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**FY18 Budget Request for the Law Offices of the Public Defender
(Agency 280)**

Introduction

The Law Offices of the Public Defender (LOPD) is the largest law firm in New Mexico, with nearly 200 LOPD public defenders and 150 contract defenders representing criminal defendants in 70,000 new cases each year. LOPD was created in response to the U.S. Supreme Court's 1963 decision in Gideon v. Wainwright that guarantees indigent defendants receive the right to counsel in criminal cases. Justice Black explains the premise of equality before the law that led to the Court's holding in Gideon:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards *designed to assure fair trials* before impartial tribunals in which *every defendant stands equal before the law*. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Both the Federal and New Mexico Constitutions require that the State of New Mexico adequately fund indigent defense in order to ensure equality before the law.

The citizens of New Mexico have strived to ensure that indigent defense is independent from political pressures and more adequately funded. In 2012, the New Mexico Constitution was amended to add Article VI, Section 39 which created an independent Public Defender Department along with a Public Defender Commission to provide oversight and set performance standards for public defense.

In 24,000 cases annually, contract defenders provide representation in the 20 counties where LOPD does not have an office and in cases statewide where LOPD has a conflict of interest because it represents a co-defendant or the alleged victim in another case. LOPD has offices in seven of the thirteen Judicial Districts (First, Second, Third, Fifth, Eighth, Ninth, Eleventh, and Twelfth).

Due to the sheer volume of cases there is a significant shortage of attorneys and support staff. Consequently, many indigent clients in New Mexico do not receive the effective assistance of counsel. The Legislature and Governor have responded to this shortage, increasing LOPD's budget 16.8 percent from FY2013 to FY2017, from \$42 million to \$49.1 million. This represents a down payment towards ensuring constitutionally adequate indigent defense, but only begins to address the serious deficit caused by multiple decades of underfunding indigent defense in New Mexico.

LOPD and the Public Defender Commission recognize two fundamental yet contradictory points:

1. **There are funding limitations.** The Commission and the LOPD have submitted budget requests for the last two fiscal years that show the estimated needs for indigent defense, if conducted properly, but these requests amounted to huge increases, between 90 and 100 per cent over the previous budget. While those requests are good faith estimates, the Commission and LOPD are aware that those increases are not likely given the state's economy and other factors. The

money is not available to meet all needs and the agency must do what it can to spend responsibly and to prioritize needs.

2. **The LOPD and the Commission cannot perform their constitutional obligations without adequate funding.** Just as there are limits to funding, there are limits on the work that can be done if it is to meet constitutional requirements. There are only so many hours in a day that can be devoted to proper representation. Without significant, sustained increases— aimed at expanding the LOPD budget by nearly 90%— both public and contract defenders will be ethically and constitutionally required to take legal steps in cases to alert courts of their inability to adequately defend their clients.

The LOPD and the Commission are committed to improve indigent defense by increasing the number of public defenders, ensuring that indigent clients have representation at all stages, including felony first appearances, arraignments, grand jury and preliminary hearings, improving the representation of juvenile clients, increasing the pay for contract defenders, and substituting alternate defenders (state-employed conflict defenders) for contract defenders in locations where LOPD contract defenders are not available.

LOPD will also advocate for reforms in the criminal justice system which could focus the use of resources for many agencies and the courts in a manner which would allow LOPD to work more efficiently and effectively. This move, however, cannot be accomplished overnight and will not reduce the demands of the system for an indefinite time.

Current Systemic Weaknesses in Indigent Defense

Due to the shortage of attorneys and support staff, many indigent clients in New Mexico are not receiving effective assistance of counsel.

Representation at all Critical Stages. The Constitution requires that indigent defendants be represented at every “critical stage” to receive adequate representation:

- **Initial appearances.** In almost every county in New Mexico, both LOPD offices and contract defenders cannot represent clients at arraignments and felony first appearances in Magistrate Courts. Contract defenders are not assigned to cases until the end of these hearings, so clients often attempt to plead guilty and struggle to request conditions of release without the benefit of counsel. Sometimes defendants make statements that harm them. Lack of representation at arraignments and felony first appearances results in unnecessary jail time, excessive bail or damage to the Defendant's case.
- **Grand Jury.** Many defendants are not represented at all during grand jury proceedings – and, in fact, the LOPD is sometimes not even aware of the case until after an indictment is brought – even though New Mexico law provides the right to effective counsel at that stage. Even when made aware, attorneys often have too little notice or time to adequately prepare for grand jury issues that might dispose of the case.
- **Preliminary Hearing.** During the preliminary hearing proceeding, another critical stage, defendants are sometimes not properly represented, often due to the crush of time to conduct numerous preliminary hearings during a single docket. Hearings are unnecessarily waived or not conducted with adequate preparation.
- **Pre-trial custody decisions.** Bail determinations are sometimes not able to be properly pursued. Though entitled to pursue denial of reasonable bail, counsel often must choose to spend lawyer time on another client's issues.
- **Pre-trial motions and discovery.** Legal issues such as suppression motions or discovery issues are sometimes not pursued even though they are necessary in a case. Consequently, issues that might dispose of a case or lead to resolution are not done and the case continues through the system.

Juvenile representation. Indigent juvenile representation in New Mexico is sporadic in quality and coverage:

- Juvenile clients are often represented by public or contract defenders who are untrained in juvenile law and adolescent psychology.
- Juvenile cases often take more time than adult felonies and misdemeanors, but both public and contract defenders have caseloads that are so high that juvenile clients receive little attention.

Meet and Plea Representation:

- High caseloads result in some clients meeting their public defender or contract defender for the first time in court when they are offered the state's plea bargain. "Meet and plea" representation is representation in name only because the necessary investigation and case evaluation is missing thus depriving the client of the constitutional right to counsel.

Low Pay for Contract Defenders. New Mexico's underfunded hybrid model of providing indigent defense, using contract defenders as the sole public defenders in 20 of New Mexico's 33 counties, has resulted in a number of critical problems:

- Low flat rates of \$180 to \$750 per case force contract defenders to run a volume practice, taking as many cases as possible, in order to stay in business, without the capacity to provide adequate representation to all clients.
- The pay structure for contract defenders is so low that in FY2016 LOPD released an RFP for additional contract defenders for Eddy and Lea counties and received only one proposal.
- Attorneys with too many cases are unable to give sufficient time to each case, forcing attorneys to select which cases will receive effective assistance of counsel depriving many other clients of a constitutionally adequate defense.
- Clients in the 13 counties that have LOPD offices have the benefit of an integrated defense team with paralegals, investigators, social workers, and other staff assisting the public defenders with their cases. Clients in the other 20 counties do not have this level of support. Contract defenders normally only request additional funding when a case is likely to be tried or includes a mental health issue, leaving other cases without the same level of support.

- In many of the rural counties, contract defenders must commute from Albuquerque or Santa Fe, taking time and resources to do so. The pay structure for contract defenders is not sustainable, especially in those counties without LOPD offices and rural locations far from the concentrations of attorneys in Albuquerque and Santa Fe.

Excessive Workloads. The systemic problems with contract defense in the hybrid model are exacerbated by the excessive workloads carried by many in-house LOPD attorneys:

- In 2015, the New Mexico Sentencing Commission determined that LOPD required 291 line attorneys and 214 support staff to provide adequate indigent defense in the thirteen counties where there are currently offices.
- As of July 27, 2016, LOPD has 189 line attorneys handling full caseloads, 6 administrators with law degrees, and 177 support staff, a deficit of 102 attorneys and 47 support staff per the Sentencing Commission. This results in substantial underrepresentation of many clients.
- The 1973 National Advisory Commission on Criminal Justice Standards and Goals (NAC) states maximum annual newly assigned caseload standards for public defenders as: 150 felony cases, 400 misdemeanor case, 200 juvenile cases, or 25 appeals.
- LOPD attorneys have handled an average of 99 felony and 119 misdemeanor cases each during the first seven months of 2016. This figure includes cases opened in 2016, including those that have already closed, plus cases opened in earlier years that are still open.
- At the end of May 2016, LOPD's annual caseload was 13.1% over the NAC maximum. To reduce LOPD's caseloads just to the 100% cap, LOPD requires an additional 25 attorneys.
- Even the NAC caseload maximums have been criticized in multiple states as being too high to provide the effective assistance of counsel across a system. As noted in U.S. Department of Justice pleadings in Wilbur v. City of Mount Vernon "caseload limits are no replacement of a careful analysis of a public defender's *workload*, a concept that takes into account all of the factors affecting a public defender's ability to adequately represent clients, such as the complexity of cases

on a defender's docket, the defender's skill and experience, the support services available to the defender, and the defender's other duties"

- When LOPD attempts to ease excessive caseloads by "overflowing" office cases to contract defenders the problem is often simply transferred to those contractors who might not be in a position to improve the representation.
- The workload for both public and contract defenders is exacerbated by long hours spent traveling to court and jail in rural New Mexico.
- In FY2017, LOPD is following the lead of public defenders in Missouri, Texas, Colorado, and a dozen other states to institute permanent time-keeping for attorneys and staff to measure actual work time spent each day on each case. This will increase efficiency and allow LOPD to identify situations where attorneys are being assigned too many cases to allow for the effective assistance of counsel.
- LOPD requires a substantial increase in attorneys and staff to ensure that effective assistance of counsel is provided in the counties where offices exist.

FY2017 Measures to Address Some of the Systemic Weaknesses

In FY2017, LOPD is going to take five actions to further the process of strengthening New Mexico's indigent defense system. First, LOPD will institute permanent time-keeping for both attorneys and staff, adopting the procedures of the Missouri Study, a process adopted by public defenders in fifteen states including Colorado and Texas. This will enable LOPD to accurately estimate the resources needed for every type of case and to find inefficiencies in the system.

Second, LOPD will begin an Alternate Defender Pilot Project in counties where it is difficult to find and keep contract defenders. This model uses state-employed public defenders, rather than contract defenders, to provide representation in cases where LOPD has a conflict of interest. These alternate defenders may be full-time or part-time employees. The alternate defenders will be in a separate division of

LOPD, screened from the other attorneys in the agency to avoid conflicts of interest. A new Director of Alternate Defender Services was hired at the beginning of FY2017 to coordinate this project. Additionally, several current LOPD attorneys will be transferred to become alternate defenders with statewide practices allowing LOPD to conflict out some serious cases and appeals to attorneys who are paid a salary rather than a flat or hourly rate.

Third, LOPD will identify counties that do not currently have an LOPD office that need a Client Service Agent to determine eligibility for indigent defense, facilitate the appointment of a contract defender, and collect the application fee necessary for LOPD's automation fund. These fees are now only haphazardly collected in counties where we do not have an office. This model has been piloted in Valencia County and works well. It provides for a better blending LOPD services in counties where we only have contract defenders.

Fourth, LOPD will identify Magistrate Courts that do not currently have a LOPD attorney or contract defender providing representation at arraignments and first appearances. This will allow LOPD to find solutions to begin providing such representation.

Finally, LOPD will work with criminal justice system partners and other interested parties to identify potential changes in the criminal code as well as local practices that will reduce the number of unnecessary low-level criminal charges. For example, it is absolutely unnecessary to have jail time as a possible sanction for failure to insure a motor vehicle. Sanctions of this nature clog the courts and jails as well as the dockets of prosecutors and defenders. Civil penalties offer fully adequate remedies for many infractions.

FY2018 Budget Request

While the Public Defender Commission and LOPD recognize the dire situation in public finance in New Mexico, LOPD must continue to alert the Legislature to the true cost of meeting its constitutional obligation of providing effective assistance of counsel. Those needs include 100 additional attorneys and 62 additional support staff as well as a payment structure for contract counsel that

fairly pays contract attorneys and incentivizes constitutionally adequate representation in every case. These resources are necessary to provide immediate adequate representation and to prevent future litigation against for failure to adequately fund indigent defense.

There must always be an equanimity of funds for the task charged to be undertaken, in this case adequate representation of defendants. If additional representation is required commensurate funding must follow. Conversely, if fewer funds are available less representation can be undertaken.

The budget request does not reflect the amount necessary to meet statutory and constitutional obligations but is simply a recognition of budget realities. It is also a recognition of the need to seek other avenues of relief as described herein if adequate funding is not available.

The next step in adequately meeting the State's constitutional obligations is the immediate addition of at least 25 attorneys to reduce the workload/caseload levels to nationally acceptable maximum levels of no more than 150 felonies or 400 misdemeanors per attorney. These levels are simply a cap, not the proper standard for determining constitutionally effective assistance of counsel. That determination is made by evaluating whether an attorney is able to do the legal work that is necessary for professional representation, a standard that cannot be met in most cases when caseloads are at the maximum. Public and contract defenders in New Mexico continue to struggle with caseloads well over these caps, inevitably leading to wrongful convictions and improper sentences because the defender was unable to properly provide factual and legal defenses. For example, in one office, at the time of this writing, the managing attorney is assigned 375 cases while his staff attorneys have 275 cases, three and four times the recommended maximum caseload. These numbers of clients are physically impossible to legally represent.

In addition to staff positions, the payment structure for contract defenders must be reformed to include hourly rates in order to ensure that contract defenders are not financially forced to take too many cases at once thus providing ineffective assistance of counsel.

In the likely event that the needs described are not met through the budget process and the workloads are not reduced to acceptable levels the Commission and LOPD will take steps to ensure that each client is afforded constitutionally-adequate representation. This might take a number of forms including declining representation of cases, bringing motions to dismiss cases for failure to provide an adequate defense or pursuing litigation concerning the failure of the system to provide adequate counsel.

The Commission and LOPD recognize that the government budget process requires that specific dollar amounts be requested. Unfortunately, partial increases in funding, while helpful, will not alleviate LOPD's legal and ethical requirement to take the steps described above. We are informed by the State that the dollars are not available to adequately fund indigent defense. We wish to maximize the number of dollars received so that as many clients can be served as possible. We are informed that a ten percent increase is not likely to be granted but can be requested. While helpful, a ten percent increase is only an emergency increase and will not provide the funds necessary to provide constitutional representation. Thus, the Commission and LOPD would need to continue taking other measures to protect the rights of clients.

LOPD can not countenance the spreading thinner of resources that does not provide effective counsel but must instead limit its work to providing adequate counsel to as many clients as it responsibly can provide. To the extent the funding is not adequate, the Commission and LOPD must take the steps necessary to either not represent some clients or to have defendants' cases removed from the system so that the needs of the remaining clients remaining will match the funding available.

The Public Defender Commission and LOPD will work to use resources responsibly but that responsibility always will include protection of the constitutional rights of clients as well as efficient use of resources.

The Commission and LOPD request full funding, but if that is not possible, we request an emergency budget increase of 1.3 percent to the base budget and an 8.7 percent expansion increase as described below:

Emergency Expansion Request 1 – 200s/400s Categories – 25 Associate Trial Attorneys to Reduce Public Defender Caseloads to the Maximum National Advisory Committee Level

It is critical to add attorneys to the indigent defense system because the attorney caseloads are too high to provide effective assistance of counsel in every case. Even operating at the maximum of the national caseload levels is too high, but it is lower than the status quo and will improve representation. Based on FY2016 caseloads, the increased need is as follows: 2 appellate/habeas, 2 Santa Fe/Rio Arriba, 5 Albuquerque, 2 Las Cruces, 1 Carlsbad, 5 Hobbs/Lovington, 1 Roswell, 2 Aztec/Farmington, 2 Clovis/Portales, 1 Gallup, 1 Alamogordo, and 1 Ruidoso. The cost for this expansion will be \$2,031,400 in the 200s category and \$142,900 in the 400s category.

Emergency Expansion Request 2 - 200s/400s Categories – 1 Managing Attorney, 5 Trial Attorneys, 2 Senior Secretaries, 1 Paralegal, and 1 Investigator for Alternate Defender Office


Using Alternate Defenders in addition to Contract Defenders in some locales will result in an estimated \$600,000 in savings in the 300s category to be used to partially fund Expansion Request 3. The cost for seven new positions constitutes an expansion request of \$478,300 in the 200s category and \$80,000 in the 400s category. Three of these positions were hired in FY2017 and are included in our base budget request for FY2018.

Emergency Expansion Request 3 – 300s Category – Pay Hourly Rates to Contract Defenders in Up to 100 Cases with Possible Life Sentences

LOPD Requests an additional **\$1.5 million** for FY2018 to appropriately pay contract defenders for their time in at least the most serious cases where defendants face a life sentence. If LOPD pays hourly rates of \$85 for attorney time and \$35 for staff time up to the Commission's cap of \$30,000 per case (not including costs for expert witnesses) it will improve the work situation for defense counsel who presently work many hours for free in the most serious cases pursuant to the

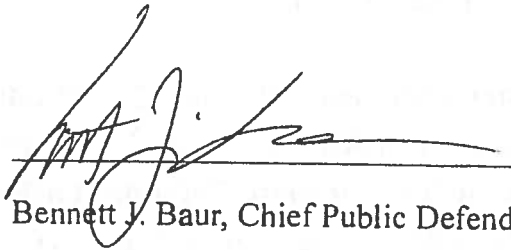
\$5400 flat fee where the natural temptation is to cut corners due to inadequate pay. The highest possible annual cost would be \$3 million, if every case went to trial and hit the cap. Based on historical data, this cost is unlikely to exceed \$2 million. LOPD requests \$1.5 million in additional funding for FY2018, supplementing the funding with money saved through the use of alternate defenders (approximately \$600,000). Another \$540,000 is saved from the cost of the flat fees in these cases. If additional funds are needed, they will be converted from complex case funds and overall contract savings brought about by the Alternate Defender program. Alternate defenders will also provide representation in some life sentence cases. New Mexico should pay these rates in all cases, but we need to start paying them now in at least some of the most serious cases.

Respectfully submitted,



Michael Stout, Chair

Public Defender Commission



Bennett J. Baur, Chief Public Defender

Law Offices of the Public Defender