashcroft unweighted standard of 235 cases, without regard to case type, assures that public defenders are providing adequate representation.

- a. We have spent a number of years dealing with public defender caseloads, caseload standards and case weighting systems, and we cannot support the assumption that in FY 2006 and 2007, the 235 figure agreed to in 1989, without regard to empirical data, has any validity today.

- b. Over the last 10 years, we have conducted a number of quantitative caseload studies on public defender systems around the country using contemporaneous time sheets for twelve or fifteen weeks to record the actual time the public defenders put towards not only certain types of cases but also certain types of tasks (e.g., client contact, investigation, motions, and trials). The use of both the 235 Ashcroft standard and the weighted standard of 225 both present major problems. In our opinion, it is not possible to develop quantitative workload for public defenders in Missouri who are doing the various kinds of cases without performing a meaningful case weighting analysis; that is a task that we feel needs to be undertaken to fully assess the workload requirements.
28. Having said that, we remained convinced that the Missouri State Public Defender System is operating in a crisis mode and cannot ensure that clients are being provided with adequate and meaningful representation day to day. It is important for us to state that even though we cannot measure the actual workload currently being handled, we are able to determine that the program is severely under-funded, the salaries are pathetic, and that the appropriation for the Missouri State Public Defender is the lowest of all state public defenders in the country. Further, there has been no increase in appropriation for the last five years.
29. After reviewing the case tracking system developed by the Missouri State Public Defender, we feel that the caseload issue raised here does not pertain to the quality of the case tracking system, which we find to be acceptable. The problem lies in the analysis of the workload among public defenders; this needs to be addressed as soon as possible.

Disparity of Resources

30. A complete comparison of resources between the Public Defender and the prosecution cannot be performed as Missouri lacks comprehensive, reliable data on the resources of local prosecutors. However, efforts were made by the Missouri Bar to gather information on attorney salaries from both the Attorney General's Office and from local Prosecuting Attorneys.
- a. Based on the information supplied by the Attorney General's Office to the Missouri Bar, there does not appear to be substantial disparity between the salaries of staff attorneys in their first few years at the Attorney General's Office and those at the Public Defender.
 - b. The Missouri Bar also received the results of a survey by the Missouri Office of Prosecution Services (MOPS) regarding the full-time and part-time positions and salaries of local prosecutors. The information received from this survey varied widely, and many counties did not respond to the survey. It was therefore suggested that the information we received from local prosecutors during our site work (set forth below) was as valuable as that received from the MOPS survey.

31. In comparison to Public Defender trial attorney salaries of \$33,792 - \$52,452, we learned the following:

- a. Prosecutor salaries are substantially higher than public defender salaries. From the information provided, prosecutor starting salaries are anywhere from \$40,000 to \$55,000 and the highest range in some places can go up to around \$100,000 or more.
 - i. In one county, the part-time prosecutor reportedly makes about the same as a full-time public defender. In fact, we were told by the Missouri Bar that most prosecutors making less than \$35,000 are considered part-time under Missouri statute.
 - ii. In Boone County, the salaries of the trial prosecutors range from \$45,898 to \$68,847.
 - iii. In St. Louis City, trial prosecutors' salaries start at \$40,000, and the highest salary for an executive management position (currently unfilled) is \$105,000.
 - iv. In St. Louis County, prosecutors' salaries start at \$44,900 and can go up to \$140,000. Most trial prosecutors can make up to \$100,000.
 - v. In the Juvenile Division of the St. Louis Family Court, the budget of the Chief Legal Counsel (who handles juvenile cases for the city and county) is under the Circuit Court's budget, and attorney salaries range from \$55,673 to \$109,341. However, because attorneys are prevented from making more than an associate circuit judge, the highest effective salary is \$96,000.
 - vi. In St. Francois County, prosecutors' salaries range from \$45,000 to \$67,000.
- b. Prosecutors receive many grants that public defenders do not, and many in-kind resources in criminal cases that cannot be valued, such as the investigation and support of state and local law enforcement.²⁴ They also receive additional revenue from sources such as fees in bad check cases.

²⁴ One Circuit Judge commented recently about the disparity during Public Defender litigation in St. Louis City: "When it starts mounding up to five or six years and no salary increases of any significance, and no personnel increases when other branches of the government are getting grants to prosecute certain levels of crime and their [sic] lovely people, all of them, every time they get one of these federal grants you all [public defenders] don't get a grant to defend cases; do you?" Exhibit S of Plaintiff's Amended Petition for Declaratory Judgment *State of Missouri Ex Rel. J. Marty Robinson, Director, Missouri State Public Defender System v. Honorable John J. Riley, Presiding Circuit Judge, 22nd Judicial Circuit, Honorable Thomas C. Grady, Circuit Judge, 22nd Judicial District, Circuit Court of St. Louis County, 22nd Judicial Circuit*, No. 045-1634 (Filed July 27, 2005) (Transcript of Proceedings, July 5, 2005).

Unfulfilled Mandate

32. Public defenders in Missouri must provide representation to any eligible person “for whom the federal constitution or the state constitution requires the appointment of counsel.”²⁵ Despite this mandate, we are extremely concerned that many juveniles across the state are not being represented in delinquency proceedings at which they have the right to counsel (e.g., detention hearings). With the exception of St. Louis, Kansas City, and Columbia, public defenders reportedly do not routinely provide representation to juveniles in delinquency cases unless the juvenile or a parent requests it or the court seeks the appointment. When the public defender does get involved, it is in cases where the prosecutor seeks to transfer the juvenile to adult court; in other cases, the representation often occurs after notice of the adjudication hearing. Our concern is heightened by the fact that in some counties, we were told that juvenile officers play a significantly larger role than defense counsel and in some cases are reportedly advising juveniles to waive their right to counsel. It is disappointing that this problem has not been raised statewide by either the criminal or private bar or by the courts.

- a. Among the 33 non-juvenile trial division offices (i.e., excepting St. Louis and Kansas City) in FY 2005, 23 offices handled fewer than 50 juvenile crime cases for the entire year; eleven of these offices handled 15 or fewer juvenile crime cases, and two of these offices handled none. Only two offices handled over 200 juvenile crime cases, and one office handled over 100.

33. We are also concerned that many defendants in drug courts and mental health courts across the state are not being represented in cases in which they have the right to counsel until or unless they are facing actual imprisonment. The Director reported that in many districts, the Public Defender does not take an active role in these courts “unless and until a Public Defender client faces an adversarial hearing in which there is a significant legal or liberty issue at stake, such as termination from drug court or a probation revocation. The District Defender and the Assistant Public Defender have discretion to determine when and how their participation is appropriate.” The focus of our concern is those cases in which a defendant may plead guilty without adequate assistance of counsel in order to be accepted into the specialty court, but then later faces loss of liberty.²⁶ It is significant note that in its FY 2007 budget request, the Public Defender requested a total of 32.75 APD III positions “to marginally staff the drug courts.”

Conflicts

34. We are concerned about the handling of conflict cases by the Public Defender. Many conflict cases are referred within the Public Defender program to other regional offices. We expressed this concern in 1993, and noted that we knew of no other public defender program that did not use the private bar for conflict cases. At the very least, public defender handling of conflict cases, including co-defendants, creates an appearance of a

²⁵ 18 CSR 10-2.010(1)(E).

²⁶ See *Alabama v. Shelton*, 535 U.S. 654 (2002)(a defendant cannot face actual imprisonment on a suspended or probated sentence unless the defendant was offered the assistance of counsel at the trial stage).

conflict in the same manner as attorneys from the same law firm creates such appearance. For example, two public defenders could be representing co-defendants whose cases have been consolidated for trial. Apart from the ethical considerations of imputed disqualification, which may not apply to the Missouri State Public Defender System, we think there is a strong danger of the appearance of conflict if both public defenders are to provide zealous advocacy on behalf of their co-defendant clients at such a trial.

35. There is no written policy that sets forth the definition of a conflict or the policies and procedures for assigning conflict cases out to the private bar. Each attorney is told only to be guided by the Rules of Professional Conduct, and there appears to be no review of the staff attorneys' determinations of conflict.
36. Conflict cases are taking too long to transfer from the originating office to the conflict office. In 2003, conflict cases took an average of 55 days from initial assignment to "disposition" or transfer from the originating office. In 2005, the average time for a conflict transfer was down to 43 days. However, this is still too long for a case to reach a conflict attorney. Cases are also taking too long to transfer for assignment to private counsel out of the office. In 2003, it took an average of 70 days to transfer a case for assignment out of the office; in 2005, it took 101 days.
37. The transfer of conflict cases to other Public Defender regional offices reduces the amount of time that a staff attorney can devote to his/her clients in their primary office. A public defender handling a conflict case may need a half-day or longer attending a distant court or visiting the conflict client in a distant jail. Further, the conflict attorney has no office in the conflict county and may not be familiar with the judges and the judicial practice and procedure there.
38. The Public Defender Appeals Division represents defendants whose trial was conducted by another public defender in the Trial Division. Where claims of ineffective assistance of counsel need to be raised on appeal, we believe a conflict of interest is created, although the Missouri Supreme Court has ruled that this does not create a per se conflict of interest that absolutely disqualifies the public defender.²⁷

Tension With the Courts

39. There appears to be a large conflict between the Public Defender and the courts regarding when the public defender should be assigned to represent defendants. Many public defenders describe their roles as the "attorneys of convenience" for the courts.
 - a. Unlike most states, Missouri judges do not have the inherent authority to appoint counsel in the interests of justice unless a defendant has completed and signed an application and the Public Defender has determined the defendant to be

²⁷ *State Ex. Rel. Public Defender Commission v. Bonacker*, 706 S.W.2d 449 (Mo.banc 1986). However, the Missouri Supreme Court also stated: "First, we note the Commission is authorized by statute to cure and resolve any potential conflicts of interest by employing private counsel under contract or on a case-by-case basis. Second, the commission has followed such a practice in the past when a conflict loomed" (citations omitted). *Id.* at 451.

indigent.²⁸ This has created some tension between the Public Defender, who is concerned about high caseloads and limited resources, and the judges who are concerned about the efficiency of the courts.

- b. In response to findings in the recent Auditor's Report regarding judicial determinations of eligibility, the Public Defender stated: "[The Office of the State Public Defender (OSPD)] is currently involved in litigation pursuing judicial compliance, which should bring the added benefit of public and governmental awareness of the problem. Should the problem continue, OSPD will aggressively litigate and challenge future misuse of its resources."²⁹ Indeed, the Public Defender has filed litigation against judges for overriding a Public Defender determination of ineligibility. This has escalated the tension between the program and the courts, creates a conflict with potential clients, and does not appear to be an effective means of reducing caseloads.
- c. Many public defenders complained that judges are too quick to allow private attorneys to withdraw from cases and appoint the public defender when a defendant can no longer pay his/her retained attorney. This has also created a resentment towards some members of the private bar.
- d. Some judges do not appear to understand or appreciate the day-to-day problems faced by public defenders. Examples of this tension include:
 - i. Missouri Supreme Court Operating Rules set forth time standards for case processing.³⁰ We were told that some judges are very concerned with meeting these standards and that they are officially commended for meeting them. We were also told that some judges believe that one public defender can replace another who is unavailable for trial. However, public defenders must effectively represent their clients which includes adequate trial preparation. High caseloads and transfers of serious cases make timely trial preparation difficult if not impossible.
 - ii. Central docketing schedules in areas such as St. Louis City require attorneys (both public defenders and prosecutors) to prepare multiple cases for trial on the same day. This creates an unnecessarily difficult and stressful situation for attorneys and affects the quality of trial preparation and representation indigent defendants are able to receive. In addition, some courts do not allow dispositive motions to be heard and decided prior to the trial date; this needlessly creates additional uncertainty and stress, and should such a motion be successful, creates a waste of trial preparation time and resources.

²⁸ See *State ex rel. Public Defender Commission v. Williamson*, 971 S.W. 2d 835 (Mo.App. W.D. 1998).

²⁹ Public Defender Commission Audit Report, No. 2004-94 (December 17, 2004), p. 7.

³⁰ See Missouri Supreme Court Operating Rule 17.23 (in Circuit Court, 98% of felony cases are to be disposed of in 12 months, 90% in eight months, and 50% in four months; in Associate Criminal Court, 98% of cases are to be disposed of in 6 months, 90% in 4 months, and 50% in 3 months).

- e. We were told of instances where the court requires the public defender to provide representation in court when the public defender is not the attorney of record. In St. Louis City, the Public Defender has changed its policy and will no longer provide representation to defendants in the misdemeanor confined docket unless (a) a defendant is first found indigent, and (b) the defendant does not plead guilty the same day. This was the subject of some controversy between the court and the Public Defender.
- f. Several public defenders reported that in some courts, judges ask unrepresented defendants at arraignment whether they have been to see the prosecutor yet. This has been observed to occur before an advisement of rights.

Indigency Determinations

40. By statute, the Public Defender is required to make all initial indigency determinations. Both the indigency standard and the role of the public defender in determining indigency are problematic for several reasons:
- a. We believe that some defendants who are unable to afford private counsel and should be found indigent are not. The statute regarding eligibility for representation states that the ability of a defendant to make a bond is one of the circumstances to be considered in making the determination, not that it is a bright-line rule.³¹ Under its statutory authority, the Public Defender Commission has further established “Guidelines for Determination of Indigence” which state that “a presumption is created” that a defendant is ineligible if the defendant is released on a bail of \$5,000 or more.³² Finding support with this guideline, some public defenders will find a defendant ineligible if such a bond has been made, without regard to other factors, such as whether a small percentage of the bail was paid to a bondsman or whether a friend or family member who would not pay for counsel posted the bond. We find this practice to be unsupported by the statute or the guidelines, and find it problematic, as did some judges.
 - b. Using the public defenders to make indigency determinations and seek liens on their own clients creates at the very least an appearance of a conflict of interest. Public defenders have an incentive to not find a person indigent as doing so will add to their caseloads. In fact, contrary to the Auditor’s report (or perhaps since the report), we found that many public defenders are quick to find a defendant ineligible for counsel if, for example, they have posted a bond.
 - c. Much valuable attorney time is spent interviewing potential clients regarding indigency and making eligibility determinations.

³¹ Missouri Revised Statute 600.086.1.

³² 18 CSR 10-3.010(2)(B)(2).

41. Despite the statutory requirements, we believe that the Public Defender should not be responsible for indigency determinations or collecting moneys from its clients. Few statewide public defender programs remain responsible for either task. Both roles create an appearance if not an actual conflict. In this regard, we believe the Auditor's Report wrongly criticizes the Public Defender regarding these practices, and the Public Defender wrongly responded with agreement.
 - a. The Auditor's Report bases its findings and recommendations on a very small sample of records that are insufficient to support any strong statistical conclusions.
 - b. The findings and recommendations in the Auditor's Report were made without regard to public defenders' ethical obligations or the constitutional rights of indigent defendants.

Leadership Efforts

42. On February 23, 2005, the Public Defender and two members of the Public Defender Commission met with the Missouri Supreme Court to discuss the issue of caseload standards for the Public Defender System. We were told that the court was to create a committee to look at the possibility of creating a court rule regarding caseload standards and that the idea of creating legislation to address caseload standards was also going to be considered. The current status of these efforts is unclear to us.
43. Despite its June 10th findings and directive, the Public Defender Commission has not been successful with the Governor, Legislature, the Missouri Supreme Court or the Missouri Bar in its efforts to increase the funding and improve the quality of the Missouri State Public Defender System.
44. There is a perception among judges and others that we interviewed that the Public Defender Commission does not have a voice independent from the Public Defender Director.
45. The Missouri State Public Defender appears to have few consistent allies that support its effort to improve the quality of indigent defense in Missouri. This includes the Missouri Bar, the Missouri Association of Criminal Defense Lawyers, the judges, the prosecutors, the law schools, and the public. Some of these groups (or their counterparts) are strong and consistent allies in other states. There appear to be a few contributing factors to this problem in Missouri:
 - a. Both the Public Defender Commission and the Public Defender have been slow to engage or elicit the support of outside organizations.
 - b. Except for the recent emergency request to the State Bar to elicit volunteer attorneys to handle minor traffic cases, there has been little effort to educate people outside of the indigent defense community as to the extent of the problem

and the need for relief. In our judgment, this request should not be repeated in future years.

- c. We were told that the Director appears on a radio talk show in mid-Missouri, but beyond that there do not appear to be many efforts made to use the mainstream press to educate the public on the challenges the Public Defender is facing and the potentially serious consequences to the indigent citizens of Missouri.
46. The Public Defender and the Public Defender Commission take the view that they have not received any increases in annual appropriations since FY 2001 because Missouri does not have any money. Further, they state they have done well to avoid budget cuts over the last several years, as most other agencies have been cut. This view runs the danger of becoming a self-fulfilling prophecy as stated in our 1993 report. Some expect to see a cut in appropriations next year.
 47. The Public Defender and the Commission have been unsuccessful in improving funding on a statewide basis for at least five years. (See also findings under “Public Defender Budget Requests,” above.)
 48. The September 30, 2005 meeting of the Missouri Bar’s Public Defender Task Force was attended by the Public Defender Director and two members of the Public Defender Commission and was well-attended by members of the Task Force. While we believe the meeting was a productive one in discussing our draft report and the issues facing the Public Defender System, we were disappointed to learn that the Public Defender was to submit the FY 2007 budget request to the governor the following day, yet none of the contents of the proposed budget were shared with the Task Force that day.

Where Does Missouri Stand Nationally?

49. Missouri indigent defense expenditures compare poorly in comparison to other southern states and the country as a whole (see *Attachment B*).
 - a. No other statewide indigent defense program has failed to receive any additional appropriations in the last five fiscal years.
 - b. Missouri has the lowest per-capita annual indigent defense expenditure of all the southern states (except Mississippi, where data is not available).
 - c. Missouri has the lowest per capita expenditure of all statewide public defender systems.
 - d. Missouri has the lowest Attorney Unit Cost of any jurisdiction in our recent experience. Attorney Unit Cost is the total cost of supporting a single FTE attorney, including salary, benefits, support staff, administration and other overhead. Simply, the Attorney Unit Cost for all divisions in the Missouri Public Defender system in FY 2006 is the total annual budget (\$30,156,416) divided by

the number of FTE attorneys (including the Director, Deputy Director and Division Directors), which is approximately \$86,000.

- e. In order to reach the average per capita expenditure for all southern states, Missouri would need an additional appropriation of almost \$16 million. Since 1993, Missouri appears to have fallen from 42nd to 47th in the nation in per capita expenditure.
50. The Missouri State Public Defender has the largest number of regional offices of any state public defender program, with a total of 55 offices, including 36 trial offices, six alternative sentencing offices, seven appellate and/or PCR offices, four capital offices, a Director's office in Columbia, and an office for the Director in Jefferson City. We do not feel that such a large number of offices is needed and that some consolidation would reduce the overall administrative costs of the program.

What Can Be Done?

51. Missouri has too many minor misdemeanor offenses, particularly traffic offenses, that carry potential jail time (e.g., driving while suspended). Such offenses should be made civil in nature, and the possibility of jail time and other collateral consequences such as sentencing enhancement and violations of probation and parole should be removed. This would cut back on Public Defender caseloads and costs.
52. We feel strongly that the membership on the Public Defender Commission should be expanded to include members with significant stature who are recognized by the Missouri Bar, courts, and legislative and executive branches to be strong advocates for the substantial improvement and increased funding of the Missouri Public Defender System.
53. We believe that the Public Defender and the Commission should discontinue attempts to justify increased funding based on the 235 caseload standard agreed to by Governor Ashcroft in 1989 or on the weighted formula that was created by the Public Defender and used in the FY 2005 budget request. A new workload formula to gauge the actual workload needs of the Public Defender System should be developed soon through a quantitative case-weighting study.
54. The following possibilities have been suggested as possible solutions to the Missouri Public Defender System's current crisis:
- a. Withdraw from a large number of minor cases;
 - b. De-criminalize minor misdemeanors;
 - c. Seek a large increase in funding; and/or

- d. File a systemic lawsuit.³³

Conclusion

In our opinion, the Missouri Public Defender System is on the verge of collapse.³⁴ The Missouri State Public Defender's Deputy Director Dan Gralike recently reported that "[a]t some point, even the most seasoned and well-intentioned defenders are overwhelmed, jeopardizing their client's right to effective assistance of counsel and possibly their license to practice law."³⁵ The Public Defender Commission itself reported on June 10, 2005 that it found that "the situation is already at a crisis level, with trends pointing to an impending disaster in Missouri's criminal justice system."³⁶ While the problem goes well beyond one of caseload, we strongly agree with these statements.

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*. In our view, the crisis is no longer looming; it exists right now. The following findings are among those previously made in this report and support this conclusion:

- The salaries for public defender attorneys in Missouri are pathetic, and the comparison of defender salaries and resources with those of the prosecution is totally unacceptable.
- The turnover rate of public defenders in Missouri exceeds that of any other public defender system in our experience. The cumulative turnover rate for the program over the past five years reaches approximately 100 percent.
- Due in part to low salaries and lack of resources, when experienced attorneys leave, they are replaced with new attorneys and recent law school graduates. Despite a first-rate statewide training program, these new public defenders are assigned cases that they are not competent to effectively handle. Furthermore, there is little to no supervision provided by senior lawyers because either there are no senior lawyers in the office who

³³ See, e.g., *In re Order on Prosecution of Criminal Appeals by the Tenth Judicial Circuit Public Defender*, 561 So.2d 1130 (Fla. 1990)(finding that a case overload situation creates a conflict of interest for attorneys and ordering that if sufficient funds are not appropriated for the private bar to handle overload, then writs for habeas corpus will be entertained by the court); *Harris v. Champion*, 15 F. 3d 1538 (10th Cir. 1994)(creating a rebuttable presumption of a due process violation for appellate delay of over two years due to case overload in appellate defender program); *Green v. Washington*, 917 F. Supp. 1238 (N.D. Ill., 1996)(holding the legislature responsible for consistent underfunding of state appellate program and creating the *Harris v. Champion* rebuttable presumption; "[w]hen an agency...is appointed to more cases than it can timely handle...conflicts of interest are necessarily created as a surfeit of clients compete for the scarce resources of available attorney time and attention... Those conflicts of interest pose an inherently intractable dilemma that admits of only one possible solution – the agency must seek to withdraw from cases until there are sufficient available resources of attorney time and attention to eliminate the conflict." Citations omitted.)

³⁴ This opinion is based on the following: our current study of the Missouri Public Defender System; our prior studies of the Missouri Public Defender System in 1989 and 1992; our 50-state FY 2002 expenditure study performed for the ABA Bar Information Program; our recent update on FY 2004 expenditures of 32 states; and our recent comprehensive work in Texas, Virginia, Georgia, Alabama, Massachusetts, New York, and Tennessee.

³⁵ Dan Gralike, *supra*.

³⁶ Missouri Public Defender Commission, *supra*, Finding 11.

are sufficiently experienced to supervise, or the senior lawyers have a full caseload and do not have the time.

- Among the 50 states, Missouri appears to rank 47th in cost-per-capita for indigent defense. Among the 12 southeast states, Missouri ranks last in cost-per-capita as of FY 2004 (not including Mississippi, for which statewide data is unavailable). To put this in greater perspective, Missouri would need an additional appropriation of almost \$16 million, an increase of over 50%, to reach the mid-point of the average cost-per-capita among the 12 southeast states.
- Under state law, the Missouri Public Defender is mandated to provide representation to any eligible person “for whom the federal constitution or the state constitution requires the appointment of counsel.” This responsibility is not consistently met in the representation of juveniles charged with delinquent acts in many parts of the state.
- The Missouri Public Defender System has not received an increase in their yearly budget for five years. This places them alone in the country among state public defender systems. In our judgment, part of the responsibility for this failure lies both with the Director and with the Public Defender Commission. There is little evidence over this five-year period that substantial efforts have been made to address the funding crisis and the harmful effects on the indigent citizens of Missouri by reaching out to either the Missouri Bar (until recent months), the Missouri Association of Criminal Defense Lawyers, the judges, the prosecutors, the law schools or the public. Rather, the Director and the Commission have attempted to handle the crisis themselves and have largely believed that further attempts would be futile. For example, the response of the Director and the Commission regarding their lack of coalition building is that the state legislature has no money and that the Public Defender has been one of the only state agencies that has not had their budget cut over this period. We find this response to be unacceptable and potentially a self-fulfilling prophecy.
- Despite (1) the June 10, 2005 finding by the Public Defender Commission that the situation was at a crisis level and was moving towards disaster, (2) the Commission’s directive that the Director review the caseloads of the office, review the ability of public defenders to meet their ethical duties and take necessary action including declining representation in some cases, and (3) the Director’s finding that 32 of 36 Trial Division offices exceed the caseload standard, to our knowledge, nothing further has been done to address the situation.

When the Missouri Legislature approved a substantial increase in funding for the Missouri Public Defender System in 1989, the system was able to expand to full-time public defender staff covering the entire state. The Legislature is to be commended for these efforts in 1989, but times have changed. When we visited Missouri in 1993, only four years after the funding increase, we found the system struggling to provide competent representation to the indigent citizens of Missouri. While some did not understand how this could true after the funding increase, we responded: “The answer to us is rather simple – the additional money simply opened a large number of offices across the state and did not address such important

things as staff salaries, staff caseload, proper equipment, and other overhead needs. It simply spread less than adequate services throughout the state.”³⁷ This was over twelve years ago. Today, the Missouri State Public Defender System faces many of the same struggles, but on an even larger scale. In 2005, salaries remain abysmal, the turnover is worse than in any program we have seen, morale is very low, and the number and complexity of cases has increased.

The Missouri State Public Defender has not received an increase in appropriations from the Legislature for five fiscal years. In this report, we have assessed some of the efforts of the Public Defender and the Public Defender Commission with regard to the current crisis. However, we state in very strong terms that the executive and legislative branches of Missouri government can no longer ignore the critical need for additional funding. With the formation of the Missouri Bar Public Defender Task Force, many concerned stakeholders in Missouri’s criminal justice system are working now to address the crisis, but they cannot do it alone. The crisis of the Missouri State Public Defender System cannot be solved until the issue of funding is fully and fairly addressed by both governmental branches.

³⁷ The Spangenberg Group, *A Report on the Operation of the Missouri State Public Defender* (June 1993), p.4.