



MEMORANDUM

Date: May 21, 2015

To: Isabel Garcia
Legal Defender

From: C.H. Huckelberry
County Administrator

A handwritten signature in black ink, appearing to be "C.H. Huckelberry", is written over the printed name and title.

Re: **Your May 14, 2015 Memorandum Regarding Reorganization of County Indigent Defense Services**

Your May 14, 2015 memorandum expresses concerns regarding the consolidation of indigent legal services within the Department of Public Defense Services (DPDS). Your concerns are based on incorrect assumptions and are unfounded.

First, the DPDS Director will have administrative oversight of all five indigent defense offices as provided in the attached Classification Description 7463.

In addition, the DPDS Director will indeed manage contracts with contract attorneys, but she will not have access to confidential case information and will not have an attorney-client relationship with the clients of contract attorneys. Contract attorneys have an ethical duty to act independently of the County that pays them to represent indigent clients and a duty to preserve client confidences. These duties are reviewed in detail in Arizona Ethics Opinion 01-06 (June 2001), which quotes Ethical Rule 1.8(f), which states that "a lawyer shall not accept compensation for representing a client from one other than the client *unless ... there is no interference with the lawyer's independence of professional judgment or with the client-lawyer relationship ... and information relating to representation of a client is protected as required by ER 1.6*" (emphasis added). Further, the opinion quotes ER 5.4(c) for the proposition that a "lawyer shall not permit a person who recommends, employs or pays the lawyer to render legal services for another to direct or regulate the lawyer's professional judgment in rendering such legal services."

The ethics opinions you cited do not apply to the role planned for Ms. Lori Lefferts as the DPDS Director. Such opinions would conceivably apply if Ms. Lefferts were moving from the Public Defender's Office to the Legal Defender's Office, since both of those offices actually represent clients; and such clients potentially are adverse to each other. Thus, the Public Defender's Office and Legal Defender's Office are akin to law firms that represent adverse clients. By contrast, the Office of Court Appointed Counsel (OCAC) is not like a law firm; it does not itself represent any clients. Ms. Lefferts will not have an attorney-client relationship with the clients of contract attorneys, and she will not have access to client files. She will not be supervising outside attorneys who, as noted above, must retain their professional independence when providing services to clients under a County

Ms. Isabel Garcia
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contract. If your interpretation were correct, OCAC could not provide attorneys for multiple defendants in one case, which it does regularly. By definition, all contract attorneys act independently of each other and of OCAC.

Moreover, current OCAC Director Robert Hirsh was the Public Defender immediately prior to becoming the OCAC Director. Neither you nor anyone else ever raised a concern about Mr. Hirsh having a conflict during the three years he has managed OCAC. Similarly, the Director of Maricopa County's Office of Public Defense Services, James Logan, moved to that position from an attorney position in the Maricopa County Office of the Legal Advocate, which is an in-house criminal defense agency. Mr. Logan manages Maricopa County's attorney contracts, and no ethical concerns have ever been raised. He confirms that he does not have access to client information and that he makes clear his office does not represent clients. Our public defense model has been patterned after Maricopa County.

In response to other incorrect assumptions raised in your memorandum:

- The Director of DPDS will not manage case-related expenses within the separate indigent defense offices; those expenses will be managed by the office directors.
- The Director of DPDS will not make hiring or termination decisions within the individual offices.
- The two attorney positions being eliminated at the Public Defender's Office were assigned to juvenile delinquency cases and are not needed for current caseload levels.
- The goals cited from Maricopa County's strategic plan are related to its *Transition from Jail to the Community* efforts spearheaded by the County Manager and Sheriff and are unrelated to the Office of Public Defense Services.

I agree completely with your statement that the County must have a commitment to hiring the best and strongest advocates for indigent clients, and I know that Ms. Lefferts shares and will act on that commitment. We do that today and will do so in the future.

The Board of Supervisors is requesting financial accountability in our indigent defense expenditures, no matter from which office, and this model of management moves us closer to an accountable system. I agree with the Board's demand for accountability.

I appreciate your concerns, but they are unfounded.

CHH/mjk

Attachments

c: The Honorable Chair and Members, Pima County Board of Supervisors

Code: 7463

Title: PUBLIC DEFENSE SERVICES DIRECTOR

SUMMARY: Plans, coordinates and administers the functions and activities of the Public Defense Services Department, which includes the Offices of the Public Defender (PD), Legal Defender (LD), Court Appointed Counsel (OCAC), Children's Counsel (OCC) and Mental Health Defender (MHD). Organizationally, this classification reports to the County Administrator and provides managerial oversight to the PD, LD, OCAC, OCC and MHD. This classification is in the unclassified service and is exempt from the Pima County Merit System Rules.

DUTIES/RESPONSIBILITIES: (Work assignments may vary depending on the department's needs and will be communicated to the applicant or incumbent by the supervisor.)

Plans, organizes and directs all functions, programs and activities of the Public Defense Services Department and OCAC;

Oversees the operations and management, planning and budget development, policies, procedures and practices of the PD, LD, OCC and MHD;

Determines the Public Defense Services Department's organizational structure and personnel needs, developing policies for the selection, training, supervision and evaluation of professional, technical, and clerical staff;

In consultation and collaboration with the directors of PD, LD, OCC and MHD, identifies and implements best practices and evidence-based practices in public defense management to promote delivery of high-quality, cost-effective public defense services in Pima County;

Formulates and implements Public Defense Services Department administrative procedures and policies, analyzes effectiveness, and directs changes in the same to meet statutory requirements;

Establishes policies and guidelines for negotiation of contracts and directs such negotiations;

Develops and reviews relevant County policies and procedures to ensure compliance with state guidelines and regulations relative to the Public Defense Services Department and county operations;

Reviews proposed and new legislation affecting public defense or the administration of criminal or juvenile justice and advises County management on impact;

Monitors Public Defense activities and prepares management reports, summary reports and other informational reports;

Directs and coordinates Public Defense activities with other County departments and with community agencies;

Directs the preparation of the annual budget and evaluates and monitors expenditures;

Responds to county and public inquiries and performs community relations activities;

Establishes and maintains liaison with federal, state, and local governmental agencies.

KNOWLEDGE & SKILLS:

Knowledge of:

- legal principles and practices to include civil, criminal, juvenile, constitutional and administrative law and procedure;
- principles, methods, materials and practices of effective legal research;
- principles and practices of pleading civil and criminal cases and effective techniques for the presentation of cases in court;
- trial procedures, rules of evidence and court requirements;
- principles and practices for effective administration and management of a county functional area, to include fiscal management;

- principles and practices of effective employee supervision, training and evaluation;
- related county, state and federal laws, regulations and standards;
- techniques of program development and evaluation, project economics and financial reporting;
- budget preparation and evaluation.

Skill in:

- conducting legal research, analyzing data and determining proper courses of action;
- preparing for, presenting and conducting client defenses and appeals;
- analyzing and applying legal principles;
- presenting oral and written statements of law, fact and argument clearly and logically;
- preparing and presenting proper legal instruments;
- planning, directing and evaluating the work of staff;
- planning, organizing and directing programs and activities relative to department;
- interpreting and implementing rules, regulations, policies and procedures related to department operations and activities;
- use of computer-based resources for research, analysis, creation, recording and maintenance of records, correspondence and related materials.
- assessing department achievements and deficiencies and developing solutions to address problems;
- communicating effectively, both orally and in writing;
- administering and managing the staff and activities of an organization;
- negotiating contracts and monitoring contract compliance.

DESIRED QUALIFICATIONS:

Graduation from an American Bar Association (ABA) accredited law school and current admission to the Arizona State Bar and ten years of experience as a practicing attorney in criminal litigation including at least five of which specialized in criminal defense and three of which involved supervisory or management responsibilities.

OTHER REQUIREMENTS:

Licenses and Certificates: Current admission to the Arizona State Bar is required at the time of appointment, and must be maintained as a condition of employment; failure to maintain this admission in good standing shall be grounds for termination. Possession of a valid Class D Arizona driver license may be required at time of application or appointment.

Physical/Sensory Requirements: Physical and sensory abilities will be determined by position.

This class specification is intended to indicate the basic nature of positions allocated to the class and examples of typical duties that may be assigned. It does not imply that all positions within the class perform all of the duties listed, nor does it necessarily list all possible duties that may be assigned.

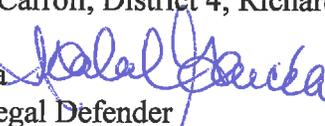


MEMORANDUM

Indigent Defense Services

Legal Defender

TO: C.H. Huckelberry, Pima County Administrator
Board of Supervisors: Ally Miller, District 1; Ramón Valadez, District 2; Sharon Bronson,
District 3; Ray Carroll, District 4; Richard Elías, District 5

FROM: Isabel G. García 
Pima County Legal Defender

DATE: May 14, 2015

RE: "Reorganization of Indigent Defense Services and Significant Improved Cooperation Among
County Justice and Law Enforcement Organizations"

Introduction

Though my tenure ends on July 3, 2015, I am respectfully submitting this memorandum for your review and consideration. Given my many years as the Director and my responsibility to Pima County, I feel compelled to provide the Board questions and concerns that remain with the reorganization plan. This memo is not to criticize or demean efforts that must be made to reduce costs in light of the State budget. I write to highlight the potential for grave harm to the provision of quality indigent defense services mandated by Constitutional protections and to point out that current studies and evidence-based best practices support 'smart on crime' polices that actually make communities safer while also reducing criminal justice system costs.

As conceived in the April 24, 2015 Memorandum from C.H. Huckelberry, the administrative decision was to reorganize all indigent defense services (Public Defender, Legal Defender, Office of Children's Counsel, and Mental Health Defender) under a new Department of Public Defense Services (DPDS) to purportedly gain efficiencies through centralized management of all five indigent defense law offices. It was not clear from the Memorandum and Board hearing how and where cost-savings will actually occur. The Director of DPDS official job description, which has since been published, indicates that the new DPDS manages only three of the five indigent defense law offices. Code: 7463, Title PUBLIC DEFENSE SERVICES DIRECTOR (5/12/15) ("... the Public Defense Services Department which includes the Offices of the Public Defender, Legal Defender and Court appointed Counsel within Pima County government."). This creates virtually no change in the centralized data management for Public Defender, Legal Defender, and Office of Court Appointed Counsel.

The purpose of this memo is to set forth factual, legal, and ethical constraints and questions raised by the decisions to reorganize some, but not all, Indigent Defense Services (IDS) under a new Department of Public

Defense Services (DPDS) headed by an attorney Director who is the current Pima County Public Defender with continuing duties of loyalty and confidentiality to current clients of the Pima County Public Defender Office.

The Administratively Created DPDS Will Create More Costs While Not Clearly Reducing Costs:

The administratively created DPDS to be headed by the current Public Defender will create conflicts of interest for any and all clients of OCAC attorneys who have conflicts with current clients of the Public Defender precisely because the Director of DPDS will directly manage OCAC contract attorneys which (1) requires OCAC attorneys to share with the Director of DPDS access to confidential and work product information of OCAC clients, and (2) grant or deny case related expenditures of OCAC clients some of whom are in the same or related matters with current Public Defender clients. See, Memorandum, by C.H. Huckelberry, dated April 24, 2015, at p.2 (“DPDS will directly manage such areas for OCAC.”). However, the current Public Defender will continue to have duties of loyalty and confidentiality to the current clients of the Public Defender’s Office. As described in a 1989 Arizona Ethics Opinion,

The fact that the moving lawyer occupied a position as head of the Legal Defender’s Office takes on a heightened importance here. Although many lawyers in an office may not acquire confidential information about cases handled by other lawyers, a lawyer in a position of ultimate authority and oversight may acquire confidential information about all, or nearly all, of the cases handled by the office during his or her tenure. Although this is necessarily a question of fact, the inquiry is aided by inferences and presumptions. Comment to ER 1.10. One of these inferences or presumptions is applicable in situations in which a lawyer has general access to files of all clients of a firm and participates regularly in discussions of their affairs. Under such circumstances, “it should be inferred that such a lawyer in fact is privy to all information about all the firm’s clients.” Id. Thus, the Legal Defender’s move to the Public Defender Office may have the effect of disqualifying all lawyers in the Public Defender’s Office in cases involving conflicts of interest with defendants represented during the lawyer’s tenure in the Legal Defender’s Office.

Ariz. Ethics Op. No. 89-08 (October, 1989), at p.4; see also, Ariz. Ethics Op. No. 04-04 (2004)(Under revised Ethical Rule 1.10 a separate "Conflicts Unit" may not be employed to address imputed conflicts involving former clients even if screening is employed as defined under ER 1.0.); Ariz. Ethics Op. No. 93-06 (1993)(question of whether a public defender's office may split into two divisions in order to avoid imputed disqualification problems is answered in the negative.); Ariz. Ethics Op. No. 92-07 (1992)(screening of Deputy Public Defenders is not an adequate remedy for conflict under ER 1.7); Ariz. Ethics Op. No. 92-06 (1992)(ethical propriety of a public defender's continued representation of a client, where the client's defense is to inculcate a co-defendant whom the Public Defender's Office was appointed to represent in the early stages of the same case and also in another proceeding.).

Any and all OCAC attorney clients who have a conflict with current clients of the Public Defender could no longer be managed by OCAC, if OCAC is to be directly managed by the current Pima County Public Defender. This would create administrative problems and unknown costs.

The Director of DPDS is contemplated to have authority to decide extraordinary expenses, presumably to include extraordinary case-related expenses in each of the separate IDS law offices. See, Memorandum, by C.H. Huckelberry, dated April 24, 2015, at p.2. (“The PD, LD, OCC and MHD will continue to manage their own internal expenses for cases and office needs *but with DPDS’s general oversight and input on extraordinary expenses.*”). As noted above, the Maricopa County Office of Public Defense Services is categorically deferential

to the independent indigent defense offices with regard to case-related expenditures, extraordinary or otherwise. There are ethical and legal reasons for this categorical deference:

Attorneys in a public defender's office are engaged in representing individual criminal defendants. *Branti v. Finkel*, 445 U.S. 507, 519, 100 s. Ct. 1287, 1295, 63 L. Ed2d 574 (1980) (“[t]he primary, if not the only, responsibility of an assistant public defender is to represent individual citizens in controversy with the State”). Thus, such an office is highly analogous to a legal services organization or, more importantly, a private criminal defense firm, and should be treated as such. See Comment to ER 1.10 (lawyers employed in the legal department of an organization or in a legal services organization are a “firm” within the meaning of the rule). Cf. *Rodriguez v. State*, 129 Ariz. 67, 74, 628 P.2d 950, 957 (1981) (Holohan, J., concurring) (“[t]he relationship of the public defender’s office in the representation of indigent defendants *should be no different than the representation of any client by a private law firm*”).

(*Emphasis added*). Ariz. Ethics Op. No. 89-08 (October, 1989), at p.2.

The proposed Director of DPDS is apparently contemplated to participate in hiring and firing decisions within the different IDS law offices. See, Memorandum, by C.H. Huckelberry, dated April 24, 2015, at p.2 (“The DPDS will have primary responsibility for planning and budget development, *human resources*, systems development (e.g., case management systems), forecasting, statistical analysis, and related tasks for the entire IDS, in consultation with the PD, LD, OCC and MHD. DPDS will directly manage such areas for OCAC.” *Emphasis added*). If the Director of DPDS were to have hiring and firing authority, then the Director of DPDS would necessarily be part of each of the supervised IDS law firms and would necessarily interfere with the requirement of professional independence in each of the separate IDS law offices. See, Ariz. Ethics Op. No. 89-08 (October, 1989), *see also*, *Polk County v. Dodson*, 454 U.S. 312, 102 S.Ct. 445 (1981); *Branti v. Finkel*, 445 U.S. 507, 100 S.Ct. 1287 (1980); *West v. Atkins*, 487 U.S. 42, 108 S.Ct. 2250 (1988). As noted above, the Maricopa County Office of Public Defense Services is categorically deferential to the hiring and firing decisions of the attorney directors of each of the separate and independent indigent law offices.

The April 24, 2015 Memorandum describes the staff who will move to the newly created DPDS. Twenty-three percent of the cost of that administrative team has been funded by the budget for the Legal Defender’s Office. This administrative team had provided to date a level of centralized administrative functions while not violating the above ethical and legal constraints necessary for maintaining independent professional law offices.

The April 24, 2015 Memorandum also indicates that two attorney positions are being eliminated in the Public Defender’s Office. However, that will necessarily mean that more indigent clients will need to be assigned OCAC contract attorneys at a greater cost to the County. Each attorney is limited by law on the number of cases that can be ethically assigned to that attorney.

It is also important to note that approval or denial of case-related expenses, such as approving or denying scientific testing in a particular case, expert witnesses in a particular, or similar case-related expenses in a particular case, must be evaluated and made by a licensed attorney. The decision to approve or deny these case-related expenses, even if extraordinary, cannot be made by a non-attorney administrator but instead must be made by a non-conflicted licensed attorney in the independent law office that represents the client. The Legal Defender’s Office in 1993 created a review committee consisting of one experience trial attorney and one experience appellate attorney to discuss, evaluate, consider alternatives, and decide these requests for case-related expenses.

It remains unclear how, where, and why cost-savings will occur by the reorganization of indigent defense services under the new DPDS. Legal and ethical constraints will prevent the attorney-director of DPDS from micro-managing and cutting, by force of will, specific personnel and specific case-related expenditures within the independent IDS law offices. Absent the legal and ethical authority to cut specific expenses within independent IDS law offices, the attorney-director of DPDS and the County Administrator would need attorney-directors of the IDS law offices to act out of loyalty in support of their drive to reduce indigent defense funding by increasing the maximum number of cases to be resolved with the fewest number of attorneys, staff, and memorandum, to the necessary detriment of clients. The April 24, 2015 Memorandum does not include information on the role to be played by the new DPDS in hiring or firing the attorney-directors of the separate IDS law offices. Upon information and belief, the current Public Defender is appointing a successor (engendering loyalty) to become the new Public Defender, as she takes over the role of the attorney-director of the new DPDS. Upon information and belief, my successor as head of the Legal Defenders Office is to be decided by a committee with final approval by Mr. Huckelberry. As described more fully below, under my leadership, the Legal Defenders Office opposed the adoption of an ECD program that would have been more efficient in generating more felony convictions and more fundamentally unfair to indigent clients. The ECD program was not adopted. If attorney-directors of IDS law offices are loyal to their clients, I am hopefully that no ECD program will ever be adopted in Pima County. The process used to replace or select the Public Defender, the Legal Defender, and the other attorney-directors of IDS law offices in Pima County, must be guided by a commitment to hiring the best and strongest advocates for indigent clients, which necessarily means the strongest advocates for indigent defense funding that remains sufficient to consistently improve the quality, time, and resources commitment to the defense of each and every indigent client.

Maricopa County.

The April 24, 2015 Memorandum asserts that the DPDS structure has been successfully implemented in Maricopa County. However, there are critical aspects of Maricopa County's "managing for results" and the Maricopa County Office of Public Defense Services that do not appear to be present in the administratively adopted Pima County DPDS:

- The Maricopa County Office of Public Defense Services is headed by attorney James Logan. Prior to taking that position, it appears that Mr. Logan was in private practice and not the head of an indigent defense office representing clients in cases in which other IDS offices had conflicts.
- The Maricopa County Office of Public Defense Services is categorically deferential to the independent defense offices with regard to case-related expenditures, extraordinary or otherwise.
- The Maricopa County Office of Public Defense Services is categorically deferential to the hiring and firing decisions of the attorney director of the independent indigent law offices.
- Maricopa County has implemented Managing for Results (MFR) that focusses decision making on measurable results for community safety by the criminal justice system. It is described as "...a comprehensive and integrated management system that focuses on achieving results for the customer and makes it possible for departments to demonstrate accountability to the taxpayers of Maricopa County." The Maricopa County Strategic Plan for 2015-2018 specially includes the following result-oriented goals for the criminal justice system:

Strategic Priority: SAFE COMMUNITIES - Maricopa County will support safe communities and neighborhoods by providing access to a timely, integrated, and cost-effective smart justice

system.

Strategic Goal: By end of FY 2018, public safety is enhanced by reducing the number of adult probationers convicted of a new felony offense to 8% or lower.

Strategic Goal: By end of FY 2018, the overall rate of juvenile recidivism is 20% or less.

Strategic Goal: By end of FY 2017, 90% of Cradles to Crayons youth with petitions filed have permanency established within 365 days of the petition filing.

Strategic Goal: By the end of FY 2016, for moderate to high risk Seriously Mentally Ill (SMI) offenders, decrease the recidivism rate by at least 5 percentage points by providing them with continuity of appropriate treatment and services during and after incarceration. Continue to reduce the recidivism rates for moderate to high risk SMI offenders through 2020 in amounts based upon results achieved in 2016.

County Indicators:

Violent Crime Rate • Property Crime Rate • Average length of pre-trial stay in County jail
Number of persons with mental health issues (Rule 11 finding)

Maricopa County Strategic Plan FY 2015-2018, copy attached as **Exhibit 1**. Pima County Government as a whole has not explicitly adopted the result-oriented goal of reducing crime, reducing convictions, and reducing recidivism. This is a critically important point given the successes in many states across the nation that have lowered their crime rates *while reducing the number of persons subjected to felony prosecution, felony conviction, and prison sentences*. See, e.g., Mauer, Marc, Nazgol Ghandnoosh, and Sentencing Project. "Fewer Prisoners, Less Crime: A Tale of Three States." (2014). Between 2008 and 2013, New York, New Jersey, and California all reduced their prison populations, reduced the number of persons subjected to felony prosecution, felony conviction, and prison, while at the same time reducing their crime rates:

Key findings:

- New York and New Jersey led the nation by reducing their prison populations by 26% between 1999 and 2012, while the nationwide state prison population increased by 10%.
- California downsized its prison population by 23% between 2006 and 2012. During this period, the nationwide state prison population decreased by just 1%.
- *During their periods of decarceration, violent crime rates fell at a greater rate in these three states than they did nationwide.* Between 1999-2012, New York and New Jersey's violent crime rate fell by 31% and 30%, respectively, while the national rate decreased by 26%. Between 2006-2012, California's violent crime rate drop of 21% exceeded the national decline of 19%.

(*Emphasis added*). Mauer, Marc, Nazgol Ghandnoosh, and Sentencing Project. "Fewer Prisoners, Less Crime: A Tale of Three States." (2014).

The newest and most comprehensive studies are showing that maximizing the number of felony prosecutions, felony convictions, and persons sentenced to prison for the longest possible time is not a smart or cost-effective approach to reducing crime and making communities safer:

The Brennan Center's recent report, *What Caused the Crime Decline?*, examines 14 theories for the nation's dramatic crime decline since 1990. After a rigorous empirical analysis, it finds, among other things, that increased incarceration played a **limited role** in the crime drop. Specifically, incarceration accounted for approximately 5 percent (potentially ranging from 0 to 10 percent) of the crime drop in the 1990s, and **accounted for essentially zero percent of the crime decline since 2000**.

(Emphasis added). Nicole Fortier, Lauren-Brooke Eisen, *New Findings on Crime and Incarceration: How These Findings Relate to Legislation in Your State* (February 27, 2015), copy attached as **Exhibit 2**; Roeder, Oliver K., Lauren-Brooke Eisen, Julia Bowling, Joseph E. Stiglitz, and Inimai M. Chettiar. "What Caused the Crime Decline?." Available at SSRN 2566965 (2015); See also, Travis, Jeremy, Bruce Western, and Steve Redburn, eds. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. National Academies Press, 2014; Chettiar, Inimai M., Lauren-Brooke Eisen, Nicole Fortier, and Timothy Ross. "Reforming Funding to Reduce Mass Incarceration." Available at SSRN 2370524 (2013).

Pima County.

Unlike the 'managing for results' approach in Maricopa County, each year the Pima County Attorney recites the same general fact as justification for the budget of the Pima County Attorney: "Pima County **continues to maintain one of the higher crime rates per 100,000 population in the nation**, with a crime index of 5,292 exceeding both Maricopa County (3,736) and the state of Arizona (3,653)." *(Emphasis added)*. See, Memorandum From Barbara LaWall, to C.H. Huckelberry, dated January 20, 2015, at p.3, paragraph 1. Rather than accepting this fact, Pima County Government needs to adopt the result oriented goal of reducing crime by implementing evidence-based best practices that work, including reducing the number of felony prosecutions, felony convictions, and persons sent to prison. This can be done, in part because Pima County has the same national trend in **reduced felony arrests**:

Total arrests in Pima County **declined** each year from 2009 to 2012, running counter to the trend in felony filings and cases presented for prosecution. There were 57,098 arrests of adults in Pima County in 2009, compared with 39,681 adult arrests in 2012, according to the Arizona Department of Public Safety's Crime in Arizona reports.

Id., at p.5. Despite the decline in felony arrests, the Pima County Attorney exercises the discretion to prosecute more arrestees on felony charges:

Felony cases filed in Superior Court have increased significantly over the last four years, from 4,860 in 2009-10 to 5,702 in 2012-13, according to court records

Id., at p.5. In the face of fewer felony arrests in other parts of the nation, community leaders have adopted policies and practices of filing fewer felony prosecutions, securing fewer felony convictions, and sending fewer people to prison. Those cost-effective measures, in turn, have correlated in those communities, including in our neighbor state California, a reduction in crime rates and increase in community safety. In that same Memorandum quoted above, Ellen Wheeler noted the causes of increased indigent defense expenditures:

It is difficult to identify trends or consistent patterns that can be used to accurately predict future costs of indigent defense, but there is a mix of factors that undoubtedly affect costs in any given year. Among them are **crime levels**; law enforcement policies and staffing levels; attention to certain types of crimes, including child abuse and neglect; **charging and plea decisions by the County Attorney's Office**; the

complexity of individual cases; population growth; the availability of social services for families and youth; and even the ability of individual defendants to afford private counsel.

(Emphasis added). Memo, by Ellen Wheeler, to Chuck Huckleberry, dated 02/18/2014, attached to Memorandum by C.H. Huckleberry to The Honorable Chair and Members of Board of Supervisors, dated 04/14/2014, at p.3.

None of the factors recognized in the above 2014 Memorandum that affect the rise of indigent defense costs include anything that would be impacted or reduced by the creation of new Department of Public Defense Services (DPDS).

The policy and practice of Pima County every year, for as long as I can remember, is to secure the highest possible number of felony arrests, felony prosecutions, felony convictions, and the longest prison sentences. There is no empirical evidence that this policy and practice provides greater safety for people living in Pima County and this policy and practice is the driving force behind the higher and higher cost of the criminal justice system in Pima County. There is a growing body of evidence that convicting more people of felonies and sending more people to prison longer has the opposite effect:

- Overuse of incarceration leads to ineffectiveness. *Incarceration has diminishing returns as a crime-control policy*. When prison is used judiciously, incarceration is reserved for the highest-risk offenders, therefore increased incarceration helps reduce crime. At today's historically high levels of incarceration, correctional facilities are filled with low-level and non-violent prisoners. Further increases in incarceration have steadily decreasing crime control benefits, as the individuals imprisoned pose less of a public safety risk. We are now well past the point of diminishing returns of incarceration on crime control.
- Incarceration can *cause individuals to commit more crimes upon release*. When people who commit less serious crimes enter prison, they are often living in unsafe or unsanitary prison conditions and surrounded by other prisoners who have committed more serious and violent offenses. These factors make re-entry into the community difficult and increase the likelihood that an individual will commit crimes upon release. *The trouble many former prisoners have finding employment, and the legal and social stigmas they face, can lead to recidivism and fuel a cycle of incarceration*.
- Incarceration does not serve as an effective deterrent to crime. *Empirical studies indicate that longer sentences have minimal or no benefit on whether offenders or potential offenders commit crimes*.

(Emphasis added). Nicole Fortier, Lauren-Brooke Eisen, New Findings on Crime and Incarceration: How These Findings Relate to Legislation in Your State (February 27, 2015), copy attached as **Exhibit 2**. There is no objective evidence that "tough on crime" policies and practices is working to reduce the crime rate in Pima County. There is objective evidence against these counter-productive and cost-prohibitive policies and practice.

One possible interpretation for why, "Pima county *continues to maintain one of the higher crime rates per 100,000 population in the nation*, with a crime index of 5,292 exceeding both Maricopa County (3,736) and the state of Arizona (3,653)," is that the policies and practices of pursuing the highest possible number of felony prosecutions, highest possible number of felony convictions, and longest possible prison sentences has fueled and continues to fuel a continuous cycle of recidivism and incarceration. A simple step in the right direction would be for Pima County Government as a whole to explicitly adopt the result-oriented goal of reducing crime, reducing convictions, and reducing recidivism. This would force Pima County leaders and department heads to demonstrate the effectiveness of budget expenditures based upon achieving measured results of reduced crime

and reduced recidivism accomplished through fewer felony prosecutions, fewer felony convictions, and fewer people being sent to prison. Studies show that is working in California and there is no reason it would not work in Pima County.

The Need for Fairness, Transparency, Accountability of Law Enforcement, Fewer Felony Filings and Fewer Felony Convictions.

There is nothing in the reorganization indicating that efforts will be made to reduce the crime rate and reduce the number of felony filings. At the same time, the reorganization is designed to provide less financial resources to the law offices that represent indigent clients. Providing less resources to indigent defense will necessarily result in greater unfairness, less transparency, less accountability of law enforcement, and more felony convictions, more prison sentences, and more waste of public funds that do not reduce the crime rate nor make the community safer. See discussion and authorities cited above.

Because the vast majority of cases (over 90%) are resolved by plea agreement, formal felony charges alone will compel a resolution of the case by plea agreement at a rate of over 90%; and empirical studies show that occurs regardless of innocence. L. Dervan and V. Edkins, *The Innocent Defendant's Dilemma: An Innovative Empirical Study of Plea Bargaining's Innocence Problem*, 103 J. Crim. L. & Criminology 1 (2013)(Study found 46% of innocent subjects falsely admitted guilt to avoid risk of greater punishment), available at <http://dx.doi.org/10.2139/ssrn.2071397>; J.H. Blume, *The Dilemma of the Criminal Defendant with a Prior Record – Lessons from the Wrongfully Convicted*, 5 J. Empirical Legal Stud. 477 (2008) (noting numerous instances of innocent defendants who did not testify in their own defense – some of whom pled guilty – because they had a prior conviction). A growing number of articles and cases document innocent defendants falsely pleading guilty to avoid the objective risk of a false trial conviction with greater punishments.¹

In recent months, our office has identified a number of felony cases in which local law enforcement and the Pima County attorney failed to disclose evidence of innocence. The clients were urged repeatedly to take 'sweet' plea agreements without being given disclosure. Eventually, after refusing 'sweet' plea agreements while listening to threats of mandatory long-term prison sentences, the clients were assigned a trial attorney in my office. In each of the cases, one of my attorneys was able to confirm the client was either innocence or had been subjected to unlawful police conduct. In one case, a drug possession case, the Prosecution eventually disclosed a report showing the 'drug' was tested and confirmed to not be a drug. In another case, it was confirmed that police had disposed of evidence that was necessary to maintain the prosecution. Despite legal and ethical duties to disclose these critical pieces of information helpful to the defense, the Pima County Attorney had not made the disclosure, but instead, had demanded that the client take a 'sweet plea' agreement or risk a long mandatory prison sentence after being convicted at trial. There is nothing fair nor just about this type of system. 'Justice' is delivered as if in a poker game in which the Prosecution does not have to show its hand if the defendant folds his cards out of a rational fear that playing longer could result in an even greater injustice than what is immediately available in the 'sweet plea agreement' offered by the County Attorney. Each of the cases that I am thinking of were ultimately dismissed, but largely due to the tenacity of those clients who refused to take a 'sweet plea agreement' as risk-averse defendants (including the innocent) will do to avoid the risk of a long prison sentence.

Our office opposed an Early Case Disposition (ECD) program that would have made it easier and more efficient

¹ *Why innocent people plead guilty – Federal judge says thousands are in prison after taking deals*, USC News, USC University Communications, (April 18, 2014)(Judge Jed Rakoff delivers the Neiman Sieroty Lecture); *Blindsided: The exoneration of Brian Banks*, 60 Minutes, March 24, 2013; John Blume and Rebecca Helm, *The Unexonerated: Factually Innocent Defendants Who Plead Guilty* (2014), Cornell Law Faculty Working Papers. Paper 113, http://scholarship.law.cornell.edu/clsofs_papers/113.

for the County Attorney to secure felony convictions while providing even less disclosure of police reports and evidence, without defense investigations, without witness interviews, in short, without the normal accoutrements of a defense designed to insure truth, fairness, and accountability of police and accountability of the system. If adopted, ECD would have involved the Prosecution providing minimum disclosure to defense counsel, the most lenient Plea Agreement that would ever be offered to the client, and the requirement that the client waive probable cause and plead guilty. This type of program moves cases through quicker, generating even higher rates of felony convictions resolved by plea agreement without critical components of our adversarial system: no requirement that ‘probable cause’ be formally found by a Grand Jury or Preliminary Hearing, no requirement for full disclosure of police reports and evidence, no time allowed for defense investigations. One of the fundamental problems with the kind of ‘efficiency’ made possible through programs like ECD is that it creates a “meet and plead” system of indigent defense that has been the subject of class action lawsuits in other states. See, e.g., *Wilbur v. City of Mount Vernon and City of Burlington* (Washington), cited and described in Margaret A. Costello, “Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool.” *Iowa L. Rev.* 99 (2014): 1951-2299.

The checks and balances in our criminal justice system must remain intact. Indigent defense funding is critically necessary for maintaining legally and constitutionally required checks and balances. True cost-saving must occur by adopting policies and practices of reducing felony filings as other parts of the nation are doing successfully while making their communities safer. If Pima County continues with the ineffective policies of seeking the highest possible rate of felony filings and highest possible rate of felony convictions while at the same time systematically cutting funding to indigent defense services, the results will likely lead to the type of litigation that has occurred and is occurring in other states. See, Margaret A. Costello, “Fulfilling the Unfulfilled Promise of Gideon: Litigation as a Viable Strategic Tool.” *Iowa L. Rev.* 99 (2014): 1951-2299, describing *Rivera v. Rowland* (Connecticut), *Flournoy v. State of Georgia* (Georgia), *Simmons v. State Public Defender* (Iowa), *Hurrell-Harring v. New York* (New York), *Arianna S. ex rel Weber v. Massachusetts* (Massachusetts), *Public Defender, Eleventh Judicial Circuit v. Florida* (Florida), *Best v. Grant County* (Washington), *Wilbur v. City of Mount Vernon and City of Burlington* (Washington), *White v. Martz* (Montana), *Duncan v. Michigan* (Michigan).

Conclusion

In going forward, Pima County must follow other parts of the nation that are being ‘smart on crime’. The greater weight of studies and evidence-based practices indicate that with the decline in felony arrests in Pima County, there should have been and should be declines in felony filings, declines in felony prosecutions, and declines in sending people to prison where they are removed from their work and families. In parts of the country where this is being done, including California, communities are being made safer for less cost to tax payers.

Ultimately, community health and safety is all of our responsibility. It is clear from all the research, from history, and from our experiences, that serious societal ills of drug addiction, behavioral health crises, homelessness, poverty, lack of education and employability, etc., drive “crime,” and the ability to heal, both individually and as a community. Our policy makers have placed undue, and misplaced, burdens on police and prosecutors to “solve” the problems. As policy makers, your responsibility is to address problems at their root whenever possible, while also guarding and protecting our system of justice so that the necessary checks are not diminished, regardless of personalities. This is not an attack on our prosecutors or police officers, but rather a call to ask all of us to attempt to really “fight crime,” by joining forces to focus attention and resources to the “front end,” ie education, training, housing, jobs, etc., in order to reduce not only the financial costs, but the pain and suffering that surround the criminal justice system. It is my hope that we can come together in a more holistic model to provide for transformative and restorative justice in our community and across this country.

Exhibit 1



Maricopa County Strategic Plan FY 2015-2018

Mission

The Mission of Maricopa County is to provide regional leadership and fiscally responsible, necessary public services so that residents can enjoy living in a healthy and safe environment.

Vision

Citizens serving citizens by working collaboratively, innovatively, efficiently and effectively.
We will be responsive to our customers while being fiscally prudent.

Values

Public Interest First • Open and Honest • Accountable • Measure Results • Relentless Improvement
Communicate and Collaborate • All People Realize Their Full Potential

Strategic Priorities and Goals

Strategic Priority: SAFE COMMUNITIES - Maricopa County will support safe communities and neighborhoods by providing access to a timely, integrated, and cost-effective smart justice system.

Strategic Goal: By end of FY 2018, public safety is enhanced by reducing the number of adult probationers convicted of a new felony offense to 8% or lower.

Strategic Goal: By end of FY 2018, the overall rate of juvenile recidivism is 20% or less.

Strategic Goal: By end of FY 2017, 90% of Cradles to Crayons youth with petitions filed have permanency established within 365 days of the petition filing.

Strategic Goal: By the end of FY 2016, for moderate to high risk Seriously Mentally Ill (SMI) offenders, decrease the recidivism rate by at least 5 percentage points by providing them with continuity of appropriate treatment and services during and after incarceration. Continue to reduce the recidivism rates for moderate to high risk SMI offenders through 2020 in amounts based upon results achieved in 2016.

County Indicators:

Violent Crime Rate • Property Crime Rate • Average length of pre-trial stay in County jail
Number of persons with mental health issues (Rule 11 finding)

Strategic Priority: REGIONAL SERVICES - Maricopa County will provide best-in-class regional services, both mandated and of concern to citizens, while coordinating with municipalities, other local jurisdictions, and community-based entities to consolidate services and avoid duplication, when applicable.

Strategic Goal: By end of CY 2018, 100% of all air quality monitors are in compliance with federal health standards.

Strategic Goal: By end of FY 2018, 85% or more of citizens indicating satisfaction with the amount of and access to open space, parks and recreation land in Maricopa County.

Strategic Goal: By end of FY 2018, 4-5 year olds in Head Start increase their school readiness by 60% (on average in the year of their participation in Head Start--based on the State's assessment tool).

County Indicators:

Coverage levels of immunizations (MMR & Tdap) • Public Health Accreditation

Strategic Priority: GOVERNMENT OPERATIONS - Maricopa County will deploy an effective and efficient infrastructure to implement streamlined policies and procedures to improve delivery of services and promote a healthy workplace and a fully engaged workforce.

Strategic Goal: By end of FY 2018, 80% or more of County residents indicate trust in County government.

Strategic Goal: PLACEHOLDER - By end of FY 2018, Maricopa County's Employee Engagement Score (a widely used measure indicating the strength of the workforce) increases x% from the baseline established in FY 2015.

Strategic Goal: Maricopa County will improve turnaround times and response times through the use of electronic filings:

- a. 7.5% increase in electronic recordings through the Recorder's Office by the end of FY 2018
- b. 28% increase in electronic filings through the Clerk of the Superior Court end of FY 2018.
- c. By the end of 2018, the Treasurer's Office will increase the number of parcels enrolled to receive paperless statements to 10%, a percentage that will be reviewed following a study to be completed by the end of FY 2016.

County Indicators:

Citizen Satisfaction with County Performance and County Communication • Voluntary Employee Turnover Rate

Strategic Priority: GROWTH AND ECONOMIC DEVELOPMENT - Maricopa County will be innovative in leveraging its resources, adaptive in its regulatory policies and practices, and proactive in its public relations to attract, promote, and support the growth of business enterprises to produce a vibrant and balanced regional economy.

Strategic Goal: By 2018, 90% of regulated entities indicate they are satisfied or more than satisfied with their interactions with Maricopa County's regulating agencies (as measured by customer satisfaction surveys).

Strategic Goal: By 2018, 80% of participants completing workforce development training who obtain a job and remain employed after 6 months.

County Indicators:

High School Graduation Rate • Employment Levels • Median Home Values • County Per Capita Income as a percent of US

Strategic Priority: FISCAL STRENGTH AND RESPONSIBILITY - Maricopa County will continue to efficiently manage County resources and engage in effective fiscal planning with integrity and transparency to promote financial stability and economic prosperity for Maricopa County residents.

Strategic Goal: By the end of FY 2018, 100% of all County funds will obtain structural balance.

Strategic Goal: By the end of FY 2019, Maricopa County's General Fund Operating reserves will equal two months of operating expenditures.

County Indicators:

Percent of General Fund expenditures going to the State through required contributions and unfunded mandates.

Exhibit 2

BRENNAN CENTER FOR JUSTICE

at New York University School of Law

New Findings on Crime and Incarceration How These Findings Relate to Legislation in Your State

*By Nicole Fortier and Lauren Brooke Eisen **

The Brennan Center's recent report, *What Caused the Crime Decline?*, examines 14 theories for the nation's dramatic crime decline since 1990. After a rigorous empirical analysis, it finds, among other things, that increased incarceration played a limited role in the crime drop. Specifically, incarceration accounted for approximately 5 percent (potentially ranging from 0 to 10 percent) of the crime drop in the 1990s, and accounted for essentially zero percent of the crime decline since 2000.

This analysis indicates how these findings apply to different types of legislation (or ballot initiatives) on the horizon in many states this year. For more on the report's findings, please see our [state fact sheets](#), [report landing page](#), and this excerpt in *The Atlantic*.

What legislation do these findings support?

Policymakers enacted laws to increase incarceration in the 1980s and 1990s in an attempt to reduce crime. While it may seem counterintuitive that increased incarceration had a limited impact on crime reduction, there are several explanations:

- **Overuse of incarceration leads to ineffectiveness.** Incarceration has diminishing returns as a crime-control policy. When prison is used judiciously, incarceration is reserved for the highest-risk offenders, therefore increased incarceration helps reduce crime. At today's historically high levels of incarceration, correctional facilities are filled with low-level and non-violent prisoners. Further increases in incarceration have steadily decreasing crime control benefits, as the individuals imprisoned pose less of a public safety risk. We are now well past the point of diminishing returns of incarceration on crime control.
- **Incarceration can cause individuals to commit more crimes upon release.** When people who commit less serious crimes enter prison, they are often living in unsafe or unsanitary prison conditions and surrounded by other prisoners who have committed more serious and violent offenses. These factors make re-entry into the community difficult and increase the likelihood

* Lauren-Brooke Eisen is counsel and co-author of *What Caused the Crime Decline?* Nicole Fortier is counsel and a member of the report's research team.

that an individual will commit crimes upon release. The trouble many former prisoners have finding employment, and the legal and social stigmas they face, can lead to recidivism and fuel a cycle of incarceration.

- **Incarceration does not serve as an effective deterrent to crime.** Empirical studies indicate that longer sentences have minimal or no benefit on whether offenders or potential offenders commit crimes.

Today, lawmakers across the nation are recognizing the fiscal, economic, and social toll that mass incarceration created. With the benefit of a generation of research demonstrating the effectiveness of alternatives to incarceration, many lawmakers are seeking ways to reduce incarceration in their states. This report provides additional empirical evidence that further increasing incarceration is not an effective crime control tactic.

Generally, the findings support large scale reforms to reduce incarceration:

- **Focusing Law Enforcement Resources on Serious and Violent Offenses.** The report's findings support prioritizing limited law enforcement resources on serious and violent offenses. Implementing 21st century priorities for prosecutors and police – that drive toward the dual goals of reducing serious and violent crime *and* reducing unnecessary arrests, prosecutions, and incarceration – can be an effective way to reduce incarceration while continuing to keep the country safe. New priorities can be implemented by changing practices within agencies, or could also be implemented through legislative change, particularly reforms focusing on improving funding priorities.
- **Ensuring that Government Funds What Works in Criminal Justice.** Government dollars should be spent on policies and practices that align with public policy goals. Legislation tying funding of criminal justice agencies to achieving the twin goals of reducing crime and reducing incarceration can be a potent way to reduce prison populations. Such programs have been tested in Illinois and California, showing much progress and cost savings, while continuing to promote public safety. Actors respond to financial incentives, even when subtle.
- **Decreasing Pretrial Detention and Reducing Bail Amounts.** Pretrial detention serves, in part, to prevent crime. This report's findings suggest that incarcerating those who do not need to be incarcerated will have a limited impact on reducing crime. Pre-trial detention is one area ripe for reform. Detention may not be needed for those who commit low-level or non-violent offenses, or for those who simply cannot pay bail. Moreover, pretrial detention is strongly associated with an increase recidivism and prison time.¹
- **Reclassifying Felonies to Misdemeanors.** This report suggests that long sentences are likely not needed to reduce crime. Further, there is evidence that sending someone to prison for longer than necessary can actually increase their propensity to commit future crimes. Reforms reclassifying felonies to misdemeanors when long punishments may not be appropriate are a high-impact method to reduce incarceration without harming public safety.

- **Removing Prison as a Sanction for Low-Level Crimes, Except in Exceptional Circumstances.** This report suggests that prison sentences for those who commit many low-level crimes, including drug possession, may not be needed to reduce crime.
- **Reducing Mandatory Sentence Minimums and Maximums.** Mandatory minimum laws require judges to impose overly harsh and specific sentence lengths for certain crimes. These laws undermine justice as their mandatory lengths are generally disproportionate to the crime committed, and they prevent judges from reducing sentences when appropriate. This report suggests such long sentences are likely not needed to reduce crime, and can sometimes increase future propensity to commit crimes.
- **Expanding Treatment and Reentry Programs.** These programs offer methods to reduce incarceration rates while improving public safety. Research has found that treatment programs can play a role in effectively reducing recidivism and future incarceration. For example, research shows that out-of-prison treatment programs can reduce recidivism by 12 percent, increasing to 22 percent if coupled with intensive supervision.²
- **Expanding Parole Eligibility.** Expanding parole eligibility can help reduce the prison population. Early release, coupled with reentry services, can also help prevent recidivism and crime.
- **Raising the Age of Adult Criminal Responsibility.** The adult criminal justice system generally punishes more harshly than the juvenile justice system. New York and North Carolina prosecute all 16 and 17-year-olds as adults in criminal court. And, youth incarcerated in adult facilities are at a greater likelihood of reoffending.³ Increasing the age of adult criminal responsibility to 18 would ensure children are punished proportionally.

What legislation would these findings not support?

The report's findings do not support attempts to unnecessarily increase incarceration, including:

- **Increasing Bail Amounts.**
- **Increasing Mandatory Minimums.**
- **Increasing Sentences for Low-Level or Non-Violent Offenses.**
- **Unnecessarily Restricting Parole Eligibility.**

¹ LAURA & JOHN ARNOLD FOUNDATION, PRETRIAL CRIMINAL JUSTICE RESEARCH 3-4 (2013), *available at* http://www.arnoldfoundation.org/sites/default/files/pdf/LJAF-Pretrial-CJ-Research-brief_FNL.pdf.

² *See, e.g.*, STEVE AOS, ET AL., WASHINGTON STATE INSTITUTE FOR PUBLIC POL'Y, EVIDENCE-BASED ADULT CORRECTIONS PROGRAMS: WHAT WORKS AND WHAT DOES NOT 3 (2006), *available at* <http://www.wsipp.wa.gov/ReportFile/924>.

³ JASON ZIEDENBERG, NAT'L INST. OF CORR. YOU'RE AN ADULT NOW: YOUTH IN ADULT CRIMINAL JUSTICE SYSTEMS 5 (2011) ("Youth transferred to the adult corrections system recidivate at a higher rate than those kept in the juvenile justice system"), *available at* <http://static.nicic.gov/Library/025555.pdf>.