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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF FRESNO

Carolyn Phillips,  
Peter Yopez, and  
Ruthina Estrada,

Plaintiffs,

vs.

State of California,  
Edmund G. Brown Jr., in his official  
capacity as Governor of California, and  
County of Fresno,

Defendants.

FILED

JUL 14 2015

FRESNO COUNTY SUPERIOR COURT

By \_\_\_\_\_ LP - DEPUTY

CASE NO. 15 CE CG 02201

VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF UNDER CAL. CONST. ART. I  
§ 15, U.S. CONST. AMDS. 6 AND 14, CAL.  
PENAL CODE §§ 987, 1382, 859B

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1 **I. INTRODUCTION**

2 1. The right to appointed counsel and adequate legal representation for indigent  
3 criminal defendants is guaranteed by both the U.S. and California Constitutions. This right is  
4 fundamental and is essential to a fair trial. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Ex parte*  
5 *Newbern*, 53 Cal. 2d 786 (1960). But in Fresno County, the State of California and Fresno  
6 County have abdicated their constitutional and statutory responsibility to enforce and protect this  
7 right by failing to provide indigent defendants with meaningful and effective assistance of  
8 counsel.

9 2. For at least six years, the Fresno County Public Defender’s Office (“the Office”)  
10 has been in a state of crisis, disabled from fulfilling this constitutional duty. Beginning in August  
11 2008, the Fresno County Board of Supervisors (“the Board”) initiated a series of devastating cuts  
12 to the Public Defender’s budget, resulting in the loss of more than half the Office’s staff by the  
13 end of the 2011-2012 fiscal year. In January 2009, the Public Defender alerted the Board that  
14 recent cuts to the Office’s budget severely limited the Office’s ability “to provide competent and  
15 effective representation on each case” and “to staff or service all of the various courtrooms and  
16 calendars within Fresno County.”<sup>1</sup>

17 3. Despite this clear message, the crisis went unaddressed. In September 2013 the  
18 union for the Public Defender’s Office warned the Board and Office management that excessive  
19 caseloads and the assignment of cases beyond attorneys’ skill and training “are jeopardizing our  
20 client[s] constitutional rights on a daily basis.”<sup>2</sup> The deputy public defenders asked for a  
21 response to their letter by September 30, 2013. In the nearly two years since then, the Board has  
22 never responded, and the crisis continues.

23 4. Fresno County deputy public defenders are shouldering caseloads that make it  
24 impossible for even the most skilled attorneys to provide meaningful and effective representation  
25

26 <sup>1</sup> Public Defender Kenneth Taniguchi, letter to Board of Supervisors, Jan. 23, 2009, at p. 2. A true copy of the  
January 23, 2009 Public Defender letter is attached to this complaint as Exhibit A.

27 <sup>2</sup> Professional Association of Fresno County Employees (“PACE”), letter to Public Defender Kenneth Taniguchi, cc  
Board of Supervisors, Fresno Superior Court Presiding Judge, and County Administrative Officer, Sept. 20, 2013, at  
28 p. 4. A true copy of the September 2013 PACE letter is attached to this complaint as Exhibit B.

1 to their indigent clients. A conservative estimate indicates that public defenders handle, on  
2 average, 418 felony cases per year, or 612 if supervised-release cases are included. According to  
3 the National Advisory Commission on Criminal Justice Standards and Goals (“NAC”), the  
4 absolute maximum number of felony cases that an individual attorney should handle in a year is  
5 150. A similarly conservative estimate indicates that Fresno County public defenders handle, on  
6 average, 1,375 misdemeanor cases per year, or 1,462 including supervised-release cases.  
7 According to the NAC, the absolute maximum number of misdemeanor cases that an individual  
8 attorney should handle in a year is 400. The NAC maxima assume adequate training,  
9 investigative and administrative support. Where these elements are lacking, the reasonable  
10 maximum caseload will necessarily be lower.

11 5. This means the average Fresno County felony public defender is carrying a  
12 caseload that should be handled by nearly three attorneys, and each Fresno County misdemeanor  
13 public defender is carrying a caseload that should be handled by nearly four attorneys.

14 6. As a result of these crushing caseloads and other structural deficiencies, indigent  
15 defendants who are accused of crimes and represented by the Fresno County Public Defender’s  
16 Office are systematically denied their constitutional right to meaningful legal representation at  
17 every critical stage of their criminal proceedings. Among other things, indigent accused persons  
18 in Fresno County regularly experience:

- 19 • wrongful conviction of crimes;
- 20 • unnecessary or prolonged pre-trial detention;
- 21 • guilty pleas to inappropriate charges;
- 22 • waiver of meritorious defenses;
- 23 • compelled waiver of their rights to a speedy trial and hearing;
- 24 • guilty pleas taken without adequate knowledge and awareness of the full, collateral  
25 consequences of the pleas;
- 26 • harsher sentences than the facts of the case warrant and few alternatives to  
27 incarceration; and
- 28 • waiver of the right to appeal and other post-conviction rights.

1           7.       The right to appointed counsel and adequate legal representation for indigent  
2 criminal defendants imposes a duty on Defendants to operate a public defense system that  
3 provides adequate assistance of counsel to indigent persons charged with crimes.  
4 Notwithstanding this duty, Defendants have failed to remedy the extreme, years-long, and  
5 ongoing crisis in the Fresno County Public Defender’s Office.

6           8.       Even though the head of the Office in 2009, the deputy public defender’s union in  
7 2013, and Plaintiffs’ counsel in February 2015 alerted Defendants to this crisis, Defendants have  
8 allowed it to persist. Indeed, the County recently denied that its public defense system is broken.  
9 And the State denied legal responsibility, stating it is up to Fresno County to “take any further  
10 steps that may be necessary or appropriate to assure its [Public Defender’s] program is on a solid  
11 footing.”

12           9.       In the meantime, the Fresno County Public Defender’s Office represents tens of  
13 thousands of indigent criminal defendants every year.

14           10.      Because of Defendants’ indifference to the constitutional and statutory rights of  
15 these indigent defendants, it falls on this Court to ensure that the right to counsel is not an empty  
16 promise for people in Fresno who are accused of a crime and cannot afford to hire an attorney.

17           11.      Plaintiffs bring this case seeking mandamus, injunctive and declaratory relief to  
18 protect the constitutional rights of all indigent persons charged with crimes in Fresno County.

19       **II.    JURISDICTION AND VENUE**

20           12.      This Court has jurisdiction under Article VI, § 10 of the California Constitution  
21 and California Code of Civil Procedure § 410.10.

22           13.      Venue is proper in this Court because the action arose in this County and  
23 Defendant County of Fresno is situated in this County. *See* Cal. Civ. Proc. Code §§ 393(b),  
24 394(a), 395(b).

25       **III.   PARTIES**

26           14.      Plaintiff Carolyn Phillips has been a resident of Fresno County since 1981 and is a  
27 member of the American Civil Liberties Union. Ms. Phillips is also a mother and a member of  
28 the California Bar. As an attorney Ms. Phillips has devoted her legal practice to advocating for

1 equal justice under the law especially for individuals in poverty. She has worked at California  
2 Rural Legal Assistance in Madera and Central California Legal Services.

3 15. Ms. Phillips is a member of the Criminal Justice Act panel, through which she  
4 provides legal representation to indigent persons in the federal criminal justice system. She has  
5 worked on criminal defense and appeals in the federal system for approximately 15 years. Ms.  
6 Phillips believes that all persons accused of a crime, regardless of their financial status or  
7 economic means, should receive the benefit of the presumption of innocence in our criminal  
8 justice system. In her opinion, the Fresno County Public Defender's Office does not have the  
9 resources necessary to make the presumption of innocence a reality for their clients. Ms. Phillips  
10 believes that parity between the prosecution and indigent defense providers is essential to the  
11 integrity of our adversarial criminal justice system.

12 16. Ms. Phillips owns real property in Fresno County and has paid property taxes to  
13 the County within the last year. She has also paid income taxes assessed by the State of  
14 California within the last year. Ms. Phillips brings this suit as a citizen and taxpayer of Fresno  
15 County and the State of California.

16 17. Plaintiff Peter Yepez is a resident of Fresno County and a father. Mr. Yepez is  
17 also a former indigent defendant and was represented by attorneys from the Fresno County Public  
18 Defender's Office. As a result of excessive caseloads and other deficiencies in Fresno County's  
19 public defense system, Mr. Yepez did not receive adequate legal representation in the criminal  
20 proceedings against him. His case experienced many delays, and the factual investigation was  
21 not completed in a timely manner. Mr. Yepez was detained in the Fresno County jail while  
22 awaiting adjudication of his case and as a result suffered from severe mental and emotional  
23 distress, including depression. Because he was detained, he missed a memorial service for his  
24 deceased child and his daughter's graduation. Mr. Yepez felt pressure to, and in fact did, plead  
25 guilty to charges of which he is innocent.

26 18. Mr. Yepez brings this suit as a citizen.

27 19. Plaintiff Ruthina Estrada is a resident of Fresno County. She is a retired employee  
28 of Fresno City College, where she worked as an administrative aid for 27 years. Ms. Estrada is a

1 proud grandmother. Both her daughter and her son-in-law, Mr. Yepez, have been involved in the  
2 criminal justice system and were represented by public defenders. When Mr. Yepez was  
3 incarcerated, Ms. Estrada was his children's primary caretaker. She took them to visit Mr. Yepez  
4 while he was in jail and has witnessed the negative emotional impact his absence has had in their  
5 lives.

6 20. Ms. Estrada owns real property in Fresno County and has paid property taxes to  
7 the County within the last year. She receives pension disbursements from the California Public  
8 Employees' Retirement System and has paid taxes assessed by the State of California within the  
9 last year. Ms. Estrada brings this suit as a citizen and taxpayer of Fresno County and the State of  
10 California.

11 21. Defendant State of California is required by Article I, § 15 of the California  
12 Constitution and the Sixth and Fourteenth Amendments to the United States Constitution to  
13 provide meaningful and effective legal representation to indigent defendants in criminal court  
14 proceedings.

15 22. Defendant Edmund G. Brown Jr. is the Governor of the State of California and has  
16 a duty to "see that the law is faithfully executed." Cal. Const. art. V, § 1. This includes a duty to  
17 ensure that the State respects the federal and state constitutional and statutory provisions  
18 guaranteeing the right to counsel to indigent defendants in criminal court proceedings.

19 23. Defendant County of Fresno is a legal subdivision of the State of California.  
20 Under state law, Defendant Fresno County bears responsibility for funding the County's indigent  
21 defense system. Defendant Fresno County runs the Fresno County Public Defender's Office.

22 **IV. FRESNO COUNTY'S PUBLIC DEFENSE SYSTEM FAILS TO COMPLY WITH**  
23 **MINIMAL CONSTITUTIONAL AND STATUTORY REQUIREMENTS**

24 **A. The State Has Abdicated Its Responsibility to Ensure the Right to Counsel for**  
25 **Indigent Persons Accused of a Crime in Fresno County**

26 24. Both the United States and California Supreme Courts have held that the right to  
27 counsel requires the State to provide counsel for those defendants who cannot afford to hire a  
28 lawyer to represent them. *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Ex parte Newbern*, 53  
Cal. 2d 786, 790 (1960).

1           25.     Since *Gideon*, the U.S. Supreme Court has continued to expand the right to  
2 counsel in significant ways. The Court has extended the right to counsel to children in juvenile-  
3 delinquency proceedings, *see In re Gault*, 387 U.S. 1 (1967); probationers in probation  
4 revocation proceedings, *see Mempa v. Rhay*, 389 U.S. 128 (1967); and indigent defendants  
5 charged with misdemeanors, *see Argersinger v. Hamlin*, 407 U.S. 25 (1972). More recently, the  
6 Court has found that the right to counsel attaches for all defendants at their initial appearance, *see*  
7 *Rothgery v. Gillespie County, Texas*, 554 U.S. 191 (2008); and that plea bargaining constitutes a  
8 “critical stage” of any criminal proceeding, thereby requiring the effective assistance of counsel  
9 in connection with plea negotiations, *see Lafler v. Cooper*, 132 S. Ct. 1376 (2012), and *Missouri*  
10 *v. Frye*, 132 S. Ct. 1399 (2012).

11           26.     Both the U.S. and California Supreme Courts have made it clear that this requires  
12 the appointment of competent counsel with the opportunity and resources necessary to contest the  
13 criminal charges in a meaningful way. *See Powell v. Alabama*, 287 U.S. 45, 59 (1932); *People v.*  
14 *Williams*, 40 Cal. 4th 287, 303 (2006).

15           27.     California has delegated its constitutional duty to run indigent defense systems to  
16 individual counties. Under this system, counties have the choice of creating a Public Defender’s  
17 Office, contracting with an individual attorney or firm, using assigned counsel as appointed by  
18 the court, or using a combination of these models. The State provides no oversight to ensure that  
19 the county-operated systems meet the constitutional and statutory standards for adequate  
20 representation.

21           28.     Moreover, the cost for counsel and necessary ancillary defense service has, and  
22 continues to be, borne almost entirely by the counties. Cal. Penal Code § 987.2(a).

23           29.     California is also unusual in that it places strict limits on the ability of cities and  
24 counties to raise revenue through property and other taxes. *See* Cal. Const. XIII A, § 1. Because  
25 of this limitation, and because the State does not provide oversight regarding the provision of  
26 indigent defense services and the state leaves counties to shoulder the financial costs of providing  
27 defense services to people who cannot afford private lawyers, indigent defense services vary  
28 widely across the state, and some counties with the highest percentages of indigent defendants—



1 like Fresno County—also have the lowest levels of per capita funding due to an impoverished tax  
2 base.

3 30. Recognizing the deficiencies in the county-operated public defense systems in  
4 California, in 1980 the State Bar’s former Standing Committee on the Delivery of Legal Services  
5 for Criminal Defendants recommended that the State Bar establish guidelines to protect the  
6 indigent persons’ right to counsel. That committee’s work led the State Bar to issue  
7 comprehensive guidelines for indigent defense providers.<sup>3</sup> The 2006 guidelines recommend:

- 8 1) **Client Loyalty Must Come First:** The indigent defense provider must subordinate all  
9 other loyalties and concerns to the best interests of each client. Decisions of the defense  
10 provider, including those about what resources are reasonable and necessary to properly  
11 prepare a client’s case, must be unaffected by political influence.<sup>4</sup> “Should there develop  
12 an unavoidable conflict between the duties, responsibility or allegiance of an institutional  
13 public defender as a county manager or department of county government, and the role of  
14 said Public Defender in representing an indigent client, the duty to properly represent the  
15 client supersedes all other loyalties.”<sup>5</sup>
- 16 2) **Reasonable Standards of Representation Must Be Met:** “Indigent defense providers  
17 must act zealously to provide services meeting the mandate of being a ‘reasonably  
18 competent attorney acting as a diligent, conscientious advocate.’”<sup>6</sup>
- 19 3) **Indigent Defense Providers Must Be Qualified:** “Cases must be assessed as to  
20 seriousness and complexity and only assigned to indigent defense providers who possess  
21 the requisite relevant experience, training and ability necessary for such matters.”<sup>7</sup>
- 22 4) **Quality Control Mechanisms Must Exist:** There should exist a mechanism whereby the  
23 quality of the representation provided by indigent defense providers is monitored and  
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25 <sup>3</sup> The State Bar of California, Guidelines on Indigent Defense Services Delivery Systems, 2006,  
26 <http://calbar.ca.gov/LinkClick.aspx?fileticket=fwTzyTmupEY%3D&tabid=2326> (“State Bar Guidelines”), at p. 2.

27 <sup>4</sup> *Id.* at p. 4.

28 <sup>5</sup> *Id.* at p. 7.

<sup>6</sup> *Id.* at p. 8 (citing *People v. Pope*, 23 Cal.3d 412 (1979)).

<sup>7</sup> *Id.* at p. 11.

1 accurately assessed, employing uniform standards. Likewise, should remedial training or  
2 some form of punitive action be needed, a fair and uniform approach should exist.”<sup>8</sup>

3 **5) Indigent Defensed Providers Must Be Trained:** Indigent defense providers must  
4 comply with the minimum State Bar Minimum Continuing Legal Education requirements  
5 applicable to all lawyers<sup>9</sup> and complete additional hours “of relevant legal education  
6 classes or equivalent training dealing specifically with juvenile (dependency or  
7 delinquency), mental health and/or criminal law, on a calendar year basis.”<sup>10</sup>

8 **6) Indigent Defense Providers Owe Juveniles Special Care:** Indigent defense providers  
9 must represent juvenile clients in delinquency court, engage in resource advocacy and  
10 monitor their progress while in custody of the Division of Juvenile Justice of the  
11 California Department of Corrections and Rehabilitation, camps or other placements and  
12 when released on probation.<sup>11</sup>

13 **7) Workloads Must Not Be Excessive:** “Indigent defense providers shall not accept nor be  
14 burdened with excessive workloads that compromise the ability of the provider to render  
15 competent and quality representation in a timely manner, without the risk of damaging the  
16 mental/physical health and motivation of the providers.”<sup>12</sup>

17 **8) Comparable Resources To Prosecutors:** “Indigent defense providers should enjoy  
18 parity, to the extent permitted by law, on a relative scaled basis, with prosecutors in access  
19 to technology, criminal history information, other criminal justice databases such as those  
20 housing DNA information, legal research tools, investigators and investigative tools,  
21 including a travel budget, experts, paralegals, forensic labs, facilities, data processing and  
22 exhibit creation capability.”<sup>13</sup>

23 **9) Comparable Compensation With Prosecutors:** “There should exist, at a minimum,  
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25 <sup>8</sup> *Id.* at p. 14.

26 <sup>9</sup> *Id.* at p. 18.

27 <sup>10</sup> *Id.*

28 <sup>11</sup> *Id.* at p. 21.

<sup>12</sup> *Id.* at p. 24.

<sup>13</sup> *Id.* at p. 30 (internal footnote omitted).

1 parity between full-time indigent defense providers and full-time prosecutors in net  
2 compensation, as well as benefits or an amount sufficient to provide benefits of the same  
3 value.”<sup>14</sup>

4 **10) Clients’ Interest Trumps All:** “Indigent defense providers must ensure that the interests  
5 of the clients supercede all else.”<sup>15</sup> “In appropriate situations the indigent criminal  
6 defense provider must refuse to undertake an excessive workload that exceeds the skill of  
7 the provider.”<sup>16</sup> “Institutional public defenders should promulgate written policies or  
8 guidelines and provide training to staff regarding the ethical rules binding employees of  
9 such defenders and explaining the process whereby ethical issues are resolved.”<sup>17</sup>

10 **11) Demographics/Diversity/Culture Considerations Should Be Addressed:** “In order to  
11 become a better informed workforce with broad cultural competencies, it is important that  
12 such service providers strive to attract, hire and retain a highly qualified staff that reflects  
13 the communities which they serve.”<sup>18</sup>

14 **12) Compliance By Management/Leadership:** It is the responsibility of anyone occupying  
15 an administrative, management or leadership position in an indigent defense provider to  
16 ensure that all of the above-mentioned guidelines are fully met.”<sup>19</sup>

17 31. The State has not taken action to hold counties accountable for any of these  
18 metrics or the constitutional standards they were designed to uphold. Not surprisingly, in 2008,  
19 the California Commission on the Fair Administration of Justice found “that the quality of  
20 representation afforded indigent accused is far from uniform in California, and sometimes falls  
21 short of the constitutional minimum.”<sup>20</sup>

22  
23 <sup>14</sup> *Id.* at p. 32.

24 <sup>15</sup> *Id.* at p. 35.

25 <sup>16</sup> *Id.* at p. 36.

26 <sup>17</sup> *Id.* at p. 37.

27 <sup>18</sup> *Id.* at p. 38.

28 <sup>19</sup> *Id.* at p. 39.

<sup>20</sup> *Report and Recommendations on Funding of Defense Services in California*, Cal. Comm’n on the Fair Admin. of Justice, at p. 2, Apr. 14, 2008, <http://www.ccfaj.org/documents/reports/prosecutorial/official/OFFICIAL%20REPORT%20ON%20DEFENSE%20SERVICES.pdf>.

1           32.     California’s Central Valley is a region “plagued by high concentrations of poverty,  
2 unemployment and crime.” 24.8% of Fresno County residents live below the federal poverty  
3 level, compared to 15.3% of all Californians and 14.9% nationwide. Fresno County’s 9.5%  
4 unemployment rate is higher than the State and national rates of 6.9% and 5.7%, respectively.  
5 The demand for indigent representation in Fresno County is, therefore, significant.

6           33.     The two providers of indigent defense in Fresno County are the Fresno County  
7 Public Defender’s Office and Richard A. Ciummo & Associates. The Public Defender’s Office is  
8 the County’s primary provider of indigent defense services, providing legal representation for  
9 indigent adult and juvenile persons charged with felony or misdemeanor offenses in Fresno  
10 County Superior Court, and as otherwise prescribed by statute. In Fresno County, the court  
11 appoints the Public Defender unless the defendant chooses to retain private counsel. Ciummo is  
12 the secondary provider, providing legal representation for indigent accused in the County when  
13 the Public Defender cannot represent them due to a conflict of interest or for other reasons.

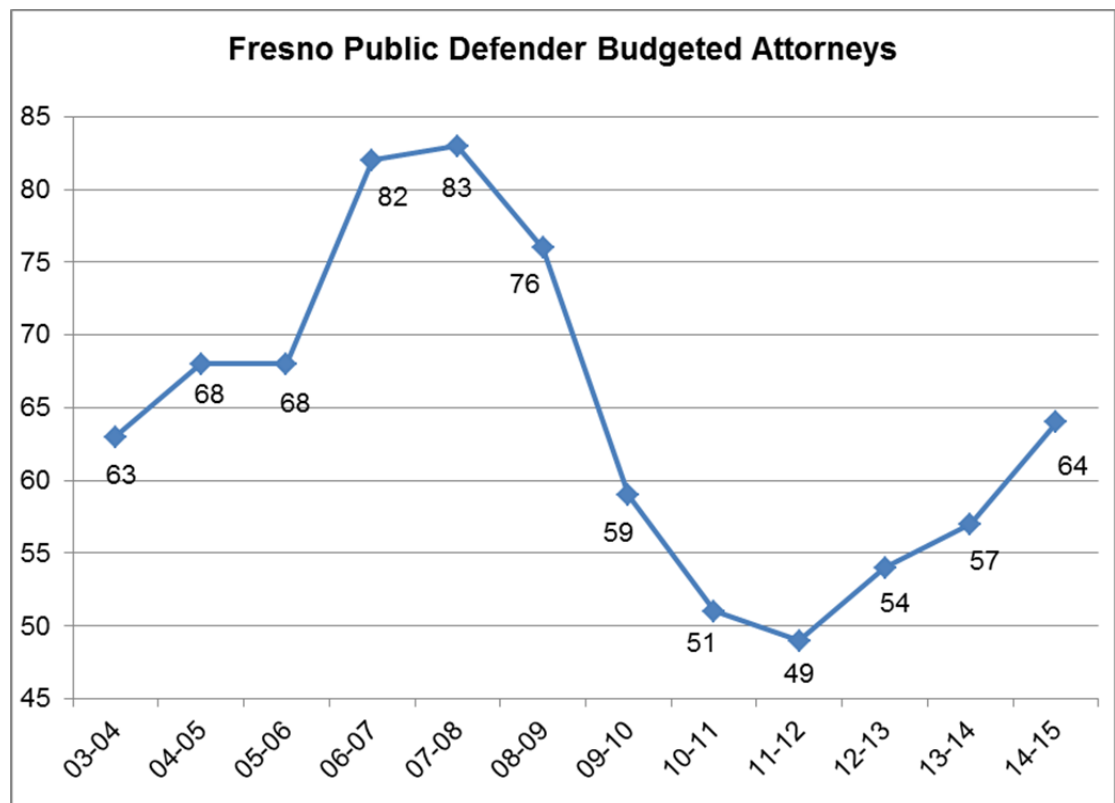
14           34.     The Fresno County Board of Supervisors determines staffing for the Public  
15 Defender’s Office and how much money the Office can spend in the fiscal year. The County  
16 Administrative Officer makes staffing recommendations to the Board and “exercises continuous  
17 budgetary control” over all county department heads, including the Public Defender. Fresno  
18 County Charter § 19(3); Fresno County Code § 2.08.030(E). The County Administrative Officer  
19 has the power to “to appoint, suspend or remove, with prior approval of the Board of  
20 Supervisors” the Public Defender. *See* Fresno County Charter § 16. The other lawyers in the  
21 Public Defender’s Office are at-will employees. As the Former Standing Committee of the State  
22 Bar recognized, this threatens the independence of county public defenders, allowing the Board of  
23 Supervisors undue and counterproductive influence and pressure over the manner and quality of  
24 representation that public defenders provide for their clients.

25           **B.     Defendants’ Failure to Ensure Fresno County’s Public Defender’s Office Has**  
26           **Necessary Resources Has Resulted in Severe Understaffing**

27           35.     The Constitution requires that attorneys representing indigent defendants have  
28 adequate time and resources to meet with and counsel their clients, investigate, conduct legal

1 research, file and litigate appropriate motions, and take cases to trial when their clients wish to  
2 contest the charges. But the Fresno County Public Defender simply does not have enough staff to  
3 allow it to fulfill these constitutional mandates.

4 36. Despite repeated warnings from the Office of persistent underfunding, the Fresno  
5 County Public Defender’s Office has remained understaffed for at least the last decade  
6 constituting a persistent and systemic crisis. Over the last ten years, the number of budgeted  
7 attorneys has fluctuated between 49 and 83 attorneys, but even at its highest point, that number  
8 has been insufficient to satisfy the County’s and the State’s constitutional obligations to maintain  
9 an adequate indigent defense system.



23  
24 37. Indeed, in 2007, when the Office had more staff and attorneys than at any other  
25 point in the last 10 years, 83 attorneys and 135 total staff, the Public Defender’s Office noted in  
26 the County’s proposed budget that “[h]istorically, the Public Defender’s Office has provided  
27 basic legal service to the citizens of Fresno County with inadequate staffing and disproportionate  
28

1 funding when compared with the other Public Safety departments.”<sup>21</sup> The Public Defender’s  
2 Office further warned that “it is *absolutely critical* that the current level of staffing (135 staff  
3 members) remain intact to allow the department to efficiently meet its service obligations.”<sup>22</sup>  
4 (emphasis added).

5 38. The very next fiscal year, 2008-2009, in response to a budget recommending the  
6 deletion of 5 positions, the Public Defender’s Office cautioned that “there are limits as to what  
7 can be accomplished when staffing levels are so severely cut that basic service levels simply  
8 cannot be met no matter how hard Department employees may work nor how creative  
9 management may be with increasingly limited resources.”<sup>23</sup>

10 39. Rather than heed these warnings, the Board gutted the Fresno County Public  
11 Defender’s Office. Between fiscal years 2007-2008 and 2011-2012, the Office dropped from 137  
12 budgeted positions (which includes both attorneys and non-attorney staff) to 79. Seasoned  
13 veterans of the Office left, and new, inexperienced attorneys took their place without the benefit  
14 of formal training. Senior positions went unfilled for extended periods of time.

15 40. In 2010, the Fresno County Public Defender declined to accept case appointments  
16 by the court because the Office did not have enough attorney staff to physically cover the  
17 courtrooms. This forced the County to incur more than \$500,000 in unexpected costs to pay  
18 private court-appointed attorneys.<sup>24</sup> Since 2011, the Board has approved modest increases to the  
19 Public Defender’s budget. However, as of March 4, 2015, the Office only had 60 attorneys, 11  
20 investigators, five paralegals, 19 office assistants, and two secretaries, one accountant and one  
21 administrative services assistant to handle its annual caseload of more than 42,000 cases. The  
22 2015-16 budget approved by the Board only added one position.<sup>25</sup>

23 \_\_\_\_\_  
24 <sup>21</sup> 2007-2008 Proposed Budget (Revised 7/12/2007), County of Fresno,  
<http://www.co.fresno.ca.us/ViewDocument.aspx?id=19629>, at p. 193.

25 <sup>22</sup> *Id.* at p. 194.

26 <sup>23</sup> 2008-09 Proposed Budget, County of Fresno, <http://www.co.fresno.ca.us/ViewDocument.aspx?id=20177>, at p.  
333.

27 <sup>24</sup> Fresno County, Public Defender Assessment Panel Report, Feb. 2011,  
[http://www2.co.fresno.ca.us/0110a/Questys\\_Agenda/MG184383/AS184384/AS184401/AI184651/DO184652/4.DO](http://www2.co.fresno.ca.us/0110a/Questys_Agenda/MG184383/AS184384/AS184401/AI184651/DO184652/4.DO)  
C (“2011 PD Assessment”), at p. 11.

28 <sup>25</sup> 2015-16 Proposed Budget, County of Fresno, <http://www.co.fresno.ca.us/ViewDocument.aspx?id=64158>, at p. 42.

1           **C. Fresno County’s Public Defense System Fails to Satisfy Minimal**  
2           **Constitutional and Statutory Requirements**

3           41. Because Defendants have neglected the Public Defender’s Office for years and  
4 starved it of necessary resources, there are substantial deficiencies in Fresno County’s public  
5 defense system, which collectively result in the constructive denial of counsel.<sup>26</sup> These  
6 deficiencies include:

- 7           1. excessive caseloads in violation of California and national standards;<sup>27</sup>
- 8           2. lack of conflict-free representation in violation of state and national standards;<sup>28</sup>
- 9           3. lack of continuous representation in violation of state and national standards;<sup>29</sup>
- 10          4. inadequate attorney-client contact and confidential communication in violation of state  
11           and national standards;<sup>30</sup>
- 12          5. indigent defendants being deprived of meaningful representation by attorneys with the  
13           training necessary to defend them in violation of state and national standards;<sup>31</sup>
- 14          6. inadequate factual investigation in violation of state and national standards;<sup>32</sup>
- 15          7. lack of support staff in violation of state and national standards;<sup>33</sup>

16           <sup>26</sup> See generally U.S. Dep’t of Justice, Statement of Interest in *Hurrell-Harring v. New York*, No. 8866-07, Sept. 25,  
17 2014, [http://www.justice.gov/crt/about/spl/documents/hurrell\\_soi\\_9-25-14.pdf](http://www.justice.gov/crt/about/spl/documents/hurrell_soi_9-25-14.pdf) (explaining the constructive denial of  
18 counsel).

19           <sup>27</sup> See The State Bar of California, Guidelines on Indigent Defense Services Delivery Systems, 2006,  
20 <http://calbar.ca.gov/LinkClick.aspx?fileticket=fwTzyTmupEY%3D&tabid=2326> (“State Bar Guidelines”), at pp. 24-  
21 30 (guideline 7); ABA, Ten Principles of a Public Defense Delivery System, 2002,  
22 [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) (“ABA Ten Principles”), at p. 2 (principle 5); National Advisory Commission (NAC),  
23 The Criminal Justice Standards and Goals, 1973, ch. 13, The Defense,  
24 [http://www.nlada.org/Defender/Defender\\_Standards/Standards\\_For\\_The\\_Defense](http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense) (“NAC Standards”), at p. 9  
25 (standard 13.12); see generally American Bar Association (ABA), Eight Guidelines of Public Defense Related to  
26 Excessive Workloads, 2009,  
27 [http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_eight\\_guidelines\\_of\\_public\\_defense.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_eight_guidelines_of_public_defense.authcheckdam.pdf) (“ABA Eight Guidelines”).

28           <sup>28</sup> See State Bar Guidelines, at pp. 4-8, 35-37 (guidelines 1 and 10); ABA Eight Guidelines, at p. 5 (guideline 1);  
ABA Ten Principles, at p. 2 (principles 1 and 5); NAC Standards, at p. 7 (standard 13.8).

<sup>29</sup> See State Bar Guidelines, at p. 11 (guideline 2); ABA Ten Principles, at p. 3 (principle 7); NAC Standards, at p.5  
(standard 13.1).

<sup>30</sup> See State Bar Guidelines, at pp. 8-10 (guideline 2); ABA Ten Principles, at p. 2 (principle 4).

<sup>31</sup> See State Bar Guidelines, at pp. 11-13 (guideline 3); ABA Ten Principles, at p. 3 (principles 6 and 9); NAC  
Standards, at p. 12 (standard 13.16).

<sup>32</sup> See State Bar Guidelines, at pp. 8-9 (guideline 2); ABA Ten Principles, at p. 3 (principle 8).

<sup>33</sup> See State Bar Guidelines, at pp. 29-30, (guidelines 7 and 8); ABA Eight Guidelines, at p. 8 fn.24 (guideline 4);  
ABA Ten Principles, at p. 3 (principle 8); NAC Standards, at p. 10 (standard 13.14).

1 8. lack of parity with prosecutorial counterparts in violation of state and national  
2 standards;<sup>34</sup> and

3 9. lack of supervisory controls in violation of state and national standards.<sup>35</sup>

4 Fresno County's public defense system therefore does not satisfy minimal constitutional and  
5 statutory requirements.

6 **1. Public Defenders Carry Excessive Caseloads**

7 42. In 1973, under the direction of the U.S. Department of Justice, the NAC articulated  
8 the first and only national set of numerical caseload limits for indigent defense providers.<sup>36</sup>

9 According to NAC Standard 13.12: "The caseload of a public defender attorney should not  
10 exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding  
11 traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not  
12 more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per  
13 attorney per year: not more than 25."<sup>37</sup>

14 43. The U.S. Department of Justice has stated that the "NAC standards are an effective  
15 tool to help public defenders" determine what staffing resources are needed.<sup>38</sup> The California  
16 State Bar's workload guideline also recognizes the importance of adhering to a numerical  
17 caseload limit that takes into account "the amount of work (in time) that is required to bring a  
18 case to a conclusion" based on the jurisdiction and type of case.<sup>39</sup>

19 44. The NAC standards are true maxima, and, the American Bar Association has  
20 declared that the NAC numerical caseload standard "should in no event be exceeded."<sup>40</sup> In fact,

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22 \_\_\_\_\_  
23 <sup>34</sup> See State Bar Guidelines, at pp. 29, 32 (guidelines 8 and 9); ABA Ten Principles, at pp. 3 (principle 8); NAC  
Standards, at p. 9, 10-11 (standards 13.11 and 13.14).

24 <sup>35</sup> See State Bar Guidelines, at pp. 6, 13, 14, 16-17, 29, 39 (guidelines 1, 3, 4, 7 and 12 ); ABA Eight Guidelines, at  
pp. 6, 8 (guidelines 2 and 4); ABA Ten Principles, at p. 3 (principle 10); NAC Standards, at p. 8 (standard 13.9).

25 <sup>36</sup> National Advisory Commission (NAC), The Criminal Justice Standards and Goals, 1973, ch. 13, The Defense,  
[http://www.nlada.org/Defender/Defender\\_Standards/Standards\\_For\\_The\\_Defense](http://www.nlada.org/Defender/Defender_Standards/Standards_For_The_Defense) (NAC Standards), Standard 13.12,  
at pp. 9-10.

26 <sup>37</sup> *Id.*

27 <sup>38</sup> DOJ, at p. 8.

28 <sup>39</sup> State Bar Guidelines, at pp. 26-27.

<sup>40</sup> ABA Ten Principles, at p. 2 (principle 5).



1 there are a number of reasons to think that the NAC maxima may be too high, both generally and  
2 particularly as applied to Fresno County.

3 45. First, as the ABA and U.S. Department of Justice have noted, the NAC guidelines  
4 do not take full account of case complexity or of an attorney's non-representational duties,  
5 including administration and professional development.

6 46. Second, in recent years, experts in the field have suggested that the NAC standards  
7 are outdated and fail to account for the added complexities that have been infused into criminal  
8 defense practice over the last 40 years, including the introduction of sexually violent offender  
9 commitment proceedings, persistent offender or "three strikes" statutes, significant collateral  
10 consequences resulting from convictions, and a growing recognition of the unique nature of  
11 juvenile defense. Commentators have therefore argued that the NAC standards are themselves  
12 too high.<sup>41</sup>

13 47. Third, the NAC standards assume that attorneys have appropriate experience,  
14 adequate training and adequate investigative and administrative support. In jurisdictions like  
15 Fresno County, where those elements are almost wholly missing, the effective caseload that an  
16 attorney can handle must be substantially lower than the NAC's stated maxima.

17 48. While the Public Defender's Office's staffing has decreased, the County's  
18 population, the number of courts in the County, and the number of cases handled by the Public  
19 Defender's Office have generally increased, particularly in recent years. For example, Fresno  
20 County's proposed 2014-2015 budget stated that "[i]n the first seven months of FY 2013-2014  
21 the department's felony team experienced a 20% increase in the number of new case assignments  
22 in comparison to the same period of the prior fiscal year."<sup>42</sup> The misdemeanor department saw a  
23 15% increase in the same period.<sup>43</sup> Because the Office has not increased staffing to match this  
24 rising caseload, caseloads per attorney have skyrocketed to levels far in excess of any recognized

25 \_\_\_\_\_  
26 <sup>41</sup> Norman Lefstein, *Securing Reasonable Caseloads: Ethics and Law in Public Defense* (2011),  
[http://www.americanbar.org/content/dam/aba/publications/books/ls\\_sclaid\\_def\\_securing\\_reasonable\\_caseloads.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/publications/books/ls_sclaid_def_securing_reasonable_caseloads.authcheckdam.pdf), at pp. 43-48.

27 <sup>42</sup> 2014-15 Proposed Budget, County of Fresno,  
<http://www.co.fresno.ca.us/WorkArea/DownloadAsset.aspx?id=59240>, at pp. 48-49.

28 <sup>43</sup> *Id.* at p. 49.

1 standard. This seriously jeopardizes the constitutional rights of those the Office serves because  
2 an attorney with too many cases simply does not have enough time to do what the Constitution  
3 requires of her.

4 49. Indeed, Fresno County's caseloads far exceed those specified in the NAC  
5 standards, or for that matter, any numerical standards developed by other jurisdictions and  
6 professional organizations. Although in response to Public Records Act requests the County  
7 maintains that it does not have records that accurately reflect individual public defenders'  
8 caseloads, the Public Defender's board briefing report and staffing levels can be used to derive a  
9 conservative estimate of average caseload per felony and misdemeanor attorney.

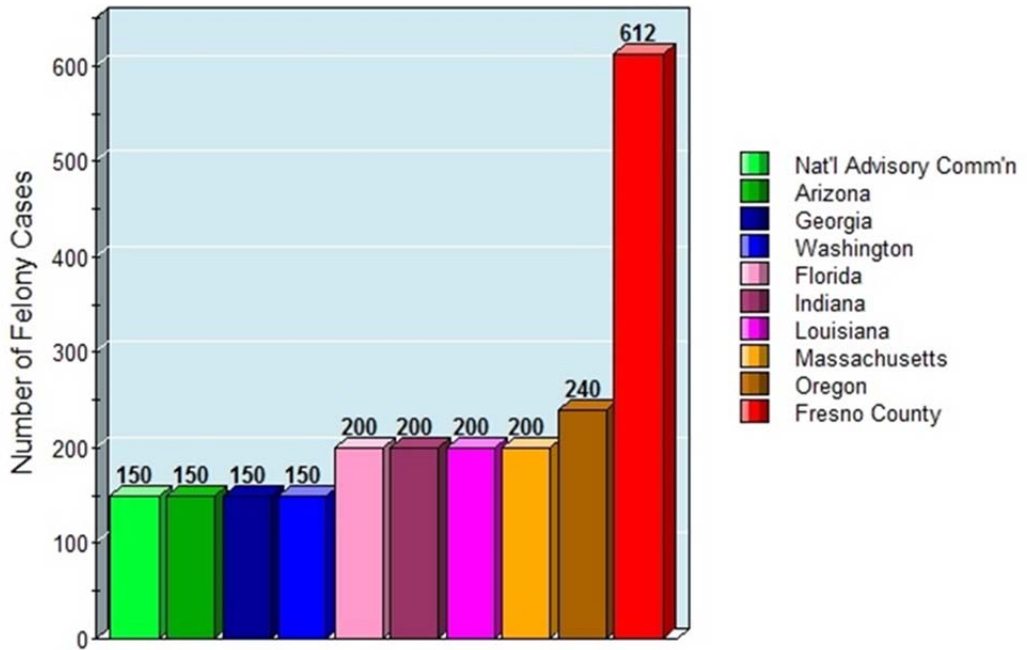
10 50. Dividing the number of cases opened and closed in fiscal year 2013-2014 by the  
11 number of attorneys employed by the Public Defender's Office as of December 2014 suggests  
12 that the average felony attorney in the Office handles 418 cases per year or 612 including cases  
13 for violations of supervised release conditions. These numbers are conservative estimates in that  
14 they do not include the time felony attorneys may spend handling their clients' misdemeanor  
15 cases. Also, the Office has approximately ten attorneys who handle only cases classified as major  
16 crimes; these attorneys tend to carry a lower caseload of 20 to 25 open cases at a time. Therefore,  
17 other felony attorneys carry substantially more than the average felony caseload calculated here.  
18 In any event, both the 418 and 612 cases a year stand in stark contrast to the NAC's 150 felony  
19 cases cap, which the DOJ and commentators have noted may be too high in the face of more  
20 complex cases and insufficient training.<sup>44</sup> Most, if not all, felony attorneys in the Fresno County  
21 Public Defender's Office therefore carry more open cases at any given time than the State Bar of  
22 California recommends a felony attorney handle in an entire year.

23 51. Not only do the Fresno County Public Defender's Office's average felony attorney  
24 caseload exceed these standards developed by other jurisdictions and professional organizations,  
25 they also far exceed the felony caseload caps of states that have established caseload limits.

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28 <sup>44</sup> DOJ, at p. 8.

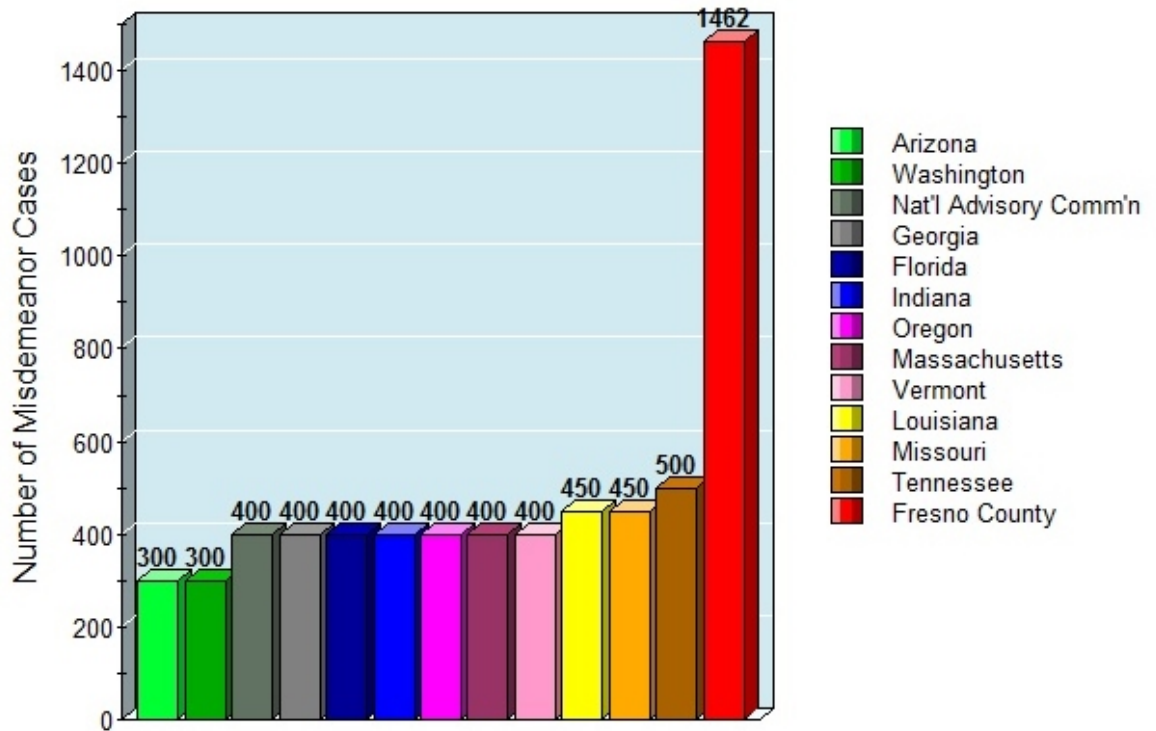
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## Average Annual Fresno Felony Attorney Caseloads vs. State Caps and National Standards



52. Fresno County Public Defender's caseloads for misdemeanor attorneys are equally, if not more, troubling. Using the same methodology described above, each misdemeanor attorney handles approximately 1,375 cases per year or 1,462 including cases for violation of supervised release conditions, which stands in stark contrast to the maximum 400 misdemeanors recommended by the National Advisory Commission.

**Average Annual Fresno Misdemeanor Attorney Caseloads  
vs. State Caps and National Standards**



53. Fresno County public defenders have recognized that these excessive caseloads prevent them from adequately representing clients. In September 2013, over 80% of the attorneys working in the Public Defender’s Office signed a letter with the Professional Association of Fresno County Employees (“PACE”) —the union that represents the Fresno County Public Defenders—protesting their working conditions and excessive caseloads. Ex. B. In the letter, the deputy public defenders specifically highlighted the excessive caseloads in the Public Defender’s Office, saying that “[a]ttorneys in this office are over-burdened with a staggering number of cases.” *Id.* at p. 1. The deputy public defenders warned that “all of the undersigned attorneys are hereby giving notice that we are at risk of being ineffective in representing our clients due to excessive caseloads” and added that “[w]e are asking that management address the issue of excessive caseloads immediately due to the severity of the situation and the imminent harm that could befall our clients[.]” *Id.* at p. 2.

1           54. Attorneys for the Public Defender face an insurmountable task in providing  
2 competent representation to their clients under these conditions. As discussed more fully below,  
3 excessive caseloads place enormous pressure on public defenders to secure plea agreements  
4 without engaging in motion practice, conducting an adequate factual investigation or exploring  
5 viable legal defenses. On the specific issue of motion practice, according to the Fresno Superior  
6 Court records, from January through June 2014, only 32 suppression (Penal Code § 1538.5)  
7 hearings were held in misdemeanor cases, and none were held in felony cases. Even if one  
8 assumes all the motions to suppress were filed by public defenders, then that would mean that  
9 during the referenced six-month period the Office filed motions to suppress in approximately  
10 1.8% of its open misdemeanor cases and *none* of its felony cases. This indicates that viable and  
11 winnable motions to suppress simply are not being filed. Because of the excessive caseloads,  
12 attorneys often do not have time to review their clients' files before representing them in court.  
13 They must proceed without adequate time to prepare a defense or encourage their clients to waive  
14 their rights to a speedy trial and hearing.

15           55. The violations of national caseload standards are exacerbated by turnover and  
16 inexperience. The Office faces extremely high turnover as new attorneys, who are given little  
17 training or guidance, leave in the face of impossible work conditions. Between 2010 and 2014  
18 the Public Defender's Office lost at least 50 attorneys, amounting to a turnover of almost the  
19 entire legal staff. As recently as June 5, 2015 the head of the Public Defender's Office stated in  
20 the annual report to the Board that "[t]he Department continues to struggle with high attorney  
21 attrition and is actively recruiting to fill vacancies."<sup>45</sup>

22           56. In the PACE letter, the public defenders wrote, "[w]e are discouraged and  
23 demoralized due to the decimation of staff, greatly increased caseload, lack of training, lack of  
24 mentoring, and refusal to promote anyone beyond [a mid-level attorney position] within the past  
25 five years." Ex. B, at p. 4. Notably, neither the management of the Public Defender's Office nor  
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27 <sup>45</sup> Public Defender Elizabeth Diaz Board Briefing Report, Public Defender FY 2014-15 Summary Report through  
28 April 30, 2015, Fresno County Board of Supervisors, June 5, 2015,  
<http://www.co.fresno.ca.us/WorkArea/DownloadAsset.aspx?id=64315>, at p. 2.

1 the Board responded to this letter, and shortly thereafter, the head of the Public Defender’s Office  
2 resigned.

3 **2. Indigent Defendants Are Deprived of Conflict-Free and Independent**  
4 **Representation**

5 57. When a lawyer has so many cases that she cannot fulfill her duties to her existing  
6 clients, that lawyer has an ethical obligation to not accept additional cases, or, if necessary, to  
7 withdraw from representing sufficient existing clients so that she can effectively represent the  
8 remainder. The United States Department of Justice recognizes that “[a] lawyer who has so much  
9 work, so many cases, so many other clients that she is materially limited in her ability to  
10 effectively represent another client has an impermissible personal conflict of interest and cannot  
11 assume responsibility for an additional client. Rules clearly establish that a lawyer cannot  
12 ethically accept another case or other work when she has so much work that accepting another  
13 case will preclude her from competently representing the new client or performing other ethical  
14 requirements . . . .”<sup>46</sup>

15 58. The Public Defender’s departmental policy, as set out in the 2009 Caseload  
16 Memorandum, Ex. C, prohibits or actively discourages individual public defenders from  
17 complying with their ethical obligations. The Caseload Memorandum states that the Public  
18 Defender’s Office will not declare unavailability due to concerns about the ability to provide  
19 effective representation in cases “where this department already has an on-going attorney-client  
20 relationship in an open case.” Ex. C, at p. 2. Put another way, the Department’s written policy  
21 effectively bars any attorney from withdrawing from an existing case, even in order to meet  
22 obligations to other existing clients, and even when doing so is ethically required.

23 59. Thus, the only way that an attorney in the Public Defender’s Office can address  
24 conflicts of resources between clients consistent with departmental policy is by refusing new  
25 clients. But the individual attorney is not free to make that decision on her own. Instead, the  
26 attorney must pursue the decision with her supervisor, and, if the remedy sought is a declaration  
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28 <sup>46</sup> DOJ, at p. 6.

1 of unavailability, that determination can be made “only by the Department Head or his designee.”  
2 *Id.* In short, a front line attorney, no matter how overburdened or under supported, can obtain  
3 permission to decline additional conflicted representations only by going through at least two  
4 layers of management to the very top of the Office. Conversely, the written policy does not  
5 recognize any affirmative responsibility on any senior lawyer to ensure that front line lawyers  
6 have appropriate caseloads and are in compliance with their ethical obligations.

7         60. In an office whose high turnover guarantees that virtually all front line lawyers  
8 will be junior, inexperienced, at-will employees, a policy which makes departmental compliance  
9 with basic ethical obligations hinge on the willingness of those employees to raise potentially  
10 explosive political issues on an individual basis and pursue them to the highest levels of the  
11 department is a policy that is designed to fail. The only safe way that deputy public defenders can  
12 express their concerns about excessive caseloads, the effect they are having on the attorneys’  
13 ability to adequately represent their clients, and the resulting conflicts of interest, is collectively.  
14 But when the deputy public defenders have banded together to do so, the County has ignored  
15 them. The 2013 PACE Letter to the Office’s management and the County Board of Supervisors  
16 explicitly stated that “all of the undersigned attorneys are hereby giving notice that we are at risk  
17 of being ineffective in representing our clients due to excessive caseloads . . . .” Ex. B, at p. 2.  
18 But the Office and the County never responded to that letter and has not addressed the caseload  
19 issue. In fact, the Public Defender’s Office routinely accepts case appointments even when no  
20 attorneys are available to work on the case.

21         61. These conflicts are compounded by the Public Defender’s lack of independence  
22 from the County Administrative Officer and the County Board of Supervisors. The County  
23 Administrative Officer has the power to suspend and remove the Public Defender from her  
24 position with prior approval of the Board of Supervisors. This structure creates a situation in  
25 which the Public Defender may reasonably fear that she will lose her job, or be otherwise  
26 disciplined, if she runs afoul of these County officials’ expectations and preferences. Indeed, by  
27 its very design, this structure makes the Public Defender beholden to these officials. Without  
28 independence from them, the Public Defender—like line attorneys—may reasonably fear

1 retribution and advocate with less zeal for the necessary funding to ensure that the Office reliably  
2 provides constitutionally adequate representation to each and every client.

3 **3. Fresno County’s Public Defense System Suffers From Lack Of**  
4 **Continuous Representation**

5 62. The Constitution “requires effective assistance at critical stages of a criminal  
6 proceeding, including pre-trial stages.” *Lafler v. Cooper*, 132 S. Ct. 1376, 1380-81 (2012).  
7 National and state standards advise that defendants should have continuous representation in  
8 order to ensure a defendant’s rights are preserved at all stages of the proceeding. The National  
9 Legal Aid and Defender Association (“NLADA”) Guidelines also require that “[d]efender offices  
10 should provide for continuous and uninterrupted representation of eligible clients[.]”<sup>47</sup>

11 63. The Public Defender’s Office’s staffing model and the excessive number of cases  
12 mean that Fresno County indigent defendants are often represented by different attorneys at each  
13 courtroom appearance. Furthermore, even when an attorney from the Office is assigned to a  
14 particular client’s case, the lack of a clearly articulated file management system and the excessive  
15 caseload the Office is handling mean that urgent issues in a client’s file may go unaddressed as  
16 the case goes from one attorney to another in otherwise routine circumstances. At times the  
17 shuffling of cases between public defenders results in little to no work being done on a case  
18 between court hearings.

19 **4. Inadequate Attorney-Client Contact and Confidential Communication**  
20 **Pervade Fresno County’s Public Defense System**

21 64. As a direct result of the Fresno County Public Defender’s Office’s excessive  
22 caseloads and severe understaffing, attorneys do not have the time necessary to meet and  
23 communicate with clients in an effective manner and in a confidential setting.

24 65. California law and the California Rules of Professional Conduct require all  
25 attorneys to keep clients reasonably informed about significant developments relating to the case.  
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27 <sup>47</sup> NLADA Guidelines for Legal Defense Systems in the United States, 1976,  
28 [http://www.nlada.org/Defender/Defender\\_Standards/Guidelines\\_For\\_Legal\\_Defense\\_Systems](http://www.nlada.org/Defender/Defender_Standards/Guidelines_For_Legal_Defense_Systems) (NLADA Guidelines),  
at 5.11 (“Continuity of Representation”).



1 Cal. Bus. & Prof. Code § 6068(m); California Rules Prof. Conduct 3-500. Also, national and  
2 state standards recognize that attorney-client contact and communication are essential elements of  
3 effective representation. For example, the NLADA Guidelines require that “[t]he defense  
4 attorney should frequently consult with his client so that the client fully understands the nature  
5 and scope of the legal representation which will be provided to him.”<sup>48</sup> Likewise, ABA Principle  
6 4 requires that “[d]efense counsel is provided sufficient time and a confidential space within  
7 which to meet with the client.”<sup>49</sup> In its commentary to Principle 4, the ABA adds that “[c]ounsel  
8 should have confidential access to the client for the full exchange of legal, procedural, and factual  
9 information between counsel and client.”<sup>50</sup>

10 66. Excessive caseloads restrict the ability of public defenders in Fresno County to  
11 have adequate contact and confidential communications with their clients. On days where they  
12 are assigned to represent clients at court hearings, misdemeanor attorneys see approximately 60 to  
13 80 clients a day. Felony attorneys may see 40 to 50 clients on their court days.

14 67. Public defenders do not have time to meet with their clients outside of court. On  
15 days where attorneys are not assigned to their usual courtroom, they are often temporarily  
16 reassigned to a different courtroom to cover for colleagues who are in trial or on sick leave.  
17 Attorney-client meetings must then take place in the evenings on weekdays or on weekends, if at  
18 all.

19 68. Fresno County Sheriff records indicate that from July 1, 2014 to March 3, 2015,  
20 approximately 79% of the Public Defender’s felony clients in pre-trial detention did not have a  
21 legal visit with staff from the Public Defender’s Office.

22 69. Because attorneys are often unable to meet with their clients before scheduled  
23 court hearings, much of the communication between public defenders and their clients occurs in  
24 the courthouse. This is a problem for two reasons: First, the lack of client-interview rooms  
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26 <sup>48</sup> NLADA Guidelines, at 5.10 (“Attorney, Client Relationships in a Defense System”).

27 <sup>49</sup> ABA, Ten Principles of a Public Defense Delivery System, 2002,  
[http://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/ls\\_sclaid\\_def\\_tenprinciplesbooklet.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/ls_sclaid_def_tenprinciplesbooklet.authcheckdam.pdf) (ABA Ten Principles), at p. 1.

28 <sup>50</sup> *Id.* at 2.

1 makes it difficult if not impossible for defenders to have confidential discussions with their in-  
2 custody clients. Second, pressure to move quickly through the daily calendar prevents attorneys  
3 from taking the necessary time to advise their clients.

4 70. Generally, members of the public, other defendants, the judge and even the district  
5 attorney can overhear conversations between public defenders and their clients. This prevents  
6 candid attorney-client communication. Alternatively, it forces the public defender and client to  
7 risk disclosure of privileged communications.

8 71. It is common practice for misdemeanor public defenders to “group advise” and  
9 plead out their clients who are charged with the same misdemeanor offense in unrelated cases. In  
10 these group advisements, a public defender gathers a group of anywhere from 3 to 15 clients into  
11 the hallway and explains the charge and the prosecutor’s offer. Individual clients are given little  
12 to no time to discuss the specific facts surrounding their charge with their attorney. As discussed  
13 below, they may *never* have discussed the facts of their case with anyone from the Public  
14 Defender’s Office. Based on that limited opportunity for consultation, the clients must decide  
15 whether to accept the prosecution’s plea offer. The plea form is reviewed in the same public  
16 setting. Clients who decide to waive their right to contest the charges against them then return to  
17 the courtroom in a group where the public defender represents all of them in a single hearing  
18 before the judge.

19 72. Thus, the problems in the Office are not only causing clients to be deprived of  
20 meaningful communication with their public defenders, but they also are making it so that the  
21 limited communications that clients are able to have with their attorneys often are not even  
22 private.

23 **5. Attorneys in the Fresno County Public Defender’s Office Receive**  
24 **Insufficient or No Training**

25 73. Federal and state standards recognize that public defenders must be appropriately  
26 trained so that they can adequately represent their clients. For example, ABA Principle 6 requires  
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1 that “[d]efense counsel’s ability, training, and experience match the complexity of the case.”<sup>51</sup> In  
2 its commentary to Principle 6, the ABA adds that “[c]ounsel should *never* be assigned a case that  
3 counsel lacks the experience or training to handle competently.”<sup>52</sup> (emphasis added). The State  
4 Bar Guidelines also emphasize that it is critical that attorneys work within their class, *i.e.*, within  
5 their experience level. The Guidelines state that “[c]ases must be assessed as to seriousness and  
6 complexity and only assigned to indigent defense providers who possess the requisite relevant  
7 experience, training and ability necessary for such matters.”<sup>53</sup> The minimal training for Fresno  
8 County Public Defenders creates a fundamental systemic problem in the Office and impedes  
9 attorneys’ ability to provide adequate representation to their clients.

10 74. The Fresno County Administrative Office assembled a public defender assessment  
11 panel in 2011. The panel reported that “the training program [in Fresno County] has been  
12 discontinued and the lack of training for the less experienced attorneys is evident in the  
13 courtroom.”<sup>54</sup> The panel also added that “[t]he Public Defender should have a comprehensive  
14 training program for all personnel” and that the Office has “dismantled the research and training  
15 programs . . . result[ing] in individual attorneys initiating continuing education efforts and  
16 seeking out information on an informal basis.”<sup>55</sup>

17 75. There is a problem in the Fresno County Public Defender’s Office with attorneys  
18 working out of their classification level. Deputy public defenders are classified into levels, with  
19 each successive level earning higher pay to compensate for the greater complexity in case  
20 assignments. The 2013 PACE letter sent by the Fresno County Public Defender union states that  
21 “every Level I and Level II attorney is working outside of their job specifications,” meaning  
22 attorneys are assigned cases beyond their experience or training. Ex. B, at p. 3. The letter further  
23 explains that Fresno County job specifications state that Level I attorneys may make court  
24 appearances in minor cases, but “most trial work is performed by higher level classes in the

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25 <sup>51</sup> ABA Ten Principles, at p. 3.

26 <sup>52</sup> *Id.*

27 <sup>53</sup> State Bar Guidelines, at p. 11.

28 <sup>54</sup> 2011 PD Assessment, at p. 7.

<sup>55</sup> *Id.* at pp. 3, 9.

1 defense attorney series.” *Id.* However, every Level I defense attorney is handling “an entire  
2 misdemeanor calendar including all the misdemeanor trials without any formal mentoring or  
3 training program.” *Id.* As explained in the letter, job specifications provide that Level II  
4 attorneys should be handling cases of “average difficulty,” but Level II defense attorneys are  
5 assigned much more serious felony cases, including life imprisonment cases, three strikes cases,  
6 and complex cases involving home invasion robberies, first degree burglaries, gang allegations,  
7 sex crimes, welfare fraud, check fraud, and worker’s compensation fraud, which can involve  
8 thousands of pages of discovery. *Id.* By contrast, Fresno County’s Level II District Attorneys are  
9 only allowed to work on misdemeanor cases. *Id.*

10 76. There is also a need for public defenders, especially in areas with large immigrant  
11 populations, to have adequate training as to the immigration consequences of various types of  
12 criminal convictions. The U.S. Supreme Court in *Padilla v. Kentucky*, 559 U.S. 356 (2010), held  
13 that the Sixth Amendment requires defense counsel to provide affirmative, competent advice to a  
14 non-citizen defendant regarding the immigration consequences of a guilty plea. Because of this, a  
15 public defender whose client is a non-citizen has a duty to advise her clients about how  
16 convictions may affect their legal status. This is particularly important in Fresno County, where  
17 immigrant communities constitute 22% of the population.

18 77. In the absence of training on the immigration consequences of their clients’  
19 pending charges, public defenders at worse advise their clients without considering this important  
20 client interest or at best advise their clients to seek advice regarding the immigration  
21 consequences elsewhere. One federal defender in San Diego representing former Fresno County  
22 public defender clients who are now facing illegal entry charges reports that they say that they  
23 were not advised about the immigration consequences of the charges they pled to in Fresno  
24 County.

25 **6. Loss Of Necessary Investigator Staffing Has Produced Inadequate**  
26 **Factual Investigation**

27 78. Criminal defense attorneys have a duty to investigate possible defenses. However,  
28 the Public Defender’s Office is not staffed to fulfill that constitutional obligation. In the 2013-

1 2014 fiscal year, the Office had 10 investigators for the approximately 42,382 cases that the  
2 Office handled—or one investigator for every 4,000 cases. The 2015-2016 budget approved by  
3 the Board only provides for 14 investigators.<sup>56</sup> Inevitably, this means that most cases cannot be  
4 adequately investigated.

5 79. The inadequate investigator staffing problem is well-known to the Office. In  
6 2011, the Assessment Panel warned that one of the Office’s weaknesses was the “[l]oss of high  
7 caliber investigative staff.”<sup>57</sup> Additionally, in 2013, the Sixth Amendment Center, a national  
8 right-to-counsel advocacy organization, wrote a letter to the Board expressing similar concerns.  
9 The Center stated that staff investigator positions in the Fresno County Public Defender’s Office  
10 have been “reduced to the point where most attorneys must conduct their own investigations.”<sup>58</sup>  
11 Because the Fresno County Public Defender’s Office lacks a sufficient number of investigators,  
12 attorneys forgo submitting an investigation request in order to not add to the investigators’  
13 excessive caseloads. Public defenders conducting their own investigations is practically  
14 impossible given the number of demands on their time. It is also ill-advised given the potential  
15 for them to become witnesses in their own cases. When public defenders do submit investigation  
16 requests, they experience delays in completing requests or are provided with the results of an  
17 incomplete investigation.

18 80. Furthermore, due to excessive caseloads and pressure to process cases quickly,  
19 Fresno County public defenders do not have time to conduct initial factual interviews with their  
20 clients. In many instances, clients plead to charges without any factual interview with anybody at  
21 the Public Defender’s Office. Also, delays in initial factual interviews with clients make it  
22 difficult for clients to recall specific facts that may aid in their defense and create an additional  
23 obstacle to contacting witnesses and conducting a thorough investigation.

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<sup>56</sup> 2015-16 Proposed Budget, County of Fresno, <http://www.co.fresno.ca.us/ViewDocument.aspx?id=64158>, p. 42.

27 <sup>57</sup> 2011 PD Assessment, at p. 13.

28 <sup>58</sup> Sixth Amendment Center Executive Director David Carroll, letter to Fresno County Board of Supervisors, Sept. 29, 2013.

1                   **7. The Number of Support Staff in the Fresno County Public Defender’s**  
2                   **Office is Grossly Deficient**

3           81. The Fresno County Public Defender’s Office also does not have the support staff  
4 necessary for general administrative tasks to support the Office. This leaves attorneys, who are  
5 already overburdened, to perform their own administrative tasks as well.

6           82. The Fresno Public Defender’s 2011 Assessment Panel found that “[t]he Public  
7 Defender does not have adequate staff to support their legal representation of defendants” and  
8 concluded that the Office must “[r]estore staff levels to right size for caseloads.”<sup>59</sup> The  
9 weaknesses that the Panel identified included the fact that “there is only one secretary who  
10 supports the fifty-six (56) attorneys in the office,” the “lack of sufficient legal secretarial staff . . .  
11 [and] paralegal staff to assist in white collar cases,” and the lack “of interpreters/staff conversant  
12 in appropriate languages.”<sup>60</sup>

13           83. The number of support staff has not improved significantly since the 2011 Panel  
14 Report. The Office currently has only two secretaries, five paralegals, one supervising and 17  
15 regular office assistants among its support staff.

16                   **8. The Public Defense System Suffers From Lack Of Parity With**  
17                   **Prosecutorial Counterparts**

18           84. According to the State Bar Guidelines, “[t]here should exist, at a minimum, parity  
19 between full-time indigent defense providers and full-time prosecutors in net-comparison.”<sup>61</sup>  
20 However, there is no parity between the resources provided to the Fresno County District  
21 Attorney’s Office and those provided to the County’s public defense system.

22           85. In the past, the County has had the “intent,” “to maintain [a Public Defender]  
23 attorney ratio of 2 for 3 or 66% with the District Attorney.”<sup>62</sup> However, near the end of the 2008-  
24 2009 fiscal year, the Board adopted a salary resolution that reduced the ratio to 61%.<sup>63</sup> Notably,

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26 <sup>59</sup> 2011 PD Assessment, at pp. 10, 15.

27 <sup>60</sup> 2011 PD Assessment, at pp. 10, 13.

28 <sup>61</sup> State Bar Guidelines, at p. 32.

<sup>62</sup> 2009-10 Proposed Budget, County of Fresno, <http://www.co.fresno.ca.us/ViewDocument.aspx?id=38025>, p. 301.

<sup>63</sup> *Id.* at p. 301.

1 the County's prior intended attorney ratio for the Public Defender to the District Attorney cannot  
2 take into account the Public Defender's actual proportion of the District Attorney's caseload since  
3 the County does not keep track of that data.

4 86. In the PACE letter, the Association stated that the Fresno County public defenders  
5 are "discouraged and demoralized" partly due to the "refusal to promote anyone beyond a Level  
6 II within the previous five years." Ex. B, at p. 4. The Association also listed several attorneys  
7 who were demoted as a result of budget restraints. *Id.*

8 87. The lack of parity with the District Attorney's Office means that Fresno County  
9 public defenders do not have the resources and the tools to meaningfully engage in the adversarial  
10 process. One result of this, and of the excessive caseloads, is that very few cases go to trial. For  
11 example, in the 2013-2014 fiscal year, the Office disposed of 31,283 cases and only took 60 cases  
12 to trial. This means Fresno County public defender clients were able to exercise their right to trial  
13 in only 0.19% of the cases. In contrast, in California 2.29% of felony and 1.02% of misdemeanor  
14 cases are disposed by trial.<sup>64</sup> And in the 75 largest urban counties in the country 3% of felony  
15 cases are disposed by trial.<sup>65</sup> The Public Defender's inability to credibly threaten to take cases to  
16 trial means that clients are routinely forced to accept pleas that do not reflect the merits of their  
17 cases.

18 88. Even when Fresno County public defenders take cases to trial, excessive  
19 caseloads, inadequate resources and training mean that they often are not adequately prepared.  
20 For example, one misdemeanor public defender has noted that because the regular work day was  
21 filled with court hearings and administrative work, he once had only five hours to prepare for trial  
22 in a client's case where a possible consequence was his client's placement on the state's sex-  
23 offender registry. And a former Fresno County public defender reports that because he frequently  
24 spent every workday representing clients at hearings in court, he often had to prepare for trial on  
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27 <sup>64</sup> 2014 Court Statistics Report Statewide Caseload Trends 2003-2004 Through 2012-2013, Judicial Council of  
California, <http://www.courts.ca.gov/documents/2014-Court-Statistics-Report.pdf>, at pp. 116, 120, 124.

28 <sup>65</sup> Felony Defendants in Large Urban Counties, 2009 – Statistical Tables, U.S. Dep't of Justice, Dec. 2013,  
<http://www.bjs.gov/content/pub/pdf/fdluc09.pdf>, at p. 24.

1 weekends. As a result, he would have to take clients' cases to trial without having finished legal  
2 research that was important to his client's defense.

3 89. Because Fresno County's public defense system is not capable of putting the  
4 prosecution's case to meaningful adversarial testing, courts cannot ensure that their decisions,  
5 judgments, verdicts and punishments are rendered fairly and accurately.

6 90. Even the Fresno County District Attorney, Lisa Smittcamp, has decried the  
7 inadequate funding of the Fresno County Public Defender's Office and recognized the systemic  
8 problems that such underfunding creates. Smittcamp repeatedly has advocated for more money  
9 for the Public Defender, saying that if the Public Defender is underfunded, it bogs down the entire  
10 judicial system. Smittcamp has described Fresno County public defenders as "overworked and  
11 overstressed."

12 **9. Defendants Are Failing to Monitor and Supervise Fresno County's**  
13 **Public Defense System To Ensure Compliance With Minimal**  
14 **Constitutional And Statutory Requirements**

15 91. California Rules of Professional Conduct 3-110 requires managing attorneys "to  
16 supervise the work of subordinate attorney and non-attorney employees or agents." Additionally,  
17 Rule 1-120 prohibits assisting in, soliciting, or inducing any violation of the Rules. These ethical  
18 rules mandate the management of the Public Defender's Office to supervise its attorneys and take  
19 reasonable steps to ensure that attorneys in the Office are in compliance with their individual  
20 professional obligations of competence, loyalty and confidentiality.

21 92. The Fresno County Public Defender's Office is violating these rules by, among  
22 other things, failing to monitor the workloads of line lawyers to ensure that they are appropriate,  
23 assigning excessive workloads, and failing to take reasonable remedial measures to address the  
24 consequences of excessive caseloads. These failures create an obvious and continuous risk that  
25 those attorneys will breach their ethical duties to their clients.



1           93.     In the County’s 2011 assessment of the Office, a “critical issue” identified for  
2 management was the “lack of supervision and supervisory tools.”<sup>66</sup>

3           94.     Management in the Office is understaffed. Five attorneys manage the Office’s  
4 other 55 attorneys, 11 investigators, and other support staff. Given the inadequate staffing of  
5 deputy public defenders who carry excessive caseloads, management is preoccupied with  
6 ensuring that a public defender is physically present at court hearings for the more than 20,000  
7 indigent defendants the Office represents. Even when the Office had 66 attorneys, the Public  
8 Defender “anticipate[d] significant problems in providing daily replacements for attorneys who  
9 are unavailable due to trials, vacations, mandatory furloughs and illness.”<sup>67</sup>

10          95.     Because of the time it takes to ensure physical coverage of the courtrooms and to  
11 do administrative work, attorneys in management positions have little time to monitor, evaluate  
12 and ensure the quality of representation satisfies minimal constitutional and statutory standards.  
13 Supervisors do not have time to do courtroom observations of the attorneys they supervise. The  
14 County’s 2011 assessment of the Public Defender’s Office noted that “many judges” were  
15 concerned “that there is a lack of courtroom observation and/or supervision of attorneys by their  
16 supervisors.”<sup>68</sup> Formal attorney evaluations and feedback on attorney performance are rare.

17          96.     The Fresno County Public Defender, in the 2009 Caseload Memorandum, directly  
18 acknowledged the responsibility to not accept more case appointments than the Office can  
19 competently handle. However, the Office has violated its ethical duties by failing to take active  
20 steps to monitor attorney workload. Indeed, in response to a Public Records Act request, the  
21 County could not even produce an estimate of the number of cases per defense attorney.

22          97.     The Office has further violated its ethical duties by failing to take reasonable  
23 remedial action. For example, the 2013 PACE Letter put management on notice of the very high  
24 risk of ethical and legal violations caused by excessive caseloads and workloads and requested  
25 “that management address the issue of excessive caseloads immediately due to the severity of the  
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27 <sup>66</sup> 2011 PD Assessment, at p. 9.

28 <sup>67</sup> 2009-10 Proposed Budget, County of Fresno, <http://www.co.fresno.ca.us/ViewDocument.aspx?id=38025>, p. 302.

<sup>68</sup> 2011 PD Assessment, at p. 7.

1 situation and the imminent harm that could befall our clients.” Ex. B, at p.2. However,  
2 management took no steps whatsoever to address the excessive workload. In fact, neither the  
3 Public Defender’s Office nor the Board ever responded to the letter.

4 **D. Impact of the Public Defense Crisis on Indigent Criminal Defendants**

5 98. As a result of these systemic flaws, public defenders are not able to perform even  
6 the most basic tasks necessary to provide adequate representation to their clients. They do not  
7 and cannot act as an adversarial check on the prosecutor in criminal cases. Indigent criminal  
8 defendants in Fresno County therefore regularly experience: wrongful conviction of crimes;  
9 unnecessary or prolonged pre-trial detention; guilty pleas to inappropriate charges; waiver of  
10 meritorious defenses; compelled waiver of their rights to a speedy trial and hearing; guilty pleas  
11 taken without adequate knowledge and awareness of the full, collateral consequences of the pleas;  
12 harsher sentences than the facts of the case warrant and few alternatives to incarceration; and  
13 waiver of the right to appeal and other post-conviction rights.

14 99. For example, Plaintiff Peter Yepez is a former Fresno County Public Defender  
15 client and has suffered harm as a result of deficiencies in the County’s public defense system. In  
16 Mr. Yepez’s case a factual investigation was not completed in a timely manner, he was not able to  
17 exercise his right to a speedy preliminary hearing and trial, and he felt pressure to and in fact did  
18 plead to charges of which he appears to be innocent.

19 100. In October 2013, Mr. Yepez was charged with residential burglary, possession of  
20 stolen property, both felonies, after he allegedly stole some property from a home; he was also  
21 charged with possession of less than one ounce of marijuana, an infraction. At arraignment the  
22 Fresno County Public Defender was appointed to represent Mr. Yepez. From that time until his  
23 sentencing hearing in January 2015, Mr. Yepez was represented by nine different Fresno County  
24 deputy public defenders, who repeatedly told him they did not have time to work on his case.

25 101. The public defenders assigned to represent him at the pre-trial hearings primarily  
26 communicated with him at court in a public setting. They only had time to explain what was  
27 going on in his case and to tell him the date for the next scheduled hearing. A public defender did  
28 not conduct an initial factual interview with Mr. Yepez until September 16, 2014 at the Fresno

1 County jail, nearly a year after he had been arrested and charged and the Public Defender  
2 appointed to represent him. By that time, Mr. Yopez had difficulty remembering the details of the  
3 circumstances surrounding the charges against him. This was his only jail visit from staff at the  
4 Public Defender's Office.

5 102. Mr. Yopez's case experienced many delays. At his arraignment on October 30,  
6 2013 and his pre-preliminary hearing on July 30, 2014, the public defender entered general time  
7 waivers. On July 30, 2014, the judge, noting the long delay in the case, granted Mr. Yopez's oral  
8 motion for pretrial release, after his public defender refused to ask the judge on his behalf.

9 103. On July 22, 2014, the prosecution filed an amended complaint, alleging that a  
10 victim was present in the residence at the time of the burglary. This increased the scheduled bail  
11 for the charge and increased the charge to a violent felony under Penal Code § 667.5(c)(21),  
12 meaning that Mr. Yopez would have to serve 85% of a potential six-year prison term for that  
13 offense, rather than 50% of that term. This amended complaint did not specify who was present  
14 in the residence during the burglary and the police report clearly indicated that nobody was  
15 present (the complaining witness was in a *detached* garage; nobody else was home). A public  
16 defender, who had not previously appeared in the case, failed to oppose the amendment or point  
17 out that nothing in the police report or any other documents before the court showed probable  
18 cause to hold Mr. Yopez on this enhancement.

19 104. On September 10, 2014, nearly a year after the initial complaint and nearly two  
20 months after the amended complaint, the public defender requested a continuance to September  
21 18 to conduct investigation. Mr. Yopez was in custody at the time. On September 18, the  
22 defense again requested a continuance.

23 105. On September 29, Mr. Yopez pled no contest to all of the charges in the amended  
24 complaint. His plea form specifies that he was admitting the person-present burglary  
25 enhancement; the space on the form where the factual basis for the plea is to be indicated simply  
26 reads "*People v. West.*" Throughout the process, his public defenders advised him to plead guilty,  
27 although Mr. Yopez insisted that he was innocent and the police report indicates that there is no  
28

1 basis in fact for the violent-felony enhancement of the burglary charge. Nobody discussed the  
2 factual basis for, or the consequences of, this enhancement with him.

3 106. After Mr. Yepez entered his no contest pleas, but before his November 10, 2014  
4 sentencing, California voters approved Proposition 47, which reduced the crime of possession of  
5 stolen property, Penal Code § 496(a), to a misdemeanor if the value of the property does not  
6 exceed \$950 in value. This reduction applied to pending cases. Although the police report  
7 valued the property at exactly \$950, there was no discussion of this fact at the sentencing hearing  
8 and no reduction of the offense to a misdemeanor.

9 107. In addition to Mr. Yepez, other public defender clients have been impacted by the  
10 system-wide deficiencies in the County's public defense system.

11 108. For example, one public-defender client pled to a charge although the case against  
12 him was based on evidence likely obtained in violation of the Fourth Amendment. Prior to the  
13 arrest, the police officer searched the defendant simply because he was wearing baggy pants.  
14 This issue went unnoticed by the public defender initially assigned to the case until a colleague  
15 identified it and filed a motion to suppress. After the suppression hearing was continued due to a  
16 routine delay, a new public defender assigned to the case pled the client out notwithstanding the  
17 pending motion to suppress.

18 109. Vincent Apodaca is another public-defender client who pled to a charge based on  
19 evidence likely obtained in violation of the Fourth Amendment. According to the police report,  
20 on October 30, 2014, a Fresno police detective who was a member of the law enforcement team  
21 targeting gangs stopped Mr. Apodaca, "a hispanic male riding a bicycle" for "weaving in and out  
22 of heavy moving traffic," in violation of Vehicle Code § 21202(a) (not riding as close as  
23 practicable to the right hand curb). Although Mr. Apodaca cooperated with the police by  
24 informing them he had a knife in his pocket and allowing the detective to hold it during the stop,  
25 the detective initiated a pat-down search of Mr. Apodaca because Mr. Apodaca "appeared  
26 nervous" and the detective believed that "it is not uncommon for a subject to possess more than  
27 one weapons [sic] at a time." The police report states that this search resulted in the detective  
28 finding a handgun in Mr. Apodaca's pocket. On November 3, 2014, Mr. Apodaca was charged

1 with two felonies – possession of a firearm by a felon under Penal Code § 29800(a)(1) and  
2 concealed firearm in a vehicle under Penal Code § 25400(a)(1). Notably, the latter charge was  
3 not supported by facts in the police report, which indicates the gun was concealed on Mr.  
4 Apodaca himself, in his pocket, and not in a vehicle. On November 4, the Public Defender was  
5 appointed to represent Mr. Apodaca at his arraignment. At the pre-preliminary hearing on  
6 November 10, the defense requested a continuance to discuss the case with Mr. Apodaca, which  
7 was granted, and the defense entered a general time waiver. At the pre-preliminary hearing on  
8 November 17, the defense requested a continuance to consider the prosecution’s plea offer and  
9 the defense waived time to December 8, 2014 plus ten court days. Without the public defender  
10 filing a motion to suppress the gun, on November 24, 2014, Mr. Apodaca pled no contest to the  
11 possession of firearm by a felon charge. The concealed firearm in a vehicle charge, which was  
12 not supported by the facts in the police report, was dismissed as a result of the plea negotiation.  
13 Mr. Apodaca was sentenced to one year and four months in state prison.

14 110. Another public-defender client pled to a charge although it should have been  
15 dismissed due to the violation of his right to a speedy trial. This defendant was in pre-trial  
16 detention while awaiting adjudication of a misdemeanor driving under the influence charge.  
17 Because of delays in the process, the client’s speedy trial rights had been violated such that the  
18 charge should have been dismissed under *Serna v. Superior Court*, 40 Cal. 3d 239 (1985). The  
19 public defender assigned to the case had it temporarily transferred to another public defender’s  
20 misdemeanor courtroom for the speedy trial motion to be filed and heard. Because of the Office’s  
21 excessive caseloads, the motion was not filed or heard at the moment the case was transferred,  
22 resulting in the client having to spend another month in jail to wait for the motion to be heard.  
23 The client ultimately pled guilty because he wanted to get out of jail notwithstanding the  
24 winnable pending speedy trial motion.

25 111. Another public-defender client was charged with a single felony count and  
26 arraigned on February 27, 2014. The same day the defense waived the 10-day statutory time for a  
27 preliminary hearing such that the case was continued to April 1, 2014 plus 15 court days. The  
28 public defender requested and was granted subsequent continuances on April 1 for further

1 investigation and on April 22 such that the preliminary hearing was not scheduled until May 27.  
2 At the preliminary hearing on June 19, 2014, the defense requested another continuance for  
3 investigation and waived time until July 17, 2014 plus 10 court days. After the conclusion of the  
4 preliminary hearing, the defense requested and was granted 3 additional continuances “for  
5 assessment” and “to receive assessment” until the client finally pled to the charge on September  
6 3, 2014 and was later sentenced to four years in state prison. Five different public defenders  
7 represented the client throughout this time period and his motion to remove the Public Defender’s  
8 Office from his case was denied. The client remained in pre-trial custody during this entire  
9 period.

10 112. Another public-defender client remained in custody while his case was continued  
11 for at least 92 days simply because no one from the Public Defender’s Office was available to be  
12 assigned to his case. On February 13, 2014, the defendant was charged with two felonies.  
13 Although the preliminary hearing was initially set on March 24, 2014, within the statutory time,  
14 at the pre-preliminary hearing on March 17 the defense entered a general time waiver and the  
15 March 24 preliminary hearing date was vacated. The pre-preliminary hearing was repeatedly  
16 continued and on October 8, 2014, the public defender explained to the judge that no one from the  
17 Office was currently assigned to the case: “There is still no attorney assigned to [the defendant’s]  
18 caseload [sic], and I’m going to request to put the matter out to January 14th.” The court granted  
19 the request. On January 14, the defendant accepted a plea offer under which he pled guilty to two  
20 misdemeanor counts and received 180 days credit for time served in custody while awaiting  
21 adjudication of this case.

22 **V. PLAINTIFFS ARE ENTITLED TO EQUITABLE RELIEF**

23 113. The deficiencies in Fresno County’s public defense are systemic and continue to  
24 result in the denial of indigent defendants’ right to counsel under the U.S. and California  
25 Constitutions and California law applying to criminal proceedings. There is an ongoing  
26 controversy between the parties.



1 The Sixth Amendment to the U.S. Constitution provides, “In all criminal prosecutions, the  
2 accused shall enjoy the right ... to have the Assistance of Counsel for his defence.”

3 Defendants have failed to ensure that all indigent criminal defendants receive meaningful  
4 and effective legal representation at all critical stages of the criminal proceedings against them.

5 Defendants are violating indigent defendants’ right to counsel and due process of law  
6 provided in the Sixth Amendment to the United States Constitution, as applied to the States by  
7 the Fourteenth Amendment.

8  
9 **COUNT TWO**  
10 **Violation of the Constitutional Right to Counsel**  
11 **Article I, § 15 of the California Constitution**  
12 **(All Plaintiffs against All Defendants)**

13 Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully  
14 set forth herein.

15 Article I, § 15 of the California Constitution provides, “The defendant in a criminal cause  
16 has the right ... to have the assistance of counsel for the defendant’s defense[.]”

17 Defendants are violating indigent defendants’ right to counsel provided in Article I, § 15  
18 of the California Constitution.

19  
20 **COUNT THREE**  
21 **Violation of the Constitutional Right to Due Process**  
22 **Fourteenth Amendment to the United States Constitution**  
23 **(All Plaintiffs against All Defendants)**

24 Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully  
25 set forth herein.

26 The Fourteenth Amendment to the U.S. Constitution provides that the State shall not  
27 “deprive any person of life, liberty, or property, without due process of law; nor deny to any  
28 person within its jurisdiction the equal protection of the laws.”



1 Defendants are violating indigent defendants’ right to due process provided in the Due  
2 Process Clause of the Fourteenth Amendment to the United States Constitution.

3  
4 **COUNT FOUR**  
5 **Violation of the Constitutional Right to Due Process**  
6 **Article I, § 15 of the California Constitution**  
7 **(All Plaintiffs against All Defendants)**

8 Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully  
9 set forth herein.

10 Article I, § 15 of the California Constitution provides, “Persons may not ... be deprived of  
11 life, liberty, or property without due process of law.”

12 Defendants are violating indigent defendants’ right to due process provided in Article I,  
13 § 15 of the California Constitution.

14  
15 **COUNT FIVE**  
16 **Violation of Statutory Right to Counsel**  
17 **California Penal Code § 987**  
18 **(All Plaintiffs against All Defendants)**

19 Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully  
20 set forth herein.

21 Section 987 of the California Penal Code provides that all defendants—regardless of their  
22 financial means—are entitled to counsel.

23 Defendants are violating defendants’ statutory right to counsel provided in Section 987 of  
24 the California Penal Code.

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**COUNT SIX**  
**Violation of the Constitutional Right to a Speedy Trial**  
**Article I, § 15 of the California Constitution**  
**(All Plaintiffs against All Defendants)**

Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully set forth herein.

Article I, § 15 of the California Constitution provides, “The defendant in a criminal cause has the right to a speedy public trial[.]”

Defendants are violating indigent defendants’ right to a speedy trial provided in Article I, § 15 of the California Constitution.

**COUNT SEVEN**  
**Violation of Statutory Right to Speedy Trial**  
**California Penal Code § 1382**  
**(All Plaintiffs against All Defendants)**

Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully set forth herein.

Section 1382(a)(2) of the California Penal Code requires that defendants charged with felonies be brought to trial within 60 days of their arraignment unless the defendant voluntarily and knowingly waives the 60-day trial requirement.

Section 1382(a)(3) of the California Penal Code requires that defendants charged with a misdemeanor or infraction be brought to trial within 30 days if the defendant remains in state custody and 45 days if the defendant is not in custody unless the defendant voluntarily and knowingly waives the requirement.

Defendants are violating indigent defendants’ statutory right to a speedy trial provided in § 1382 of the California Penal Code.

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**COUNT EIGHT**  
**Violation of Statutory Right to a Speedy Preliminary Hearing**  
**California Penal Code § 859b**  
**(All Plaintiffs against All Defendants)**

Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully set forth herein.

California Penal Code § 859b provides that a preliminary examination must be held “within 10 court days of the date the defendant is arraigned or pleads, whichever occurs later, or within 10 court days of the date criminal proceedings are reinstated” unless the defendant and the people “waive that right or good cause for a continuance is found as provided for in Section 1050[.]”

Defendants are violating indigent defendants’ statutory right to a speedy preliminary hearing provided in § 859b of the California Penal Code.

**COUNT NINE**  
**Taxpayer Action to Prevent Illegal Expenditure of Funds**  
**Cal. Civ. Proc. Code § 526a**  
**(Plaintiffs Phillips and Estrada against All Defendants)**

Plaintiffs incorporate by reference the allegations of the above paragraphs as though fully set forth herein.

Defendant Fresno County is illegally expending public funds by operating Fresno County’s indigent defense system in a manner that does not comply with state and federal law.

Defendants State of California and Governor of California are illegally expending public funds by failing to ensure Fresno County’s indigent defense system complies with state and federal law.

**PRAYER FOR RELIEF**

WHEREFORE, the Plaintiffs pray for relief as follows:

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1. Declare that Defendants are responsible for ensuring that indigent persons accused of crimes in Fresno County receive competent counsel with the opportunity and resources necessary to contest the criminal charges in a meaningful way as required by the federal and state constitutions and state statutes.

2. Declare that Defendants are depriving indigent defendants of their right to counsel provided in the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 15 of the California Constitution, and California Penal Code § 987;

3. Declare that Defendants are depriving indigent defendants of their right to a speedy trial provided in Article I, § 15 of the California Constitution, and California Penal Code § 1382;

4. Declare that Defendants are depriving indigent defendants of their right to a speedy preliminary hearing provided in California Penal Code § 859b;

5. Declare that Defendants are depriving indigent defendants of their right to due process provided in the Fourteenth Amendment to the United States Constitution and Article I, § 15 of the California Constitution;


6. Grant injunctive and mandamus relief restraining Defendants from violating the Sixth and Fourteenth Amendments to the United States Constitution, Article I, § 15 of the California Constitution, and California state laws in the provision of indigent defense services in Fresno County, and requiring them to take specific steps to comply with these provisions;

7. Order Defendants to pay Plaintiffs’ attorneys’ fees and costs under California Civil Procedure Code § 1021.5, 42 U.S.C. § 1988, and any other applicable statutes; and

8. Grant Plaintiffs any further relief as the Court deems just and proper.

Respectfully submitted,

DATED: July 13, 2015

  
\_\_\_\_\_  
Novella Y. Coleman  
Attorney for Plaintiffs

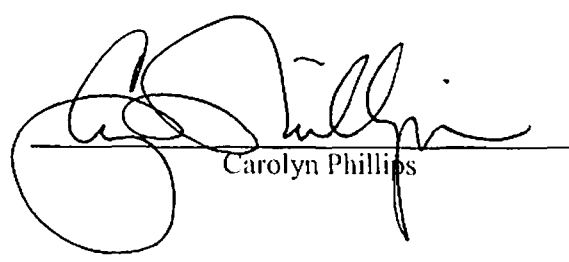
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VERIFICATION

I, Carolyn Phillips, have read this Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief in the matter of *Phillips v. State of California*. I am informed, and do believe, that the matters herein are true. On that ground I allege that the matters stated herein are true. In addition, the facts within paragraphs 14 through 16 are within my own personal knowledge, and I know them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: July 11, 2015



Carolyn Phillips

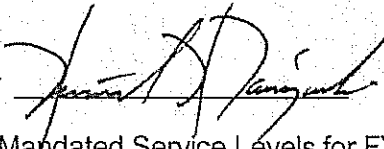
# **EXHIBIT A**



Agenda Date: \_\_\_\_\_

## Board Briefing Report

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DATE: January 23, 2009  
TO: Board of Supervisors  
FROM: Kenneth Taniguchi, Public Defender   
SUBJECT: Public Defender Budget Status and Mandated Service Levels for FY 2008-09

### EXECUTIVE SUMMARY

The purpose of this Board Briefing Report is to provide information regarding the Public Defender's status in meeting its FY 2008-09 Adjusted Budget of \$14,634,725 and in meeting its mandated service levels. As of December 31, 2008, the Department has expended \$6,964,958. By the end of the current fiscal year, the Department projects an increase in net County cost of \$665,000.

The expected increase in net County cost includes a total year-to-date annual leave payout of \$75,000 and a decrease in estimated revenues of \$65,000. It is unknown if the Department will incur additional annual leave payouts for the remainder of the fiscal year. The Department plans to come to your Board at a later date to request a transfer of funds from the Annual Leave Designation. The decrease in estimated revenues is primarily due to lower than expected court ordered attorney fees, and an over accrual of the FY 2007-08 DUI Grant revenue.

On August 26, 2008, the Board approved a \$3.2 million budget reduction to meet a shortfall in Foster Care resulting in a \$324,728 reduction in the Public Defender's current year budget. It is predominately this additional budget reduction and a lack of attrition within the Department that has caused the current projected shortfall.

Fresno County is statutorily and constitutionally mandated to provide representation to indigents charged with criminal offenses and in certain other statutorily defined cases. The Board was informed in the August 26, 2008, budget reduction agenda item that any further cuts in personnel would result in the inability of the Public Defender to staff all courts and fulfill 100% of its mandated functions. In the current fiscal year, the Department has suffered a reduction of six attorney positions, an investigator position, and an office assistant position.

### HISTORY/STATUS

The Public Defenders Office has a long history of doing more with less. However, there are limits as to what can be accomplished when staffing levels are so severely cut that basic mandated service levels cannot be met. The budget process for the current fiscal year resulted in the elimination of four defense attorney positions and one investigator position. The loss of these positions placed a severe strain on the Department and substantially jeopardized the Department's ability to fulfill 100% of its mandated services. Then, on August 26, 2008, the Board approved a \$324,728 budget reduction for the Department, as it's pro rata share of the \$3.2 million allocation reduction to meet the shortfall in Foster Care. This budget reduction resulted in the elimination of an additional two defense attorney positions and one office assistant position. Thus, within the last six months, the Department has lost a total of eight positions which calculates to six percent of its workforce.

AS stated in the Executive Summary, Fresno County is statutorily and constitutionally mandated to provide representation to indigents charged with criminal offenses and in certain other statutorily defined cases. Implicit within and legally required by these mandates is that each individual who is appointed counsel is entitled under the law to competent and effective legal representation. In fulfilling these mandates, the challenge for the Department is twofold. First, to provide competent and effective representation on each case and for each individual for which the Public Defender is appointed. And, second, to staff or service all of the various courtrooms and calendars within Fresno County. This not only requires a trained staff of competent attorneys, but also a *sufficient number* of staff attorneys. Without a sufficient number of staff it is not only impossible to maintain the controllable workload levels per attorney necessary to meet the legally required level of competent representation, but it is also impossible to meet the demands of the Superior Court for the necessary staffing of all of the various courtrooms throughout Fresno County. Currently, the caseload level for each full-time staff attorney in the Department far exceeds the American Bar Association standards and only grows each time an attorney position is deleted.

Consequently, without sufficient staff the Public Defender is legally forced to decline appointment on a certain number of new cases.<sup>1</sup> Even though the Public Defender becomes unavailable to accept appointment, Fresno County's obligation to provide indigent defense counsel remains. Thus, the County must either provide outside counsel at additional cost or the Courts will appoint private counsel at the County's expense. Either way, the cost unavoidably falls upon the County. It makes fiscal and practical sense for the Board to remain in full control of these costs by insuring that the Public Defender is sufficiently staffed to be able to accept all case appointments. Otherwise, the County will spend more money; have less control, less quality assurance, and do so at a level of uncertainty that makes it impractical to manage.

It is also important to note that the progress made by the Department since 2006 in helping to alleviate jail overcrowding has essentially come to a halt due to the continued reduction of attorney positions. In October 2006, the Board made a determination that pre-trial detainees were the major contributing factor to jail overcrowding. In order to process this segment of the jail population more efficiently, and with less delay, the Board added positions to all of the Justice Departments – the Public Defender, the District Attorney, and Probation. However, with successive budget reductions and fewer attorney positions over the last two fiscal years, this plan for reducing jail overcrowding has been rendered ineffective.

### STATUS OF ACTION PLAN

The Department has implemented creative management techniques and restructured several internal operations. The dedicated attorney staff has frequently worked in excess of a 40-hour work week (without additional compensation) and has allowed the Department to continue to meet its goal of covering 100% of its mandated services. However, any further reduction of staff, or the use of hiring controls to limit the Department's ability to fill its vacancies as they arise, places the Department in peril of being unable to meet this

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<sup>1</sup> Federal law and The State Bar of California legally compel the Public Defender to seek the appropriate amount of resources from the Board in order to fulfill the Department's mandated functions. If those resources are not forthcoming, the Public Defender is legally compelled to refuse to accept that portion of cases that the Department is unable to adequately represent due to understaffing. This duty is summarized in The State Bar of California's *Guidelines on Indigent Defense Services Delivery Systems (2006)*, as follows:

Should a Chief Defender determine that the combination of the existing and incoming workload exceeds the capacity of institutional defender employees (all of them not only lawyers) to provide necessary services in a competent fashion in a timely manner and without unduly risking the health of the defender workforce, it is incumbent upon such a Chief Defender to secure the additional resources necessary or to refuse to accept that portion of the incoming workload that exceeds the capacity of the defender program. Failure of a Chief Defender to effectively address workloads may result in personal liability for an adverse civil judgment and jeopardize the right of the Chief Defender to practice law in any capacity.

[See *Miranda v. Clark County, Nevada* (2003), 319 F.3d 465, 471 C.A. 9 (Nev.); *In Re Matter of Robert Pinto Public Defender San Benito County* (California State Bar Court Case No. 93-0-10027); *California Business & Professions Code* § 6086.7(a)(2).]



service goal. A recent situation illustrates just one of the Department's ongoing efforts to cope with less staff and still meet its mandated service levels. Soon after the budget reduction of \$324,728 was approved, the Public Defender was prepared to declare the unavailability to staff the Kerman Court and to defend Kerman felony cases. However, a declaration of unavailability was avoided by working with the Superior Court to consolidate the entire misdemeanor-felony Kerman calendar into Firebaugh, thus avoiding the necessity of having the County pay for outside counsel to handle the Kerman cases.

The courts have not remained stagnant in their demands for Public Defender services. For example, in June 2008, the Superior Court opened the Adult Behavioral Health Court. To date, the Department has been able to staff this court but it is becoming increasingly difficult. In addition, the Superior Court continues to place higher demands on the services of the Public Defender in order to solve its own workload problems. In April 2008, the Superior Court expanded its Home Court model. Home courts are where the bulk of all Fresno felony cases are handled, pretrial. In order to alleviate congestion in its own workload, the Court added a new, additional sixth felony home courtroom. This is a full-time courtroom that requires the services of four defense attorneys per week. The Public Defender reorganized, reconfigured and managed to staff this courtroom with no additional attorneys.

Our efforts to improve efficiency and to cover more courts with less staff are ongoing. Nevertheless, maintaining our mandated service level will remain a challenge without additional staff and with hiring controls restricting our ability to fill vacancies. With any further decrease in staff it is clear that we will be unable to provide 100% of our mandated services.

#### **ADDITIONAL CONCERNS**

It should be noted that Professional & Specialized Services (expert witness fees, DNA analysis, etc.), are becoming increasingly more expensive. The increase by law enforcement in the use of DNA evidence and other sophisticated forensic techniques has caused expert witness costs to soar. We also explained during budget hearings that we were making a concerted effort to clear up a backlog of cases in our Mental Health unit (sexually violent predator cases, mentally disordered offender cases, not guilty by reason of insanity cases, etc.) These cases rely heavily upon expert testimony. During the FY 2008-09 Budget Hearings, the Department requested an amount based upon projected costs for these services; however, the amount was significantly reduced. In addition, our educational and associated mileage expenses are currently exceeding projections. The original amount we requested was also significantly reduced during budget hearings. Maintaining competent legal representation, training newly hired attorneys, and preparing even the more experienced attorneys for increasingly complex cases, has placed a strain on educational expenses. The Department is currently scrutinizing the use of these funds but these expenses remain an area of concern.

#### **CONTACT PERSONS**

For additional information or questions, please contact:

Kenneth Taniguchi, Public Defender, 488-3546

Gary Shinaver, Chief Defense Attorney, 488-3546

# **EXHIBIT B**

**P.A.C.E.**  
**Professional Association of Fresno County Employees**  
**P.O. Box 661**  
**Fresno, California 93709-0661**

President – Scott Baly  
Secretary – Daniel Brickey  
Shop Steward – Eric Christensen

Vice President – Kristin Maxwell  
Treasurer – Kathy Marousek  
Member at Large – Doug Feinberg

September 20, 2013

Ken Taniguchi, Public Defender  
2220 Tulare Street, Ste. 300  
Fresno, CA 93721

Mr. Taniguchi,

Pursuant to the American Bar Association Standards for Criminal Justice, the ABA Model Rules, California Rules of Professional Responsibility section 3-110, and ABA formal opinion 06-441 we the undersigned are informing management of the Fresno County Public Defender's Office of our concern regarding our Constitutional duty to effectively perform competent legal services for our clients due to excessive caseloads, and working out of class.

Attorneys in this office are over-burdened with a staggering number of cases. All are concerned about being singled out for punishment should an individual complaint be voiced due to the recent termination of an attorney colleague. In light of our concern we are bringing this request for a solution to you through our Association.

In 2009, prior to declining cases assigned to the Public Defender's Office, you informed the Board of Supervisors the following:

"The Board was informed in the August 26, 2008, budget reduction Item that any further cuts in personnel would result in the inability Of the Public Defender to staff all courts and fulfill 100% of its Mandated functions." "Currently the caseload level for each Full-time staff attorney in the Department far exceeds the American Bar Association standards and only grows each time an attorney Position is deleted." (***Public Defender Budget Status and Mandated Service levels for FY 2008-09; January 23, 2009.***)

You explained to the BOS that our constitutionally mandated duty of providing effective legal representation to the indigent of Fresno County was dangerously close to overload due to budget cuts. You informed them that further cuts to our staff would force you to decline cases and that your failure to act would subject you to personal liability. (***Please see attachment "A".***)

When you wrote the above-referenced budget status report to the BOS the Public Defender was staffed with 78 attorneys, 6 legal assistants, 18 investigators and 22 office assistants. Since 2009, according to budget reports by the District Attorney's Office and this office,

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criminal filings have increased by at least 16%. At this time the Public Defender's Office has a total of 56 attorneys, 4 legal assistants, 9 investigators, and 11 office assistants: 38 attorneys are handling a criminal caseload of more than 23,000 cases per year. (**Please see inner-office telephone list; 2013-14 budget reports for DA and PD; PD Budget Report FY 2012-13.**)

For a brief time in 2009 you complied with your Constitutional mandate of insuring the caseloads did not exceed a designated number and once we reached a cap you declined new cases. While criminal filings have continued to greatly increase, our office has been reduced by at least 1/3 of its staff yet you have not declined any cases since 2009.

As of July 1<sup>st</sup>, 2013, the misdemeanor attorneys are carrying an average of 356 open cases (**Please see attachment "B"; Public Defender Annual Report FY 2012-13.**) with up to, if not more than, 2,000 cases assigned per year to each attorney. (**Please see attachment "D".**) The ABA recommends only 400 total cases per attorney per year in reference to misdemeanors.

The felony attorneys are carrying an average of 230 cases as of July 1<sup>st</sup>, 2013 with up to, if not more than, 1,000 cases assigned per year to each felony attorney. (**Please see Public Defender Annual Report FY 2012-13 and attachment "C."**) The ABA rules recommend a total of 150 felony cases per year per attorney.

The major crimes attorneys each have approximately 16-22 cases currently assigned including specials cases, homicides, complex gang crimes, etc. An attorney handling a specials case, at the maximum, may carry one or two other non-specials cases. It is taking an average of three to four years to get a homicide case to trial, and an average of one to two years to get a non-homicide major crimes case to trial.

In light of the above, all of the undersigned attorneys are hereby giving notice that we are at risk of being ineffective in representing our clients due to excessive caseloads, shortage of investigators, legal assistants and office assistants.

"Defense counsel should not carry a workload that, by reason of its Excessive size, interferes with the rendering of quality representation, Endangers the client's interest in the speedy disposition of charges, or May lead to the breach of professional obligations." (**ABA standards 4-1.3.**)

We are asking that management address the issue of excessive caseloads immediately due to the severity of the situation and the imminent harm that could befall our clients coupled with the stress and emotional toll it is taking on the attorneys and support staff. This office is in a crisis and management has not addressed these concerns when brought up by individual attorneys. We have lost over 40 attorneys in the last four years and 11 attorneys have taken extended leaves, yet during the last budget hearings you have not asked for any additional funding for desperately needed staff in order to adequately and competently represent our clients.

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The second issue is attorneys working out of class. According to Fresno County personnel job specifications every Level I and Level II attorney in this office is working outside of their job specifications.

“Upon assignment, the Defense Attorney I may make court appearance in Minor cases. MOST TRIAL WORK IS PERFORMED BY HIGHER LEVEL CLASSES IN THE DEFENSE ATTORNEY SERIES.” (*Defense Attorney I, Fresno County Job Specifications.*)

Every Defense Attorney I in this office is currently working outside of the above classification. Each attorney is handling an entire misdemeanor calendar including all the misdemeanor trials without any formal mentoring or training program in place.

Defense Attorney IIs are handling felony home courts and are assigned all felony cases excluding those designated a major crimes case or MDO, NGI or SVP. According to the job specification a Level II attorney should be handling cases of “average difficulty.” Instead they are handling all felonies including life-top cases, three strikes cases, complex cases such as home invasion robberies, first degree burglaries, gang allegations, sex crimes, large paper cases including welfare fraud, worker’s compensation fraud and check fraud involving thousands of pages of discovery. Not only are these cases time intensive, they also involve a high level of stress on both the attorneys and the clients due to high exposure and complexity. Placed in further perspective: A DA level II attorney is only allowed to work on misdemeanor cases and they do not face the same potential repercussions with the State Bar Association as a defense attorney. (*Please see Attachment “E.”*)

It appears that you are aware how the majority of felony cases currently fall outside the Level II Attorney job specifications, as you set forth in your report to the Board in November of 2012:

“Felony cases include a wide spectrum of violations, from low level Felonies to the most serious and violent cases such as homicides. Many cases in the ‘other’ and ‘felony’ categories require skills in Areas that include understanding of the bearing of client’s mental illness diagnoses and psychotropic medications, ability to interact And communicate with mentally ill clients and the ability to effectively Conduct cross examination of complex case expert witnesses. (*Public Defender FY 2011-12 Summary and FY 2012-13 First Quarter Report, November 7, 2012, Ken Taniguchi.*)

A Level II attorney who recently resigned from the Fresno County Public Defender’s Office was a certified legal specialist with the State Bar of California. This Level II attorney had over five years of experience in criminal law, had completed numerous complex felony jury trials, hearings and appeals, passed a State Bar certification exam and peer review

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committee, yet he was only considered a level II attorney in this office. In juxtaposition, there are several Level II attorneys with less than 2 years criminal law experience. It is apparent from the disparity of experience that the job specifications are not being adhered to, to the disregard of our clients and the attorneys.

From 2009 to 2013 we have lost the following chief, senior and level IV attorneys due to resignations:

1. Pete Jones
2. Ron Perring
3. Mike Aed
4. Julie Bowler
5. Mike Bowler
6. Garrick Byers
7. Franz Criego
8. Todd Eilers
9. Debra Girard
10. Paul Hinkly
11. Manny Nieto
12. Carl Reed
13. Ralph Torres
14. Tom Zynda

Not a single senior or Level IV position has been replaced despite the fact that the County promotion freeze was lifted on October 23, 2012. (*Please see attachment "F."*) In addition there have been several demotions:

1. Donna Miller Level V to IV
2. Angelica Rivera Level IV to III
3. Kristen Maxwell Level IV to III
4. Adrienne Harbottle Level IV to III
5. Cindy Cohn Level IV to III
6. Judith Sanders Level IV to III

The above attorneys have not been restored to their previous classification levels yet at least 18 new attorneys have been hired since the demotions were imposed.

We cannot continue in this manner. We are jeopardizing our client's constitutional rights on a daily basis. We are discouraged and demoralized due to the decimation of staff, greatly increased caseloads, lack of training, lack of mentoring, and refusal to promote anyone beyond a Level II within the previous five years. This office must hire and retain additional staff to attain manageable caseload numbers. Also, attorneys should no longer be assigned cases that are clearly outside their job specifications.

We ask that you respond to our concerns by September 30, 2013. Thank you.

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Vice President - Kristin Maxwell  
Treasurer - Kathy Marousek  
Member at Large - Doug Feinberg

Sincerely,

Scott Baly

Kathy A. Marousek

Kristin Maxwell, Pace Vice President

Eric Christensen

Dan Brickey

Beth Ann Lee

Eric Christensen

Alan Lee

Alan de Ocampo

[Signature]

[Signature]

[Signature]

Jens Mikkelsen

Avery Mikkelsen

Jan Lu

Janette Mikkelsen Baly

Roberto Rodriguez

Rubén

Deasy

A. Haro

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Janet K Dana

Alan M - W

E L Duran

Russell

Angel Rina

Marena Pincus

Johnna Edwards

Mary Huff

Heidi J

Mrs Bader

W. B.

Jared Johnson

Scott Baly

Judith Landen

Kathy Marousek

Doug Feinberg

Kristin Maxwell

D Miller

Jean Sorenson

Whitney Lopez



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CC: Liz Diaz, Assistant Public Defender  
Gary Shinaver, Chief Attorney  
Robert Delmare, Chief Attorney  
Supervisor Henry Perea  
Supervisor Debbie Poochigian  
Supervisor Andreas Borgeas  
Supervisor Judy Case  
Supervisor Phil Larson  
Gary Hoff, Fresno Superior Court Presiding Judge  
John Navarette  
National Legal Aid and Defense Association  
California Attorneys for Criminal Justice  
ACLU Fresno Division

# **EXHIBIT C**



## Fresno County Public Defender

# Memo

**To:** All Staff  
**From:** Kenneth K. Taniguchi, Public Defender  
**Date:** August 17, 2009  
**Re:** Unavailability

---

Commencing August 17, 2009, the following protocol will guide if the need to declare unavailability of the Public Defender arises. All staff members are urged to become familiar with it immediately. The Assistant Public Defender, Chiefs and Senior lead attorneys Garrick Byers, Carmen Romero, Antoinette Taillac, Lourdes Arellano and Ralph Torres shall fashion and tailor specific operating rules to ensure compliance with the policies and procedures set forth in this protocol. Cooperation of the entire staff is of great importance to the proper declaration and monitoring of unavailability.

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## **POLICY FOR DECLARATION OF UNAVAILABILITY OF PUBLIC DEFENDER**

### **INTRODUCTION**

The purpose of this policy is to provide an orderly process for declaring that the office has workloads in excess of its ability to competently represent all assigned clients.

The Public Defender will maintain a presence in all of the courts of the county.

Each public defender defense attorney has an ethical duty to represent his or her clients competently. The Public Defender, as the Department Head, bears the ultimate responsibility for addressing ethical concerns about workload issues that may cause an inability to carry out the representation competently.

A public defender defense attorney acts as a subordinate of the Public Defender. If a defense attorney believes that because of workload he or she may not be able to provide competent representation, the defense attorney should bring this matter to the attention of his or her supervising attorney. If the supervising attorney agrees that the workload is excessive, the supervisor should take appropriate steps to reduce that deputy's workload by spreading the overload among other attorneys within that unit, if possible. If it is not possible to redistribute workload, the matter should be brought to the attention of the appropriate Chief Defense Attorney.

If there is a dispute between a defense attorney and his or her supervisor over whether an attorney's workload is excessive the matter should be brought to the attention of the appropriate Chief.

If unavailability is to be declared, the number of cases not accepted from the court will be based on staffing deficits as defined by the Department Head.

## **PROCEDURES**

The determination of unavailability of the Public Defender in any specific location is to be made only by the Department Head or his designee. Once the Department Head has determined that the level of staffing at a particular court requires the declaration of unavailability, the day to day administration of this policy, and the informing of the court of such unavailability, will be the responsibility of the respective Chief Defense Attorney.

The deficit in attorney and investigator staffing will define the number of cases which will be subject to declarations of unavailability. Department guidelines will be based on historical average workloads, an assessment of the current ability of attorney staff at each location to take additional cases, and a comparison with various indigent defense standards.

Records shall be strictly maintained in any court where a declaration of unavailability has been made. The case name and number will be documented for record keeping. At the end of each court day the information will be logged by the Assistant Public Defender, Chief or Senior lead attorney in a shared folder. The original information will be maintained with the unit or section responsible for the declaration.

A declaration of unavailability shall only be made as to individuals who have been determined to be indigent.

To the extent possible, declarations of unavailability should not be made on incarcerated defendants and serious felonies. Also, to the extent possible, declarations of unavailability should not be made in multiple-defendant cases.

This policy does not replace the policy regarding declarations of conflict of interest. Conflicts of interest take precedence over declarations of unavailability.

Unavailability shall not be declared in any case where this department already has an on-going attorney-client relationship in an open case. Once the Public Defender has undertaken representation, we will not thereafter declare unavailability on that client. This also means that there should be no unavailability declared when an existing caseload is being distributed upon reassignment, resignation or other staff reduction event.