



**THE LOUISIANA PUBLIC DEFENDER BOARD
AT THE CROSSROADS
ETHICS AND LAW IN PUBLIC DEFENSE**

**JAMES T. DIXON, JR.
STATE PUBLIC DEFENDER
LOUISIANA PUBLIC DEFENDER BOARD
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TABLE OF CONTENTS

| | |
|---|----|
| Executive Summary | 1 |
| Introduction | 3 |
| Myth 1: Restriction of Services is a Surprise | 4 |
| Myth 2: LPDB Attorney Caseloads are Arbitrary | 5 |
| Myth 3: LPDB Inflates Attorney Caseloads | 7 |
| Myth 4: LPDB uses Caseload Standards to Close District Offices | 8 |
| Myth 5: LPDB Lacks Accountability and Oversight | 10 |
| Myth 6: LPDB is Short-Changing Local Public Defenders Offices to Fund Capital Programs | 11 |
| Restriction of Services does not Cause the System to stop but rather is a Symptom of an Unreliable Funding System | 12 |
| Louisiana's Indigent Defense History | 14 |
| Equal Protection Concerns Raised by the Prosecutors are Disingenuous | 15 |
| Federal Involvement | 16 |
| Conclusion | 17 |

EXECUTIVE SUMMARY

On April 27, 2015, in support of House Bill 605, a highly misleading and inaccurate memorandum and other documents were sent by the Louisiana District Attorneys Association (LDAA) to every member of the Louisiana Legislature’s House of Representatives. Through HB 605, the membership of the Louisiana Public Defender Board (LPDB) and enabling legislation contained in the Louisiana Public Defender Act (Act 307 of the 2007 Regular Legislative Session) came under attack. First the bill brought by the LDAA sought to strip capital representation from the LPDB. Imbedded within the bill was the removal of the rights of appeal and post-conviction representation. Based on the district attorneys association paper, replete with misinformation, untruths and inaccuracies, the Louisiana Public Defender Board responds with evidence-based factual corrections.

MYTH #1: Restriction of Services is a surprise

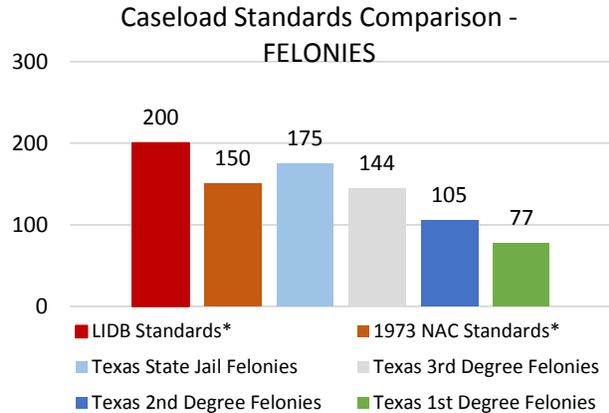
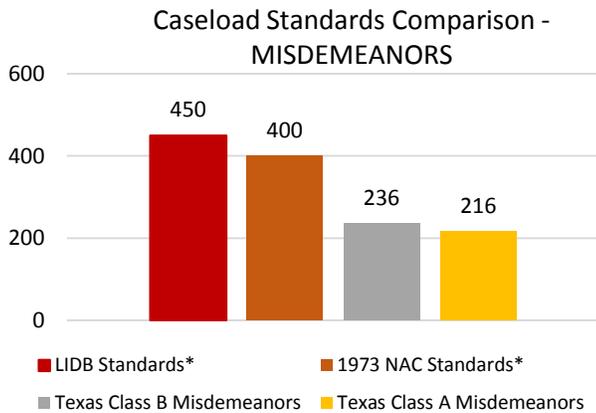
FACT

- ✓ The Service Restriction Protocol (LAC 22: XV, Chapter 17) was promulgated in 2012 to address excessive workload and insufficient funding.
- ✓ For years districts have been dependent on fund balances to meet the gap between local revenues, supplemental state funding, and expenditures.
- ✓ Legislative auditor reports have consistently noted fund balance depletion caused by insufficient revenues.

MYTH #2: LPDB attorney caseload standards are arbitrary

FACT

- ✓ Louisiana standards were promulgated by the Louisiana Indigent Defender Board (LIDB) in 1994. LIDB took the National Advisory Commission on Criminal Justice Standards and Goals (NAC Standards, 1973) and added 50 cases to all categories except capital.
- ✓ Louisiana standards exceed those of every other known caseload standard in the United States.



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

The noble ideal [of a fair trial] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. *Gideon v. Wainwright*, 373 U.S. 335 (1963).

MYTH #3: LPDB inflates attorney caseloads

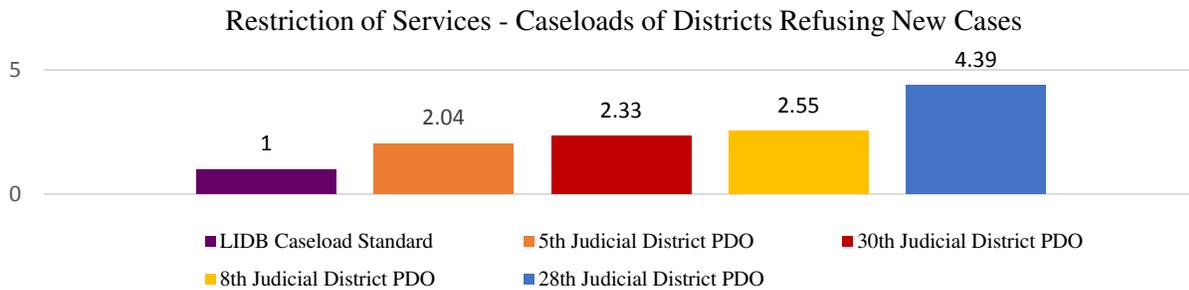
FACT

- ✓ LPDB’s database automatically changes the status of cases which have been dormant for more than six months, these cases are not considered open.
- ✓ LPDB conforms to the definition of a case as established in Louisiana R.S. §15:174(C).

MYTH #4: LPDB uses caseload standards to close district offices

FACT

- ✓ No local Public Defenders Offices have closed.
- ✓ Of the eight districts currently in restriction of services – three districts have eliminated the offices’ conflict panels (1st, 20th, and 26th); four districts are refusing new cases due to excessive existing caseloads (5th, 8th, 28th, and 30th); one has implemented a hiring freeze which has not affected client representation (19th).
- ✓ The four districts which are refusing new cases due to excessive caseloads all maintain caseloads more than two times the caseload standards.



MYTH #5: LPDB lacks accountability and oversight

FACT

- ✓ LPDB is an agency established within the Office of the Governor, overseen by the Senate Judiciary B Committee, the House Committee on the Administration of Criminal Justice, and the Louisiana Legislative Auditor.
- ✓ The Governor either directly appoints or must approve the appointments of six of the 15 board members, including the Board Chairperson.
- ✓ Other appointing entities include the Louisiana Supreme Court, Louisiana Bar Association, Louisiana Legislature, Louis A. Martinet Society, Louisiana Interchurch Conference, and the Louisiana Law Institute’s Children’s Code Committee.

MYTH #6: LPDB is short-changing local Public Defenders Offices to fund capital programs

FACT

- ✓ Capital cases are expensive. During testimony on HB 605, it was noted that one capital case can cost a District Attorney’s Office anywhere from \$500,000 to \$1,500,000. In contrast, LPDB spent approximately \$5,800,000 at the trial level on more than 70 potentially capital cases in calendar year 2014 – an average of less than \$83,000 per case.

The noble ideal [of a fair trial] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. *Gideon v. Wainwright*, 373 U.S. 335 (1963).

Introduction

On April 27, 2015, in support of House Bill 605, a highly misleading and inaccurate memorandum and other documents were sent by the Louisiana District Attorneys Association (LDAA) to every member of the Louisiana Legislature's House of Representatives. Through HB 605, the membership of the Louisiana Public Defender Board (LPDB) and enabling legislation contained in the Louisiana Public Defender Act (Act 307 of the 2007 Regular Legislative Session) came under attack.¹ First, the bill brought by the LDAA sought to strip capital representation from the LPDB. Additionally, the LDAA sought creation of the Committee for the Provision of Indigent Defense Services to be comprised of three judges, one district attorney, and one criminal defense attorney (all with capital experience) who were to review the capital defense costs, the delivery model and make a final recommendation to the Supreme Court of Louisiana as to the state-wide plan for capital defense. Imbedded within the bill was the removal of the rights of appeal and post-conviction representation. Based on the district attorneys association's paper², replete with misinformation, untruths and inaccuracies, the Louisiana Public Defender Board responds with evidence-based factual corrections.

- Service restriction is no surprise, for years, districts have been dependent on fund balances to meet the gap between local revenues, supplemental state funding, and expenditures;
- Louisiana standards exceed those of every known caseload standard in the United States;
- LPDB does not inflate attorney caseloads, LPDB conforms to the definition of a case as established in Louisiana R.S. §15:174(C);
- LPDB does not use caseload standards in an attempt to close district offices but rather to protect clients' 6th Amendment Right to Counsel;
- LPDB is accountable to the Governor's Office, Legislature, and the Legislative Auditor;
- Capital programs relieve the district offices of the workload and financial burdens associated with capital representation; and
- Restriction of Services does not cause the system to stop but rather is a symptom of an unreliable funding system.

While HB 605 was deferred amidst a great deal of opposition and HCR 196³ was substituted in its place for this year, it is clear from the intentions of HB 605 and the structure of HCR 196 as well as conversations among judges and prosecutors that there is no intention of abandoning the tenets of HB 605. The Louisiana Public Defender Board has a proven track record of monitoring the expenditure of public dollars while improving the quality of indigent representation across the state. The information included in this document provides the facts which dispel the misstatements and misinformation circulated to garner support for HB 605.

¹ Available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=936682>

² A copy of the document was delivered to the Legislature in April 2015.

³ Available at <http://www.legis.la.gov/legis/ViewDocument.aspx?d=956009>

MYTH #1: Restriction of Services is a Surprise

FACT: Districts have been Dependent on Fund Balances to Meet the Gap between Local Revenues, Supplemental State Funding, and Expenditures for Years

Recognizing the impending failure of the indigent defense system, the Louisiana Legislature passed the Louisiana Public Defender Act (Act 307 of the 2007 Regular Legislative Session) which created the Louisiana Public Defender Board. The Board was established to address excessive caseloads caused by an unreliable and unstable funding source of traffic ticket revenue for the indigent defense system. In short, the Legislature determined that the local indigent defender boards were in crisis and the system had to change.

Act 307 was the result of years of hard work to ensure that every constituency was brought to the table and had a voice in crafting that legislation. Everyone at the table saw the looming crisis in indigent defense and knew that, absent bold state action, the criminal justice system likely would come under attack in the federal system. Caseloads and workloads in many offices throughout the state exceeded all national maximum caseload standards. With the increase in state funding, some offices were able to reduce their caseloads, but were forced to exhaust their locally generated fund balances.

The Service Restriction Protocol, found at LAC 22:XV, Chapter 17, was promulgated on March 20, 2012, largely in response to the LPDB's recognition of massive case and work overload. During 2012, financial crises necessitated service restriction in both Orleans and Calcasieu Parishes. A careful read of § 1701A of the Service Restriction Protocol, cites the Legislative Auditor's report stating that 28 of Louisiana's 42 district public defenders had expenditures that exceeded revenues during the 18-month period beginning January 1, 2009 and ending June 30, 2010.

“Twelve districts were required to use their fund balances to finance operations in 2008 and 28 districts were required to do so in 2009. It was a limited solution that allowed the continuation of the public defense system during lean economic times. At the same time, this seriously depleted most of the local districts' fund balances.” *Id.*, citing “Louisiana District Public Defenders Compliance with Report Requirements” Legislative Auditor Report dated May 25, 2011

MYTH #2: LPDB Attorney Caseloads are Arbitrary

FACT: Louisiana Standards Exceed those of Every Known Caseload Standard in the United States

In response to claims that LPDB has established arbitrary caseloads based on ABA guidelines, it must be noted that the ABA has never set guidelines for defender caseloads. The numbers quoted at page two of the LDAA “Response” list the caseload numbers promulgated by the Louisiana Indigent Defender Board in 1994. The LIDB took the National Advisory Commission on Criminal Justice Standards and Goals (NAC Standards, 1973) and added fifty cases to each category but capital, which added two cases.

| NAC Standards | | LIDB Standards | |
|---------------|-----|----------------|----------------|
| Felonies | 150 | Felonies | 200 |
| Misdemeanors | 400 | Misdemeanors | 450 |
| Juvenile | 200 | Juvenile | 250 |
| Capital | 3 | Capital | 5 ⁴ |

The NAC standards set more than thirty-five years ago are *disjunctive*, as are the Louisiana Indigent Defender Board Standards and are not intended to be cumulative. For example, if a public defender is assigned cases from more than one category, the combined weighted caseload total should not exceed the equivalent of 450 misdemeanor cases. Obviously, “a public defender’s pending or open caseload should be far less than the annual figure.”⁵

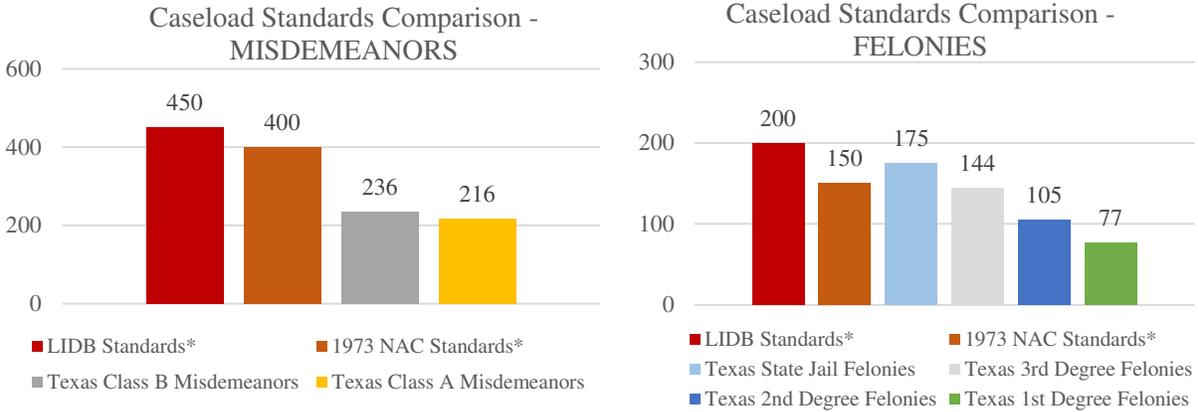
Recently, the state of Texas conducted an extensive and rigorous case-weighting study and published the findings in *Guidelines for Indigent Defense Caseloads: A Report to the Texas Indigent Defense Commission*⁶. This research used several methodologies to study current practices, attorney survey recommendations, and a case-weighting study. The case-weighting study was coupled with Delphi panels of expert practitioners using recommended trial rates and actual trial rates to derive caseload maximums that were ethically responsible and practical. The standards currently in use by LPDB far exceed the recommendations of the Texas study.

⁴ LPDB does not implement ROS until caseloads are twice the LIDB Standards.

⁵ JUSTICE DENIED: AMERICA’S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL, 66 n.102 (The Constitution Project 2009).

⁶ GUIDELINES FOR INDIGENT DEFENSE CASELOADS: A REPORT TO THE TEXAS INDIGENT DEFENSE COMMISSION. (Public Policy Research Institute, Texas Indigent Defense Commission & the Texas Office of Court Administration, January 2015)

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

The Washington Supreme Court instituted caseloads through Washington Supreme Court Rule, Order No. 25700-A-1004:

| | |
|-------------|------------|
| Felony | 150 |
| Misdemeanor | 300 to 400 |
| Juvenile | 200 |

The New Hampshire Public Defender Staff Attorneys who are full time, providing general felony, misdemeanor and juvenile representation may not carry a caseload of more than 55 open and active cases.⁷

The statutorily required Louisiana weighted caseload/workload study is currently underway and will be completed during the spring of 2016.⁸ If Louisiana is similar to other states conducting weighted caseload studies, Louisiana will likely find that its caseloads are too high, considering the *Rules of Professional Conduct* and the application of the Rules as interpreted by state and federal courts.

⁷ SECURING REASONABLE CASELOADS ETHICS AND LAW IN PUBLIC DEFENSE, Norman Lefstein (2011) American Bar Association Standing Committee on Legal Aid and Indigent Defendants. www.indigentdefense.org last accessed May 19, 2015.

⁸ La. R.S. § 15:148 (B)(1)(a)

The noble ideal [of a fair trial] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. *Gideon v. Wainwright*, 373 U.S. 335 (1963).

MYTH #3: LPDB Inflates Attorney Caseloads

FACT: LPDB Conforms to the Definition of a Case as Established by Louisiana Law

Caseloads and workloads are not inflated. The definition of a case is controlled by law and “is defined as a charge or set of charges contained in a charging instrument or petition against a single accused arising out of one or more events, transactions, or occurrences, which are joined... In the event that a charging instrument contains a charge or set of charges arising out of multiple events, transactions or occurrences, indigent defender boards [sic] shall track, record and report the number of instances per charging instrument.”⁹

LPDB’s database automatically isolates cases that lie dormant for more than six months yet remain open. The database automatically moves dormant cases to special case status, which no longer counts the case as open. Additionally, the database alerts the state and district office so the lawyer can close or update the case information. Dormant cases are not included in an attorney’s open case load. Of the 240,000 cases pending and received each year, only 2.5% have been pending for longer than six months without activity reflected in the case management system.

| Timeframe of Last Case Activity (on May 14, 2015) | | |
|---|--------------|--------------|
| 3 Months or Less | 3 – 6 Months | 6 – 9 Months |
| 73.20% | 18.79% | 8.00% |

LPDB has the most accurate, up-to-date caseload numbers. Case numbers reported by different entities define cases differently and use different time frames. Public defenders receive the case shortly after arrest, most often at the initial appearance, long before the DA makes the decision whether to pursue or refuse the case. Without knowing the DA’s decision, the defender is ethically bound to spend time and resources meeting the client, investigating the case, researching the law and preparing motions until such time as the DA makes a charging decision. If the DA does a change of booking or dismisses the case, he is not likely to count this case. The court may never know about a change of booking or a dismissal which occurs close in time to arrest and would not count it. Conversely, the defender who has worked on the case would indeed count this case as would the Sheriff or Police Department which made the arrest. This phenomenon is particularly evident in capital-eligible cases, where the DA may carefully consider whether to pursue death for many weeks before opting for second degree murder—all the while the defense must vigorously work the case as a capital case in accord with professional and ethical requirements.

Unlike defense attorneys who must be prepared for whichever of their many cases is put on the docket for a particular date, prosecutors control their caseloads through screening, dismissal, diversion, and delay. The prosecutor CHOOSES which case s/he is ready to handle and actually sets the docket. If she is not ready, she simply does not set a case or cases for hearing.

⁹ La. R.S. § 15:174(C).

The idea that a prosecutor would compare his/her caseload numbers with a criminal defense lawyer’s caseload is ludicrous at best and duplicitous at worst. The Right to Counsel under the United States and Louisiana Constitutions does not apply to prosecutors, nor do the duties owed to an individual client under the *Louisiana Rules of Professional Conduct*.

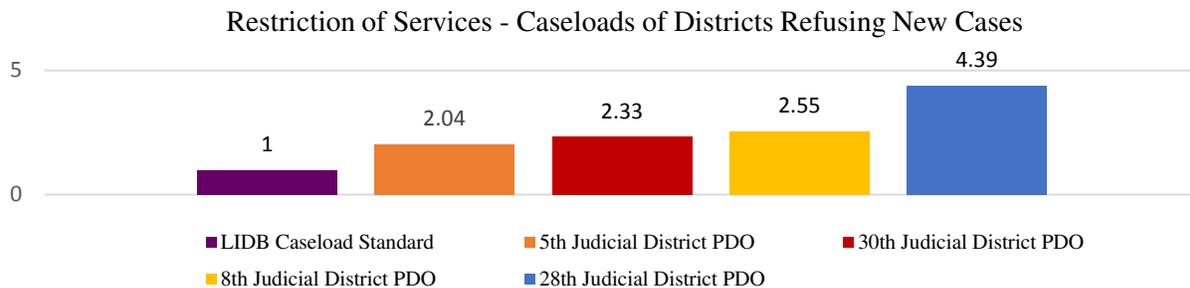
MYTH #4: LPDB uses Caseload Standards to Close District Offices

FACT: LPDB does not Use Caseload Standards to Close District Offices but Rather to Protect Clients’ 6th Amendment Right to Counsel

Since the creation of the Louisiana Public Defender Board, no local Public Defenders Office has closed due to inadequate funding or excessive caseloads. LPDB enforces caseload maximums not to close district offices, but rather to protect the rights of indigent clients. Caseload standards represent the number of cases an experienced and adequately-resourced attorney can manage without compromising professional and ethical responsibilities to each client.

Poor people, largely poor people of color, accused of crime in this state are entitled to be interviewed, regardless of the nature of the alleged crime. They are entitled to lawyers who understand that as an accused, s/he is a person who likely has a family and responsibilities owed to others. Reaching across racial and cultural boundaries, thoroughly investigating a case, and researching the law relating to the case all take time.

As of July 1, 2015, eight Public Defenders Offices have implemented a service restriction plan. Of those eight, three districts have eliminated or reduced the offices’ conflict panels (1st, 20th, and 26th); four districts have begun refusing new cases due to excessive existing caseloads (5th, 8th, 28th, and 30th); one has implemented a hiring freeze which at this time has not affected client representation (19th). As shown below, of the four districts refusing new cases due to excessive caseloads, all maintain caseloads more than two times caseload maximums. In the case of the 28th Judicial District Public Defenders Office, average caseloads in the district equate to a full-time equivalent (attorneys in the 28th Judicial District are all contract attorneys who work on a part-time basis) of 878 felonies or 1,975 misdemeanors handled by each attorney each year.



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Restriction of services due to excessive caseloads is the result of chronic inadequate funding of the defense function. Districts' monthly financials are public records and available for review. The idea that the district defenders are declaring themselves ineligible to take cases *sua sponte* is spurious. The Service Restriction Protocol requires various levels of decision making and notice. The Rules of Professional Conduct justifiably expect attorneys representing a client to take all necessary steps to competently represent that client. Particularly, Rules:

1.1 (requiring competent representation which is defined as legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation);

1.2 (requiring meaningful consultation with a client);

1.3 (requiring "reasonable diligence and promptness" in representation);

1.4 (requiring prompt and reasonable communications with the client);

1.7(a)(2) a "lawyer shall not represent a client if . . . there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person. . . ");

1.16(a)(1) (requiring a lawyer to "withdraw from the representation of a client if... the representation will result in violation of the Rules of Professional Conduct or law.");

5.1(a) and (b) ("imposing on a 'firm' the obligation to make reasonable efforts to ensure that the firm has in effect measures giving reasonable assurance that all lawyers in the firm conform to the Rules of Professional Conduct" and that a "lawyer having direct supervisory authority over another lawyer shall make reasonable efforts to ensure that the other lawyer conforms to the Rules of Professional Conduct"); and

6.2(a) (a "lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause such as . . . representing the client is likely to result in violation of the Rules of Professional Conduct or other law.").

Public defenders, like all criminal defense lawyers, must learn about the charged conduct, prepare for and conduct the initial interview with the client in a confidential setting, investigate the case, interview witnesses, ask for and examine evidence produced by the state, apply the evidence and facts of the case to the charged offense, research any legal defects in the proceedings, consider filing appropriate motions, develop a theory of the case, all the while communicating with and developing a trusting professional relationship with the client. Given United States Supreme Court case law, defense counsel must also advise clients of collateral consequences.¹⁰ Defense counsel's

¹⁰ In Louisiana, alone, there are 1,446 collateral consequences. <http://www.abacollateralconsequences.org> (last visited May 19, 2015).

duty and responsibility are to promote and protect the expressed interests of the client. Defense counsel respond to charges levied by law enforcement and prosecutors.

Lawyers who have provided ineffective assistance of counsel risk losing their license to practice law. Lawyers with hundreds of open files do not have adequate time to competently represent their clients. Lawyers have a duty to their clients to provide them with competent representation which requires legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

MYTH #5: LPDB Lacks Accountability and Oversight

FACT: LPDB is an Agency Established within the Office of the Governor, Overseen by the Senate Judiciary B Committee, the House Committee on the Administration of Criminal Justice, and the Louisiana Legislative Auditor

LPDB members are appointed from a vast array of entities from the executive, judicial, and legislative bodies, as well as civic policy makers and stakeholders. One need only look at the enabling legislation to see that the Governor has six appointments to the board, the Chief Justice of the Louisiana Supreme Court and the president of the Louisiana Bar Association each have two appointments; the remainder: the Legislature has two appointments, the Louis A. Martinet Society, the executive director of the Louisiana Interchurch Conference, the chairman of the Louisiana Law Institute's Children's Code Committee, each have one appointment to the board. One ex-officio member is appointed by the Louisiana Association of Criminal Defense Lawyers.¹¹ Additionally, LPDB's legislative oversight committees are Senate Judiciary B and House Administration of Criminal Justice Committee. As an agency within the Executive branch of state government, LPDB complies with all OFSS, ORM, OCR, HR and Civil Service regulations as well as being regularly audited by the Louisiana Legislative Auditor.

Given the fact that the executive director of LDAA testified before the House Judiciary Committee that Act 307 would not have passed without the district attorneys' agreement, it is odd that his essay states "[n]ot one local public defender sits on this all-powerful and totally independent board."¹² The very statute which spreads the appointing authority of the all-volunteer Public Defender Board members explicitly states: "No active part-time, full-time, contract or court-appointed indigent defense provider, or active employees of such persons, may be appointed to serve on the board as a voting member."¹³ Placing a sitting district defender on the regulatory board that oversees that district defender creates a conflict of interest.

¹¹ La. R.S. § 15:146 (B)(3)

¹² "The Louisiana Public Defender Board at the Crossroads? (In Support of a Closer Analysis)" (April 27, 2015) p. 5.

¹³ *Id.* at § 146(B)(2)

MYTH #6: LPDB is Short-Changing Local Public Defenders' Offices to Fund Capital Programs

FACT: Capital Case Representation is Inherently Expensive

Representation of clients in a capital case is expensive. Louisiana Guidelines and Performance Standards, American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases and the Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases require the appointment of two highly skilled attorneys, a fact investigator and a mitigation specialist for each client arrested for first degree murder. The attorneys must be competent, well trained and capable of providing high quality legal representation. One member of the defense team must have specialized training in identifying, documenting mental illness, developmental disability, neurological deficits; long term consequences of deprivation, neglect and maltreatment during developmental years; social, cultural, historical, political, religious, racial, environmental and ethnic influences on behavior effects of substance abuse and the presence, severity and consequences of exposure to trauma. The Supreme Court of the United States has referred to the ABA Guidelines as “guides to determining what is reasonable”¹⁴ in judging counsels’ performance. From the time of arrest through disposition of the capital case a legal team of four professionals work on the client’s case.

A thorough bio/psycho-social history has to be conducted, requiring investigation and locating all pertinent records associated with the client: pre-natal birth records, medical records, school records, employment records, government assistance records, military records, criminal records. Once collected, the records must be scanned, read, indexed and cross-indexed. Three generations of family history have to be explored and investigated. Multiple meetings with family and friends are required, all of which have to be documented and shared with the team. Experts are nearly always required to assist the team in performing their duties. All of this required investigation and work takes time and money.

During LDAA’s testimony on HB 605, it was noted that one capital case can cost a District Attorney’s Office anywhere from \$500,000 to \$1,500,000. In contrast, LPDB spent approximately \$5,800,000 at the trial level on more than 70 potentially capital cases in calendar year 2014.

Non-profit programs provide services statewide, relieving districts from the obligation to provide capital representation. In other words, the non-profit programs assume responsibility for the various districts’ cases: capital and non-capital appeals, capital and non-capital post-conviction and capital trial level representation for the vast majority of districts that lack the capacity to represent clients in a capital case. They supply services to and for the districts and their clients.

The State will not save money by redefining what constitutes a capital case or eliminating capital direct appeals and capital post-conviction. Under the definition of a capital case, proposed by the

¹⁴ *Williams v. Smith*, 539 U.S. 510, 524 (2003), quoting *Strickland v. Washington*, 466 U.S. 668, 688 (1984)

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prosecutors, until a post-indictment notice of death is filed,¹⁵ the case will remain non-capital. As long as the case remains “non-capital” the cost of the defense remains with the district, under LPDB’s supervision and not with any newly created committee. LPDB’s fiscal note worksheet for HB 605 indicated that the districts would need an additional \$3,500,000 in funding to provide the resources necessary to allow attorneys to meet their ethical obligations to their clients. Public defenders have an ethical obligation to treat all capital eligible cases as such until the office receives information acknowledging that the District Attorney’s Office will not seek the death penalty. Additionally, the elimination of capital direct appeals will throw the state’s criminal justice system into federal court as a direct violation of *Douglas v. California*, 372 U.S. 353 (1963) (recognizing a right to legal representation on a client’s first appeal of a conviction).

The prosecution is frequently heard to be concerned with reaching finality in the cases of persons on death row. With a contested execution, 1 volunteer execution, 10 exonerees and 45 inmates re-sentenced to life without parole from a pool of 57 **finally-settled cases** on death row since 1999, the death penalty system has a **proven failure or reversal rate of 96.5%** (if the prosecution considers a case of “assisted suicide by execution” to be a “success”).

A.M. “Marty” Stroud III, prosecuted Glenn Ford in Shreveport, Louisiana in December 1984. Mr. Ford was sentenced to death for a murder he did not commit. Thirty years later, on capital post-conviction, Mr. Ford was exonerated after investigations found evidence which had not been turned over to the prosecutor and therefore was never presented to defense counsel.

Had A.M. “Marty” Stroud, III not had the courage and devotion to the legal profession and the criminal justice system, he never would have spoken out about its systemic flaws. “And Stroud, now a 63-year-old attorney in private practice, also says this: ‘No one should be given the ability to impose a sentence of death in any criminal proceeding. We are simply incapable of devising a system that can fairly and impartially impose a sentence of death because we are all fallible human beings.’”¹⁶

Would the reader refer a friend or loved one to a heart surgeon who has a **3.5%** survival rate and then deny him the right to second opinion?

Why would a state trying to redress legally significant systemic failures, with the highest per capita capital exoneration rate in the country, try to repeal capital post-conviction? It is difficult to understand how Act 307, created as a result of the recognition of a systemic failure and to “[e]nsure that the public defender system is free from undue political and judicial interference and free from conflicts of interest”¹⁷ would seek to eradicate review of convictions coming from a broken system. More relevant to critics is the fact that the capital programs actually save money and relieve over half of the districts with capital cases from the financial burden of staffing capital cases.

¹⁵ There is no such requirement under existing law, nor does this legislation create such a requirement.

¹⁶ See Leonard Pitts, Jr., *Glenn Ford Walks Free, Marty Stroud Never Will*, THE COLUMBUS LEDGER-ENQUIRER, March 25, 2015. <http://www.ledger-enquirer.com/2015/03/25/3636471/leonard-pitts-jr-glenn-ford-walks.html#storylink=cpy>.

¹⁷ La. R.S. § 15:142 (B)(2).

Similar to the district offices, LPDB provides oversight and monitors the program offices' compliance to standards. Based on performance evaluations, one capital trial level program was denied a contract for Fiscal Year 2015. Additionally attorneys who have not abided by Capital Guidelines and Performance Standards have been reduced to provisional certification and decertified.

Restriction of Services does not Cause the System to Stop but rather is a Symptom of an Unreliable Funding System

Rather, the crushing caseload and restriction of services are a symptom of the unreliable, insufficient, and ineffective funding mechanism for Louisiana's criminal justice system: The only state in the country which depends primarily on traffic ticket revenue as its funding base. Reliance on traffic filings has cost the public defender system millions of dollars. The Louisiana Supreme Court reports show that traffic filings in city and district courts around the state have dropped by 28% since 2009.¹⁸

Locally, the district indigent defender fund receives \$45 for every client who violates a state, parish or municipal ordinance (except a parking violation), in cases where the defendant is convicted, pleads guilty or nolo contendere, or forfeits a bond. Public Defenders Offices are authorized to collect a \$40 application fee however, collecting such a fee from people who are indigent often takes more money to administer than what is actually collected. The amount from local funds, which cannot be moved from the districts, constitutes on average more than 65% of an office's income. The state District Assistance Fund supplements the rest.

The reason for a district's entrance into restriction of services is simple: the district does not have sufficient funds to meet expenditures during the fiscal year. It is a basic function of economics. Without sufficient funding, a district must curtail its expenditures. Unfortunately, most districts have been cutting budgets to the bone for years and are left with only one expenditure to cut: personnel.

District offices provide a service. That service is legal representation to those indigent citizens being prosecuted by the state. When personnel is cut, the result is a restriction in the services a district is able to provide. The level of services provided by the district is necessarily decreased when personnel are decreased. The same applies to any service profession.

How the decrease in personnel will affect each district varies. Districts are mandated to restrict services in a manner "least harmful to the continuation of public defense services within the district." LAC 22: XV, Chapter 17, Section 1703A. If a District Defender is able to restrict services without affecting the continuation of public defense services, he or she must do so.

¹⁸ Compiled from data found at http://www.lasc.org/press_room/annual_reports/reports/2009_Annual_Report.pdf

Circumstances, however, may dictate what restrictions are necessary. In 2012, the District Defender in the 14th Judicial District, Calcasieu Parish, was facing a financial crisis and had to cut personnel. In that instance, after consultation with the local judiciary and other stakeholders, it was agreed that the most efficient use of resources was to maintain the district's full-time attorneys and slash the number of contract conflict attorneys from seven to two. These were conflict cases, therefore the district office was precluded from handling them. Private attorneys, many of whom had little or no experience in criminal defense law, were appointed to provide indigent defense services on a *pro bono* basis.

Restriction of Services in Calcasieu Parish in 2012 was not a “tactic”, but rather a financial necessity. Service restriction was not a unilateral decision or action imposed upon the district. It was a carefully considered plan designed to implement a restriction of services in a manner least harmful to the continuation of public defense services within the 14th Judicial District after consultation with the judiciary and other stakeholders. The appointment of private counsel was not designed to inflame anyone nor to draft judges or attorneys to support additional funding for the office. It was a financial necessity employed to keep the office open and the system running while complying with the *Louisiana Rules of Professional Conduct*. We will see the same situation in many districts throughout the state if we do not address the chronic underfunding of public defense in Louisiana.

Louisiana’s Indigent Defense History

The Legislative findings contained in the Louisiana Public Defender Act cite Article I, Section 13 of the 1974 Constitution of Louisiana and the state’s obligation under the Sixth and Fourteenth Amendments of the United States Constitution, note “it is the obligation of the legislature to provide for the general framework and the resources necessary to provide for the delivery of public defender services in this state.”¹⁹

Poor people accused of crime in this state have been represented by untrained *pro bono* attorneys without the necessary background and resources needed to provide an adequate defense. In death penalty cases, civil lawyers with no knowledge of criminal law, procedure, or cross-cultural competency have been appointed to represent clients whom they despise. Little wonder our exoneration rates and sentencing reduction rates are what they are.

The post *Gideon v. Wainwright*²⁰ indigent defense “system” created by the Legislature was to have local indigent defender boards whose lawyer members were appointed by sitting judges. Not surprisingly, Act 307’s Legislative findings listed:

B. In recognition of its mandates under both the United States and Louisiana constitutions, the legislature enacts the Louisiana Public Defender Act of 2007 to provide for all of the following:

¹⁹ La. R.S. § 15:142A.

²⁰ 372 U.S. 335 (1963).

(1) Ensuring that adequate public funding of the right to counsel is provided and managed in a cost-effective and fiscally responsible manner.

(2) Ensuring that the public defender system is *free from undue political and judicial interference and free of conflicts of interests*.²¹

The reduction in violent crime since 1993 does not take into account increases in other filings, nor does it begin to address the expectations that courts and the *Rules of Professional Conduct* have for the performance of court appointed counsel. Note 4 of the prosecutors' essay states that violent crime has "decreased sharply in the past twenty years, however indigent defense spending has not similarly decreased." This statement fails to recognize the increase in the complexity of cases, the number of cases with complex forensic issues, the necessity to research and file motions on crime labs with historically inaccurate results, the number of statutory mandatory minimum sentences and statutory collateral consequences. Nor does it recognize the increased expectations and the evolving definition of "competent" and "knowledgeable" representation as defined by *Louisiana Rules of Professional Conduct* as well as the ever increasing demands made by state and federal courts on defense counsel and his or her performance.

Additionally, crime numbers in several jurisdictions have risen precipitously. Collecting data from Fiscal Years 2004-2013, the Louisiana Supreme Court reported that several jurisdictions have experienced a steady rise in criminal cases: the 14th Judicial District, (excluding juvenile) went from 6,735 criminal filings in 2004 to 16,111 filings in 2013; the 19th Judicial District went from 8,870 criminal filings (excluding juveniles) in 2004 to 13,249 filings in 2013 and the 33rd Judicial District from 949 filings (excluding juveniles) in 2004 to 1,130 criminal filings in 2013; while other jurisdictions show a recent trend of increasing the number of criminal filings, 7th, 9th, 12th, 15th, 16th, 17th, 21st, 24th, 25th, 27th, 33rd, 34th, 34th, 40th.²²

The \$10 per-case increase to the \$35 local criminal court fee passed by the Legislature in 2012 did not result in the increase in local funds promised by Act 578 (2012).²³ The act originally proposed a \$20 increase which would have resolved the current funding problem faced by most district offices. However, due to opposition of the LDAA, the amount of the increase was reduced by half to only a \$10 increase. The \$10 increase was expected to produce a 28% increase in local funding. Despite this prediction, post-act FY14 remittances only increased by an average of 15%, some districts have actually experienced a reduction in local revenues. The reason for the revenue shortfall is unknown but could be explained by decreased traffic ticketing by law enforcement, increased diversion and dismissal by prosecution, decreased fee collection/remittance rates or a combination of any of the above.

LPDB has no control over the writing of tickets, the prosecution or diversion of traffic tickets, nor the collection or remittance of any imposed fees. The Sheriffs, the judges and the district attorneys

²¹ *Id.* at § 142B(2).

²² Supreme Court of Louisiana Annual Report 2013, pp. 32-61.

²³ La. R.S. § 15:168(B)(1). Of note should be the fact that the public defenders sought an increase of \$20 which was opposed by the prosecutors. This opposition by the prosecutors helped to push the districts into financial shortfall.

control the flow of money into the criminal justice system, including that of their adversaries: the public defenders.

Equal Protection Concerns Raised by the Prosecutors Are Disingenuous

The LDAA essay cites *State ex rel. Williams, v. State*, 04-575 (La. 12/01/04) 888 So.2d 792, 797. It is a capital post-conviction case, however the essay mischaracterizes and misstates the facts of the cited case. Quite simply, this is neither an equal protection nor a due process case. The Supreme Court of Louisiana remanded the case for a hearing on statutory issues and expressly eschewed ruling on the constitutional issues of equal protection and due process.

The alleged equal protection and due process concerns the prosecutors raise here are inapplicable. It is far more likely that the state will face due process and equal protection issues based on providing poor people, particularly poor people of color, with appointed counsel who have inadequate time and resources to properly represent their clients.

Federal Involvement

When a legal delivery system becomes so overwhelmed that the lawyers cannot possibly do what the Rules of Professional Conduct require, indigent persons are denied the fundamental right to assistance of counsel. A United States District Court has concluded that the defense services for indigent clients in two municipal defense systems amounted to little more than a “meet and plead” system, violating the Sixth Amendment. *Wilbur v. City of Mt. Vernon* (989 F. Supp. 2d 122 (W.D. Wash. 2013)).

As recently as May 13, 2015, United States Senator Chuck Grassley, Chairman of the Senate Judiciary Committee held a hearing on “protecting the Constitutional Right to Counsel for Indigents Charged with Misdemeanors.” During the hearing, Senator Grassley recommended reclassification of some misdemeanors to civil infractions, while Ranking Member Senator Patrick Leahy suggested legislation to provide technical assistance to state and local governments so they can meet their Sixth Amendment obligations and to authorize the U.S. attorney general to seek relief through civil action if systemic failure continues.

The United States Department of Justice is already authorized to file suit against state officials who systemically deny juveniles their due process rights to the effective assistance of counsel.²⁴ Senator Leahy’s suggestion simply extends DOJ’s right to file lawsuits for systemic failure to indigent adults.

²⁴ Title 42 U.S.C. Section 14141

The noble ideal [of a fair trial] cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him. *Gideon v. Wainwright*, 373 U.S. 335 (1963).

Conclusion

The “Big Picture” is about the entire criminal justice system which includes legal ethics and clients’ rights to the effective assistance of counsel. The current level of practice in various areas of the state has never conformed to prevailing professional standards as articulated in the Louisiana Trial Court Performance Standards (LAC 22:XV, Chapter 7).

Working for justice is not about threats and fear. Working for justice means justice for all. No one is shutting down the legal system. The world did not end when Calcasieu and Orleans went into restriction of services. The criminal justice system adjusted and the system improved as a result of the Restriction of Services.