IN THE CIRCUIT COURT OF JACKSON COUNTY, MISSOURI
AT KANSAS CITY

IN RE:	)	
AREA 16 PUBLIC DEFENDER OFFICE III	)	
Movant	)	
	)	**Case No. 1716-MC14505**
	)	**Division 3**

JUDGMENT/ORDER

On the 30th day of May, 2019, the above captioned matter was called and before the Court for consideration of the issues raised in Movant's Second Amended Motion Pursuant to R.S.Mo. Section 600.063 for a Hearing to Address Public Defender Caseload Issues (filed May 22, 2019 – hereinafter "Second Amended Motion"). Movant appeared by District Defender Ruth Petsch and by attorneys John C. Aisenbrey, Jessica L. Pixler and Bradley James Yeretsky; Jackson County Prosecutor's Office appeared by Terrence M. Messonnier. A conference was held on the record, with information being provided by numerous individuals, by documents marked as exhibits and by information provided by counsel and the Court. The Court heard, reviewed and duly considered all of the information and documentation provided and submitted as well as data compiled regarding the claims asserted by Movant. The Court took this matter under advisement for entry of this written Judgment/Order.

History

On December 15, 2017, this case was filed by Movant.[1] When initially filed, Movant sought caseload relief on behalf of Assistant Public Defenders Laura O'Sullivan

[1] This matter is the 3rd filing by the Movant/District Defender seeking relief pursuant to R.S.Mo. Section 600.063. The first filed case was Case Number 1716-MC13258. In that case, then Presiding Judge

EXHIBIT N

and William Jobe. In the Amended Motion (filed October 10, 2018) and continuing with the Second Amended Motion currently before the Court (filed May 22, 2019), Movant substituted the individual Public Defenders for whom she is seeking caseload relief. Therefore, before the Court for consideration is Movant's Second Amended Motion requesting caseload relief for Assistant Public Defenders David Wiegert and Walter Stokely.

On January 10, 2018, a conference was held at which time representatives of Movant, the Jackson County Prosecuting Attorney and the Court met to discuss the issues raised by Movant – said conference was not held on the record. On February 21, 2018, the Court, through then Presiding Judge John Torrence, denied Movant's Motion requesting caseload relief. Thereafter, Movant appealed the Court's decision. By Order dated July 18, 2018, the Missouri Court of Appeals, Western District[2], reversed and remanded this case to the Circuit Court for further proceedings pursuant to said Order.

On July 19, 2018, the day after the Order remanding this case, Judge Torrence emailed Joseph Megerman at the District 16 Office inquiring if Mr. Megerman would be interested in meeting to discuss the issues in this case.[3] On August 6, 2018, Mr. Megerman

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John Torrence denied Movant's Motion for failure to follow statutory requirements. Judge Torrence also found that the Motion was not filed in good faith. The second filed case was Case Number 1716-MC13600. In that case, then Presiding Judge John Torrence again denied Movant's Motion for failure to follow statutory requirements. Effective January 1, 2019, the undersigned Judge became Presiding Judge of the 16th Judicial Circuit.

[2] *Petsch v. Jackson County Prosecuting Attorney's Office*, 553 S.W.3d 404 (Mo. App. 2018).

[3] Ms. Petsch was engaged with personal matters at the time – therefore, the email was sent to Mr. Megerman who was presumed to be in charge of the office in Ms. Petsch's absence.

responded and declined. Thereafter, Movant did not contact Judge Torrence to *request a conference*, notwithstanding Movant's alleged continuing workload concerns.[4]

The Court scheduled a conference in this matter to be held on October 12, 2018. That conference was appropriately continued by the Court and a telephone case management conference was scheduled. Thereafter, this matter was re-scheduled for a conference on November 28, 2018. That conference did not occur as scheduled. The interested parties agreed to mediate the issues herein with the Honorable Charles Atwell. Mediation occurred on December 18, 2018 - mediation was unsuccessful.

Subsequent to completion of mediation, Movant did not contact the Court to request a conference, notwithstanding Movant's alleged continuing caseload concerns. Therefore, on April 1, 2019, this Court entered an Order scheduling a conference on the record. Movant's Motion for Continuance (filed May 17, 2019) was denied. A conference on the record was held on May 30, 2019.

Statutory Provisions

Movant's Second Amended Motion is filed pursuant to the provisions of R.S.Mo. Section 600.063 and seeks relief pursuant to that statute. Therefore, the provisions of that statute govern the Court's consideration and review of this matter. Section 600.063 (effective August 28, 2013), states in its entirety:

> 1. Upon approval by the director or the commission, any district defender may file a motion to request a conference to discuss caseload

[4] Regarding this statement that Movant did not contact Judge Torrence requesting a conference, there was an email exchange involving Judge Jeffrey Bushur and Mr. Aisenbrey in August 2018 regarding caseload issues. Judge Bushur indicated that his suggestion was not related to the Section 600.063 matter that was pending before Judge Torrence. In fairness to Movant, Mr. Aisenbrey did advise Judge Bushur that he believed a preliminary conference would be a worthwhile planning tool. This email exchange was identified in the conference as Exhibit 105.

issues involving any individual public defender or defenders, but not the entire office, with the presiding judge of any circuit court served by the district office. The motion shall state the reasons why the individual public defender or public defenders will be unable to provide effective assistance of counsel due to caseload concerns. When a motion to request a conference has been filed, the clerk of the court shall immediately provide a copy of the motion to the prosecuting or circuit attorney who serves the circuit court.

2. If the presiding judge approves the motion, a date for the conference shall be set within thirty days of the filing of the motion. The court shall provide notice of the conference date and time to the district defender and the prosecuting or circuit attorney.

3. Within thirty days of the conference, the presiding judge shall issue an order either granting or denying relief. If relief is granted, it shall be based upon a finding that the individual public defender or defenders will be unable to provide effective assistance of counsel due to caseload issues. The judge may order one or more of the following types of relief in any appropriate combination:

(1) Appoint private counsel to represent any eligible defendant pursuant to the provisions of section 600.064;

(2) Investigate the financial status of any defendant determined to be eligible for public defender representation under section 600.086 and make findings regarding the eligibility of such defendants;

(3) Determine, with the express concurrence of the prosecuting or circuit attorney, whether any cases can be disposed of without the imposition of a jail or prison sentence and allow such cases to proceed without the provision of counsel to the defendant;

(4) Modify the conditions of release ordered in any case in which the defendant is being represented by a public defender, including, but not limited to, reducing the amount of any bond required for release;

(5) Place cases on a waiting list for defender services, taking into account the seriousness of the case, the incarceration status of the defendant, and such other special circumstances as may be brought to the attention of the court by the prosecuting or circuit attorney, the district defender, or other interested parties; and

(6) Grant continuances.

> 4. Upon receiving the order, the prosecuting or circuit attorney and the district defender shall have ten days to file an application for review to the appropriate appellate court. Such appeal shall be expedited by the court in every manner practicable.
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> 5. Nothing in this section shall deny any party the right to seek any relief authorized by law nor shall any provisions of this section be construed as providing a basis for a claim for post-conviction relief by a defendant.
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> 6. The commission and the supreme court may make such rules and regulations to implement this section. Any rule or portion of a rule, as that term is defined in section 536.010, that is created by the commission under the authority delegated in this section shall become effective only if it complies with and is subject to all of the provisions of chapter 536 and, if applicable, section 536.028. This section and chapter 536 are nonseverable and if any of the powers vested with the general assembly pursuant to chapter 536 to review, to delay the effective date, or to disapprove and annul a rule are subsequently held unconstitutional, then the grant of rulemaking authority and any rule proposed or adopted after August 28, 2013, shall be invalid and void.

Section 600.063 sets forth a clear framework regarding this proceeding and consideration of the issues herein.

The Court finds that the District Defender did have the approval of the Director or Commission to file this Motion. The statute provides that any District Defender may file a Motion requesting a conference with the Presiding Judge to discuss "caseload issues involving any individual public defender or defenders, but not the entire office". In accordance with the statute, Movant seeks relief only for Mr. Wiegert and Mr. Stokely, two of the 35 public defenders (one position is unfilled at this time) in the District 16

office.[5] However, Movant also alleges in the Second Amended Motion that the statute does not preclude the District Defender from identifying all public defenders in her office if they have excess caseloads.[6] Even *if* that assertion is accurate (which is not a finding of the Court herein), the District Defender has *chosen* in her Second Amended Motion to *only* address the caseloads of Mr. Wiegert and Mr. Stokely. Therefore, the caseloads of those Assistant Public Defenders are before the Court for consideration.

During the conference, discussions occurred and information was provided regarding caseloads of other public defenders in the District 16 office. This was not done to specifically determine if their caseloads were excessive, but rather to create a comprehensive record and address an issue raised in footnote 6 of the Court of Appeals Order remanding this case - "some discussion in the motion of the workloads of the other attorneys in the office is necessary to address why the identified attorneys' cases cannot simply be reassigned". *See Petsch v. Jackson County Prosecuting Attorney's Office, 553 S.W.3d at page 410.*

At the outset of the conference on May 30, 2019, in an attempt to make a clear and complete record regarding this matter, the Court posed the following questions to the attorneys present: How do you describe what we are doing today? What are the guidelines and parameters for what is occurring? Is this a hearing, a conference, an

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[5] In the second footnote of Movant's Second Amended Motion, the District Defender acknowledges that "the motion requesting a conference cannot refer to the office as an entity, but instead must identify individual public defenders with excess caseloads".

[6] Movant essentially asserts that she is not precluded from filing a Motion seeking relief on behalf of the entire office – a proposition that is clearly barred by the statute.

administrative proceeding or some other type of proceeding? The attorneys and the Court discussed these questions.[7]

The Court finds that the statute is clear and leads to the unmistakable and unambiguous determination that the proceeding is/was a conference and not a hearing. The Court is to give effect to the language as written. *See Sherf v. Koster, 371 S.W.3d 903 (Mo. App. W.D. 2012), citing State ex rel. Cravens v. Nixon, 234 S.W.2d 442, (Mo. App. W.D. 2007).*

Section 600.063 uses the word "conference" on five different occasions including in section 1 describing the motion as requesting a "conference to discuss" caseload issues. The word "hearing" does not appear in the statute.

"Conference"[8] is defined as:

1. a meeting for consultation or discussion;
2. the act of conferring or consulting together; consultation, especially on an important or serious matter;
3. Government – a meeting, as of various committees, to settle disagreements between the two branches of the legislature.

The Missouri Legislature knows how to and routinely enacts statutes that create new causes of action. If that was the intent of the Legislature in this statute, it would/could have done so – however, that was not done. The statute does not create a new cause of action. Section 600.063 is silent as to specific rules or procedures that are to

[7] Section 600.063.4 provides that both the prosecuting attorney and the district defender have the opportunity to file an application for appellate review. Therefore, throughout the conference, the Court allowed and encouraged the District Defender and the Prosecuting Attorney to make a full and complete record on any issue they deemed appropriate.

[8] www.dictionary.com which is primarily sourced from the Random House Unabridged Dictionary.

be followed. That silence is consistent with a decision to *not* create a cause of action, is consistent with usage of the word "conference" and is consistent with the clear statutory intent of having a conference. In a conference, people confer, they discuss, they share information and they consult – specific procedures are not mandated.

To the extent an argument was made that this matter is to be treated as an administrative hearing[9], the Court disagrees. Subsection 6 of Section 600.063 does allow the Missouri State Public Defender Commission and the Missouri Supreme Court to implement rules and regulations.[10] However, the statute then provides that *if* any such rules or regulations are implemented, they are to comply with the provisions of Chapter 536 R.S. Mo.. Requiring that rules or regulations *comply* with Chapter 536 does not morph this statute into one creating an administrative hearing. In fact, Missouri courts as created by Article V of the Missouri Constitution, are expressly excluded from the definition of an agency or state agency within Chapter 536. R.S. Mo. Section 536.010 contains the following definitions:

> (2) "'Agency' means any administrative officer or body existing under the constitution or by law and authorized by law or the constitution to make rules or to adjudicate contested cases, *except those in the … judicial branches*."
>
> (8) "'State Agency' means each board, commission, department, officer or other administrative office or unit of the state *other than … the courts* … existing under the constitution … and authorized by the constitution or statute to … adjudicate contested cases."

[9] Referencing *In re: Missouri State Public Defender District 21, 2018 WL 6787054 (Mo. App. E.D. 2018),* which has been considered by the Court.

[10] As of the date of the conference herein, neither the Commission nor the Supreme Court had created nor implemented any rules or regulations.

This matter proceeded as a conference.[11] However, the Court desired to proceed in an orderly manner and ensure that a comprehensive record was made for appellate review. As a result, in many respects, the training and experience of the attorneys was evident by the fact that some common and familiar procedures for court proceedings were followed.[12]

The District Defender presented information by way of testimony and exhibits. Notice was provided to the Prosecuting Attorney (as required in section 2 of the statute). The Prosecuting Attorney was allowed to present information (by way of testimony and exhibits) and participate in the conference. The Presiding Judge also participated in the conference and presented information and exhibits for consideration. Pursuant to Article V, Section 15.3 of the Missouri Constitution, the Presiding Judge has "general administrative authority over the court and its divisions". This authority includes directing the Court Administrator and other court personnel to prepare statistical data regarding operations of the Court. *See 16th Judicial Circuit Local Rule 100.1.2.4.*

Constitutionality of R.S. Mo. Sections 600.062 and 600.063

In the body of the Second Amended Motion, Movant alleges that Sections 600.062 and 600.063 are unconstitutional, in violation of several provisions of the United States

[11] In keeping with this matter being a "conference", the Court did not swear in witnesses (although the record reflects that it was clearly anticipated and expected that the information provided would be accurate). The District Defender and Prosecuting Attorney were also allowed to mark any and all documents as "exhibits" and include them as part of the record of the conference, even though the Court did not apply admissibility standards to said exhibits. In fact, subsequent to the conclusion of the conference, both the District Defender and the Prosecuting Attorney have provided the Court with additional exhibits which are part of the electronic court file.

[12] To the extent the Court uses the words "testify", "evidence", "exhibit" or similar words herein, they are used to denominate commonly understood actions in a courtroom. They are not intended nor should they be construed to imply or suggest that anything other than a conference was held.

Constitution and the Missouri Constitution. However, in the prayer for relief set forth in the Second Amended Motion, Movant does not seek or ask for a court determination regarding the constitutionality of said statutes.

To the extent the *allegations* in the body of the Second Amended Motion are deemed sufficient to challenge the constitutionality of Sections 600.062 and/or 600.063, the Court hereby finds that said statutes are constitutional.

Caseload Issues

The specific and ultimate issues before the Court are whether Mr. Wiegert and/or Mr. Stokely have caseload issues and if so, is/are he/they unable to provide effective assistance of counsel as a result of those caseload issues. Section 600.063.3 states that if the Court grants relief (that is, if the Court finds that the named Assistant Public Defender(s) *do/does* have caseload issues), it shall be based on a finding that the individual public defender(s) will be unable to provide effective assistance of counsel due to caseload issues. Only after making such finding can the Court order any relief enumerated in the statute.

Although the Court is specifically evaluating Mr. Wiegert's and Mr. Stokely's caseload issues, the Court must also consider some discussion of the workloads of the other attorneys in the District 16 office.[13] While it is not the Court's role or intent to advise or direct the District Defender how to operate her office, assign cases, process cases or handle cases, because the District Defender is before the Court claiming caseload

[13] *See* footnote 6 of the Court of Appeals Order remanding this case. *Petsch v. Jackson County Prosecuting Attorney's Office, 553 S.W.3d at page 410.*

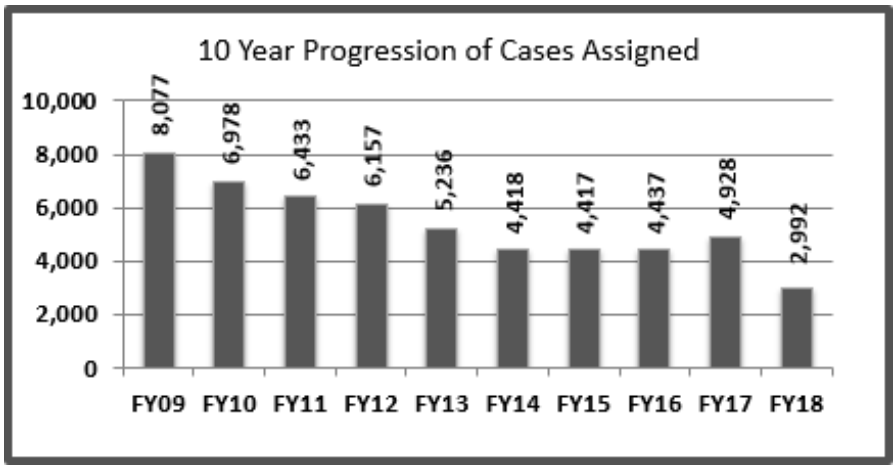
concerns and seeking specific statutory relief, the Court is compelled to and should properly evaluate *all* factors that might impact the claim, including but not limited to the District Defender's processes and procedures regarding the operation of her office.

At the conference, Ms. Petsch discussed the information contained in the Second Amended Motion, Exhibit A attached to the Second Amended Motion (her affidavit) and the other Exhibits attached to the Second Amended Motion. Ms. Petsch indicated that the attorneys in her office came to her in early October 2017, advising that their caseloads were unmanageable. Ms. Petsch also confirmed that she evaluated the caseload determinations of both Mr. Wiegert and Mr. Stokely (which they made in early October, 2017) and she found that their caseloads were unmanageable. Ms. Petsch asserts on page 2 of the Second Amended Motion that all of the public defenders in the District 16 office are in substantially the same "quandary" regarding their caseloads.

Ms. Petsch stated that she had worked for the public defender's office for 21 years. She also stated that, during the 10 years preceding the filing of the Motion, the District 16 Public Defender's office was comprised of 36 public defenders, until approximately 2012 when the one position was cut, resulting in 35 public defender positions. At the time of the conference, the District 16 office had one open public defender position – 34 public defender positions were filled.

In the conference, the Court provided information taken directly from the State of Missouri Public Defender Commission Fiscal Year 2018 Annual Report. Page number 76 of that Annual Report contains the following information for District 16, denominated

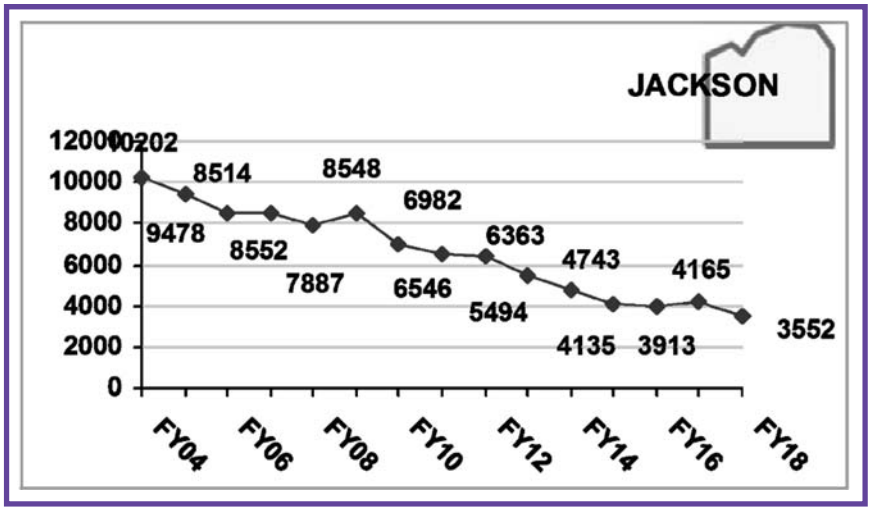
"10 Year Progression of Cases Assigned" (Court Exhibits 100 and 102 from the conference):



From FY09 through FY18, the Public Defender District 16 office has seen a reduction in the annual number of cases assigned to it from 8,077 to 2,992. This is a 63% reduction in cases assigned to the District 16 office over the past 10 fiscal years. During that time, the District 16 office maintained essentially the same number of attorneys - either 35 or 36 – to handle the decreasing number of cases assigned to it. Notwithstanding this significant reduction of cases assigned, the District Defender asserts in her Second Amended Motion that the caseload issues in the District 16 office started in early October, 2017, which is the issue before the Court. Ms. Petsch did state at the conference that she believed the office had been operating in crisis mode the entire 21 years she has worked at the public defender office.

Page number 43 of the Public Defender Commission FY 2018 Annual Report also provided a 15 year summary of cases closed by different public defender offices. The

summary for Jackson County, District 16, is as follows (Court Exhibits 101 and 102 from the conference):



From FY09 through FY18, the annual number of cases closed by the District 16 office has decreased from 8,548 to 3,552 – a reduction of 58%. Therefore, even though significantly fewer cases were being assigned to District 16 and the office maintained the same number of attorneys, District 16 closed 58% fewer cases.

Page 4 of the Public Defender Commission FY 2018 Annual Report contained a chart reflecting the total number of cases *assigned* to the trial division of the State Public Defender system in FY18 throughout the State of Missouri – 63,395 (this chart was marked as Exhibit 103 at the conference). This chart also stated the total number of FTE attorneys in the State Public Defender Trial Division in FY18 - 320.

Trial Division	
# of Offices	33
Cases Carried Forward into Fiscal Year 2018	33,296
# of Assigned Cases	63,395
# of Attorney FTE	320

Based on this information, the state-wide *average number of cases assigned* to each FTE attorney in the Trial Division in FY18 was 198 (63,395÷320). Conversely, in District 16 in FY18, the *average number of cases assigned* to each attorney in the office was only 85.5 (total number of cases assigned 2,992÷35 attorneys). *Therefore, on average, in FY18, each attorney in the District 16 Office received less than ½ the number of cases assigned as compared to the average numbers of cases assigned to attorneys throughout the state.*

Finally, the Court provided information (set forth in Court's Exhibit 104) comparing case filings and dispositions in the 16th Judicial Circuit (which is handled by Public Defender District 16 Office) and the 21st Judicial Circuit (which is handled by the Public Defender District 21 Office).[14] According to Exhibit 104 and the OSCA Circuit Court Profiles, comparing these two circuits reveals the following:

	16th Circuit	21st Circuit
FY 2018 Census	698,895	996,726
Number of Public Defenders in District Office	35	20[15]

[14] The information in Exhibit 104 is taken from the OSCA Yearly Circuit Court Profiles, published on the Missouri Courts website.

[15] Based on the statements of the Honorable Douglas R. Beach in his Order dated March 19, 2018 regarding public defender workload issues in the 21st Circuit.

Filings

Year*	Circuit Felonies		Associate Felonies	
	16th	21st	16th	21st
2008	3,666	4,156	4,922	4,760
2009	4,082	4,605	4,594	4,808
2010	3,565	5,017	4,382	5,671
2011	3,611	4,543	4,779	4,595
2012	3,695	4,700	4,363	6,303
2013	3,454	5,686	3,903	5,797
2014	3,000	6,022	3,621	6,701
2015	3,128	4,671	4,226	4,890
2016	3,202	4,369	4,455	4,981
2017	4,004	4,357	4,501	5,307
2018	3,682	4,791	4,029	5,972

Dispositions

Year*	Circuit Felonies		Associate Felonies	
	16th	21st	16th	21st
2008	3,832	4,002	4,415	4,397
2009	4,709	4,433	4,854	4,942
2010	4,029	4,884	4,392	5,425
2011	3,736	4,770	4,260	5,012
2012	3,557	4,349	4,434	4,988
2013	3,480	5,210	4,179	6,159
2014	2,994	5,783	3,632	6,564
2015	3,018	5,085	3,853	5,104
2016	2,757	4,363	4,072	4,840
2017	3,925	4,246	4,113	4,883
2018	3,861	4,642	3,246	5,342

* Missouri Fiscal Year running from 7/1 of the prior year through 6/30 of the year shown

** Data from OSCA Yearly Circuit Court Profiles - Published on Missouri Courts webpage

In discussing this information, Ms. Petsch pointed out that there is a much higher percentage of Class C, D and E Felonies filed in the 21st Circuit as compared to the 16th Circuit. However, even so, there have been significantly more criminal cases filed and disposed in the 21st Circuit over the past ten fiscal years.

In fairness to all parties, the information in Exhibit 104 represents the total number of filings in each circuit – not the number of cases assigned to the respective Public Defender's office. However, a review of pages numbered 30 and 80 from the Public Defender Commission's FY2018 Annual Report reveals that a very high percentage of the criminal cases filed in the 21st Circuit are assigned to the public defender's office (which is also true in the 16th Circuit). Therefore, considering all of this information, the unmistakable conclusion is that the District 21 Office is assigned and disposes of

significantly more cases each year, doing so with approximately ½ of the number of public defenders when compared to the District 16 Office. This does not support a conclusion of workload issues in the District 16 office.

The Court believes, based on the specific information and data referenced above, together with additional information and data discussed during the conference as it pertains to Mr. Wiegert and Mr. Stokely, that it is *not* reasonable to conclude, under any standard or legal burden, that the District 16 office has caseload issues and it is *not* reasonable to conclude that the attorneys in that office, specifically Mr. Wiegert and Mr. Stokely, have caseload issues. The Court does *not* find that the individual defenders are unable to provide effective assistance of counsel due to caseload issues.

The District Defender offered information through several witnesses claiming that the public defender system has been in crisis for years.[16] However, *if* correct, the District Defender could have availed herself of the statutory procedures in Section 600.063 at an earlier point in time. As to District 16 and the caseload claims regarding Mr. Wiegert, Mr. Stokely and perhaps other public defenders in the office, the District Defender did not pursue relief under Section 600.063 until November 2017 – over four years after the statute was enacted.

As to Mr. Wiegert and Mr. Stokely, their statements at the conference, their respective affidavits and the allegations in the Second Amended Motion all assert that in early October 2017, they concluded that they had caseload issues. However, Ms. Petsch,

[16] Much of this information focused on a statewide examination of the public defender system in Missouri. That is a different and distinct issue than the statutory issue before the Court. An examination of the statewide public defender system should be made in a different forum.

Mr. Wiegert and Mr. Stokely all acknowledged that they did not receive nor were they assigned a large number of cases in early October 2017 thereby causing the caseload problem.

The claimed "caseload issues" did not arise from an influx of cases nor an independent determination of caseload concerns that materialized in October 2017. Rather, the genesis of the caseload concerns arose contemporaneously with the Missouri Supreme Court's determination in the disciplinary action *In Re: Hinkebein*, SC96089. However, *Hinkebein* did not create any new obligations on the public defenders in District 16 (or anywhere else), it did not burden those attorneys with new requirements regarding their representation of defendants and it did not burden those attorneys with an additional number of cases. Rather, *Hinkebein* simply pointed out that the Rules of Professional Conduct (Missouri Supreme Court Rule 4) apply to public defenders. That is not new - there is not now nor has there previously been an exception in Rule 4 exempting public defenders from the requirements and responsibilities of the Rules of Professional Conduct. The District 16 Office has operated for years under the requirements of Rule 4, handling more cases than the current caseload of assigned cases. It does not follow that an enunciation of their long-standing professional obligations has created a caseload issue.

Caseload Issues/Concerns of David Wiegert

Mr. Wiegert's claimed caseload issues are based in large part on his RubinBrown hours as set forth in the Caseload Statistics chart prepared by Ms. Petsch and attached to her affidavit. One of the prepared charts contains statistics effective October 1, 2018 and

the second chart contains statistics effective April 30, 2019.[17] In the seven month interim between the dates of those charts, according to the District Defender's calculations, Mr. Wiegert's number of cases increased. However, as noted by the Court at the conference, in that same time period, the total number of cases assigned to the District 16 office remained steady – therefore, during the time the District Defender has sought caseload relief for Mr. Wiegert, the number of cases assigned by the District Defender to Mr. Wiegert has apparently increased even though there was not a proportionate increase in the number of cases in which the public defender's office was appointed.

As part of the undersigned's responsibilities as Presiding Judge and in preparation for this conference, the Court directed a review of the Court's electronic records, to determine the number of cases in which Mr. Wiegert had entered an appearance as an attorney of record. *See Court's Exhibits 108 and 109.* That evaluation of Mr. Wiegert's caseload effective April 30, 2019 reflected that Mr. Wiegert had entered his appearance in a total of 97 cases. However, 34 of those cases (35%) had active warrants, were in diversion or suspended for mental examination. As a result, Mr. Wiegert had an active caseload of 63 cases – however, only 34 of those cases were pending in trial divisions. The Court does not find this to be an excessive or unmanageable caseload.

Mr. Wiegert represents defendants being held in the Jackson County Detention Center ("JCDC"). He stated that, in order to review discovery with those clients, he sits

[17] RubinBrown is further discussed elsewhere in this Judgment/Order. In referencing either RubinBrown, the RubinBrown hours or the cases assigned to Mr. Wiegert, the Court is not adopting the RubinBrown report, the numbers, the methodology or the calculations included in Ms. Petsch's chart – it is simply referencing those numbers as the District Defender's assertion regarding Mr. Wiegert's caseload issues.

and reviews each and every page and document of discovery with his client during a "contact" visit[18] at JCDC. Mr. Wiegert stated this process impeded his ability to effectively handle all of his cases as it required him to spend an inordinate amount of time at the jail waiting for his client to be brought for a contact visit and then review discovery. However, it is possible for Mr. Wiegert (or any other attorney entering JCDC) to have a "non-contact"[19] visit with clients in JCDC. Those visits can occur quicker and are a more efficient use of time. Mr. Wiegert advised that he was not comfortable with a non-contact visit.

As discussed at the conference, there are also other alternatives available which would allow Mr. Wiegert to more efficiently provide discovery to his clients and efficiently review that discovery – alternatives which are available to and regularly utilized by other attorneys. These alternatives include providing confidential, privileged copies of the discovery to management at JCDC, with the instruction that the documents be provided to his client for review in the jail library. After the client reviews the discovery, Mr. Wiegert could then meet his client to discuss the discovery. Although possible, Mr. Wiegert indicated he did not want to leave any discovery at JCDC for clients to review.

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[18] At JCDC, a "contact" visit allows the attorney and his/her client to meet in the physical presence of each other in a room (there can be other attorneys and their clients in the same room discussing their cases). This allows the attorney and client to shake hands, write on papers and hand them back and forth to each other and otherwise have physical contact with each other.

[19] A "non-contact" visit at JCDC allows the attorney and his/her client to see each other in the same room, separated by glass and using telephones to talk to each other. Other attorneys and their respective clients can be in the same room talking on separate phones regarding their cases. Although the attorney and client can talk, look at each other and show each other documents, they cannot pass the documents back and forth to each other, cannot shake hands and cannot otherwise have physical contact with each other.

In the conference, Mr. Wiegert stated that he is required to "triage" his cases to address those that were more urgent. However, this is not uncommon - every attorney who tries cases (and every other practicing attorney) routinely engages in the same practice. "Triaging" cases does not equate to caseload issues. While it is not the intent of the Court to tell Mr. Wiegert how to do his job, the Court is mindful that Mr. Wiegert, and every other trial attorney in this area, are busy ("busy" is not the same as having caseload issues as addressed in the statute) and therefore triage their cases. Busy attorneys (and busy people in other professions) do and should seek ways to work more efficiently. The same should be true of Mr. Wiegert and other attorneys in the District 16 office.

Because the District Defender is before the Court having filed a Motion seeking caseload relief, it is appropriate for the Court to consider if inefficiencies are contributing to claimed caseload issues. Some of the actions and policies discussed in the conference and in this Judgment/Order are inefficiencies that could be remedied by Mr. Wiegert and the District Defender if desired.

Mr. Wiegert acknowledged that he maintained a personal postponement list and that he had filed "limited" entries of appearance. However, he agreed that a personal postponement list was essentially the same as a wait list. As discussed later in this Judgment/Order, it is inappropriate to create a wait list *before* there is a court finding of the existence of caseload issues. Regarding his "limited" entries of appearance, the legal authority for Mr. Wiegert's limited appearances remains unclear, especially in the face of

Court orders to enter his appearance. These actions only serve to further delay cases on behalf of his clients.

Caseload Issues/Claims of Walter Stokely

Like Mr. Wiegert, Mr. Stokely's claimed caseload issues are based in large part on his RubinBrown hours and are set forth in the Caseload Statistics chart prepared by Ms. Petsch and attached to her affidavit.[20] The charts are the same as referenced above (when discussing Mr. Wiegert's caseload) and contain statistics from the same dates as referenced above. In the seven month period between the dates represented by those charts, according to the District Defender's own calculations, Mr. Stokely's number of cases decreased from 91 to 60 (a 33% decrease) and his RubinBrown hours decreased from 2,940 to 2,351.3 (a 20% decrease).

As was done regarding Mr. Wiegert, the undersigned, as Presiding Judge and in preparation for this conference, directed a review of the Court's electronic records, to determine the number of cases in which Mr. Stokely had entered an appearance as an attorney of record. The Court's evaluation of Mr. Stokely's caseload effective April 30, 2019 reflected that Mr. Stokely was assigned and had entered his appearance in a total of 78 cases. *See Court's Exhibits 106 and 107.* However, 35 of those cases (45%) had active warrants, were in diversion or suspended for mental examination. As a result, Mr. Stokely had an active caseload of 43 cases – however, only 25 of those cases were pending

[20] See footnote 17 above – the Court makes similar observations as it pertains to Mr. Stokely.

in trial divisions. The Court does not find this to be an excessive or unmanageable caseload.

Mr. Stokely also identified the same policies or practices that are claimed to impede his ability to effectively represent his clients, including difficulties related to the time involved in having contact visits with his clients detained in JCDC and the time it takes to sit with clients and review discovery. The same observations and information which is/are described above in the comments regarding Mr. Wiegert's caseload, were also discussed with Mr. Stokely – the Court will not repeat those observations here but rather refers the reader to the section above.

Based on the April 30, 2019 chart of caseload statistics prepared by Ms. Petsch and attached to her Affidavit, there are seven team leaders/supervisors in the District 16 Office in addition to Mr. Stokely. All of those supervisors have significantly fewer cases and a much lower RubinBrown hour calculation than Mr. Stokely. This leads to the conclusion that those other supervisors are available and able to handle many more cases than currently assigned to them. If Mr. Stokely has a caseload issue, which is not the finding of this Court, this is one way for the District Defender to alleviate that issue.

The State Public Defender Commission recently entered into an agreement with Plaintiffs represented by the American Civil Liberties Union in the case *Dalton, et al. v. Barrett, et al.*, Case Number 17-04057-CV-C-NKL, pending in the United States District Court for the Western District of Missouri, Central Division.[21] In that agreement, the State

[21] This Court is aware that the agreement has not been adopted by the United States District Court. By referring to that agreement in this Judgment/Order, this Court is not adopting that agreement nor the specific terms in the agreement. The agreement is referenced to provide insight regarding the State Public

Public Defender Commission stated that it believed and agreed that supervisors should have an assigned caseload not to exceed 1,560 RubinBrown hours.

In District 16, all supervisors other than Mr. Stokely have a RubinBrown number significantly less than the standard which the State Public Defender Commission apparently believes is appropriate. Therefore, if Mr. Stokely has a caseload issue, which is not the finding of this Court, there is opportunity to re-assign his cases to other attorneys in the office if the District Defender chose to do so.

RubinBrown[22]

Throughout the filings in this matter and throughout the conference, there was much discussion regarding RubinBrown. In the Second Amended Motion (and prior versions of the Motion), the District Defender relied heavily on RubinBrown as support for her assertion that Mr. Wiegert and Mr. Stokely (and other attorneys in the District 16 Office) have caseload issues. At the conference, Ms. Petsch, Mr. Wiegert, Mr. Stokely and others again asserted RubinBrown as support for the excess caseload claims. As set forth herein, the Court is not adopting RubinBrown as a definitive standard regarding caseload issues.

The RubinBrown standards were developed by using a time entry study of Missouri public defender activities, combined with a survey process to arrive at the

Defender Commission's apparent belief as to an appropriate caseload for attorneys and supervisors in the Public Defender system.

[22] In June 2014, a report entitled "The Missouri Project: A Study of the Missouri Public Defender System and Attorney Workload Standards" was prepared by RubinBrown LLP, certified public accountants. RubinBrown was engaged by the American Bar Association to prepare such report. Throughout the conference and this Judgment/Order, this report has been referred to and simply called "RubinBrown". RubinBrown was attached to the Second Amended Motion as Exhibit C.

workload standards. The resulting workload standards, in theory, reflect estimates of the average amount of time an attorney can expect to spend on different categories of cases and case tasks in order to provide reasonably effective assistance of counsel.

The RubinBrown standard or hours as set forth in the caseload charts, reflect a caseload for Mr. Wiegert and Mr. Stokely that is above the recommended RubinBrown hours. The District Defender, Mr. Wiegert and Mr. Stokely rely heavily on that calculation in claiming that Mr. Wiegert and Mr. Stokely (and the rest of the District 16 Office) have caseload issues.

The caseload charts as prepared by Ms. Petsch include three different types of cases in the first column. Each of these different types of cases have different RubinBrown hours associated with them. Therefore, on its face, the calculations set forth in the charts cannot be confirmed. There was no information provided at the conference breaking down this calculation consistent with RubinBrown.

Mr. Steve Hanlon, Project Director for the ABA on the RubinBrown standards, advocated that the Court to adopt the RubinBrown standard when considering the caseloads of Mr. Wiegert, Mr. Stokely and the rest of the District 16 Office. Mr. Hanlon stated that the Court should give "deference" to RubinBrown as a beginning point in its evaluation of caseload issues. However, when Mr. Hanlon was asked whether the RubinBrown standard should be the *only* factor considered when looking into a public defender's caseload issues, he indicated it would not be the only factor. Mr. Hanlon indicated that RubinBrown did include subjective factors in its calculations. He also stated that the intent of RubinBrown was that it act as a "general instruction" (comparable

to a jury instruction) on the matter of caseload issues and the Presiding Judge should then review particular factors and subjective factors and weigh those factors as part of the overall analysis.

While instructive, RubinBrown is not the "end all be all" regarding caseload issues nor is it simply a mathematical computation that ultimately determines caseload issues. As noted by the witnesses who discussed RubinBrown, there are significant subjective factors and analyses that must be made and considered in determining caseload issues. Although Mr. Hanlon indicated that he believed subjective factors are included in RubinBrown, the Court is not persuaded to believe that every, or even most, reasonable and necessary subjective factor(s) is/are or can be included in RubinBrown. By definitive, "subjective" factors are distinctive to, pertain to or are characteristic of specific, unique circumstances, individuals and events. If all subjective factors could be included in a study, they would effectively become "objective" as they would apply in every situation for every individual and event. The Court declines to adopt RubinBrown, in and of itself, as a definitive measure for caseload issues and concerns.

The RubinBrown number/hours is stated to be an annual hours calculation. Ms. Petsch stated that cases "drop off" the calculation when they are over one year old. The information provided at the conference, including from witnesses who addressed this issue, consistently acknowledged that criminal cases in the 16th Circuit typically remain pending over one year – Ms. Petsch and others acknowledged that 1½ years was not unusual. It is also typical that cases remain pending and active over two (and sometimes more) calendar years.

Although RubinBrown states that it calculates annual hours, it remains a static, snapshot computation – that is, a computation taken on any given day based on the number of cases then assigned to a given attorney on that day. As to Mr. Wiegert for example, his RubinBrown number as of April 30, 2019 (based on the District Defender's calculations) was 3,041.10. However, if that static calculation takes into consideration that Mr. Wiegert's cases will take approximately 1½ years to resolve, it would appear inappropriate to include all of those RubinBrown hours within that particular calendar year. This would seem to be part of the subjective analysis and evaluation that must be taken when evaluating caseload issues. These are unique aspects of Mr. Wiegert's cases pending in the 16th Judicial Circuit. The same subjective analysis and consideration would apply to Mr. Stokely's caseload.

The caseload standard representing the maximum number of hours of cases which a public defender can be assigned without being considered to have caseload issues is 2,080.00 based on RubinBrown calculations.[23] As noted above in the discussion regarding the agreement in *Dalton,* the State Public Defender Commission acknowledged that supervisors should have an assigned caseload not to exceed 1,560 RubinBrown hours. Based on these calculations alone, 14 of the attorneys and supervisors (actually 13 attorneys plus one open position) in the District 16 Office are under that standard – therefore, 40% of the attorneys in the District 16 Office are available per RubinBrown to have additional cases assigned to them. Apparently however, the District Defender has

[23] This caseload standard was referenced by Ms. Petsch in the information she provided at the conference. It is also acknowledged and agreed to by the State Public Defender Commission in its proposed consent agreement in the *Dalton, et al v. Barrett, et al*.. See page 11 of the proposed consent judgment.

elected to not re-assign or re-distribute cases to those attorneys. Although that is her prerogative, it is certainly one of the factors for this Court to consider in evaluating the claims in this matter.

One of the supervisors, Joseph Megerman, provided information at the conference. Both caseload charts prepared and submitted by Ms. Petsch reflected that Mr. Megerman had less than ½ of the RubinBrown hours the State Commission believes a supervisor can handle. When asked about this at the conference, Mr. Megerman advised that he was unaware of the State Commission's belief regarding his possible caseload. Mr. Megerman did however, tell the Court that his caseload can double on a daily basis – that statement is not supported based on the facts and information presented and known to the Court. Mr. Megerman remains one of several attorneys in the District 16 Office who are available for re-assignment of cases if the District Defender chooses to do so.

Finally, even *if* the Court were to adopt RubinBrown (which is not the finding of this Court), there must be consideration and evaluation of specific, subjective facts, findings and factors within the 16th Judicial Circuit and within the District 16 Office, many of which are discussed in this Judgment/Order. Those specific, unique and subjective factors would outweigh and overrule a simple, mathematical computation driven by RubinBrown.[24]

[24] While not intending to repeat all of these subjective factors, they include the significant reduction in numbers of cases assigned to the District 16 Office, the relatively low number of cases closed by the District 16 Office which extends the length of cases to disposition, the inefficiencies internal in the District 16 Office's assignment of cases and processing of cases, the fact that there are several attorneys in the

Another subjective factor to consider as it applies to the 16th Circuit and therefore the District 16 Office, is the Court's Criminal A dockets. For all criminal cases filed in the Kansas City venue of the 16th Circuit, the preliminary handling and processing of those cases (through arraignment and continuing until a case is assigned to a circuit trial division) occurs on larger dockets handled by one Circuit Judge and one Associate Circuit Judge. For years prior to the claim of caseload issues, the District Defender utilized a docket attorney to handle these larger dockets. The District Defender has declined to consider re-instituting docket attorneys for these dockets, which would allow for a more efficient processing of cases handled by public defenders.

In addition, the District Defender has declined to re-institute an early disposition docket (which has been an appropriate and efficient manner to resolve cases). This was a docket which public defenders (and private attorneys) have participated in for years – it identified cases that could (and often were) resolved early. The public defender could remove any cases from this docket if deemed appropriate.

The District 16 Office also has a "first felony policy", by which the attorneys do not allow a defendant to plead guilty to a first felony without a full and complete workup of the case. On its face, such policy is appropriate. However, the blind application of such a policy, even in the face of a defendant wanting to plead guilty (perhaps contrary to his/her attorneys advice), is appropriate for this Court to consider as it applies to the claims in the District Defender's Motion. In determining whether the individual public

District 16 Office whose RubinBrown numbers are significantly less than the RubinBrown standard and the fact that cases remain pending for longer than one year on average.

defenders in this Motion (and/or other public defenders in the District 16 Office) are unable to provide effective assistance of counsel due to caseload concerns, it is appropriate for the Court to consider and review whether there are actions available to the District Defender to address or alleviate any of the claimed caseload issues.

Remedies/Relief

At the conference, the District Defender presented a significant amount of information, through several witnesses, which focused on potential remedies or relief that might be granted. In many respects, this information would more appropriately be directed to legislative or executive policy makers. As it applies in the specific issues before this Court and according to Section 600.063.3, the Court must *first* grant relief (i.e. sustain the motion) based on "a finding that the individual defender or defenders will be unable to provide effective assistance of counsel due to caseload issues". Only *after* the Court makes that finding may the Court consider or order certain relief as enumerated in the statute.

Rather than bifurcating the conference and in an effort to create a complete and comprehensive record, the District Defender, the Prosecuting Attorney and the Court each had the opportunity to provide information related to remedies/relief. However, based on the findings in this Judgment/Order, the Court is denying the relief sought by the District Defender – i.e. the Court is finding that there are *no caseload issues* as to Mr. Wiegert and Mr. Stokely and that there are *no caseload issues* as to the District 16 Office. Therefore, because of that finding, the Court does not order any specific relief.

Although there are no caseload issues and therefore no remedies/relief needed or ordered, the Court is compelled to make the following observations regarding the District Defender's claims and the unilateral and unwarranted actions of attorneys in the District 16 office. These actions are particularly problematic in light of the District Defender's failure to contact the court during the pendency of this matter, seeking to actually hold the conference.

Since the initial filing of this Motion and continuing thereafter, attorneys in the District Defender's office have initiated their own, unilateral relief, based on their belief and assertion (without a Court determination) that they had caseload issues. There was much discussion at the conference regarding these actions. Of specific concern are the creation of "postponement lists", refusal or delays in interviewing and screening defendants when Ordered by the Court to do so and refusal to enter appearances in cases when Ordered by the Court.

A "postponement list" is for all practical purposes, the same as a "wait list". A wait list is a remedy to be ordered by a Court *after* a finding of caseload issues. Additionally, R.S.Mo. Section 600.062 specifically prohibits the District Defender and any assistant public defender from limiting their availability or refusing representation without *prior* court approval.

Therefore, the District Defender and some of the attorneys in her office have, regrettably, acted contrary to statutory authority, without prior court approval or authorization and in some cases, directly contrary to specific Orders of the Court. As officers of the Court, all public defenders in the District 16 office, *and all other licensed*

attorneys, are bound to follow Missouri statutes and Court orders – the deliberate and flagrant failure to do so (especially when there are legal avenues and actions that can/should be followed) is and should be a cause of grave concern to all. The rule of law has long been a bedrock of society and results in order and stability. The failure to follow and honor the rule of law, especially by those *within* the system, can only lead to disarray, chaos and disorder.

Judgment/Order

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the District Defender's Second Amended Motion is **DENIED** and the relief sought by the District Defender is **DENIED**. The Court does ***not*** find that David Wiegert has caseload issues and does ***not*** find that Mr. Wiegert is unable to provide ineffective assistance of counsel due to caseload issues. The Court does ***not*** find that Walter Stokely has caseload issues and does ***not*** find that Mr. Stokely is unable to provide ineffective assistance of counsel due to caseload issues. To the extent the Court has considered the caseload of the District 16 Office consistent with comments set forth in the Court of Appeals Order remanding this case, the Court does ***not*** find that the District 16 Office has caseload issues.

IT IS SO ORDERED.

June 27, 2019
Date

HONORABLE DAVID MICHAEL BYRN
Presiding Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the above and foregoing were mailed/emailed/faxed on this 27th day of June, 2019 to:

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