The Florida Senate

Interim Project Summary 98-16 *November 1998*

Committee on Criminal Justice Senator Alberto "Al" Gutman, Chairman

REVIEW OF THE PUBLIC DEFENDER CONFLICT SYSTEM AND APPELLATE OVERLOAD

SUMMARY

In the past year, several events have combined to bring public defender trial conflict and appellate overload issues to the forefront. Consequently, the Senate President directed the Criminal Justice Committee to lead an interim study analyzing the public defender conflict system and appellate overload and suggest reform proposals, if appropriate.

In November 1998, Floridians approved Revision 7, a constitutional amendment initiated by the Constitution Revision Commission to shift most of the state court system costs from counties to the state by July 1, 2004. Revision 7 provides that the state is to assume the full costs of conflict counsel, (special assistant public defenders, or SPD).

The question for the state is whether it should simply fund the current SPD system (about $26 million) or adopt reforms aimed at ensuring effective representation while reducing costs.

Staff recommends that the Legislature should reject any proposals which would radically alter the current SPD system. Among other things, the Legislature should establish pilot programs and task a circuit-based entity, like the circuit conflict committees, with assessing which conflict representation model would serve that circuit best.

The Tenth Circuit Public Defender has had an appellate overload problem for many years. In responding to this issue, the Legislature should not eliminate the centralized, 5 appellate public defender system. Instead, the Legislature should make recurring the $300,000 lump sum appropriation provided to the Tenth Circuit Public Defender in fiscal year 1998-99.

BACKGROUND

In Florida's state courts, indigent criminal defendants are represented by a public defender system headed by 20 constitutional officers, elected from the counties comprising Florida's judicial circuits. The public defenders and their assistants represent all indigent persons charged in their circuits with felony, misdemeanor, or juvenile offenses. In addition, 5 public defenders serve as appellate defenders and handle all indigent felony appeals.

When a public defender withdraws from a case due to an "ethical" conflict or because of an "overload conflict" (excess caseload), the trial court appoints a special assistant public defender (SPD) from the private defense bar. The SPD system is funded by counties as part of its "Article V costs."

In the past year, several events have combined to bring public defender trial conflict and appellate overload issues to the forefront.

- First, in November 1998, Floridians approved Revision 7, a constitutional amendment initiated by the Constitution Revision Commission to shift most of the state court system costs from counties to the state. Revision 7 provides that the state is to assume the full costs of the SPD system.

- Second, Justices Overton and Wells have strongly recommended that the Legislature reform the public defender conflict appointment system. In addition, the Justices recommended eliminating the centralized appellate defender system and requiring that all 20 public defenders handle their own appeals. The 1998 Legislature created the Commission on Legislative Reform of Judicial Administration and asked it to study these proposals and make recommendations.

- Third, in late 1997, the Tenth Circuit Public Defender, one of the 5 appellate defenders, filed a motion to withdraw from 248 appellate cases due to excessive caseload. Affected counties and the Attorney General challenged this motion in the District Court of Appeal and the Florida Supreme Court.

- Finally, in 1998, Wakulla County, a small North Florida county with limited fiscal resources, experienced a large and unanticipated increase in the number of conflict counsel appointments for multiple defendant capital cases. Fearing these cases would break its bank, in July 1998, Wakulla County applied for and received an emergency transfer of funds from the Governor and Cabinet.

With these events in mind, the Senate President directed the Criminal Justice Committee to lead an interim study analyzing the public defender conflict system and appellate overload and suggest reform proposals, if appropriate. This report is designed to provide a comprehensive overview of the conflict appointment and appellate defender systems. Since the number of conflict cases is a function of initial public defender appointments, the report also reviews the status of the indigency screening program. The report discusses the pros and cons of various reform proposals and includes staff recommendations.

METHODOLOGY

The Criminal Justice Committee staff researched and reviewed the literature, statutes, rules of court, and case law relevant to this study. Staff conducted dozens of interviews and held informal meetings with interested parties, including: judges, public defenders, private defense attorneys, county attorneys, state attorneys, and the Attorney General's staff. On September 15, 1998, staff held a workshop attended by over 30 participants. The workshop was designed to provide an open forum where interested parties would carry on a dialogue in order to educate legislative staff and identify areas of consensus and disagreement.

Staff also consulted and received the valuable assistance of the following legislative committees' staff: Senate Ways and Means, Subcommittee D; Senate Judiciary Committee; Legislative Committee on Intergovernmental Relations; and the Joint Legislative Auditing Committee.

Finally, staff monitored the work of the Commission on Legislative Reform of Judicial Administration. Staff met numerous times with the Commission's Executive Director and attended the Commission meetings of October 5, 1998 and November 9, 1998.

FINDINGS

Conflict Appointment System:

When a public defender is unable to represent a defendant because of a conflict of interest, he or she moves to withdraw and the trial court appoints an attorney from the private defense bar pursuant to s. 27.53(3), F.S. "Ethical conflicts" most typically occur when the public defender is appointed to represent co-defendants whose defenses are adverse or hostile. "Overload conflicts" occur when a public defender moves to withdraw because his or her office is experiencing an excessive trial or appellate workload.

The state funds public defender salaries. However, counties pay for conflict counsel fees and costs. The conflict counsel appointment system is also known as the special assistant public defender system (SPD). In fiscal year 1995-96, counties reported to the Justice Administrative Commission an aggregate SPD cost of just over $26 million. In recent years, the state has begun to provide counties a modest reimbursement for these costs pursuant to s. 925.037, F.S.

The SPD costs are a part of what has become known as "Article V costs," a cost for the state court system which counties have assumed an increasing share of in recent years. In November 1998, voters approved Revision 7, an amendment to the constitution which will shift all SPD costs to the state by no later than July 1, 2004.

"Overload" trial conflicts. "Overload" trial conflicts existed in only 6 judicial circuits in fiscal year 1997-98, yet constituted close to 60 percent (49,350 cases) of total conflicts. The vast majority of "overload" conflicts (40,686 cases) were attributable to the Eleventh Judicial Circuit (Miami-Dade County). Miami-Dade County provided the Eleventh Circuit Public Defender with 82 county-paid FTEs at a cost of $3,185,257 for fiscal year 1997-98. "Overload" conflicts may be handled by the public defender's office that moved to withdraw if the office is provided sufficient resources to handle its caseload.

"Ethical" trial conflicts. On "ethical conflicts," the question for the state is whether it should simply fund the current SPD system or adopt reforms aimed at ensuring effective representation while reducing costs.

Justice Overton has proposed that the Legislature mandate each public defender to create conflict sections whose lawyers would handle the conflict cases for adjacent circuits. However this proposal, if enacted state-wide, will present the following disadvantages:

- The proposal may not be cost-effective. The Florida Public Defender Association fiscal analysis estimated a total cost to fund the proposal of $34,336,772.
- Matching circuits in a state as geographically diverse as Florida may be extremely difficult.
- Participation by the private defense bar would be severely diminished thereby risking the continued interest of the bar in the welfare of the criminal justice system.

The geography, demographics, and economics of Florida's 20 circuits are diverse. A conflict representation model like public defender cross-circuit assignment may work and be cost-effective in some circuits, but not in others. Implementation of a one-size-fits-all model would appear to be unwise.

In the Eighth Circuit, the establishment of a Court Cost Containment Office in Alachua County has been very successful in reducing the costs for the SPD system. The philosophy of the program is cost containment through conflict attorney management. This management model may be replicated with success in other circuits.

Small counties. In 1998, Wakulla County experienced a fiscal crisis with an unexpected increase in capital conflict cases. This shows how vulnerable smaller counties can be to conflict costs. Of course, with Revision 7 all counties fiscal exposure to conflict counsel will end by July 1, 2004. In recent years, the state has reimbursed all counties for conflict costs for a total of $2.5 million, distributed on the basis of a county's proportionate share of public defender cases.

Guzman rule. The public defender determines what constitutes a conflict. On trial level conflicts, under the Florida Supreme Court's decision in *Guzman v. State*, 644 So. 2d. 966 (Fla. 1994), the trial courts have no discretion to review a public defender's decision and must grant any motion to withdraw and appoint private counsel. However, s. 27.53(3), F.S., provides that when a public defender determines there is a conflict he or she shall "move the court to appoint other counsel." The statute then provides that "the court *may*" appoint outside counsel. Despite what appears to be statutory language giving the trial court discretion to review the public defender's motion, the *Guzman* rule prohibits review.

It is uncertain whether trial court discretion will result in a great cost savings particularly if appeals were to increase. However, one public defender noted that he was aware that the ethics rule concerning former clients was being misinterpreted by some assistant public defender in other circuits. Testimonial evidence from some county attorneys suggests that at least in some circuits the conflict rules are being stretched farther than a court would allow. Consequently, there is the potential for some costs savings if the statute were amended to clarify what appears to be the legislative intent.

Indigency examiners. The indigency examiner program is designed to reduce public defender costs on the front end. While a review of this program was not originally envisioned to be a part of this interim study, it soon became apparent that the program was relevant since it has the potential to screen out a number of conflict cases.

Indigency examiners exist in all 20 judicial circuits for the purpose of verifying a defendant's indigency affidavit (application for the public defender). Since fiscal year 1996-97, the state has funded one indigency examiner in each of the 20 judicial circuits. The state funds an additional 4 examiners in the Eleventh Circuit (Miami-Dade County) to meet that circuit's exceedingly large caseload.

Consequently, the State Courts Administrator reports that, except in the Eleventh Circuit, the indigency examiner program is substantially understaffed. Under-staffing has led to selective affidavit verification. Adding to the problem, the state does not provide the indigency examiner program with funding for investigations or assets checks. The indigency examiners are able to check assets only where county funding supports it or by using free available methods such as a check of records from the local property appraisers. Examiners are not able to run credit or national assets checks, leaving a fairly significant gap in the program. Despite the lack of resources, some circuits have reported some successes.

Appellate Defender System:

When an appellate defender determines that, because of an excessive number of cases, his or her office cannot file initial briefs without a lengthy delay, the defender must withdraw from the excess. For many years, the appellate public defenders have argued that funding of their offices has not been sufficient to keep up with the demands of an increasing caseload. Their arguments have found support with the Florida Supreme Court, which has made repeated appeals to the Legislature for increased funding.

The appellate defender from the Tenth Judicial Circuit, J. Marion Moorman, has historically had an excess caseload. In late 1997, Moorman filed a motion to withdraw from 248 appellate cases due to excessive caseload. Affected counties and the Attorney General challenged this motion in the Second District Court of Appeal and the Florida Supreme Court. In responding to the crisis, the 1998 Legislature provided Moorman's office a $300,000 lump sum appropriation.

The Tenth Circuit's overload may be attributable to unique conditions in its appellate district, the Second District Court of Appeal. For example, the Second District has the largest volume of criminal filings and highest jury trial rate. Also, the Tenth Circuit Public Defender is under funded, compared to other appellate defenders. The Tenth Circuit's under funding is a result of unequal pubic defender funding which has never been corrected. The problem is exacerbated because the Legislature does not determine public defender funding based on the prior year's workload. In testimony before the Commission on Legislative Reform of Judicial Administration, Moorman stated that, absent a spike in the current caseload, the chronic overload situation in his office could be easy solved if the $300,000 lump sum appropriation were made recurring. In essence, this lump sum would go toward remedying the historically unequal funding.

Justice Overton and Wells have proposed eliminating the 5 district appellate offices and requiring all 20 public defenders to handle their own appeals. The staff workshop and Commission meetings showed, however, that such a radical change will sacrifice the economies of scale gained by the centralized appellate offices. Moreover, the appellate overload problems in recent years have been limited to the Second District. Breaking up the other 4 offices risks creating problems where none currently exist.

RECOMMENDATIONS

Conflict Appointment System:

- **Recommendation #1**: The Legislature should begin taking on the SPD system costs by assessing and funding the costs of "overload" conflicts. Funding "overload" will significantly reduce the number of conflict cases and allow public defenders to handle more cases.

- **Recommendation #2:** The Legislature should reject any proposals which would radically alter the current SPD system. The Legislature should not mandate the cross-circuit assignment of public defenders or the creation of "ethics screens," since the statewide cost-benefits of these proposals are not certain and they contain some significant disadvantages.

- **Recommendation #3:** The Legislature should task a circuit-based entity, like the circuit conflict committees, with assessing which conflict representation model would serve that circuit best. This assessment should consider which system would be most cost-effective, offer administrative control, and provide high quality representation. The circuit entities should also provide the Legislature with recommendations on how to improve the reliability of conflict case reporting data from its circuit.

- **Recommendation #4**: The Legislature should provide funding or establish pilot programs in other circuits patterned after the Eighth Circuit's Court Cost Containment office.

- **Recommendation #5**: The Legislature should consider reimbursing smaller counties for a greater than proportionate share of its cases. The modest reimbursement dollars, if increased for smaller counties, will have a greater impact and serve to provide these counties with a larger safety net.

- **Recommendation # 6:** The Legislature should amend s. 27.53(3), F.S., to undo the *Guzman* rule and make clear what appears to be the legislative intent already in the statute. Section 27.53(3), F.S., should be amended to allow trial court judges to review motions to withdraw and deny those motions which do not demonstrate a conflict. To address concerns that public defenders may be forced to reveal confidential communications, the law should

state that the trial court must conduct its inquiry without improperly requiring disclosure of any confidential communication of the client.

- **Recommendation #7:** The Legislature should increase funding and resources to the indigency screening program. Additional funding should be aimed at increasing the number of circuit indigency examiner positions and providing funding to enable examiners to run national credit and assets checks. The Legislature should consider a bid process to obtain statewide access to national asset searches, credit checks, and cost recoupment services.

Appellate Defender System:

- **Recommendation # 8:** The Legislature should not eliminate the centralized, 5 appellate public defender system.

- **Recommendation # 9:** The Legislature should make recurring the $300,000 lump sum appropriation provided to the Tenth Circuit Public Defender in fiscal year 1998-99. The Legislature should consider increasing this recurring amount if it is demonstrated that the amount will not cure the chronic overload problem in the foreseeable future.

- **Recommendation #10:** The Legislature should fund appellate defenders based on their workload. The Legislature should consider funding based on the current appellate funding formula which reflects the prior year's workload.

COMMITTEE(S) INVOLVED IN REPORT ***(Contact first committee for more information.)***
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MEMBER OVERSIGHT
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