

**Recommendation for Corrective Action Plan for Carson City
Regarding Indigent Defense Services**

A. Summary

Carson City, like the rest of the state and many parts of the nation, is experiencing a critical shortage of indigent defense attorneys. Carson City has resolved to take swift and proactive measures to remedy the situation, and to prevent a looming constitutional crisis. These measures include reaching out to the Nevada Department of Indigent Defense Services to voluntarily enter into a Corrective Action, pursuant to NRS 180.440-450, which will result in a fundamental amendment to its current plan for the provision of indigent defense service.

Carson City's existing Indigent Defense Plan requires the State Public Defender (SPD) to provide primary indigent defense representation. Due to a number of factors outside Carson City's control, which are discussed more fully herein, the SPD has become critically short-staffed and cannot handle the current caseload while still providing the level of representation required by the Sixth Amendment.

As a result, on April 03, 2023, the SPD stopped accepting additional felony cases.¹ Those cases are currently being assigned to the three contracted conflict public defenders, as well as qualified appointed counsel. This system, however, is not fiscally sustainable, especially considering that the hourly rate for appointed counsel is currently \$300/hr.

This situation is likely to continue for the foreseeable future, as the salaries for attorneys in the SPD are too far below market rate to attract qualified attorneys. Several positions have been open, listed, and advertised for months, and no applications have been received for them. Further, the Governor's proposed budget for the next biennium does not include a salary increase for any SPD employees, so the situation is likely to get worse over the next two years, as counties and municipalities dramatically outpace the State in their salaries and benefits.

The State of Nevada Board of Indigent Defense Services (BIDS) Regulation 39 requires that indigent defense providers be afforded fiscal parity with their corresponding prosecutors. The Governor has recommended a 10 percent salary increase for all state employees for Fiscal Year (FY) 2024 and a 5 percent salary increase for FY 2025. These incrementally small increases will not provide parity with the current Carson City District Attorney's Office (CCDA) salaries, however. Further the CCDA is currently finalizing a new collective bargaining agreement,

¹ It should be noted that the SPD is the third public defender's office to have to resort to this action in the last year, due to attorney shortages. From June 13 to August 31, 2022, the Washoe County Public Defender's Office stopped taking all felony and gross misdemeanor cases. In December of 2022, the Elko County Public Defender did the same.

and DIDS is informed that the salaries for the CCDA are expected to increase substantially, and that the increased state salaries will not be comparable. Accordingly, under the current circumstances the SPD cannot provide the parity required by Regulation 39, thus requiring Corrective Action.

Carson City and DIDS have agreed to work together to develop a Corrective Action Plan to remedy the current situation. Carson City has stated that it intends to create its own public defender's office, funded in parity with the criminal division of the CCDA. It is the understanding of DIDS that Carson City has drafted a budget for a county public defender's office and will begin the process of county approval as soon as possible, then begin building the infrastructure for the county office. Once the Carson City Public Defender's Office (CCPD) is approved, infrastructure is in place, and the office is staffed, the SPD would then begin to transfer cases to the CCPD and the CCPD would eventually take over primary responsibility for indigent defense representation in Carson City.

B. Brief Current History of Staffing Issues & Efforts to Remedy

1. The Current Personnel Level of the State Public Defender's Office Presents Significant Challenges to Continuing to Provide Effective Services.

The previous Nevada State Public Defender, Karin Kreizenbeck, retired on July 22, 2022. The Governor directed DIDS to forward to his office three applicants for the top SPD position. By the close of the application period, however, fewer than three applications were received. At the direction of the Governor's Office, DIDS extended the deadline. A total of five applications were received, though three of them ultimately withdrew their names from consideration.² The two remaining applications were forwarded to the Governor, who appointed Chris Arabia to the position. Arabia officially began on January 3, 2023.

After the passage and implementation of AB 242 (requiring bail hearings within 48 hours), one additional Deputy Public Defender position was created within the SPD. This position was filled in November of 2022. On February 19, 2023, that attorney resigned and took a position with the Attorney General's Office. This newly-created position remains vacant.

On January 23, 2023, the Chief Appellate Deputy Public Defender resigned their position and took a position in the Washoe County Public Defender's Office. This position remains vacant, despite being advertised widely.

² Applicants and potential applicants advised DIDS that the low salary of the SPD position was a reason either for not applying or for removing their names from consideration. For instance, one applicant opted for a lower position with a county public defender's office that paid \$30,000 more than the top position at the SPD.

On January 27, 2023, the Chief Deputy Public Defender resigned their position and took a position in the Douglas County District Attorney's Office. This position was filled with an existing SPD Deputy Public Defender on January 30, 2023, creating a vacancy in their former position. That Deputy Public Defender position remains vacant, despite being advertised widely. The Chief's stated reason for leaving was for a better paying job.

On March 4, 2023, another Deputy Public Defender resigned their position and took a position in the Washoe County Public Defender's Office. This position was filled on March 13, 2023. The stated reason for leaving was for a better paying job.

On March 27, 2023, the Chief Trial Deputy resigned their position and took a position with the Douglas County District Attorney's Office. This position remains vacant, despite being advertised widely.

Another of the Deputy Public Defenders has been on authorized indefinite medical leave since 2022, with no known date of return to active duty.

In total, there are four vacant positions, two of them being chiefs and two of them being "line" Deputy positions, along with one employee being on indefinite leave.

As soon as each of the above vacancies was confirmed, the State Public Defender began efforts to fill the positions. These efforts included internet job postings through the Nevada State Bar Career Center, Nevada State Bar email blasts, DIDS's website, the NVJobs website, and direct solicitation of individuals believed to be qualified or recommended. The Office believed it had secured one attorney, currently serving as a Clerk at the Supreme Court of Nevada, to begin in July of 2023, but DIDS is informed and believes that this attorney took a job offer with the Washoe County Public Defender's Office instead.

2. The Difficulty in Attracting New Personnel Will Likely Continue

The Governor's Recommended FY 2024-FY 2025 budget does not include modifications to the salary ranges of attorneys within the State Public Defender's Office.³ As reported by a data analyst retained by DIDS, the salary ranges are lower than comparable positions within the Attorney General's Office and are significantly lower than those for similar positions in nearby counties with county public defender offices (*e.g.*, Washoe County, Churchill County, or Humboldt County) and the positions of prosecutors employed by Carson City or Storey

³Budget 101-1499 as presented to the Joint Meeting of the Assembly Committee on Ways and Means and Senate Committee on Finance on March 6, 2023. Attached hereto.

County.⁴ These disparities are only increasing with the upcoming biennium.⁵ Based on the staffing levels identified above, it will likely continue to be difficult to attract and retain talented attorneys to fill positions within the State Public Defender's Office. Additionally, there is a concern that the office will not be able to effectively continue to work down the already high caseload of felony cases.

3. Other Issues and Additional Efforts to Remedy Shortages.

Prior to December 2022, the SPD closed more cases each month than were being opened and assigned to the office. Since December 2022, the number of cases being opened continues to increase while the number being closed has decreased. In short, the SPD has opened more cases than it has been able to close in each month since December 2022.

DIDS has worked with the office to transition funds from salary savings to contract funds so that contract attorneys could be retained pursuant to NRS 180.050 to provide workload coverage. One contract was filled, and the contractor has been covering specialty court calendars. One putative contractor withdrew from their contract before it began. Two more contractors have been engaged, one for appellate attorney services, and one for daily coverage as they are available. At least one potential contractor reported that they could not justify the cost of meeting some of the insurance requirements mandated by the State for its contracts.

Without new attorneys coming into the office, the number of open cases is not likely to be significantly reduced to a point where the SPD can effectively handle all the open cases.

An additional concern is the amount of time the SPD can dedicate to training its employees to handle more difficult cases. While DIDS provides ample training opportunities for attorneys to maintain compliance and keep abreast of changes in the law and best practices, it seems likely SPD attorneys will not have the time to dedicate to their caseloads and be trained and supervised to take on more complex cases.

C. Other Factors Contributing to Shortages of Indigent Defense Counsel

The shortage of indigent defense counsel is not unique to the SPD, Carson City, or even Nevada as a whole, but is a significant problem in states around the county. This is due to a number of co-occurring factors, including: the mass retirement of

⁴ Soval Solutions, LLC, Compensation Analysis and Recommendations for Nevada Department of Indigent Defense Services: Final Report (May 2022).

⁵ Washoe County has released an updated salary schedule for FY 24 that exceeds the salaries paid to public defenders and district attorneys by Clark County. Salary schedule attached hereto.

boomer-aged attorneys, the exodus of these same attorneys, as well as others from the profession as a result of the COVID-19 pandemic, the fact that a number of Nevada's long-standing indigent defense attorneys have recently become deceased, law school enrollment is trending down, and significantly fewer law school graduates are choosing to go into public interest work. (Out of over a hundred Boyd School of Law graduates in 2020, only six elected to go into public service, and it is DIDS's understanding that none of those chose public defense work.)

Ripple effects from other counties: In the fall of 2021, Lyon County, facing difficulty in attracting appointed counsel to its geographic location, elected to offer \$150 an hour for felony and gross misdemeanor appointed cases, and \$125 an hour for appointed misdemeanor and juvenile cases (the statutory rate is \$100/hr.). Since this time, a number of counties have followed suit, including Washoe County, that due to a number of factors, is now offering \$200 to \$300 an hour for felony cases, and \$150 an hour for misdemeanor cases. As stated, Carson City is now offering \$300/hr. for appointed felony cases.

Also, from June 13 to August 31, 2022, due to attorney shortages of their own, the Washoe County Public Defender's Office stopped taking all felony and gross misdemeanor cases. The result was that the excess of cases had to be absorbed by the Washoe County Alternate Public Defender's Office and by the Washoe County appointed counsel list. This also impacted the availability of appointed counsel in other counties.

The Elko County PD followed suit, faced with their own attorney shortages (two of their deputies were hired for greater salaries by the Washoe County PD during their shortage, and one veteran deputy passed away), the office began not accepting felony cases and withdrawing from other high-level felony cases in December 2022.

As detailed herein, due to all the factors explained herein, next came the SPD, that was forced to stop accepting felony and gross misdemeanor cases in April of 2023.

D. Recommended Steps Toward a Corrective Action

As noted in the introduction, Carson City and DIDS have agreed to collaborate on a Corrective Action Plan as follows:

- (1). In collaboration with DIDS, Carson City will draft an amended Indigent Defense Plan ("Plan"), as well as an updated indigent defense budget that includes the costs of the CCPD, conflict contract(s), and any other expenses, including appointed counsel, investigators, and experts;
 - (a). As part of the Plan, the budget for the CCPD shall reflect an office that receives salary, benefits and resources in parity with the criminal division of the Carson City District Attorney's Office, pursuant to Reg. 39;

- (2). Carson City shall develop a timeline for creating the CCPD, hiring the Carson City Public Defender (Public Defender), and staffing the CCPD. Once the Public Defender is hired, Carson City, the Public Defender and the SPD will collaborate to establish the process and timeline for transferring existing cases from the SPD to the CCPD, including when the CCPD will take over full primary responsibility for indigent defense representation in Carson City;
- (3). Carson City shall include in its amended Plan whether the SPD will provide representation for direct appeals to the Nevada Supreme Court, Pardons Board hearings, and Parole Revocation hearings;
- (4). In creating its amended Plan, Carson City will comply with all relevant regulations of BIDS;
- (5). Carson City will not pay the State of Nevada for public defender services for FY 2024.

E. Interim Steps Toward Corrective Action

- (1) The timeline for creating a Corrective Action Plan is as follows:
 - (a) First draft from Carson City to DIDS by May 26, 2023;
 - (b) DIDS will provide input to Carson City by June 2, 2023;
 - (c) If DIDS and Carson City cannot agree on final terms, the Board on Indigent Defense will resolve any disputes at its June 16, 2023 meeting;
- (2) During this transition period, the SPD will stop accepting all new cases. Since the current caseload far exceed the ABA guidelines for workload, and because all cases will eventually be transferred to the CCPD, the SPD attorneys will focus on working and resolving their current caseloads;
- (3) The Public Defender will be appointed by the Carson City Board of Supervisors pursuant to NRS 260.010(5). Carson City will release a public solicitation seeking interest from qualified attorneys. The Public Defender will be appointed at a public meeting where the Board of Supervisors may consider input on the applicants from DIDS, BIDS, the judiciary or any other interested person. Pursuant to Regulation 22, no district attorneys or law enforcement officials will have input in the selection of the Carson City Public Defender. Judicial input may be considered, but shall not be the sole basis for hiring CCPD attorneys. Once appointed, the Public Defender may appoint deputy public defenders, clerks, investigators, and other employees as the Public Defender considers necessary to enable him or her to carry out his or her responsibilities, as provided by NRS 260.040(2);
- (4) Because the circumstances of the transition from the SPD to the CCPD require additional care and attention, Carson City may request from DIDS assistance with

the position of Appointed Counsel Administrator for Carson City, along with the duties of selection of counsel and review of billing, until the transition is complete.

F. Justifications for Corrective Action

(1) A Corrective Action Plan is necessary pursuant to Regulation 39, which requires that indigent defense providers be afforded fiscal parity with their corresponding prosecutors. The SPD salaries are not on parity with current or proposed CCDA salaries, and will not be on parity for the foreseeable future;

(2) Regulation 42(1) also requires: “The workload of an attorney must allow the attorney to give each client the time and effort necessary to ensure effective representation. Any office, organization or attorney who provides indigent defense services shall not accept a workload that, by reason of its excessive size, interferes with the attorney's competence, diligence or representation of clients under the Nevada Rules of Professional Conduct.” ;

(3) Nevada Rule of Professional Conduct (NRPC) 1.1 requires all attorneys to provide competent representation to their clients, and specifically “requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” Rule 1.3 requires an attorney to “act with reasonable diligence and promptness in representing a client.” Rule 1.4 requires effective and informative communications with clients, including keeping the client informed about the matter, to promptly comply with reasonable requests for information, and to consult with the client about the representation. Additionally, the Sixth Amendment, ADKT 411, and the ABA Guidelines all require similar standards of representation which is not possible with such limited staff. Accordingly, due to these shortages, and the ongoing inability of the office to attract qualified attorneys due to its inadequate salary levels, the SPD stopped accepting appointments to all felony cases on April 03, 2023;

(4) The current caseload of the SPD is approximately 1,680 cases, which includes 64 Category A cases, 360 other felony cases, and 576 misdemeanor cases. The SPD office is designed to have 9 attorneys. There are currently only 4 active attorneys, including the head of the office, who has administrative duties in addition to a caseload. Only 2 of the SPD’s current attorneys are qualified to handle high-level felony cases. According to the ABA guidelines, the SPD’s current caseload requires at least 7 full time attorneys. And while the RAND Corporation’s new national workload study has not been released, it is expected that the standards set forth therein will require significantly less cases per attorney than the 50-year old ABA guidelines;

(5) A Plan for Corrective Action is also in accordance with NRS 180.440(4) and NRS 180.450, as the SPD, by no fault of its attorneys nor Carson City, is either not able to “meet[] the minimum standards for the provision of indigent defense services” or is “deficient in the provision of such services,” as it is unable to act as the primary public defender for Carson City due to critical under-staffing circumstances, and will likely be unable to do so at least for the foreseeable future.