

Georgia Public Defenders Standards Council

Legislative Oversight Committee

Annual Report



January, 2008

Senator Preston W. Smith, Chairman

EXECUTIVE SUMMARY

The Georgia General Assembly places a high priority on fulfilling its constitutional obligation to provide an adequate criminal defense for the indigent. Indeed, between the years of 2000 and 2008, the legislature has implemented a statewide public defenders system and has seen the aggregate expenditures in furtherance of that system double from \$54 million to \$107 million.

In accordance with O.C.G.A. 17-12-10.1(b), the bicameral legislative oversight committee of the Georgia Public Defender Standards Council (hereafter, "Council") held numerous meetings in addition to, and in coordination with, meetings of the joint legislative study committee and the appropriations subcommittees. Those sessions underscored the following themes which generate grave concern to the legislative oversight committee and appear to threaten the continued viability of Georgia's statewide indigent defense system:

- There is a consistent lack of transparency and/or general managerial incompetence demonstrated by the Council and its staff. This frequently led to misinformation being furnished to the legislature and Governor's office which subsequently formed the basis of policy and budgetary decisions. While these decisions may have been manipulated to the temporary benefit of the Council's agenda, the process generally eroded the credibility of the Council staff to the General Assembly.¹
- The legislature repeatedly requested that the Council produce a 'zero-base' budget which links the state's costs to specific statutory requirements set forth in code. However, to date, the Council has failed to produce such a budget. Instead, the Council simply criticized the legislature's zero-base budget without providing its own alternative. Rather than addressing the amount of funding that the code requires the state to contribute to the system, the Council instead repeatedly focused on designing a system to use the maximum amount of money that may be available to be spent – a formula that minimizes efficiencies and guarantees a burgeoning bureaucratic system with disproportionately escalating budgets. This apparently stems from an erroneous belief that a revenue stream generated by the collection of fines and fees is earmarked entirely for a specific purpose, a concept which is expressly prohibited by the Georgia Constitution.
- The Council has demonstrated an inability or unwillingness to live within the budget parameters established by the legislature each year. Instead it creates its own internal budget which virtually ignores the one established by the appropriations process. This has led to a dramatic escalation of expenditures as compared to other state agencies.
- Most disturbingly, the Council engages in the practice of "coercive deficiencies" whereby it operates a budget far in excess of what was appropriated and then returns to the General Assembly demanding the legislature "must" make an emergency funding appropriation or

¹ It should be noted that while there are pervasive problems with the structure of the system and the policies of the GPDSC Council, the majority of the local circuit public defenders and their staffs are doing an exceptional job and should be commended for succeeding in a system which has often hindered rather than helped their difficult work.

the result will be disrupting the entire judicial system, delaying the administration of justice, failing to honor contracts and causing mass layoffs of employees. Despite repeated attempts to correct this through a 'full-year' appropriation budget, the Council nevertheless returns each year with threats of dire consequences if they do not receive additional appropriations beyond that which the legislature budgeted. Any other state agency is prohibited from this practice. But amazingly, the Council has succeeded in using this tactic to obtain funding in amounts that exceed 100% of its own budget requests, while publicly proclaiming that it is still under-funded and experiencing a shortfall.²

- The appropriations and oversight committee have urged the Council to recognize and exhaust other agency funds prior to using its money from the State General Fund. This will minimize the economic impact on the State General Fund from which all other state priorities are funded. For two consecutive years, the Council falsely testified that it had exhausted all agency reserves and demanded 'emergency' funding through a coercive deficiency to correct an alleged shortfall in funding. Only later (both years) did they allegedly discover millions of additional funds after the legislature and Governor had trusted their assurances that they were actually out of money. This has resulted in the Council being over-funded and receiving millions of dollars from the State General Fund in excess of its own original budget request submission.
- The Council has made decisions to declare a conflict of interest in a massive number of cases and outsource those cases to private attorneys who bill the state by the hour for their services. Now the council acknowledges its mistake in outsourcing so many cases and blames that decision, in part, for its budget woes caused by the ballooning costs associated with the so-called pipeline conflict cases. This includes the Brian Nichols case,³ which the Council now says never should have been sent out as a conflict case. The gross mismanagement of that case by the trial judge who was unable or unwilling to bring it to trial after approving more than \$1.5 million of defense funds demonstrates an additional problem with the system. Senior Judge Hilton Fuller, who is not accountable to any electorate, presided over the case and approved unprecedented amounts of money for the defendant while sealing the financial records from any legislative review. Moreover, after issuing gag orders to the participants in the case (purportedly to ensure that a jury would not be tainted by media comments), Judge Fuller then conducted his own media/publicity campaign. Unbelievably, he used his public stage to conduct on-camera and print media interviews which benefited the defense (and its future appeals) through his public statements about the "lack of funding" for a fair defense.

² By way of example, in the Fiscal Year 2008, the agency initially submitted a budget of \$45,505,318 (in addition to the county contributions to the system). The legislature adopted HB95 which approved a budget of \$40,265,178. If the Council receives its amended request for additional funds in the FY08A budget, its total estimated final budget for fiscal year 2008 would be an aggregate total of \$50,758,935. If approved by the legislature, this would place its annual budget at more than five million dollars *above* its own FY08 agency request for the entire year and more than ten million dollars *above* that which the legislature initially approved for its annual budget (See Table 8, *infra*).

³ Brian Nichols is a criminal defendant who, while awaiting trial on a rape charge, is accused of staging a murderous escape from the Fulton County courthouse, during which four people were murdered including a superior court judge, court reporter, deputy sheriff and federal customs agent.

When the legislature began to express concern over the Judge's unconventional behavior, he retained Emmet Bondurant as his personal attorney. Mr. Bondurant was one of the architects of the statewide public defender system and had only recently stepped down as Chairman of the Council. Ultimately, Judge Fuller resigned from the case when one of his press interviews with *The New Yorker* magazine, quoted him as having passed judgment on the accused - all but guaranteeing a mistrial or at least a reversal of any death penalty conviction.⁴ In the wake of that debacle, Judge Fuller again tried to place the spotlight on himself, focusing upon whether he thought his latest media/publicity comments were "on" or "off" the record. Of course, this misses entirely the relevant question of why the judge presiding over a quadruple murder, death-penalty trial is frittering away his time (and the taxpayers' money) conducting interviews with *The New Yorker* magazine in the first place. This is especially so, when he has taken 34 months and approved over \$1.5 million in defense costs without even impaneling a jury to *begin* a trial.

- The Council has attempted to usurp the authority of the legislature to establish policy through its management of the budget. Driven by ardent defense advocates who eschew any legislative policy relating to the death penalty and lobby for the best defense that money can buy, the Council has created a system that is collapsing under its own weight. This effectively undermines the state's policy of providing constitutionally adequate criminal defense to all truly indigent persons accused of crimes. It also drives an argument that the escalating costs of the system (now largely controlled by these advocates) contravenes the legislature's established policy for criminal penalties, including the imposition of the death penalty.
- Finally, it is apparent that the new Director of the Council, Mack Crawford, recognizes many of these problems and has expressed an intention to work to correct them. However, there is a significant disparity between the Council staff and Director Crawford. There also is a significant disparity between the viewpoint of Director Crawford and the membership of the Council, who frequently speak on its behalf. A minority group of the Council, including its current Chairman (curiously elected immediately prior to the change in the Council membership), continues to espouse the views of the previous Chairman, Emmet Bondurant and former Director Mike Mears. While this extreme viewpoint now appears to be a minority one on the Council, it is the most vocal. It also has become increasingly evident that these spokesmen do not necessarily speak for the majority view of the Council. This disparity has caused significant confusion among legislators who now perceive widely differing views from the Director and those who serve on the Council or its staff. Unless Director Crawford is allowed to lead true reforms to this system, it is destined to fail at the hands of the very Council and staff charged with its protection.

⁴ The article, based upon an interview that Judge Fuller voluntarily offered, quotes him as saying that the defense planned to argue Brian Nichols acted out of a delusional compulsion. Judge Fuller is next quoted as saying, "That's their only defense, because everyone in the world knows he did it." *The New Yorker*, "Death in Georgia: The high price of trying to save an infamous killer's life", by Jeffrey Toobin, February 4, 2008.

INTRODUCTION & BACKGROUND

The Public Defender Standards Council Legislative Oversight Committee was created by O.C.G.A. § 17-12-10.1. The purpose of the joint legislative oversight committee is to review and evaluate information on new programs, standards, strategic plans, program evaluation reports, and budget recommendations proposed by the council on an annual basis. The Committee also reviews and evaluates the fiscal impact of fees and fines on counties, and attempts to identify opportunities to reduce or consolidate fees, fines, and surcharges. The Chairman of the joint legislative oversight committee is required to prepare an annual report of the Committee's activities and findings and submit the same to the membership of the General Assembly and the Governor.⁵

The Governor, the Senate Committee on Assignments, and the Speaker of the House of Representatives appointed the following eight members to serve on the Committee in 2007: Senator Preston Smith as Chairman; Senator Mitch Seabaugh; Senator Jack Hill; Senator Judson Hill; Representative Barry Fleming; Representative Tom Knox; Representative David Ralston; and Representative Mack Crawford. In the summer of 2007, Mr. Crawford resigned as a State Representative and member of the legislative oversight committee to become the Director of the Council. To date, the Speaker of the House has not appointed a House member to replace Rep. Crawford on the legislative oversight committee.

The Council was created by House Bill 770 in 2003, and officially replaced the former Georgia Indigent Defense Council on December 31, 2003. Although originally the Council was part of the judicial branch of government, the passage of Senate Bill 139 in 2007 transferred authority over the Council to the executive branch. According to statute, the Council is "responsible for assuring that adequate and effective legal representation is provided, independently of political considerations or private interests, to indigent persons who are entitled to representation under this chapter."⁶

Pursuant to O.C.G.A. § 17-12-1(b), the legislative oversight committee is required to meet at least six times each year.⁷ Each of the 2007 meetings focused on different aspects of the Council's financial responsibilities. Since its inception four years ago, budget requests from the Council have increased dramatically, and one goal of the legislative oversight committee is to investigate the reasons behind the consistently rising budgetary demands to ensure that the Council is operating efficiently. A common theme throughout the oversight committee meetings was the general lack of transparency in the Council's budget requests.

⁵ O.C.G.A. § 17-12-10.1(f)

⁶ O.C.G.A. § 17-12-1(c)

⁷ Sen. Preston Smith chaired meetings on January 10, June 13, July 23, August 22, September 24 and November 19, 2007 as well as a final meeting on January 10, 2008.

INDIGENT DEFENSE FUNDING FY00 – FY08

Prior to the creation of the Georgia Public Defender Standards Council, counties contributed approximately 90% of the total costs for Georgia’s indigent defense system. While the state, through the Georgia Indigent Defense Council (IDC) contributed the remaining 10% in the form of grants to counties.

Since the current statewide public defender system was established, the state’s contribution has risen to approximately 40% of the total costs. However, the counties continue to contribute approximately the same amount (see Table 1). Accordingly, total expenditures for indigent defense in Georgia have now reached \$107 million, almost double the amount spent in 2000.

Table 1: Indigent Defense Funding FY00 - FY08

Fiscal Year	State General Funds	Agency Funds	Total State	% State	Total County(1),(2)	% County	Total Costs
2000	\$5,262,000	\$0	\$5,262,000	9.7%	\$48,935,814	90.3%	\$54,197,814
2001	\$5,821,227	\$16,161	\$5,837,388	9.5%	\$55,419,947	90.5%	\$61,257,335
2002	\$7,259,946	\$0	\$7,259,946	10.1%	\$64,314,561	89.9%	\$71,574,507
2003	\$7,682,177	\$0	\$7,682,177	9.8%	\$70,534,144	90.2%	\$78,216,321
2004 (3)	\$9,304,145	\$0	\$9,304,145	-	-	-	-
2005	\$29,808,043	\$1,200,000	\$31,008,043	35.5%	\$56,310,197	64.5%	\$87,318,240
2006	\$37,079,060	\$3,359,775	\$40,438,835	37.6%	\$67,123,428	62.4%	\$107,562,263
2007	\$36,341,079	\$1,972,832	\$38,313,911	36.5%	\$66,773,894	63.5%	\$105,087,805
2008	\$35,430,140	\$4,835,038	\$40,265,178	37.6%	\$66,773,895	62.4%	\$107,039,073

- 1) FY00 – FY03, Actual county expenditures/state budgeted amounts.
- 2) FY05 – FY08, Amounts budgeted (actual expenditures are only partly available).
- 3) FY04, Expenditures and amounts budgeted are not available

As a general matter, the oversight committee has requested that the Council create a budget model that sets out both the state and county contributions accurately and completely.

COUNTY CONCERNS

Kem Kimbrough of the Association County Commissioners of Georgia (ACCG) testified before the Committee that counties too often are left to pay unexpected costs because the state contributes a limited amount of money to the Council each year.

STATE GENERAL FUND REVENUE SOURCES

In a 2004 Special Session, the General Assembly passed HB1EX which established a new revenue source that could be used by the legislature to help fund the provision of indigent defense. These revenues included an indigent defense application fee, a \$15 civil action surcharge, and a Peace Officer, Prosecutor and Indigent Defense Funding surcharge.⁸ Although these revenues have been treated like an entitlement by the Council, the statute establishing these revenue streams also states that “the General Assembly *shall not be obligated* to appropriate such amount for indigent defense” (italics added).⁹

AGENCY REVENUE SOURCES

INTEREST ON LAWYERS’ TRUST ACCOUNTS (IOLTA)

Indigent defense in Georgia is also funded using a variety of other sources of revenue. This year the Georgia Supreme Court, which had been instrumental in urging the creation of the new system, issued an order to cut off all funding from one such revenue stream. IOLTA funds, or ‘Interest on Lawyer’s Trust Accounts,’ are collected by order of the Georgia Supreme Court and managed by the Georgia Bar Foundation for the general purpose of supporting legal services for lower income Georgia citizens. This year Wachovia Bank agreed to increase the interest rate on IOLTA accounts from 0.75% to 3.41%, which is likely to significantly increase the amount of IOLTA funds available to the Georgia Bar Foundation. Notwithstanding this potential increase in available IOLTA funds, the judicial branch nevertheless followed through with their decision to stop providing these funds to the Council after FY07. The loss of this funding source is a huge detriment to the Council because it received \$1.4 million annually by order of the Supreme Court.

The legislative oversight committee questioned the Administrative Office of the Courts and the judicial branch as a whole about its action on this matter, pointing out the apparent inconsistency between judicial claims that the state indigent defense system is underfunded and the discontinuation of all funding to that program.

CLERKS’ AND SHERIFFS’ TRUST ACCOUNTS

The Clerks’ and Sheriffs’ Trust Account is another source of financial support for the Council. According to O.C.G.A. § 15-16-27, this fund is responsible for remitting money directly to the Council on a quarterly basis, and the Council in turn is required to allocate these funds back to the circuit public defender offices. Since FY05, this fund collected, on average, \$1.9 million a year, and FY08 collections are projected to exceed \$2 million.

⁸ O.C.G.A. §§ 15-6-95, 15-21A-6

⁹ O.C.G.A. §17-12-26

ADMINISTRATIVE FEES

The Council charges a 5-7% administrative fee for contracts with counties for additional personnel and operating expenses (which in turn support county-supplemented indigent defense services). The Council maintains that these funds are to be used only to pay for services rendered to county employees and for the costs associated with administering these contracts. These funds may not be used to replace state expenditures. Therefore, they refuse to recognize these funds in its base budget.

However, the Council's claim could not be verified because its accounting system does not adequately track these funds. Council staff has agreed to modify its accounting system in FY09 to ensure these funds are coded so that they can be appropriately tracked.

Since FY05, this fund collected, on average, \$2 million a year, however; each year collections exceeded expenditures resulting in surpluses that did not lapse. Previously these surpluses accumulated in the Council's reserve accounts. However, in response to inquiries from the Committee, the Council agreed to revise its policy and will return any future surpluses back to the counties.

FY07 GENERAL APPROPRIATIONS ACT (HB1027)

The law that established the funding mechanism for the Georgia Public Defender Standards Council capped the Council's budget requests based on the *actual* amount of revenues raised by the new fines and fees.¹⁰ However, in FY06, because there was no previous track record of spending on indigent defense, the Council's budget requests were based on the *projected* revenues expected to be raised under HB1EX. After FY07, the legal limit went into effect.

In their FY07 budget request, the Council requested \$27,832,122, the legal limit. In the General Appropriations Act (HB1027), the Council received an appropriation of \$27,832,122 in state general funds. The legislation also recognized \$1,972,832 in agency funds for a total anticipated budget of \$29,804,951. This amount did represent a cut in state fund appropriations over FY06, and the General Assembly expected the agency to live within this budget. In statute, the Director of the Council is required to "ensure that the expenditures of the council are not greater than the amounts budgeted or available from other revenue sources."¹¹ The Council, however, apparently expected to receive all of the new funds established under HB1EX, continuing to base its budget on "projected" or anticipate revenues.

¹⁰ O.C.G.A. §17-12-26(a).

¹¹ O.C.G.A. §17-12-5(c)(9)

FY07 AMENDED APPROPRIATIONS ACT (HB94)

Despite the decrease in appropriations, the Council also managed its operating budget as though it would ultimately receive the same level of funding in FY07 as in FY06. This assumption resulted in a mid-year budgetary shortfall, and in late 2006 the Council reported that they would run out of money by March 31st of 2007 (three months before the end of the fiscal year). In the FY07 Amended Budget, the Council requested an additional \$9,590,163 to cover this projected shortfall.

The Council argued that without receiving the entire request it would be unable to provide statutorily required services and would be forced to take the following actions: shut down offices; suspend payments to all appointed counsel; furlough employees; and, suspend payments to opt-out circuits. This strategy of running a coercive deficiency has the effect of forcing elected officials to increase funding or face a complete loss of a public service.

In addition to the \$9,590,163, the Council's FY07 Amended request recognized \$4,094,978 in agency funds. This brought the total amount requested to \$13,685,141 over the original amount appropriated in HB1027 (see Table 2).

Table 2: HB1027 vs. FY07 Amended Agency Request

GPDSC Totals	HB1027	FY07A Agency Request	% Change from HB1027
State Funds	\$27,832,122	\$37,422,285	34%
Agency/Federal Funds	\$1,972,832	\$6,067,810	208%
Clerks and Sheriff's Trust Accounts	\$559,797	\$2,404,797	330%
Interest on Lawyer's Trust Accounts (IOLTA)	\$1,413,035	\$3,663,013	159%
Collection/Administrative Fees			
Federal Funds			
Total	\$29,804,954	\$43,490,095	46%

During discussions with the Council, Council staff noted that they had additional reserves beyond those agency funds recognized in the FY07 Amended Budget request. The General Assembly asked the Council to expend all of its reserves prior to requesting any additional state funds. The General Assembly then appropriated \$8.5 million in HB94, the FY07 Amended Budget.

As outlined below in Table 3, it is now apparent that the General Assembly overfunded the Council in HB94. The Council's FY07 final budget totaled \$47,772,491 -- 9.8% over the amount requested by the Council in FY07A. Despite being asked to spend its agency funds first, in FY08, the Committee found that the Council still had \$3,595,674 in agency fund reserves.

Table 3: Comparison of FY07A Agency Request to the Final FY07 Budget

SFY2007	FY07 Amended				
GPDSC Totals	FY07A Agency Request	FY07 Amended Budget (HB94) (1)	% Change from FY07A Agency Request	FY07 Final Budget (2)	% Change from FY07A Agency Request
State Funds	\$37,422,285	\$36,341,079	-2.9%	\$36,341,079	-2.9%
Agency/Federal Funds	\$6,067,810	\$1,972,832	-67.5%	\$11,431,412	111.7%
Clerks and Sheriff's Trust Accounts	\$2,404,797	\$559,797	-76.7%	\$6,000,879	149.5%
Interest on Lawyer's Trust Accounts (IOLTA)	\$3,663,013	\$1,413,035	-61.4%	\$5,424,283	48.1%
Federal Funds				\$6,250	
Total	\$43,490,095	\$38,313,911	-11.9%	\$47,772,491	9.8%

(1) These amounts only reflect base amounts of agency funds.

(2) In its Final FY07 budget, the Council is reflecting more than they originally recognized in its FY07A Agency Request. The General Assembly assumed this amount was the balance of its reserves and that they had spent it prior to spending state funds. (Source: Year-End Budget Comparison Report 6/30/2007 (PeopleSoft))

FY08 GENERAL APPROPRIATIONS ACT (HB95)

In HB95, the FY08 General Appropriations bill, the General Assembly's expectation was the Council would use all of its agency reserves to offset the FY07 shortfall prior to using state general funds.¹² The agency funds in HB95 were projections of what was expected to be collected in FY08, and therefore did not include the reserve amounts recognized by the Council in its FY08 agency request (see Table 4).

Table 4: FY08 Agency Request vs. HB95

SFY2008	FY08 General		
GPDSC Totals	FY08 Agency Request	HB95 (1)	% Change from FY08 Agency Request
State Funds	\$37,422,285	\$35,430,140	-5.3%
Agency/Federal Funds	\$8,083,033	\$4,835,038	-40.2%
Clerks and Sheriff's Trust Accounts	\$2,059,444	\$1,206,752	-41.4%
Interest on Lawyer's Trust Accounts (IOLTA)	\$3,350,669	\$1,413,035	-57.8%
Collection/Administrative Fees	\$2,672,920	\$2,215,251	-17.1%
Total	\$45,505,318	\$40,265,178	-11.5%

(1) This amount reflects the General Assembly's belief that the Council would expend all of its reserves in FY07. The amounts reflected in HB95 were based on historical collections.

¹² For those not familiar with Georgia's budget process, HB94, the FY07 Amended Budget was passed around the same time as the FY08 General Appropriations bill (HB95). As a result, the General Assembly could only guess what the agency would actually end up recognizing in its final FY07 budget.

FY08 AMENDED AGENCY REQUEST

In FY08, the Council again has come to the General Assembly with a mid-year budgetary shortfall. The Council has stated that it currently is running a deficit of \$4,456,317 over the amount budgeted in HB95 (see Table 5). The Council attributes this to the estimated 9,200 pipeline conflict cases and has requested this additional funding in its FY08 Amended Agency Request. Also, the Office of Planning and Budget (OPB) has given the Council permission to “front end” its June 2008 budget, resulting in a shortfall equal to one month of operating expenses. This Council has expressed concern that they may have to furlough the entire agency in June.

Table 5: GPDSC’s Projected Shortfall¹³

Program	HB95	Projected Expenditures	Difference
Public Defender Standards Council	\$8,705,076	\$9,697,175	(\$992,099)
Public Defenders	\$31,560,102	\$35,024,320	(\$3,464,218)
TOTAL	\$40,265,178	\$44,721,495	(\$4,456,317)

FY08 ADDITIONAL FUNDS

Despite the General Assembly’s request that the Council use its reserves in FY07, the Council received a transfer of \$3,595,674 from the Administrative Office of the Courts (AOC) consisting of various agency funds rolled over from the old Indigent Defense Council (IDC). Also the Council estimates it will collect an additional \$855,248 in agency funds over the amounts recognized in HB95. Offsetting this amount, the Council has recently chosen to reduce their charge to the counties because of the surplus in Administrative Fee revenues. In total, the Council will have approximately \$3.9 million in additional money over the HB95 amounts. With these funds, the Council’s estimated budget now totals \$44,208,370, putting them at only \$1,296,948 less than the FY08 Agency Request and \$3,943,192 over HB95 (see Table 6). Once these additional funds are added to the Council’s HB95 appropriation, the Council only has a \$513,125 deficit (see Table 7).

¹³ Estimates provided by the Georgia Public Defender Standards Council at the January 10th, 2008 meeting of the legislative oversight committee.

Table 6: Analysis of GPDSC FY08 Budget (HB95) with Additional Funds

GPDSC Fund Sources	FY08 General						
	FY08 Agency Request	HB95	% Change from Agency Request	Transfers of Agency Fund Reserves	Additional Collections/ Reductions Over/Under HB95	Estimated Final Budget	% Change from Agency Request
State Funds	\$37,422,285	\$35,430,140	-5.3%			\$35,430,140	-5.3%
Agency/Federal Funds	\$8,083,033	\$4,835,038	-40.2%	\$3,595,674	\$347,518	\$8,778,230	8.6%
Clerks and Sheriff's Trust Accounts	\$2,059,444	\$1,206,752	-41.4%	\$1,589,918	\$855,248	\$3,651,918	77.3%
Interest on Lawyer's Trust Accounts (IOLTA)	\$3,350,669	\$1,413,035	-57.8%	\$539,218		\$1,952,253	-41.7%
Collection/ Administrative Fees	\$2,672,920	\$2,215,251	-17.1%	\$1,448,038	(\$507,730)	\$3,155,559	18.1%
Federal Funds				\$18,500		\$18,500	
Total	\$45,505,318	\$40,265,178	-11.5%			\$44,208,370	-2.9%
<i>Over/Under HB 95</i>						\$3,943,192	
<i>Over/Under FY08 Agency Request</i>						-\$1,296,948	

Table 7: GPDSC Projected Shortfall With Additional Funds

Program	HB95	HB95 + Reserves & Growth	GPDSC Projected Expenditures	Difference
Public Defender Standards Council	\$8,705,076	\$9,645,384	\$9,697,175	(\$51,791)
Public Defenders	\$31,560,102	\$34,562,986	\$35,024,320	(\$461,334)
TOTAL	\$40,265,178	\$44,208,370	\$44,721,495	(\$513,125)

FY08 AMENDED BUDGET REQUEST

If the Council were to receive its FY08 Amended Agency Request of an additional \$4.456 million its estimated *final* budget would total \$50,758,935. This would put them \$5,253,617 over its FY08 Agency Request and \$10,493,757 above HB95.

Table 8: Analysis of GPDSC Budget (HB95) with Additional Funds AND FY08A Request

SFY2008	FY08 General			FY08 Amended		
GPDSC Totals	FY08 Agency Request	HB95 (1)	AOC Transfers & Growth Over HB95 Estimates	FY08A Agency Request	Estimated Final w/ FY08A Agency Request	% Change from FY08 Agency Request
State Funds	\$37,422,285	\$35,430,140		\$40,280,705	\$40,280,705	7.6%
Agency/Federal Funds	\$8,083,033	\$4,835,038	\$3,943,192	\$1,700,000	\$10,478,230	29.6%
Clerks and Sheriff's Trust Accounts	\$2,059,444	\$1,206,752	\$2,445,166	\$286,965	\$3,938,883	91.3%
Interest on Lawyer's Trust Accounts (IOLTA)	\$3,350,669	\$1,413,035	\$539,218	\$1,413,035	\$3,365,288	0.4%
Collection/ Administrative Fees	\$2,672,920	\$2,215,251	\$940,308	\$0	\$3,155,559	18.1%
Federal Funds			\$18,500		\$18,500	
Total	\$45,505,318	\$40,265,178		\$41,980,705	\$50,758,935	11.5%
<i>Over/Under HB 95</i>				\$1,715,527	\$10,493,757	
<i>Over/Under FY08 Agency Request</i>					\$5,253,617	

COST CONTAINMENT CONCERNS

The legislative oversight committee has deep concerns about the fiscal impact of conflict cases on the indigent defense budget. The Council testified that conflict cases occur most often when there are multiple co-defendants, in which case judges prohibit a single public defender office from representing every defendant. Private attorneys hired in conflict cases bill at an hourly rate, and these costs per conflict case is significantly higher than for cases that are kept in-house.¹⁴

The single largest factor in the budget overruns appears to be linked to the ballooning costs associated with the Council's decision to deal with conflict cases in this manner. This is largely because the cost per case for private appointed counsel in non-capital felony conflict cases has increased from an average of \$367 in 2005 to over \$1,000 today. The Council attributes the increase in costs to the poor implementation of internal cost containment strategies. In June of 2007, the Council approved a new conflict case management and cost containment plan. However, the Council cannot articulate projected savings and its FY08A and FY09 requests still include funds for cost overruns in conflict cases.

Additionally, the Council has not been able to control costs associated with the Brian Nichols trial. The Council anticipates by the end of this fiscal year the total cost for this case will exceed \$2 million.

The Brian Nichols case has exacerbated the need for the Council to have a policy for dealing with extraordinary cases. The Council frequently cites the Nichols case as an example of a case whose extraordinary expenses have caused difficulty in budgeting. However, the Council conceded that neither its FY08A nor FY09 budget submissions include a request for additional funds to cover the extraordinary costs of this case. These problems raise a serious concern about the Council's long term ability to manage within a given budgeted amount. *The Council has not yet provided assurances that the new plan is the most cost efficient model and that deficiencies will not be recurring each year.*

An alternative is to legislate cost containment strategies (or some form of "cost per case"/"cost per attorney") - a plan that many other states have adopted. If the General Assembly chooses to legislate cost containment strategies, conflict cases may be more efficiently managed by farming out conflicts to neighboring circuit offices, very similar to the model utilized by Missouri (see Appendix "A"). The Council currently is managing its conflict cases by creating new offices dedicated exclusively for that purpose.

In addition to Missouri's model, the Committee recommends further examination of Virginia, Kentucky and Philadelphia's conflict case management strategies as potential models for a Georgia plan (see Appendix "A").

¹⁴ According to the Council, it spends \$174 per in-house case (in addition to the county contribution of \$200 per case). However, conflict cases outsourced to private attorneys have increased to an average cost exceeding \$1,000 per case.

CONCLUSION & RECOMMENDATIONS

The most difficult problem which has arisen in the statewide public defender's system is a structural one inherent in its organization. Under the previous system, criminal defense attorneys accepted appointments or contracts to defend the indigent. However, as with every other case, the attorney balanced the consideration of the costs of the case with all of the other factors of his or her representation. No lawyer would bankrupt his or her own practice in the furtherance of any single case. So, the financial impact was a factor to be considered when making decisions about the case.

However, the new system removes financial considerations from the equation since the state and counties are now obligated to pick up the entire tab, rather than the attorneys. Consequently, these criminal defense attorneys are ethically obligated to zealously advocate on behalf of their clients without any real consideration of limitations related to the cost of that representation. Without any such financial consideration, one can expect that the costs will continue to rise extraordinarily as the expense of the experts and other defense costs increase on the state's tab.

Additionally, there is an enormous ideological policy gap between some of the criminal defense advocates who designed the system and many of the current legislators regarding the extent of the state's duty to provide free lawyers to those accused of crimes. There is undoubtedly a constitutional requirement for the provision of an 'adequate' defense. However, there is significant disagreement over the meaning of the term 'adequate defense.' At one recent study committee meeting some advocates testified that 'adequate' may well mean the *best* defense that money can buy. One witness pointedly asked the Committee if they needed a neurosurgeon, wouldn't they want the best one possible, even if he or she was the most expensive? Chairman Smith questioned the probity of such an interpretation of the Constitution.

This debate over the meaning of 'adequate defense' dramatically impacts the policy, structure and funding of the system. If indeed, 'adequate' means the best defense money can buy, then it will certainly affect the funding of other state priorities. In such case, the taxpayers must be prepared to fund dream team defenses at the expense of many other priorities such as education, healthcare and public safety. Though it should be noted that such an interpretation is not at all consistent with a long line of Georgia appellate case law in which the Courts have consistently declined to overturn convictions based upon 'inadequate assistance of counsel' appeals (even when the defense involved egregiously pitiful behavior).

The 2007 legislature formed a bicameral study committee to review many of these issues. That Committee worked closely with the General Oversight Committee throughout the year. In the 2008 legislature, an indigent defense reform bill will be filed to address several of the issues highlighted by this report. However, as long as the Council continues to exceed the budget established by the General Assembly, refuses to allow a transparent partnership with the legislative budget writers and restrains Director Crawford from reforming the system, it is destined to continue to escalate in cost until its expense exceeds its value to Georgia's taxpayers and they demand a wholesale revision to the system.

APPENDIX A:

Other State's Models for Containing Costs in Conflict Cases

Besides setting an hourly rate for court appointed counsel to be compensated, many states have set statutory limits on the amount that may be paid per case. Some states set caps on these amounts per case by type of the case or by a flat annual fee usually through a contract with a private attorney. However, in all states, a judge has the authority to waive any caps in extraordinary circumstances.

- 1) **Statutory:** Set by the state legislature through legislation and/or the appropriations act.
- 2) **Administrative or Court Rule:** Set either by executive administrative rule (usually by the state Supreme Court) or court rule (usually as part of the state's rules of criminal procedure).
- 3) **Public Defender:** Rates are set by the state public defender office or equivalent are subject to appropriation.
- 4) **State Commission on Indigent Defense:** Rates are set by statewide public defender commissions or boards.

Notable States:

#1 - Missouri

Non-Capital Felony Conflicts: Approximately 75% of all conflict cases in the state are handled by transferring the case from the branch office where the conflict of interest arose to a neighboring branch office. For the remaining 25% of conflicts the public defender appoints counsel for a flat fee rate per case, usually between \$500 - \$750 depending on the complexity of the case and the time needed. If this flat fee is waived the attorney will then receive an hourly rate of \$50.

- This strategy is similar to the Committee's recommendation to manage conflicts through neighboring circuits.

Capital Conflict Cases: Missouri has a specialized death penalty trial unit and representation may also be handled by attorneys from the branch offices. However, in the event of a conflict or overload capital case, the Missouri Public Defender contracts with private attorneys for a flat fee rate of \$10,000 - \$13,000 for lead counsel and \$5,000 - \$8,000 for co-counsel. These rates do not include reimbursable expenses.

#2 - Virginia

Non-Capital Conflicts: The state Supreme Court has established rates of \$90 per hour for all work in or out of court, however; state law caps per-case expenditures to no more than \$1,235 for felony charges punishable for 20 years or more and limits all other felony charges at \$445 per case.

The Virginia General Assembly passed legislation during the 2007 session that would cap the amount allowed for waivers so the maximum of \$1,235 for felony charges punishable by 20 or more years may be waived up to \$850 while the maximum of \$445 to defend all other felony charges may only be waived up to \$155. While counsel may request additional waivers above these amounts all waivers are subject to funding. This legislation, SB1168, says *"If at any time the funds appropriated to pay for waivers under this section become insufficient...no further waivers shall be approved."*

Capital Conflict Cases: The Virginia General Assembly authorized the creation of four regional capital defender offices. In every capital case the defendant is given two attorneys of which one, who serves as the lead chair, is an employee of one of these regional offices. For private attorneys an hourly rate of \$125 has been set by the state Supreme Court but no limit is set.

#3 - Kentucky

Non-Capital Conflicts: Each of the 30 Department of Public Advocacy (DPA) offices enter into a "conflict contract" where attorneys are either paid a flat fee per case or a trial bonus. Private attorneys who do get reimbursed on an hourly basis are paid \$40 per hour for non-violent felonies and \$50 per hour for violent felonies but per case maximums are set depending on the type of felony and if the case goes to trial.

Capital Conflict Cases: The DPA has a Capital Trial Branch consisting of seven death penalty attorneys, the Louisville Metro Public Defender has its own death penalty unit with four death penalty attorneys and attorneys in the DPA's field offices can handle death penalty cases. Any appointed counsel receives an hourly rate of \$70 with a maximum per attorney of \$30,000 which may be waived if necessary.

- A possible concern might be the maximum amount per attorney. One question is what our costs would be if we used this model?

#4 - Philadelphia, PA

Non-Capital Cases: In Pennsylvania the decision regarding the compensation and policy for court appointed attorneys resides with local judges and vary widely across the state. Philadelphia moved from an hourly rate to a “Modified Guaranteed Fee System” where appointed attorneys are reimbursed on a per-diem basis with the fee payable as follows:

Preparation Fees:

- * Non-homicide felony, disposition after arraignment but prior to trial: \$400
- * Non-homicide felony, disposition at trial: \$650
- * Homicide, disposition after arraignment but prior to trial: \$1,133
- * Homicide, disposition at trial: \$1,700

Pier Diem Fees:

- * Non-homicide felony, 3 hours or less: \$175
- * Non-homicide felony, more than 3 hours: \$350
- * Homicide felony, 3 hours or less: \$200
- * Homicide felony, more than 3 hours: \$400

Capital Conflict Cases: The same “Modified Guaranteed Fee System” is used for capital conflict attorneys with the fee payable as follows:

Preparation Fees:

- * Homicide, disposition after arraignment but prior to trial: \$1,133
- * Homicide, disposition at trial: \$1,700
- * Mitigation appointment: \$1,700

Pier Diem Fees (at trial):

- * Half day, 3 hours or less: \$200
- * Full day, more than 3 hours: \$400
- * Mitigation, half day: \$100
- * Mitigation, full day: \$200