

AFFIDAVIT OF ROBERT C. BORUCHOWITZ

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I, Robert C. Boruchowitz, declare, based upon my good faith knowledge and belief, as follows:

I. Assignment

1. I have been retained by counsel for the Plaintiffs in this action and have been asked by counsel to review and opine on the adequacy of the public defense system throughout the state of Louisiana.

2. In arriving at my conclusions, I have relied on my 43 years of experience in public defense, the reports issued by defendant Louisiana Public Defender Board (“LPDB”), relevant federal and state law as to what constitutes effective assistance of counsel, including the Sixth Amendment to the U.S. Constitution and Article 13 of the Louisiana Constitution of 1974; performance standards set out in the 2010 Louisiana Public Defender Board Trial Court Performance Standards (the “Performance Standards”); ABA Standards for Criminal Justice Defense Function (ABA Standards for Criminal Justice: Prosecution and Defense Function, 3rd ed., 1993); National Legal Aid and Defender Association (“NLADA”) Performance Guidelines for Criminal Defense Representation (NLADA, 1995; 4th Printing, 2006); American Council of Chief Defenders Statement on Caseloads and Workloads (2007); American Bar Association Ten Principles of a Public Defense Delivery System; and American Bar Association Eight Guidelines of Public Defense Related to Excessive Workloads (2009). I have also relied on two key ethical opinions: ABA Formal Opinion 06-441, *Ethical Obligations of Lawyers Who Represent Indigent Criminal Defendants When Excessive Caseloads Interfere with Competent & Diligent Representation* and NLADA American Council of Chief Defenders Ethics Opinion 03-01 (2003).

3. My conclusions are also based on site visits and interviews that I have personally conducted and observations and interviews conducted by others at my direction.

4. In November, 2016, I spent four days observing public defender representation and interviewing stakeholders in Plaquemines Parish (25th Judicial District), West Feliciana Parish and East Feliciana Parish (20th Judicial District), and East Baton Rouge Parish (19th Judicial District). In January, 2017, I spent four days observing public defender representation and interviewing stakeholders in Caddo Parish (1st Judicial District) and Ouachita Parish (4th Judicial District). I also interviewed the District Defender for the 26th Judicial District and the Interim District Defender for the 5th Judicial District.

5. Under my direction, others also have observed public defender representation and conducted interviews in courts in Caddo Parish (1st Judicial District), Lincoln Parish (3rd Judicial District), Ouachita Parish (4th Judicial District), Richland Parish (5th Judicial District), Catahoula Parish (7th Judicial District), Concordia Parish (7th Judicial District), Winn Parish (8th Judicial District), Rapides Parish (9th Judicial District), Natchitoches Parish (10th Judicial District), Sabine Parish (11th Judicial District), Avoyelles Parish (12th Judicial District), Calcasieu Parish (14th Judicial District), Lafourche Parish (17th Judicial District), St. Tammany Parish (22nd Judicial District), and Vernon Parish (30th Judicial District), and provided me with detailed reports.

6. The observations and interviews conducted at my direction were carried out by an experienced and trained Louisiana private investigator, Ashley Cusick; law students from Tulane and Loyola Law Schools and Hofstra Law School in New York, Bryan M. Steed, Michael Guttentag, Madeline Rasmussen, Deanna Wolf, Michael DuBose, David Wolfenson, Michael Goldstein, Anthony Gedeon, and Victoria McIntyre; and a law graduate of Loyola Law School in Louisiana, Candice Sirmon. Ashley Cusick was compensated at a rate of \$90 per hour and received her expenses. The students from Tulane and Loyola and the law graduate received payment for their work at \$10.00 per hour and their expenses were paid. The Hofstra students worked without compensation but received school credit and their expenses were paid.

7. Before they began their work, I provided each of those working with me with a detailed explanation and guidelines as to how they were to proceed, and I spoke with them either in person or by phone throughout their work.

8. In addition to the observations, I was able to review part of a response to a public records request to the LPDB which produced an 825,894 entry spreadsheet listing individuals it recorded as clients from November 1, 2013 to November 30, 2016. From that production, Brian Segers, a statistician with Charles River Associates, drew a representative sample of 700 defendants, excluding defendants with a birth date that would render the individual a juvenile at the time the case was opened. That sample, according to Mr. Segers, would adequately represent the population of cases of Louisiana public defenders' clients from November 1, 2013 to November 30, 2016. As to that sample, counsel for plaintiffs attempted to gather the files on all 700 of the defendants, and were able to collect 458 files. The others proved to be unavailable in the files of the courts throughout the state. Mr. Segers has opined that the ultimate sample of 458 is representative within +/- 4.55% using a 95% confidence interval.

9. In their effort to gather the files, plaintiffs' counsel utilized paralegals and staff to collect them from the clerk of the court in each parish in addition to utilizing online court records where they were kept electronically. A combination of attorneys and paralegals then coded the files for various data points. The team was unable to collect the remaining 242 files because the LPDB recording did not match the clerk of court record or because the individual defendant's file did not appear to exist in the district in which it was listed on the LPDB spreadsheet.

10. While various data points were not available in all of the 458 cases collected, whether a motion to hire an investigator or expert witness was recorded in 413 cases; whether other types of motions were filed and whether there were hearings on those motions was recorded in 384 cases; the date of arrest and the date that counsel was appointed was recorded in 154 cases; and the date of arrest and date of arraignment was recorded in 181 cases.

11. I am being paid \$200 per hour for my work on this matter.

12. In my declaration, I have provided citations to specific documents. The citations are meant to be helpful to the court and not exhaustive. A list of documents and other materials that I considered and/or relied upon in formulating my opinions is contained in **Appendix B**.

13. My review is ongoing, and my conclusions may continue to be refined between now and trial. I reserve the right to revise the opinions contained herein and to consider additional pertinent information.

II. Background and Qualifications

14. I am an attorney licensed to practice law in the State of Washington, admitted to practice before the United States District Court for the Western District of Washington, the United States Court of Appeals for the 9th Circuit and the Supreme Court of the United States. I am certified under the Washington State Superior Court Special Proceedings Rules as qualified to be appointed as counsel in capital appeals and post-conviction proceedings.

15. I graduated from Kenyon College in 1970 with a degree in Political Science and from Northwestern University School of Law in 1973.

16. For 28 years, I served as Director of The Defender Association in Seattle, a non-profit public defender program. In that role, I administered an office of approximately 125 staff, including as many as 90 lawyers. Among my duties as Director, I was responsible for negotiating our contracts with government funders at the city, county and state level, advocating for resources from local government, seeking foundation and other private funding, negotiating building and equipment leases, addressing personnel and labor issues, and supervising and participating in training of staff. I also developed a successful proposal for a state capital defense assistance center funded by the Washington Office of Public Defense.

17. As Director, I was co-counsel in two hearings in King County Superior Court that resulted in increased payments to The Defender Association for work in Wash. Rev. Stat. § 71.09 (i.e., sex offender commitment) cases. Our presentation included an analysis of the staffing requirements for and the financial impact of handling those cases, including extensive discussion of the budget.

18. My office had contracts with local government that had performance guidelines informed by the King County Bar Association Guidelines, Washington Defender Association

Standards, Washington State Bar Association Standards, National Legal Aid and Defender Association Performance Guidelines, and Wash. Rev. Stat. § 10.101.

19. As a staff attorney with The Defender Association, I worked in misdemeanor, juvenile, felony, and appellate divisions. While in the appellate division, I was co-counsel on a trial-level capital case.

20. I have represented clients at every level of state and federal courts.

21. I have participated in state and national efforts to develop public defender standards and a model defender services contract, which have been published by the Washington State Bar Association (“WSBA”), the American Bar Association (“ABA”), and the National Legal Aid and Defender Association.

22. For many years, I have been a member of the ABA’s Indigent Defense Advisory Group. I have also served on other ABA committees and a working group and on a number of state and local committees, all relating to criminal justice and public defense.

23. I was chairperson of the WSBA Criminal Law Section in 1981-1982 and 1984-1985. For more than ten years, I have served on the WSBA Committee on Public Defense and its successor Council on Public Defense.

24. I have been co-chair of a committee for the Council on Public Defense assigned to review standards and to develop performance guidelines. In that role, I have co-lead an effort to amend the WSBA Indigent Defense Standards and to develop defender performance standards. The Council on Public Defense approved both the resulting amended Standards and the Performance Guidelines and recommended that the WSBA Board of Governors endorse them, which it did. The State Supreme Court has endorsed the WSBA Indigent Defense Standards.

25. I helped to draft the Washington State law requiring local governments to develop standards for public defense (enacted as Wash. Rev. Stat. § 10.101), initially passed in 1989. The law requires, among other things, that:

Each county or city . . . shall adopt standards for the delivery of public defense services, whether those services are provided by contract, assigned counsel, or a public defender office. Standards shall include the following: Compensation of counsel, duties and responsibilities of counsel, case load limits and types of cases, responsibility for expert witness fees and other costs associated with representation, administrative expenses, support services, reports of attorney activity and vouchers, training, supervision, monitoring and evaluation of attorneys, substitution of attorneys or assignment of contracts, limitations on private practice of contract attorneys, qualifications of attorneys, disposition of client complaints, cause for termination of contract or removal of attorney, and nondiscrimination.

Wash. Rev. Stat. § 10.101.030. The law provides that the WSBA Standards “should serve as guidelines to local legislative authorities in adopting standards” under § 10.101.

26. In 1983, I helped to establish The Washington Defender Association (the “WDA”) and for 20 years served as its Founding President. During that time, the WDA established staff attorney positions providing technical assistance to defenders throughout the state and developed a legislative advocacy program working with the Washington Association of Criminal Defense Lawyers.

27. In 2007, I led a committee for the American Council of Chief Defenders (“ACCD”) that wrote a Statement on Caseloads and Workloads (the “ACCD Statement on Caseloads and Workloads”).

28. I currently lead a Council of Public Defense committee that is developing proposed Performance Guidelines for Juvenile Defense Representation in Washington.

29. I have been a member of the Washington State Minority and Justice Commission, a commission of the Supreme Court of the state of Washington that is charged with the mission

of ensuring that all courts in the state of Washington remain free of bias so that justice may be adjudicated in a neutral and fair manner. I have participated with prosecutors, defenders, and judges in developing successful proposals for amendments to court rules and in presenting training programs.

30. I am a Professor from Practice at the Seattle University School of Law (the “School of Law”) where I have been on the faculty since January 2007. Among other courses, I have taught a seminar on Right to Counsel, Law and Lawyering, a Clinic on Right to Counsel, and in Criminal Procedure Adjudicative classes. My teaching in the clinics has included classroom training on trial practice and ethical considerations, discussion of related criminal procedure issues, and representation of defendants in prosecutions in King County Superior Court and in two habeas corpus proceedings in Snohomish County Superior Court (in Washington State).

31. I also serve as the Director of The Defender Initiative at the School of Law. Among other projects, The Initiative’s first project was a comprehensive investigation of misdemeanor public defense in the United States conducted with the National Association of Criminal Defense Lawyers (“NACDL”). I was the primary researcher and co-author of a report published by NACDL in 2009 entitled *Minor Crimes, Massive Waste, The Terrible Toll of America’s Broken Misdemeanor Courts* that surveyed the law on right to counsel in misdemeanor cases and examined actual representation across the country. For that project, I reviewed recent case law and ethical opinions relating to caseloads and conducted site visits in Pennsylvania, Arizona, and Washington State. The report analyzed issues relating to caseloads, available resources, and the components of effective representation, including use of investigation, training, supervision and compensation. The report discussed diversion of cases and ethical issues. The report has been cited in more than 60 law review and journal articles.

32. In 2009, The Defender Initiative received a grant from the Foundation to Promote an Open Society (the “Foundation”) to advocate for increased provision of counsel in Washington’s misdemeanor courts. The Foundation provided additional funding for 2010-2011 and 2011-2012, which allowed me to expand the work into Kentucky, New Hampshire, and South Carolina. The Defender Initiative receives grant funding from the U.S. Department of Justice to provide technical assistance on public defense.

33. Working with The Sixth Amendment Center, a sub-awardee from The Defender Initiative, I conducted site visits in a number of Utah counties culminating in a report to the Utah Judicial Council entitled *The Right to Counsel in Utah: An Assessment of Trial-Level Indigent Defense Services* (2015). The Defender Initiative is preparing a similar report for the Mississippi Supreme Court Task Force on Public Defense and the Mississippi Office of the State Public Defender for which I have conducted site visits in a number of Mississippi counties. We also are consulting with the staff of the Michigan Indigent Defense Commission. In another project with The Sixth Amendment Center, I helped to research and write a report on compensation for assigned counsel in Wisconsin entitled *Justice Shortchanged, Assigned Counsel Compensation in Wisconsin* (2015).

34. I have also participated in site-visit evaluations of public defender programs for the National Legal Aid and Defender Association in Idaho, Michigan, Louisiana (in Orleans and Avoyelles Parishes), Nevada, and Washington, D.C.

35. I have previously provided expert testimony and/or reports in several actions in state and federal courts relating to the ability of public defenders to provide effective assistance of counsel to indigent defendants.

- a. In 2005, I served as an expert witness in a class action seeking injunctive relief from systemic ineffective assistance of counsel in Grant County, Washington. I provided testimony, and, after depositions and motion hearings, the parties entered into a settlement that established per-attorney caseload limits and other requirements.
- b. In 2009, I submitted an affidavit as an expert witness in support of a summary judgment motion filed by the Kentucky Public Advocate in a declaratory judgment action involving excessive public defender caseloads. I concluded that the defenders had excessive caseloads and inadequate resources. Although the

trial court dismissed the lawsuit on ripeness grounds, the Kentucky Governor shortly thereafter announced a new \$2 million allocation for public defense.

- c. I submitted a declaration as an expert witness in support of a motion filed by the Miami Dade County Public Defender in *State of Florida v. Bowens*, 39 So. 3d 479 (Fla. Dist. Ct. App. 2010), to withdraw because of excessive caseloads. The Florida Supreme Court agreed that the Public Defender had demonstrated cause for withdrawal based on his office's excessive caseloads. *Public Defender v. State*, 115 So. 3d 261, 279 (Fla. 2013). My declaration is available at http://www.pdmiami.com/ExcessiveWorkload/Mo_to_Withdraw_Exhibit_D.pdf.
- d. I was qualified as an expert witness by the New York Supreme Court, Appellate Division, Third Judicial Department in a class action litigation styled as *Hurrell-Harring v. State of New York*, 119 A.D. 3d 1052, 1054 (N.Y. App. Div. 2014). In 2014, the parties entered into a settlement that included an agreement by the state of New York to develop caseload standards, provide counsel at all arraignment hearings, and improve the quality of public defense representation in five counties. As part of my work in that case, I conducted observations and interviews in Suffolk County and Washington County, New York.
- e. In November 2015, I testified (by video) as an expert witness in the Orleans Parish Criminal District Court in support of a motion filed by the Orleans Public Defender to suspend the assignment of new cases. I testified that the defenders' excessive caseloads undercut their ability to provide effective representation to their clients.

36. I was invited to and did testify before the United States Senate Judiciary Committee at a hearing on Protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors on May 13, 2015. My written testimony is available at <https://www.judiciary.senate.gov/download/05-13-15-boruchowitz-testimony>.

37. I have also served as an expert witness in cases involving claims by individual defendants of ineffective assistance of counsel.

- a. In 2007, I served as an expert witness regarding effective assistance of counsel on behalf of the defendant in an evidentiary hearing before King County Superior Court in Washington. The Court of Appeals granted the petition to withdraw the guilty plea. *In re Pers. Restraint of Gay*, 142 Wash. App. 1001 (Wash. Ct. App. 2007).
- b. I served as an expert witness regarding effective assistance of counsel on behalf of the defendant in a federal habeas corpus proceeding challenging a persistent offender conviction. *Thorne v. DuCharme*, C97-1280Z (W. D. Wash.) (2001). After my deposition testimony, the parties stipulated to an order to issue a writ of Habeas Corpus and to direct the Superior Court of the State of Washington to vacate the judgment and conviction in the state trial court.

38. I have written extensively on subjects relating to public defense, including the following:

- a. Sixth Amendment Center et al., *Justice Shortchanged--Assigned Counsel Compensation in Wisconsin* (Fred T. Korematsu Center for Law and Equality May 2006), available at http://sixthamendment.org/wp-content/uploads/2015/04/6AC_wijusticeshortchanged_2015.pdf.
- b. Robert C. Boruchowitz, *SU Study Assesses Costs of Seeking Death Penalty*, King County Bar Association Bar Bulletin, Mar. 2015, available at <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=03&Year=2015&AID=article3.htm>.
- c. Robert C. Boruchowitz, *Major Public Defense Changes Postponed*, King County Bar Association Bar Bulletin, Jan. 2015, available at <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=01&Year=2015&AID=article9.htm>.

- d. Robert C. Boruchowitz, John A. Strait, and Phillip H. Ginsberg, *Division Autonomy Crucial in Defender Restructuring*, King County Bar Association Bar Bulletin, Oct. 2013, available at <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=10&Year=2013&AID=article25.htm>.
- e. Robert C. Boruchowitz, *Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants Who Cannot Afford to Hire Their Own*, 11 Seattle J. of Soc. Just. 891 (2013).
- f. Bob Ferguson and Robert C. Boruchowitz, *50 years later, fulfilling right to counsel*, HeraldNet, Mar. 17, 2013, available at <http://www.heraldnet.com/opinion/50-years-later-fulfilling-right-to-counsel/>.
- g. *The Right to a Lawyer*, Louisville (Kentucky) Courier Journal (Mar. 17, 2013).
- h. Robert C. Boruchowitz, *Anniversary of Gideon case spotlights right to court-appointed attorney*, Seattle Post-Intelligencer, Mar. 15, 2003, available at <http://www.seattlepi.com/news/article/Anniversary-of-Gideon-case-spotlights-right-to-1109661.php>.
- i. Robert C. Boruchowitz, *State Supreme Court Issues Historic Order on Defender Standards*, King County Bar Association Bar Bulletin, Sept. 2012, available at <https://www.kcba.org/newsevents/barbulletin/BView.aspx?Month=09&Year=2012&AID=article2.htm>.
- j. Robert C. Boruchowitz, Opinion, *Caseload limits a win for public defenders, clients—and justice*, Seattle Times, July 18, 2012, available at <http://www.seattletimes.com/opinion/caseload-limits-a-win-for-public-defenders-clients-8212-and-justice/>.
- k. Robert C. Boruchowitz, *On Public Defenders and Excessive Caseloads*, CrimProf Blog, July 10, 2010, available at http://lawprofessors.typepad.com/crimprof_blog/2010/07/guest-blogger-robert-c-boruchowitz-on-public-defenders-and-excessive-caseloads.html.
- l. Robert C. Boruchowitz, *Citizen's Voice: Public defenders underfunded in Tennessee*, Knoxville News Sentinel, June 5, 2010, available at <http://archive.knoxnews.com/opinion/columnists/citizens-voice-public-defenders-underfunded-in-tennessee-ep-408318489-358694861.html>.
- m. *Enough is Enough! Defenders Act on Excessive Caseloads*, 29 NLADA Cornerstone 12 (2008).
- n. *At 45, Gideon Right to Counsel Remains Elusive*, King County Bar Bulletin (Mar. 2008).

39. A copy of my curriculum vitae, which sets out my credentials and experience, is attached hereto as **Appendix A**.

III. **Summary of Opinions**

40. In my expert opinion, Louisiana's system for providing defense counsel for the poor fails to meet Constitutional and professional standards and creates an unacceptable risk that indigent defendants throughout the State who are charged in non-capital cases carrying a threat of imprisonment will be denied effective representation by counsel. Louisiana's public defenders consistently are failing to subject the cases against such defendants to meaningful adversarial testing, and, as a result, the State is failing to meet its foundational constitutional obligation to provide counsel to eligible persons.

41. The Louisiana public defender system fails to meet Constitutional and professional standards and statutory requirements because of inadequate and inconsistent funding; excessive caseloads; a material disparity of resources between prosecution and defense; insufficient supervision and training; insufficient attorney-client communications (often without

the protection of confidentiality); inadequate support from investigators, experts, social workers and other necessary support personnel; reliance on part-time lawyers with other obligations; use of fixed fee contracts; and inadequate resources for the performance of necessary legal research. The LPDB is not able to provide consistent supervision and training to supplement what the local judicial district defenders are able to provide.

42. The local district defenders are limited in what they can do because of their necessary reliance on inconsistent and erratic sources of funding. These structural barriers make it nearly impossible for most defenders to provide effective representation to most of their clients. Although the LPDB's own standards mandate that it will supervise defenders to assure adherence to its performance standards, I understand from Derwyn Bunton, Chief Defender in the 41st District, that the LPDB is not supervising the districts other than to require financial reporting. That is so, notwithstanding the fact that the defenders are not coming close to compliance with the LPDB's standards.

43. The situation in Louisiana has grown to be so serious that the defenders and judges have come to accept routinely and openly a pattern of practice regarding indigent accused persons that falls well below what the Louisiana Rules of Professional Conduct require and effectively disregards the ethical responsibilities of both lawyers and judges. As detailed below, there are a range of problems raising serious ethical concerns.

44. The local districts are impaired because of the reliance on inconsistent and erratic sources of funding. The LPDB's Board Reports show that, in the words of the State Public Defender, the "system is in crisis" and is "significantly underfunded as has been the case for many years."

45. The Board Reports show that most of the Defenders in Louisiana's 42 Districts have caseloads that exceed national caseload standard limits and 39 of the districts exceed the LPDB's own caseload standards, very often by significant amounts. Such excessive caseloads inevitably result in defenders who either provide too little help in representing defendants or, as our observations show, are unable to represent the accused at all.

46. The 2015 and 2016 Board Reports show that more than one-half of the districts have had to declare a need to restrict services, leading to thousands of defendants facing charges being placed on waitlists for counsel and going unrepresented while incarcerated. Other districts that have excessive caseloads have not declined new cases when ethically they should have.

47. Whether or not District Defender services have been declared to be restricted, there is a system-wide practice of defendants remaining incarcerated for months at a time because counsel cannot get to them. Often, the defendants are held in jail so far from the Defenders' offices that it is very difficult logistically for the Defenders to go to the jail.

48. Because the Louisiana public defense lawyers do not have adequate support staff, as described below, and some of them have long distances to travel between courts and between their offices and the jails incarcerating their clients, their caseload numbers should be lower than the recommended limits. Nevertheless, many districts have caseloads more than double the Board standards.

49. Our observations show a pattern of defendants engaging in discussions only with the prosecutor and the judge even where there is a defender nominally assigned to their case in the court room. Such defendants have counsel in name only.

50. In many cases the defenders do not have timely and confidential communications with their clients and they cannot exercise informed judgment on the type of investigation needed in their cases.

51. Many defenders rarely investigate the facts in their cases. Many defenders do not conduct motion hearings to the extent that they should, and most defenders rarely use expert witnesses.

52. Almost none of the districts use social workers. Although social workers and careful preparation by counsel can significantly improve plea bargaining results and result in better sentences for the defendants, the pattern across Louisiana is of counsel engaging in limited preparation for sentencing and of social workers being unavailable.

53. Another pattern across the districts is that there are very few trials, even though experience shows that if cases are tried many defendants will prevail. Twenty one districts have a trial rate of one percent or less, and in 2016 two districts reported no trials at all. Nine districts reported no misdemeanor trials, yet a number of districts that did try misdemeanor cases recorded significant acquittal rates.

54. The number of exonerations in Louisiana provides an additional reason for concern. As of 2014, there had been 52 exonerations since 1991, 42 of which were in non-capital cases. James T. Dixon, Jr., *Criminal Justice System at a Crossroads* 10 (Oct. 2014).

55. As the LPDB wrote about Louisiana exonerations in “Defending the Innocent”:

While many factors caused these wrongful convictions, one common theme in almost every case is that the defendant did not receive a strong defense at trial and during his initial appeal. Innocent people, wrongfully convicted, spend decades in prisons while perpetrator [sic] remain free. Well-trained and adequately resourced public defenders would have prevented these convictions.

Defending the Innocent, <http://lpdb.la.gov/About/Defending%20the%20Innocent.php> (last visited May 1, 2017).

56. The deficiencies I have identified are not limited to a handful of districts or a particular geographical part of the state. They are pervasive and systemic throughout the state.

IV. **Constitutional Mandates Require That Effective Representation Be Provided to Indigent Defendants at All Important Stages of a Criminal Proceeding**

57. Consistent with federal constitutional mandates, under Louisiana state law, “[t]he person arrested has, from the moment of his arrest, a right to procure and confer with counsel and to use a telephone or send a messenger for the purpose of communicating with his friends or with counsel.” La. Code Crim. Proc. art. 230 (2011) (Rights of person arrested).

58. Under both federal and Louisiana state constitutional mandates, if a defendant’s income and assets after expenses for the necessities of life are insufficient to pay for private counsel, the defendant is eligible for appointed counsel at the state’s expense.

59. Both the federal and Louisiana constitutions require appointment of counsel whenever imprisonment is possible, including in both felony and misdemeanor cases. U.S. Const. amend. VI; La. Const. art. 1, § 13.

60. Under the law of Louisiana, “[w]hen any person has been arrested or detained in connection with the investigation or commission of any offense, he shall be advised fully of . . . his right to the assistance of counsel and, if indigent, his right to court appointed counsel. . . . *At each stage of the proceedings, every person is entitled to assistance of counsel of his choice, or appointed by the court if he is indigent and charged with an offense punishable by imprisonment.* The legislature shall provide for a uniform system for securing and compensating qualified counsel for indigents.” La. Const. art. 1, § 13 (emphasis added). Under Louisiana state law, appointment of counsel must occur within 72 hours of arrest:

Art. 230.1. Maximum time for appearance before judge for the purpose of appointment of counsel; court discretion to fix bail at the appearance; extension of time limit for cause; effect of failure of appearance

A. The sheriff or law enforcement officer having custody of an arrested person shall bring him promptly, and in any case within seventy-two hours from the time of the arrest, before a judge for the purpose of appointment of counsel The defendant shall appear in person unless the court by local rule provides for such appearance by telephone or audio-video electronic equipment. . . .

B. At this appearance, if a defendant has the right to have the court appoint counsel to defend him, the court shall assign counsel to the defendant. . . .

La. Code Crim. Proc. art. 230.1 (2011).

61. As the Louisiana Supreme Court has written in *State v. Peart*, 621 So.2d 780,789 (1993), “reasonably effective assistance of counsel” means that “the lawyer not only possesses adequate skill and knowledge, but also that he has the time and resources to apply his skill and knowledge to the task of defending each of his individual clients.” The Constitution of the United States also requires that appointed counsel must be “reasonably effective.” *Strickland v. Washington*, 466 U.S. 668, 687-89 (1984) (citing the “[p]revailing norms of practice as reflected in the American Bar Association standards and the like” as “guides to determining what is reasonable”).

62. In many Districts in Louisiana, the defenders do not always have the necessary skill and knowledge to provide effective representation in the full spectrum of criminal cases, and when they do, they often do not have the time and resources to apply their skill and knowledge effectively.

63. Consistent with constitutional requirements, Louisiana has directed the LPDB to provide uniform defender services under La. Stat. Ann. § 15:146:

There is hereby created and established as a state agency within the office of the governor the Louisiana Public Defender Board to provide for the supervision, administration, and delivery of a statewide public defender system, which shall deliver uniform public defender services in all courts in this state. . . .

La. Stat. Ann. § 15:146(A)(1) (2016).

64. In its mission statement, the LPDB states that “[i]n pursuit of equal justice, the Louisiana Public Defender Board (LPDB) advocates for clients, supports practitioners and protects the public by continually improving the services guaranteed by the constitutional right to counsel.” Louisiana Public Defender Board, *2016 Board Report* 6 (Jan. 2017) (hereinafter “2016 Board Report”). Citing a “commitment to performance standards, ethical excellence, data-driven practices and client-centered advocacy,” the LPDB acknowledges its role in overseeing the provision of “high quality legal services affecting” people “across Louisiana.” *Id.*

65. To that end, it has established its own Performance Standards (codified in La. Admin. Code tit. 22 pt. XV (2010)) that the Board is required to enforce. The Performance Standards are “intended to provide a measure by which the performance of individual attorneys and district public defender offices may be evaluated, and to assist in training and supervising attorneys.” LPDB, *Louisiana Public Defender Board Trial Court Performance Standards* § 701(B) (2010).

66. Although the Board’s Performance Standards are consistent with both federal and state constitutional requirements, because of the statewide systemic deficiencies summarized above and detailed below, they are neither enforced effectively nor generally implemented.

67. As a result, although the United States Supreme Court has been clear that defendants are entitled to effective counsel at all important stages of a proceeding, in my opinion, that requirement is most often not met in Louisiana.

V. **Pervasive Disregard of Ethical Standards**

68. The practice of public defense in Louisiana raises a multitude of ethical concerns.

69. In many Districts, however much in good faith the individual lawyers and judges may be, both the defender offices and the court system more generally have become so accustomed to the lack of funding and the heavy caseload that the lawyers and judges have come to avoid confronting the ethical challenges that their situation presents. As discussed below, the first Rule of Professional Conduct is that lawyers must provide competent representation. But when they are not able to see their clients in jail, when judges routinely take guilty pleas from unrepresented people in hearings that last only a few minutes, when the lawyers are inattentive to conflicts of interest or tolerate them because of economic pressure, when accused persons wait months in jail before having a meaningful conversation with their attorney or even knowing who their attorney is, when

there are few motions and fewer trials, when the lawyers have too many cases but keep taking more, the participants can become inured to a culture that lawyer and journalist Amy Bach calls “ordinary injustice.” See Amy Bach, *Ordinary Injustice: How America Holds Court* (Metropolitan Books, 2009). Ms. Bach described how a community of legal professionals can become accustomed to a pattern of lapses.

70. In many Districts in Louisiana, the caseload has been so high for so long, the funding has been so inadequate for so long, the disparity in resources between the prosecution and the defense has been so dramatic for so long, the defenders have operated with meager investigation and practically no expert witnesses for so long, people have been staying in jail for weeks or months before having counsel appointed for so long, the courts have treated misdemeanors perfunctorily for so long, that the defenders, the prosecutors, and the judges have become accustomed to that culture and have become inattentive to their ethical obligations.

71. Certainly, individuals have stood up and chief defenders have refused to take cases. But, as the average caseload across the state remains approximately double the LPDB’s maximum levels, which themselves are artificially inflated, and as even many defenders in restriction of services continue to have excessive caseloads, many defenders are not able to meet their ethical and constitutional obligations.

72. I detail below examples of the failures of Louisiana’s public defense system to meet its ethical and constitutional obligations.

VI. **Maximum Caseload Standards**

73. A root cause of the pervasive failure of the public defense system in Louisiana is the absence of adequate and consistent funding resulting in excessive caseloads.

74. “No attorney can reasonably be expected to handle 400 criminal cases at once.” *Wilbur v. City of Mount Vernon*, 989 F. Supp. 2d 1122, 1125 n.4 (W.D. Wash. 2013). The spectrum of work required to represent an accused person all require significant investment of time. The work includes: court appearances; communicating with the client; seeking release of the client if the client is in jail; obtaining and reviewing discovery; reviewing and researching the law; investigating; negotiating with the prosecutor; consulting with the client’s family, as appropriate; obtaining expert witness assistance, as appropriate; addressing immigration issues; motions practice; and preparing for and conducting trials and, if necessary, sentencing.

75. Excessive caseloads prevent defenders from adequately representing their clients. High caseloads prevent lawyers from having enough time to provide effective representation because attorneys are unable to interview clients effectively, conduct investigations, counsel clients about pleas offered at arraignment, and do other necessary preparation. The ABA Criminal Justice Section Defense Function Standard § 4-1.3(e) states:

Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client’s interest in the speedy disposition of charges, or may lead to the breach of professional obligations. . . .

American Bar Association, ABA Crim. Just. Def. Function Std. § 4-1.3(e) 2015).

76. The first of the ABA Eight Guidelines of Public Defense Related to Excessive Workloads indicates that it is important to consider whether defenders generally are being allowed sufficient time for:

- interviewing and counseling clients;
- prompt interviews of detained clients and of those who are released from custody;
- seeking release of incarcerated clients;
- pursuing formal and informal discovery from the prosecution;

- sufficient legal research;
- sufficient preparation for pretrial hearings and trials; and
- sufficient preparation for hearings at which clients are sentenced.

ABA Eight Guidelines of Pub. Def. Related to Excessive Workloads, Guideline 1 (2009).

77. The ACCD Statement on Caseloads and Workloads “recommends that public defender and assigned counsel caseloads not exceed the NAC [National Advisory Commission on Criminal Justice Standards and Goals] recommended levels of 150 felonies, 400 non-traffic misdemeanors, 200 juvenile court cases, 200 Mental Health Act cases, or 25 non-capital appeals per attorney per year.” American Council of Chief Defenders, *Statement on Caseloads and Workloads* 1 (2007). If a public defender or assigned counsel is carrying a “mixed caseload,” including cases from more than one category of cases, “these standards should be applied proportionally. (For example, under the NAC standards a lawyer who has 75 felony cases should not be assigned more than 100 juvenile cases and ought to receive no additional assignments.)” *Id.*

78. “These caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified.” *Id.* The maximum number of cases must be reduced when the lawyers have inadequate resources and when they have other obligations in addition to caseload representation, such as supervision or appearing at court calendars representing groups of clients. In addition, caseload numbers should be reduced when there is significant travel time required for the lawyers. The ABA 10 Principles, Principle 5 states:

Defense counsel’s workload is controlled to permit the rendering of quality representation. Counsel’s workload, including appointed and other work, should never be so large as to interfere with the rendering of quality representation or lead to the breach of ethical obligations, and counsel is obligated to decline appointments above such levels. National caseload standards should in no event be exceeded, but the concept of workload (i.e., caseload adjusted by factors such as case complexity, support services, and an attorney’s nonrepresentational duties) is a more accurate measurement.

American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 5 (2002) (emphasis supplied).

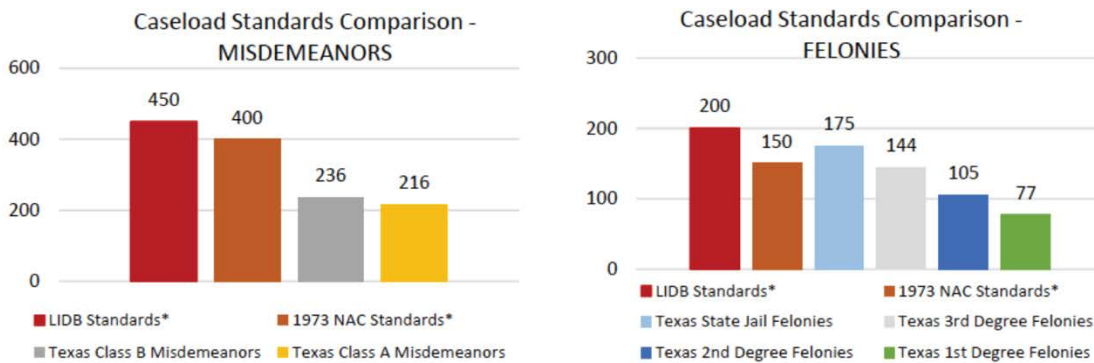
79. There is the potential for a conflict of interest when a public defender with an excessive caseload decides to accept additional cases.

A. **LPDB’s Caseload Limits Are Unreasonably High**

80. The Louisiana Public Defender Board has set caseload maximum levels of 200 for felony cases and 450 for misdemeanor cases. See James T. Dixon, Jr., *The Louisiana Public Defender Board at the Crossroads, Ethics and Law in Public Defense* (Executive Summary) 2 (2015). In my opinion, those caseload levels are too high.

81. In a July 2015 report entitled “The Louisiana Public Defender Board at the Crossroads, Ethics and Law in Public Defense,” the State Public Defender noted that the LPDB’s caseload limit standards “exceed those of every other known caseload standard in the United States.” *Id.*

82. The State Public Defender included the following charts to demonstrate how the Louisiana maximum levels are far higher than the National Advisory Commission Standards and the case weighting numbers developed in Texas:



*Note: LIDB and NAC Standards are disjunctive. For example, if a public defender is assigned cases from more than one category, the combined weighted total should not exceed the equivalent of 450 misdemeanors.

Id.

83. Louisiana is not so unique in its caseload mix that it can accurately claim that the national standards do not apply to it. In fact, Mr. Dixon noted that the Board in 1994 decided to develop caseload standards by simply adding 50 cases to all case categories in the National Advisory Commission on Criminal Justice Standards and Goals (NAC), except capital. The Board did not reach those standards by performing any research or analysis. The LPDB Board’s decision to add 50 cases to the caseload limits of the NAC/ACCD standards was arbitrary.

B. Defender Caseloads in Louisiana Districts Are Excessive

84. As the LPDB has indicated, Louisiana Defenders average 201% of even the LPDB maximum caseload. 2016 Board Report, *passim*. That means that full-time defender attorneys average 402 felonies or 904.5 misdemeanors per year. These numbers are crushing: felony lawyers have about four hours per case and misdemeanor lawyers less than two hours per client. As discussed below, this is simply not enough time to be able to provide consistently effective representation. The charts throughout its report for 2015 indicate that the average caseload of Louisiana Defenders was 236% of its own standards. Louisiana Public Defender Board, 2015 Board Report, *passim* (Jan. 2016) (hereinafter “2015 Board Report”).

85. As set out in the Board Reports, the already-unreasonably-high caseload limits are materially exceeded in practice. Overall, state-wide defender caseloads exceed the LPDB standards by more than 100% and exceed national standards by far more than that. As set out below in my analysis of Districts throughout the state, both LPDB standards and national caseload limits are exceeded in the vast majority of Districts. Taking the defenders’ various obligations into account, the caseloads of defenders in Louisiana are, as the LPDB itself has recognized in its reports, far too high.

86. In February 2017, Postlethwaite & Netterville, APAC¹ and the American Bar Association Standing Committee on Legal Aid and Indigent Defendants published a report called *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards* (2017) (the “Louisiana Project”). The Louisiana Project used the well-known Delphi Method,² developed by the Rand Corporation, to conclude that as of October 31, 2016, the State of Louisiana needed 1,406 additional FTE attorneys to meet its public defense caseload.

¹ Postlethwaite & Netterville, APAC is a major consulting and accounting firm based in Baton Rouge, Louisiana.

² As described in the Louisiana Project at page 14:

[T]he Delphi Method is an iterative process of surveys given to a group of professionals, with structured feedback presented to the experts at each interval stage In general, a group of experts first provide individual, anonymous responses on a given topic based on the background information provided and their expertise. Next, professionals are provided the same survey with the inclusion of the aggregated results of the initial survey, including peer response means and ranges. At this time, the participants may then choose to adjust their initial responses based on the feedback provided by the aggregated results and their expertise.

This “iterative process of alternating participant’s independent assessments with other anonymous aggregated peer responses data” is designed to convert “professional opinion” into “objective consensus opinion.” *Id.*

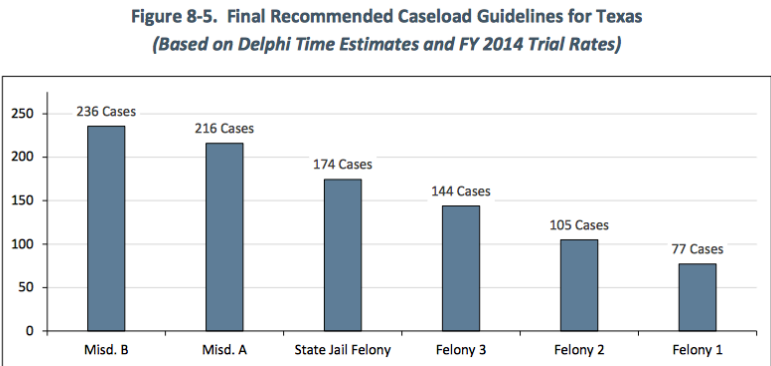
Postlethwaite & Netterville, APAC, and ABA Standing Com. on Legal Aid and Indigent Defs., *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards* 2 (Feb. 2017). The Louisiana Project stated, “[a]lternatively, based on the Delphi Method’s results and analysis presented herein, the Louisiana public defense system currently only has capacity to handle 21 percent of the workload in compliance with the Delphi Panel’s consensus opinions.” *Id.* That conclusion presumes that the Defenders would have adequate investigative, secretarial and other support services, which in general they do not. The Louisiana Project report is available at <http://www.americanbar.org/content/dam/aba/images/abanews/LouisianaProjectReportFinal.pdf>.

87. In addition to the assessment of the LPDB itself and the Louisiana Project, other state workload studies have concluded that defender caseload levels should be much lower than those of Louisiana’s Defenders. “The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards” reached the following conclusions:

Controllable Case Task	
Case Type	Hours per Case
Murder/Homicide	106.6
A/B Felony	47.6
C/D Felony	25.0
Sex Felony	63.8
Misdemeanor	11.7
Juvenile	19.5
Appellate/PCR	96.5
Probation Violation	9.8

RubinBrown, on behalf of the ABA Standing Com. on Legal Aid and Indigent Defs., *The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards* 6 (June 2014), available at http://www.americanbar.org/content/dam/aba/events/legal_aid_indigent_defendants/2014/ls_scla_id_5c_the_missouri_project_report.authcheckdam.pdf.

88. In a 2015 Texas report, the researchers concluded that, “for the delivery of reasonably effective representation attorneys should carry an annual full-time equivalent caseload of no more than” the numbers in the chart below:



Dottie Carmichael, et al., *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission* 34 (Jan. 2015), available at http://tidc.texas.gov/media/31722/150114_WCL-Final_Reduced-file-size.pdf.

89. Effective advocacy by lawyers with reasonable caseloads can make a difference. Washington State examples provide insight. For example, in 2011, in Seattle Municipal Court, where caseloads are limited by law to 380 per lawyer per year, 24.7% of charges resulted in guilty findings whereas in Mount Vernon in the same state, where the lawyer caseloads were in the range of 2,000 per lawyer per year, 50.3% resulted in guilty findings.

90. Courts in other states have been successful in reducing public defender caseloads when they were excessive. For example, a court rule in Washington State limits defender caseloads to 400 misdemeanor or 150 felony cases per lawyer per year, which is consistent with Affidavit of Robert C. Boruchowitz - 13

NAC standards. Standard 3.3 provides in part that “[c]aseload limits reflect the maximum caseloads for fully supported full-time defense attorneys for cases of average complexity and effort in each case type specified. Caseload limits assume a reasonably even distribution of cases throughout the year.” Washington CrR 3.1 (Standards for Indigent Defense); *see also* Washington State Bar Association, *Standards for Indigent Defense Services*, Standard 3.3 (2011).

91. The Court’s Standard 3.3 specifically addresses the need to reduce caseloads further when cases are more demanding:

The increased complexity of practice in many areas will require lower caseload limits. The maximum caseload limit should be adjusted downward when the mix of case assignments is weighted toward offenses or case types that demand more investigation, legal research and writing, use of experts, use of social workers, or other expenditures of time and resources.

Id.

92. The New York State Office of Indigent Legal Services has recognized the critical importance of limiting caseloads. In a recent statement on its web site relating to an upcoming request for proposals for funding, it wrote:

Excessive caseloads impair the quality of legal representation that indigent legal service lawyers can provide. Indeed, it is widely and properly recognized that maintaining reasonable public defender and assigned counsel caseloads is the sine qua non of effective representation. *See* Justice Denied: America’s Continuing Neglect of Our Constitutional Right to Counsel (The Constitution Project, 2009) at 192, Recommendation 6; and Securing Reasonable Caseloads: Ethics and Law in Public Defense (American Bar Association, 2011) at 200 (“caseload limits . . . are the very bedrock of quality control”).

No lawyer, however well qualified, can provide the effective assistance of counsel that our Constitution requires if he or she is saddled with an excessive caseload.

NYS Office of Indigent Legal Services, <https://www.ils.ny.gov/content/upstate-quality-improvement-and-caseload-reduction> (last visited May 1, 2017).

93. In New York State, the Administrative Rules of the Unified Court System & Uniform Rules of the Trial Courts, Rules of the Chief Administrative Judge have the same maximum caseload numbers as Washington and the ACCD, and they became binding in New York City effective April 1, 2014:

127.7 Workload of Attorneys and Law Offices Providing Representation to Indigent Clients in Criminal Matters in New York City

(a) The number of matters assigned in a calendar year to an attorney appointed to represent indigent clients in criminal matters pursuant to Article 18-B of the County Law in New York City shall not exceed 150 felony cases; or 400 misdemeanor cases; or a proportionate combination of felony and misdemeanor cases (at a ratio of 1:2.66). Where staff attorneys employed by an indigent defense organization within the City of New York are appointed to represent clients in criminal matters pursuant to Article 18-B of the County Law, these limits shall apply as an average per staff attorney within the organization, so that the organization may assign individual staff attorneys cases in excess of the limits to promote the effective representation of clients.

(b) The Chief Administrator of the Courts shall annually, at the time of the preparation and submission of the judiciary budget, review the workload of such organizations and attorneys, and shall take action to promote compliance with this rule. In undertaking such review, the Chief Administrator may consider: (1) differences among categories of cases that comprise the workload of the defense organization; (2) the level of activity required at different phases of the

proceeding; (3) local court practice, including the duration of a case; and (4) any other factor the Chief Administrator deems relevant.

(c) These workload standards shall constitute non-binding guidelines between April 1, 2010 and March 31, 2014, and shall be binding effective April 1, 2014.

Admin. R. of the Unified Court Sys. & Uniform R. of the Trial Courts, R. of the Chief Admin. Judge, § 127.7 (2010), available at <https://www.nycourts.gov/rules/chiefadmin/127.shtml>.

94. There is a maximum number of human beings that a lawyer can meet and effectively represent in a year. In my opinion, criminal defense lawyers should not exceed 1,800 hours per year directly representing clients, and a more realistic number is 1,650 hours per year. When a lawyer has 200 felony cases per year, even at 1800 hours, the lawyer has an average of nine hours or less available for the work for each client. At 450 misdemeanor cases a year, the lawyer has an average of four hours or less per client. At a more reasonable year of 1,650 hours, the lawyer with 200 felonies has only 8.25 hours per client. The misdemeanor lawyer with 450 misdemeanors would have 3.66 hours per client.

95. A study for the Massachusetts Committee for Public Counsel Services determined that an appropriate number of hours to spend directly representing clients per year is 1,662 hours:

Case Available Hours			
Description	Hours	Days	Total
Non-weekend days	8	260	2080
Holidays	8	11	88
Training	8	3	24
Annual Conference	8	1	8
Vacation (less than 5 yrs)	8	15	120
Personal	8	5	40
Sick (estimate)	8	5	40
Non case duties	2	49	98
total non case time			418
Available case time			1662

Center for Court Innovation, *The Committee for Public Counsel Services Answering Gideon’s Call Project (2012-DB-BX-0010) Attorney Workload Assessment* 12 (Oct. 2014), available at <https://www.publiccounsel.net/cfo/wp-content/uploads/sites/8/2014/12/Attorney-Workload-Assessment.pdf>

96. The Washington Defender Association standards recommend 1,650 hours directly representing clients per year. See Washington Defender Association, *Standards for Public Defense Services*, Standard Three (Commentary) (2007) . The Office of Management and Budget (“OMB”) has advised agencies that of the 2,088 hours attributable on an annual basis to a federal employee, each employee works only 1,744 hours per year, which reflects hours worked after the average amount of annual, sick, holiday, and administrative leave used. Performance of Commercial Activities, OMB Cir. No. A-76, IV-8 (revised) (Aug. 1983).

97. The National Association for Law Placement (“NALP”) reported in its May 2006 document, “Billable Hours Requirements at Law Firms” that “[a]lthough billable hour requirements ranged from 1,400 to 2,400 hours per year in 2004, most offices reporting a minimum require either 1,800 or 1,900 hours (24% and 21% of offices, respectively).” NALP Bulletin, *Billable Hours Requirements at Law Firms*, available at <http://www.nalp.org/2006maybillablehours> (May 2006). A more recent report stated: “reporting of billable hours requirements in the 2013-2014 Directory of Legal Employers reveals an average requirement of 1,884 hours per year overall. . . .” NALP Bulletin, *New Findings on Associate Hours Worked and Law Firm Leverage*, May 2014 (May 2014), available at <http://www.nalp.org/0514research>. This average is brought higher by the 1,918 hours average of firms with more than 700 lawyers. The average for firms of 100 or fewer lawyers was 1,809 hours.

98. Taking reasonable standards for total hours of representation into account, Louisiana defenders cannot, in my opinion, consistently effectively represent their clients while carrying the caseloads currently imposed upon them.

VII. **Louisiana’s Public Defenders Cannot Meet Their Obligations to Provide Effective Assistance to Indigent Defendants Because of Inadequate and Undependable Funding**

99. The excessive caseloads across the state are the result of inadequate and undependable funding.

100. Faced with the absence of anything approaching adequate funding state-wide, in December 2016, LPDB declared a “state of emergency” for Louisiana’s indigent defendants, which was subsequently approved by Chief Justice Bernette Joshua Johnson. *See Della Hassel, Why a recent law to shield cash-strapped public defenders from budget cuts may not work*, New Orleans Advocate (Jan. 14, 2017), available at http://www.theadvocate.com/new_orleans/news/courts/article_99cedd16-d9d2-11e6-9f5c-5b1b41fa44ad.html.

101. In her March 15, 2016 State of the Judiciary Speech to the Louisiana Legislature, Chief Justice Johnson recognized indigent defense as “an area of particular concern,” recognizing that approximately 85% of all criminal defendants in the state of Louisiana are represented by public defenders. Chief Justice Bernette Joshua Johnson, *2016 State of the Judiciary Address to the Joint Session of the Louisiana* (Mar. 15, 2016), available at http://www.lasc.org/press_room/press_releases/2016/2016-09.asp.

It is our constitutional obligation to provide adequate representation. We cannot try felony cases-cases where folks are subject to imprisonment at hard labor-without them having an attorney. . . . While not usually considered as a cost savings method, if we fail to provide adequate counsel at the outset, we will not be able to avoid the exorbitant costs associated with reversal and retrial of case. Our indigent defender system is funded through a combination of state appropriations (\$33 million last year), proceeds from traffic tickets, and local funds and court fees. Unfortunately, revenues from traffic tickets have decreased dramatically; and we know state appropriations have been slashed. As a result, 33 of the state’s 42 judicial district public defender offices are presently operating under a Restriction of Services, and they foresee that half the public defender offices in the state will be insolvent within months.

Id.

102. As Federal District Court Judge James J. Brady observed in a ruling on January 31, 2017, “[i]t is clear that the Louisiana legislature is failing miserably at upholding its obligations under *Gideon*.” *Yarls v. Bunton*, CV 16-31-JJB-RLB, 2017 WL 424874, at *7 (M.D. La. Jan. 31, 2017). “By all objective measures, there is a crisis in public defense funding in Louisiana.” *Id.* at 5.

103. In the *Yarls* case, Judge Brady cited a joint proposed opinion provided by the plaintiffs (arrestees who had been put on a waiting list to receive counsel) and by the defendants (the Orleans Defender and the Director of the Louisiana Public Defender Board):

[T]here is no dispute that the state legislature has chronically underfunded Louisiana’s public defender system. The system relies overwhelmingly on a \$45 fee assessed on those convicted of a crime. In practice, approximately two-thirds of public defense funding comes from fees collected on traffic tickets. This system is inherently unreliable and inadequate. It renders public defender funding dependent on factors entirely divorced from the actual demand for public defenders, such as the number of highways that pass through a district Plaintiffs’ Sixth Amendment right to counsel has been violated.

Id. at *3, n. 20.

104. The LPDB acknowledges that one of the “needed changes in the law” is the “[c]reation of a stable, reliable, sufficient funding source for public defense . . . including access to investigative resources, expert witnesses, and the appeals process” as well as “[a]ccess to social workers and other multidisciplinary professionals.” 2016 Board Report at 4.

105. As the State Public Defender wrote in the Board Report for 2015:

The public defense system in Louisiana has been persistently underfunded since its inception. In 2012, the Louisiana Public Defender Board (LPDB) sought additional funding from the legislature. It was known, even then, that the present funding mechanism for the individual districts was inadequate, unstable, and unreliable. At that time, we forecasted a financial crisis should additional funding not be forthcoming. The Louisiana legislature responded to this notice of crisis by increasing funds due to the local districts from \$35 to \$45 pursuant to R.S. 15:168. It should be noted that, on average, 66% of a district's funding is raised locally and stays in the district with a majority of local funding being raised through fees received from traffic tickets. The LPDB merely supplements these locally raised fees and fines. It was anticipated that locally generated revenues would increase by 25%. The expected end result was an increase of approximately \$8,000,000 in local funding, annually, which would have resolved the matter and avoided the crisis foretold. Unfortunately, this increase has been offset, and often surpassed, by the decrease in court filings in the individual district throughout the state. As a result, the financial crisis we anticipated in 2012 has not been averted, as intended by the legislature. Instead, we are experiencing financial crises in more than 10 districts and we expect that number to increase as we go forward. . . . [P]ublic defense remains severely underfunded.

106. In its latest Board Report, issued in January 2017, the State Public Defender noted that “[p]ublic defense in Louisiana remains under-funded,” including because “[d]istricts still rely on funds raised locally to provide for a majority of their budget” and “[t]he majority of local funds are derived from traffic tickets.” 2016 Board Report at 2, 1. In fact, 65% of statewide revenues for calendar year 2016 came from these local revenues. *See id.* at 52. The State Public Defender reiterated that this funding source is “unreliable, unstable and insufficient . . . especially when [as is the case here] that funding is the source of a majority of the district’s funding.” *Id.* at 1-2; *see also State v. Peart*, 621 So. 2d 780, 789 (La. 1993) (explaining that the system which funds indigent defense through criminal violation assessments, mostly traffic tickets, “is an unstable and unpredictable approach”). For example, “[t]raffic cases can be diverted so that no proceeds reach the public defender in the district” and “funds can be reduced by severe weather, elections and other political vagaries, judicial action, reductions in road traffic, and the lack of interstate or major highways in a particular jurisdiction.” 2016 Board Report at 2. “Further, district offices are entirely reliant upon their counterparts in the criminal justice system to collect and remit the fines and fees needed to operate their respective offices.” *Id.*

107. Indeed, data from the Louisiana Supreme Court “establishes a marked decrease in the filing of ticket cases in both city and district courts” and a “steady decrease from 2009 to 2014.” *Id.* “When we compare the ticket filings in 2009 to those in 2014, we are able to determine that the districts lost approximately \$7,518,803 in revenues due to the decrease in ticket filings, in 2014 alone.” *Id.* at 3.

108. As a result, most of the districts have inadequate local budgets and need state funding to maintain their inadequate funding levels.

109. While cost per case is only one way to measure Defender programs, comparing the total expenditures for the calendar year 2016 with the number of new cases handled during that same time period reveals total expenditures of just \$306.09 for each new case. 2016 Board Report at 51. Multiplying \$306.09 by 150 felony cases yields only \$45,913.45 for what should be a maximum felony caseload. Based on my experience, this level of expenditures is inadequate to provide effective assistance of counsel. This is dramatically less than one half of what one full time felony lawyer should cost. Because in many districts the defenders are working on half again as many cases as they are assigned in that year, the actual expenditures per case handled are far lower.

110. The funding situation throughout the state is so erratic and uncertain that in at least one instance, the public defender had to accept funding from the district attorney to be able to provide counsel at arraignment hearings. *See, e.g.,* discussion of District 14 [¶ 468].

111. In a March 18, 2016 memorandum to all Louisiana Public Defenders, the LPDB wrote:

As a result, our criminal courts are now in a state of near total collapse and public safety is imperiled. Unlike the rest of the country, a wholly inadequate and unpredictable system of parish fines and fees funds much of the cost of this constitutional obligation Louisiana public defenders are now implementing our Restriction of Service Rule and telling the courts that because they have too many cases they cannot provide reasonably effective assistance of counsel to each of their clients as required by law, and so they must decline new appointments. . . . To fail to take this action is to risk wrongful convictions of accused persons, which has occurred all too frequently in Louisiana and other states.

LPDB, Memorandum from LPDB to all Louisiana Public Defenders (March 18, 2016), available at [http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/LPDB%20Memo%20to%20Defenders 3 18 2016.pdf](http://lpdb.la.gov/Serving%20The%20Public/News/txtfiles/pdf/LPDB%20Memo%20to%20Defenders%203%2018%202016.pdf).

112. In *Peart*, the Louisiana Supreme Court held that:

[H]aving found that evidence in the record before us shows that the provision of indigent defense services in Section E of Orleans Criminal District Court is in many respects so lacking that defendants who must depend on it are not likely to be receiving the reasonably effective assistance of counsel the constitution guarantees, we find that a rebuttable presumption arises that indigents in Section E are receiving assistance of counsel not sufficiently effective to meet constitutionally required standards.

621 So. 2d at 791.

113. The situation of the defender in *Peart* was essentially the same as that of most of Louisiana public defenders today. He had 70 active felony cases. *Id.* at 784. In a seven-month period, he represented 418 defendants. *Id.* His office had only enough funds to hire three investigators who were the only ones to provide assistance in more than 7,000 cases per year. He usually received no investigative support. *Id.* There were no funds for expert witnesses, and his office's library was inadequate. *Id.*

114. Many Defenders have told us that they see themselves as engaged in “triage,” the implication of which is that some clients simply will not be helped. The volume of cases coupled with the inadequate support services and inadequate supervision, complicated by inadequate compensation, geographical challenges, and in some cases, additional burdens from private practices, produces the risk of inadequate representation for thousands of indigent clients. *See, e.g.*, discussion of District 19 [¶ 602-629].

115. The use of the word “triage” as applied to defender clients is jarring, and in my opinion, results from the recognition by the Defenders that their workloads are too high to provide adequate representation to all of their clients.

116. For example, the Florida Supreme Court identified the public defender's office's high caseload as resulting in a practice of “‘triage’ with the clients who are in custody or who face the most serious charges getting priority to the detriment of other clients.” *Public Defender v. State*, 115 So. 3d 261, 274 (Fla. 2013) (footnotes omitted). The court called this “a damning indictment of the poor quality of trial representation that is being afforded indigent defendants by the Public Defender.” *Id.*

117. “Triage” has connotations better suited to battlefield or an emergency room. The dictionary definition of triage is:

Noun

1. the process of sorting victims, as of a battle or disaster, to determine medical priority in order to increase the number of survivors.

2. the determination of priorities for action: She began her workday with a triage of emails.

Adjective

3. of, pertaining to, or performing the task of triage: *a triage officer*.

Verb (used with object)

4. to act on or in by triage: *to triage a crisis*.

Triage Definition, Dictionary.com, <http://www.dictionary.com/browse/triage>, (last visited May 1, 2017).

118. In my opinion, defenders should not liken their work to sorting victims in a disaster or an emergency room. A more appropriate medical analogy would be an internal medicine doctor greeting each patient individually and assessing their medical needs in a private, quiet room that inspires the patient’s confidence in the doctor, rather than the fear that a person would have on a battlefield or surrounded by noise and chaos in an emergency room.

119. The amount of time that Louisiana Defenders have for most of their clients’ cases is less than one-quarter of what a recent workload study concluded is needed. The Louisiana Project, cited above, includes the following chart outlining their conclusions on how many hours different kinds of cases require:

Delphi Panel Survey Results	
Case Type	Hours Per Case
Misdemeanor or City Parish Ordinance	7.94
Enhanceable Misdemeanor	12.06
Low-level Felony	21.99
Mid-level Felony	41.11
High-level Felony	69.79
Felony-Life Without Parole	200.67
Juvenile Delinquency	19.78
Families in Need of Service (FINS)	9.66
Child in Need of Care (CINC)	25.08
Revocation	8.47

Postlethwaite & Netterville, et al, *The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards* (2017) at 20.

120. As I outline below, some Defenders do not go to jail to see their clients. In many cases, Defenders meet their client only in the open courtroom without the opportunity for confidential communication. *See, e.g.*, discussion of District 19 [¶ 618], District 22 [¶ 688]. In my opinion, the willingness of public defenders to accept lawyer meetings only in the courthouse is part of the triage mentality that undercuts the defenders’ ability to develop trust with their clients and their ability to provide effective representation.

121. As Federal Judge Robert Lasnik has written: “Timely and confidential input from the client regarding such things as possible defenses, the need for investigation, mental and physical health issues, immigration status, client goals, and potential dispositions are essential to an informed representational relationship.” *Wilbur*, 989 F. Supp. at 1126.

122. It is not possible to have the kind of informed representational relationship required to provide reasonably effective counsel when the lawyers can meet their clients only in the courtroom for a few minutes and when lawyers do not visit incarcerated clients in jail.

123. In my opinion, the practice of meeting with clients in public to discuss what should be confidential matters, is a violation of ABA Ten Principle 4:

Defense counsel is provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal, procedural,

and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

124. In addition, in many misdemeanor cases, the Defenders do not participate at all, and often the judges sentence people to jail or suspended jail sentences with no adequate colloquy about the right to counsel or adequate waiver of counsel. *See, e.g.*, discussion of District 7 [¶¶ 320-26], District 17 [¶¶ 552-65].

125. In my opinion, the failure to enable appropriate communication with clients is a sign of the broken public defense system in Louisiana.

VIII. **Insufficient Funding for Overhead for Defender Offices and Contract Defenders**

126. A result of the overall lack of funding is that, throughout Louisiana, compensation for contract attorneys and funding for district offices is insufficient to provide adequate resources for overhead, including support staff and benefits. As discussed below, one of the Districts pays a salary of \$4,200 a month that equals \$50,400 a year. On an 1,800 hour year, that would equal \$28 per hour. In many Districts, the compensation does not include benefits, so health, dental, life and disability insurance, and any retirement investment must be paid out of that \$50,400.

127. It is important to consider contract defender salaries with two important facts in mind: (1) the debt that lawyers accrue going to college and law school and (2) the real overhead costs they have in running a law practice. The average yearly cost of attending LSU Law School is \$46,034.90. LSU Law, *Cost of Attendance, Tuition & Fee for Current Students*, <http://www.law.lsu.edu/academics/tuitionfeesexpenses/> (last visited May 1, 2017) (reflecting 2016-2017 year).

128. Law students who borrow money to pay for their education may end up graduating with over \$140,000 in debt. *DJ Dorff & Ishan Puri, Should I Go to Law School?* Huffinton Post (July 11, 2016), available at http://www.huffingtonpost.com/ishan-puri/should-i-go-to-law-school_b_10851512.html.

129. The up-front costs required to maintain and operate a law practice (commonly referred to as “overhead expenses”) are many, including, but not limited to: office rent, telecommunications, utilities, support staff, accounting, bar dues, legal research services, business travel, and professional liability insurance. *See, generally*, Sixth Amendment Center et al., *Justice Shortchanged--Assigned Counsel Compensation in Wisconsin* (Fred T. Korematsu Center for Law and Equality May 2006) 28, available at http://sixthamendment.org/wp-content/uploads/2015/04/6AC_wijusticeshortchanged_2015.pdf.

130. The typical law office spends 45 to 50 percent of its fee on the expenses of operating the office, including support staff salaries, rent, telephone, library, equipment, supplies and other facilities. *See* Harrison Barnes, *Overhead Ratios Of A Law Firm*, Law Crossing, <http://www.lawcrossing.com/article/900010148/Overhead-Ratios-of-a-Law-Firm> (last visited May 1, 2017).

131. Legal malpractice insurance can cost from as low as \$700 a year for a new attorney handling only simple cases to \$15,000 a year for experienced attorneys. *See*, James Hirby, *How Much is the Average Malpractice Cost for a Lawyer?*, The Law Dictionary, <http://thelawdictionary.org/article/how-much-is-the-average-malpractice-cost-for-a-lawyer/> (last visited May 1, 2017).

132. In South Dakota, court-appointed attorney fees in 2017 are \$94 per hour, and mileage for court-appointed attorneys is paid at the rate of \$1 per mile. *See* Letter from Greg Sattizahn, State Court Administrator Letter, to Thomas C. Barnett, Secretary Treasurer, State Bar of South Dakota (Dec. 17, 2016), available at <https://ujs.sd.gov/uploads/docs/2017CourtAppointedAttorneyFees.pdf>.

133. If a lawyer devotes 1,800 hours a year to direct representation of clients and earns \$94 per hour, the lawyer’s income before taxes would be \$169,200. This is a level of income that would allow for a reasonable salary, purchase of insurance, and expenses for secretarial assistance and office space. This contrasts with what Louisiana contract counsel can earn from their public defense work. As documented below, the salaries paid to contract counsel in

Louisiana are far below the South Dakota level and drive those counsel to have other work so that they can earn a reasonable living.

134. Many Louisiana conflict counsel are paid the same amount no matter how many cases they are assigned in a year. This violates Principle 8 of the ABA Ten Principles of a Public Defense Delivery System, which states in part:

Assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses. Contracts with private attorneys for public defense services should never be set primarily on the basis of cost; they should specify performance requirements and the anticipated workload, provide an overflow or funding mechanism for excess, unusual, or complex cases, and separately fund expert, investigative, and other litigation support services.

135. As the National Legal Aid and Defender Association has explained, a flat-fee contract that pays a lawyer a single lump sum to handle an unlimited number of cases creates a direct financial conflict of interest between the attorney and each client. Because the lawyer will be paid the same amount, no matter how much or little the lawyer works on each case, it is in the lawyer's personal interest to devote as little time as possible to each appointed case, leaving more time for the lawyer to do other more lucrative work. Jon Mosher, *Flat-fee Contracts*, National Legal Aid and Defender Association, http://www.nlada.net/library/article/na_flatfeecontracts (last visited May 1, 2017).

136. As a report by The Sixth Amendment Center and The Defender Initiative at Seattle University pointed out:

Both unreasonable compensation with no allowances for overhead expenses and flat fee contractual arrangements to represent the poor in criminal courts are constitutional violations precisely because each pits the attorney's financial well-being against the client's right to conflict-free representation. A lawyer can be pushed into thinking about how to make the representation profitable in addition to, and potentially in opposition to, the stated interest of the client.

Sixth Amendment Center et al., *Justice Shortchanged--Assigned Counsel Compensation in Wisconsin* (Fred T. Korematsu Center for Law and Equality May 2006) 16, available at http://sixthamendment.org/wp-content/uploads/2015/04/6AC_wijusticeshortchanged_2015.pdf.

IX. Funding Disparity Between Public Defenders and District Attorneys

137. Principle 8 of the ABA Ten Principles of a Public Defense Delivery System states that there must be "parity between defense counsel and the prosecution with respect to resources." ABA, *Ten Principles of a Public Defense Delivery System*, Principle 8 (2002). The comment to the principle notes that there "should be parity of workload, salaries and other resources (such as benefits)." *Id.* It further states that "assigned counsel should be paid a reasonable fee in addition to actual overhead and expenses." *Id.*

138. A number of states have determined that assigned counsel are entitled to a reasonable hourly fee plus overhead expenses. *See, e.g., Wilson v. State*, 574 So.2d 1338 (Miss. 1990); *Jewell v. Maynard*, 383 S.E.2d 536 (W. Va. 1989); *State Ex Rel. Stephan v. Smith*, 747 P.2d 816 (Kan. 1987).

139. In 2016, the LPDB reported that the state spent approximately \$65 million on public defense (including capital case representation), of which approximately \$50 million was spent by the District Offices. 2016 Board Report at 50.

140. By contrast, the Louisiana Legislative Auditor (the "Auditor") found that "District attorney offices reported a total of approximately \$142.5 million in revenue and \$147 million in expenditures in their financial reports for calendar year 2014." Louisiana Legislative Auditor, *Evaluation of Revenues and Expenditures--Louisiana District Attorney Office* (July 28, 2016), available at [http://app.la.state.la.us/PublicReports.nsf/0/C2BCC8AAB97CC3FC86257FFE004E34E6/\\$FILE/0001047A](http://app.la.state.la.us/PublicReports.nsf/0/C2BCC8AAB97CC3FC86257FFE004E34E6/$FILE/0001047A).

141. It appears that the funding for district attorneys may be even higher. The Auditor found that many “district attorney offices either partially reported local funding they received or did not report any local funding in their financial reports. . . . We also found that some district attorney offices did not report all state funding as required” *Id.* at 2.

142. The Auditor also found that District Attorneys did not report \$12,337,094 in State Paid Salaries, Benefits, and Payroll Taxes. *Id.* at 8.

143. The Auditor described the legislatively-required salaries for district attorneys and their assistants:

In addition to the salaries and benefits paid by local governments, R.S. 16:10-11 requires that each of the 42 district attorneys receive an annual state salary of \$50,000 and each of the 579 assistant district attorneys receive \$45,000. The Division of Administration (DOA) pays these salaries directly to each district attorney and assistant district attorney using state general funds. In addition to salaries, DOA determines and pays payroll taxes and retirement contributions associated with these salaries using state general funds.

Id. at 5.

144. By statute, then, Louisiana assistant district attorneys are paid \$45,000 per year plus whatever their local parishes and police juries decide to pay. La. Rev. Stat. §§ 16:11, 16:52. In the First Judicial District, for example, the first assistant district attorney receives an additional \$11,750 per year. La. Rev. Stat. § 16:82; *see also* La. Rev. Stat. 16:102.

145. By contrast, there are no legislatively-required salaries and benefits for the public defenders in Louisiana.

146. The dramatic disparity in funding between the district attorneys and the defenders violates Principle 8 of the ABA Ten Principles of a Public Defense Delivery System and as described below, contributes materially to the inadequacy of the state’s public defense system.

147. As described below, among other things, the inadequate compensation for defenders has resulted in defenders leaving public defense to become assistant district attorneys and in both staff and contract defenders taking other work to supplement their salaries. *See, e.g.*, discussion of District 3 [¶¶ 277-78, 292].

X. Bail and Arraignment Hearings

148. Consistent with state and national standards, it is critical to have counsel at the first appearance, bail setting, and arraignment hearings. The United States Supreme Court has emphasized: “Counsel is needed so that the accused may know precisely what he is doing, so that he is fully aware of the prospect of going to jail or prison, and so that he is treated fairly by the prosecution.” *Argersinger v. Hamlin*, 407 U.S. 25, 40 (1972). Providing attorneys at the first court appearance is the simplest and most effective way to ensure that a defendant understands the charge against him or her, receives a full explanation of the court’s procedures, makes informed decisions about critical rights, and does not sit in jail unnecessarily on a minor charge.

149. Judges have recognized that many lay people do not understand the charges, the court proceedings, the potential consequences of a conviction or even what a lawyer can do for them. As set forth in a letter from the Washington State District and Municipal Court Judges Association to the state Supreme Court April 6, 2009:

The reality we see every day is that people entering our criminal justice system are confused by or ignorant of legal concepts, often unsophisticated, low on the literacy continuum, frightened, intimidated by authority, and faced by increasingly complicated direct and collateral consequences of conviction.

150. Clients who fit that description need more attorney time than a few minutes to understand what is happening and make reasoned decisions about their options.

151. In my opinion, the bail and arraignment hearings in Louisiana are critical stages because they are proceedings where counsel is necessary to protect the defendant’s rights and

can help the client understand the legal situation faced. The lawyer can address liberty issues, presenting argument for release or affordable bail, and advocate for the accused in responding to questions and rulings by the court. *See Hurrell-Harring v. State*, 15 N.Y.3d 8, 20 (2010) (bail hearing is critical stage); *People v. Settles*, 46 N.Y.2d 154, 164 (N.Y. 1978) (New York law requires advice of counsel before waivers of counsel). While counsel should be provided in those hearings, in Louisiana they are very often not provided.

152. Section 709 of the LPDB Performance Standards (“Obligations of Counsel Regarding Pretrial Release”) provides that:

A. Counsel or a representative of counsel have an obligation to meet with incarcerated defendants within 72 hours of appointment, and shall take other prompt action necessary to provide quality representation including:

1. Counsel shall invoke the protections of appropriate constitutional provisions, federal and state laws, statutory provisions, and court rules on behalf of a client, and revoke any waivers of these protections purportedly given by the client, as soon as practicable via a notice of appearance or other pleading filed with the state and court.

2. Where possible, counsel shall represent an incarcerated client at the La.C.Cr. P. Art. 230.1 1st Appearance hearing (County of Riverside v. McLaughlin, 500 U.S. 44 (1991)) in order to contest probable cause for a client arrested without an arrest warrant, to seek bail on favorable terms (after taking into consideration the adverse impact, if any, such efforts may have upon exercising the client’s right to a full pretrial release hearing at a later date), to invoke constitutional and statutory protections on behalf of the client, and otherwise advocate for the interests of the client.

B. Counsel has an obligation to attempt to secure the pretrial release of the client.

LPDB, *Louisiana Public Defender Board Trial Court Performance Standards* § 709 (2010).

153. At the hearing, “Counsel should be prepared to present to the appropriate judicial officer a statement of the factual circumstances and the legal criteria supporting release and, where appropriate, to make a proposal concerning conditions of release.” *Id.* at § 713.

154. The Performance Standards continue,

Where the client is not able to obtain release under the conditions set by the court, counsel should consider pursuing modification of the conditions of release under the procedures available.

If the court sets conditions of release that require the posting of a monetary bond or the posting of real property as collateral for release, counsel should make sure the client understands the available options and the procedures that must be followed in posting such assets. Where appropriate, counsel should advise the client and others acting in his or her behalf how to properly post such assets.

Id.

155. At the first hearing, a lawyer should follow these basic guidelines:

- a. Consider and if appropriate present a challenge to probable cause
- b. Talk with client about rights, silence, ability to post bail, residence, work, references, time in community
- c. Assess any immediate needs of client

- d. Advocate for release if in-custody
- e. Confirm appointment process beyond first appearance
- f. Consider appellate review of order denying bail or setting release conditions and pursue as appropriate.

156. Notwithstanding those requirements, in Louisiana courts, there is a pervasive absence of such representation at the early stages of proceedings. As a result, defendants frequently take pleas without the assistance of counsel's necessary advice, *see, e.g.*, discussion of District 17 [¶¶ 552-564], and are also often incarcerated for extended periods without a challenge either to the charges against them or to their incarceration. *See e.g.*, discussion of District 17 [¶ 561].

157. Although these are clear standards indicating what defenders should do, the state-wide pattern is that of Defenders neither having the time nor the inclination to take those steps for clients.

158. When no lawyers are testing the government's case, cases that might be dismissed proceed and often result in jail and probation. In my experience in the Seattle Municipal Court, as many as 25% of cases were dismissed after lawyers worked on them. The Defender Association in Seattle reported that, in the Seattle Municipal Court cases the Association closed in 2012, 25% resulted in dismissals. Robert C. Boruchowitz, *Fifty Years After Gideon: It is Long Past Time to Provide Lawyers for Misdemeanor Defendants who Cannot Afford to Hire Their Own*, 11 Seattle J. for Soc. Just. 891, 920 n.99 (2013).

159. The representative sample of court files described above at paragraph 8 revealed that in the majority of cases, counsel was not appointed until more than 30 days after arrest, and in nearly half of the cases, it was more than 50 days after arrest before counsel was appointed. When it takes that long for counsel to be appointed, clients who could be released if they had an effective release motion are kept in jail, resulting in devastating impacts on their lives. In addition, important evidence can be lost. Client health issues, including the possible need for a mental health examination, can be ignored. And the important establishment of a confidential and trusting attorney-client relationship is made extremely difficult when counsel finally is appointed. In only slightly more than a third of the cases was counsel appointed within three days of arrest.

160. The sample showed the following:

- Time between arrest and counsel appointed: The date of arrest and date of counsel appointed were recorded in 154 cases. Counsel was appointed within 3 days of arrest in 51 or 33.1% of cases.
- Counsel was appointed within 7 days of arrest in 56 or 36.3% of cases.
- In 98 or 63.6% of cases counsel was appointed more than 7 days after arrest.
- In 95 or 61.7% of cases counsel was appointed more than 20 days after arrest.
- In 90 or 52.6% of cases counsel was appointed more than 30 days after arrest.
- In 72 or 46.8% of cases counsel was appointed more than 50 days after arrest.
- Time between arrest and arraignment: The date of arrest and date of arraignment was recorded in 181 cases.
- In 3 or 1.66% of cases the defendant was arraigned within 20 days of arrest.
- In 136 or 75.1% of cases the defendant was arraigned 50 or more days after arrest.
- In 67 or 37.0% of cases the defendant was arraigned 100 or more days after arrest.

XI. Meeting with Clients

161. The initial meeting with a client should be long enough to provide both the information the lawyer needs to obtain and to provide the information the client needs to have to make informed decisions and to develop workable communication with the lawyer. Attorneys should ensure that barriers to communication, such as differences in language or literacy, are overcome and the client comprehends the information provided by the attorney. It is important to address issues such as whether the client is a U.S. citizen, whether the client is on probation or parole, and whether there are medical or mental health issues. Failure to spend adequate time with a client and cover these points violates professional standards and increases the risk that defender attorneys will provide inadequate representation to their clients. My own rough standard is that the initial meeting should be about one hour. If the lawyer's schedule does not permit that, there should be a second meeting and the total time of the two initial meetings likely should be at least one hour.

162. A careful review of a client's case is necessary in order to provide constitutionally adequate advice to a client about a possible guilty plea. Some analysis of the prosecution's case and review of the possible consequences of conviction are required. In my opinion, based on my observations and observations of others and reading the Board Reports, the practice in many Louisiana districts falls far short of meeting these critical elements.

163. It is especially important that clients understand all of the consequences resulting from a guilty plea. Consequences can be quite grave. No criminal conviction should ever be regarded as minor or unimportant. When convicted, a defendant could be deported, denied employment, or denied access to a wide array of professional licenses. A person convicted of a misdemeanor may be ineligible for student loans. Additional consequences can include the loss of public housing and access to food assistance, which can be dire, not only for the misdemeanant but also for his or her family. Fines, costs, and other fees associated with convictions can also be staggering and too frequently are applied without regard for the ability of a defendant to pay the assessed amounts. *See National Association of Criminal Defense Lawyers, Minor Crimes, Massive Waste, The Terrible Toll of America's Broken Misdemeanor Courts* 12-13 (2009) (citing Bridget McCormack, *Economic Incarceration*, 2 Windsor Y.B. Access to Just. 25, 223-46 (2007)). In my opinion, the attorney must fully understand and explain to the client the potential impact of a guilty plea, including on housing, employment, health or food benefits, custody of minor children, and deportation.

164. As Rick Jones, the Executive Director of the Neighborhood Defender Service of Harlem, explained, while it may seem attractive to accept a plea to "get the criminal charge over with," a criminal conviction, "even for a minor offense, has an enormous impact on a client's life." *Id.* at 13.

165. Some Louisiana courts treat misdemeanor defendants as having less rights than felony defendants. An example is what the group of out-of-custody defendants were told in the 11th District/Sabine Parish District Court on March 16, 2017, as reported by our observer: "You can only plead guilty right now to a misdemeanor. If it's a felony, you have to come forward either way."

166. As an example of a document that could be used in defender training, I attach as Appendix C a form that was developed by the Washington State Council on Public Defense to provide defendants a sense of the consequences of a guilty plea and to urge them to consider the possible effects of a guilty plea, including impacts on housing, employment, the ability to enter military service, child custody, and student loans. A document like this is helpful not only to attorneys whose legal duties include fully counseling clients on the impacts of a plea, but also to clients themselves. It gives them something tangible to take away after the discussion with their attorney and reference when making their decisions.

167. Defense counsel must also have confidential space within which to meet with the client. Principle 4 of The ABA 10 Principles of a Public Defense Delivery System states:

Defense counsel should be provided sufficient time and a confidential space within which to meet with the client. Counsel should interview the client as soon as practicable before the preliminary examination or the trial date. Counsel should have confidential access to the client for the full exchange of legal,

procedural, and factual information between counsel and client. To ensure confidential communications, private meeting space should be available in jails, prisons, courthouses, and other places where defendants must confer with counsel.

American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 4 (2002).

168. Although it is a necessary part of effective representation, in Louisiana, space for confidential communications between attorney and client is most often not provided. Often there are no confidential communications because counsel cannot take the time.

169. In my opinion, the failure to enable appropriate communication with clients is a sign of a deficient public defense system.

XII. Investigations

170. Both national and Louisiana state standards make clear that defenders need to investigate their cases.

171. Section 717(A) of the LPDB Performance Standards, “Duty of Counsel to Conduct Investigation,” states:

Counsel has a duty to conduct a prompt investigation of each case. Counsel should, regardless of the client’s wish to admit guilt, insure that the charges and disposition are factually and legally correct and the client is aware of potential defenses to the charges.

LPDB, *Louisiana Public Defender Board Trial Court Performance Standards* § 717(A) (2010).

172. The ABA Criminal Justice Standards for the Defense Function states in part:

Standard 4-4.1: Duty to Investigate and Engage Investigators

(a) Defense counsel has a duty to investigate in all cases, and to determine whether there is a sufficient factual basis for criminal charges.

(b) The duty to investigate is not terminated by factors such as the apparent force of the prosecution’s evidence, a client’s alleged admissions to others of facts suggesting guilt, a client’s expressed desire to plead guilty or that there should be no investigation, or statements to defense counsel supporting guilt.

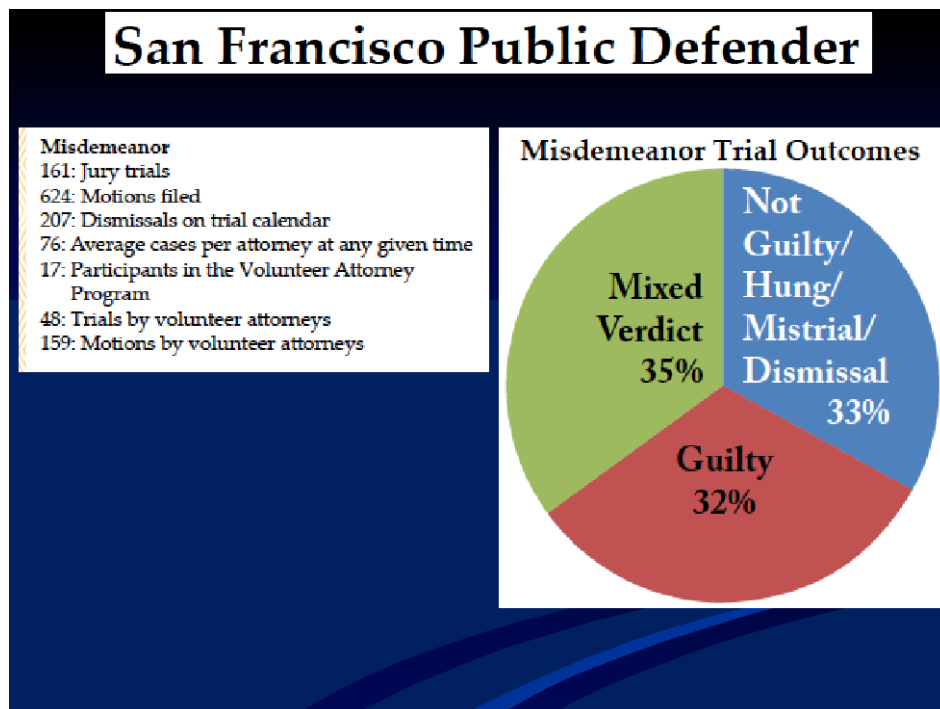
(c) Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter, consequences of the criminal proceedings, and potential dispositions and penalties Defense counsel’s investigation of the merits of the criminal charges should include efforts to secure relevant information in the possession of the prosecution, law enforcement authorities, and others, as well as independent investigation. . . .

(e) . . . Publicly funded defense offices should advocate for resources sufficient to fund such investigative expert services on a regular basis. If adequate investigative funding is not provided, counsel may advise the court that the lack of resources for investigation may render legal representation ineffective.

ABA Crim. Just. Def. Function Std. § 4-4.1 (4th ed. 2015).

173. As the LPDB and ABA Standards make clear, defense counsel has an obligation to investigate the facts of the case even if the client expresses a desire to plead guilty. While counsel needs to be realistic in assessing the case and discussing it with the client, all options, including going to trial, should be considered. A client could decide to go to trial regardless of what the plea negotiations produce. If the investigation leads to the conclusion that the case should be dismissed, the defense attorney has an obligation to pursue that outcome.

174. In fact, taking misdemeanor cases to trial can be quite effective. For example, for a 2016 conference presentation, I prepared this slide based on the San Francisco Public Defender’s report:



175. The Louisiana Supreme Court has recognized that having an investigator can be essential and that the state should pay for it if the appointed counsel cannot obtain funds for investigation:

The right to a private investigator may in many cases be an adjunct to the right to counsel: furnishing counsel to the indigent defendant is not enough if counsel cannot secure information on which to construct a defense. . . . ABA Standards for Criminal Justice Relating to Proving Defense Services (1967), 1.5 and commentary. It is a fundamental principle that the kind of trial a man gets cannot be made to depend on the amount of money he has. *Griffin v. Illinois*, 351 U.S. 12, 76 (1956). Therefore when an indigent defendant shows that his attorney is unable to obtain existing evidence crucial to the defense, the means to obtain it should be provided for him, and if the indigent defender system cannot defray the expense, the State ought to supply the funds.

State v. Madison, 345 So. 2d. 485, 490 (La. 1977) (various citations omitted).

176. The Louisiana Supreme Court in a more recent case wrote that when counsel makes a particularized showing that “an expert would be of assistance to the defense and that the denial of expert assistance would result in a fundamentally unfair trial,” and funding is not forthcoming, “the trial court may then consider other appropriate alternatives, including a stay of proceedings, until funding is made available.” *State v. Kyle*, 117 So. 2d 498, 499 (La. 2013).

177. In my opinion, consistent with the obligation to investigate, using investigators is key to providing a constitutionally adequate defense. However, Louisiana Defenders in most Districts have either no support from investigators or support that is woefully inadequate. *See, e.g.*, discussion of District 1 [¶ 260], District 2 [¶ 271], District 3 [¶ 276], District 4 [¶ 297-98], District 8 [¶ 364], District 9 [¶ 388], District 30 [¶¶ 408-09], District 10 [¶ 422], District 11 [¶ 438], District 42 [¶ 448], District 12 [¶ 461], District 14 [¶ 470], District 38 [¶ 492], District 17 [¶ 535], District 18 [¶ 600], District 19 [¶ 622-23], District 20 [¶ 649], District 25 [¶ 697], District 26 [¶ 716], District 30 [¶ 725], District 35 [¶ 735].

178. LPDB Standard § 717(b)(3) contemplates using investigative staff to conduct interviews of witnesses.

179. In his restriction of services protocol for FY 2015, the 8th District Defender wrote:

Investigators are essential to criminal defense. They locate the witnesses and get the statements from people who are indispensable to a case. We will no longer be able to afford a full time or part-time investigator due to the fact that we did not receive adequate state funding. This takes time away from our clients and now that we have greater numbers of clients due to a reduction in force, it is virtually impossible to find the time to adequately investigate the cases. In addition, we are not trained, licensed investigators. People facing the most serious crimes cannot get adequate representation because there are no investigators to flush out their witnesses, get statements from witnesses, review the crime scene, and talk to those eyewitnesses that the police never interviewed. There is simply no money available for any investigative work whatsoever.

Herman A. Castete, *8th Judicial District Restriction of Services Protocol 10* (2015).

180. The National Study Commission on Defense Services Guideline 4.1 includes numerical staffing ratios indicating that, for effective representation, there should be one investigator for every three attorneys and at least one investigator in every defender office. NLADA, *Guidelines for Legal Def. Sys. In the United States*, Guideline 4.1 (1976). In various jurisdictions, the ratios are 4 to 1 or 5 to 1. Notwithstanding these commonly understood and appropriate practices and as reflected in LPDB reports, defenders consistently have either far too few investigators and conduct far too few investigations or have no investigators at all.

181. In the San Francisco Public Defender office, for example, there is one investigator for every three attorneys. Although in my opinion, there should be at least one investigator for every three attorneys, the staffing level in all of the Districts I reviewed is far below the recommended standard. This lack of staff investigators is inconsistent with the recommendation of National Study Commission on Defense Services Guideline 4.1.

182. Throughout Louisiana, public defender lawyers do not have adequate investigation resources, and often either do not refer cases for investigation or attempt to do it themselves. This is particularly true in misdemeanor cases, because often what investigation resource is available is almost completely devoted to the more serious felony cases.

183. The sampling of files showed that even when defenders do not have investigation resources on staff or in their budget, they do not seek court appointment of investigators. The data reveal that in 413 cases whether a motion to hire an investigator or expert witness was recorded, there was no motion to hire an investigator in any of those 413 cases.

184. In my opinion, the lack of investigators on staff or by regular appointment or contract makes it impossible for lawyers properly to investigate their cases. Often a visit to the scene of the incident and the arrest can be crucial in understanding what happened and in being able to challenge testimony of witnesses. It is a significant problem to go to trial with no investigation or to evaluate and confront forensic evidence with no defense experts to test that evidence.

185. As a comparison, the Defender Association in King County in 2012 referred for investigation 392 of 1361 non-review felony cases opened in 2012. Of 537 misdemeanor non-review cases opened in 2012, the lawyers referred 168 for investigation. (See discussion above about the use of experts in King County, paragraph 202).

186. The Federal District Court in the Western District of Washington has recognized the value of both investigators and paralegals to assist appointed counsel. In a General Order January 17, 2017, the Court wrote: "For the efficiency of counsel and the Court, the Court hereby authorizes CJA counsel to utilize the services of paralegals and investigators up to \$800.00 for each service provider type without further Order of the Court." [Full order in **Appendix D.**] An example of a trial court addressing the question of appropriate staffing levels is the settlement in *Best v. Grant County*, Case No. 04-2-00189-0 (Kittitas County, WA Superior Court, 2005), in which the court approved a settlement requiring that the county provide funds for one full-time investigator for every four full-time public defenders.

XIII. Motions

187. Section 723 of the LPDB Trial Court Performance Standards states:

§723. The Duty to File Pretrial Motions

A. Counsel should consider filing an appropriate motion whenever there exists a good-faith reason to believe that the defendant is entitled to relief which the court has discretion to grant.

B. The decision to file pretrial motions should be made after considering the applicable law in light of the known circumstances of each case.

C. Among the issues that counsel should consider addressing in a pretrial motion are:

1. The pretrial custody of the accused;
2. The constitutionality of the implicated statute or statutes;
3. The potential defects in the charging process;
4. The sufficiency of the charging document;
5. The propriety and prejudice of any joinder of charges or defendants in the charging document;
6. The discovery obligations of the prosecution and the reciprocal discovery obligations of the defense;
7. The suppression of evidence gathered as a result of violations of the Fourth, Fifth or Sixth Amendments to the United States Constitution, or corresponding state constitutional provisions, including:
 - a. The fruits of illegal searches or seizures;
 - b. Involuntary statements or confessions;
 - c. Statements or confessions obtained in violation of the accused's right to counsel or privilege against self-incrimination;
 - d. Unreliable identification evidence which would give rise to a substantial likelihood of irreparable misidentification;
8. Suppression of evidence gathered in violation of any right, duty or privilege arising out of state or local law;
9. Access to resources which, or experts, who may be denied to an accused because of his or her indigence;
10. The defendant's right to a speedy trial;
11. The defendant's right to a continuance in order to adequately prepare his or her case;
12. Matters of trial evidence which may be appropriately litigated by means of a pretrial motion in limine;
13. Matters of trial or courtroom procedure.

LPDB, *Louisiana Public Defender Board Trial Court Performance Standards* § 701(B).

188. Yes because of the overwhelming caseload that most district defenders have, they do not file motions in nearly half of their cases and they have motion hearings in only 7.56% of their cases. The sampling research revealed the following:

- Whether other types of motions were filed (e.g., discovery) was recorded in 384 cases.
- There were no motions filed in 183 or 47.66% of cases.
- There were no motion hearings in 355 or 92.44% of cases.

XIV. Use of Expert Witnesses

189. Throughout Louisiana, defenders either rarely or never report expenditures for expert witnesses, and the reported expenditures are quite low. When the defenders do not have adequate resources in their own budgets, there is a pattern of not asking the court to appoint experts. The sampling of files revealed that in the 413 cases in which whether a

motion to hire an expert witness was recorded, there was no motion to hire an expert witness in any of those 413 cases.

190. Under Section 717 of the LPDB Performance Standards, “[c]ounsel should secure the assistance of experts where it is necessary or appropriate to: (a) The preparation of the defense; (b) Adequate understanding of the prosecution’s case; or (c) Rebut the prosecution’s case.” LPDB, *Louisiana Public Defender Board Trial Court Performance Standards* § 717.

191. It is critical for defenders to be able to use expert witnesses both to challenge the prosecution’s case and to be able to present affirmative defenses. In recent years, it has become increasingly clear that much of the forensic evidence presented by the prosecution may be subject to effective challenge.

192. The National Research Council published a report entitled *Strengthening Forensic Science in the United States: A Path Forward*, which documented that:

in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

National Research Council, *Strengthening Forensic Science in the United States: A Path Forward* 4 (2009), available at <https://www.nap.edu/catalog/12589/strengthening-forensic-science-in-the-united-states-a-path-forward>.

193. The Innocence Project has reported: “Misapplication of forensic science is the second most common contributing factor to wrongful convictions, found in nearly half (46%) of DNA exoneration cases.” Innocence Project, *Misapplication of Forensic Science*, <http://www.innocenceproject.org/causes/misapplication-forensic-science> (last visited May 1, 2017).

194. In September 2016, a report by the President’s Council of Advisors on Science and Technology indicated the importance of challenging forensic evidence with expert witnesses.

Starting in 2012, the Department of Justice (DOJ) and FBI undertook an unprecedented review of testimony in more than 3,000 criminal cases involving microscopic hair analysis. Their initial results, released in 2015, showed that FBI examiners had provided scientifically invalid testimony in more than 95 percent of cases where that testimony was used to inculcate a defendant at trial. . . .

PCAST finds that latent fingerprint analysis is a foundationally valid subjective methodology—albeit with a false positive rate that is substantial and is likely to be higher than expected by many jurors based on longstanding claims about the infallibility of fingerprint analysis.

Executive Office of the President, President’s Council of Advisors on Science and Technology, *Report to the President: Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods* 3, 9 (2016), available at https://obamawhitehouse.archives.gov/sites/default/files/microsites/ostp/PCAST/pcast_forensic_science_report_final.pdf. There have been numerous instances of forensic experts’ misconduct, poor performance, or lack of qualifications. See, e.g., Rene Stutzman & Gal Tziperman Lota, *More than 2,600 Orlando-Area Lawyers Get Letters Warning About Fingerprint Expert*, Orlando Sentinel (Feb. 6, 2017), available at [http://www.orlandosentinel.com/news/breaking-news/os-marco-palacio-fingerpring-investigation-20170206-story.html?ct=t\(DNA_Newsletter_144_28_2015\)](http://www.orlandosentinel.com/news/breaking-news/os-marco-palacio-fingerpring-investigation-20170206-story.html?ct=t(DNA_Newsletter_144_28_2015)); see also Tony Plohetski, *2,200 Convicted Persons to be Notified of Austin DNA Lab Problems*, Austin-American Statesman (Feb. 9, 2017), available at [http://www.mystatesman.com/news/200-convicted-persons-notified-austin-dna-lab-problems/jMMDfSc0HNNKSRU4S9sn4M/?ct=t\(DNA_Newsletter_144_28_2015\)](http://www.mystatesman.com/news/200-convicted-persons-notified-austin-dna-lab-problems/jMMDfSc0HNNKSRU4S9sn4M/?ct=t(DNA_Newsletter_144_28_2015)); see generally *Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods*.

195. In an article that concluded that “forensic science is in crisis,” three British authors wrote:

De facto deference to the weight ascribed to forensic evidence in the courtroom or indeed to the opinions of experts is being consigned to the past. Shortfalls inherent in the current system include operational problems related to the efficiency of the justice system and the way it is administered [1], the admissibility of expert evidence [2], reliability tests [3], and structural problems including the influence of the evidence tendered by experts on the jurors [4], the adversarial nature of the system in common law jurisdictions [5], the bias of legal representatives [6], and flawed assumptions in forensic sciences [7–10].

Éadaoin O’Brien, Niamh Nic Daeid & Sue Black, *Science in the Court: Pitfalls, Challenges and Solutions*, Philos. Trans. R. Soc. Lond. B. Biol. Sci. (2015), available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4581010/>.

196. In *Representing Clients With Mental Illness: A Resource for Louisiana Defenders*, a publication co-produced by the LPDB, the authors commend the use of expert witnesses:

The use of strategically selected experts and specialists can assist attorneys in numerous aspects of the legal defense, including:

- Communication style and the manner in which the attorney relates to the client
- Client’s competence to stand trial
- Client’s mental state at the time of the offense
- Plea negotiations
- Jury selection
- Making decisions about client testimony
- The need for medical treatment or other services for the client until the case is disposed
- Determination of assessments, evaluations and testing that is needed
- Selection of witnesses for the trial, including the penalty phase

Louisiana Appleseed, the Louisiana Coalition, and LPDB, *Representing Clients With Mental Illness: A Resource for Louisiana Defenders* 17 (2011), available at <http://appleseednetwork.org/wp-content/uploads/2012/05/Representing-Clients-with-Mental-Illness3.pdf>.

197. The manual advises defenders of the importance of consulting social workers:

When deciding who to obtain as a mental health expert(s), the attorney should consider first consulting a mitigation specialist, who will often be a licensed social worker. The specialist will:

- Conduct a thorough bio-psycho-social history investigation
- Interview the client
- Conduct collateral interviews
- Gather the client’s medical records
- Determine what cultural, environmental, and genetic circumstances might have factored into the client’s case.

Id.

198. And the authors add: “[a] forensic social worker is ideal to use in case history development because this social worker has been trained and is experienced in working with court related matters.” *Id.* at 18.

199. It appears that, in most of Louisiana, Defenders make little or no effort to engage mental health experts, including mitigation specialist social workers, to assist them in their cases.

200. In my opinion, the rate of expert usage by Louisiana Defenders is far too low. Expert testimony about the mental health of the client, for example, could be used both to establish a defense, including the absence of an intent element, and to provide mitigation for sentencing. It might also help to persuade a district attorney to offer a reduced charge. Failure to request an expert witness can indicate “a serious dereliction of his duty to investigate the facts and circumstances” of the client’s case. *See* ABA Standards for Criminal Justice 4-4.1 (4th ed. 2015) (“Defense counsel’s investigative efforts should commence promptly and should explore appropriate avenues that reasonably might lead to information relevant to the merits of the matter. . . . Counsel’s investigation should also include evaluation of the prosecution’s evidence (including possible re-testing or re-evaluation of physical, forensic, and expert evidence. . . .)).

201. Many of the District Defenders report no budget expended for expert witnesses. For 2016, this includes the 2nd District, the 3rd District, the 5th District, the 7th District, the 8th District, the 9th District, the 10th District. Other District Defenders report low levels of expert witness expenditures. For example, the 4th District, which reported handling 10,382 cases in 2016, reported spending \$2,892.50 on experts in 2016. The 6th District, which reported handling 1,571 cases in 2016, reported spending \$2,000 on experts in 2016. The 11th District, reporting handling 1,662 cases, reported spending \$2,400 on experts in 2016. In my opinion, such infrequent use of experts is inexplicable, a sign of a broken public defense system, and that public defense system risks providing inadequate representation to indigent defendants.

202. As a comparison, in 2016, the King County (Washington) Department of Public Defense, when it assigned 5,941 new felony cases to public defenders and assigned counsel, spent \$1,962,547. This was for 2,206 requests for experts in 707 cases. The Defenders were obtaining experts in approximately 11.9% of all their felony cases. The Department estimated that it declined 3-4% of the requests made by defenders in all program areas. The county spent a total of \$2,357,162 in all practice areas, including misdemeanor, juvenile, and civil commitment. This expert witness expenditure for felony cases amounted to a per capita expense of \$330.33, dividing the expenditure for felony case expert witnesses by the total number of new felony assignments.

203. In Louisiana, the districts spend between \$0 and \$8.06 per capita for experts in felony cases.

204. Notwithstanding the evident need for expert witness assistance, in Louisiana poor defendants, therefore, almost never have the benefit of experts in non-capital cases.

XV. Advocacy at Sentencing

205. The importance of attorney preparation for sentencing has been recognized by criminal justice professionals for some time. In 1995, The Sentencing Project published a report entitled “An Introduction to Defense-Based Sentencing.” It stated, “The hallmark of these programs are the well-constructed, documented alternative sentencing proposals, which are prepared to demonstrate to a prosecutor, judge or the public, that lengthy incarceration is not necessary in selected cases.”

206. National defender guidelines require attention to sentencing. The National Legal Aid and Defender Association Performance Guidelines for Criminal Defense Representation provide:

Guideline 8.1 Obligations of Counsel in Sentencing

(a) Among counsel’s obligations in the sentencing process are:

1. where a defendant chooses not to proceed to trial, to ensure that a plea agreement is negotiated with consideration of the sentencing, correctional, and financial implications;
2. to ensure the client is not harmed by inaccurate information or information that is not properly before the court in determining the sentence to be imposed;
3. to ensure all reasonably available mitigating and favorable information, which is likely to benefit the client, is presented to the court;
4. to develop a plan which seeks to achieve the least restrictive and burdensome sentencing alternative that is most acceptable to the client, and which can reasonably be obtained based on the facts and circumstances of the offense, the defendant's background, the applicable sentencing provisions, and other information pertinent to the sentencing decision;
5. to ensure all information presented to the court which may harm the client and which is not shown to be accurate and truthful or is otherwise improper is stricken from the text of the presentence investigation report before distribution of the report;
6. to consider the need for and availability of sentencing specialists, and to seek the assistance of such specialists whenever possible and warranted.

NLADA, *Performance Guidelines for Crim. Def. Rep.*, Guideline 8.1 (2006).

207. To represent a client effectively during the sentencing phase of the criminal justice process, defense counsel should learn about sentencing alternatives and evaluate which might be appropriate for the client; understand the practical consequences of different sentences and explain them fully to the client; become familiar with the court's sentencing discretion and pattern of sentences for the offenses involved; advocate to the court and/or the person writing the sentencing report any ground that could assist in generating a favorable outcome for the client; review the presentence report (if prepared and provided to counsel); verify its information and be prepared to challenge it if necessary; in appropriate cases, research and suggest an alternative sentence based on available community services, such as employment, education, counseling, substance abuse treatment and other opportunities; ensure that the client understands the nature of the presentence investigation process and the significance of statements made to probation officers; alert the client to the right of allocution; and fully explain the possible dangers of making a statement that might prejudice an appeal.

208. Accused persons have a right to effective assistance in negotiating plea bargains as well as in sentencing advocacy. Often, sentencing can be significantly labor-intensive, depending on the plea agreement (if any), the recommendation of the sentencing or probation report writer, the sentencing structure of the state, and the criminal history and mental health history of the client. As Rick Jones, the Executive Director of the Neighborhood Defender Service of Harlem, explained, while it may seem attractive to accept a plea to "get the criminal charge over with," a criminal conviction, "even for a minor offense, has an enormous impact on a client's life." NACDL, *Minor Crimes, Massive Waste: The Terrible Toll of America's Broken Misdemeanor Courts* 13 (2009). When a wide sentencing range is possible, the lawyer's role in advocating for the low end of the range is critical. Complicating factors in the plea negotiation process include immigration status, need for language or hearing-impaired interpretation, probation status in other courts, and mental health issues of the client. All of those issues can require more attorney time to be able to explain options to the client and make sure that the client understands them.

209. Even in cases that appear to be simple, there may be viable motions to suppress evidence. For example, there may have been an unlawful stop, there may be questionable witness testimony, the witness for the state may not be available or may be impeachable, there may be constitutional challenges to the ordinance or statute, and/or there may be infirmities in the charging document. All of these issues might result in dismissals or a settlement to a lesser charge if there is competent advocacy by the defense attorney.

210. In my opinion, guilty pleas at the first meeting with a client are generally not advisable. This is because, at a first appearance, it is difficult, if not impossible, for an attorney to complete the individualized investigation and analysis that must go into consideration of that client's situation. Recognizing this important principle, the Washington State Supreme Court adopted a standard that "resolutions of cases by pleas of guilty to criminal charges on a first appearance or arraignment docket are presumed to be rare occurrences requiring careful evaluation of the evidence and the law, as well as thorough communication with clients." Washington State Bar Association, *Standards for Indigent Defense Services*, Standard 3.4 (2011).

211. The willingness to accept the "standard plea" rather than working to negotiate a resolution appropriate to the individual client, effectively a plea, the failure to investigate in order to negotiate effectively a plea and the failure to advise clients of all the consequences of pleading guilty are all signs of a fundamentally deficient system of defense and indications that indigent defendants are at risk of having their constitutional right to counsel violated. With the excessive caseloads defenders in Louisiana carry, these problems are common in the state.

XVI. Use of Social Workers

212. As the foregoing reflects, there is national recognition of the need for and the benefit of having social workers to assist attorneys. See Charles E. Silberman, *Criminal Violence, Criminal Justice* (Random House, 1978).

213. The LPDB recognizes the importance of social work resources for defenders. In its 2016 Report, the Board writes in its section on needed changes:

Access to social workers and other multidisciplinary professionals allow public defenders to connect clients to needed and appropriate services, including mental health care, job training and education, employment, transportation assistance, housing, and other protective factors that decrease recidivism, violations of probation, parole, conditions of bond, and expeditious, successful, and permanent reunification of families in the child welfare system.

2016 Board Report at 4.

214. Kentucky, with a population of 4.4 million people, has an organized state defender program with 45 social worker positions in 35 locations across the state. The Kentucky Department of Public Advocacy received an award from the National Criminal Justice Association for its social worker program.

The social workers develop plans that provide personalized rehabilitative support that address pivotal aspects of offenders life such as addiction, physical health, mental health, housing, education, employment, family and other issues to improve the client's successful function in the community and reduce recidivism.
...

Each social worker has saved 10,000 days of incarceration and \$100,000 in incarceration costs.

The Kentucky Department of Public Advocacy Alternative Sentencing Social Worker Program Wins NCJA Outstanding Criminal Justice Program Award, The Advocate (Aug. 9, 2011), available at <http://advocateky.blogspot.com/2011/08/the-kentucky-department-of-public.html>.

215. The Colorado State Public Defender website describes the work of its social workers in part as follows:

Under direction of the defense attorney, Social Workers conduct assessments and compile psychosocial histories to develop recommendations for appropriate pretrial release, treatment options, conditions of probation or diversion, and sentencing and post-sentencing options.

Office of the Colorado State Public Defender, *Social Workers*, <http://www.coloradodefenders.us/jobs/social-workers> (last visited May 1, 2017).

216. The Maryland Public Defender website describes the work of its social workers in part as follows:

With specialized training in forensic services, our licensed social workers join with defense attorneys to provide holistic representation by assessing the underlying causes of clients' behaviors, and developing individualized recommendations for treatment. . . .

By investigating a client's social history, our social workers unearth the root causes of a client's decision-making, and develop meaningful plans to remove barriers to success in the future. Social workers meet with clients, family members and other support networks to unearth, scrutinize and evaluate client information, then use that information to offer alternatives to incarceration and expert testimony.

Maryland Office of the Public Defender, *Social Work Division*, <http://www.opd.state.md.us/opd/Divisions/socialwork.aspx> (last visited May 1, 2017).

217. There is a National Alliance of Sentencing Advocates and Mitigation Specialists (NASAMS) that holds an annual Conference. The web page for the June 2017 conference includes this note of particular interest to Louisiana defenders: "A special focus for this year's conference, in light of the Supreme Court's decisions in *Miller v. Alabama* and *Montgomery v. Louisiana*, is on re-sentencing of individuals who were sentenced as juveniles to life in prison without parole." 2017 NASAMS Conference Program, *Holistic Defense and Leadership Conferences*, <http://www.nlada.org/conferences-and-training/public-defender-events/2017-nasams-conference/nasams-program> (last visited May 1, 2017).

218. Although social workers have become an important and widely recognized component of effective representation, in Louisiana social workers are rarely employed to assist indigent defendants. *See, e.g.*, discussion of District 2 [¶ 271], District 3 [¶ 276], District 4 [¶ 297], District 8 [¶ 364], District 9 [¶ 388], District 30 [¶ 408], District 10 [¶ 422], District 42 [¶ 448], District 12 [¶ 461], District 38 [¶ 492], District 17 [¶ 535], District 18 [¶ 600], District 20 [¶¶ 639, 649], District 30 [¶¶ 725, 729], District 35 [¶ 735]. The lack of social work assistance adversely affects the Louisiana defenders' ability both to obtain pre-trial release for their clients and to advocate more effectively at sentencing. Particularly given the lack of adequate mental health services in Louisiana,³ having social workers to assist defenders could make a tremendous difference for clients.

XVII. **Withdrawal and/or Restriction of Services**

219. In its Performance Guidelines, the LPDB recognizes that when counsel have too many cases to be able to provide effective representation, they should move to withdraw. Specifically, Section 707 of the Performance Standards ("General Duties of Defense Counsel") requires that:

Before agreeing to act as counsel or accepting appointment by a court, counsel has an obligation to make sure that counsel has available sufficient time, resources, knowledge and experience to offer effective representation to a defendant in a particular matter. If it later appears that counsel is unable to offer effective representation in the case, counsel should move to withdraw.

LPDB, *Louisiana Public Defender Board Trial Court Performance Standards* § 701(A).. This section further requires counsel "to keep the client informed of the progress of the case." *Id.* at § 701(C).

220. Similarly, Guideline 6 of the ABA Eight Guidelines of Public Defense Related to Excessive Workloads provides that:

³ *See, e.g.*, "An ongoing struggle: Treating mental illness in Louisiana," KTBS (Aug. 23, 2015), available at <http://www.ktbs.com/story/29860830/an-ongoing-struggle-treating-mental-illness-in-louisiana>.

Public Defense Providers or lawyers file motions asking a court to stop the assignment of new cases and to withdraw from current cases, as may be appropriate, when workloads are excessive and other adequate alternatives are unavailable.

ABA Eight Guidelines of Pub. Def. Related to Excessive Workloads, Guideline 6 (2009).

221. As discussed below, many districts with excessive caseloads have not restricted services. *See, e.g.*, discussion of District 7 [¶ 315], District 10 [¶ 418], District 42 [¶ 447], District 21 [¶ 673], District 22 [¶ 683]. And in those that have restricted services, many accused persons are left for weeks or months with no lawyers at all, or often they are assigned lawyers who have no criminal defense experience. *See, e.g.*, discussion of District 28 [¶¶ 351-56]. Those lawyers that are appointed often struggle to be compensated for their work.

XVIII. Training and Supervision

222. It appears that there is minimal supervision of the work of the defender attorneys and there are minimal expectations of what the attorneys are to do for their clients. *See, e.g.* description of District 3 [¶ 274], District 7 [335].

223. Louisiana Rule of Professional Conduct Rule 1.1. (Competence) provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

La. R. Prof. Conduct 1.1 (2002).

224. In my opinion, to assure compliance with this rule and constitutional mandates, a public defender's office should provide continuing training to its attorneys. Under ABA 10 Principles Number 9, “[d]efense counsel is provided with and required to attend continuing legal education. Counsel and staff providing defense services should have systematic and comprehensive training appropriate to their areas of practice and at least equal to that received by prosecutors.” ABA, *Ten Principles of a Public Defense Delivery System*, Principle 9 (2002) (emphasis supplied). Failure to do so increases the risk that indigent criminal defendants will not be provided effective representation.

225. In addition, there should be one full-time lawyer supervisor with no caseload for every ten attorneys supervised. For example, the Washington State Bar Association Standards For Indigent Defense Services provides:

STANDARD TEN: Supervision

Each agency or firm providing public defense services should provide one full-time supervisor for every ten staff lawyers or one half-time supervisor for every five lawyers. Supervisors should be chosen from among those lawyers in the office qualified under these guidelines to try Class A felonies. Supervisors should serve on a rotating basis, and except when supervising fewer than ten lawyers, should not carry caseloads.

Washington State Bar Association, *Standards for Indigent Defense Services*, Standard 10 (2011).

226. The State's failure to provide adequate oversight and supervision of the management of the caseload and to respond to the requests for more attorneys results in the District Defenders violating their ethical obligation to limit caseloads to what the attorneys can reasonably handle.

227. A supervisor who carries a caseload should reduce his caseload by the amount of time that is required for supervision. For example, if a supervisor is supervising six attorneys, the supervisor should carry no more than 4/10 of a caseload. National Study Commission on Defense Services Guideline 4.1 includes numerical staffing ratios, *e.g.*, there must be one supervisor for every 10 attorneys, or one part-time supervisor for every 5 attorneys. I interpret this to mean that if there are six attorneys to be supervised, that requires a .6 FTE supervisor.

228. It is clear that the majority of Louisiana public defense attorneys do not fully follow these guidelines as to training and supervision, and as a result they fail to meet professional standards of representation, increasing the risk that the State will provide inadequate representation to indigent criminal defendants.

229. In my opinion, the lack of supervision in Public Defenders' Offices across Louisiana violates Principle 10 of the ABA 10 Principles: "Defense counsel is supervised and systematically reviewed for quality and efficiency according to nationally and locally adopted standards." American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 10 (2002).

230. The absence or minimal level of supervision and training in most districts compounds the problem that results from the limited supervision and training provided by the staff of the Board.

231. The State Public Defender reported on the adverse impact of not providing training: "The reduction in the LPDB administrative budget has resulted in a curtailing of training for public defenders throughout the state. This directly and adversely impacts a line defender's ability to adequately represent the poor." 2016 Board Report at 2.

XIX. Waiver of Counsel

232. In many Louisiana misdemeanor courts, defenders either are not present or stand by not participating as judges take guilty pleas from accused persons who have not consulted with a lawyer or adequately waived counsel.

233. As set out below in Article 556, the Louisiana Rules contemplate that the court will determine that the defendant understands all of the rights that the defendant is waiving:

Art. 556. Plea of guilty or nolo contendere in misdemeanor cases; duty of court

A. Except as otherwise provided in Paragraph B of this Article or in R.S. 32:57 or in any other applicable law, in a misdemeanor case, if the defendant is not represented by counsel of record, the court shall not accept a plea of guilty or nolo contendere without first determining that the plea is voluntary and is made with an understanding of the nature of the charge and of his right to be represented by counsel.

B. In a misdemeanor case in which the court determines that a sentence of imprisonment will actually be imposed or in which the conviction can be used to enhance the grade or statutory penalty for a subsequent offense, the court shall not accept a plea of guilty or nolo contendere without first addressing the defendant personally in open court and informing him of, and determining that he understands, all of the following:

(1) The nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law.

(2) If the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if financially unable to employ counsel, one will be appointed to represent him.

(3) That he has the right to have a trial, and if the maximum penalty provided for the offense exceeds imprisonment for six months or a fine of one thousand dollars, a right to trial by a jury or by the court, at his option.

(4) At that trial he has the right to confront and cross-examine witnesses against him and the right not to be compelled to incriminate himself.

(5) That if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

C. The court shall require either:

(1) That a verbatim record of the proceedings at which the defendant enters a plea be made.

(2) That a form reflecting the court's advice to the defendant and the court's inquiry into the voluntariness of the plea be signed by the court and the defendant and filed in the record at the time of the plea.

D. Any variance from the procedures required by this Article which does not affect substantial rights of the defendant shall not invalidate the plea.

La. C. Cr. P. art. 556.

234. In *Faretta v. California*, 422 U.S. 806 (1975), the U.S. Supreme Court addressed the requirements before a court accepted a pro se defendant. Discussing *Powell v. Alabama*, *Gideon*, *Argersinger*, and *Johnson v. Zerbst*, the Court wrote, “it is surely true that the basic thesis of those decisions is that the help of a lawyer is essential to assure the defendant a fair trial.” *Id.* at 832-33.

235. The *Faretta* court then wrote:

When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must knowingly and intelligently forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing and his choice is made with eyes open.

Id. at 835 (internal quotations omitted).

236. Of particular assistance in assessing the inadequacy of the waivers of counsel is the federal habeas corpus decision in *Robinson v. Rader*, No. 3:11-CV-00458, 2013 WL 5818606 (M.D. La. Oct. 29, 2013). Because of its value in reviewing the “waiver” practices discussed here, I quote it at length:

Notwithstanding, the decision to proceed *pro se* must be made voluntarily, knowingly, and intelligently, and it is the trial judge’s responsibility to ensure that this is the case. Specifically, a criminal defendant “must be warned specifically of the hazards ahead” and “should be made aware of the dangers and disadvantages of self-representation.” *Iowa v. Tovar*, 541 U.S. 77, 88–89 (2004). These dangers and disadvantages must be “rigorous[ly] conveyed” to the defendant, *Patterson v. Illinois*, 487 U.S. 285, 298 (1988), and to that end, the Fifth Circuit has stated that the trial judge “should engage in a dialogue” with the defendant to ensure that he knows what he is doing and his choice is made with eyes open. *Chapman v. United States*, 553 F.2d 886, 892 (5th Cir. 1977). *See also Von Moltke v. Gillies*, 332 U.S. 708, 723–24 (1948) (“To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand”). In short, a defendant must be determined, not only to have voluntarily given up the right to counsel, but also to have done so with a full understanding of the dangers and disadvantages of self-representation. *See Moran v. Burbine*, 475 U.S. 412, 421 (1986). In determining whether a criminal defendant has effectively waived his right to counsel, the court should consider the totality of the circumstances and must consider such factors as:

the defendant’s age and education, and other background, experience, and conduct. The court must ensure that the waiver is not the result of coercion or mistreatment of the defendant, and must be satisfied that the accused understands

the nature of the charges, the consequences of the proceedings, and the practical meaning of the right he is waiving.

Although there is no formula, script or sacrosanct litany which must be read to a defendant, the 5th Circuit has approved the relevant section of The Benchbook for Federal Judges as “an instructive guide for state court judges in respect of their ... constitutional obligations under *Faretta*.” *Gross v. Cooper*, 312 Fed. Appx. 671, 675 n.1 (5th Cir. 2009). A reviewing court should indulge every reasonable presumption against the waiver of a fundamental constitutional right. *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

In the instant case, in light of the minimal colloquy conducted by the state trial judge, this Court is unable to conclude that the petitioner’s waiver of counsel was voluntary, knowing and intelligent within the meaning of *Faretta*. **Specifically, the trial judge made no inquiry whatever into the petitioner’s education, background or experience and made no attempt to advise the petitioner of the dangers and disadvantages of self-representation.** See *United States v. Jones*, 421 F.3d 359 (5th Cir. 2005) (waiver deemed invalid where judge informed the defendant only that representing himself was “dangerous” but gave no further warnings regarding the pitfalls of self-representation); *United States v. Davis*, 269 F.3d 514 (5th Cir. 2001) (waiver deemed invalid where judge informed the defendant only that, by proceeding *pro se*, he might unintentionally implicate himself at trial, but otherwise relied on warnings given to the defendant by counsel); *Gross v. Cooper*, *supra* (waiver deemed invalid where judge provided no warnings whatever regarding the dangers of self-representation). Nor did the trial judge make any recommendation against self-representation, recommend that the defendant continue to utilize the services of his appointed attorney, engage in a dialogue with the petitioner, seek to ascertain that the petitioner understood the practical meaning of the right he was giving up, or offer the petitioner the benefit of standby counsel. See *United States v. Jones*, *supra* (waiver deemed invalid notwithstanding that judge strongly and repeatedly recommended that the defendant keep his appointed attorney, who was “extremely competent”). Although the State points to the judge’s prior determination at arraignment of the defendant’s age and “understanding” of the proceedings, to the defendant’s apparent prior experience with the criminal justice system, to the fact that the defendant had filed motions which the court could review, to the pretrial stage of the proceedings, and to the subsequent “favorable” plea agreement all as militating in favor of a determination of voluntariness, this is an attempt to discern voluntariness from an after-the-fact recitation of mostly unrelated details, which details are not shown to have been evaluated by the trial court. Instead, this case more closely presents the situation faced by the 5th Circuit Court of Appeals in *Gross v. Cooper*, *supra*, where the Court vacated a petitioner’s conviction upon a finding that there had been a stark failure to abide by *Faretta*, both because “the trial court never warned the defendant of the dangers of self-representation at all” and “did not consider any background factors or engage in any dialogue to ascertain the defendant’s awareness of the consequences or practical meaning of waiving representation.”

Robinson v. Rader, 2013 WL 5818606, at *6-7 (various citations omitted) (emphasis added).

237. The 5th Circuit reversed a decision because when the defendant agreed to go pro se, the judge did not provide adequate warnings of the dangers of self-representation.

The transcript is void of any indication that the district court sought to apprise Virgil of the “perils and disadvantages of self-representation,” which is the minimum required by *Davis* and *Faretta*, much less engaged in any of the broader warnings suggested by *Davis*.

United States v. Virgil, 444 F.3d 447, 454 (5th Cir. 2006) (citing *United States v. Davis*, 269 F.3d 514, 520 (5th Cir.2001)).

238. Notwithstanding these clear holdings our observers saw repeated instances of judges dealing directly with defendants and accepting pleas without the necessary advice of counsel on proper waivers of counsel, while either defenders in the courtroom did nothing or there was no lawyer available. *See, e.g.*, discussion of District 7 [¶¶ 320-28], District 9 [¶¶ 389-92].

XX. **The Use of Waitlists Amounts to Actual Denial of Counsel.**

239. As explained by the LPDB in its January 2016 Board Report:

Many district[s] have had to limit the number of cases they accept. To do otherwise would result in caseloads so high as to render their lawyers’ representation ineffective, in violation of state statutes, the state and federal constitutions, and the Louisiana Rules of Professional Conduct. Placing a limit on the cases accepted by a Public Defender Office, in some instances, has resulted in waiting lists, leaving criminal defendants unrepresented until defenders are available to represent them. This also leaves the State open to legal attack and litigation regarding the right to counsel.

2015 Board Report at 3.

240. Because of inadequate resources and the inability to hire enough lawyers, according to a news report, 33 out of 42 public defender offices in Louisiana in 2016 refused cases or placed clients on waitlists. Della Hasselle, *A public defense crisis in Louisiana: 33 of 42 public defender office restricting client services due to funding shortfalls*, *The Gambit* (May 25, 2016), available at <http://www.bestofneworleans.com/blogofneworleans/archives/2016/05/25/a-public-defense-crisis-in-louisiana-33-of-42-public-defenders-offices-refusing-clients-due-to-funding-shortfalls>.

241. According to the January 2017 Board Report, fourteen districts disclosed that they had been in restriction of services. 2016 Board Report at 1.

242. In 2016, more than 1000 cases were put on wait lists. The following table is from the Louisiana Project time study report.

Case Type Waitlisted ²²	2013	2014	2015	Annualized 2016
Child in Need of Care (CINC)*	0	0	1	2
Enhanceable Misdemeanor*	59	120	238	217
Felony – Life Without Parole*	2	4	8	6
Fine Only	0	0	0	1
High-level Felony*	46	116	251	215
Low-level Felony*	60	106	315	257
Mid- level Felony*	82	122	353	290
Misdemeanor or City Parish Ordinance*	37	51	53	50
Other	1	1	7	8
Revocation*	0	0	2	10
Total New Cases	287	520	1,228	1,057
Total New Delphi Cases*	286	519	1,221	1,048

The Louisiana Project: A Study of the Louisiana Public Defender System and Attorney Workload Standards 10 (Feb. 2017).

243. In the January 2017 Board Report, the 41st District reported that one felony life without parole, 44 felony, 11 misdemeanor and 16 Municipal Court cases were still on the office’s waitlist in January 2017. 2016 Board Report at 782.

244. As of January 31, 2017, Federal Judge Brady of the United States District Court for the Middle District of Louisiana, reported that there were 44 defendants in New Orleans

alone who were on the waitlist for counsel, 29 of whom were incarcerated. *See Yarls v. Bunton*, No. CV 16-31-JJB-RLB, 2017 WL 424874, at *2 n.13 (M.D. La. Jan. 31, 2017). He wrote:

Defendants cannot dispute that waitlists violate the constitution, but they use them in an attempt to comply with ethical duties that require them to limit their caseloads. By issuing a declaratory judgment, the Court would just be repeating what those involved already know—Defendants are not living up to their duties.

Id. at *6.

XXI. The Lack of Legal Research Resources Undercuts the Ability of Louisiana Defenders to Provide Effective Representation

245. Legal research is essential to effective representation. The LPDB Performance Standards Part III, Section 723(B) recognizes the need to consider the applicable law. That requires in today’s practice access to electronic legal research. Many Louisiana defenders cannot afford either Lexis or Westlaw, the two major sources of electronic legal research.

246. As one Federal judge has written, counsel have:

an obligation under Rule of Professional Conduct 1.1 to provide “competent representation,” which includes an ability to research the law. Similarly, Rule 1.3 requires that “a lawyer shall act with reasonable diligence and promptness in representing a client,” which includes pursuing applicable legal authority in timely fashion. Case reports are available in hard cover and on-line from computers.

Massey v. Prince George’s Cnty, 918 F.Supp. 905, 908 (D. Md. 1996). The judge in a footnote explained the value of Westlaw: “The Natural Language search method on Westlaw allows one to enter a string of concepts that describes one’s research issue.” *Id.* at 908 n.4.

247. While it is theoretically possible for lawyers to do legal research with books in a library, that simply is not feasible for most defenders, particularly for defenders in smaller Louisiana cities and rural areas, where electronic research capacity is critical. “Today all the cases of the National Reporter System are available on Westlaw, LexisNexis, and Bloomberg Law.” Michael Whiteman, *Book Burning in the Twenty-First Century: ABA Standard 606 and the Future of Academic Law Libraries as the Smoke Clears*, 106 Law Libr. J. 11, 28 (2014).

248. I am aware that the Louisiana Bar Association offers access to FastCase, but it is my understanding that it is not as powerful as Westlaw or Lexis. As explained by Florida Coastal School of Law,

The FastCase database contains case law only. Access to statutes and regulations are provided by links to official internet sources for those materials. This helps to lower the cost, but it also means that you cannot search for cases and statutes at the same time. Nor can you search for statutes or regulations across multiple jurisdictions.

Florida Coastal School of Law, *Free and Lo-Cost Legal Research*, <http://cslguides.charlottelaw.edu/content.php?pid=102528&sid=771078> (last visited May 1, 2017)

249. I discuss below examples of districts that do not have access to electronic legal research and their recognition that this limits their ability to provide effective representation. *See, e.g.*, description of District 1 [¶ 266], District 8 [¶ 366], District 11 [¶ 439], District 25 [¶ 701].

XXII. Part-Time Public Defenders Divide Limited Time Between Indigent Defendants and Paying Private Clients

250. Except in the minority of defender offices with full-time staff, Louisiana Defender Districts rely on part-time contract defenders who work for a fixed annual contract amount that is so low that they seek other work, including civil cases, making it difficult both to focus on their defender clients and to maintain current expertise on criminal law developments. *See, e.g.*,

discussion of District 4 [¶ 304], District 7 [¶¶ 333-40], District 8 [¶ 362], District 9 [¶ 398], District 30 [¶ 410], District 10 [¶ 419], District 42 [¶¶ 451-57], District 14 [¶ 478], District 17 [¶¶ 539, 442-45], District 19 [¶ 614], District 21 [¶¶ 676-78], District 35 [¶ 736].

251. The American Bar Association has recognized the financial disincentives that can arise in the mixed private practice-public defense practice situation. The ABA Criminal Justice Section Standards Providing Defense Services Standard 5-4.2 Restrictions on private practice provides: “Defense organizations should be staffed with full-time attorneys. All such attorneys should be prohibited from engaging in the private practice of law.” American Bar Association, *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-4.2 (3d ed. 1992).

252. Some district defenders do not fully review the cases of their lawyers’ private practices to determine whether conflicts exist. *See, e.g.*, discussion of District 30 [¶ 410]. Having to juggle the conflicts presented by private practice clients complicates the assignment process and could increase expenditures if additional lawyers have to be hired to handle the conflict cases.

253. In my opinion, indigent defendants are at risk of being assigned an attorney who has conflicts of interest in their case because of the lack of a system for identifying conflicts. A number of districts have no system to identify conflicts of interest other than when there are co-defendants. This results in each attorney determining as the case goes on whether there is a conflict. This is not an acceptable way to address potential and actual conflicts of interest particularly when each of the defenders has a private practice. At a minimum the attorneys should be reporting to the office what cases they have in private practice, and there should be a computer database that allows the office to keep track of what clients they have represented.

254. My opinion is that many of the defender attorneys are and will continue to be improperly torn between significant private practice obligations and their relatively heavy and poorly compensated defender case responsibilities and that there is great risk that as a result many clients are denied effective representation.

XXIII. The Lack of Funding and Failure to Enforce Performance Standards Results in Constitutionally Inadequate Counsel in Districts Across the State of Louisiana.

255. My analysis of conditions in various Districts throughout the state supports my conclusions. I have summarized my findings as to individual Districts below including both information drawn from LPDB reports for each District and our various observations and interviews.

A. 1st District (Caddo Parish)

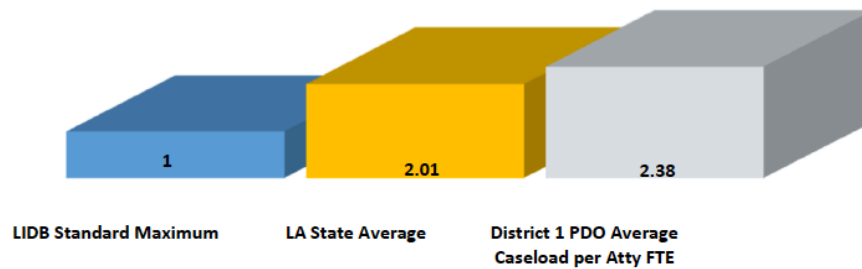
256. In the 1st District, comparing the total expenditures for the calendar year 2016 with the number of new cases handled during that same time period reveals total expenditures of just \$212.82 for each new case. *See* 2016 Board Report at 56, 67. Multiplying \$212.82 by 150 felony cases yields only \$31,923 for what should be a maximum felony caseload. Based on my experience, this level of expenditures is inadequate to provide effective assistance of counsel.

257. The 1st Judicial District was one of the districts in restriction of services during 2016. “Due to the office’s inability to obtain the appropriate financial and personnel resources to provide ethical representation to it’s [sic] clients, the 1st Judicial District office remains in service restriction[,] which was implemented on April 1, 2015.” *Id.* at 56.

258. In January 2017, I interviewed the 1st Judicial District Defender, Pam Smart, who previously was the 26th District Defender. She told me that her office has “too many cases, way too many.” Despite caseloads “at their lowest levels since 2010, the public defense attorneys of the 1st Judicial District continue to maintain caseloads more than two times the recommended caseload limit for each attorney.” *Id.* at 57.

259. The District reported that its caseload had decreased but was still more than twice the LPDB recommended level. The 2016 Board Report included the following chart:

District 1 PDO Average Caseloads Compared to State Average & State Standard Maximums



Id.

260. In the 1st District, I also interviewed a contract attorney, Sean Southern, who took over a caseload of about 200 cases in October 2016 and who reported receiving 8 to 10 new cases a month. He told me that while he would benefit from the use of investigators, he has not had a case that required investigation. This indicates both the failure to appreciate the benefits of investigation and a culture in which lawyers avoid asking for investigation because they feel that the investigators would not be able to handle more cases.

261. In 2016, despite handling 17,325 cases, the 1st District reported no expenditures at all for expert witnesses, interpreters, or social workers. *Id.* at 56, 72. In 2015, when it handled 18,761 cases, the District had no expert witness, interpreter, or social worker expenditures. 2015 Board Report at 61, 77. The office had a significant number of serious cases that one would expect would require expert services. In 2016, the office had 10 new delinquency life cases, 580 new delinquency misdemeanor cases, 339 new delinquency felony cases, 7951 adult misdemeanor cases, 3283 adult felony non-LWOP and 73 adult LWOP cases. 2016 Board Report at 67.

262. In the 1st District, I interviewed staff investigator Daniel Olds. He formerly was an investigator for the Capital Assistance Project (“CAP”), which he says was better funded than the 1st District PDO. He said that reports that require payment to obtain, for example hospital records, are not as easy to obtain, whereas he could obtain those when working for CAP. The Director has to approve those payments, and he said that the Director has turned down some other staff persons’ requests. As a result, some staff do not request those reports. He indicated that his work is handicapped because the office does not receive complete discovery until about three months after the arrest, and they have only an arrest sheet to prepare for preliminary hearings. The office has no money for investigator training, and he had to pay \$104 out of his own pocket to attend a training on interrogation. He said they also need training on social networks and on cell phones.

263. One staff lawyer told our observer that she has worked for the Caddo Parrish Office of the Public Defender for 19 years and has not received a raise since 2008.

264. This lawyer told our observer that she had asked to be removed from a case with two defendants because of a conflict of interest. The judge had denied her request.

265. Another lawyer told one of our observers that the office’s three investigators for district court are the resource for 3000 pending cases, there are no paralegals, so everyone does “double jobs,” and it is difficult to visit clients in jail within 72 hours of their arrest.

266. I interviewed J. Antonio Florence, an attorney who had been appointed to about half a dozen cases because the Defender had restricted services. He had just represented a client who had pled guilty to an amended misdemeanor charge. He told me that he had spent several hundred hours on the case, which had been charged as a child molestation charge. He said he did not expect to be paid because the Board “say they don’t have funds.” He said it made more sense for him financially to move on rather than spend time trying to get paid for this work. He said to submit a bill would be “a waste of time.”

267. The 1st District Defender told me that she had to cancel the office's Westlaw contract and has not been able to renew it. One of the contract lawyers in the 1st District told me he would like the office to provide statute books, which cost about \$400.

B. 2nd District (Claiborne, Bienville, and Jackson Parishes)

268. During Calendar Year 2016, the 2nd Judicial District Public Defenders Office received 923 new cases and received only \$493,609 in total revenues to handle these new cases, or \$534.79 per new case. *Id.* at 75, 85.

269. The office carried over into 2016 413 adult misdemeanor and 670 adult felony non-LWOP cases. *Id.* at 85. They received 364 new misdemeanor cases and 480 new non-LWOP felony cases. *Id.* They closed 595 adult felony and 487 adult misdemeanor cases. *Id.* This suggests that the six part-time contract attorneys were not able to keep current with their cases.

270. Its attorneys "maintain caseloads one and a half times the recommended caseload limit for each attorney," and "caseloads in the office have risen every year since 2014." *Id.* at 76.

271. In the Board Report for 2016, the 2nd District Defender reported "Funding" as an "Immediate Critical Issue Area[]." *Id.* at 80. The district's monthly expenses exceed the local revenues it collects. *Id.* "This 'negative cash flow' prevents there being any long term commitment for office space in 2 of the 3 parishes comprising the district." *Id.* at 80.

272. In 2016, despite handling 2,068 cases, the 2nd District reported no expenditures at all for expert witnesses, interpreters, or social workers, while reporting expenditures of only \$5,000 for investigators. *Id.* at 75, 90. The office reports hiring a "part time investigator which appears to be adequate for the time being." *Id.* at 81. This indicates a failure to appreciate the importance of investigation of the facts by an office that "handled" 2,068 cases in 2016.

273. The District requires an individual contract attorney to notify the office of a potential conflict of interest. *Id.* at 78. This is not a sufficient conflicts check system.

C. 3rd District (Union and Lincoln Parishes)

274. During Calendar Year 2016, the 3rd Judicial District Public Defenders Office received 2,468 cases and received only \$741,446 in total revenues to handle these cases, or \$300.42 per new case. *Id.* at 93, 103.

275. In the LPDB's report for 2015 the Defender stated that the lawyers averaged a caseload that was 114% of the LPDB maximum. *See* 2015 Board Report at 99. The Board Report for 2016 states: "In the 3rd Judicial District, public defense attorneys maintain caseloads 1.7 times the recommended caseload limit for each attorney, an increase from prior year caseloads." 2016 Board Report at 94. The District Defender supervises the seven conflict attorneys, with no offsetting workload reduction for him. *Id.* at 99. Accounting for duties as a supervisor and recognizing his obligations to his individual clients, he should not have more than .3 of a caseload (45 felonies per year).

276. In 2016, the office tried 9 misdemeanor cases out of 1021 closed cases, a trial rate of less than one percent. *See id.* at 103. It reported 6 acquittals, raising a question why they did not try more cases. *Id.* They had only 6 felony trials out of 486 closed cases, a trial rate of only 1.2 percent. *See id.*

277. In 2016, the 3rd District reported spending no money on expert witnesses or social workers and only \$21,875 for investigators, while its lawyers handled 3,461 cases. *Id.* at 93, 108. The 3rd District reported no expert witness or social worker expenditures in 2015. 2015 Board Report at 112.

278. A senior district attorney in the 3rd District told us that he had been a long-time defender in Union Parish and Lincoln Parish, and left to become a district attorney because of better benefits including pension and medical care. He has a special needs child and needs good medical insurance. The Defender office provides no health benefits. 2016 Board Report at 99.

279. The former District Defender for the 3rd District, Mr. Jones, who now is an assistant district attorney there, told our observers that he left the defender job because of the lack of health insurance and that he could not deal with the instability of running the public defender's office. He said that the Board one year would provide \$200,000 and the next year would provide no funding. The office listed eight part-time contract attorneys plus the District Defender who told us that he had a contract defender office because the office did not have enough money to hire full time staff attorneys. At the same time that he was being given almost no money by the Louisiana Public Defender Board, the Board was pressuring him to hire full time staff attorneys and do away with the contract system.

280. Our observers watched court in the Lincoln Parish Courthouse on January 4, 2017. A great number of defendants appeared for arraignment and the judge referred them to the defender, Mr. Moegle.

281. Mr. Moegle is a contract defender, and he told our observers that at any given time he has 400 active cases. On the day our observers saw him in court, he represented numerous defendants and it appeared that he had no files with him. On the printed docket, he was listed on 49 defendants' cases.

282. There was no private conference area or room which Mr. Moegle could speak with clients. For the clients for whom he was appointed for arraignment, he spoke with them at his desk in the well. He would collect a few appointments from the judge, screen them, and then address two or three at a time.

283. Mr. Moegle represented five defendants who pled guilty in a group guilty plea. Each defendant was charged with separate crimes, two for driving while intoxicated and three for possession of marijuana.

284. The judge asked one of the defendants, "Did you have marijuana?" to which the defendant responded something to the effect of, "I don't know, I guess so. It was in my car but I'm not sure if it was mine. But it was in my car." The judge then asked again, "But you had marijuana with you?" To which the defendant responded, "Yes I guess I did." While the other defendants were listed on the docket as being in court for trial, this defendant was listed as being in court for arraignment, suggesting that it was unlikely she had met with the defender before the hearing.

285. The judge asked another defendant if he was driving while intoxicated, and the defendant stated, "I was driving but I wasn't drunk." The judge asked him again if he was driving while intoxicated, to which he stated he was. She then took the time to address the courtroom stating that buzzed driving is drunk driving. As the Louisiana law has a number of provisions regarding driving while intoxicated, one of which is "under the influence of alcoholic beverages" and one of which is the blood alcohol concentration of 0.08 percent or more, La. Rev. Stat. 14:98 (2014), the defendant's comment suggests that it would have been worth exploration of what the evidence actually would support. The charging document did not specify but charged in the alternative, listing both options.

286. The entire guilty plea process for all five defendants took 28 minutes.

287. The responses of the two defendants who seemed dubious about their guilt suggest that there may have been viable defenses in their cases. The length of time that the guilty pleas and sentencing took and the lack of individual attention suggest that the defendants may not have fully understood what they were doing.

288. Prior to the hearing in a domestic battery abuse case, the Assistant District Attorney ("ADA") had told our observers that he would put pressure on the defendant by recommending a raise in his bond amount if he did not agree to plead guilty. The defender came into the room and the ADA did in fact tell the defender of this threat.

289. When the case was called, it appeared that the defender had not discussed the case fully with his client prior to beginning to enter a guilty plea. When the judge asked "Are you pleading guilty because you are in fact guilty?," the defendant stated, "I ain't guilty but I'm pleading guilty to get on with my life." The judge stated that he should not be pleading guilty if he is not guilty because domestic abuse battery is a serious charge and if he is arrested for it

again it could carry more serious penalties. The judge asked Mr. Moegle if he had reviewed this information with his client. Mr. Moegle did not respond. The judge then asked if Mr. Moegle had reviewed any discovery with his client. Mr. Moegle did not respond. The judge then asked the ADA if there was a factual basis for this charge. The ADA stated that the charge was based on the incident report. The judge asked Mr. Moegle if he had reviewed the incident report with his client. Mr. Moegle walked from his desk over to the ADA and looked at the ADA's file. Mr. Moegle then stated, "your honor, we did not review this specific document, but we have discussed the matter." The judge asked the ADA to read the incident report aloud. The judge then told the defendant that he needed to talk with his attorney again and stopped the proceeding.

290. While Mr. Moegle was talking with this defendant, the judge called another case and began the hearing even though Mr. Moegle represented that person as well.

291. When the court returned to the domestic battery defendant, Mr. Moegle said that based on the weight of the evidence, the defendant was pleading guilty because he believed if he went to trial he would receive a harsher sentence. The judge accepted the guilty plea and ordered the defendant to pay a \$300 fine and attend 26 anger management sessions. He received credit for time served. The judge reinstated an order of protection on behalf of the defendant's wife, who had arrived during the other hearing. The ADA went up to the bench and spoke to the judge who then addressed the defendant's wife and said "it is my understanding that the two of you are attending marriage counseling." Brantley's wife responded in the affirmative. The judge then wrote in marriage counseling as an exception to the order of protection. If ADA Jones had not approached the bench with this information, this would not have happened. The proceedings concluded after this.

292. The way this case developed suggests that the defender did not review the case before the hearing, did not investigate the case, and instead of resisting the ADA's threat and seeking his client's release so that he could investigate the case, the defender assisted in pleading a client guilty who may have had a valid defense.

293. Mr. Moegle told our observers that he is the misdemeanor contract attorney and the felony conflict attorney in Lincoln Parish and he has his own private practice to which current and former clients refer their friends when they have criminal legal issues. On his webpage, he indicates that his practice has "a main focus on criminal defense, family law, and personal injury litigation." Forrest L. Moegle, Attorney at Law, <http://www.forrestmoegle.com> (last visited May 1, 2017). He also is listed as an instructor for the College of Business at Louisiana Tech University. Louisiana Tech University Collect of Business, *Faculty and Staff Information*, <http://www.business.latech.edu/fmoegle/> (last visited May 1, 2017). He is listed as having taught a 3 hour 45-minute class once a week in Fall 2015. *Id.* According to a Lincoln Parish blog, he represented a defendant charged with unauthorized use of a debit card, and possession of stolen items, set for trial in March 2017. *See* Lincoln Parish News Online, *Bonton Trial Reset for March* (Sept. 26, 2016), available at <https://lincolnparishnewsonline.wordpress.com/category/lincoln-parish-sheriff/page/2>.

294. Mr. Moegle told our observers that the major pitfall of working as a contract attorney is that there is no retirement fund and no health insurance. He told us that his wife is a piano professor at Louisiana Tech and that he is on her health insurance. He stated that what the office needs the most is more funding.

D. 4th District (Ouachita and Morehouse Parishes)

295. During Calendar Year 2016, the 4th Judicial District Public Defenders Office received 6,843 new cases and received only \$2,282,095 in total revenues to handle these cases, or \$333.49 per new case. *See* 2016 Board Report at 111, 121. The LPDB report for 2015 states: "In the 4th Judicial District, public defense attorneys maintain caseloads almost three times the recommended caseload limit for each attorney." 2015 Board Report at 116. The Report for 2016 shows the average per lawyer as 220% of the Board limit. *See* 2016 Board Report at 112. That yields a per attorney felony caseload of 440 per year, nearly triple the ACCD standard. In January 2017, based on office records, one felony lawyer had 186 open cases and one misdemeanor lawyer had 214 open cases. Those are overwhelming numbers. I interviewed the 4th District Defender in January 2017. He told me that, even though they are only part time, three of his contract lawyers had more than 200 case assignments in 2016. All of his contract

attorneys are part-time. He expects them to work approximately 30 hours a week on public defense.

296. Even though the defenders have an excessive caseload, the office did not restrict services in 2016 and did not anticipate doing so in 2017. *Id.* at 116.

297. I interviewed one of the contract defenders, Walt Caldwell, who told me he spends between 1/3 and 1/2 of his time on his defender work. He also does some federal CJA work and has a private practice, and he is the Police Juror for District C, Ouachita Parish. He receives a minimum of 30 new cases a month, mostly misdemeanors and some felony conflict cases. Until mid-2016 he also did child support cases, which took his monthly assignments to 50-60 per month. He described his caseload as excessive. He said that now the caseload is “in line with ABA standards.” If he means that his caseload is in line with the 400 misdemeanor National Advisory Commission caseload limit, his perception is mistaken. Because he spends less than half of his time on his defender contract work, he should have less than 200 misdemeanor cases a year.

298. Despite handling over 10,000 cases, the 4th District reported no expenditures for investigators or social workers and only \$2,892.50 for expert witnesses and \$240 for interpreters. *Id.* at 126. The Chief Defender told me that he could not see hiring social workers until he had a sufficient number of lawyers.

299. One of the contract defenders in the 4th District told me that “for the most part” he does not use investigators on misdemeanor cases because his office “can only afford so many investigators.” He said he could not provide investigation for even ten percent of the misdemeanor cases.

300. One of the contract defenders told me that one of the biggest problems is that there is no private place to talk with incarcerated clients.

301. That attorney told me that he receives 8-12 new cases a month. He has a small private civil practice and estimated that he may work 20 hours a week. He had no trials in the past two years.

302. That attorney also told me that he is required to see his clients in jail within 7 days and then every 60 days. He tells his clients, “I’ll see you every 60 days unless something comes up.” When I met with him January 5, 2017, he told me that he did not have to go to the jail until February unless he received a new case. He did tell me that he had gone to jail the night of Saturday, December 17, to see a client.

303. I met with Robert Noel, who is the senior part-time contract attorney in the 4th District and the Interim District Defender in the 5th District. He told me that public defense takes about 80 per cent of his time and represents about one-third of his income. Without private practice, “it would be impossible.” His law firm web site advertises his criminal and personal injury practice. Robert S. Noel, *Welcome*, <http://www.monroecriminaldefenselawyer.com> (last visited May 1, 2017).

304. Mr. Noel told me that the office had four second degree murder cases dismissed in the past year because of the work of their three investigators.

305. The 4th District Defender told me that the contract lawyers cannot live “off what they get from public defense” and described his own retirement plan as “work to 85 and die at your desk.” Even though he was speaking somewhat facetiously, as his comment reflects, with no retirement system and no health or other insurance benefits provided by the office, the defenders have little choice but to work as long as they possibly can to have more than Social Security income.

306. The District Defender told me that for a full-time defender office he would need a budget of \$4 million. The reported expenses for the 4th District Defender in 2016 were \$2,282,634. By contrast, the total expenditures for the 4th District District Attorney’s office in 2014 amounted to \$4,438,479. The District Attorney’s office received \$885,574 in federal grants.

307. In the Fourth District, the misdemeanor contract attorneys are paid in the \$2600 to \$4200 a month range. The felony attorneys are paid in the \$3350 to \$6200 per month range. There are no benefit plans. The District Defender told me that the lawyers are not properly compensated at those rates. He suggested that an appropriate salary range for full-time defenders in his office would be from \$75,000 per year to \$175,000 per year for the supervisor. His own current salary is \$123,000 per year, with no benefits.

308. The compensation for the District Attorney for the Fourth District far exceeds that of the District Defender. The following is from the Financial Report for the District Attorney for 2014:

The Head of Operations is the District Attorney, Jerry L. Jones. Payments to the District Attorney, as required to be disclosed per Act 706 for the fiscal year ended December 31, 2014, are as follows.

Through the District Attorney of the Fourth Judicial District:	<u>Amount</u>
Gross Salary	\$ 175,005
Insurance Benefit	10,305
Contributions DA Retirement	14,656
Dues	435
Per Diem	450
Reimbursements	50
Travel (LDAA Meeting)	226
Conference Travel	291

Donald, Tucker, Betts & Fuller, *District Attorney of the Fourth Judicial District Financial Report* 36 (Dec. 31, 2014), available at [https://app.la.state.la.us/PublicReports.nsf/8B8AF5464ADA4EF986257E7A005353E0/\\$FILE/0008B65.pdf](https://app.la.state.la.us/PublicReports.nsf/8B8AF5464ADA4EF986257E7A005353E0/$FILE/0008B65.pdf).

309. The total expenditures for the Fourth District District Attorney’s office in 2014 amounted to \$4,438,479. *Id.* at 8. The office received \$885,574 in federal grants. *Id.* at 18.

310. Because the compensation, including benefits, for the District Attorney for the 4th District significantly exceeds that of the District Defender, the compared payments do not comply with Principle 8 of the ABA’s 10 Principles:

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. There should be parity of workload, salaries and other resources (such as benefits, technology, facilities, legal research, support staff, paralegals, investigators, and access to forensic services and experts) between prosecution and public defense.

311. The compensation scheme for defenders in the Fourth District violates the ABA Providing Defense Services Standard 5-4.1, “Chief defender and staff” which provides in part: “The chief defender and staff should be compensated at the rate commensurate with their experience and skill sufficient to attract career personnel and comparable to that provided for their counterparts in prosecutorial offices.” American Bar Association, *ABA Standards for Criminal Justice: Providing Defense Services*, Standard 5-4.1 (3d ed. 1992).

312. In 2016, the office tried 36 misdemeanors out of 3,087 closed cases (with 13 acquittals), a trial rate of approximately 1.1%. 2016 Board Report at 121. It tried 30 non-LWOP felony cases out of 2,756 (all guilty), a trial rate of just over 1%. *Id.*

E. **7th District (Catahoula and Concordia Parishes)**

313. During Calendar Year 2016, the 7th Judicial District Public Defenders Office received 2,616 cases and received only \$372,073 in total revenues to handle these cases, or \$142.23 per new case. *Id.* at 165, 174. While “[a]n increase in total revenues over the last two years has allowed the 7th Judicial District office to avoid insolvency,” “local revenues associated with court costs have been unstable and erratic.” *Id.* at 165.

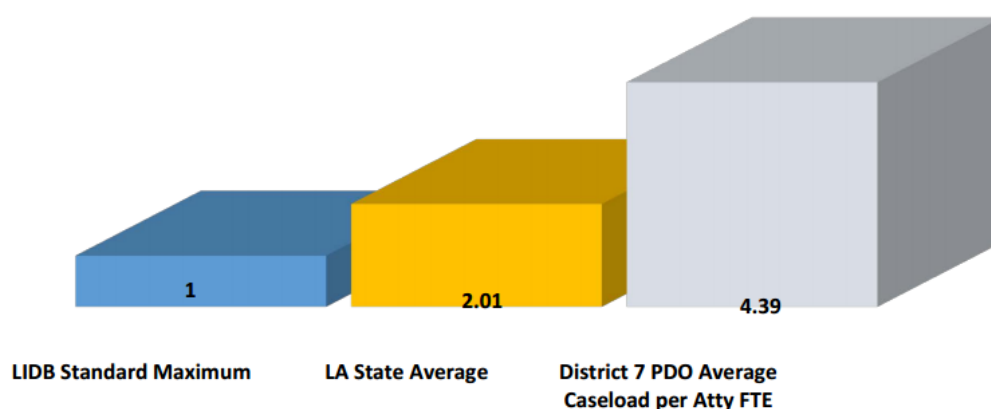
314. To understand the negative impact of this low level of funding, if the attorneys met the ACCD caseload limit of 150 felonies per year, at \$142.23 per case that would yield

\$21,334.46 per attorney. Four hundred misdemeanors at \$142.23 per case would yield \$56,892. Those amounts are simply inadequate to support a full-time attorney and overhead.

315. The 7th District stated in the Board Report for 2016 that “reliance on insufficient revenues has resulted in caseloads that by far exceed established caseload limits. Excessive cases limit each defender’s ability to provide effective assistance of counsel to their clients.” *Id.* at 166. Public defense attorneys in the 7th District maintain caseloads almost four and a half times the recommended caseload limit for each attorney. *Id.* These are the equivalent of 878 cases per year for a full-time equivalent attorney. Out of 564 closed misdemeanor cases, the District had no trials. *Id.* at 174. Out of 1315 closed non-LWOP felony cases, there was one jury trial. *Id.*

316. Asked whether the District foresaw restricting services in 2017, the District responded: “Possible, keeping close on revenue and spending and looking for ways to decrease monthly costs.” *Id.* at 170. This is troubling, given the excessive caseload and the almost non-existent trial rate.

District 7 PDO Average Caseloads Compared to State Average & State Standard Maximums



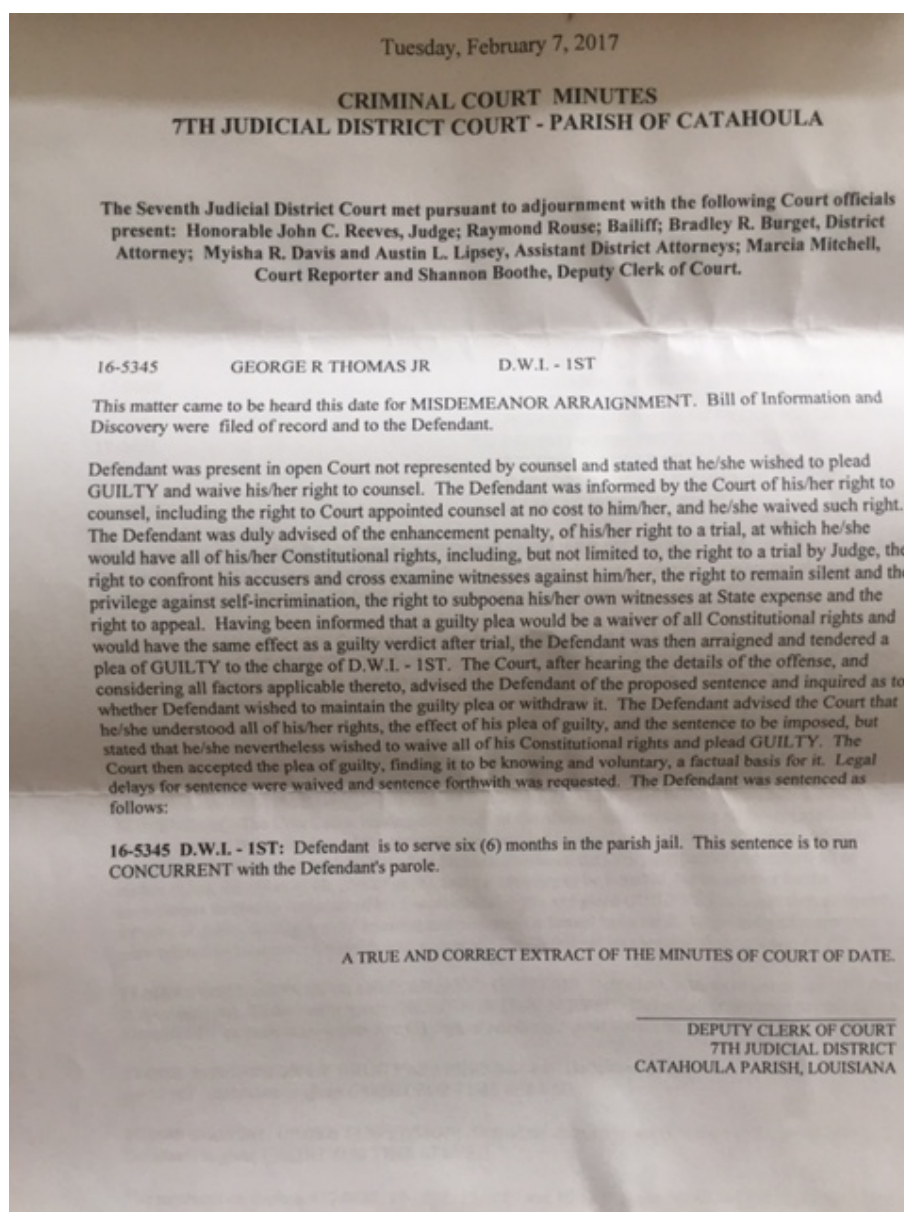
317. When an attorney has 878 cases per year, he or she would have about two hours per case. Preparing for and conducting a trial with that kind of caseload for more than a handful of clients is practically impossible.

318. An indication of the negative consequences of the District’s excessive caseload is that the office carried over 569 adult felony non-LWOP cases into 2016, received 1526 new cases, and closed only 1315. *Id.* at 174. In misdemeanors, they had 123 cases pending at the first of the year, received 966 new ones, but closed only 564. *Id.* This suggests that the lawyers were not able to keep current on their cases.

319. The District reported an “Inability to see clients on regular basis; budgeting travel expense; using time for travel that could be used to see local clients.” *Id.* at 168.

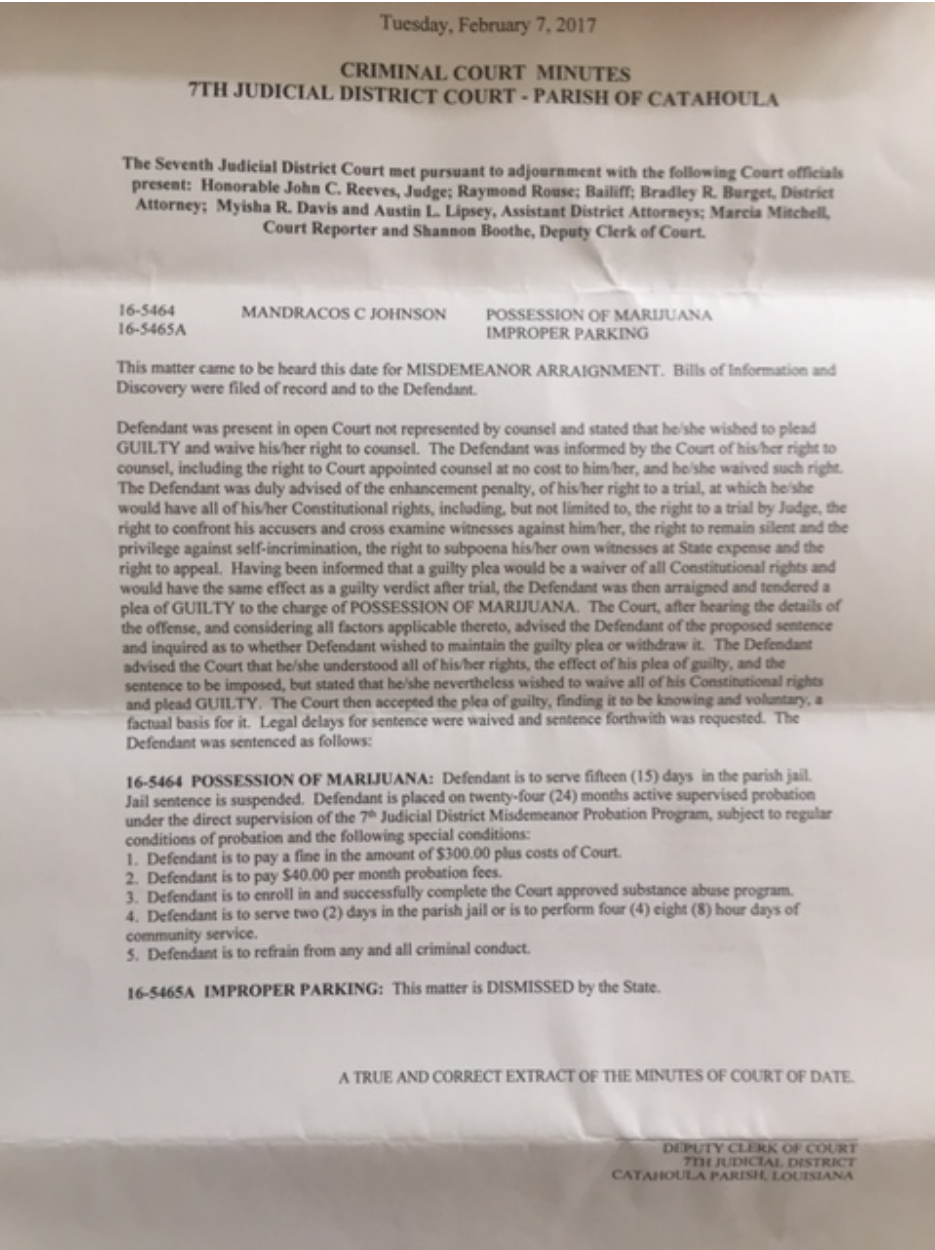
320. An issue for all defenders in the 7th District, as reported in the 2016 Board Report, is that incarcerated women clients are held in Richland Corrections, Monroe, Louisiana. The District Defender identified “distance for client visitation for women housed elsewhere” as an external factor that negatively affects the delivery of service in his district. *Id.* at 171. Google Maps shows that distance as 75.9 miles requiring a one hour, 22-minute drive each way.

321. On February 7, 2017, our observer was present for a proceeding in a misdemeanor case for which no defense counsel was provided and there was no constitutionally adequate waiver of counsel. In the proceeding which lasted a total of approximately four minutes, Mr. George Thomas, who had been incarcerated for seven days on a first offense DUI, and who was on parole, pled guilty without counsel and was sentenced to six months in jail to run concurrent with any time he would receive on a parole violation. Such a DUI conviction likely would result in parole revocation. While our observer heard no colloquy or waiver of counsel, the minute entry reflects that he was advised. Given that the hearing lasted about four minutes and included a guilty plea and sentencing, the minute entry may have been boiler plate language inattentively entered by a clerk.



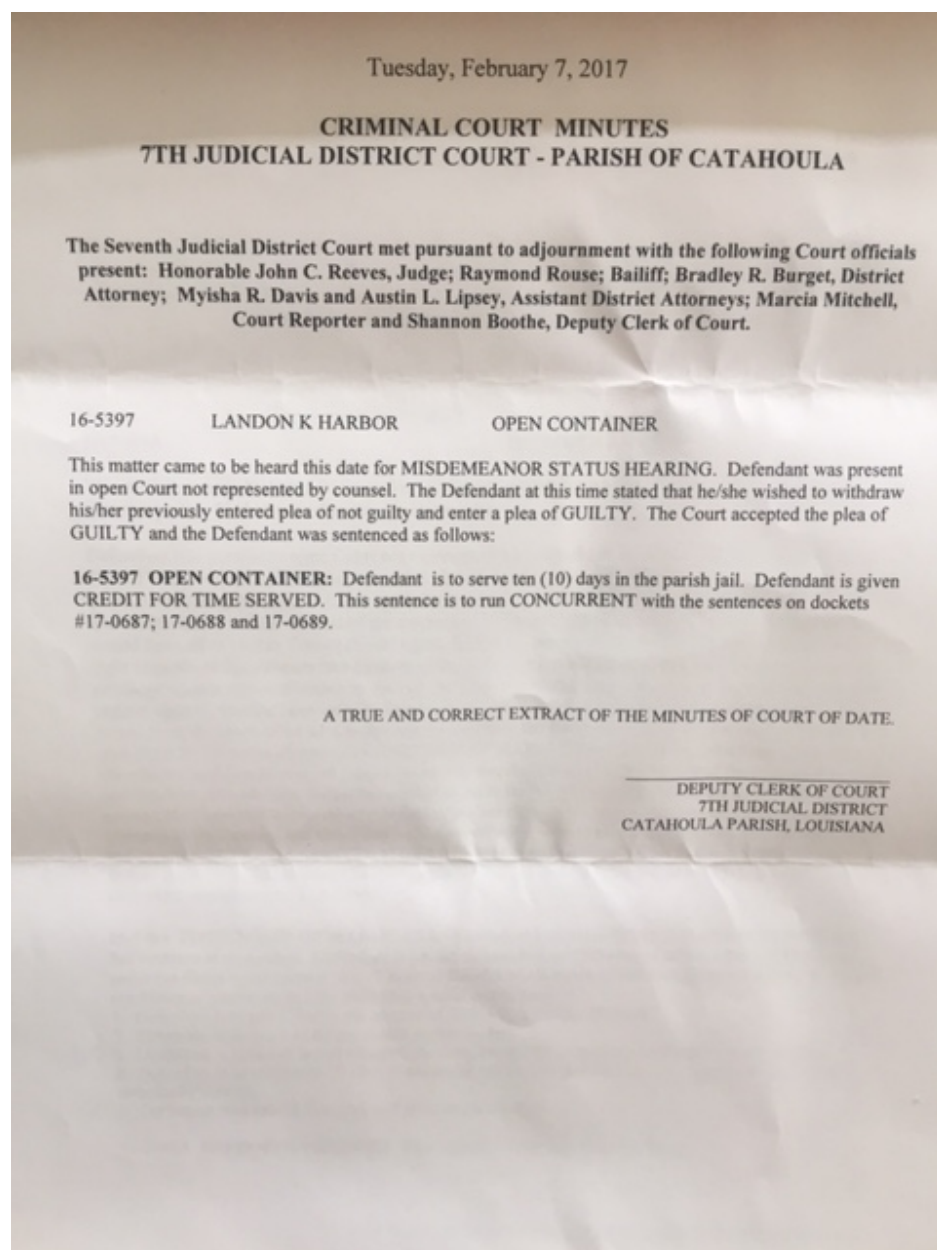
322. During the proceeding, the public defender, who was present in the courtroom, sat silently at a table and did not participate. The court’s minute entry stated: “Having been informed that a guilty plea would be a waiver of all Constitutional rights . . . the Defendant was then arraigned and tendered a plea of GUILTY to the charge of D.W.I.-1st.” A guilty plea is not a waiver of the right to counsel. This advice by the court was incorrect, but the defender at the table said nothing. The U.S. Supreme Court has made clear that accused persons have a right to counsel to help negotiate a guilty plea and to advocate for them at sentencing. *See Missouri v. Frye*, 566 U.S. 133 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012); *see also State v. Johnson*, 2016-KW-1471, 2017 WL 700484 (La. Ct. App. Feb. 21, 2017). It is not workable to advise a defendant of the charges, the rights to counsel and to trial, and the enhancement effect of a conviction, and then to take voluntary, knowing, and intelligent waivers of the right to counsel and the right to trial, and then to conduct a fair sentencing hearing, all within four minutes.

323. In another case in Catahoula Parish, Mandracos Johnson, who did not have counsel, was sentenced to two days in jail or four days of community service. The court’s minutes in Mr. Johnson’s case have the same language regarding waiver of counsel and waiver of rights as in Mr. Thomas’ case. There was nothing in the court’s inquiry about whether the defendant understood the rights he was waiving and the defendant had no counsel to advise him.

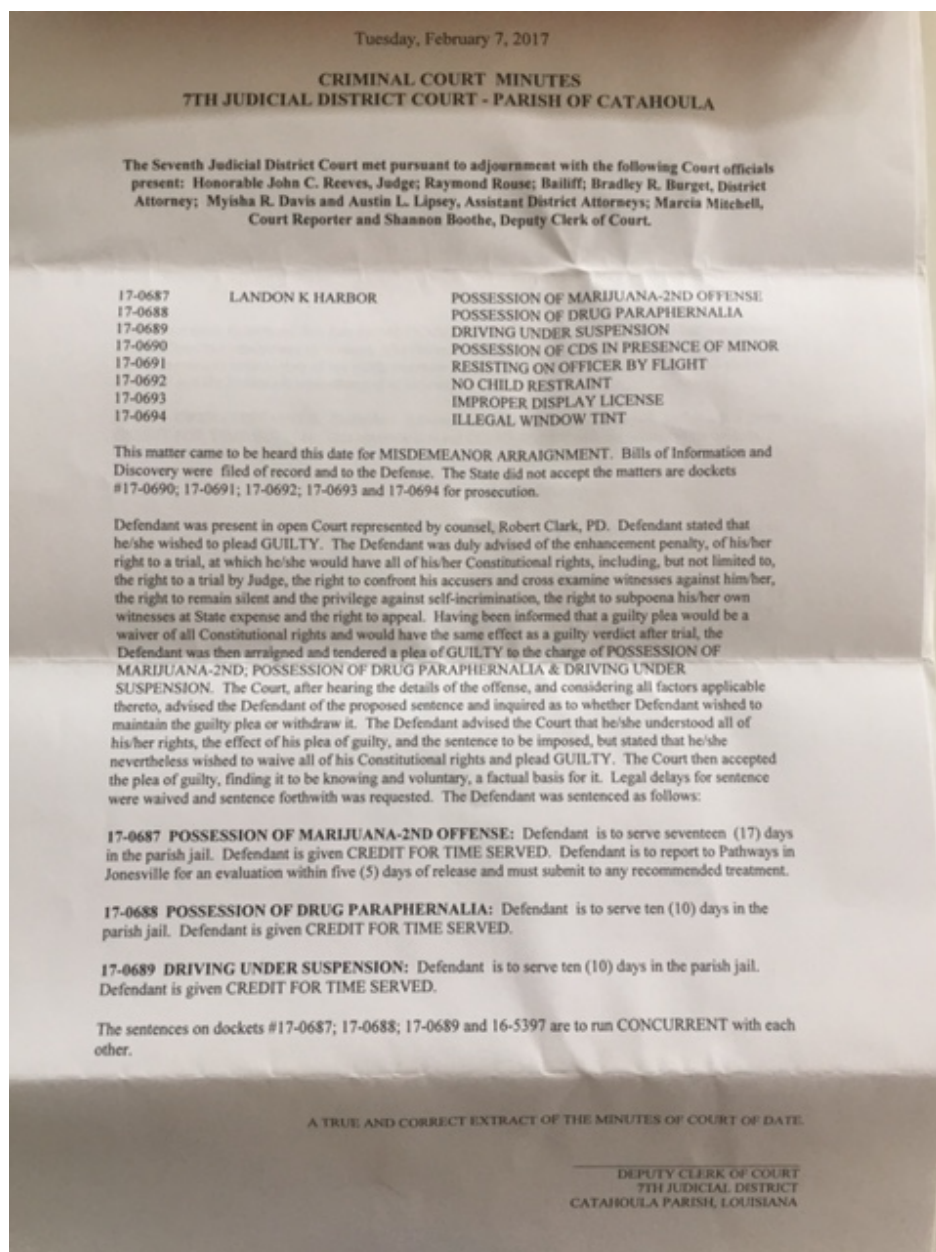


324. There was no indication that when pleading the defendants were made aware of the collateral consequences of a plea.

325. Mr. Landon K. Harbor, also incarcerated, was arraigned and eventually pled guilty to four misdemeanor charges. Mr. Harbor did talk with the public defender and the minute entries for the court shows that he was represented by a defender on some charges but not on the charge of open container.



326. After the district attorney handed copies of the charges to the defendant, the judge asked the defendant how he pleads, and Mr. Harbor said, “Not guilty, your honor.” The district attorney said, “You can’t make bond?,” and Mr. Harbor said no. The district attorney then spoke directly to the defendant about a possible plea of guilty. Responding to the judge on how he pled with regard to possession of drug paraphernalia and driving with a suspended license, Mr. Harbor said guilty. The district attorney said, “if he pleads to the marijuana as well, we’ll offer him 17 days with credit for time served.” He also said that if the defendant pled guilty to an open container charge, “we can run that concurrent with the other charges.” The judge asked if the defendant wished to change his plea on the possession of marijuana charge. He said, “Yes, sir.” The defendant stood alone and was sworn in by the court clerk.



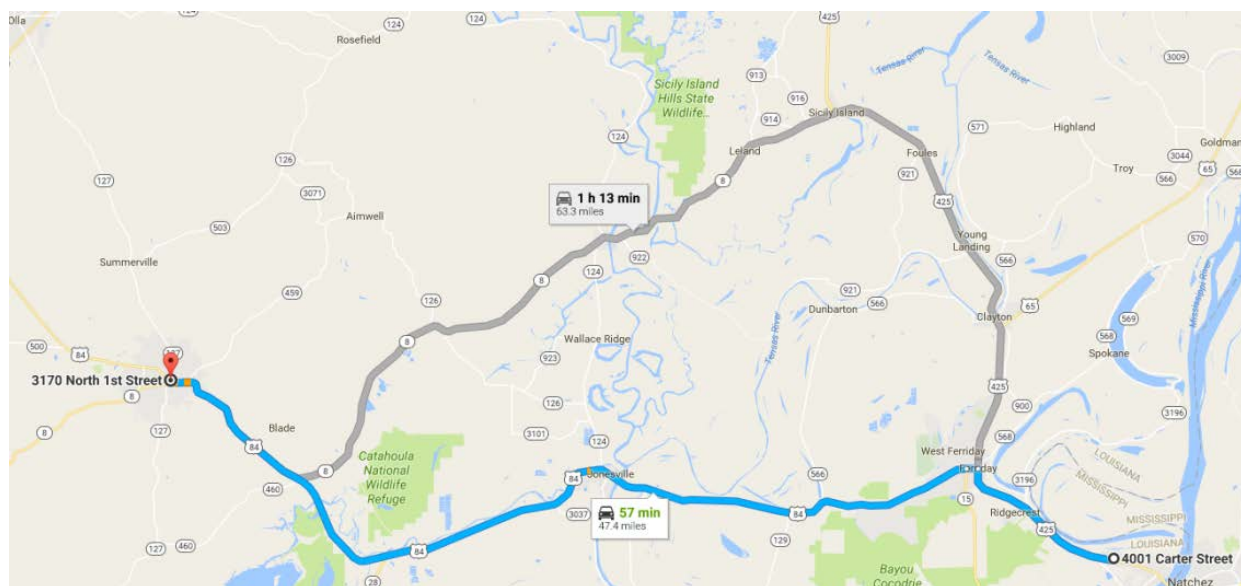
327. In another Catahoula Parish case, a Ms. Jefferson was charged with improper lane change, reckless operation of a vehicle, and flight from an officer. She pled not guilty. The judge said that because these were misdemeanor charges he did not need to appoint counsel for her. The district attorney said to Ms. Jefferson, “Are you looking for a trial or what?” He then discussed with the judge what a likely fine would be should she plead guilty. The judge said \$250 in court costs and 20 days in the Parish prison if she defaulted. The matter was continued so that Ms. Jefferson could get together \$250.

328. I note that for 2016, the District reported opening only 966 adult misdemeanor cases while it opened 1526 adult felony non-LWOP cases, a ratio of .63 to 1. 2016 Board Report at 174. This is an indication that many accused persons are pleading guilty in misdemeanor cases without counsel. In my experience, when defenders appear at misdemeanor arraignments, their misdemeanor caseload is substantially greater than their felony caseload, because far more misdemeanor cases are filed than felony cases. I observe that in the 41st District, for example, there were 9,148 new misdemeanor cases and 4,907 adult felony non-LWOP cases, a ratio of 1.86 to one. *Id.* at 794. In the 1st District, the office had 7,951 new misdemeanor cases and 3,283 non-LWOP felony cases, a ratio of 2.42 to 1. *Id.* at 66.

329. In Whatcom County, Washington in 2015, the public defender reported receiving 1,570 adult felony cases, a number comparable to the 7th District, and 2,807 county misdemeanor cases. Washington State Office of Public Defense, *2016 Status Report on Public Defense in Washington State* 46 (Mar. 2017), available at http://www.opd.wa.gov/documents/00429-2016_StatusReport.pdf.

330. I conclude from the comparison of the felony to misdemeanor ratio in the 7th District and Whatcom County that in the 7th District, most misdemeanor defendants are pleading guilty without counsel.

331. Derrick Carson is the 28th District Defender and the District Defender in the 7th District. Google Maps shows the distance between the 7th District office and the 28th District office as requiring just under a one hour drive each way. Every day that Mr. Carson has to drive that route round-trip he loses about two hours.



332. According to the Board’s webpage report in 2013, Mr. Carson was the District Defender in the 7th District and “The District Defender supervises all staff in two contiguous judicial districts, the 7th and the 28th. No caseload reduction is provided to him.” LPDB, *7th Judicial District*, <http://www.lpdb.la.gov/districts/Concordia.php> (last visited May 1, 2017). He supervised five attorneys in the 7th District in 2012. *Id.* The Board Report for 2012 for the 28th District reported: “At the end of 2012 the district reported one full-time staff attorney, two part-time contract attorneys, including the District Defender, and two part-time conflict attorneys. . . . The office also has two administrative staff members.” LPDB, 2012 Board Report 504 (Jan. 2016). The 7th District in 2012 had one investigator and two administrative staff members. *Id.* at 154. In 2016, he had six part-time attorneys and four other contractors and staff. *See* 2016 Board Report at 171.

333. A June 2, 2016 article in The Atlantic reported that Mr. Carson’s office “handles about 3,300 cases per year. Divided among his staff of part-time support attorneys, this amounts to more than triple the state’s recommended caseload.” Dylan Walsh, *On the Defensive*, The Atlantic (June 2, 2016), available at <https://www.theatlantic.com/politics/archive/2016/06/on-the-defensive/485165/>.

334. The Atlantic article added: “All of the attorneys in his office hold second, even third, jobs. Carson, too, maintains a private practice, where he spends about 20 percent of his time. ‘You can’t survive on this salary alone,’ said one of the support attorneys. ‘I do it for the love of Derrick,’ said another.” The 2016 Board Report for the 7th District states regarding private practice of the attorneys: “Permitted, but no policy established.” 2016 Board Report at 170.

335. The 7th District reported in 2016 that factors negatively affecting its services were [not] “timely receiving information to identify potential conflicts and distance for client visitation for women housed elsewhere.” *Id.* at 171. The District reports that to ensure conflict-free representation, “Chief reviews files, discovery, reassigning counsel if necessary.” *Id.* at 168. If Mr. Carson is reviewing 2,616 cases a year for conflicts, that is more than ten cases a day and further cuts into his time. In addition, he supervises one full-time and three part-time attorneys in the 28th District. *Id.* at 554.

336. Mr. Carson is spending 80% of his time in public defense supervising two districts each of which has an excessive caseload. Based on the description in the Atlantic article, which reports defenders only meeting their clients for a few minutes in the courtroom and clients not knowing who their lawyer is, and on the statistics in the 2016 Report, and on the

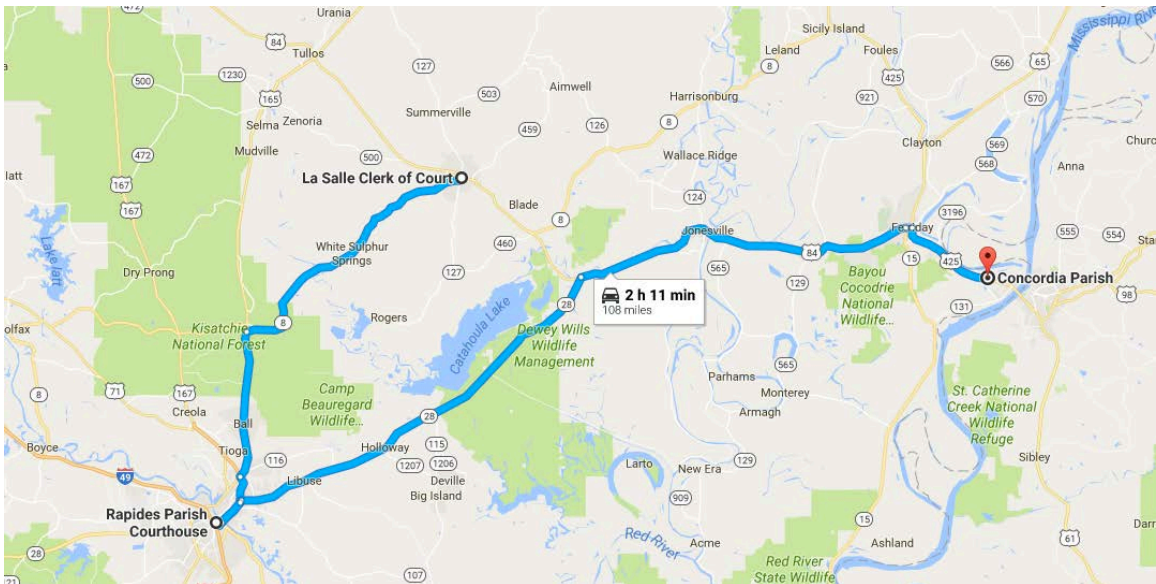
driving time required to the women’s jail and between courts, Mr. Carson has too little time for his clients.

337. One part-time defender is listed on the reports of three different districts--7,9, and 28. The 2016 Report states: “In the 7th Judicial District, public defense attorneys maintain caseloads almost four and a half times the recommended caseload limit for each attorney. . . . Excessive cases limit each defender’s ability to provide effective assistance of counsel to their clients.” *Id.* at 166. The office reported handling 3,345 cases in 2016, and listed six part-time contract attorneys, including Darrell Hickman, and the district defender. *Id.* at 166, 171. The 7th District office is in Vidalia, Louisiana.

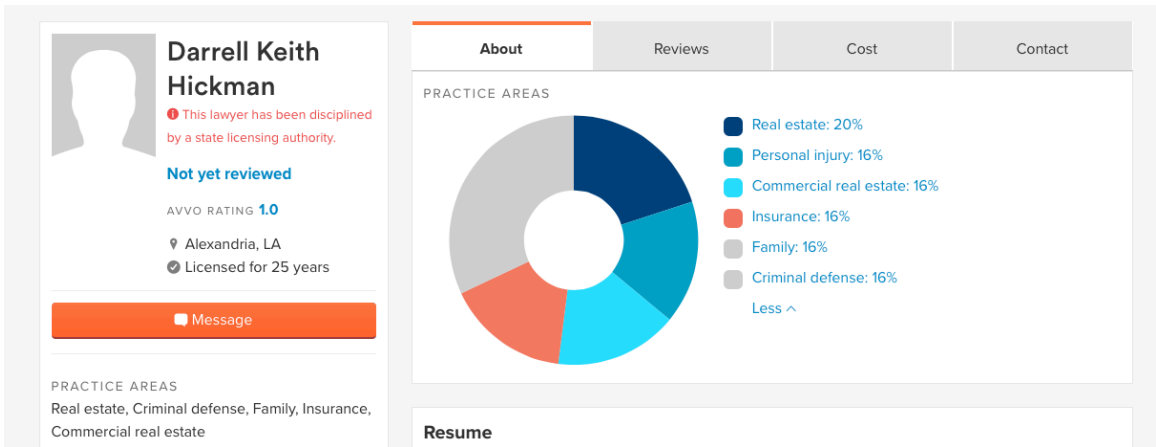
338. Darrell Hickman is also listed as a part-time contract attorney in the 9th District, which is in Alexandria, Louisiana. *Id.* at 554. The 2016 Board Report states: “In the 9th Judicial District, public defense attorneys maintain caseloads almost two and a half times the recommended caseload limit for each attorney.” *Id.* at 200. The Report lists 16 part-time contract attorneys plus the District Defender, handling 8,046 cases in 2016. *Id.* at 206, 199.

339. Darrell Hickman is also listed as one of four part-time contract attorneys (and there is one full-time staff attorney) in the 28th District, which is in Jena, Louisiana. *Id.* at 554. The Board Report lists four part-time contract attorneys including the District Defender, handling 627 cases and maintaining caseloads 1.55 times the Board’s maximum limit. *Id.* at 554, 548, 549.

340. As indicated in the map below, the distances among the three parish courthouses are considerable. It is 69 miles from Concordia Parish to Rapides Parish and 38 miles from Rapides (Alexandria) to Jena.



341. According to the Avvo listing, Mr. Hickman’s office is in Alexandria, in Rapides Parish. His Avvo listing shows that he works in a number of practice areas besides criminal law. It lists his criminal practice as 16% of the total. Darrell Keith Hickman, <https://www.avvo.com/attorneys/71301-la-darrell-hickman-154735.html> (last visited May 1, 2017).



342. In all three of the districts in which Mr. Hickman worked in 2016, there were almost no trials. In the 7th District, out of 564 closed misdemeanor cases, there were no trials. *Id.* at 174. Out of 1315 closed non-LWOP felony cases, there was one jury trial. *Id.* In the 9th District, out of 1699 closed misdemeanor cases, there was one bench trial. *Id.* at 209. Out of 1645 closed felony non-LWOP cases, there were one jury and six bench trials. *Id.* In the 28th District, out of 86 closed misdemeanor cases, there were no trials, and out of 135 closed felony non-LWOP cases, there was one bench trial. *Id.* at 557. In all three districts, the offices opened far more cases than they closed, suggesting that the lawyers could not stay current with their caseload.

343. While it is difficult to know from the Board reports how many cases Mr. Hickman was assigned in 2016 in the three districts, the fact that he advertises a private civil practice and he has cases in courthouses that are considerable distances apart suggest that he has little time for each of his defender cases.

F. 28th District (La Salle Parish)

344. Mr. Carson also is Chief Defender in the 28th District and Darrell Hickman takes cases in the 7th, 9th, and 28th Districts.

345. During Calendar Year 2016, the 28th Judicial District Public Defenders Office received 505 new cases and received only \$171,651 in total revenues to handle these cases, or \$339.90 per new case. *Id.* at 548, 557. According to the 28th District, “[l]ocal funds derived primarily from traffic tickets and special court costs are insufficient to support client representation” and “continue to be erratic and insufficient as the district is rural with no major highways.” *Id.* at 548.

346. The District was one of the districts in restriction of services during 2016. “Insufficient personnel and fiscal resources forced the 28th Judicial District office to begin restricting services on February 16, 2015.” *Id.* at 548. It reported partial restriction of services in early 2017 “in so far as cannot represent conflict cases, do not have the money to pay additional attorneys.” *Id.* at 551.

347. Public defense attorneys in the 28th Judicial District “maintain caseloads one and a half times the recommended average caseload limit for each attorney.” *Id.* at 549. Those figures do not include cases on the wait list as to which no lawyer is assigned.

348. The 28th District reported no expenditures for expert witnesses, investigators, interpreters, or social workers in 2016. *Id.* at 562.

349. The 28th District reported doing no misdemeanor trials out of 86 closed cases and one felony trial out of 135 closed cases. *Id.* at 557.

350. The District carried over 28 misdemeanor cases into 2016, had 197 new ones, and closed only 86. *Id.* It carried over 90 felony cases into 2016, had 298 new ones, and closed only 135. *Id.* These numbers suggest that the lawyers were not able to stay current on their cases.

351. For the 28th District, answering the question about steps taken to ensure conflict-free representation, Mr. Carson wrote, “Chief reviews files, discovery reassigns counsel if necessary.” *Id.* at 551. If Mr. Carson is reviewing all new cases, that is another 505 cases a year, or more than two a day on top of the more than 10 a day he reviews in the 7th District.

352. A recent petition for writ of habeas corpus raised serious issues about the inability of the 28th District Defender to provide effective representation in cases presenting conflicts of interest.

353. On March 24, 2016, lawyers from the MacArthur Justice Center in New Orleans filed Petitions for Writ of Habeas Corpus in the District Court alleging that eight defendants in the 28th District had been deprived for months of conflict-free and effective counsel. *See, e.g., Keene v. Franklin*, No. 15-1198 (March 3, 2016). In *Keene v. Franklin*, Sherrie Keene was arrested on drug charges on June 24, 2015 and was still in custody on March 24, 2016. At least three of the defendants were incarcerated for months before eventually being assigned conflict counsel.

354. Several months after the defendants had been arrested and charged and after the district attorney had provided discovery to the public defender including the name of the confidential informant in the case, the assigned defenders moved to withdraw as they had represented the informant. On January 28, 2016, Chief Defender Carson moved to withdraw the office from the case because of the conflict of interest presented because one of his office's clients was the informant against Ms. Keene. On March 3, 2016, Mr. Carson filed a second motion to withdraw, which was set for hearing April 5, 2016.

355. Mr. Carson had placed Ms. Keene on a wait list for counsel on February 29, 2016. *See* Notice of Placement on Wait list, in **Appendix E**. He filed an affidavit in the case, stating that because of conflicts of interest he could not provide an attorney to represent Ms. Keene and he had no funds to hire an additional attorney to represent her. In his second motion, he moved to withdraw because “[d]ue to a lack of funding, the Public Defenders Office is unable to provide the thoroughness, preparation, and diligence necessary to provide competent representation.” Motion to Withdraw and Stay Proceedings, *State v. Keene*, No. 15-1198 (Mar. 3, 2016).

356. The writs were denied April 4, 2016. On April 5, the motions to withdraw were tabled. This followed an in-chambers meeting that included the State Public Defender. The confidential informant then pled guilty and agreed that the Defender could represent Ms. Keene. The originally assigned defender remained as counsel for Ms. Keene but as of May 4, 2016, when the MacArthur Center sought appellate review, no apparent work had been done on Ms. Keene's behalf.

357. The impact on Ms. Keene was devastating, being incarcerated for more than nine months without counsel to do any advocacy on her behalf, and facing possible loss of a child through a dependency proceeding. This is a dramatic example of the consequences of both restriction of services and not having funds to hire conflict counsel.

358. Conflict counsel eventually was appointed for the defendants, and the petitions for writ of habeas corpus, by then in the state supreme court, were withdrawn. *See, e.g., Johnston v. Franklin*, No. 2016-KK-1165; *Keene v. Franklin*, No. 2016-KK-1164, Louisiana Supreme Court, Motion to Withdraw Petition for Writ of Habeas Corpus (Sept. 12, 2016).

G. 8th District (Winn Parish)

359. During Calendar Year 2016, the 8th Judicial District Public Defenders Office received 404 new cases and received only \$237,396 in total revenues to handle these cases, or \$587.61 per new case. 2016 Board Report at 182, 191. The 8th District gets most of its revenues from state funding because “local funding is largely insufficient.” *Id.* at 182.

360. “The 8th Judicial District remains in service restriction which was implemented on April 1, 2015 due to insufficient personnel and fiscal resources.” *Id.* In the LPDB Report for 2015, the district reported an average caseload of 172% of the LPDB standard. 2015 Board report at 185. In the Restriction of Services Protocol, the 8th District Defender wrote: “The average case load for a contract attorney who represents clients in the 8th Judicial District PDO is 2.55 times the maximum case load limit for defense attorneys. Therefore a wait list must be established for new clients.” Herman A. Castete, *8th Judicial District Restriction of Services Protocol 7* (2015). In 2016, the average caseload per attorney was 1.63 times the LPDB maximum, or the equivalent of 326 felonies per year for a full-time attorney. 2016 Board Report at 183. This did not include two felony cases on a waitlist in January 2017.

361. In his Restriction of Services Protocol for Fiscal Year 2015 sent to the LPDB, the District Defender stated that he personally handled 245 felony cases in 2014. Castete, *8th Judicial District Restriction of Services Protocol 7*. This is 63.3% greater than the ACCD recommended maximum. As he wrote in support of his decision to restrict services:

The Chief Defender who currently carries a full felony load, is prevented by the Rules of Professional Conduct from maintaining a caseload in excess of that which would allow him to provide ethical representation to each and every client. A greater caseload means that each attorney can spend less time with each client and therefore may not be able to give a particular case the attention it requires.

Id.

362. In the 2016 Board Report, the 8th District Defender added: “We are in restriction of services because we don’t have funding to pay the lawyers we need to represent all entitled defendants. Our district needs funding for 4 lawyers in order to meet the needs of indigent defendants.” 2016 Board Report at 187. The District had two part-time attorneys in 2016. *Id.* at 188.

363. In the LPDB Board Report for 2015, the 8th District Defender, Mr. Castete, describes himself as a part-time contract attorney and reports that he has a part-time Misdemeanor Attorney, and a part-time CINC and Conflict Attorney. 2015 Board Report at 199. According to the website for the City of Winnfield, Mr. Castete is also the City Attorney for Winnfield. City of Winnfield, *City Attorney*, <http://www.cityofwinnfield.com/departments/City-Attorney> (last visited May 1, 2017). “The City Attorney serves as chief legal advisor to the city council, mayor, and all departments, boards, and agencies. He represents the city in all legal proceedings and performs any other duties prescribed by the city council.” *Id.*

364. For 2016, the 8th District reported closing 235 non-LWOP felony cases, five of which went to trial, a trial rate of 2.1 percent. 2016 Board Report at 191. Of 85 closed misdemeanor cases, none went to trial. *Id.*

365. The 8th District reported no expenditures in 2016 for expert witnesses, investigators, interpreters or social workers. *Id.* at 196. As discussed in paragraph 179, the District Defender lamented the lack of investigative resources. He also wrote in the Restriction of Services Protocol for Fiscal Year 2015:

Expert witnesses are not necessary in the majority of our cases but we will have no money whatsoever to hire an expert. Our clients will not have the benefit of professionals who can determine DNA, fingerprints, handwriting analysis, injuries, etc. Defendants in the 8th Judicial District will be greatly disadvantaged by not being able to employ professionals who have expertise in their respective fields. The District Attorney is fully funded for his experts, but a defendant cannot have the same ability if they are poor and without personal resources. . . . If a particular case needs an expert, we will attempt to continue the matter until next year with hope that we will be able to fund that particular professional.

Herman A. Castete, *8th Judicial District Restriction of Services Protocol* 10-11 (2015).

366. If a case were continued to wait for funding, it is likely that the defendant would remain incarcerated during the wait.

367. In the 8th District Defender’s Restriction of Services Protocol for FY 2015, the Defender also wrote: “Westlaw research and books are being reduced in an effort to save money. Of course, this prohibits the attorneys from having access to all the material necessary to be effective in representation.” *Id.* at 9.

368. Our observer saw hearings in Winn Parish on January 11, 2017. Four defendants pled guilty without counsel although there was a defender in the court who represented another person. The defendants never said “guilty.” The judge simply said “I will sentence you to X” and then asked “is that what you want to do?” When the defendant replied, “yes,” the judge said “Well, that’s what we just did” or “that’s how we’ll handle it.” This inattention to the requirements of appropriate waivers of counsel and the necessary elements of a guilty plea are signs of a broken system.

369. I have read the verified statement of Plaintiff James Howard and reviewed documents in his court file. The file had references to a scheduled preliminary hearing and to the defense request that a crime lab technician testify rather than have the state rely on a written report. But there is no indication in the file of that preliminary hearing having taken place. At the time of filing of the petition herein, Mr. Howard had been in jail since April 2016. He is charged with possession with intent to distribute methamphetamine, possession of drug paraphernalia, and various traffic offenses. If convicted, Mr. Howard faces between two and thirty years’ imprisonment on these charges. Although Mr. Howard had been in jail for close to ten months, Mr. Howard alleged that he and his family have had almost no communications or contact with the defender assigned to the case. Mr. Howard alleged that the attorney refuses to speak with Mr. Howard during court hearings and does not respond to calls from Mr. Howard’s

family. Mr. Howard alleged that the attorney failed to consult with Mr. Howard before or after seeking a continuance of the initial trial setting. According to Mr. Howard, in their one substantive interaction, the attorney met with Mr. Howard in prison to communicate a plea offer but did not discuss available defenses or options. Mr. Howard was scheduled to go to trial on April 24 but had no confidence that his counsel had conducted an investigation, identified witnesses or evidence, or was prepared to advocate on his behalf. It is my understanding that since the petition was filed Mr. Howard has pled guilty to a seven-year prison sentence.

370. I have read the petition for habeas corpus filed May 4, 2016, by two pro bono attorneys on behalf of James D. Malone, 2016-CR-43722, Eighth District, who had been arrested January 27, 2016, on charges of indecent behavior with a juvenile. Mr. Malone had filed his own motion for release April 4, 2016, claiming that he had not been charged within 60 days. Apparently, Mr. Malone mailed his motion on March 30, 2016. The court denied his motion April 11, 2016, noting that an information had been filed on March 23, 2016. Attorney Connor Junkin had filed a motion for a preliminary examination. The motion has a certificate of service dated January 28, 2016, but the court file stamp is from March 2016. A hearing was set for April 19, 2016, but on that date the court entered the following notation:

Trial date

Other Arraignment reset May 17, 2016
court will apppt atty

371. On May 17, 2016, a trial was set for November 28, 2016, and on May 20, 2016, attorney J. Michael Small was appointed. The court wrote:

As the Office of the Public Defender for Winn Parish, Louisiana has informed the Court that it has no attorney that can be assigned to represent the indigent named above; and under the authority set forth in the case of *State vs. Citizen* 898 So2d (La. 2005)

IT IS ORDERED that J. MICHAEL SMALL, be and is hereby appointed as counsel for the indigent defendant named above.

372. It appears from these documents that Mr. Malone effectively had been incarcerated with no counsel for approximately five months, and that counsel was appointed only after a writ of habeas corpus had been filed for him.

373. On June 1, 2016, the habeas petition and motion for release were denied because Mr. Malone had been appointed counsel.

374. In May 2016, Mr. Small filed motions for a bill of particulars and for discovery and the court set that for a hearing on September 21, 2016. On May 25, 2016, Mr. Small filed a motion to withdraw as counsel. He noted that between June and December 2016 he had 8 cases set for trial in state and federal court including a murder case. He wrote that his various responsibilities and trials “would seriously impair his ability to provide effective assistance to Mr. Malone. . . .”

375. On October 3, 2016, Mr. Small filed a Motion to Determine Source of Funding or, Alternatively, to Withdraw as Counsel, and the motion was set for November 28, 2016. In his motion, Mr. Small said that he had been appointed at arraignment in May 2016 and that he was objecting to this appointment. Mr. Small wrote: “Thus, this court is left with a defendant it cannot provide a lawyer for, a lawyer it cannot provide funding for, and a runaway public defender system it cannot stop.”

376. On November 28, 2016, the matter was set for trial on April 24, 2017. The court documents I reviewed did not disclose the disposition of Mr. Small's motions. By November 28, 2016, Mr. Malone had been in custody for ten months without a lawyer committed to his representation. On April 24, 2017, a new attorney was present and the matter was reset for August 28, 2017.

377. I have read the statement of Plaintiff Ashley Hurlburt. At the time of the petition, Ms. Hurlburt had been held in Winnfield City Jail since her arrest on June 6, 2016. She and her husband are charged with negligent homicide of their one year-old child and face a maximum sentence of five years in prison. Since her arrest, it appears that the court has appointed three different attorneys to represent her. The first attorney--a contract public defender in one court and part-time prosecutor in another court--filed a boilerplate motion to reduce bond, but according to Ms. Hurlburt never pursued the motion or spoke with Ms. Hurlburt about the motion. The court then removed the attorney from the case for an unknown conflict of interest. It is my understanding that the second attorney did meet with Ms. Hurlburt after the lawsuit was filed, but that the second lawyer also withdrew because of a conflict of interest. Apparently the third lawyer has met with Ms. Hurlburt. The court had set a hearing date for February 22, 2017 and trial for April 24, 2017. No investigation had taken place. It is my understanding the trial is now set for June 19, 2017. It is my understanding that Ms. Hurlburt has had to receive medical attention for pre-existing depression and anxiety disorders.

378. I have reviewed the statement of Plaintiff Steven Ayres. Mr. Ayres is married to Ms. Hurlburt and charged with the same crime. According to Mr. Ayres, at a preliminary examination hearing--a critical hearing in the criminal procedure process--the attorney did not explain the purpose or significance of the proceeding to Mr. Ayres; nor did he permit Mr. Ayres to participate in his own defense. He said that his letters to his attorney had gone unanswered. It is my understanding that after the lawsuit was filed, the defender did visit Mr. Ayres. A trial set for April 24, 2017, has been continued to June 19, 2017.

H. 9th District (Rapides Parish) and 30th District (Vernon Parish)

1. 9th District (Rapides Parish)

379. During Calendar Year 2016, the 9th Judicial District Public Defenders Office received 5,874 new cases and received only \$890,178 in total revenues to handle these cases, or \$151.55 per new case. *Id.* at 199, 209. At 150 felony cases per lawyer per year, \$151.55 per case would yield a total of \$22,731.81. This is simply inadequate to provide adequate compensation for a full-time attorney and overhead.

380. "During CY16, the 9th Judicial District office experienced a 14.5% reduction in local revenues from the previous year." *Id.* at 199.

381. The 9th District Defender has an excessive caseload. In the Board Report for 2016, the 9th District reported that its lawyers had caseloads 2.41 times the state recommended maximum. *Id.* at 200. That is the equivalent of 482 felonies or 1085 misdemeanors per year for a full-time attorney. That is a crushing caseload that does not permit providing consistent effective representation to all the clients.

382. In the LPDB report for 2015, the District reported total revenue of \$987,518 and said it handled 6,236 cases. 2015 Board Report at 201, 211. It reported 4,739 new cases, including 1 delinquency life and 34 adult LWOP cases. *Id.* at 211. It reported having 37 LWOP cases open and 990 open adult felonies at the end of 2014. *Id.* The 9th District received an average of only \$208.38 per new case assigned. *See id.* at 201, 211. Multiplying that by 150 felony cases would yield only \$31,257.16 for what should be a maximum felony caseload. This is less than one-third of what the full cost of fielding a full-time felony lawyer should be. The lawyers handling the 35 especially serious cases should have had a caseload much lower than 150. For 2015, the District reported having no full-time attorneys and 13 part-time attorneys. *Id.* at 207-08. It reported average attorney caseloads more than four times the LPDB maximum limit. *Id.* at 202. In 2016 it reported 16 part-time attorneys. 2016 Board Report at 206.

383. During an observation visit to the Alexandria City Court on January 10, 2017, the defender there told our observer that he had about 1,000 cases per year and that he only worked two days a week because he was retired.

384. During that visit, the defender told our observers that he would write “smiley faces” on the files of those clients he deemed to have a good attitude and the prosecutor would know that if a defendant’s file did not have a smiley face that they had a bad attitude. He stated that for in-custody defendants, those that were rude or “had a bad attitude” he would put in the front row, separating them from the other in-custody defendants that were located in a back room. He said he did this to alert the judge that these defendants were not as compliant. This practice by the defender violated La. R. Prof. Conduct 1.6 (confidentiality of information) and in effect turns the lawyer into an advocate against his clients.

385. Our observers also witnessed a number of contempt hearings in which unrepresented defendants were ordered to pay fines or go to jail. The defender said these hearings were civil and so the defendants were not entitled to counsel. In my opinion, when defendants are facing jail time, they at least have a case by case right to counsel. *See, e.g., Turner v. Rogers*, 564 U.S. 431(2011) (a case involving child support in which the state was not represented). If counsel is not provided, the state must have in place alternative procedures that assure a fundamentally fair determination of the critical incarceration-related question. The Court noted that it was not deciding whether counsel would be required when the state was seeking child support payments. It stated that the “average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, *wherein the prosecution is presented by experienced and learned counsel.*” *Id.* at 449 (emphasis supplied) (quoting *Johnson v. Zerbst*, 304 U.S. 458 (1938)). In the cases in Alexandria, the prosecutor was pursuing the contempt findings.

386. Many of the cases our observers witnessed involved allegations of missing court dates. Some defendants said they had confused the dates.

387. As the Court said in *Turner*, “A court may not impose punishment ‘in a civil contempt proceeding when it is clearly established that the alleged contemnor is unable to comply with the terms of the order.’” *Id.* at 442 (citation omitted). Before courts find that a person is in contempt, they need to assess the ability of the person to comply. Based on what our observers saw, this was not happening in every case and because the prosecutor was involved, the defendants should have had counsel to assist them.

388. In the 9th District, out of 1699 closed misdemeanor cases, there was one bench trial. 2016 Board Report at 209. Out of 1645 closed felony non-LWOP cases, there were one jury and six bench trials. *Id.* Of 27 closed LWOP cases, none went to trial. *Id.*

389. The office reported spending only \$5,182 on expert witnesses in 2015. 2015 Board Report at 216. In 2016, the 9th District reported no expenditures for expert witnesses, investigators, interpreters or social workers for any of the 8,046 cases handled. 2016 Board Report at 214, 197.

390. In Rapides Parish, our observer was present on January 13, 2017 when Benjamin Neal Aycock was arraigned on three separate bills of information. He had been charged more than a month earlier on December 5, 2016. The minutes [copies in **Appendix F**] reflect that he had appointed counsel but that counsel was not present, and the court proceeded without counsel. The ADA instructed Aycock that “you’re going to waive appearance of attorney and plead not guilty to everything.” The ADA then said, “you’re waiving the statute of limitations, right? You understand?” Our observer noted that the defendant paused and it appeared that he did *not* understand. Still without counsel, the defendant was then ordered into a treatment program.

391. There are a number of issues with this hearing. Counsel had been appointed but did not appear. In a matter of a few minutes, Mr. Aycock’s arraignment on a number of felony and misdemeanor offenses was continued indefinitely, he “waived” a statute of limitations issue, and he was ordered into a treatment program. A number of the offenses were 18 months old. There may well have been speedy trial issues and other issues, and the docket minutes are quite unclear as to when, if ever, he is supposed to return to court and what might happen if he does not complete the treatment program.

The failure of counsel to come to court and to allow clients to go to court without them are examples of the state’s pattern of failing to provide an effective defense.

392. Also in Rapides Parish on January 3, 2017, our observer observed the arraignment of Derek Fontenette on two counts, possession of marijuana first and possession of drug paraphernalia. The offenses allegedly had occurred on September 19, 2016. Mr. Fontenette had been appointed counsel but the Defender was not present. Without counsel, he entered a guilty plea to one count and the other count was nolle prossed. He was ordered to pay a fine of \$50 and court costs of \$417.50 and was sentenced to 10 days in parish prison if he did not pay the fine and costs that same day. *Boykin v. Alabama*, 395 U.S. 238, 243 (1969), requires that the record disclose that the defendant who pled guilty did so “voluntarily and understandingly.” However, our observer reported that there was no *Boykin* plea colloquy or discussion of possible enhancement in future offenses or any other collateral consequence of the plea.

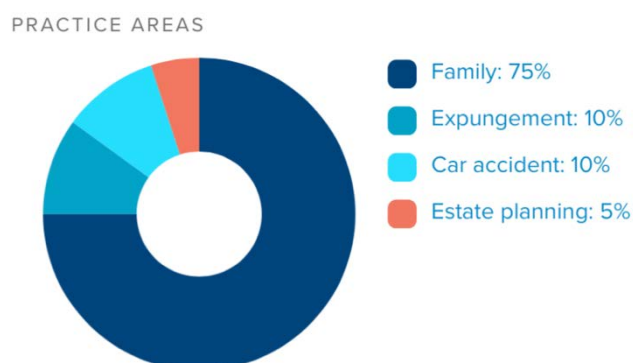
393. On the same day, Kendrick Norris was arraigned on a charge of possession of marijuana which allegedly occurred on October 1, 2015. The court record shows that he had failed to appear in February 2016, a warrant was issued, and he was in custody at the hearing. Mr. Norris had no attorney present. Our observer noted that the prosecutor asked “did you talk to Collins?,” who our observer understood to be a defender attorney who was listed in court records as having previously represented Mr. Fontenette. When Mr. Norris replied “no,” the ADA said “let me just arraign you then.” Without counsel Mr. Norris entered a guilty plea and was sentenced to five days in jail with credit for time served.

394. The practice of jailing defendants without counsel or a proper waiver of counsel is inconsistent with the holding of *Alabama v. Shelton*, 535 U.S. 654 (2002).

395. Our observer in Rapides interviewed Chad Guillot, who is a part-time contract attorney in the 9th District and in the 12th District. He discussed differences between Rapides (9th) and Avoyelles (12th). The defender in Avoyelles does not have an investigator and Rapides does. In Rapides, the defender sends the investigator to the jail when someone is arrested and a public defender is assigned at that time. In Avoyelles, the chief public defender is appointed at the 72-hour hearing, but the actual attorney working the case may not be appointed for months, even if the defendant is in custody. The Avoyelles chief defender handles everything between arrest and arraignment. Mr. Guillot gave an example from Rapides Parish: there was a 2nd degree murder case in which the defendant was in jail for approximately 6 months before the bill of indictment and was not arraigned during that time.

396. Another example of a lawyer working in more than one district is Tiffany Ratliff, who is reported in the 2016 Report as working in the 9th District and the 30th District. 2016 Board Report at 206, 590. The 9th District headquarters is in Rapides Parish, Alexandria, in which the lawyers carry a caseload 2.41 times the Board maximum. *Id.* at 200. The 30th District is located in Vernon Parish, Leesville, in which the lawyers carry a caseload 1.75 times the Board maximum. *Id.* at 584.

397. Ms. Ratliff, who lists her office as in Leesville, does not confine her practice to public defense. Her Avvo listing shows the following:



Tiffany L. Ratliff, www.avvo.com/attorneys/71446-la-tiffany-ratliff-4570064.html (last visited May 1, 2017).

398. Her office web page lists her practice areas as follows:



Tiffany L. Ratliff, Attorney at Law, L.L.C., *Practice Areas*, <http://www.tratliffllaw.com> (last visited May 1, 2017).

399. While the Board Report does not include how many cases Ms. Ratliff had in the two districts, the indications are that she had a heavy defender caseload in addition to her private practice and that her private practice left little time for defender clients.

2. 30th District (Vernon Parish)

400. The District Defender in the 30th District is Tony Tillman. 2016 Board Report at 585. Mr. Tillman in his private practice represents West Louisiana Ice Inc., which in 2016 was involved in a dispute with the City of Leesville. *See West Central's Best, Leesville ice company claims large quantity of ice was ruined during water line work, seeks compensation* (Oct. 5, 2016), available at http://www.westcentralsbest.com/news/leesville-ice-company-claims-large-quantity-of-ice-was-ruined/article_99faaeb0-8b11-11e6-8864-0f93957501a3.html.

401. Tony Tillman was paid \$3,000 a month for part of 2016 as interim district defender in District 9. 2016 Board Report at 45.

402. The District wrote in its Board report: “All attorneys are contract attorneys and all have private practices. All attorneys rely on their private practice for their primary income.” *Id.* at 588.

403. The Board Report of February 2013 stated that no caseload reduction was provided to the District Defender for his work supervising 11 part-time attorneys and four non-attorney staff. LPDB, 2013 Board Report 539 (Feb. 2013). This practice continued in 2016. *See* 2016 Board Report at 589.

404. During Calendar Year 2016, the 30th Judicial District Public Defenders Office received 1,755 new cases and received only \$617,059 in total revenues to handle these cases, or \$351.60 per new case. 2016 Board Report at 583, 593. Since 2012, “local revenues associated with court costs have been unstable and erratic.” *Id.*

405. The 30th District was one of the districts in restriction of services during 2016. It reported to the LPDB: “The 30th Judicial District office has nearly exhausted its fund balance. Insufficient personnel and fiscal resources forced the 30th Judicial District office to begin restricting services January of 2015.” *Id.* at 583.

406. “In the District public defense attorneys maintain caseloads nearly twice the recommended caseload limit for each attorney. These caseload averages do not include the cases newly opened during CY16 which were still on a waitlist in January 2017.” 2016 Board Report at 584.

407. In 2016, the District carried over from 2015 223 adult misdemeanor cases, opened 734 new ones, and closed only 584. *Id.* at 593. They carried over 358 felony non-LWOP cases, opened 643 new ones, and closed only 560. *Id.* This indicates that the lawyers were not able to keep current with their cases.

408. The office had only 7 misdemeanor trials (including one acquittal) out of 584 closed cases and 2 felony trials of 560 closed cases. *Id.* The felony trials were both bench trials and one resulted in acquittal. *Id.*

409. For the 2,514 cases handled in 2016, the 30th District reported expenditures of only \$1,330.05 for expert witnesses and \$4,796.43 for investigators. *Id.* at 583, 598. No expenditures for interpreters or social workers were reported. *Id.* at 598.

410. The District identifies a need for a social worker: “With a drug court and extensive OCS caseload, a social worker would greatly benefit our clients.” *Id.* at 588.

411. Responding to the question on how to provide conflict-free representation, the District wrote: “During interview clients are asked if they were arrested with anyone or if they have any co defendants. If they have co defendants we then make a note so that at time of appointment they won’t be assigned same attorney.” *Id.* at 586. This approach does not consider whether the office has conflicts with witnesses for the state or with clients the lawyers have in their private practices and therefore likely misses a great number of conflicts.

I. 10th District (Natchitoches Parish)

412. During Calendar Year 2016, the 10th Judicial District Public Defenders Office received 970 new cases and received only \$536,813 in total revenues to handle these cases, or \$553.42 per new case. *Id.* at 217, 227. The 10th District states that 58% of the revenues come from state funding because “local funding is largely insufficient.” *Id.* There appears to be a discrepancy in the amount of revenue reported. On page 217 of the 2016 Board Report the District reports \$536,813 in revenue, but on page 231 in its list of revenue, it reports a total of \$453,667.16, a substantial difference. It is important to note that the District “handled” 1453 cases in 2016, roughly half again as many cases as it had new cases. It is unable to pay medical benefits for its eight full and part-time staff. *Id.* at 222. It does not have Westlaw or Lexis. *Id.* at 225.

413. The District reported for 2015 that its lawyers carry 1.58 times the LAPD recommended maximum caseload. 2015 Board Report at 220. The office reported being assigned 227 adult misdemeanor cases and 654 adult felony non-LWOP cases in 2015. *Id.* at 228. The LPDB 2016 Report stated that the District’s average caseload was 1.7 times the LAPD maximum. 2016 Board Report at 218. The Board Report for 2015 for the 10th District shows one misdemeanor trial out of 191 closed cases and 4 trials out of 423 closed non-LWOP felony cases. *Id.* at 228. For 2016, the 10th District reported closing 317 felony cases, four of which went to trial, a 1.26 percent rate. *Id.* They had no misdemeanor trials. *Id.* So few trials strongly suggests the District’s defenders are not able to provide meaningful testing of the government’s charges.

414. The Board Report for 2016 states that “[t]he District Defender himself is the only full time employee in the District who does not represent other clients.” 2016 Board Report at 221. One of the part-time attorneys told us that the District Defender personally handles about 200 cases a year. We were told in January 2017 by another attorney that the District Defender had two pending murder cases that he was co-counseling with another defender. He also is a Chapter 7 Panel Trustee for the Alexandria Division of the Western District of Louisiana U.S. Bankruptcy Court. LinkedIn, *Brett Brunson*, <https://www.linkedin.com/in/brett-brunson-83774719> (last visited May 1, 2017).

415. One of the defenders told us that the funding for the PDO is not on a par with the District Attorney’s office and that the PDO cannot afford to hire any full-time attorneys.

416. The 10th District reported carrying over 71 misdemeanor cases into 2016, opened 311, and closed only 123 cases. 2016 Board Report at 227. They carried over 341 felony non-LWOP cases, opened 521, and closed only 317. *Id.* This indicates that the defenders were not able to stay current with their cases.

417. I note the Defender reported the following:

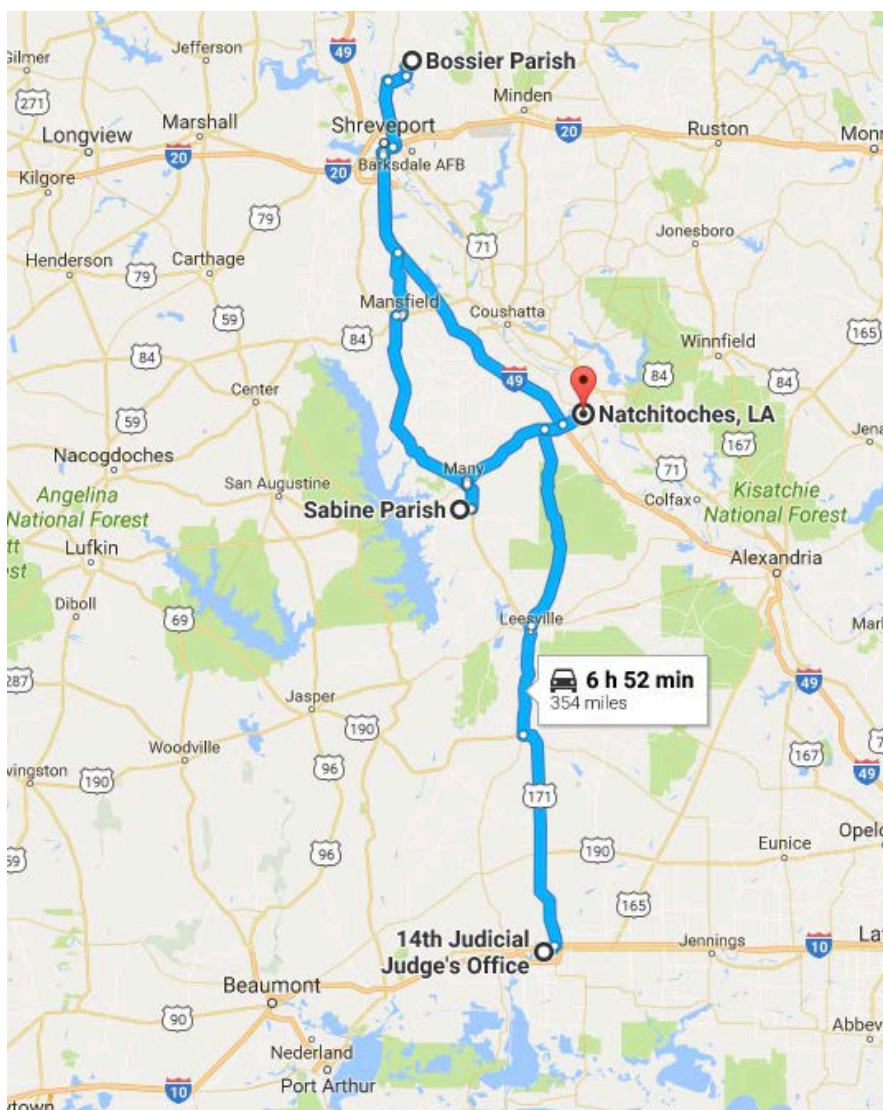
We implemented a rotating schedule for contract attorneys to attend 72 hour hearings and encourage them to see their clients at the Detention Center when they are out there. The District Defender has assisted contract attorneys in preparing for trial and trying cases. We have encouraged a team approach to trial preparation, particularly crime scene investigation and voir dire preparation.

Id. at 223. These efforts are commendable. Given them, it is curious that the defenders only tried four felony cases and tried no misdemeanor cases in 2016. But without adequate investigation resources and with a caseload that is more than twice what a lawyer should carry, it is understandable that the defenders would find it difficult to prepare for and conduct trials.

418. The 10th District reported that other than the District Defender, its “attorneys are part-time contract attorneys and would not contract if they gave up private practice to do so.” *Id.* at 221.

419. Despite having a caseload that equals 340 felonies per lawyer per year or 765 misdemeanors per lawyer per year, the District had no plans to restrict services in 2017. *Id.* at 222.

420. Howard Conday, a part-time public defender, told our observer that he handles about 200 cases a year. He also said that he works 80 hour weeks. On his LinkedIn page, Mr. Conday discusses at length his practice representing clients facing complex legal and business issues and providing management services to a hip-hop artist. He does not mention his public defense work. LinkedIn, *Howard Conday*, <https://www.linkedin.com/in/howard-conday-esq-mba-a8069547> (last visited May 1, 2017). On his Facebook page, he does feature some of his criminal work, and mentions that in one week he would have court appearances in Calcasieu Parish, Bossier, Sabine, and Natchitoches. Facebook, *Howard Conday Law*, <https://www.facebook.com/howardcondaylaw> (last visited May 1, 2017). From Natchitoches, where Mr. Conday has his office, it is about a 2.5 hour drive one way to Calcasieu Parish (Lake Charles). From Calcasieu Parish to Bossier is approximately 200 miles (3.75 hour drive). From Bossier to Sabine is about a two-hour drive. From Sabine to Natchitoches is about a 55-minute drive.



421. That a part-time defender is working in several different parishes that far apart, while maintaining an active civil practice, raises significant questions about how able he is to be prepared in all of his cases.

422. Working 80 hour weeks also is likely to lead to burnout, possible ill health and decreased efficiency. See, e.g., Department of Health and Human Services et al., *Overtime and Extended Work Shifts: Recent Findings on Illnesses, Injuries, and Health Behaviors* (Apr. 2004), available at <https://www.cdc.gov/niosh/docs/2004-143/pdfs/2004-143.pdf>.

423. The 10th District has inadequate investigation resources. The office reported that it would have to lose its one investigator in January 2015 and was not able to replace him, 2015 Board Report at 223, although one of the defenders told our observer in January 2017 that the office had one investigator. In 2016, the office reported spending \$1,530 for investigation and nothing on expert witnesses or social workers. 2016 Board report at 232. One of the lawyers told our observer that the investigator works mostly on the “serious cases.”

J. 11th District (Sabine Parish) and 42nd District (DeSoto Parish)

424. Steven Thomas is District Defender in the 11th District (17 years) and in the 42nd District (17 years). Both districts list their office as in Mansfield, Louisiana. The 11th District is Sabine Parish and the 42nd is DeSoto Parish. According to Google Maps, it is 41.8 miles between Mansfield in Desoto and Many in Sabine.



425. In the 11th District, Mr. Thomas is listed as full-time staff, with five part-time contract attorneys and three non-attorney employees and contractors. In the 42nd, Mr. Thomas is listed as full-time, with four part-time contract attorneys and three non-attorney employees and contractors. The non-attorney employees and contractors are the same people in the two districts. A cooperative endeavor agreement between the 11th and the 42nd District is the only way they have both “remained solvent.” *Id.* at 235.

426. In both districts, Mr. Thomas reviews 72-hour forms and assigns the attorneys to cases. *Id.* at 237. There were 906 new cases in the 11th District in 2016, *id.* at 244, and 931 new cases in the 42nd 2016. *Id.* at 813. That is 1,837 new client cases that he had to review and assign to attorneys. If he took no weekday days off, and assigned cases five days a week for 52 weeks, he had to review and assign 7 new cases every day. Mr. Thomas also makes the determination of a reduced rate charged to clients if they are deemed able to make a partial payment. *Id.* at 808, 239. In the 11th District Report, Mr. Thomas describes his supervisory role consulting with the lawyers on cases: “I also work individually with attorneys about strategies and approach on particular cases.” *Id.* at 240.

427. In the 11th District Report, Mr. Thomas describes as an external factor that affects the quality of the representation or the budget, the fact that juvenile clients are detained in Coushatta, Louisiana, which Google Maps says is a 39-minute drive from the District Defender Office. He wrote, “Yes, distance from clients impacts access and greatly increases costs for attorneys, mileage, etc.” *Id.* at 238.

428. Considering the limited resources in the two districts, as outlined below, and given the enormous responsibility carried by Mr. Thomas as chief defender in two districts the courts of which are more than 40 miles apart, it is impossible for him to provide effective representation to all his clients.

429. The 11th District defenders have caseloads that are 334% of the LPDB maximum, or the equivalent of 668 felonies or 1503 misdemeanors per year for a full-time attorney.

430. In the 42nd District, the defenders have caseloads that are 289% of the LPDB maximum, or the equivalent of 578 felonies or 1300 misdemeanors per year for a full-time attorney. Yet Mr. Thomas has not declared a restriction of services.

431. Asked to identify critical areas, the 11th District stated:

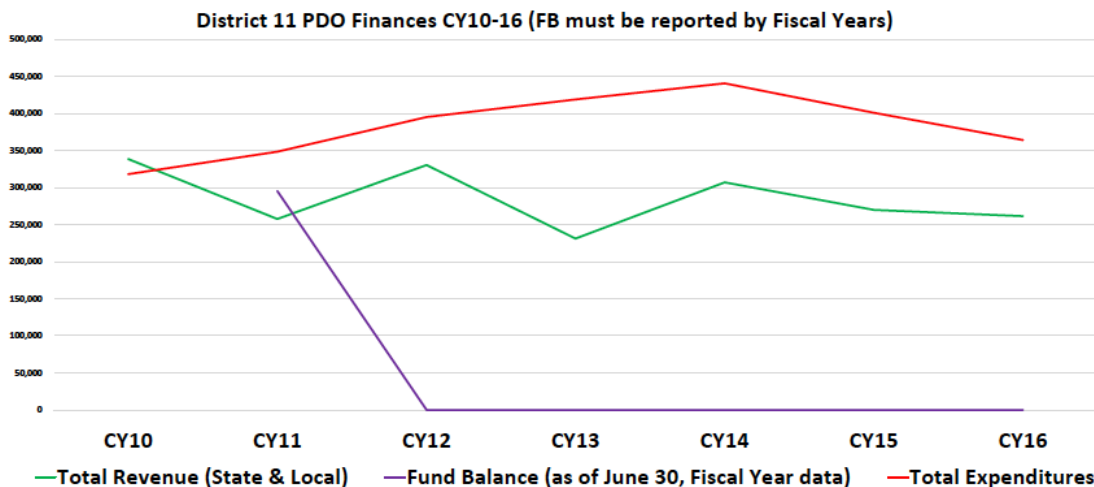
uncertainty in revenue source makes it difficult to plan and impossible to grow/improve my program. Poor revenue from Sabine is getting progressively

worse and any reduction in DAF would force us to reconsider the fairness of the agreement and practical/moral basis for continuing it.

Id. at 240. The 42nd District responded with the same language. *Id.* at 809.

432. During Calendar Year 2016, the 11th Judicial District Public Defenders Office received 906 new cases and received only \$261,246 in total revenues to handle these cases, or \$288.35 per new case. *Id.* at 235, 244. Seventy seven percent of the revenues come from state funding because “local funding is largely insufficient.” *Id.* at 235. The 11th Judicial District office’s expenditures exceed the office’s revenues. *Id.*

433. The Report displayed the following chart showing a decrease in revenue and the complete elimination of a reserve fund for the District.



Id.

434. In the LPDB Report for 2015, the 11th District reported an average caseload 5.56 times the LPDB standard. 2015 Board Report at 237. It further reported that “[r]eliance on insufficient revenues has resulted in caseloads that by far exceed established caseload limits. Excessive cases limit each defender’s ability to provide effective assistance of counsel to their clients.” *Id.*

435. An attorney representing clients in 5.56 times the number of cases considered acceptable by the LPDB would have 1,112 felony cases. With an 1800 hour year of directly representing clients, that would permit only an average of 1.618 hours per case. It is simply impossible to provide effective representation to the majority of clients with that amount of time available per client. The misdemeanor number is even more staggering. 556% of 450 equals 2,502 cases. The amount of time lawyers would have for their clients is far below what is required to represent a client effectively. Even the 1,503 full-time equivalent misdemeanor caseload in 2016 is overwhelming.

436. While the 2016 numbers are lower than those in 2015--a caseload of 3.34 times the LPDB felony maximum of 200 is 668 felonies per lawyer per year--they still do not permit the lawyers to provide effective representation to all their clients. On an 1800 year of directly representing clients, that is 2.69 hours on average available per felony, simply not enough to provide effective representation for most clients.

437. The 11th District Defender reported having 3 trials out of 269 closed misdemeanor cases, and 12 trials out of 326 closed non-LWOP felony cases. 2016 Board Report at 244. The lawyers reported winning three acquittals in bench trials. That is a good outcome for those three clients. However, the hours spent on trying cases reduce the amount of time available for other clients.

438. The 11th District contract attorneys are part-time; Mr. Thomas is listed as full-time in two districts. If one FTE lawyer handled all 326 closed felonies, which is highly unlikely, those 12 trials would have reduced significantly the time available for all the other cases. Even if they only took one day to prepare and one day to try, which would be unlikely, those trials took 24 days or 192 hours. Because we know that the

average FTE caseload was the equivalent of 668 felonies per year, we can calculate the remaining time available as if the lawyer were roughly half-time, or having an approximately 900 hour year of directly representing clients. After deducting the trial time, there would be only 708 hours for the other 314 cases, or 2.25 hours per case. In addition, the office reported carrying over 220 non-LWOP felony cases into 2016, providing a total caseload for the year of 571, as they had 351 new cases. *Id.* The actual time per case likely was significantly less than 2.25 hours, as the lawyers had some work to do on those 220 carry-over cases.

439. The 11th District reported spending only \$2,400 on expert witnesses and \$1,620 for investigators in 2016, indicating that the lawyers did not have the resources they needed for their work. *Id.* at 249. As noted above, caseload limits should be lowered when lawyers do not have adequate support.

440. The 11th District reported that in 2016 it used Fast Case and spent no money on legal research software. *Id.* at 242.

441. Our observer saw arraignments in 11th District/Sabine Parish District Court on March 16, 2017. After the judge entered a series of not guilty pleas and appointed counsel for a number of defendants, he took an hour-long recess during which two lines of defendants were formed, the guilty line and the not guilty line. The defenders in the room consulted with a handful of these defendants during the recess.

442. The judge then began taking guilty pleas from a group of defendants. For several who were charged with traffic-related misdemeanors such as speeding, he gave them a fine, five days in jail if in default, and told them they could “step out.”

443. The judge took guilty pleas from seven people charged with a variety of offenses including domestic abuse battery, violation of a protection order, theft, possession of marijuana, and disturbing the peace. These seven pleas took a total of approximately 15 minutes and while the judge mentioned the possible sentences he did not discuss the elements of the crimes.

444. Later in the day, our observer watched a preliminary hearing on a theft case that the court and the public defender conducted without the defendant present. The judge said the defendant was incarcerated. The defender said he was not here but she would proceed without him. After the detective’s testimony, the court found probable cause. While it is conceivable that the defendant for some reason had told his lawyer that he did not want to be present, the court should have inquired further and in my opinion, the court and the defender should not have proceeded in the hearing without the defendant present without a further inquiry. On another case, involving a stolen car, a gun, and methamphetamine, the defendant was not present and the defender proceeded without her. The court found probable cause.

445. I have reviewed the statement of Plaintiff Demarcus Morrow. At the time the petition was filed, Mr. Morrow had been in the Sabine Parish Jail since September 27, 2016 on charges of domestic abuse battery, simple criminal damage to property over \$500, and several drug-related offenses. Mr. Morrow faces a minimum of two and a maximum of 30 years if convicted of the charges. According to Mr. Morrow, he saw his public defender for the first time at his arraignment on October 27, 2016, more than a month after his arrest. The public defender did not meet with Mr. Morrow before or after the arraignment, and Mr. Morrow returned to jail without any information on what to expect going forward. According to Mr. Morrow, for several months following the arraignment, he had no further contact with his attorney. The attorney did not file any substantive motions and failed to oppose or respond to substantive motions filed by the prosecution. As of the date of filing this petition, Mr. Morrow had spoken only once and only briefly with his public defender. He said that he had never received a visit from his attorney at jail and he had not been able to participate in his defense. It is my understanding that Mr. Morrow recently completed a 28-day rehabilitation program in Shreveport but is now back in the Sabine Parish Jail.

1. 42nd District (DeSoto Parish)

446. During Calendar Year 2016, the 42nd Judicial District Public Defenders Office received 931 new cases and received only \$688,070 in total revenues to handle these cases, or \$739.07 per new case, which comes entirely from local funding. *Id.* at 804, 813. The Board Report explains that, “[b]y virtue of a Cooperative Endeavor Agreement with the 11th PDO following the creation of the 42nd, the fund balance of both districts is shared. With the exception of CY16, the shortfalls in the 11th have depleted gains in the 42nd.” *Id.* at 804.

447. While the 42nd District claims to be “self-reliant,” 2016 Board Report at 804, “public defense attorneys maintain caseloads almost three times the recommended caseload limits for each attorney.” *Id.* at 805. The average district defender caseload is 2.89 the LPDB maximum. *Id.*

448. The 42nd District had caseloads in 2016 that were the equivalent of 578 felony cases per year per full-time equivalent attorney. Yet the District Defender did not restrict services in 2016 and regarding 2017 wrote: “I do not foresee ROS if our revenue stream can remain constant. I have regular meetings with the Sheriff and staff, DA and staff to discuss this issue.” *Id.* at 809.

449. For all 1,349 cases handled, the 42nd District reported only \$800 in expenditures for expert witnesses, \$2,620 for investigators, \$100 for interpreters, and no expenditures for social workers. 2016 Board Report at 818.

450. The District reported a negative impact on its practice because of the distance to the detention facilities:

Does the Location of Detention Facilities Affect Quality of Representation or Budget? If So, How?	Yes, distance from clients impacts access and greatly increases costs for attorneys, mileage, etc.
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Id. at 807.

451. The District reported opening 466 Adult Misdemeanor cases in 2016, and carrying over 226 cases from 2015 into 2016. *Id.* at 813. It reported spending \$12,000 on misdemeanor contracts. *Id.* at 818. I interpret from those reports that one or two of the four contract attorneys represented clients in all of the 466 new cases for \$12,000. This is absurdly low compensation and raises questions on how many hours the lawyer(s) can spend on those cases.

452. The district reported a total of \$688,403.98 in revenue and \$426,807.28 in expenditures for 2016. *Id.* at 817-18. This yielded a surplus of \$ 261,596.7, or 61% of its operating budget. While I agree that defender offices should have a reserve fund, when their lawyers are operating at a caseload as excessive as that in the 42nd District, in my opinion they should put less money in reserve and hire more staff, including investigators and social workers. I note that the fiscal year fund balance as of June 30, 2016, appears to have been approximately \$150,000. *Id.* at 804. That indicates to me that the larger surplus was generated primarily in the second half of the calendar year. It appears from the chart showing revenue that the District had a dramatic increase in revenue in 2016 at the same time that its average caseload per lawyer increased from 2.52 to 2.89. When the revenue was increasing so substantially, the office should have increased its staff. If building a reserve fund was judged to be a priority, that would be even greater support for declining new case assignments.

453. Charles H. Kammer, III is listed as a contract attorney in the 42nd District. A Charles “Pete” Kammer III is listed as a founding partner of a law firm in Shreveport, which is about a 40 minute drive from Mansfield. The web site states:

Pete offers his services in domestic litigation, divorce, property partition, custody, alimony, adoption, wills, successions, white collar crimes, misdemeanors, felonies, business and corporate litigation, and personal injury.

Kramer & Huckabay Law Firm, Ltd., *Lawyers who Fight for You*, <http://kandhlawoffice.com/who-we-are> (last visited May 1, 2017).

454. Mr. Kammer's partner in the firm is listed as Pugh "Sonny" T. Huckabay, III. On the firm's website, Mr. Huckabay describes his practice as follows: "He dedicates his practice to domestic litigation, divorce, child custody, property partition, alimony, wills, successions, white collar crimes, misdemeanors, and felonies. *Id.*

455. Avvo.com lists Mr. Huckabay as having a 50% general practice and 50% family practice. Avvo, *Pugh Huckabay*, <https://www.avvo.com/attorneys/71101-la-pugh-huckabay-4340692.html> (last visited May 1, 2017).

456. The 2016 Board Report lists Pugh H. Huckaby, III, as one of the 42nd District's contract lawyers. 2016 Board Report at 810. I recognize that the Board Report's spelling is different than the law firm's spelling but I believe it is the same person.

457. The Louisiana Bar Directory lists a Pugh T. Huckabay III. There is no Pugh Huckaby listed. Louisiana State Bar Association, *LSBA Membership Directory*, <https://www.lsba.org/public/membershipdirectory.aspx> (last visited May 1, 2017). The Bar Directory also lists Charles H. Kammer III in Shreveport. *Id.*

458. The breadth and diversity of those two lawyers' practice are such that they are not likely to have much time for their defender clients whose cases are in court a 40 minute drive from their office.

459. Given the responsibility that the Chief Defender has for two different districts, the excessive caseload in each, and the lack of resources in each, the 42nd District's ability to provide effective representation to most of its clients is severely limited. The decision not to limit new case assignments raises ethical concerns.

K. 12th District (Avoyelles Parish)

460. In the 12th District public defense attorneys maintain caseloads nearly one and a half times the recommended caseload limits for each attorney. 2016 Board Report at 253.

461. During Calendar Year 2016, the 12th Judicial District Public Defenders Office received 2,404 new cases and received only \$341,480 in total revenues to handle these cases, or \$142.05 per new case. *Id.* at 261, 252. The 12th District observed in its 2016 report that it "has nearly exhausted its fund balance. Additional state supplemental assistance in previous years has prevented insolvency, however without a reliable increase in revenues or reduction in expenditures, the office will deplete its small fund balance and eventually become insolvent." *Id.* at 252.

462. In 2015, the office handled 2,928 cases and 2,688 cases in 2016 but reported no expenditures for expert witnesses, investigators, interpreters or social workers. 2015 Board Report at 25, 267; 2016 Board Report at 252, 266.

463. In 2016, the office tried 33 misdemeanors out of 1181 closed cases (including 13 acquittals) a trial rate of 2.79%. 2016 Board Report at 261. It tried 5 non-LWOP felony cases out of 639 closed cases, a trial rate of less than 1%. *Id.*

464. One of the part-time contract attorneys told our observer that the Avoyelles public defender cannot afford experts for their clients. He mentioned a case involving two constables who shot a young autistic boy. One constable was represented by private counsel and the other by the defender. The defender told the judge they needed an expert; the judge said the defender had to pay the expert fees out of its budget, but the defender does not have the money for expert fees.

L. 14th District and 38th District (Calcasieu and Cameron Parishes)

1. 14th District (Calcasieu Parish)

465. The 14th District reported at the beginning of 2017, "The 14th Judicial District office is not currently engaged in deficit spending. However revenues are largely insufficient, resulting in attorney caseloads which exceed client representation standards." *Id.* at 286.

466. The District reports attorney caseloads that were 2.28 times the LPDB maximum, *id.* at 287, which translates to 456 felonies per year for a full-time attorney. Despite that, the District did not restrict services in 2016 and did not anticipate restricting services in 2017. *Id.* at 291. The Chief Defender told our observer on January 9, 2017, that his attorneys have upwards of 300 cases in each section of court.

467. The District has significant conflict of interest issues.

468. The 14th District, through the Chief Judge, is asking law enforcement officials to collect money from the Defender clients to pay the defenders. This poses serious problems regarding the relationship between the Defender and its clients and raises at least the appearance of a conflict of interest, as the law enforcement officers are witnesses in the Defender cases. The idea of an armed sheriff going to a client’s house to ask for money for the client’s public defender threatens the attorney-client relationship. There also is no indication of a determination that the client is able to pay the assessed fees before the sheriff goes to collect them. The 2016 Board report includes the following:

Other than funding issues, what External Factors (outside of your control) Negatively Affect the Delivery of Services in Your District?	We are having trouble collecting our application fees and partial reimbursement fees. Chief Judge Davis is attempting to set up a program where the Sheriff's Department is responsible for collecting the fees for us.
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Id. at 293.

469. Another conflict of interest issue is presented by the Defender having accepted funds from the District Attorney so that the Defender could provide counsel at an arraignment calendar. The District reported: “Because of the simultaneous court sessions, we were required to hire an attorney to attend the Hearing Officer sessions. The DA agreed to give us \$20,000 per year from his LACE fund to cover the expense.” *Id.* at 289.

470. The Defender reported carrying over into 2016 2095 misdemeanor cases, opening 2,063 new ones, and closing 2,566. *Id.* at 297. They carried over into 2016 3284 felony non-LWOP cases, opened 3477, and closed 3533. *Id.* This indicates that the defenders may not be able to keep current with their cases.

471. The District reported spending only \$1,000 on expert witnesses and no funds for interpreters or social work, while handling 13,413 cases. *Id.* at 302, 286. The office had a total of 6,761 non-LWOP felony cases and 18 LWOP cases. *Id.* at 297. Not using more than \$1,000 in expert witness resources is a sign of a failing public defense program.

472. The defenders do not have as many resources as the district attorney, according to what the chief defender and one of his staff told our observer. The Chief Defender said that each ADA has their own secretary and investigator. One of the defender staff told our observer that the defenders have one legal secretary to every two divisions of court (about six legal secretaries). She said they have four investigators. The 2016 Board Report lists 15 staff attorneys including the chief defender, and eight part-time contract attorneys. *Id.* at 293.

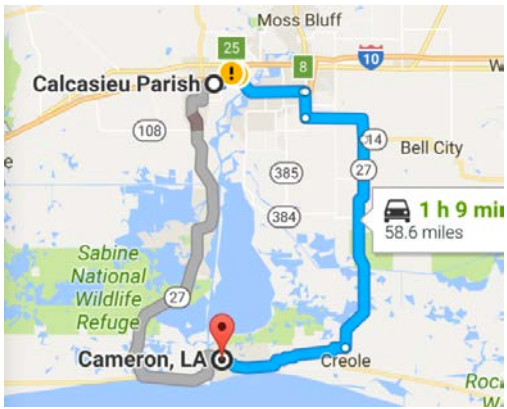
473. On January 9, 2017 our observer witnessed a woman, who was represented by a defender attorney, plead guilty to operating under the influence second offense. The judge asked the defendant if she understood that she was pleading guilty without discovery and she replied “yes.”

474. This example illustrates the practice of defenders in participating in guilty pleas when they have not been able to investigate the case or even to review discovery.

475. Harry Fontenot is the 14th District Defender (Calcasieu) and the 38th District Defender (Cameron).

476. The information in the 2015 and 2016 Board Reports supports the conclusion that having one person be the chief defender in those two districts leads to deficiencies in the provision of defender services because there is too much work for one person to do effectively. In the process, it appears that at least some of the numbers reported by Mr. Fontenot are not accurate.

477. The parish seats are 58 miles apart. Google Maps shows the following information:



478. Mr. Fontenot’s LinkedIn page has the following information:

District Defender at Calcasieu and Cameron Parish Public Defenders' Offices
Calcasieu and Cameron Parish Public Defenders' Offices
Lake Charles, Louisiana Area • 212 &

Harry Fontenot, www.linkedin.com/in/harry-fontenot-bab64840/ (last visited May 1, 2017).

479. LinkedIn provides the opportunity for a user’s associates to endorse his or her skills. Mr. Fontenot’s LinkedIn page lists 22 endorsements for wrongful death work, 16 for commercial litigation, 12 for personal injury, 10 for criminal defense, and 1 for white collar criminal defense, suggesting that criminal law is only part of his practice and that he accepts private practice clients. *See id.*

480. Mr. Fontenot is listed as a full-time staff attorney in the 14th District and in the 38th District. 2016 Board Report at 293, 732.

481. The 14th District Reported: “All attorneys employed by PD office are fulltime with no outside practice permitted. Contract attorneys are considered part-time and have their own private practices.” *Id.* at 291.

482. It would appear that Mr. Fontenot does not apply the outside practice rule to himself.

483. Mr. Fontenot is assigned all non-conflict cases in the 38th District. *Id.* at 728.

484. Because of staff cuts in the 14th District, Mr. Fontenot took on more work in 2016. The 14th District reported the following for 2016:

Explain District's Method of Assigning Lawyers to Cases in Courts/Sections	After approximately 3 months, we let the contract attorney go in an effort to conserve money. District defender Harry Fontenot has taken over these duties.
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Id. at 289.

485. And the District reported:

In CY16, have you instituted any downsizing of staff in response to a revenue-expenditure gap your district may have anticipated? If so, please list staff terminated.	We let go of the Contract Attorney handling felony arraignments. District Defender Harry Fontenot assumed those duties in order to conserve funds.
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Id. at 291.

486. The 14th District reported 3,477 new felony assignments in 2016. *Id.* at 297. If Mr. Fontenot handled arraignments for 9 months, it is likely he represented clients in 2,607 arraignments. If the court met five days a week for 36 weeks, that would mean he handled approximately 14 felony arraignments per day. Even if Mr. Fontenot spent only two minutes talking with each client and two minutes handling the actual hearing (which would be unlikely to

be enough time to provide effective representation), he would have had to spend at least one hour every day doing arraignments, not counting travel time.

487. The 14th District reported handling 13,413 cases in 2016, including 3477 adult felony and 2063 adult misdemeanor cases. *Id.* at 286, 297.

488. The 14th District reported 4,717 applications for services in 2016. *Id.* at 290.

489. The District reported 82 non-LWOP felony trials, 3 LWOP trials, and 13 misdemeanor trials. *Id.* at 297.

490. The 14th District should have declined cases as its caseload is more than double what it should be.

491. The 14th District had 14 full-time attorneys, 8 part-time contract attorneys, and 12 non-attorney employees and contractors in 2016. *Id.* at 293.

2. **38th District (Cameron Parish)**

492. The 38th District reports that “public defense attorneys maintain caseloads in compliance with recommended caseload limits for each attorney.” *Id.* at 727.

493. In 2016, the 38th District reported no expenditures for expert witnesses, interpreters, or social workers. *Id.* at 740. The 38th District did report expenditures of \$2,743.01 for conflict counsel. *Id.*

494. The 38th District reported handling 177 cases in 2016. *Id.* at 726. While it is not clear how many of those might have been assigned to conflict attorneys, it is likely Mr. Fontenot represented clients in the bulk of those cases. The District reported 59 adult felony cases, 109 adult misdemeanor and 2 juvenile misdemeanor cases pending on December 31, 2015. *Id.* at 735.

495. With 34 people to supervise, 14 of whom were full-time attorneys, Mr. Fontenot should have 1.4 FTE supervisors under him or if he were going to supervise people himself, he should not have had case work and he still needed at least another .4 FTE supervisor. And that is without even considering his responsibility in the 38th District. While his report does indicate that other attorneys have supervisory authority, none of them has any caseload or workload relief. *See id.* at 292.

496. The 38th District reported no new cases in any category in 2016 except 4 misdemeanors. *Id.* at 735. Yet it reported 96 applications for services in 2016. *Id.* at 729.

497. It is not clear how a district that had 173 cases pending on December 31, 2015, would have only four new cases in 2016. One possibility is that because Mr. Fontenot had too much to do, his report for the 38th District is incomplete and/or mistaken.

498. The 2015 Report raises other questions. The district reported having 108 adult misdemeanor and 58 adult felony cases pending on December 31, 2014. 2015 Board Report at 728. Yet it closed only 6 adult misdemeanor cases and 8 adult felony cases while opening 21 new misdemeanor and 31 new felony cases. *Id.* If the District had 58 felony cases pending at the end of 2014, and in 2015 opened 31 new cases and closed 8, it should have had 81 felony cases pending at the end of 2015. Yet it reported 59 felony cases pending at the end of 2015 and that it closed all of them in 2016.

499. If the District had 108 misdemeanor cases pending at the end of 2014 and in 2015 opened 21 new ones while closing only 6, it should have had 123 misdemeanor cases pending at the end of 2015. Yet it reported 109 pending at the end of 2015.

[Tables for the 38th District are in the **Appendix G.**]

500. The large number of cases carried over from 2014 suggests that Mr. Fontenot was not able to tend to his clients’ cases. It also is possible that because Mr. Fontenot has too many things to do, his reporting of the numbers was incomplete or mistaken. It certainly appears that at least some of the numbers were incorrect.

M. **15th District (Acadia, Lafayette, and Vermillion Parishes)**

501. The 15th Judicial District office exhausted its fund balance and began restricting services on January 1, 2016. 2016 Board Report at 305. The District described as an additional need \$1,000,000 in additional state funding “to meet workload standards and clerical assistance.” *Id.* at 310.

502. The defenders have an average caseload that is 206% of the LPDB maximum. *Id.* at 306.

503. The District reported:

These caseload averages do not include the 463 felony, two juvenile, 82 misdemeanor cases and 61 traffic related cases received during CY16 which were still on the office’s waitlist in January 2017. The district also had thousands of cases received prior to CY16 which were moved to the waitlist due to attorney layoffs.

Id. at 306.

504. The District provides in-house training and takes advantage of Gideon’s promise training. *Id.* at 311.

505. Regarding the questions in the Board Report on supervision, the district wrote:

ROS has been destructive of systemic growth, and we have lost a portion of full time and part time felony defense. Supervision and controls have been impaired due to the litigation related to judges demanding lawyers and DD along with executive staff responding to complaints from clients other stakeholders. ROS has been destructive of systemic growth, and we have lost a portion of full time and part time felony defense. Supervision and controls have been impaired due to the litigation related to judges demanding lawyers and DD along with executive staff responding to complaints from clients other stakeholders.

Id.

506. The District is able to provide health benefits: “All full time employees are enrolled for health and dental benefits after 60 days of employment. PDO pays all but \$15 of the premium cost. *Id.* at 311.

507. In response to the question what changes the district made to improve services in 2016, the Defender wrote:

None during ROS. Things are worse due to overloaded lawyers, loss of client goodwill, turnover of lawyers in full time, disorganized due to workflow overload and other factors.

Id. at 312.

508. Out of 4192 closed misdemeanor cases, the District reported 61 trials (a 1.45% trial rate), of which 22 resulted in acquittal (36%). *Id.* at 316. The District tried 18 felony cases out of 4403 closed, a trial rate of less than half of one percent. *Id.* One third of the felony trials resulted in acquittal. *Id.*

509. The District reported spending \$50, 982.38 on expert witnesses and \$49,028.21 on investigators. *Id.* at 321.

510. Our observer watched hearings in Lafayette City Court April 24, 2017. The judge collectively advised defendants of their rights promptly at the start of court but did not repeat that advice for people who arrived after 9:00 a.m. The judge told the group:

Most of you will receive a jail sentence that will be suspended and unsupervised probation. . . . You may also have a fine. If it is not paid,

your jail sentence runs at a rate of \$20 a day. For example if your \$200 is not paid, then the jail sentence is 20 days.

511. One woman who arrived late explained to the judge that she was trying to find the right building. The defendant was charged with simple criminal damage to property. The judge asked how the defendant wished to plead. The defendant paused then said, “Ummm. No contest.” After a discussion about restitution (the judge asked the ADAs whether there was anything in the file about restitution and the defendant said she'd talked to the victim and agreed to pay her for the fence], the judge accepted the defendant's plea and fined her \$210 or 21 days in default of payment with 15 additional days that were suspended during good behavior. The judge also placed the defendant on unsupervised probation for one year and imposed restitution of \$80. The public defender was conferring with clients in a private meeting space outside the courtroom so he was not present when this case was handled.

512. Another woman was charged with theft of items from Walmart. The judge asked how she wished to plead. The defendant said guilty. The judge said she accepted the plea and sentenced the defendant to a fine in the amount of \$180 or days in jail with an additional 15 days in jail suspended while on good behavior. She placed the defendant on unsupervised probation for 1 year and as a condition of probation, the defendant could not enter any Walmart. She said if the defendant is found in Walmart in the next year, she will do jail time.

513. The judge took several other guilty and no contest pleas from unrepresented people without taking a waiver of counsel and imposed similar sentences. The defender was not in the court when most of these cases were heard as he was outside talking with clients.

514. A Mr. Williams was charged with driving without a license, failure to register, and simple battery. The judge asked how he wished to plead. He said, “no contest.” The judge said, “Remember when you were here and convicted of driving with no license before and I told you if you did it again you were going to jail? This time you're going to jail, sir.” In addition to suspended incarceration, the judge sentenced him to 48 hours in jail.

515. Another woman charged with theft entered a not guilty plea. The judge asked her if she needed to speak with the public defender and set the matter for a motions hearing.

516. Our observer noted that the judge followed one of two formulas:

If defendants said they wished to plead guilty, the judge would accept the plea without asking if they had an attorney or if they wished to waive their right to one. If defendants said they wished to plead not guilty, the judge would ask whether they had an attorney, and if not, she would ask whether they wished to speak to the public defender.

517. This willingness to dispense with the right to counsel if the defendant indicates a willingness to plead guilty denies the right to effective assistance of counsel in negotiating a plea bargain and in advocating at sentencing. *See Missouri v. Frye*, 566 U.S. 133 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012).

518. These hearings indicate the problem when there is not a public defender available to advise and represent accused persons and when the court does not take an adequate waiver of counsel or an adequate guilty plea. The suspended jail sentences that the judge imposed were invalid under *Alabama v. Shelton*, 535 U.S. 654 (2002), which held that a suspended sentence that may result in jail time may not be imposed unless the defendant was accorded “the guiding hand of counsel” in the prosecution for the crime charged. *Id.* at 658. The 48-hour jail sentence violated *Argersinger v. Hamlin*, 407 U.S. 25 (1972), and *Johnson v. Zerbst*, 304 U.S. 458 (1938), as there was no valid waiver of counsel.

N. **16th District (Iberia, St. Martin, St. Mary Parishes)**

519. The District reported the following about its caseload, revenue, and restriction of services:

During Calendar Year 2016, the 16th Judicial District Public Defenders Office handled 8,500 cases. The office received \$1,752,775 in total revenues to handle these cases. Approximately 63% of the office's revenues came from

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local funding which was derived primarily from traffic tickets and special court costs. . . . Due to diminishing financial resources which prevented the office from providing the personnel resources necessary to provide effective assistance of counsel, the office began restricting services on May 27, 2016.

2016 Board Report at 324.

520. The average caseload for the defenders was 177% of the LPDB maximum. *Id.* at 325. The District added: “These caseload averages do not include the three felony cases received during CY16 which were still on the waitlist in January 2017.” *Id.*

521. The District said that its immediate needs are “Conflict free counsel and more attorneys to share the excessive caseload. Also, in need of mitigation investigators and fact investigators.” *Id.* at 329.

522. Asked to identify external factors that negatively affect the delivery of services, the Defender wrote: “The court calendar is extremely unwieldy with numerous courts in three parishes. There are often conflicting schedules. Not enough full time attorneys. St. Mary Parish houses clients in several different jails.” *Id.* at 331.

523. In 2016, the office tried 54 misdemeanor cases out of 2586 closed cases, with 24 acquittals, a trial rate of 2%, and an acquittal rate of 44.4%. *Id.* at 335. They tried 6 non-LWOP felony cases out of 1811 closed, a trial rate of less than one percent. They had one acquittal. *Id.*

524. The District reported \$20,615.05 in expert witness expenditures and \$4,988.51 for investigation, but no expenditures for social workers. *Id.* at 340. Based on the report discussed below, it would appear that the expert witness expenditures were incurred in the second half of 2016.

525. I have reviewed the National Association for Public Defense (“NAPD”) 2016 Technical Assistance Report on the Public Defender Office for the 16th Judicial District. National Association for Public Defense, *Technical Assistance Report* (June 2016), available at http://www.publicdefenders.us/files/NAPDTechnicalAssistanceReportJune2016_FINAL.pdf.

526. The Report notes: “there are no staff social workers or alternative sentencing specialists and no staff investigators for actual case investigation. Per Ms. Bonin at the time of our site visit, her office had no funds for investigators or for experts . . .” *Id.* at 12.

527. The NAPD report authors were concerned about the rarity of trials:

We are concerned about the number of adult misdemeanor and felony (non-LWOP) cases that are disposed of by guilty pleas. Since there is no funding for investigators and since most of the attorney staff works part-time, our conclusion must be that these cases are not being adequately, effectively investigated. We were also told that there was no office money to retain an expert witness, and, while there are cases that do not require the use of a defense expert, we must assume that this caseload does indeed include defense needs not only for a defense expert to support the defense case, but also for an expert to contradict/refute testimony from a state expert witness. Investigators and experts are essential, auxiliary elements of the Sixth Amendment Right to Counsel, and all the defendants in the 16th Judicial District are constitutionally entitled to receive effective assistance of counsel through the appropriate use of experts and case investigators.

Id. at 16.

528. They added: “The office culture needs to change so that use of investigators and experts is an automatic part of the attorney’s case assessment and evaluation process.” *Id.* at 24.

529. The NAPD authors expressed equal concern about the role of training:

We must also make sure that public defender staff attorneys, full and part-time, have the training and education resources to build their trial skill sets and to improve their case negotiation skills. If cases are not being tried because trial

attorneys do not possess the necessary skills to undertake extensive pre-trial motion litigation, or jury voir dire and jury trial advocacy, or sentencing advocacy through written memorandum and meaningful presentations, then the LPDB must expand its training agenda and consistently offer these essential programs for attorneys in the district public defender offices.

Id. at 16.

530. NAPD, while recognizing the office crisis caused by the restriction of services, emphasized the importance of supervision in maintaining effective representation:

[T]he district defender should make time to conduct case reviews with her attorneys so that she knows that cases are being prepared and represented consistent with ethical standards and the standards established by the LPDB. Courtroom observation of pre-trial motions, trials and sentencing hearings also afford an opportunity to provide attorneys with immediate feedback and suggestions for affirming quality representation and for improving courtroom advocacy and attorney client relationships.

Id. at 17.

531. Recommending that Louisiana move away from the reliance on local fees paid by the defendants whom defenders represent, the NAPD authors wrote:

Such reliance may encourage some offices to plead people guilty in order to increase their own anticipated revenues. It may also lead to the troubling expression of offices having a “good month” if fines and fees are up or a “bad” revenue month if those fees are down. It is defense counsel’s role to advocate against overly burdensome fines/fees imposed upon clients who may barely be able to afford food or a roof over their head.

Id. at 23.

532. The NAPD authors recommended moving from part-time to full-time attorneys and said:

When lawyers are working with clients on a full time basis, there is an opportunity to better know the client’s case and defense as well as the client’s background and sentencing mitigation factors. Full time staff would better enable the office to move from an attorney centered law practice to one that is more client centered.

Id. at 24.

O. 17th District (Lafourche Parish)

533. In the 17th District in 2016, the attorneys averaged 2.84 times the LPDB maximum, which equals 568 felonies per year for a full-time attorney. 2016 Board Report at 344. In an 1800-hour year of directly representing clients, that would yield only an average of 3.17 hours per case. That is not sufficient time to provide effective representation on a consistent basis in felony cases. That same rate for misdemeanors would result in 1,278 cases for a full-time-equivalent lawyer. That also would not allow sufficient time to provide effective representation on a consistent basis for clients.

534. The Board Report states that “[r]eliance on insufficient revenues has resulted in caseloads that by far exceed established caseload limits. Excessive cases limit each defender’s ability to provide effective assistance of counsel to their clients.” *Id.* at 344.

535. Specifically, during Calendar Year 2016, the 17th Judicial District Public Defenders Office received 3,728 new cases and received only \$819,930 in total revenues to handle these cases, or \$219.94 per new case. *Id.* at 343, 352. The 17th District states that 62% of the revenues come from local funding. *Id.* at 343.

536. For the 5,114 cases handled in 2016, the 17th District reported no expenditures for expert witnesses, interpreters, or social workers and only \$410.64 in expenditures for investigators. *Id.* at 343, 357.

537. The District reported:

In CY16, have you instituted any downsizing of staff in response to a revenue-expenditure gap your district may have anticipated? If so, please list staff terminated.	No investigator; less 1 girl in the office.
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Id. at 348.

538. In the 17th District, in Lafourche Parish on January 4, 2017, our observer noted that the defender met with clients in open court at a table that was close enough to the gallery for our observer to easily overhear the conversations between the defender and the clients. Several times, the defender asked “is there anybody in here represented by the PD office?” If someone said yes, the defender asked them to come forward and sit at the table with her, where they discussed the case for a short time. It appeared that the defender had not met with her clients before the hearing.

539. The District reports five full-time staff attorneys, six part-time contract attorneys, and four “Non attorney Employees and Contractors and Other Staff,” including the District Defender, Mark D. Plaisance. *Id.* at 349.

540. Mr. Plaisance has a private practice and on his web site advertises his appellate expertise:

The Law Office of Mark D. Plaisance serves clients in the field of appellate advocacy in both the State and Federal court systems. Cases on appeal require a specialized and often unique approach for their success.

Mark D. Plaisance, Attorney at Law *Louisiana Appeals Attorney Service*, <http://www.louisianaappeals.com/our-services> (last visited May 1, 2017).

541. Mr. Plaisance does not mention on his webpage that he is a chief defender. He lists on his webpage nine appellate cases, Mark D. Plaisance, Attorney at Law, *Previous Cases*, <http://www.louisianaappeals.com/previous-cases> (last visited May 1, 2017), only two of which were criminal. He has had several recent appellate court decisions, including *Neal v. Wascom*, 2016-CA-1230, 2017 WL 1376562 (La. Ct. App. Apr. 12, 2017), *Bourgeois v. Bourgeois*, 16-CA-676, 2017 WL 1365346 (La. Ct. App. Apr. 12, 2017), *Ernest N. Moral New Orleans Exhibition Hall Auth. V. New Limits, LLC*, 2016-CA-0706, 2017 WL 1245002 (La. Ct. App. Apr. 5, 2017), and three other cases reported on Westlaw as having been decided in 2017.

542. The District report includes the following:

Regular Meetings for Any Staff, Please Describe	When necessary called for by District Defender.
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2016 Board Report at 348. This question asks for what regular meetings occur. It appears from the answer that the staff do not meet regularly. With the number of staff and part time attorneys, the excessive caseload, the lack of resources, and the fact that the chief defender appears not to be regularly working on public defense, it would be important to have regular staff meetings to determine how best to allocate resources as well as when to declare a restriction of services.

543. Andrea Stentz is one of the part-time contract attorneys in the district. *Id.* at 349. On her law firm’s webpage, she advertises her areas of practice as follows:

Divorce . Personal Injury . Real Estate . Criminal Law Social Security . Maritime . Auto Accident
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The Law Offices of Carlton J. Cheramie & Andrea Stentz, <http://www.cheramielaw.com> (last visited May 1, 2017). Ms. Stentz is in partnership with Carlton J. Cheramie who also is a part-time contract attorney in the district.

544. Benjamin Comeaux is a part-time contract attorney in the district and on his web page describes his practice areas as follows: “As a general practitioner, our lawyer focuses on just about every practice area including family law, personal injury, business law and criminal defense.” 2016 Board Report at 349; The Law Offices of Benjamin Comeaux, *Don’t Sit Idly By as the Judge Takes Away Your Freedom*, <http://bcomeauxlaw.com/practice-areas> (last visited May 1, 2017). He lists his practice areas as follows:

- Criminal Defense
- Expungements
- Child Custody
- Divorce
- Domestic Violence
- Personal Injury
- Wills and Successions

The Law Offices of Benjamin Comeaux, *Choose a Local Attorney to Handle Your Local Case*, <http://bcomeauxlaw.com/about/> (last visited May 1, 2017).

545. Andrew Wise is listed as a full-time staff attorney for the district. 2016 Board Report at 349. There is a web page for Andrew W. Wise working “in the Houma/Thibodaux area.” Andrew C. Wise, *Protecting Rights and Preserving Freedoms of Those Accused*, <http://www.awwiseattorney.com> (last visited May 17, 2017). His web page includes the following:

In addition to criminal defense, my law firm provides advice, services and representation in these areas of law:

- **Personal injury** — Recovering compensation for victims of car accidents, truck accidents and other acts of negligence
- **Estate law** — Wills, powers of attorney, trusts, successions and other matters
- **Family law** — Divorce, child custody, child support, spousal support, division of community property and adoption
- **Social Security** — Appeals of denied Social Security Disability and Supplemental Security Income claims
- **Real estate** — Facilitating residential and commercial real estate transactions

Id. There is only one Andrew Wise listed in the Louisiana bar directory, and his address is in Thibodaux. Louisiana State Bar Association, *LSBA Membership Directory*, <https://www.lsba.org/public/membershipdirectory.aspx> (last visited May 1, 2017).

546. Maria E. Dugas is listed as a full-time staff attorney for the district. 2016 Board Report at 349. She also has a webpage for her law firm in Houma, Louisiana, in which she advertises her areas of practice as including criminal law, estate planning, wills, successions, corporate and business, and family law. Dugas Law Firm, *Areas of Practice*, <http://www.mariadugas.com/areas-of-practice.html> (last visited May 1, 2017). She offers concierge services: “Dugas Law Firm is introducing a unique brand of legal services. Concierge Legal Services provides businesses [sic] owners unfettered access to the legal services of an attorney . . .” Dugas Law Firm, *Firm Profile*, <http://www.mariadugas.com/firm-profile-1.html> (last visited May 1, 2017)

547. I note the following definitions from an LPDB publication that contemplates that full-time staff attorneys are prohibited from private practice:

“Full-Time” systems expect staff to regularly work at least 40 hours/week and prohibit attorneys handling from any private cases for compensation.

“Hybrid” systems are transitioning to full-time systems and use a combination of contract or part-time public defenders as well as some full-time attorneys with prohibited private practice.

“Contract” systems include systems where the District Defender and/or administrative personnel may be “staff” (working full-time, with no other practice or parish employees), but the majority of staff are employed via contract.

LPDB, *The State We’re In* 4 (2016). Full page with those definitions is in the **Appendix H**. On a map accompanying those definitions, the 17th District is reported as having a contract system. *Id.*

548. The District reported working on 5,114 cases in 2016. 2016 Board Report at 343. It has a chief defender who has an active private appellate practice and considers himself “other staff” at the District. *Id.* at 349. It has five “Full-Time Staff Attorneys” at least two of whom advertise an active criminal and civil private practice. *Id.* It has six part-time contract attorneys at least three of whom have an active civil private practice. *Id.* The demands of the attorneys’ private practices inevitably drain time and attention from their defender clients’ cases and make it difficult to maintain the current, specialized knowledge of criminal law and procedure defenders need.

549. The District reported carrying over into 2016 578 pending misdemeanor cases, opened 2,006 new ones, and closed only 1,927. *Id.* at 352. It carried over 538 non-LWOP felonies, opened 1207, and closed 1155. *Id.* This indicates that the attorneys are not able to keep current on their cases.

550. The District tried 13 misdemeanor cases (less than 1 % trial rate), of which 3 resulted in acquittals, and 15 non-LWOP felonies (1.29% trial rate). *Id.* They tried 4 LWOP cases out of 29 closed cases. *Id.*

551. The District has no investigator and no social worker. *Id.* at 357. They spent nothing on expert witnesses in 2016. *Id.* The lawyers worked on 39 LWOP cases in 2016, 29 of which were closed and four of which went to trial. *Id.* at 352. Even if the district apportioned the 39 LWOP cases equally to all 12 attorneys (including Mr. Plaisance), each attorney would have had at least three LWOP cases among their cases in 2016. Those cases require an average of 200 attorney hours to complete.

552. The 17th District does not have enough attorneys, support staff, and expert witness resources to provide effective representation to all their clients.

553. The 17th District is similar to others in the state in which defenders and judges minimize misdemeanors and do not adequately consider eligibility for assigned counsel. Our observer saw a case in Division C of the 17th Judicial District on March 3, 2017, in which the judge said he would not appoint counsel if the defendant (who was Spanish speaking with an interpreter) was working, because it was a misdemeanor. The defendant said, “I need an attorney.” The judge said, “I can’t refer him to an attorney. He’ll have time to look and talk to one if he pleads not guilty.” There was a public defender staff attorney, George Ledet, in court. The defendant was charged with driving while intoxicated, driving without a license, and

improper lane change. The judge continued the matter until May 23. The judge should have conducted an inquiry into the defendant's eligibility for assigned counsel, to determine whether he was automatically eligible because of receiving public assistance or earned less than 200% of the Federal Poverty Guideline, and if not, whether he was able, considering his income, debts, and expenses, to hire counsel without undue hardship. The defender should have spoken to the judge to advocate for a proper inquiry.

554. The LPDB has the following on its web site:

What are the guidelines to qualify for a public defender?

You qualify for a public defender if you are unable to afford competent, qualified legal representation on your own. You automatically qualify for a public defender if you receive public assistance (food stamps, Medicaid, Disability, reside in public housing/Section 8 vouchers, etc.) or if you earn less than 200% of the Federal Poverty Guideline, or if you are serving a sentence in a correctional institution or housed in a mental health facility. If the above criteria are not met, a more thorough examination is done, which considers the seriousness of the offense, monthly expenses, needs of dependents, and local counsel rates. You can have a job and still qualify for a public defender.

LPDB, *What are the guidelines to qualify for a public defender?*, <http://lpdb.la.gov/Advocating%20for%20Clients/Materials/Frequently%20Asked%20Questions.php> (last visited May 1, 2017).

555. In another case on the same docket, a defendant charged with driving under suspension appeared without counsel for his arraignment and the judge never discussed with him the right to counsel or whether he needed court-appointed counsel.

556. On the same calendar, a defendant pled guilty without counsel and without waiver of counsel to careless operation of a vehicle and expired driver's license. The judge sentenced her to pay fines but said that she would have to serve jail time "in default of payment."

557. On the same calendar, a defendant pled guilty without counsel and without waiver of counsel to speeding and was sentenced to pay a fine and 10 days to serve in default of payment. Mr. Ledet was seated at a table and did not participate in the proceeding.

558. On the same calendar, the judge asked a defendant charged with domestic abuse battery how he wished to proceed today. There was a pause and the judge said, "With or without an attorney?" The defendant said, "Without I guess." The judge said, "Ok, let him be arraigned." There was no colloquy on waiver of counsel. The judge said that if the defendant wanted to speak to an attorney, he should do it before the next court date.

559. On the same calendar, another defendant pled guilty to speeding, without counsel or waiver of counsel, and received a sentence of a fine and 10 days to serve in default of payment.

560. On the same calendar, another defendant appeared without counsel or waiver of counsel. He apparently had failed to appear on March 1. The judge asked where he was. The defendant said, "At home. I got in an accident. I believe I had a concussion and they just let me walk home on the side of the road." The judge asked whether the defendant had any proof of this accident. He said no. The ADA said the charges were improper lane use and an expired driver's license. The judge asked the defendant how he wished to proceed. The defendant said, "I kind of don't understand." The judge said, "Enter a plea of not guilty for him." The judge said they would set a date to discuss the case, not yet a trial. The judge said the defendant could talk to the district attorney. The judge also said that he was going to set a contempt hearing on that date because the defendant had missed court on March 1. The judge said if he had a document about the accident he could bring it then. The defendant said he didn't have such a document. Mr. Ledet was sitting at the defense table, uninvolved in this proceeding. The judge said that if the defendant admitted to the contempt, he would not be going to jail. He said he'd

get a \$50 or \$100 fine and the bench warrant would be recalled. This defendant needed counsel to advise him on the new charges, on the failure to appear/contempt charge, and to assist him in documenting the accident he said caused his failure to appear. He was facing the real possibility of jail time, and neither the court nor the public defender nor the district attorney acknowledged his right to counsel.

561. Another defendant on the same calendar earlier had failed to appear. He proceeded without counsel or waiver of counsel. The court fined him \$50 for failure to appear, with 2 days in jail if in default, for the contempt. On the charge of misuse of a temporary tag, he fined the defendant \$66.50 plus court costs, with 10 days if in default of payment. On a charge of not having motor vehicle insurance, the defendant said he had insurance but when the judge asked if he had proof, he said, "It's not mine, it's my wife's car." The judge fined him for that as well.

562. In another hearing on the calendar, that lasted three minutes, a defendant appeared who had failed to appear on March 2. The judge said, "Take her into custody." The defendant was handcuffed. There was no discussion of counsel and the defender did not intervene.

563. On the same calendar, another defendant appeared without counsel or waiver of counsel, and was arraigned on a charge of possession of marijuana.

564. In another case, that lasted two minutes, the court imposed a fine of \$50 and two days if in default for contempt for failing to appear the previous day, and allowed the defendant to apply for DA's PTI program.

565. In a hearing that lasted three minutes, again without counsel or waiver, the judge put a defendant in jail for contempt for failing to appear on two hearing dates, saying "Unless you were in the hospital or jail, you will be taken into custody." The defendant was handcuffed.

566. Mr. Ledet appeared with 12 clients on the calendar in less than two hours.

567. Mr. Ledet told our observer that overcrowding in the jail is a big problem and that he has to meet with defendants in a closet. He said that the day before he learned that a client had been transferred to a jail in Concordia. Concordia is approximately 189 miles from Thibodaux.

568. Mr. Ledet told our observer that the district has no resources, and the defender has no investigator.

569. Mr. Ledet told our observer that the attorneys have to do investigation themselves. Our observer asked if it's possible to properly investigate everything with their caseloads. He said, "Not as much as I'd like to." He said he always can get out and do some investigation when it comes to more serious felonies that he is planning on bringing to trial. He said if someone is likely to plead, he is less likely to investigate. He said it is unfortunate but they have to make choices like this about how to allocate their time. He said, "It's a lopsided battle."

570. Mr. Ledet pointed out that the district attorney's office has two attorneys in every court section, while the indigent defense office only has one attorney per section.

571. Mr. Ledet said he is not a full-time employee of the indigent defense office, that he is contracted. He said his public defense workload is "Pretty close to 50 percent." Mr. Ledet is listed in the 2016 Board Report as a full-time staff attorney. 2016 Board Report at 349.

572. Mr. Ledet said that a strength of the system was that they have "Good defenders who are sincere and work hard. And good employees who work with limited resources."

573. Mr. Ledet said, "I do it because I enjoy the work. It practically costs me money, but I enjoy the work."

574. Mr. Ledet said that he wished the state could provide laptops. He said that as he sits on the board of a bank and financially he does very well, he could buy his own laptop, which he uses in court. He mentioned that the defenders use picnic tables to interview clients in their office.

575. Mr. Ledet is secretary of the South Lafourche Bank. SL Bank, *About Us*, <http://www.slbank.com/customer-service/about-us/> (last visited May 1, 2017). He represented the bank in a lawsuit filed in March, 2017. See Carrie Bradon, *Bank alleges mortgage customer owes more than \$440,000*, The Louisiana Record (Mar. 8, 2017), available at <http://louisianarecord.com/stories/511087514-bank-alleges-mortgage-customer-owes-more-than-440-000>.

576. Mr. Ledet also represented State Bank & Trust Co in a suit in the U.S. District Court for the Eastern District of Louisiana in 2016. See *State Bank & Trust Co. claims loan payments are past due*, The Louisiana Record (Jun. 20, 2016), available at <http://louisianarecord.com/stories/510916203-state-bank-trust-co-claims-loan-payments-are-past-due>.

577. Our observer also watched proceedings in Thibodaux City Court in the 17th District, on March 2, 2017. She watched defendants pleading guilty to misdemeanors without counsel or an adequate waiver of counsel.

578. In one case, involving a charge of resisting an officer, the judge asked if the defendant understood his rights. He said yes. The judge asked if he wished to proceed with or without a lawyer. The defendant said, “Without.” The judge asked him to sign a form acknowledging this. The judge said, “It just says that you understand the rights that you are waiving.” The judge accepted his guilty plea and sentenced him to six months in jail, with 10 days’ credit for time served, suspending the balance, and one year of unsupervised probation. The entire hearing took five minutes.

579. In another case, the judge sentenced a woman who pled guilty to disturbing the peace to 90 days in jail suspended and one year of unsupervised probation and a fine and court costs totaling \$212.40. The woman said she was in nursing school. No one advised her whether this conviction would keep her from becoming a nurse. The judge read the police report and said, “I read what happened [he did not say what happened aloud] and I know you were upset, but some things you can’t do.” This raises a question of whether there might have been a defense or the possibility of avoiding a conviction that could affect the defendant’s career. During this proceeding, both the public defender and the district attorney were out of the room talking with defendants in separate conference rooms.

580. Another man, charged with disturbing the peace, said he would proceed without a lawyer; he pled not guilty. The judge had him sign the waiver form and told him to return May 22 for a trial.

581. The public defender in the court met in a conference room with incarcerated defendants. When he had completed those discussions, the judge said that he would appoint him “on these prisoners.”

582. A woman charged with discharging fireworks within city limits also said she would proceed without a lawyer. There was not an adequate colloquy or waiver of counsel. The judge asked her to “sign the rights form real quick.” After asking her what happened, and she said that her family just moved into the house on Christmas and her children were popping fireworks on New Year’s Eve, the judge sentenced her to 10 days in jail suspended, 1 year of unsupervised probation, and a fine of \$50 plus court costs. He said that in default of payment she would do 10 days in the jail. This case raises the question whether counsel could have negotiated a non-conviction resolution or prevailed at trial.

583. Another defendant was arraigned on charges of disturbing the peace and entering after being forbidden, both of which can lead to jail time. He said he would proceed without an attorney, also without an adequate colloquy or waiver of counsel. He pled not guilty and received a trial date.

584. On that calendar, public defender C.J. Cheramie represented eight defendants, either for pleas of guilty or setting the matter for trial.

585. Part-time contract defender Theresa King also appeared in the court on three cases.

586. Mr. Cheramie told our observer: “In this parish, it works good. We have a good system as far as indigent defense. We are all well qualified. We have a good chief who periodically holds meetings. It’s all going well.” He said that in the City Court, he is appointed to represent most prisoners and to discuss cases with other indigent clients. He said, “It’s efficient here. The funding is not adequate, because it’s unpredictable. But it’s a good system. The city court runs smoothly. It’s very efficient.”

587. Mr. Cheramie told our observer the court meets twice a week. If he represents 8 defendants on each calendar, that would be at least 800 clients a year, double the ACCD caseload limit for a full-time attorney. As outlined above, he also has a private practice.

588. I have reviewed the verified complaints of the named plaintiffs from the 17th District.

589. I have reviewed court records from case C-5588182 against Keith Arcement and his statement. At the time of the petition, Mr. Arcement had been held in the Lafourche Parish Jail and Concordia Parish Detention Center for five months. He was charged with drug, firearm, battery, and damage to property offenses and was facing a minimum of 10 years in prison if convicted. Mr. Arcement alleged that he had been represented by a different attorney at each stage of the proceedings against him. From my reading of the minutes in the file it appears that counsel was George Ledet at arraignment October 12, 2016, Paul Lapeyrouse for pretrial November 9, 2016, and Julie Erny on January 11, 2017. Mr. Arcement asserted that none of the attorneys assigned to his case had had a meaningful discussion with him about the charges against him, possible defenses, case strategy, or the strength of the case. He stated that none have advocated on his behalf or protected his interests beyond making their appearances in court. No motions had been filed or other efforts undertaken to investigate the charges or secure witnesses and evidence. On January 11, 2017, Mr. Arcement was brought to court for a pretrial conference. At the conference, the public defender represented Mr. Arcement and two of his co-defendants and informed Mr. Arcement that she had secured misdemeanor plea deals for her other clients. The attorney failed to disclose that her representation of the co-defendants created a conflict of interest and did not seek a waiver of the conflict or ask for another attorney to be appointed.

590. After the lawsuit was filed, Ms. Erny filed a motion to withdraw. She argued that the lawsuit caused her “to acquire a personal interest in the way she conducts her representation, *i.e.*, that counsel has an inordinate interest in conducting the defense in a manner calculated to minimize any opportunity for criticism of his [sic] efforts.” Motion to Withdraw, Case No. 558182-83. It is my understanding that the court granted the motion and that efforts are underway to find new counsel.

591. Frederick Bell was arrested on October 5, 2016. He was charged with possession with intent to distribute cocaine, possession of marijuana, possession of drug paraphernalia and various traffic offenses. He faced a minimum of two and a maximum of 300 years in prison if convicted on the charges against him. He had no lawyer at his bond setting and had three different public defenders between then and his arraignment November 3, 2016. According to Mr. Bell, at a pretrial conference, the public defender did not speak with Mr. Bell privately. Instead, she called out his name in open court, relayed the district attorney's plea offer, and asked Mr. Bell if he would accept it. Mr. Bell asked the public defender if he could see the discovery and speak to her about the case. Mr. Bell alleged that the public defender declined to provide copies of the disclosures from the State or speak with Mr. Bell any further about the plea offer. She instead ended the conversation. Mr. Bell turned down the plea offer. Mr. Bell alleged that he did not recall the name of the third public defender, did not know how to contact her, and as of the filing of the petition had not seen her since the pretrial conference. He wrote her a letter which he asked the jail to send to the public defender’s office asking for his discovery. He addressed it “to whom it may concern.” He has not received a response. As of the time of the petition, it appears no one was representing Mr. Bell as a practical matter. It appeared that none of his three public defenders had filed pretrial motions on his behalf to test the strength of the prosecutor’s case, spoken with Mr. Bell about the case in a meaningful way, or done anything more than present a take-it-or-leave-it plea offer to Mr. Bell. It is my understanding that after the lawsuit was filed, the court granted his counsel’s motion to withdraw and a similar effort to find counsel is underway as in Mr. Arcement’s case.

592. I have also reviewed material from the court file in C-549510 against the plaintiff Genaro Cruz Gomez and the statement of the plaintiff. At the time of the petition, he had been in jail since December 2015. He is charged with sexual battery. If convicted, Mr. Gomez faces up to ten years in prison. He also faces deportation. According to Mr. Gomez, although a public defender was present during Mr. Gomez's arraignment, this attorney did not meet Mr. Gomez and instead told Mr. Gomez that he was not his lawyer. Left without counsel or any explanation of the charges against him, Mr. Gomez filed a pro se motion for discovery in February 2016. The court denied that motion, noting in its order that "[b]ecause the defendant is represented by counsel, the trial court is not required to consider any motions filed by the defender in proper person." Mr. Gomez was introduced to his new attorney in March 2016. Mr. Gomez alleged that the attorney did not discuss the charges against him or explain how the proceedings would move forward from that time. There was a pre-trial hearing on September 20, 2016, at which the defender attorney was not present. There was a status conference November 16, 2016, at which the defender attorney was not present. According to Mr. Gomez, the attorney had the first of two brief visits with him in November 2016. During those visits, the attorney urged Mr. Gomez to accept a plea offer, but did not discuss potential defenses or trial strategies or the consequences of accepting the plea on Mr. Gomez's immigration status. The attorney did file a motion for discovery in February, 2017. It is my understanding that the defender moved to withdraw in this case as well, and that the matter was recessed so that new counsel could be found.

593. I have reviewed materials from the court file of Sam Ybarra in cause no. C-559995. At the time of the petition, Sam Ybarra had been held in the Lafourche Parish Jail and Concordia Parish Detention Center since November 2016. Mr. Ybarra was charged with resisting arrest and domestic abuse battery with child endangerment, charges for which he faced incarceration for up to six months. Mr. Ybarra alleged that approximately one week after his arrest a public defender came to visit him in jail. According to Mr. Ybarra, he told Mr. Ybarra about the charges he was facing. Mr. Ybarra asked questions about the charges against him, but Mr. Ybarra said that the public defender did not answer the questions and said that another lawyer would be assigned to his case. Mr. Ybarra was arraigned on December 28, 2016. The public defender at the arraignment told Mr. Ybarra to plead not guilty. According to Mr. Ybarra, he otherwise did not speak to Mr. Ybarra. The court set Mr. Ybarra's case for a pretrial conference on March 22, 2017. Mr. Ybarra alleged that he was understandably concerned that he had not had an adequate opportunity to communicate with his attorney about the alleged offense, pertinent legal and factual avenues for investigation, appropriate pretrial motions, the State's evidence, the potential penalties, or strategies for plea negotiations. Mr. Ybarra said that he had not met with a public defender since he had been told a new attorney would be assigned to his case. He did not know the name of his assigned attorney, and when he tried to call the public defender's office, he was told that the office did not accept collect calls. Mr. Ybarra wrote a letter to the public defender's office asking for someone to visit him, but he was unsure to whom he should address it as he did not know his public defender's name. As of the date of the petition, he had not received a response to his letter. It is my understanding that Mr. Ybarra's attorney moved to withdraw because the lawsuit had been filed and that Mr. Ybarra pled guilty without counsel and was sentenced to credit for time served.

594. The inattention to clients reflected in the complaints by the named plaintiffs is not surprising given the lack of resources in the defender office and the competing demands on the defender lawyers from their private practices. The practice of not having a defender talk with the client between arraignment and pre-trial hearing seems to be recognized as standard by the court, as our observer on March 3, 2017, heard the judge tell defendants there would be an attorney at the pre-trial hearing to assist them. The fact that the chief defender has a busy appellate practice, and lists himself as "other staff" makes it likely that he is not able to supervise the staff effectively and to assign cases in a way that would permit consistent representation of clients.

P. 18th District (Pointe Coupee, West Baton Rouge and Iberville Parishes)

595. During Calendar Year 2016, the 18th Judicial District Public Defenders Office received 1,463 new cases and received only \$736,483 in total revenues to handle those cases, or \$521.86 per new case. *See* 2016 Board Report at 361, 370. While the 18th District "has traditionally been self-reliant as 100% of its revenues were derived from local funding which came primarily from traffic tickets and special court costs," *id.* at 370, the District explained in its Report to the Board for 2016 that, "[b]etween FY11 and FY14, local revenues have decreased to the extent that in FY14, for the first time, the State began providing financial assistance to

help cover the gap between the district's revenues and expenditures. During FY16, 83% of the district's revenues were derived from local funding." *Id.* at 360.

596. The 18th District reported that, "[i]n the 18th Judicial District, public defense attorneys maintain caseloads less than half the recommended caseload limit for each attorney." *Id.* at 361. The District's average caseload, .42 of the LPDB maximum, is the equivalent of 84 felonies or 189 misdemeanors per full time lawyer per year. The District reported being in restriction of services in 2016. *See id.* at 365. It identified as an immediate need, "Increased funding to bring PD staff & related compensation back to pre-ROS levels." *Id.*

597. The District reported:

Contract felony attorneys are assigned to a particular division and contract misdemeanor attorneys are appointed to share juvenile and misdemeanor cases. The contract attorneys decide amongst themselves how to allocate the cases.

Id. at 363.

598. In my opinion, this is not a good way for a chief defender to assign cases. There should be a way for the Chief Defender to allocate cases based on the complexity of the case, the experience of the lawyer, and the workload of the lawyer. It also is unclear whether the Chief Defender is in a position to identify conflicts of interest and address them appropriately.

599. In addition, the District reported that the chief does little supervision of the contract attorneys and no regular staff meetings are held: "Since the attorneys are independent contractors very little hands-on supervision is required, only exception is supervisory requirements imposed by the LPDB." *Id.* at 365.

600. The district tried 18 of 467 closed misdemeanor cases, a trial rate of 3.85% (including 5 acquittals), and 7 of 760 closed non-LWOP felony cases, a trial rate of less than 1%. *Id.* at 370.

601. The 18th District reported expenditures of \$52,673.52 for investigators, but no expenditures for expert witness, interpreters, or social workers. *Id.* at 375.

602. I have read the statement of Plaintiff Joseph Allen. At the time of the petition, Mr. Allen said that he had been held in the Point Coupee Parish Jail since August 28, 2016. He faced several firearm charges and a minimum sentence of 10 years if convicted. Although an attorney had been appointed to represent Mr. Allen, it appeared that the attorney had had so little contact with Mr. Allen that the attorney allowed the Court to issue a bench warrant for his client even though Mr. Allen had never been released from prison. Had Mr. Allen not filed pro se motions seeking his release his case would have been stayed indefinitely. According to Mr. Allen, the attorney filed a boilerplate motion to suppress that referred to the wrong case and to a search warrant that was not relevant. It is my understanding that the day after the lawsuit was filed, Mr. Allen was offered and accepted a favorable plea bargain.

Q. 19th District (East Baton Rouge Parish)

603. During Calendar Year 2016, the 19th Judicial District Public Defenders Office received 8,281 cases and received \$4,300,299 in total revenues to handle these cases, or \$519.30 per new case. *Id.* at 378, 391.

604. The District Defender identified as an immediate critical issue the following: "Funding from court costs and traffic tickets has declined by more than 20% in the last 6 months and by 22% from last FY to now." *Id.* at 384. The Defender expected to need emergency state funding and wrote: "At the current rate of decline, OPDBR could find itself in the final phase of ROS before the end of FY 17." *Id.*

605. The 19th Judicial District of Louisiana was one of the districts in restriction of services during 2016. "The 19th Judicial District office nearly exhausted its fund balance and was forced to begin restricting services on March 1, 2015." *Id.* at 378.

606. The 19th district public defender's office had one felony-life without parole case and 31 other felony cases received during CY16 which were still on the waitlist in January 2017.” *Id.* at 379.

607. Even with restriction of services and putting serious cases on a waitlist, the 19th District defenders in 2016 averaged 36% more than the Board maximum caseload. *Id.* at 379. That means a per-lawyer felony caseload of 272 cases per year and a misdemeanor caseload of 612 per lawyer.

608. Based on numbers from their database, 24 attorneys are handling 3,329 new felony cases a year plus misdemeanors. *Id.* at 386-87, 391. There were 3,318 pending felony cases on June 30, 2016. *Id.* at 391. In addition, there were 28 new LWOP cases and 55 pending LWOP cases on June 30, 2016. *Id.* This is an excessively heavy caseload.

609. The Defender has a low trial rate (less than one percent), but it had some success in its trials in 2016. *Id.* It won acquittals in 5 of its 16 misdemeanor trials, and in 5 of its 22 non-LWOP felony trials. *Id.* at 391. I recognize that juries and judges vary by district, but this success indicates that trying more cases can yield positive results for clients.

610. I note that the 19th District opened 4,124 adult misdemeanor cases and 2,897 non-LWOP felony cases in 2016, a 1.42 to 1 ratio of misdemeanor to felony cases. *Id.* This indicates that, compared to other districts, the defenders more often are representing clients in misdemeanor cases.

611. Because of inadequate funding, the District had to reduce staff:

Yes, we laid off our entire investigative staff excluding our chief investigator and 1st assistant investigator. 8 attorney positions were not filled covering district and city court. Only four of those positions have been filled to date. Conflict contracts were suspended until FY 2017 began to remain solvent.

Id. at 384.

612. In addition, because of inadequate funding, the Defender “[d]iscontinued online research contract for 2016.” *Id.* at 388.

613. The District did report spending \$57,657.01 on investigation in 2016 but nothing on social work or interpreters. *Id.* at 396.

614. I interviewed the District Defender and Deputy District Defender. They told me that the office has 30 attorneys and that they did a “needs budget” several years ago showing that they would need 63 attorneys to meet national caseload standards. In January 2015, they had 49 attorneys but lost funding. The caseload has gone down only 5 % since then.

615. The District Defender said that his Municipal Court attorneys have about 1,000 cases each a year. Those attorneys are allowed to take private practice cases. I asked about what amount of time they are expected to work. The answer: “The rule is, spend the time it takes to handle the cases.” The Defender thinks they spend 2/3 to 3/4 of their time on defender work. I suggested that they would be spending 1 to 1.5 hour on average per case, and the Defender said, “probably”.

616. The 19th District staff attorneys told me that they feel that a lot of clients may not be adequately represented because of inadequate funding, and the lawyers may not have time to do more than bare bones representation. They said that private counsel will present everything so that the judge can make informed decisions. “We’re not able to do that in every case.” And they are only able to do what they can do by using students at minimum wage as intake interviewers.

617. One staff attorney told me in November 2016 that he had just under 100 open not-yet-resolved felony cases and 30 or 40 misdemeanor files. In addition, he had drug court cases for possibly 40 clients. Three to four months earlier, he had 126 felony files not including probation or revocation cases. The lawyer said he provides “a base level competency.” He added, “But it is a small level of representation.”

618. He recognizes that a client's life can be ruined by long periods in jail. The defenders "try to minimize damage." When I asked whether the lawyers are able to meet the level of representation people are entitled to, the answer was, "No." He said: "Can I be effective if the client doesn't trust me? I am checking the boxes, doing it well, working 60 hours a week." He said that maybe 100 of his 250 clients are incarcerated. He has to work 60 hours a week to reach a bare minimum. Another attorney in the 19th District told us in January 2017 that he had 145 open cases and that the workload made it difficult to conduct a motion practice.

619. The 19th District Defender and Deputy Defender told me that in the great bulk of cases, the lawyers do not go to the jail to see clients. For out-of-custody clients, a lot of discussion with the clients is at the courthouse. The deputy said they have better contact via phone. The Defender said the only way to reduce meeting clients solely at court is to reduce the caseload. They said, "You can't come back from court at 3 and go to the parish prison," which ends visitation at 4. The next opening for visits is 7:45 pm. There are limited visitation rooms as well as limited visiting hours at the jail. Some clients are held in a jail 2.5 hours' drive away.

620. One of the staff attorneys told me of a client complaint that he had not seen him in the parish prison. The lawyer said that it is a 15-20-minute drive each way to the prison, and it can take an hour and a half to two hours for a five-minute meeting with a client given the wait time at the prison. He said that the lawyers cannot make trips there for relationship-building with clients. He described a triage decision to send investigators to do the interview and then have the lawyers speaking with clients at court. He said that it is imperfect but "sufficient triage." He noted there is a difference between what he can do and what private counsel can do.

621. In the 2016 Board Report, in response to the question, "Does the Location of Detention Facilities Affect Quality of Representation or Budget? If So, How?," the District wrote:

Yes. It is inefficient. Investigators and attorneys travel long distances to meet with clients who are housed in facilities out of parish; on occasions the client will have been transferred to another facility. The monetary cost (mileage etc.) time and inefficiency is substantial. Travel time limits the number of clients who may be seen on any given visit, thus requiring repeat trips.

Id. at 381.

622. The District also reported: "Limited access to clients housed in the Parish Prison or transported without our knowledge to other parishes." *Id.* at 386.

623. The 19th District, with 2897 new non-LWOP felony cases and 27 new LWOP cases, reported spending \$20,689.59 on expert witnesses in 2016. *Id.* at 396. Dividing the total expert expenditures by only the number of felony cases yields a per capita cost of \$7.01.

624. The District implemented a student investigator program, reporting:

Implemented a student investigator intake program which has allowed the office to continue to interview, respond to, and investigate client cases with limited full time investigative staff.

2016 Board Report at 384. While I do not favor having student investigators do initial meetings with clients, I do support using properly supervised student investigators to supplement full-time investigative staff when budgets are limited. Other District Defenders could emulate this kind of effort.

625. The 19th District, while limited in its training and seeking more funding for training, provides more training than many other districts in Louisiana. It reported:

We sent 2 new attorneys to Gideon's Promise this year. We are also launching a track based training for our office to begin in February. We will start with track 1 which includes all new hires from the last 6 months, and will build on concepts as attorneys with increasing levels of experience are brought in on higher tracks. We need additional funding to send our more experienced/specialized attorneys to NCDC, TLC, and possibly GP's Train the Trainer component.

Id. at 385. Other Districts could emulate these efforts.

626. The 19th District also reports having a strong policy of regular staff meetings: “All Staff have regular meetings. Section Meetings daily or weekly, Full Attorney Staff Meetings bi-weekly.” *Id.* Other Districts should emulate this approach.

627. The 19th District also reports having a more comprehensive and effective approach to avoiding conflicts of interest than some other districts. It reports this conflicts checking policy:

Check in the state database for conflict of interest regarding witnesses, co-defendants, relatives and other cases you are representing. This can be preformed [sic] using Name search with as much information you have available in the lookup area, next, selecting related people and utilizing the duplicate function. If conflict exist transfer the case to Contract Conflict Attorneys Panel. The office provided Conflict Attorneys and Staff Attorneys are restricted from viewing the others work product in the State's DefenderData Database.

Id. at 382.

628. The District allows its defender staff attorneys to have some private practice. In my opinion, given the caseload they are carrying, they should not have anything other than an occasional pro bono private case and only after full discussion with a supervisor. The District's policy is as follows:

Attorneys may be allowed to have a very limited (noncriminal within the District) private practice. The attorney must demonstrate an ability to handle his/her caseload responsibly. The policy is under constant review. The practice is monitored and the general rule is that the private practice is acceptable so far as it does not interfere with the attorneys [sic] public defender duties.

Id. at 384.

629. I have reviewed the statement of Plaintiff Michael Carter. At the time of the filing of the petition, Mr. Carter had been in jail since August 2015. Charged with being a felon in possession of a firearm and indecent behavior with a juvenile, he faces a mandatory minimum sentence of imprisonment of 10 years and could be imprisoned for up to 20 years. Despite the seriousness of the charges against him, Mr. Carter did not have a public defender appointed to his case for nearly three months after his arrest and he said he had had virtually no contact with the attorney since the appointment. According to Mr. Carter, the only time Mr. Carter saw his attorney was in court. According to Mr. Carter, in the 18 months that Mr. Carter had been waiting in pretrial detention, he had not been interviewed by his counsel and had not been provided with any information about the evidence or strength of the case against him.

630. According to Mr. Carter, the public defender had repeatedly moved to continue all proceedings without asking whether Mr. Carter wanted to delay the case. Frustrated, Mr. Carter filed a pro se motion for a speedy trial on December 14, 2016. At the next hearing date, the matter was continued again, apparently without the court asking about his motion. It is my understanding that on March 14, 2017, a defender attorney whom Mr. Carter had no met previously described a plea bargain offered to him, which he declined, and that the matter is set for a hearing on May 22, 2017.

R. 20th District (West Feliciana and East Feliciana Parishes)

631. During Calendar Year 2016, the 20th Judicial District Public Defenders Office received 898 cases and received only \$310,866 in total revenues, approximately 63% of which came from local funding, to handle these cases, or \$346.18 per new case. *Id.* at 399.

632. The 20th Judicial District of Louisiana was one of the districts in restriction of services during 2016:

The 20th Judicial District office nearly exhausted its fund balance which had been in steep decline since CY10 forcing the office to enter service restriction on January 1, 2015. Expenditure reductions and increased revenues have allowed the

district to begin accruing a fund balance. LPDB and the 20th district PDO will continue to monitor the office's revenues and expenditures to determine if the office can exit service restriction.

Id.

633. The Defender identified as immediate needs: "Money, adequate staff, investigator, new copiers, scanners." *Id.* at 404.

634. "In the 20th Judicial District, public defense attorneys maintain caseloads more than two times the recommended caseload limit for each attorney." *Id.* at 400. The average caseload is 234% of the LPBD maximum, or the equivalent of 468 felonies or 1053 misdemeanors per year per attorney.

635. The Director, Rhonda Covington, is the only full-time staff person. *Id.* at 405. She has two part-time contractors. *Id.* The three attorneys had 692 open cases as of November 18, 2016. *Id.* at 408.

636. One of the contractors, who works about 20 hours a week for the Defender, works in another job full-time in the state mental health system.

637. The chief defender, who was profiled in The Guardian, *Meet Rhonda Covington, the only public defender for Louisiana's 20th judicial district*, available at <https://www.theguardian.com/us-news/video/2016/sep/09/rhonda-covington-public-defender-louisiana-east-west-feliciano-video>, reported the following when asked if she received any funding from the optional \$20 court costs provisions for Mayor's Courts:

Not yet. I haven't had time to visit the mayors and talk to them about this. I can't be the main attorney, the DOC attorney, bookkeeper, complete monthly reports, the maid, and District Defender. Hopefully, I can do this in 2017.

2016 Board Report at 403.

638. She also reported regarding external factors that negatively affect the delivery of services:

Judges and DA wanting to schedule jury trials on cases before I have an opportunity to prepare. Judge Jones is scheduling jury trials 4 months from arraignment and NO continuances. I don't have the staff to adequately defend these people that quickly.

Id. at 405.

639. The District reported difficulties in seeing clients in detention:

It is difficult to contact clients who are housed in other parishes except by phone which limits the content of the conversation. We spend time traveling, I am now also paying mileage which increases our expenses. . . . Sometimes in East Feliciana -- the jail is understaffed and they have no one to get the inmate for us and no one to remain outside the door when we talk to them.

Id. at 402.

640. Ms. Covington noted that she now has a five-defendant case for which she had to hire two additional counsel. Another case had four clients. Sometimes she has to go to Baton Rouge to find lawyers. She said smaller districts cannot afford to hire staff investigators. She notes that she is always trying to find rehabilitative services for clients and that there is no drug court in her district. She has no staff social workers like Orleans does.

641. In any given month, the chief defender does not know how much money she will receive from tickets which is the bulk of her budget. She may have \$12-14,000 one month and then \$4,000 another.

642. The office provides no insurance or retirement. The office does not pay for Ms. Covington's CLE training. She does not provide training funds for the part-time attorneys.

643. Ms. Covington works about 220 hours per month. That is a work year of 2,640 hours, which is far above a reasonable amount. It is more than 50 hours a week with no vacations, no holidays, no sick leave. Ms. Covington herself had 266 cases open, including 5 LWOP cases, 133 felony, 15 juvenile, and 97 misdemeanor cases. She had had 312 cases assigned to her when I met with her in November. In addition to her caseload, she had to tend to administrative matters including the reports to the Board. As of November 17, 2017, Ms. Covington had received 135 felonies, 5 LWOP, 15 juvenile, and 104 misdemeanor, and 16 Traffic cases. If one counts the LWOP cases as more than one, she has more than a full time felony caseload, plus a little more than a 1/4 misdemeanor caseload, in addition to her director duties.

644. According to the Delphi Panel opinion published in the Louisiana Project workload report, an LWOP case requires 200.67 attorney hours. Based on that estimate, those five cases alone on Ms. Covington's caseload should take more than half of her time.

645. When I asked Ms. Covington whether she was able to provide effective representation to all of her clients, she said, "Absolutely not. It keeps me awake at night." Ms. Covington says to be effective she should have 5 or 6 attorneys, as the District Attorney does.

646. The Legislative Auditor Report lists the 20th Judicial District DA expenditures as \$1,206,896. Louisiana Legislative Auditor, *Evaluation of Revenues and Expenditures--Louisiana District Attorney Office* Appendix D1 (July 28, 2016), available at [http://app.la.state.la.us/PublicReports.nsf/0/C2BCC8AAB97CC3FC86257FFE004E34E6/\\$FILE/0001047A](http://app.la.state.la.us/PublicReports.nsf/0/C2BCC8AAB97CC3FC86257FFE004E34E6/$FILE/0001047A). The Defender expenditures in 2016 totaled \$237,712.28. 2016 Board Report at 413.

647. Ms. Covington reported that the DA has a federal grant for Drug Awareness for \$690,000 as well as grants for truancy work.

648. Ms. Covington does not have time to go to jail to see clients upon initial appointment. Her part-time assistant and the law student see clients. She will see clients in jail after receiving the police report. While I was visiting the 20th District office, Ms. Covington's law student, who works on Fridays for \$10 per hour, arrived, having interviewed the newly appointed clients. He had 11 new files that day, six of which were felonies. He reported urgently about a young client who needed \$400 for a bond on a 2015 theft and failure to appear but who did not have the \$400. After being briefed by the law student, Ms. Covington was able to secure the client's release on recognizance. This incident illustrates the volume of new cases the office regularly receives, the reliance on a law student to conduct initial interviews, and the impact a lawyer can have when the lawyer acts quickly for a newly incarcerated client.

649. Because of the lack of resources and the heavy caseload, Ms. Covington's office is closed most of the time.



650. For 2015, the office reported no expenses for investigation. *Id.* at 412. As of mid-November, the Defender had used an investigator only once in 2016. While working on 1,164 cases in 2016, the 20th District reported expenditures of only \$600 for expert witnesses, \$1,400.36 for investigators and no expenditures for interpreters or social workers. *Id.* at 399, 412. The LPDB wants Ms. Covington to use licensed investigators and it is hard to find investigators willing to come to her parish. She notes that the lawyers do their own investigations, and that she loaned one of her attorneys her personal camera for a murder investigation.

651. The Chief Defender told me that she had money for the DNA expert witness she needed for a trial in December. But up to that point in 2016 this year she had hired no experts, and “we try our best not to use any.” She said, “We’re doing this on a shoestring budget.” This is an unacceptable position for a defender to be in.

652. Despite the heavy caseload and the lack of resources, the 20th District Defender has a higher trial rate than many other districts. They reported trying ten misdemeanors out of 503 closed cases (approximately a 2% trial rate), with 3 acquittals, and 6 non-LWOP felony cases out of 247 closed cases (approximately a 2.2% trial rate), winning 5 acquittals. *Id.* at 408.

653. I observed court in West Feliciana on November 17, 2016. There were three prosecutors and one defender, Cy D’Aquila, who is a part-time contract defender.

654. The judge permitted defendants who had negotiated with the prosecutor (before waiving counsel) to proceed pro se on misdemeanors without a Faretta colloquy. She allowed one defendant on a felony to be arraigned pro se without a colloquy but said she would do the colloquy at the next hearing.

655. Mr. D’Aquila had ten cases on the calendar, including two juvenile cases which I could not observe because the judge closed the courtroom for those cases. The ten included two in which he was appointed by the judge in the court when a defendant being arraigned asked for counsel.

656. Mr. D’Aquila told me that the ten hearings for him was a light calendar, and that he has had as many as 30 in one day. He sometimes learns of the appointment when he gets to court, and, as I saw, he sometimes is appointed in the court.

657. He has no written contract, and is paid \$38,500 a year to do all the cases he is appointed to by the district defender Ms. Covington.

658. Asked if there are too many cases, he said, “Yes and no. It can be at times.” He said, “We’re definitely underpaid.” He says they have no access to any other resources. They have to do all investigation themselves. He says he is crafty, having a good relationship with the detectives and officers and sometimes he will ask them to interview a witness and report back to him. He said it would be nice to have someone who could go get statements from witnesses. He said it possibly would help to have a social worker because so many of the clients have psychological issues.

659. He has never asked the court to appoint an investigator or an expert witness.

660. Mr. D’Aquila spends about 1/3 of his time on his defender work. When I met with him, according to a printout provided by his paralegal, he had been assigned 186 cases. That is an annual rate of 194. Of these, 85 were felonies, 2 were felony LWOP, 8 were juvenile, 78 were misdemeanors, and 13 were civil commitment cases. These are forced medication cases, not traditional civil commitment cases, for prisoners. The annualized rate of 88 felonies would be .59 FTE of a caseload using the ACCD 150 per year per attorney caseload standard. The annualized rate of misdemeanors, 81, would be .2 FTE of the 400 per year standard. At 1/3 time, he is doing .79 of an FTE workload not counting his juvenile and forced medication work, which puts his caseload well over what an 80% FTE attorney should have. And he was assigned 2 LWOP cases, which should be counted as more than one case each. His caseload is approximately 240% of what it should be at 1/3 time.

661. Ms. Michelle Duncan, the other part-time contract lawyer, has been assigned 86 felonies, two LWOP felonies, 33 juvenile, 114 misdemeanor, 1 PCR, and 9 others in revocation and traffic. Ms. Duncan’s caseload would require, under the ACCD standards, .6 of a felony Affidavit of Robert C. Boruchowitz - 92

attorney plus .26 of a misdemeanor attorney, about 15% of a juvenile attorney, before even counting the other matters. The two LWOP felonies should be counted as more than two cases as well in determining workload. She, therefore, has approximately double the caseload she should have.

662. Mr. D'Aquila has had no formal training to be a defender, other than attending an occasional CLE seminar and having had a clinic in law school. Nor does he receive continuing training for defender work. He started doing defender work after about a year and a half in practice and has been doing it since 2009. He was in practice with his father who has a defender contract in a neighboring district. He was unaware of the Gideon's Promise training program until I mentioned it to him. He has not attended any training presented by the state defender board.

663. He estimates that he has done eight jury trials in seven years and 40-60 misdemeanor bench trials.

664. I asked about one of the cases on the docket of a prisoner who asked for counsel and for whom the judge appointed the indigent defense board, not Mr. D'Aquila and Mr. D'Aquila did not talk with the defendant. Apparently for some DOC prisoners at Angola, the DOC will pay \$150 an hour for whatever attorney the judge appoints. Ms. Covington had been getting appointed to these cases individually, which supplemented her income. But given the financial troubles the office is having, according to Mr. D'Aquila, she has asked the judge to appoint the office, and even though she will do most of the cases, she is funneling the payments for the work to the office so she can maintain the office.

665. Mr. D'Aquila told me he has a similar arrangement with the "civil commitment cases" he does for Angola prisoners and he gives the money to the office as well. Ms. Covington told me that those cases are paid at a flat fee of \$1000 per case.

666. This is an example of the court recognizing the value of paying a reasonable hourly rate for client representation.

667. Mr. D'Aquila said that for the past three or four years, they have not had funds for experts.

668. He filed a writ of mandamus against the sheriff in East Feliciana to make him provide the defender affidavits of probable cause. The judge granted the writ. Mr. D'Aquila told me he did the civil writ pro bono. I view that work as integral to defender work.

669. Mr. D'Aquila mentioned the difficult situation for defenders when the DA offers diversion to their clients, as the diversion may be best for the client but will result in no money for the defender office.

670. He noted that Ms. Covington had persuaded the East Feliciana police jury to fund Ms. Duncan's salary, and that when she made a similar plea to the West Feliciana authorities, they "laughed at her."

671. I have reviewed the statement of Plaintiff James Park who at the time of the filing of the petition had been in prison since August 2015 following his arrest for first degree rape. Over the next eighteen months, it appeared that the public defender had done nothing to test the sufficiency of the charges against Mr. Park. The only motion filed by the public defender was a generic motion for discovery. Mr. Park has met with his attorney twice, once in September 2015 and once in January 2017. Both visits were perfunctory and lasted less than five minutes. His only other contact with his lawyer has been in court. The case against Mr. Park was originally set to go to trial on April 25, 2016, but has been continued and reset several times. It is my understanding that Mr. Park has met with a paralegal from his lawyer's office who discussed the possibility of hiring an investigator, and that the matter now is set for trial in August 2017. I note that I have reviewed minute entries from file no. 2015-CR-000581, in which the defendant's name is spelled Parks.

S. 21st District (St. Helena, Livingston, and Tangipahoa Parishes)

672. During Calendar Year 2016, the 21st Judicial District Public Defenders Office received 14,427 new cases and received only \$2,955,077 in total revenues to handle these cases,

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or \$204.83 per new case. 2016 Board Report at 416, 427. The Board reported “handling” 14,014 cases, but it appears that there may be errors in their caseload chart resulting in mistaken totals. *See id.* at 416. For example, the District reported 1,529 pending misdemeanors at the beginning of 2016, 6,945 new ones, for a total of 5,059. *Id.* at 427. The District reported that “[d]uring Calendar Year 2016, the 21st Judicial District office’s expenditures exceeded the office’s revenues.” *Id.* at 416. The 21st District explained that “caseloads remain high due to insufficient revenues.” *Id.* at 417.

673. “In the 21st Judicial District, public defense attorneys maintain caseloads more than twice the recommended caseload limit for each attorney.” *Id.* at 417. The average attorney caseload is 227% of the LPDB maximum, which is equivalent to 454 felonies or 1021 misdemeanors per lawyer per year. *Id.*

674. Despite this excessive caseload, the District did not restrict services, nor did it anticipate restriction of services in 2017. *Id.* at 421.

675. The District represented clients in more than 14,000 cases in 2016, yet reported expenditures of only \$3,500 for expert witnesses, and \$40,727.89 for investigators, and no expenditures on interpreters or social workers. *Id.* at 432.

676. The office has a low trial rate. It reported 5 non-LWOP felony trials out of 3275 closed cases, and 15 misdemeanor trials (including 4 acquittals) out of 3222 closed cases. *Id.* at 427.

677. The office permits civil trial practice for all its attorneys, including its full-time staff who have excessive caseloads. It described its private practice policy as follows:

Primarily staff -Full-time may have civil practice but no criminal practice inside the district. Contract Attorneys not full-time staff, may have both criminal & civil practice.

Id. at 421.

678. One of the attorneys listed as full-time staff is Shaan Aucoin. Her law firm web page states:

Shaan joined the law firm of CC&S as an associate in 2003. She also spent approximately 4 years with the Office of the Public Defender for the 21st Judicial District.

Cashe Coudrain & Sandage, *Shaan Aucoin*, <http://www.ccsattorneys.com/our-attorneys/shaan-aucoin/> (last visited May 1, 2017). It is unclear whether there is a mistake in the web page or in the District’s report to the Board.

679. Taylor Glass is also listed as a full-time staff attorney. His LinkedIn page includes the following:

Experience



Attorney

E. Taylor S. Glass, Attorney at Law
Jan 2015 – Present • 2 yrs 4 mos

Family Law, Wills and Successions, Notary Work

See less ^



Assistant District Defender

21st JDC Public Defenders Office
Oct 2014 – Present • 2 yrs 7 mos

LinkedIn, *Taylor Glass*, <https://www.linkedin.com/in/e-taylor-glass-86ab8bbb/> (last visited May 1, 2017).

680. In my opinion, a defender attorney who is “full-time” and has an average caseload more than double the LPDB maximum should not have a private civil practice.

681. The chief defender in the 21st District is Reginald McIntyre. In 2004, he was publically reprimanded by the Louisiana Supreme Court, following a joint petition for consent discipline resulting from an investigation of a complaint that he neglected his client's matter and failed to communicate with his client. *See In Re: Reginald J. McIntyre*, No. 04-B-0943, available at <http://www.lasc.org/opinions/2004/04b0943.pc.pdf>.

T. 22nd District (Washington and St. Tammany Parishes)

682. During Calendar Year 2016, the 22nd Judicial District Public Defenders Office received 7,862 new cases and received only \$2,681,933 in total revenues to handle these cases, or \$341.13 per new case. 2016 Board Report at 435, 448. The District "has nearly exhausted its fund balance as expenditures typically exceeded the office's revenues. The office was expected to become insolvent towards the end of FY16, however revenues slightly exceeded expenditures during CY16 because of expenditure reductions made by the office." *Id.* at 435.

683. "In the 22nd Judicial District, public defense attorneys maintain caseloads more than two times the recommended caseload limit for each attorney." *Id.* at 436. The lawyers average 2.44 times the LPDB maximum caseload, which is the equivalent of 480 felonies or 1098 misdemeanors per attorney per year. *Id.*

684. Despite this excessive caseload, the District does not expect to restrict services in 2017. *Id.* at 442.

685. Unlike most districts, the 22nd District provides 13 hours of in-house training and plans to send three attorneys to the Gideon's Promise training this year. *Id.* at 442.

686. Unlike many districts, the office provides health and dental insurance to full-time staff. *Id.* at 443.

687. The District closed fewer misdemeanor cases (1768) than it opened (1970) and fewer than it carried over into 2016 (1997). *Id.* at 448. It closed fewer felonies (2097) than it opened (2657) and it carried over 1499 felonies from 2015. *Id.* These numbers indicate that the lawyers had difficulty keeping current with their caseload.

688. The District had a misdemeanor trial rate of less than 1 percent. *See id.* It recorded 5 acquittals out of 16 trials. *Id.* It had a felony trial rate of about 1.2 percent and recorded 4 acquittals out of 25 trials. *Id.*

689. As reported to me by one of the observers, in the 22nd District's St. Tammany Parish Court Section A on January 5, 2017, the public defender represented 31 defendants on arraignments in approximately a three-hour period. Even assuming that the defender was able to work the entire three hours continuously, that yields only 5.8 minutes per client for a conference with the client, reviewing whatever material the prosecutor and the court had before them, handling the hearing for the client and explaining to the client what happened. Our observer noted that for the in-custody defendants, the defender met each of them in open court when they were called and did not attempt to talk to them before then. One defendant, after a two-minute meeting with the defender, stipulated to a violation of probation and revocation. He audibly told the defender that he had been brought back and forth from jail to court and nothing had happened.

690. The excessive caseload can lead to lawyers making questionable decisions. In St. Tammany on January 5, 2017, our observer reported observing a case of an in-custody defendant who had not been brought to court. The judge, defender, and assistant district attorney discussed whether the defendant would be put on probation. The defender then said "well, it's not a trial, so I can waive her presence and ask you [the judge] to put her on probation." The judge declined to do that without the defendant being present.

691. In 2015, although the office handled 14,909 cases, it spent only \$11,859 on investigators. 2015 Board Report at 451. In 2016, it reported spending 20,910.03 on investigation. 2016 Board Report at 453. The office reported handling 15,148 cases in 2016 and stated that it needed two additional investigators. *Id.* at 435, 442. In 2016, the 22nd District reported expenditures of \$21,488.55 for expert witnesses and \$20,910.03 for investigators and no expenditures for interpreters or social workers. *Id.* at 453. The District reported hiring an investigator and was seeking to hire another. *Id.* at 442.

692. The office listed 21 full-time staff attorneys. It reported hiring five new attorneys to replace those who resigned in 2016. *Id.* at 442. That is a turnover rate of 23.8%, which is significant. That rate of turnover can affect how often a case is continued, can result in the need for more training and supervision, and if the lawyers leaving are more experienced, it can make it difficult to provide representation for clients charged with the most serious cases. The office had 14 new LWOP cases in 2016 and carried over 22 from 2015. *Id.* at 448.

693. On January 5, 2017, in St. Tammany Parish, our observer reported seeing the defender talking with defendants in open court and that it did not appear that the courtroom had any space in which an attorney and client could speak privately.

694. On January 5, 2017, a judge in St. Tammany Parish told our observer that he did not know how “we could provide adequate services with so little money.” He said that many defenders leave after only a few years to take higher paying private defense jobs. He said that in the last three years he had gone through two prosecutors and four defenders in his courtroom.

U. **25th District (Plaquemines Parish)**

695. During Calendar Year 2016, the 25th Judicial District Public Defenders Office received 559 new cases and received only \$253,930 in total revenues to handle these cases, or \$454.26 per new case. *Id.* at 493, 503. “Since the inception of Act 578 (2012), local revenues associated with court costs have been unstable and erratic apparently due to irregular remittance schedules. . . .” *Id.* at 493. Approximately 62% of its revenue came from local funding, primarily from traffic tickets and special court costs. *Id.*

696. The 25th District was one of the districts in restriction of services during 2016. As stated in the Board Report for 2016:

The 25th Judicial District office exhausted its fund balance as the office's expenditures exceed the office's revenues. Insufficient personnel and fiscal resources forced the 25th Judicial District office to begin restricting services September 2015. Although the office implemented several procedures to reduce expenditures and attempt to increase revenues, the office faced a fiscal crisis and was briefly forced to close it's [sic] doors in February of 2016. The office reopened after receiving emergency bail out funds from the state office.

Id. at 493.

697. The 25th Judicial District Defender, Clarke Beljeau, also has too many cases. Based on the numbers he provided to me, he has a caseload equivalent to about 1.2 FTE workloads not counting his three LWOP cases, which probably should be counted as at least another third of a workload. He had 102 open, pending cases plus 22 that were pending acceptance and under investigation by the DA. This number of open cases is more than double what I consider to be an effective level. And this workload does not include his job as director, which requires office management, communications with the Board, external advocacy for the office with local government and law enforcement officials, and contract administration regarding his two contract attorneys. I would emphasize that the ACCD “caseload limits reflect the maximum caseloads for full-time defense attorneys, practicing with adequate support staff, who are providing representation in cases of average complexity in each case type specified.” Mr. Beljeau does not have adequate support staff, and three LWOP cases skew the average complexity of his caseload.

698. In 2015, the office reported spending no money on investigation. The Director did not recall using an investigator in 2016. *See* 2015 Board Report at 504. He says the lawyers do a lot of investigation themselves by calling people. He said that they use investigators for “heinous” crimes, sex crimes, the rare armed robbery, but when I visited in November 2016, they had not spent any money on investigation, and the office does not have a staff investigator.

699. The District reported difficulty visiting incarcerated clients:

Our Detained Clients are housed at Plaquemines Parish Prison in Davenport, LA. This sometimes makes it very difficult to drive the two hour round trip to access our Detained Clients. Additionally, the sheriffs [sic] office is understaffed which causes delays in transporting clients to the meeting [sic] area.

2016 Board Report at 496.

700. The office does not have a sophisticated conflicts-checking system. It described its approach as follows:

Review initial reports at magistrate bond setting for obvious conflict. Attorneys then self-report conflicts as they arise. If funds are available, outside conflict counsel is retained. If not, Client is put on a waiting list maintained in accordance with ROS standards.

Id. at 496.

701. The office provides no medical benefits to employees. *Id.* at 498.

702. The office uses FastCase for legal research. *Id.* at 501.

703. The office tried 3 misdemeanor cases out of 308 closed cases, winning 2 acquittals, and tried no felonies out of 188 closed cases in 2016. *Id.* at 503.

V. **26th District (Webster and Bossier Parish)**

704. During Calendar Year 2016, the 26th Judicial District Public Defenders Office received 9,907 new cases and received only \$1,600,158 in total revenues to handle these cases, or \$161.52 per new case. *Id.* at 511, 522.

705. The 26th District was one of the districts in restriction of services during 2016. “The 26th Judicial District office nearly exhausted its fund balance as the office’s expenditures exceeded the office’s revenues. Insufficient personnel and fiscal resources forced the 26th Judicial District office to begin restricting services March 4, 2015, effectively closing the gap between expenditures and revenues.” *Id.* at 511.

706. “In the 26th Judicial District, public defense attorneys maintain caseloads more than three times the recommended caseload limit for each attorney.” *Id.* at 512. The 26th District Defender told me his caseload is “ridiculous” and stated that he should have triple the staff he has. He said there are too many cases per lawyer. He would love to have more attorneys so they could, among other things, obtain more information from family members and have more jail visits.

707. According to information provided to me by the District Defender, his staff attorneys had the following numbers of felony case assignments in 2016:

- Attorney 1: 219 felonies
- Attorney 2: 304 felonies
- Attorney 3: 239 felonies
- Attorney 4: 290 felonies
- Attorney 5: 269 felonies
- Attorney 6: 354 felonies

These numbers exceed by as much as 77% the LPDB caseload limit and as much as 236% of ACCD limit. Because the 26th Judicial District has only one investigator, no paralegals, and no social workers, its caseload limits should be much lower than the ACCD limit.

708. In addition to its staff attorneys carrying excessive caseloads, the part-time contract attorney caseloads are excessive:

- Contract attorney TG: 452 felonies
- Contract attorney SS: 159 assignments between 9/11/16 to 12/31/16

- Contract attorney KW: 393 felonies

When a lawyer has 452 felony cases a year, it is impossible to provide effective representation to more than a small percentage of clients.

709. The misdemeanor staff attorneys in the 26th District also have excessive caseloads.

- Staff Attorney 1: 507 misdemeanors
- Staff Attorney 2: 529 misdemeanors
- Staff Attorney 3: 536 misdemeanors
- Staff Attorney 4: 517 misdemeanors
- Staff Attorney 5: 512 misdemeanors
- Staff Attorney 6: 603 misdemeanors

710. The staff attorney caseloads are as much as 34% higher than the Board standard and 50.75% higher than the ACCD standard.

711. Even using the OMB number of 1744 hours per year, a lawyer such as TG handling 452 cases a year can devote only 3.85 hours to each case. Time per case must cover client meetings, negotiating with the prosecutor, reading police reports and other relevant discovery, conducting legal research and factual investigation, preparing for court, writing and presenting motions and memoranda, including motions for pretrial release, discovery, motions to suppress, and sentencing memoranda, and attending court hearings, including trials. Felony jury trials rarely should be completed in less than two days and often can last a week or longer. In addition, the defender needs time for training, reading new appellate cases, and attending meetings at the courthouse or the local bar association related to criminal defense practice.

712. The district defender also has contract attorneys in misdemeanors, including Kammi Whatley who has 438 cases.

713. As a defender, Ms. Whatley's caseload is far more than one lawyer should carry. In 2016 she had a felony caseload of 393 (196 % of the LPDB maximum, 262 % of the ACCD limit) *and* 438 misdemeanors (97% of the LPDB maximum or 109.5 % of the ACCD limit). That is a defender caseload that is equivalent to the workload of 2.93 full time attorneys.

714. In addition, Attorney Whatley has a conflict attorney and city court contract in the 1st District and reported working in November, 2016, 57 hours in public defense for that district and 10 hours in private practice for that month. 67 hours is at least 38% of an appropriate monthly workload. If she maintained those hours throughout 2016, she would have had a workload for all matters of more than three full time attorneys.

715. On her web page, Ms. Whatley has the following:

Criminal Defense



When suspected of a crime, you need to contact a criminal defense attorney. Kammi Whatley defends clients across Caddo Parish and all over Northwestern Louisiana in nearly all areas of law.

Personal Injury



Kammi has a reputation for success built through decades of dedication and hard work. She has the experience and resources to handle the most challenging cases and will fight to make sure you are fully compensated for your loss.

716. If a lawyer has 393 felony cases a year and 438 misdemeanors and spends 67 additional hours a month (804 hours per year) working on other cases, in a year of 1744 hours directly representing clients, the lawyer would have only 940 hours to work on the 831 (393+438) total defender cases, or 1.13 hours per case. That is simply not sufficient to do more than spend a few minutes talking with the prosecutor, a few minutes reading the police report, a few minutes talking with the client, and a few minutes standing next to the client as the case is resolved. There is no time for legal research or factual investigation, consultation with a supervisor or colleague, or for a meaningful conversation with the client to establish rapport and to understand the client's objectives in the representation. There is no time to consult with and hire expert witnesses. There is no time to go to trial. There is no time to present a thoughtful sentencing alternative.

717. In 2016, when it had 2,865 new non-LWOP felony cases and 6 new LWOP cases, the 26th District reported expenditures of only \$1,100 for expert witnesses and no expenditures for investigators, interpreters, or social workers. 2016 Board Report at 522, 527. The same analysis yields a per capita cost of \$.38, dividing the total expenses only by felonies. It is possible the 26th District spent some of its \$1,100 for cases other than felonies.

718. The District has one investigator available for the more than 9,000 cases it receives each year. The District Defender told me that his attorneys mostly do their own investigation, which handicaps them should they need to impeach a witness who testifies in court in a way that is inconsistent with what was said in the interview. His one investigator mostly does felony and some juvenile work. The Defender admitted that if a misdemeanor lawyer wanted to have six cases a month investigated to help prepare for trial or to help decide whether to advise a client to accept a plea bargain, the lawyer would have no investigator to do the work, however necessary it might be. He said that the lawyers know that there are not enough resources so they do not ask for experts or for more investigation than their one investigator can do.

719. The District Defender told me that the office does not use experts in DUI cases. The only experts they use are for sex cases and for mental health examinations.

W. 29th District (St. Charles Parish)

720. During Calendar Year 2016, the 29th Judicial District Public Defenders Office received 1,547 new cases and received only \$853,276 in total revenues to handle these cases, or \$551.69 per new case, which is nearly entirely from local funding. 2016 Board Report at 565, 575. The 29th District explained that "Between CY10 and CY14, the Judicial District Office's local revenues continued to increase, however during CY15 the district saw a 28% reduction in revenues. Revenues again decreased by 18% from CY15 to CY16." *Id.* at 565.

721. The 29th District has excessive caseloads. "In the 29th Judicial District, public defense attorneys maintain caseloads equal to the recommended caseload limit for each attorney and well below the state average." *Id.* at 566. As discussed herein, the recommended caseload limit for defender attorneys in Louisiana is too high.

722. The 29th District reported expenditures of \$5,625 for expert witnesses, \$507.43 for investigators, \$2,022.50 for interpreters, and \$18,885.43 for social workers for an office that handled 2,116 cases in 2016. *Id.* at 580, 563.

X. 30th District (Vernon Parish)

723. During Calendar Year 2016, the 30th Judicial District Public Defenders Office received 1,755 new cases and received only \$617,059 in total revenues to handle these cases, or \$351.60 per case. *Id.* at 583, 593.

724. The 30th Judicial District of Louisiana was one of the districts in restriction of services during 2016. "The 30th Judicial District office has nearly exhausted its fund balance. Insufficient personnel and fiscal resources forced the 30th Judicial District office to begin restricting services January of 2015." *Id.* at 583.

725. “In the 30th Judicial District, public defense attorneys maintain caseloads nearly twice the recommended caseload limit for each attorney. These caseload averages do not account for the one felony case and seven revocation cases newly opened during CY16 which were still on a waitlist in January 2017.” *Id.* at 584. The 30th District explained that “caseloads remain high due to insufficient revenues.” *Id.*

726. Despite the 2,514 cases handled in 2016, the 30th District reported expenditures of only \$1,330.05 for expert witnesses, \$4796.43 for investigators and no expenditures for interpreters or social workers. *Id.* at 583, 598.

727. The 30th District Defender identified as one of its immediate primary needs funds to obtain a social worker. *Id.* at 588.

Y. 31st District (Jefferson Davis Parish)

728. During Calendar Year 2016, the 31st Judicial District Public Defenders Office received 1,577 new cases and received only \$414,970 in total revenues to handle these cases, or \$263.14 per new case. *Id.* at 601, 611. The 31st District reported that “[a]s local revenues have declined, the 31st Judicial District Office has relied heavily upon its fund balance. While it is too early to project when the 31st Judicial District Office will exhaust its fund balance, without an increase in revenues or reduction in expenditures the fund balance will continue to decline and the office will eventually become insolvent.” *Id.* at 601.

729. “In the 31st District, public defense attorneys maintain caseloads more than three times the recommended caseload limit for each attorney.” *Id.* at 601.

730. For the 2,310 cases handled in 2016, the 31st District reported no expenditures for expert witnesses, investigators, interpreters, or social workers. *Id.* at 601, 616.

731. “Clients housed in distant locations affect the quality of representation due to attorneys not being able to contact them as frequently, and it leaves them unable to meet with other clients when they travel to meet clients in distant locations.” *Id.* at 604.

732. The 31st District reported 412 closed misdemeanor cases and no trials, 544 closed non-LWOP felony cases and 1 trial, and 2 LWOP closed cases and no trials. *Id.* at 611.

Z. 35th District (Grant Parish)

733. During Calendar Year 2016, the 35th Judicial District Public Defenders Office received 635 new cases and received only \$245,789 in total revenues to handle these cases, or \$387.07 per new case. *Id.* at 674. “The 35th Judicial District office nearly exhausted its fund balance during FY14. However, increased local revenues and state supplemental assistance have allowed the office to remain solvent.” *Id.* at 673.

734. In the LPDB Report for 2015, the District reported an average caseload of 215% of the LPDB standard. 2015 Board Report at 668.

735. In the 2016 Board Report, the caseload number per lawyer was somewhat lower, at 1.88 times the Board standard, but still clearly excessive. 2016 Board Report at 675.

736. The 35th District Defender reported spending no money on investigation in 2015 and had no investigators on staff. 2015 Board Report at 681,672. The District Defender told our observer that he and his contract defenders either hire an investigator when they need one or do all of the investigation work themselves. In 2016, the 35th District reported no expenditures for expert witnesses, interpreters, or social workers and only \$3,000 in expenditures for investigators (or about \$6.55 per adult felony non-LWOP). 2016 Board Report at 688.

737. The District Defender, Robert Kennedy, told our observer in January 2017 that his office has no benefits – no retirement, no healthcare, and no offices. He furnishes the office and houses it on his own in the same building as his private practice office. Mr. Kennedy said that all the defenders have civil practices because they “need to eat.” He also said that the DA’s office gets three times as much money as the PDO.

AA. 41st District (Orleans Parish)

738. During Calendar Year 2016, the 41st Judicial District Public Defenders Office (the “41st District”) received 16,880 new cases and received only \$6,820,616 in total revenues to handle these cases, or \$404.06 per new case. *Id.* at 781, 796. The 41st District states that 66% of the revenues come from local funding, including “a significant investment from the City of New Orleans in the form of a non-statutorily-required appropriation.” *Id.* at 781.

739. The 41st Judicial District of Louisiana was one of the districts in restriction of services during 2016. “Despite significant investments made by the City of New Orleans, the 41st Judicial District office nearly exhausted its fund balance and was forced to officially begin restricting services on December 1, 2015.” *Id.*

740. I recognize that Orleans, with the largest population in the state, is different from other districts. Yet, the following comment in the 2016 Board Report provides a good summary of some of problems facing defenders in most of the state:

2016 has been a year of continuing Restriction of Services. While the hiring freeze ended during 2016, OPD has had to fill numerous vacant positions. Excessive caseloads and depleted staff continue to be the biggest obstacles regarding our representation. In addition, the District Attorney accepts a significantly higher number of cases than other parishes and pursues harsh multiple bill sentences even for non-violent offenders. There is still an ongoing issue regarding jail visitation (and out of parish detention of OPD clients) that affects delivery of services. An unprofessional and hostile climate, especially in the presence of our clients, has also had an affect [sic] in delivery of services. The inability to meaningfully consult with and interview clients before first appearances and after appointment continues to affect our advocacy for our clients. Additionally, the District Attorney decided to relocate state misdemeanors from Municipal Court to Criminal District Court, causing OPD staffing resources stress.

Id. at 790.

741. According to Derwyn Bunton, Chief District Defender, Orleans Public Defenders, in 2016, OPD refused or waitlisted 1,060 cases. This is a stunning number of accused persons who did not have timely appointment of lawyers. That is 6.27% of all its new cases.

742. The 41st District lists its average attorney caseload as being 91% of the Board maximum. *Id.* at 782. That is equivalent to 182 felonies a year for a full-time felony lawyer, which is 21.3% higher than national and other state standards. In the 2016 Board Report, the introductory comment for the 41st District states:

The 41st Judicial District Public Defenders Office designates attorney representation based on attorney practice level. The office’s fiscal crisis has led to significant attrition amongst the office’s most experienced attorneys. While as an agency, the average attorney caseload is compliant with LIDB standard maximums, the most experienced attorneys exceed both caseload and workload standards as the 41st district has the highest trial rate in the state. Attrition has forced the office to develop a wait list in some of the district’s more serious felony cases to ensure ethical representation as there are simply not enough qualified attorneys to handle these cases. Additionally, caseload averages do not account for the one felony life without parole, 44 felony, eleven misdemeanor and 16 Municipal Court cases received during CY16 which were still on the office’s waitlist in January 2017.

Id. at 782.

743. According to Mr. Bunton, in 2016, nine attorneys left OPD. In the past 16 months, a total of 11 attorneys have left. OPD has a total of 54 attorneys on staff. The average length of service for existing attorneys is 4.33 years. The loss of so many experienced attorneys coupled with the relative inexperience of the remaining attorneys makes it quite difficult, as Mr. Bunton said in his Board Report, to provide counsel for the most serious cases.

744. In refusing to take the most serious cases when he does not have enough qualified attorneys to handle them, Mr. Bunton is complying with Principle 6 of the ABA Ten Principles:

Defense counsel's ability, training, and experience match the complexity of the case. Counsel should never be assigned a case that counsel lacks the experience or training to handle competently, and counsel is obligated to refuse appointment if unable to provide ethical, high quality representation.

American Bar Association, *Ten Principles of a Public Defense Delivery System*, Principle 6 (2002).

745. As “primary immediate needs” the Defender identified “Increased funding to provide effective representation to the indigent and experienced legal staff.” 2016 Board Report at 788.

746. The Orleans Defender reported that of 4,202 closed felony (non-LWOP) cases in 2016, they had 49 trials, 23 of which resulted in not guilty verdicts, a high acquittal rate of 46.9%. *Id.* at 796. Of 7,027 misdemeanor cases closed, 129 went to trial, of which 110 resulted in acquittals. *Id.* This is a high acquittal rate of 85%. The felony trial rate of 1.16 percent and the misdemeanor trial rate of 1.83 percent are low, although they are higher than most Louisiana district offices. The Orleans acquittal rates suggest, by comparison to acquittal rates in other districts, that the relatively lower caseloads carried by Orleans defenders and the relatively higher levels of staff, supervision, investigation, training, and expert witness resources that they have, contribute to more successful outcomes for their clients.

747. Even the 41st District, which has arguably better resources than many other districts, reported spending only \$40,013.07 on expert witnesses. *Id.* at 801. It reported 4,907 new felony non-LWOP cases and 55 new LWOP cases. *Id.* at 796. Dividing the \$40, 013.07 only by the new felony assignments yields a per case cost for experts of \$8.06.

748. The Orleans Defender has three social workers, one of whom is funded through a Kellogg grant. This is an important resource to help the lawyers develop stronger assessments of their clients and find effective alternative resources for them.

749. The Orleans Defender also reported on the dramatic impact of having clients incarcerated far from their office:

Many incarcerated clients of OPD were housed in the East Carroll Parish jail (approximately five hours away). Incarcerated clients of OPD have also been placed in the Hunt Correctional facility (approximately one hour away) and at the St. Charles Parish jail (approximately 45 minutes away). In 2016, this continued to create significant resource strains and hardship for OPD staff. The placement of significant numbers of OPD clients out of parish also greatly impacted attorney/client consultation.

Id. at 784.

750. The Defender added:

In 2016, OPD was not able to adequately represent clients held at facilities outside Orleans Parish. The quality of representation was significantly impaired. In addition, the time necessary to travel out of parish to visit clients has taxed already thin staff resources and added budget costs for travel.

Id.

751. Other jail limitations affect the defenders' ability to meet with their clients. The Defender reported:

Overall, there are now significantly more attorneys competing for more limited client visitation space at OJC. There are only two attorney-client consultation areas in the jail complex, one of which has three booths and the other two contact visit rooms. Additionally, gender, youth, and other constraints lead to limited

access to inmates, as inmates in one classification group often cannot be brought to the visitation area while inmates from another classification group are present.

Id. at 785.

752. The Orleans Defender has a number of community engagement programs that could serve as models for other District offices. *Id.* at 789. It obtained a proclamation from the City Council on Public Defense Day in March. It has an active social media presence that provides information about the office and issues important to its clients. *See, e.g.*, Orleans Public Defenders, <https://www.facebook.com/OrleansPublicDefenders/> (last visited May 1, 2017).

753. Unlike many Louisiana District Defenders that have minimal or no ongoing training for attorneys, the Orleans Defender has a training program both at the beginning of their practice and on an ongoing basis:

OPD provides training designed by our Training Director. Newly admitted attorney hires receive approximately 5 weeks of training prior to representing clients autonomously and then weekly training during their first year of practice. Additionally, the Training Director provides intensive supervision, including review of written preparation, courtroom observation, and regular meetings to discuss the new attorneys' development.

Id. at 789.

754. The Orleans Defender reduces workload for supervisors and also reduces workload for staff attorneys when they reach a certain level. This is significantly different than most other Louisiana District Defender offices. The office noted in its Board Report: "When staff attorneys reach a certain level, they are taken out of the normal case pick up schedule and given time to work down their existing workload. Supervisors have a half case-load to enable them to better carry out their supervisor duties." *Id.*

755. In answer to the Board's question about what changes the office made to improve its delivery of services to clients, the office wrote:

During the middle of 2016, OPD was able to lift its hiring freeze. While this brought some relief, much of 2016 was marked by vacant staff positions and significant resource challenges. In order to streamline resources, OPD closed its conflict division and increased its conflict panel. OPD was able to apply for and receive outside funding for client advocates and social workers in its Client Services Division. OPD has also partnered with the City of New Orleans with the MacArthur Foundation Safety and Justice Project to increase bond advocacy. OPD has continued with its overall bond review project to increase bond advocacy and pre-trial release advocacy for low risk clients. OPD has also dramatically increased its alternatives to incarceration in Municipal Court. One highlight of OPD Municipal Court's efforts has been the Municipal Court in the Mission project to reduce attachments and assist homeless clients.

Id. at 791.

756. On April 16, 2017, CBS' 60 Minutes reported on the Orleans' office efforts to address its excessive caseload. 60 Minutes, *Inside NOLA public defenders' decision to refuse felony cases* (Apr. 16, 2017), available at <http://www.cbsnews.com/news/inside-new-orleans-public-defenders-decision-to-refuse-felony-cases/>. Chief Defender Bunton said about his lawyers' efforts to manage their excessive caseload: "You do your best, but a lot of times you can't provide the kind of representation that the Constitution, our code of ethics and professional standards would have you provide." Correspondent Anderson Cooper asked nine current and former Orleans defenders, "How many of you believe that an innocent client went to jail because you didn't have enough time to spend on their case?" All of them raised their hands. One of the defenders said, "We simply don't have the time. We don't have the money. We don't have the attention to be able to give to every single person." Another defender said, "as soon as you start working you realize the gap between what you should be doing and what you can do." Mr. Bunton said that people are pleading guilty to crimes they did not do. CBS reported: "He says

their clients know they don't have the time and money to mount a rigorous defense at trial, so often decide to take plea deals -- even if they aren't guilty."

757. The Orleans Defender has a lower average caseload than almost all of the other district defenders in Louisiana. It has more resources than other district defenders, including investigation and social work, training, and supervision. It has programs and projects that can serve as models for the rest of the state. Yet its caseload remains too high, its turnover rate of staff is too high, and it does not have enough experienced attorneys to match the complexity of the cases it is assigned. More funding is needed to allow the defenders to meet their constitutional and professional obligations to their clients.