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Joint Committee on Finance

Paper #485

Video Evidence Server Storage and Workload Staffing (Public Defender)

[LFB 2021-23 Budget Summary: Page 455, #4 and #5]

CURRENT LAW

Both the United States Constitution and the Wisconsin Constitution provide the right to counsel for individuals accused of a crime. The Sixth Amendment to the United States Constitution provides, in part, that, "In all criminal prosecution, the accused shall enjoy the right...to have the Assistance of Counsel for his defense." Article I, Section 7 of the Wisconsin Constitution provides that, "In all criminal prosecutions the accused shall enjoy the right to be heard by himself and counsel..." In *Gideon v. Wainwright* (1963), the United State Supreme Court held that the constitutional right to counsel guaranteed by the United States Sixth Amendment requires the government to provide counsel to indigent criminal defendants. However, under subsequent United States and Wisconsin Supreme Court decisions, there is no absolute right to the appointment of counsel in non-criminal cases carrying no threat of loss of physical freedom.

The cost of providing required counsel to the indigent in Wisconsin is generally the responsibility of the state through the Office of the State Public Defender (SPD). The SPD employs trial and appellate attorneys who represent clients who qualify for SPD representation. Generally, the State Public Defender provides legal representation for indigent persons: (a) facing a possible sentence that includes incarceration; (b) involved in certain proceedings under the Children's and Juvenile Justice Codes (Chapter 48 and 938 of the Wisconsin statutes); (c) subject to petitions for protective placement (Chapter 55 of the Wisconsin statutes); (d) facing involuntary commitment; (e) involved in certain post-conviction or post-judgment appeals; and (f) undergoing proceedings for modification of a bifurcated sentence, if representation has been requested by the indigent person or the case have been referred by a court, and the Public Defender determines that the case should be pursued. Further, unless the individual knowingly and voluntarily waives counsel or appoints his or her own counsel, the SPD must provide counsel to the following individuals without a determination of indigency: (a) those involved in certain proceedings under the

Children's and Juvenile Justice Codes; (b) those subject to petitions for protective placement; and (c) those facing involuntary commitment.

Over the last several years there has been a significant increase in the use of video evidence, such as body worn cameras by law enforcement officials, in criminal proceedings. This has increased both the workload of Public Defender staff and private bar attorneys and increased demand on technology resources such as data storage and bandwidth requirements.

DISCUSSION POINTS

Video Evidence Background

1. In addition to the United States Constitution and the Wisconsin Constitution providing the right to counsel for individuals accused of a crime, defendants have a constitutional right to "discovery"; that is, the disclosure of the prosecutor's evidence. This constitutional right is incorporated in the Wisconsin Constitution and in statute in s. 971.23. Prosecutors comply with this discovery obligation by making available copies of reports, recordings, and other pertinent investigative materials. Counties, law enforcement agencies, and other parties charge the SPD for copying costs incurred in providing these materials.

2. The SPD has experienced an increase in video recordings and payments since 2004-05 due in part to 2005 Wisconsin Act 60 which codified requirements that law enforcement agencies make an audio or (audio/visual) recording of a custodial interrogation of a juvenile who is suspected of committing a crime if the interrogation is conducted at a place of detention. It also required law enforcement agencies to make a recording, if feasible, of a custodial interrogation of a juvenile suspected of committing a crime if the interrogation is conducted at a place other than a place of detention with some exceptions. Further, 2005 Act 60 provided that custodial interrogations of adult felony defendants should be recorded and admitted into evidence at trial, and that, barring good cause not to do so, the judge may instruct the jury that they may consider the absence of a recording when weighing the evidence. Squad car recordings and security camera recordings also contribute to the increased costs in this appropriation. Recordings may also entail transcription costs because of the need to present the court with an accurate record of the recorded statement, interrogation, or other conversation.

3. The SPD experienced another increase in video recordings starting in 2015, when law enforcement agencies started implementing the use of body worn cameras. A 2020 survey of law enforcement agencies by the Department of Justice indicated that 380 agencies (88% of respondents) used at least one form of recording device (body worn or dash cameras) among their officers.

4. The following table shows the amount of time spent downloading videos, the number of videos, and the length of the videos broken down by felony and misdemeanor case types. The data was collected in the Milwaukee Trial office and includes cases in which video evidence was received between December 1, 2019, and August 31, 2020.

Video Evidence Received Between December 1, 2019 and August 31, 2020

	<u>Misdemeanor</u>	<u>Felony</u>	<u>Total</u>
Number of Cases	448	597	1,045
Number of Videos	4,247	8,722	12,969
Average Number of Videos/case	9	15	12
Total Video Length (Hours)	1,391	2,611	4002
Average Video Length/case (Hours)	3.11	4.37	3.83

5. Extrapolating the data above the SPD indicates "just to download and review video would take the equivalent of 90.8 FTE positions." The SPD indicates that a trial attorney may need to review more than 529 hours of video evidence per year or more than 25% of a 2,080 hour work year based on the statutory minimum caseload.

6. Assembly Bill 68/Senate Bill 111, provides a net increase of \$188,200 GPR in 2021-22 and \$181,400 GPR in 2022-23 and 10.0 GPR positions for the resources to receive and review video evidence such as police body worn cameras. Positions would include: (a) 7.0 attorneys; (b) 2.0 paralegals; and (c) 1.0 client service specialist. Funding would include \$665,800 GPR in 2021-22, \$818,200 GPR in 2022-23 and 10.0 GPR positions in each year and reductions to the appropriation for private bar and investigator reimbursement to reflect cost reductions generated by the additional trial attorney positions (-\$477,600 GPR in 2021-22 and -\$636,800 GPR in 2022-23).

7. In addition, the bill would provide \$1,366,900 GPR annually to account for the increased data storage costs of video evidence such as police body worn cameras. The recommendation reflects the agency's estimated cost to purchase sufficient server storage capacity to meet its current storage needs.

Video Evidence Position Authority

8. Supreme Court Rules require that attorneys review the evidence in order to provide their client with an adequate defense. The SPD indicates that "in a case with video or other electronic evidence, the attorney must watch all video related to the case in order to ensure that evidence that might be relevant is identified. Not only must the attorney review the evidence, but they must review it with their client as well. As the number of body worn cameras and other video sources has increased, so has the workload it requires for an attorney to review the video. Even a brief interaction with law enforcement usually requires viewing hours of video as multiple officers and squad car cameras create multiple views of the law enforcement contact, each of which could provide different information. This has increased the workload for public defender staff and private bar attorneys while caseloads have remained fixed. Significant time is also spent obtaining the videos from prosecutors and law enforcement officials, downloading the files from electronic servers, and addressing technical issues in being able to access and play the video evidence."

9. The cost of providing counsel to the indigent in Wisconsin is generally the responsibility of the state through the SPD. The Office is primarily funded through general purpose revenue, which is utilized to support trial and appellate staff attorneys as well as reimbursements to private bar

attorneys who are assigned indigent legal defense cases. Base resources for the SPD are \$98,726,300 GPR and \$1,438,200 PR and is currently authorized 609.85 GPR and 5.0 PR positions. Of the 586.2 positions employed by the SPD, 372.2 positions are assistant state public defenders (ASPDs).

10. In order to provide representation for indigent clients, the SPD has both a trial division and an appellate division. The trial division is comprised of 36 local trial offices located throughout Wisconsin, while the appellate division is comprised of two appellate offices, located in Madison and Milwaukee. Base resources for the SPD's trial division are \$56,166,600 GPR and 542.85 GPR positions, and base resources for the appellate division are \$4,598,800 GPR and 43.35 GPR positions.

11. Wisconsin statute establishes that each trial division assistant state public defender must meet one of the following annual caseload requirements: (a) 184.5 felony cases; (b) 15 first-degree homicides; (c) 15 sexual predator cases; (d) 492 misdemeanor cases; (e) 246 other cases; or (f) some combination of these categories. [Note that "other" cases generally litigated by the SPD include civil commitment proceedings, felony delinquency proceedings, protective placement proceedings under Chapter 55 of the statutes, juvenile cases, felony diversion cases, revocation hearings, termination of parental rights cases, juvenile waiver proceedings, as well as other miscellaneous cases.] Wisconsin statutes allow the SPD, however, to exempt up to 10 full-time supervisory ASPDs from the caseload requirement due to those attorneys' additional responsibilities.

12. While the SPD employs trial and appellate staff attorneys to represent clients who qualify for SPD representation, SPD staff attorneys do not represent all clients who qualify for SPD representation. Due to an overflow of cases in excess of what can be assigned to SPD staff, as well as conflict of interests that may exist between SPD staff and potential clients, the SPD assigns certain cases to private bar attorneys. Base GPR funding for the private bar and investigator reimbursements is \$41,966,800 GPR annually. In addition to GPR, the SPD utilizes a portion of the program revenue generated from clients who are able to provide modest payments for legal representation to support private bar reimbursements.

13. Private bar attorneys are compensated pursuant to either: (a) a statutorily defined rate totaling \$70 per hour for time spent related to a case in and out of court, and \$25 per hour for travel of more than 30 miles; or (b) a flat, per case contracted fee that may not result in the attorney receiving more than he or she would under the statutory rate. Except for a number of misdemeanor cases, private bar attorneys are generally compensated pursuant to the statutory rate.

14. In 2019-20, 121,919 new cases were assigned to SPD staff attorneys and private bar attorneys. Of the newly assigned cases, 73,554 trial and 1,217 appellate (61.3%) cases were assigned to SPD staff, while private attorneys were assigned the remaining 47,148 cases (38.7%). Of the 47,148 cases assigned to private bar attorneys, 20,707 were overflow and 25,347 were conflict of interest cases.

15. It should be noted that on March 22, 2020, Wisconsin Supreme Court order suspended most in-person court hearings, which caused trial and sentencing delays. While in-person court hearings are starting to resume and remote technology has allowed many hearings to proceed virtually, the courts have incurred a significant criminal case backlog. Between January 1, 2020, and December 31, 2020, the number of felony cases pending in circuit court increased by 9,991 cases or about 35%.

16. There are a number of factors that may make the private bar as opposed to assigning the case to a staff attorney (ASPD) more efficient. Some of these factors include: (a) salary and fringe benefit costs; (b) staff caseload; (c) location of the case; (d) location of the attorney; (e) prior interactions with the defendant; (f) type of case; and (g) complexity of the case.

17. With some caveats, however, it is generally less expensive for cases to be assigned to SPD staff attorneys rather than private bar attorneys. Despite the fact that the state supports fringe benefits, supplies and services costs, as well as support staff for assistant state public defenders, potential savings associated with employing additional ASPDs occur because: (a) trial ASPDs must meet an annual caseload requirement established under statute; (b) ASPDs minimum salary is \$37.22 per hour (\$26.17 for salary and \$11.05 for fringe benefits) while private bar attorneys are paid \$70 per hour for time they spend related to a case; and (c) efficiencies may be generated from litigating multiple defense cases at one time. Therefore, costs increase more rapidly when more cases must be assigned to private bar attorneys.

18. Generally, the more complex a case is (and the more video evidence), the more cost effective it will be for a staff attorney to handle the case than by a private bar attorney. Based on billing data from 2015-16, a serious felony was three times more expensive to hire a private bar attorney for than a simple felony. However, a serious felony is weighted the same in the statutory caseload calculations for ASPD's as a simple felony. An exception to this is when a private attorney has prior experience with the client.

19. Assembly Bill 68/Senate Bill 111 assumes that due to the reduction in the number of cases that would need to be assigned to the private bar, an associated reduction in private bar costs would occur. As such, the bill reduces funding for private bar and investigator reimbursements by \$477,600 in 2021-22 and \$636,800 in 2022-23. The administration estimated these reductions by utilizing the average amount the private bar billed the SPD, by case type, in 2019-20. Reductions are less in 2021-22 because it would take the SPD a few months to hire 6.0 new trial ASPDs and private bar attorneys generally bill the SPD six months after being assigned a case. It should be noted that while the addition of non-attorney positions may result in efficiencies to the SPD, there is not currently a way to quantify a private bar offset for non-attorney staff.

20. As a result of both the additional resources to the SPD and the reductions for private bar reimbursement, the net fiscal effect of the provision to add staff attorneys to address video evidence review, as estimated by the administration, is \$188,200 in 2021-22 and \$181,400 in 2022-23. The administration anticipates that the savings estimated in 2022-23 would continue for future fiscal years. In recognition of the fact that the time necessary to handle a case has increased since the SPD [Alternative A1]

21. While the staff attorney needs to review all video evidence, the tasks of obtaining the video discovery, downloading it into the proper files, preparing the video and requisite software for viewing, and even a preliminary review of video evidence may be done by non-attorney staff. The assistance of staff allows the attorney to concentrate on activities that only the attorney may perform. In their agency request the SPD indicates they would prioritize the "addition of non-attorney staff to coordinate obtaining, downloading, organizing, and conducting a preliminary review of video evidence. Keeping in mind that attorneys retain the primary ethical obligation to review video. In

addition, the workload impact to attorneys remains significant and increasing the number of attorneys and support staff would mitigate the workload impact of reviewing video evidence."

22. In the 2021-23 agency budget request, the SPD requested \$2,160,200 GPR in 2021-22 and \$2,632,000 GPR in 2022-23 and 40.0 positions for the resources to receive and review video evidence such as police body worn cameras. Positions would include: (a) 7.0 attorneys (2.0 for the appellate division and 5.0 for the trial division); (b) 10.0 legal secretaries (all for the trial division); (c) 9.0 paralegal (1.0 for the appellate division and 8 for the trial division); (d) 5.0 investigators (all for the trial division); and (e) 9.0 client service specialists (1.0 for the appellate division and 8.0 for the trial division). In order to provide staffing as the agency requested, the Committee could provide the positions as requested by the agency. [Alternative A2] As a result of both the additional resources to the SPD and the reductions for private bar reimbursement, the net fiscal effect of the provision is estimated to be \$1,762,100 in 2021-22 and \$2,101,200 in 2022-23. It is anticipated that the savings estimated in 2022-23 would continue for future fiscal years.

23. As indicated above, video evidence must be appropriately evaluated by defense counsel in connection with appropriate legal representation and such review is time-intensive. This review is done either by state staff or by private bar attorneys. Given that the SPD has the option to make private bar appointments rather than adding a larger number of staff, the Committee may choose to provide a lower number of positions. Under this alternative, the SPD would receive some additional staff support, but would also need to rely on private bar attorneys for caseload support. This alternative would provide a net increase of \$94,100 in 2021-22 and \$92,000 in 2022-23 and 5.0 positions for the resources to receive and review video evidence such as police body worn cameras. [Alternative A3] Note that, as allowed under current law, the SPD may request additional GPR positions through a 14-day passive review process if the agency determines additional positions are needed.

24. If the Committee takes no action, increased workload associated with the review of video evidence would need to be addressed within the agency's existing budget using staff attorney resources and private bar appointments. [Alternative A4]

Server Storage for Video Evidence

25. The SPD indicates that "aside from the impact on workload, technology costs related to data storage and bandwidth have an impact on the current SPD budget." The exponential growth of storage costs may eclipse existing agency resources.

26. In addition to the number of videos and time to download and view them, Milwaukee Trial staff tracked the size of the files that were being stored on servers. The average file size in a misdemeanor case was 7.3 gigabytes (GB) and a felony was 12.8 GB. Given the way these files must be stored while the case is pending and the costs of storage being calculated on a gigabyte per month system, the video will likely need to be retained on a server for at least six months for a misdemeanor, and a year or more for a felony. Further, Supreme Court rules require a client file to be maintained at least six years after a case is closed. When the DA's office provides the video, they may either provide the video on a flash drive or they may provide a link to an evidence management site that is good for 30 days to provide time for the SPD to download their own copy of the material.

27. In July, 2019, the SPD spent \$1,026 per month for server storage just for the Milwaukee Trial office. Before July, 2020, SPD requested 6,000 gigabytes additional storage space due to the growth of video evidence being provided electronically. By July, 2020, the server storage cost for just Milwaukee Trial had increased more than 540% to \$6,567 per month. For the SPD office as a whole, the growth in use of storage space since July, 2019, has translated to a monthly cost increase from \$16,979 to \$23,440 in October, 2020, when the SPD submitted its agency request.

28. The SPD has evaluated several different software and storage solutions with multiple providers to come up with their cost estimate. In order to provide the agency's estimated cost to purchase sufficient server storage capacity to meet its current storage needs, the Committee could provide \$1,366,900 annually to account for the increased data storage costs of video evidence such as police body worn cameras. This alternative would allow the SPD to select the most cost effective of the plans for increased server storage that the SPD found. [Alternative B1]

29. Since the SPD has been able to use existing resources to handle some of the growth in the use of server storage, the Committee may choose to provide a lower amount of funding. This alternative would provide \$683,500 annually to account for the some of the increased data storage costs of video evidence such as police body worn cameras. [Alternative B2] To the extent that additional resources are needed beyond the amount provided, existing resources would need to be utilized.

30. If the Committee takes no action, increased video servers storage costs would need to be addressed within the agency's existing budget. [Alternative B3]

ALTERNATIVES

A. SPD Staffing

1. Provide a net increase of \$188,200 in 2021-22 and \$181,400 in 2022-23 and 10.0 positions for the resources to receive and review video evidence such as police body worn cameras.

ALT A1	Change to Base	
	Funding	Positions
GPR	\$369,600	10.00

2. Provide a net increase of \$1,762,100 in 2021-22 and \$2,101,200 in 2022-23 and 40.0 positions for the resources to receive and review video evidence such as police body worn cameras.

ALT A2	Change to Base	
	Funding	Positions
GPR	\$3,863,300	40.00

3. Provide a net increase of \$94,100 in 2021-22 and \$92,000 in 2022-23 and 5.0 positions

for the resources to receive and review video evidence such as police body worn cameras.

ALT A1	Change to Base	
	Funding	Positions
GPR	\$186,100	5.00

4. Take no action.

B. Server Storage

1. Provide \$1,366,900 annually to account for the increased data storage costs of video evidence such as police body worn cameras.

ALT B1	Change to Base
GPR	\$2,733,800

2. Provide \$683,500 annually to account for the some of the increased data storage costs of video evidence such as police body worn cameras.

ALT B2	Change to Base
GPR	\$1,367,000

3. Take no action.

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