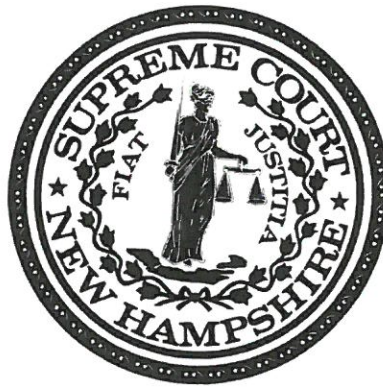


2021-006

# **NEW HAMPSHIRE SUPREME COURT**



## **REPORT ON THE RECOMMENDATIONS OF THE CRIMINAL DEFENSE TASK FORCE**

**October 27, 2021**

One Charles Doe Drive  
Concord, N.H. 03301

**NEW HAMPSHIRE SUPREME COURT REPORT  
ON THE RECOMMENDATIONS OF  
THE CRIMINAL DEFENSE TASK FORCE**

***Background:***

In September 2021, Chief Justice Gordon MacDonald requested that Associate Justice Patrick Donovan form and chair a task force, comprised of members of the New Hampshire bench and bar,<sup>1</sup> to assess the current crisis facing indigent defendants in the New Hampshire criminal justice system. The Court acknowledges the essential and difficult work that all members of the criminal justice system perform on a daily basis. Their commitment to maintaining the integrity of New Hampshire's criminal justice system during this difficult time has been nothing short of remarkable, and the Court recognizes that some measure of assistance is needed. Accordingly, the Criminal Defense Task Force's purpose was to identify and recommend measures that the Judicial Branch should consider and adopt to address the acute shortage of criminal defense attorneys willing to represent indigent defendants.

***Process:***

The Task Force met remotely on two occasions for several hours. Members learned that both the Public Defender's Office (PDO) and County Attorneys across the State are confronting dangerously high caseloads. For example, approximately 2,000 criminal cases now pending in the Circuit Courts need appointed counsel, yet several PDO offices have already reached maximum capacity and cannot accept additional cases. To that latter point, the PDO has lost 28 attorneys in the last 14 months due, in large part, to crushing caseloads. In addition, the Judicial Council has more than 118 new cases requiring appointed counsel. Another 300 cases need to be re-assigned because two contract attorneys have left the program.

After careful consideration, the Task Force drafted several recommendations, which Justice Donovan conveyed to the other members of the Supreme Court. The Court has approved and adopted the following recommendations and reports the measures that have been taken to date.

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<sup>1</sup> The following members of New Hampshire's bench and bar participated in the Criminal Defense Task Force: Associate Justice Patrick E. Donovan (chair), Chief Justice of the Superior Court Tina L. Nadeau, Administrative Judge of the Circuit Court David D. King, Attorney General John Formella, Deputy Attorney General Jane Young, Judicial Council Executive Director Sarah Blodgett, Judicial Council Chair Nina Gardner, Public Defender's Office Executive Director Randy Hawkes, Public Defender's Office Director of Legal Services Tracy Scavarelli, Strafford County Attorney Thomas Velardi, New Hampshire Association of Criminal Defense Lawyers President Robin Melone, Manchester City Solicitor Emily Rice, New Hampshire Bar Association Executive Director George Moore. The Supreme Court thanks the Task Force members for their time and efforts.

***Recommendations and Responses:***

1. Increase Public Awareness: *The present crisis needs to be publicized.*

Efforts to publicize the criminal defense crisis have already commenced with New Hampshire Public Radio interviews of Judicial Council Chair Nina Gardner and New Hampshire Association of Criminal Defense Lawyers (NHACDL) President Robin Melone. Efforts to inform and alert legislative leaders likewise need to be made, with the recommended participation of Chief Justice MacDonald and Attorney General John Formella, within the next two weeks. The New Hampshire *Bar News* intends to report on the current state of criminal defense shortages in its monthly publication.

2. Early Case Resolution (ECR): *ECR programs are a necessity given the present overwhelming caseloads that are challenging all participants in the criminal justice system.*

Strafford County Attorney Tom Velardi and PDO Executive Director Randy Hawkes are willing to meet, in person, with the County Attorneys and PDO managers to describe the process, ask for their support, and request that these programs be implemented on a statewide basis. Chief Justice MacDonald and Attorney General Formella are willing to participate in these presentations. The Task Force noted that the ECR message should stress that parties will meaningfully engage in a process that promotes justice and includes victim input. It was also noted that the Hillsborough County Attorney's Office is hiring two additional prosecutors for ECR purposes.

3. Additional Funding: *Additional funding needs to be secured to support contract attorneys.*

Funds from the Governor's Office for Emergency Relief and Recovery (GOFERR) have been approved to reimburse contract attorneys for past administrative costs associated with their increased caseloads. The Judicial Council is prepared to seek supplemental appropriations for increased funding for the PDO program. The Judicial Council is in the process of seeking \$2,066,000 in American Rescue Plan Act of 2021 funds for up to ten new, temporary attorneys to assist with current caseload challenges, additional temporary assistance for contract attorneys, and criminal defense training. That request was approved by the Joint Legislative Fiscal Committee on October 22, 2021, and will be on the agenda for the October 27, 2021 Governor and Council meeting. The Task Force also believes that a request for salary adjustments for PDO attorneys, to the extent necessary to align their salaries with those of their counterparts throughout the rest of the criminal justice field, should be made to the Legislature. The Judicial Council will work with the Attorney General's Office and other partners to prepare and advocate for this request.

4. Scheduling: *A brief pause in criminal cases would allow practitioners to better assess caseloads.*

The Task Force noted that a pause in trial courts, while it would not reduce caseloads or resolve cases, would provide all criminal practitioners with an opportunity and time to properly evaluate their caseloads. The Court recommends that the Administrative Judges of the trial courts schedule a one-time, one-week pause on all criminal cases in the trial courts during the month of January 2022.

5. Recruitment Efforts: *Judges in the trial courts have and should consider making personal overtures by way of an email or letter to criminal practitioners in their counties to accept contract and/or pro bono criminal cases.*

The Task Force noted that Judge Kissinger has successfully recruited a number of practitioners to accept cases in Merrimack County. Judges Temple and Coburn are making similar efforts in Hillsborough County. The Task Force believes that additional outreach efforts should be made to recently retired practitioners. Letters from Chief Justice MacDonald will assist in this effort. The Task Force recommends, and the Court approves, investigating a manner and method by which malpractice coverage can be secured for retired practitioners willing to accept cases on a *pro bono* basis.

6. Training: *Criminal defense training and mentoring needs to be provided to expand the number of attorneys representing indigent clients.*

The Judicial Council has secured GOFFER funding for criminal defense training. The Task Force believes that training should be developed that focuses on both felony and misdemeanor-level offenses; however, training alone will not secure competent counsel. Mentors with sufficient experience should be identified for attorneys accepting cases following such training. To that end, NHACDL members should be recruited as instructors and mentors. The Bar Association is willing to provide the facility and support necessary to conduct such training. A two-hour training video created by the PDO Program is also available to train out-of-state criminal defense practitioners who are new to New Hampshire.

7. Rule Changes: *Administrative and other temporary rule changes could encourage more attorneys to represent indigent defendants.*

The Supreme Court will propose administrative rules in the Circuit Courts that will permit attorneys to sign and execute waivers and acknowledgments on behalf of informed clients in criminal cases. The Court supports an administrative, temporary amendment to New Hampshire Rules of Criminal Procedure 42(b)(1), which will waive the requirement that bar members appear with *pro hac vice* counsel in criminal cases involving indigent defendants. The Court will also propose temporary administrative rules waiving the fee requirement in such cases. The Court will also propose a temporary amendment to Supreme Court Rule 53 to provide CLE credits to attorneys accepting indigent defense cases on a *pro bono* basis. Although the Task Force was not confident that such

proposals will significantly increase the number of qualified attorneys willing to accept these cases, the Court noted that similar proposals have been adopted successfully in a number of other states.