



# State of South Dakota Unified Judicial System



## Office of the State Court Administrator

Telephone: (605) 773-3474  
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500 East Capitol Avenue  
Pierre, SD 57501-5070

October 2, 2023

Senator Lee Schoenbeck  
President Pro Tempore  
1200 Mickelson Drive, Ste 310  
Watertown, SD 57201

Dear Senator Schoenbeck:

It is my pleasure to transmit to you the Final Report and Recommendations of the Indigent Legal Services Task Force created by House Bill 1064 during the 2023 Legislative Session. This Report identifies the challenges of our current system, overviews the work of the Task Force and makes findings concerning the current system for providing legal assistance to those unable to afford a lawyer in criminal, child abuse and neglect and juvenile court proceedings. The final report, appendix, meeting minutes and presentation materials are available on the UJS website at [ujs.sd.gov](http://ujs.sd.gov).

The Task Force has unanimously endorsed three recommendations:

- Statutorily create a statewide indigent defense commission and state public defender office.
- Evaluate alternatives for funding and cost containment in indigent defense.
- The Unified Judicial System contract to perform a thorough review of representative counties to gather further information to inform future work in this area.

My office will begin drafting implementing legislation related to these recommendations with the goal of having drafts no later than December 1<sup>st</sup>. We look forward to working together on these proposals and are happy to meet and discuss anything related to this Report with you or staff as would be helpful.

Sincerely,

Greg Sattizahn  
State Court Administrator

cc: Chief Justice Steven R. Jensen  
Mr. Reed Holwegner

*Our Mission: Justice for All*  
*Our Vision: We are stewards of an open, effective, and accessible court system, worthy of the Public's trust and confidence.*



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Speaker of the House  
1244 N. Maple  
Watertown, SD 57201

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INDIGENT LEGAL SERVICES  
TASK FORCE

# Final Report and Recommendations



OCTOBER 1, 2023



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## Introduction

The Sixth Amendment to the United States Constitution guarantees that in all criminal prosecutions the accused shall have the right to the assistance of counsel for their defense. That same right is recognized in the South Dakota Constitution in Article VI, section 7. As the United States Supreme Court has noted, “The right of one charged with a crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.” *Gideon v. Wainwright*, 372 US 335, 344 (1963). Further, “[o]f all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects [an individual’s] ability to assert any other rights [they] may have.” *United States v. Cronin*, 466 US 648 (1984). Since *Gideon*, the law has become well-established that every person is entitled to have an attorney to assist with their defense when they face the loss of liberty and are unable to afford an attorney. That same right has also been extended to criminal appeals, child dependency and juvenile proceedings.<sup>1</sup>

### Types of Proceedings

The appointment of counsel applies to various proceedings:

- Criminal case, any appeal or post-sentencing proceedings including habeas corpus. (SDCL 23A-40-9) (SDCL 21-27-4)
- Abuse and neglect of a minor child proceedings (SDCL 26-8A-9) (SDCL 26-8A-18) for the parents and the child(ren).
- Juvenile delinquency or child in need of supervision cases for the child, parents or their guardian. (SDCL 26-7A-31).

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<sup>1</sup> Providing a strong public defense system is recognized as necessary to a functioning democracy no matter political leanings. Compare for example American Legislative Exchange Council (ALEC) statement on public defense: [Resolution in Support of Public Defense - American Legislative Exchange Council - American Legislative Exchange Council \(alec.org\)](#); Americans for Prosperity op-ed on making the case for a strong public defense system: [Delayed justice is a hidden crisis in our federal justice system | The Hill](#); and American Civil Liberties Union (ACLU) public defense reform project: [Public Defense Reform | American Civil Liberties Union \(aclu.org\)](#).

## Background on South Dakota's Indigent Legal Defense System

South Dakota has a long tradition of providing legal representation to an accused that pre-dates federal case law on this issue. In fact, that history began in South Dakota Territorial times. See 1868 General Laws of the South Dakota Territory, Section 273 (1868) (recognizing a defendant appearing for arraignment without counsel be informed of their right to counsel and the court assign counsel for the defendant). South Dakota's indigent legal defense system has historically been delegated to the counties. There is no state entity that oversees indigent legal defense, and only a very small portion of indigent legal defense costs are reimbursed by the state.



**South Dakota is one of only six states that has no state entity overseeing trial-level indigent legal services.**



**South Dakota is one of only two states that requires counties to fund and provide indigent legal services at all levels (trial and appellate).**

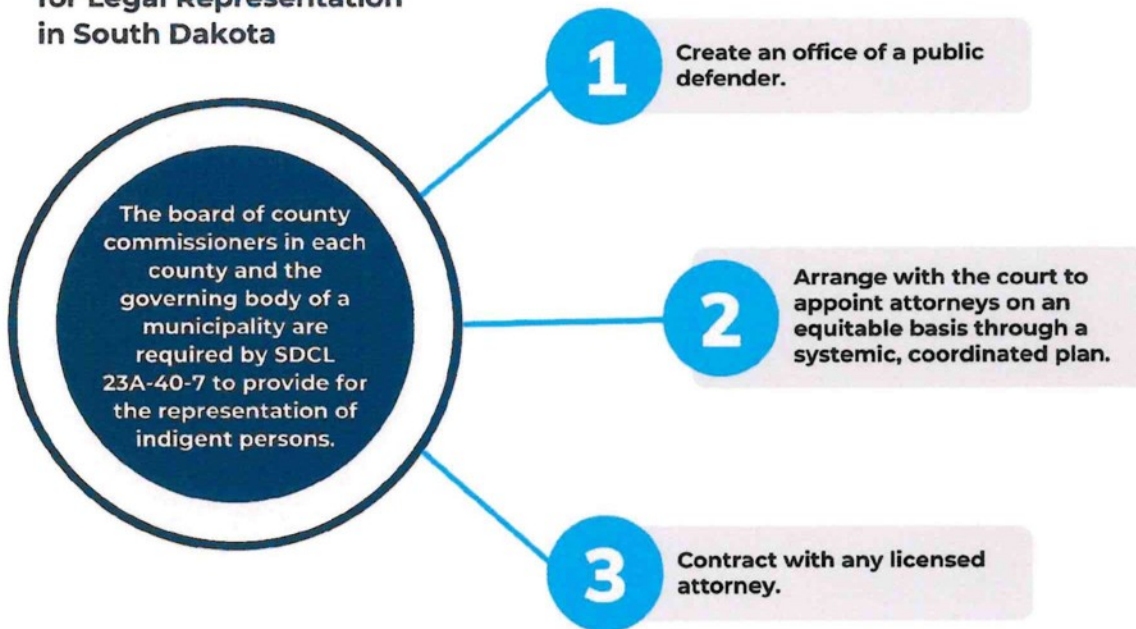


**South Dakota ranks 49th in the nation for the state's contribution to indigent legal defense costs.**

Counties are responsible by state law for either establishing public defender offices or establishing a system to provide indigent defense representation. SDCL 23A-40-7. Only three counties in South Dakota have established public defender offices: Lawrence, Minnehaha and Pennington. The rest of the 63 counties provide representation through attorneys appointed by the court from a list of available lawyers or attorneys that independently contract with a county to provide indigent legal defense. While there are statutory provisions for counties to join to provide indigent legal defense in a cooperative fashion, there are no examples of that structure in use in South Dakota. SDCL ch. 7-16A.



### Three Options for Providing for Legal Representation in South Dakota



## Challenges With Current System

The current system highlights the inherent challenges of a county-based system to recruit, obtain, qualify, train and then ultimately pay for the costs of indigent legal defense in an efficient and effective manner. South Dakota's county-based system provides no mechanism for oversight and training for defenders statewide. This lack of oversight places the burden on individual judges in many instances to assist in finding attorneys, determine if an attorney is competent to handle the case in which they have been appointed, review attorney billings, and then sit in judgment over the case and the attorney's actions in the case. The process of counties contracting with lawyers also does not necessarily factor in the quality of representation as the impetus behind those contracts in many instances is focused on controlling costs. The state's attorney may also be involved in the process of selecting defense lawyers in the county contracting process which could create concerns of a potential conflict of interest. This system certainly places the financial burden on the counties to provide indigent legal defense, and such costs are both unpredictable and increasing. These two factors have made it difficult for counties to budget and plan for such expenses.

These challenges have driven both the counties and the judicial system to question if the current system is meeting the needs of South Dakota.

“

“While South Dakota has a great tradition of providing court-appointed counsel, we are facing some challenges in our public defender system that I want to discuss today. Three counties—Minnehaha, Pennington and Lawrence counties—have public defender offices and full-time attorneys to handle indigent defense. The other 63 counties either negotiate an annual rate contract with one or more private attorneys or pay the cost of defense to private attorneys on a case-by-case basis. The variety of public defender arrangements from county to county can make it difficult for judges to appoint counsel and counties to manage costs. Judges, particularly in rural areas, are having more and more difficulty finding counsel to represent defendants in criminal cases.”

—Chief Justice Steven R. Jensen, 2023 State of the Judiciary Message

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## Formation of Indigent Legal Services Task Force

In response to these concerns, the Indigent Legal Services Task Force was created by House Bill 1064 during the 2023 Legislative Session. The goal of this Task Force as stated in the legislation is to:

1. Identify how legal services are delivered in South Dakota to indigent parties in criminal, juvenile, and child abuse and neglect proceedings statewide.
2. Recommend ways to improve the delivery of legal services to indigent parties.
3. Recommend methods to provide services for conflict cases where local public defenders may be unable to take cases.
4. Address how to ensure competent representation is provided to indigent parties.
5. Identify potential funding options to ensure delivery of legal services for indigent parties.

HB 1064 was passed with an emergency clause, and the Indigent Legal Services Task Force began forming immediately upon passage given the complexity of the topic and the legislative deadline for a final report and recommendation prior to Nov. 15, 2023.



## Task Force Members

Hon. Michael Day (Co-Chair)	Circuit Court Judge
Dean Neil Fulton (Co-Chair)	USD Knudson School of Law
Sen. Jim Mehlhaff	State Senator
Rep. Will Mortenson	State Representative
Brent Kempema	Assistant Attorney General
Wendy Kloeppner	Lake County State's Attorney
Lori Stanford	Attorney
Thomas Cogley	Attorney
Hon. Christina Klinger	Circuit Court Judge
Eric Whitcher	Pennington County Public Defender's Office
Randy Brown	Hughes County Commission
Arthur Hopkins	Oglala Lakota County Commission
Traci Smith	Minnehaha County Public Defender's Office

## Committee Project Staff

Greg Sattizahn	State Court Administrator
Aaron Olson	UJS Director of Budget and Finance
Jeff Tronvold	UJS Legal Counsel

## Task Force Work Plan

The Task Force conducted six meetings of its membership beginning in the spring of 2023. In addition to reviewing relevant statutory information, financial data and background information, the Task Force held 10 listening sessions across the state to learn more about the challenges of indigent legal defense. The Task Force further conducted surveys of judges, lawyers and county officials related to indigent legal defense to gather additional information. Finally, the Task Force conducted a comparative analysis of states similar in size, geography and structure to determine how they provide indigent legal defense. That information, along with the varied experiences of Task Force members, informed the following findings.

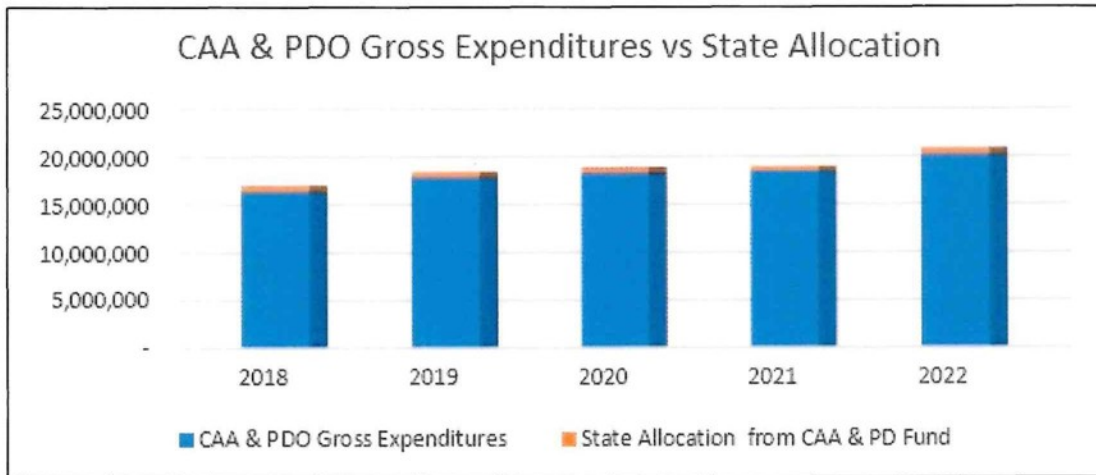
## Task Force Findings

- There is a lack of available attorneys across the state willing to provide indigent legal defense. The lack of available attorneys is particularly pronounced in rural areas of the state. There is also a lack of attorneys willing to take appointment in high-level felony cases.

- There is a need for increased training and mentorship for attorneys who provide indigent legal defense. The current system provides no organized support, training, mentoring or overarching structure to assist lawyers interested in, or currently providing, indigent legal defense services.
- Court-appointed attorney costs are increasing in counties statewide.

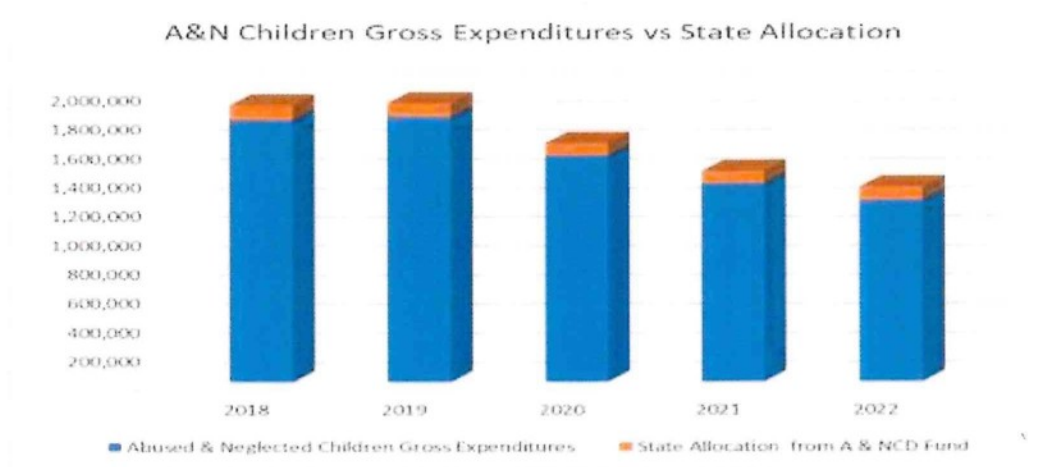
## History of County Expenditures and State Allocation

	Court-Appointed Attorney & Public Defender Office Gross Expenditures	State Allocation from Court-Appointed Attorney & Public Defender Payment Fund	Percentage of Expenditures
FY2018	\$16,395,692.85	\$602,581.32	3.68%
FY2019	\$17,882,383.69	\$551,986.16	3.09%
FY2020	\$18,325,552.02	\$546,138.83	2.98%
FY2021	\$18,486,125.40	\$461,213.51	2.49%
FY2022	\$20,218,239.93	\$637,741.23	3.15%



	Abused & Neglected Children Gross Expenditures	State Allocation from Abused & Neglected Child Defense Fund	Percentage of Expenditures
FY2018	\$1,804,555.58	\$100,443.99	5.57%
FY2019	\$1,825,854.54	\$92,410.10	5.06%
FY2020	\$1,557,880.76	\$84,077.85	5.40%
FY2021	\$1,364,726.83	\$83,841.66	6.14%
FY2022	\$1,247,455.13	\$90,520.78	7.26%

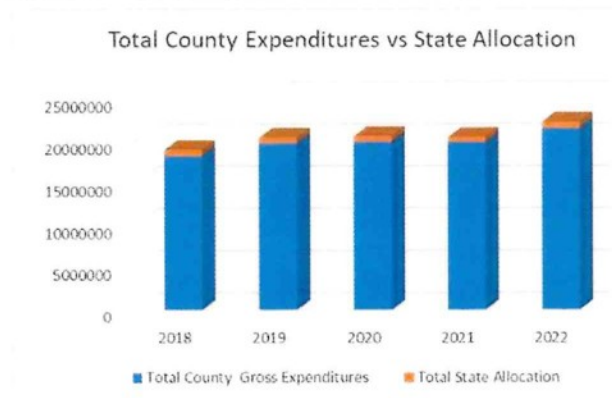




- Current state funding to the counties through the Court-Appointed Attorney and Public Defender Payment Fund and the Abused and Neglected Child Defense Fund is inadequate and does not meaningfully reimburse the counties for the cost of indigent legal defense. There are no other payments to counties for indigent legal defense from the state. The state does provide general funding, and there is a surcharge to support the Equal Access to our Courts Commission, which provides grants for civil legal aid but that does not support indigent legal defense.

## Total County Expenditures vs. State Allocation

	Total County Gross Expenditures	Total State Allocation	Percentage of Expenditures
FY2018	\$18,200,248.43	\$703,025.31	3.86%
FY2019	\$19,708,238.23	\$644,396.26	3.27%
FY2020	\$19,883,432.78	\$630,216.68	3.17%
FY2021	\$19,850,852.23	\$545,055.17	2.75%
FY2022	\$21,465,695.06	\$728,262.01	3.39%



- The current policy on compensation for private attorneys taking court appointments is viewed largely as inadequate, and the policy related to how attorneys are paid for travel time limits the availability of lawyers in rural areas because of a lack of willingness to travel for that rate. These rates significantly impact the appointment of counsel for cases involving serious charges where attorneys must devote a substantial amount of time toward representation in a single case.

### Presiding Judge Policy

- All lawyers willing to furnish services as court-appointed counsel to indigent defendants will be paid for all legal services on an hourly basis as follows: **\$107/hour** beginning Jan. 1, 2023. Subsequently, court-appointed attorney fees will increase annually in an amount equal to the cost-of-living increase that state employees receive each year from the Legislature. Travel will be paid at the rate of **\$1/mile for both the use of the automobile and for the attorney's time on necessary travel.**
  - Requests for payment of court-appointed counsel fees should be presented to the court on the date of the completion of the case, but in no event later than 30 days after the case is complete before the circuit court.
  - If the full amount of the voucher or statement for fees by counsel is not approved by the trial judge, the trial judge must explain, either orally or in writing, the reasons for change or modification of the statement or voucher submitted by counsel.
- There is no entity that oversees indigent legal defense, and there has been no resources dedicated to studying or improving indigent legal defense on a statewide basis.
  - There is no uniform method to review attorney bills and ensure uniformity in compensation rates as compared to other attorneys doing similar work. County oversight of billing is typically governed by terms of a contract or via review by the court of billings submitted by counsel in a case.
  - When local counsel is not able to handle cases because of a conflict of interest, it can be difficult to obtain outside counsel to handle those cases.



- There is no entity that monitors attorney caseloads and staffing needs for indigent legal defense.
- Specific information from all counties in South Dakota on indigent legal defense spending is not available in a format that provides more than cursory analysis. The lack of data in this area is a limiting factor in analyzing the data based on specific case types or offenses. For instance, the Task Force has sought ways to determine the cost per case for certain types of cases (felony, misdemeanor, abuse and neglect, juvenile etc.) or amount per case, and those number are not available.
- South Dakota, like 42 other states and the District of Columbia, statutorily authorizes indigent defendants to pay back some or all the cost of court appointed counsel to the county and creates a lien upon the property of the defendant (SDCL 23A-40-11) or parents for juvenile cases (SDCL 26-7A-32).
- The quality of services provided may vary from county to county as there are no uniform caseload standards or performance measures for attorneys who are appointed to represent indigent clients.
- The current system cannot keep pace with the changes in legal demand, cost and lawyer availability, and significant action must be taken to address these issues.

## Task Force Recommendations

The issue of indigent legal representation is complex and layered. The Task Force recognized very early in the process that the information available was limited in many instances and that there had been no statewide review of this important topic in recent times. While counties were interested in assisting and recognized the importance of this topic, the way data is maintained and de-aggregated by county coupled with the lack of oversight over the indigent legal defense system leaves a gap in the available information to consider when formulating policy recommendations. However, the Task Force was able to learn from other states, particularly with the assistance of the Sixth Amendment Center, as to how those systems are organized and also how they have historically transitioned from a county-based system to either a state-based system or a hybrid model with shared responsibilities between the state and county. Based on this information, the Task Force recommends the following:



## RECOMMENDATION ONE

### **Statutorily create a statewide indigent defense commission and state public defender office.**

- The indigent defense commission would oversee the strategic work needed in this area and be responsible for future development of an enhanced and coordinated indigent defense model for South Dakota.
  - The commission should be an independent entity that oversees indigent defense services statewide.
    - ✓ Must be detached from the executive and judicial branches to avoid political influence or create a conflict of interest.
  - The commission should consist of nine members appointed by various appointing authorities. Potential appointing authorities include the Supreme Court, Governor, Legislature and State Bar. The membership should include county government, tribal and citizen representation.
  - Members selected to serve on the commission should have significant experience in criminal proceedings or a demonstrated commitment to indigent defense.
- The initial caseload of the state public defender office should include criminal appellate work and abuse and neglect and habeas appeals from counties statewide.
  - This appellate work and abuse and neglect and habeas appeals will be handled by the state office at state expense.
    - ✓ Best estimates indicate this will relieve approximately \$1.5 million to \$2 million from the county indigent legal defense costs on an annual basis. Projected costs would be approximately \$1.4 million as detailed below.
- The work of the office could later expand to include felony trial level appointments through a structure to be determined by a combination of staff attorneys and contract lawyers.
- The work of the office should also include training and support for court-appointed counsel.
- The chief public defender would be the representative of the office and oversee the office of indigent defense services for indigent defendants entitled to counsel in South Dakota.
  - The proposed framework would be intended to increase communication and resource sharing with the private bar and county public defender offices,



similar to the Attorney General's Office in providing for statewide oversight and resources to criminal defense practitioners.

- The chief public defender would perform reduced case work to account for administrative responsibilities.
- The chief public defender would identify and oversee training of staff.
- The chief public defender would develop a strategic plan and oversee implementation of commission objectives.
- The state public defender's office should have parity of resources with the Attorney General's Office to ensure robust criminal defense. Parity does not mean equal resources, but instead, adequate resources to fulfill the mission of the office.

## Resources for State Appellate Defender Office

### Executive Director/Chief Public Defender:

#### 1 FTE

- Oversees office
- Supervising attorney
- Performs reduced case work
- Identifies and oversees staff training
- Strategic planning and implementation

### Attorney FTE Estimated:

- 3 FTE for criminal case direct appeal and habeas representation
  - Supreme Court three-year average of 52 cases a year
  - Attorney General's Office has 6-7 FTE equivalent
  - Minnehaha and Pennington effectively have 1 FTE each for their current caseloads
- 1 FTE for abuse and neglect representation
  - Supreme Court three-year average of 21 cases

### Other Budgetary Considerations:

- 2 FTE support staff
  - Paralegal
  - Secretary
- Budget for commission or state board
  - Per diem
  - Travel
  - Training
- Office rent, furniture, supplies, technology
- Case management system
- Human resources support
- Accounting and budget/finance support
- Contract dollars for conflict cases, or to hire outside counsel as necessary
- Travel and training budgets
- Legal research subscriptions

## Projected Budget

### Personal Services

Executive Director	\$133,750
Attorney—Direct Appeal and Habeas	\$110,000
Attorney—Direct Appeal and Habeas	\$100,000
Attorney—Direct Appeal and Habeas	\$80,000
Appellate Attorney—Abuse and Neglect	\$85,000
Paralegal	\$60,000
Legal Secretary	\$50,000
Commissioners (seven)	\$7,000

<b>Total Salaries:</b>	<b>\$625,750</b>
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Social Security & Medicare	\$47,870
Retirement	\$37,545
Health Insurance	\$82,474
Worker's Compensation	\$3,567
Unemployment Compensation	\$626

<b>Total Benefits</b>	<b>\$172,081</b>
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<b>Total Salaries &amp; Benefits</b>	<b>\$797,831</b>
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### Operating Expenses

Commission Travel, CS, Supplies	\$25,000
Staff Travel	\$15,000
Legal Research Subscriptions	\$50,000
Defense Counsel Contracts—Conflicts	\$200,000
Training Contracts	\$100,000
Rent	\$25,000
Case Management System	\$30,000
IT Infrastructure, Hardware, Software	\$100,000
Office Supplies	\$25,000
Office Furniture	\$20,000
Miscellaneous Expenses	\$25,000

<b>Total Operating Expenses</b>	<b>\$615,000</b>
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<b>Total Personal Services &amp; Operating Expenses</b>	<b>\$1,412,831</b>
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- In addition to handling and reporting on appellate criminal, abuse and neglect, and habeas cases, reporting provisions for the commission and office should include the requirement for a plan to provide statewide oversight for indigent legal defense for felony cases and child abuse and neglect cases at the trial level.
  - The Task Force recommends that the plan exclude cases where a misdemeanor is the highest charged offense.
  - It will also be important that the plan establish processes to handle conflict cases to ensure representation can be obtained throughout the state in a coordinated and timely fashion.
- Challenges in the current system have been exacerbated and allowed to linger because of the lack of statewide oversight and review in this area. The commission and statewide public defender office should fill that role.
- Examples of areas that necessitate statewide study and oversight include:
  - Developing a process to audit attorney billings and services provided to ensure efficient and fair representation across the state.
  - Identifying best practices in indigent legal defense and establishing training and mentorship requirements for defenders and private counsel.
  - Authority to set rates for court-appointed counsel and travel reimbursement.
  - Creating and monitoring caseload standards for defenders and a mechanism to ensure those standards are not exceeded.
  - Review of statewide standards for verification of income procedures to ensure consistency as to the determination of court-appointed attorney eligibility.
  - Study and review the current process and desirability of continuing the process of requiring individuals to reimburse the cost of indigent legal defense and the statutory lien process for indigent legal defense costs.



## RECOMMENDATION TWO

### **Evaluate alternatives for funding and cost-containment in indigent defense.**

- County officials expressed significant concern about both the volume and variability of indigent defense costs. Both present a budget challenge for counties. Indigent defendants are best served when taxpayer dollars are thoughtfully allocated and carefully accounted for. Budget shortfalls present a danger both to county finances and effective representation.
- The Task Force had extensive discussion of alternative funding structures and the importance of ensuring that public funds are allocated toward a coordinated study of the problem by the executive, legislative and judicial branches. The Task Force does not endorse a particular approach, but discussed these options:
  - Increase in the surcharge for court-appointed attorney reimbursement and abuse and neglect funds that currently flows to the counties.
  - Consider a one-time appropriation to the county reimbursement funds to offset costs to counties. This one-time appropriation could be limited to small counties or enhanced to support small counties as they will see fewer immediate benefits from the proposed state office focusing initially on appellate cases.
  - Create a reinvestment pool between the state and counties that reimburses county indigent defense costs when those costs exceed a certain baseline cost. There exists a model for such a structure in SDCL ch. 7-16B (County Legal Expense Relief Program) that could be expanded further and should consider state participation in that program.
  - Create a dollar cap on the amount a county is responsible for related to an individual case and also a total cap on the maximum outlay a county is required to pay for court-appointed defense costs on an annual basis. Any amounts above those caps would become the responsibility of the state.
  - Consider reallocating revenue from the alcohol excise tax to provide a larger share to the counties.
  - Explore the use of federal funds and grants for indigent legal defense.
  - Require cities to contribute to costs of indigent legal defense for city offenses.
  - Explore cost-sharing of criminal defense costs with tribal governments.
  - Coordinate with the State Bar Association to encourage lawyers to provide pro bono legal services to indigent defendants as required by Rule of Professional Responsibility 6.2.



- Require the defendant to pay a reasonable fixed cost for court-appointed counsel.
- Require a fiscal note on the costs of public defense associated with the creation of a new or enhanced criminal penalty as part of any proposed legislation.
- Consider removing the sales tax on the provision of legal services.



### RECOMMENDATION THREE

#### **Contract with Sixth Amendment Center to perform a thorough review of representative counties to gather further information to inform the work of the commission.**

- This study would inform the work of the commission and state office and would reveal specific information to assist in policy discussions and provide in-depth information to assist in the analysis of the impact of specific policy choices.
- This assessment will include:
  - Review of existing statutes and rules governing indigent defense in South Dakota.
  - Identify key cost drivers of indigent legal defense.
  - County data collection and analysis; review of defense contracts, policies, procedures to determine case costs and adequate reimbursement rates.
  - Court observations and stakeholder interviews from the seven selected jurisdictions.

## Conclusion

An effective indigent defense delivery system is paramount to ensure the rights of South Dakota citizens are protected and to ensure an efficient operation of the judicial system. There is no way around the fact that indigent defense demand and costs have not kept pace with the resources counties currently provide for indigent defense services. This has made it challenging to deliver services in a large rural state where the supply of lawyers is limited. These recommendations are intended as a starting point in the evolution of a system that requires strategic efforts to ensure those rights protected by our state and federal constitutions are vigilantly guarded.





## Appendix

Appendix A: Relevant Indigent Legal Representation Statutes

Appendix B: ABA 10 Principles of a Public Defense Delivery System

Appendix C: Lawyer, Judge and County Official Survey Summary

Appendix D: History of Court-Appointed Attorney and Abused and Neglected Reimbursement Fund and Expenditures by County

Appendix E: Map of Listening Sessions Held by the Task Force

Appendix F: South Dakota Federal Court Plan for Adequate Representation of Defendants

Appendix G: State Primers Considered by Task Force for Comparative Analysis