

# THE PUBLIC DEFENDER SERVICE

*for the District of Columbia*



CHAMPIONS OF LIBERTY

Fiscal Year 2019

Congressional  
Budget Justification

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# PUBLIC DEFENDER SERVICE FISCAL YEAR 2019 BUDGET REQUEST

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## LEGAL AUTHORITY AND MISSION

The Public Defender Service for the District of Columbia (PDS) is a federally funded, independent organization governed by an eleven-member Board of Trustees. Originally operating as the Legal Aid Agency from 1960 to 1970, PDS was created in 1970 by a federal statute<sup>1</sup> enacted to comply with the constitutional mandate to provide defense counsel to people who cannot afford an attorney.<sup>2</sup> The mission of PDS is to provide and promote quality legal representation for indigent adults and children facing a loss of liberty in the District of Columbia justice system and thereby protect society's interest in the fair administration of justice.

A major portion of the work of the organization consists of representing individuals in the District of Columbia's local criminal justice system who are charged with committing serious criminal acts and who are eligible for court-appointed counsel. In the District of Columbia, public defense services are primarily provided by PDS, the "institutional defender," and a panel of private attorneys, known as Criminal Justice Act (CJA) attorneys, who are screened for membership on the panel and paid on a case-by-case basis by the District of Columbia courts.<sup>3</sup> Because of its better resources, well-regarded training program, and overall higher skill level, PDS generally handles the more serious criminal cases, and the CJA attorneys generally handle the less serious criminal cases. The federal public defender system is modeled in most respects on this structure.

PDS also provides legal representation to people facing involuntary civil commitment in the mental health system, as well as to many of the indigent children in the most serious delinquency cases, including those who have special education needs due to learning disabilities. Every year, PDS attorneys represent indigent clients in the majority of the most serious adult felony cases filed in the District of Columbia Superior Court, clients pursuing or defending against criminal appeals, nearly all individuals facing supervised release or parole revocation under the District of Columbia Code, and all defendants in the District of Columbia Superior Court requiring representation at Drug Court sanctions hearings. In addition, PDS provides technical assistance to the local criminal justice system, training for CJA and pro bono attorneys, and additional legal services to indigent clients in accordance with PDS's enabling statute.

In 1997, the Congress enacted the National Capital Revitalization and Self-Government Improvement Act of 1997 (the Revitalization Act),<sup>4</sup> which relieved the District of Columbia of certain "state-level" financial responsibilities and restructured a number of criminal justice functions, including representation for indigent individuals. The Revitalization Act instituted a process by which PDS submitted its budget to the Congress and received its appropriation as an administrative transfer of federal funds through the Court Services and Offender Supervision Agency appropriation. With the enactment of the Fiscal Year 2007 Appropriation Act, PDS now

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<sup>1</sup> Pub. L. No. 91-358, Title III, § 301 (1970); *see also* D.C. Code §§ 2-1601 to 1608 (2001).

<sup>2</sup> *Gideon v. Wainwright*, 372 U.S. 335 (1963).

<sup>3</sup> Plan for Furnishing Representation to Indigents under the District of Columbia Criminal Justice Act. D.C. Code §§ 11-2601 to 2608 (2001).

<sup>4</sup> Pub. L. No. 105-33, Title XI (1997).

receives a direct appropriation from the Congress. In accordance with its enabling statute and the constitutional mandate it serves, PDS remains a fully independent organization and does not fall under the administrative, program, or budget authority of any federal or local executive branch agency.

Since its creation, PDS has maintained a reputation nationally and in the District of Columbia criminal justice system for exceptional advocacy. The strength of PDS has always been the quality of the legal services that the organization delivers. Judges and prosecutors alike acknowledge and respect the excellent advocacy of PDS's attorneys, as do public defender agencies and criminal justice bars across the nation.

## BUDGET DISPLAYS

### PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA

#### FY 2019 Summary of Changes

	FY 2019 PDS Need	
	FTE	(\$ in 000s)
<b>FY 2018 Full-Year CR</b>	<b>224</b>	<b>41,545</b>
<b>Adjustments to Base:</b>		
Less Efficiency Savings	-	812
<b>Total, Adjustments</b>		<b>(812)</b>
<b>FY 2019 Base</b>	<b>224</b>	<b>40,733</b>
Add Priority Programs	5	654
<b>FY 2019 Adjusted Base</b>		<b>41,387</b>
Add Non-Recurring Expense (Headquarters Move)		4,471
<b>TOTAL, Program Changes</b>	<b>5</b>	<b>654</b>
<b>TOTAL, Non-Recurring Expenses</b>		<b>4,471</b>
<b>FY 2019 REQUEST</b>	<b>229</b>	<b>45,858</b>

### FISCAL YEAR 2019 REQUIREMENTS

The Public Defender Service for the District of Columbia (PDS) requests an operating budget of \$40,733 thousand for Fiscal Year (FY) 2019. These funds would allow PDS to maintain operations and absorb inflationary increases in compensation and other operating expenses.

PDS is also seeking funding in two additional areas.

First, PDS seeks a combined \$654 thousand for five positions to respond to increased demand for legal representation for PDS clients and to assist Criminal Justice Act panel attorneys in their representation of criminal defendants and juvenile respondents in the District of Columbia.

Second, PDS seeks funding of \$4,471 thousand for a potential headquarters office relocation.

These requests, which total \$45,858 thousand, are consistent with PDS's policy and funding priorities—providing high quality representation to individuals who face serious charges but who cannot afford to hire an attorney, improving indigent defense representation in the District of

Columbia, and improving PDS's administrative efficiency—and support the Administration's goals of increased efficiency and effectiveness in federally funded programs.

## SUMMARY OF PDS'S FY 2017 ACCOMPLISHMENTS

With the funding provided in FY 2017, PDS continues to be a well-functioning public defender office, achieving excellent results and increasing and improving its data-gathering and analysis capacity.

This year, as in previous years, PDS had many positive case outcomes—acquittals, dismissals, well-negotiated guilty pleas, appellate reversals, and favorable new case law. In addition to representing successes for those individual clients, these achievements resulted in savings for the District's justice system and for federal agencies such as the Federal Bureau of Prisons. One such achievement was a major victory in a homicide trial that will save the District's criminal justice system the costs of litigating the post-trial actual innocence claim and the cost of incarcerating a PDS client during that litigation.<sup>5</sup> The achievement was at once notable for the decades of imprisonment the client was spared, while also being the result of the outstanding work of PDS's dedicated and skilled attorneys, investigative specialists, and forensic social workers.

Despite not having a research division and despite being denied access to certain electronic criminal justice system data controlled by District of Columbia law enforcement agencies and courts, PDS continues to build on its progress toward effectively incorporating evidence and evaluation in managing the organization. PDS continues to evaluate its performance through its increasing ability to obtain and analyze outcome data<sup>6</sup> and through surveys of various stakeholders.<sup>7</sup> The results demonstrate that PDS continues to be a high performing program. PDS receives high praise from judges on the quality of the representation provided by PDS lawyers and receives excellent scores from CJA lawyers on the quality of the training and support provided to them. In FY 2017:

- PDS's Trial Division won 49 percent of its jury trials.

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<sup>5</sup> See below at 19.

<sup>6</sup> For the four years since PDS completed its five-year, multi-stage project of upgrading PDS's case management system, PDS has steadily increased its ability to take advantage of the system's added database capabilities. PDS now has outcome data for several divisions to use to more accurately track the historical performance of those practice areas. PDS continues to refine its data production and analysis and, ultimately, intends to identify ways of usefully comparing PDS's performance over time with that of other defender institutions and systems that also generate outcome data.

As reported in PDS's FY 2018 Congressional Budget Justification, PDS obtained a commitment from the District of Columbia Superior Court to provide certain public outcome data from the court. PDS looks forward to receiving the data set in the expectation that it will allow PDS to assess and improve the performance of public defense in the District of Columbia. See PDS FY 2018 Congressional Budget Justification at 4, n.6.

<sup>7</sup> An example is PDS's 2014 Employee Survey, the detailed results of which were presented in PDS's FY 2016 Congressional Budget Justification at 25-26.

- PDS’s Mental Health Division won 42 percent of its contested probable cause hearings.
- PDS’s Appellate Division continued to secure reversals at the appellate level at an average rate of almost four times higher than that of the rest of the defense bar (39 percent versus 10 percent).
- PDS’s Parole Division won 41 percent of its contested hearings.

In FY 2017, PDS worked on 3,471 trial matters; 1,920 parole matters; 1,796 mental health matters; 176 appellate matters; 317 civil matters, including special education matters; 2,094 post-commitment (juvenile) and post-conviction (adult) matters; 3,047 Drug Court matters; 69 Special Litigation Division matters; and 3,529 Duty Day matters, the majority of which were requests for assistance with sealing a criminal record.

In addition, PDS continued to provide representation in the majority of the homicide cases filed in the District of Columbia Superior Court.

### **PDS Percentage of Homicide Cases**

FY 2014	<b>71%</b>
FY 2015	<b>66%</b>
FY 2016	<b>70%</b>
FY 2017	<b>72%</b>

### **Cost Savings of a High Performing Public Defense System**

Wrongful convictions are not only personal tragedies; they have also proven to be exceedingly expensive to the jurisdictions in which innocent people were wrongfully convicted. In the last three years in the District of Columbia, three exonerees received payments or obtained judgments in the combined amount of \$39 million in city funds for their wrongful convictions.<sup>8</sup>

Some exonerees in the District of Columbia, in Illinois, and elsewhere have spent decades in prison before being exonerated. In FY 2015, incarceration in the federal system cost taxpayers \$33,000 per detained person<sup>9</sup>—an increase of \$4,000 or 14 percent over the average annual cost in FY 2013.<sup>10</sup> Involuntary inpatient psychiatric hospitalization costs \$783 per day per patient in the District of Columbia.<sup>11</sup> And none of these figures captures the human and social costs that a

<sup>8</sup> [https://www.washingtonpost.com/local/public-safety/judge-orders-dc-to-pay-132-million-in-wrongful-fbi-hair-conviction-case/2016/02/28/da82e178-dcde-11e5-81ae-7491b9b9e7df\\_story.html](https://www.washingtonpost.com/local/public-safety/judge-orders-dc-to-pay-132-million-in-wrongful-fbi-hair-conviction-case/2016/02/28/da82e178-dcde-11e5-81ae-7491b9b9e7df_story.html); February 28, 2016.

<sup>9</sup> Nathan James, Congressional Research Service, “The Federal Prison Population Buildup: Options for Congress,” R42937 at 23 (May 20, 2016); <https://fas.org/sgp/crs/misc/R42937.pdf>.

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

<sup>11</sup> 22-A DCMR §§ 5501, 5502 (2010).

growing body of research shows accompany wrongful convictions, over-incarceration, and over-institutionalization.<sup>12</sup>

As detailed herein and in past budget requests, PDS saves the District's justice system from the economic and social costs that flow from wrongful convictions, over-incarceration, and over-institutionalization by providing effective representation. Every year, PDS's Trial Division not only wins a significant percentage of the cases it tries, but it also mitigates prison sentences in cases it loses and in cases in which pleas of guilty are entered, using forensic social workers and other experts to develop rehabilitation plans. PDS's Mental Health Division reduces the District's reliance on costly inpatient treatment by successfully challenging recommendations for commitment and by developing less intrusive and less costly outpatient plans. PDS's Parole Division successfully challenges both the assumptions behind the U.S. Parole Commission's outdated scoring system used in its Guidelines For Decision Making and allegations of misconduct by persons on parole or supervised release, helping reduce the amount of time they spend re-incarcerated. PDS's Community Defender Division has assisted persons in obtaining release on parole, shortening the length of incarceration and thereby contributing to a reduction in the overall cost of incarceration. PDS's remaining legal divisions address systemic deficiencies through targeted litigation, advance and clarify legal standards through appellate litigation, and address the collateral consequences of criminal convictions and attendant barriers to reentry through administrative and civil litigation.

Every legal division at PDS, often supported by PDS forensic social workers and investigative specialists, plays a part in improving the effectiveness of the criminal justice system, case by case. But PDS goes even further. Using the information learned from the four wrongful convictions PDS uncovered and litigated in the District of Columbia earlier this decade, as well as the information PDS learns at the trial level in every case, PDS works to improve the reliability of the criminal justice system and collaborates with others in the criminal justice system to develop and support evidence-based programs that cost-effectively improve the criminal justice system and reduce recidivism.

## **PDS'S FY 2019 RESOURCE NEEDS**

### **Summary of PDS's FY 2019 Resource Needs**

For FY 2019, PDS requests a base operating budget of \$40,733 thousand; an adjusted operating budget of \$41,387 thousand, which includes additional positions as detailed below; and a total budget of \$45,858 thousand, which includes relocation funding. PDS requests:

- funding of \$40,733 thousand to continue base operations.
- funding of \$654 thousand for two attorney and three professional support positions to respond to increased demand for legal representation for PDS clients and to assist

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<sup>12</sup> See, e.g., National Research Council. *The Growth of Incarceration in the United States: Exploring Causes and Consequences*. Washington, D.C.: The National Academies Press 340 (2014) ("Against weak evidence for large benefits, there is also the chance of significant social costs for individuals who are incarcerated, their families, and communities. The strong correlation of incarceration with unemployment, poverty, family disruption, poor health and drug addiction is very clear.").

Criminal Justice Act panel attorneys in their representation of indigent adults and children in the District of Columbia's justice system:

- three positions (one attorney position, one social worker position, and one investigative specialist position) to provide representation pursuant to a newly-created statutory right in the District of Columbia for certain sentenced individuals;
  - one civil attorney position to support PDS's constitutionally required criminal/immigration advice practice; and
  - one forensic scientist position to efficiently manage the expanding forensic work involved in PDS cases.
- funding of \$4,471 thousand to implement a possible headquarters office relocation upon the expiration of a lease in 2020.

PDS's budget request is designed to equip PDS to remain a high functioning public defender office and to increase PDS's overall effectiveness.

### **Resource Request—Positions**

PDS's singular priority is to achieve its mission to provide constitutionally required, first-rate quality representation for its clients. Seeking to maintain its excellence in advocacy requires that PDS be alert to changes in law, policy, and practices that affect PDS's clients' interests. Maintaining quality representation requires that PDS be prepared to respond to all of those changes. The new re-sentencing opportunity available to certain PDS clients, the increasing need for advice on immigration matters and other civil consequences, and the increasing use of DNA and other developing forensic sciences in criminal cases are concerns that PDS must be able to effectively address on behalf of its clients going forward. Recognizing that PDS's ability to manage such issues on behalf of clients and mitigate the negative effects of those issues on clients and their cases requires a constant evaluation of what resources will best serve the mission. For FY 2019, PDS needs \$654 thousand to support the five positions described below.

#### **Special Litigation Division - three positions (\$376 thousand)**

**PDS requests funds for one attorney position, one social worker position, and one investigative specialist position to represent certain individuals serving District of Columbia Code-based sentences who have a new statutory right to seek resentencing pursuant to the Incarceration Reduction Amendment Act. Because the new statute provides the right to have an attorney and to have an evidentiary hearing, the statute creates an immediate increased need for PDS services. The requested positions will enable PDS to respond to this newly created demand for legal services and will help reduce incarceration in Federal Bureau of Prisons facilities.**

The District of Columbia Council enacted the Comprehensive Youth Justice Amendment Act of 2016,<sup>13</sup> which went into effect on April 4, 2017. Title III of the bill is the Incarceration

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<sup>13</sup> D.C. Law 21-238.

Reduction Amendment Act of 2016 (IRAA),<sup>14</sup> which is the District of Columbia’s response to a Supreme Court decision, *Miller v. Alabama*,<sup>15</sup> prohibiting life sentences without the possibility of parole or release for juvenile defendants.

IRAA provides an opportunity for an individual sentenced for an offense committed before his 18<sup>th</sup> birthday to petition the court through an attorney for a lesser sentence. The statute provides the individual, who must have served at least 20 years of incarceration and who must not have reached his date for parole eligibility, with the right to a hearing on his sentence modification request. In resentencing the defendant, the court is prohibited from imposing a sentence of life without release, and instead may sentence the defendant to a term less than any applicable mandatory minimum after considering a list of required statutory factors.<sup>16</sup>

PDS and a non-profit organization, the Campaign for the Fair Sentencing of Youth, are identifying those who are eligible, and those who will become eligible, for this re-sentencing opportunity. PDS has obtained the cooperation of the Federal Bureau of Prisons and is using other means to accomplish this goal. To date, more than 80 persons have been determined to be

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<sup>14</sup> *Id.* at § 306.

<sup>15</sup> 567 U.S. 460 (2012).

<sup>16</sup> D.C. Code §§ 24-403.01 to 403.03. The factors are:

- Safety of the community;
- Interests of justice;
- The defendant’s age at the time of the offense;
- The nature of the offense and the history and characteristics of the defendant;
- Whether the defendant has substantially complied with the rules of the institution of confinement and whether the defendant completed any educational, vocational, or other programs, where available;
- Any report or recommendation from the United States Attorney;
- Whether the defendant has demonstrated maturity, rehabilitation, and a fitness to reenter society sufficient to justify a sentence reduction;
- Any statement provided orally or in writing by a victim or family of a deceased victim;
- Any reports of physical, mental, or psychiatric examination of the defendant conducted by licensed health care professionals;
- The defendant’s family and community circumstances at the time of the offense, including any history of abuse, trauma, or involvement in the child welfare system;
- The extent of the defendant’s role in the offense, and whether, and to what extent, an adult was involved in the offense;
- The diminished culpability of juveniles compared to that of adults, and the hallmark features of youth, including immaturity, impetuosity, and the failure to appreciate risks and consequences, “which counsel against sentencing them to a lifetime in prison;” and
- Any other information the court deems relevant to its decision.

eligible, roughly one-fourth of whom were PDS clients at the time of their conviction. PDS intends to represent all of its former clients, absent conflicts of interest.<sup>17</sup> The size of the pool of “IRAA-eligible” defendants will change as time passes—some currently ineligible defendants will become IRAA-eligible as they reach the 20-year mark; others currently eligible will lose IRAA eligibility as they become eligible for parole—but PDS’s future percentage of IRAA-eligible defendants will increase to approximately 50 percent.

These cases require considerable investigation, including interviews with mitigation witnesses and witnesses to the offense. Furthermore, every case in this project involves a sizable amount of records collection—all records related to the conviction itself are, by definition, more than 20 years old, as are records relating to the individual’s social circumstances preceding or at the time of the offense. PDS will need to retrieve records from various repositories, including, potentially, from an entity’s archived files. PDS will also need to locate witnesses and conduct interviews, including possibly with Bureau of Prisons staff at various facilities throughout the country. In addition, the project will call for professional assessment of the individual’s current and former mental health. And because the statute entitles each individual to a hearing, each case will, throughout, involve client communication, legal case management, and written and oral legal advocacy. These tasks will require an investigative specialist (investigation, records retrieval), a social worker (mental health assessment), and an attorney (client communication, advocacy). Providing funding for the investigative specialist and social worker positions will allow required administrative and professional tasks to be performed at a lower cost than if performed by an attorney. In addition, PDS’s current investigative staff does not have the capacity to absorb the additional and substantial investigative work required by this representation.

While PDS is seeking to place many non-PDS cases with pro bono attorneys, it does not expect to secure volunteers for all of the matters. The balance of the representation will have to be provided by either PDS or the federally funded Criminal Justice Act (CJA) panel attorneys. Funding PDS to handle its former clients’ IRAA proceedings is the most efficient option. This funding will allow PDS to develop the efficiencies that come with handling multiple cases, putting PDS in a position to provide critical assistance and advice to CJA attorneys and pro bono attorneys on IRAA cases. And the successful outcomes for clients seeking re-sentencing will cumulatively reduce the Federal Bureau of Prisons’ costs of incarceration.

#### **Civil Legal Services Division – one attorney position (\$143 thousand)**

**PDS requests funding for one attorney position to respond to the increased need for advice on the potential immigration consequences of criminal charges. Funding this position is critical to providing constitutionally effective assistance of counsel, saving the cost of post-conviction litigation, and moving immigration cases to resolution in less time.**

A significant priority for PDS is to help clients with immigration issues move smoothly through the criminal justice system. The number of clients with these issues has increased considerably over the past five years and, as a consequence, criminal defense practice in the District has changed markedly. In 2010, the United States Supreme Court in *Padilla v. Kentucky*<sup>18</sup> found that

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<sup>17</sup> PDS has conducted two training sessions for pro bono attorneys and CJA attorneys who are representing clients with IRAA cases.

<sup>18</sup> *Padilla v. Kentucky*, 559 U.S. 356 (2010).

it is “quintessentially the duty of [defense] counsel to provide her client with available advice about an issue like deportation”<sup>19</sup> when advising a client about the advisability of taking a guilty plea. Because “the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel”<sup>20</sup> and because deportation is a severe collateral consequence, the failure to advise a client about the possible immigration consequences of a guilty plea is constitutionally deficient legal representation.<sup>21</sup>

PDS and CJA trial attorneys need to be able to give competent advice to their clients facing potential immigration consequences due to the clients’ interaction with the criminal justice system. The attorney’s failure to do so can result in expensive and time-consuming post-conviction litigation. The post-conviction litigation could involve a motion to withdraw a guilty plea which, if successful, would result in a criminal case starting again from the beginning with all its attendant costs. Providing accurate advice about a client’s potential immigration consequences is therefore critical to the efficient functioning of the entire criminal justice system.

To support this priority, PDS requires funding for an attorney with immigration law expertise who can advise both PDS and CJA trial attorneys on the immigration consequences facing their clients. Reducing post-plea and post-conviction litigation is a huge cost savings for PDS as well as for the Superior Court’s federally funded Criminal Justice Act attorney program and the U.S. Attorney’s Office. In addition, the attorney will facilitate movement of non-citizen cases through the court in the most efficient manner, making their subsequent immigration determinations occur in a more timely fashion.

#### **Trial Division – one forensic scientist position (\$135 thousand)**

#### **PDS requests funds for one forensic scientist position to respond to increased demand for forensic science expertise in PDS cases.**

PDS requests funding for a new full-time position to provide required support for the forensic science issues that arise in all PDS divisions, principally the Trial Division. Forensic evidence, particularly DNA evidence, is used in an increasing number of cases prosecuted by the U.S. Attorney’s Office for the District of Columbia. Whereas in the past the prosecution would test for DNA almost exclusively in homicide and sex abuse cases, now, with scientific advances, the prosecution seeks to introduce DNA evidence in a wide variety of cases, including burglary,

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<sup>19</sup> *Id.* at 371.

<sup>20</sup> *Id.* at 373.

<sup>21</sup> To prevail on a claim of ineffective assistance of counsel, a defendant must show both that the assistance rendered by counsel was constitutionally deficient in that it fell below an objective standard of reasonableness and that the defendant suffered prejudice as a result, meaning but for counsel’s deficient representation, the result of the proceeding would have been different. In the context of effective assistance of counsel in negotiating a plea, a defendant must show that but for the counsel’s deficient representation, she would have accepted the plea offered by the prosecution. *See Padilla*, 559 U.S. at 366, 371-72 (explaining two prongs of ineffective assistance of counsel established by *Strickland v. Washington*, 466 U.S. 668 (1984)).

robbery, and firearms cases. The U.S. Attorney's Office also has introduced fingerprint evidence in a range of cases at an increasing rate over the years.<sup>22</sup>

To respond to the U.S. Attorney's Office's increased use of forensic evidence and to provide constitutionally required effective representation, PDS must expand its forensic science practice. Currently, PDS contracts part-time for a forensic scientist. If trial lawyers were unable to consult the contract forensic scientist, PDS would need to consult experts who charge a much higher per hour rate. In every case with forensic evidence, because of the constitutional requirement of effective defense investigation, the attorney must consult with the forensic scientist for help understanding the lab reports and the conclusions of the analyst. The case file review by the forensic scientist might be brief, for example when fingerprint evidence is involved, or might involve dozens of hours, for example in a more complex DNA mixture case. In addition to obviating the need for an expert for a basic case consultation, the forensic scientist is able to advise trial lawyers when they do not need to hire an expert to testify at trial. In many cases, a PDS lawyer might seek to make only one or two counterpoints about the forensic evidence at trial. The forensic scientist can assist the trial lawyer by suggesting questions to ask the prosecution's expert on cross-examination, saving the expense of hiring a defense expert at trial. A typical rate for a DNA expert is \$240 per hour.<sup>23</sup>

In addition to assisting trial attorneys to respond to the prosecution's forensic evidence, the forensic scientist advises on whether to pursue defense forensic testing. Pursuant to the Innocence Protection Act,<sup>24</sup> criminal defendants charged with a crime of violence have a right to seek pretrial testing of any evidence that may contain biological material that prosecutors choose not to test or retesting of any evidence the government has sent for analysis. Trial attorneys consult with the forensic scientist for advice on what, if any, items to submit for DNA testing or retesting. By statute, the District's Department of Forensic Sciences (DFS) provides forensic science testing services only to District of Columbia agencies, the U.S. Attorney's Office for the District of Columbia, and other law enforcement agencies.<sup>25</sup> When a trial attorney seeks DNA testing, PDS must send the sample to an independent lab for testing and must pay for that testing. Independent testing costs approximately \$4,200 per case. The part-time forensic scientist with whom PDS currently contracts estimates that in approximately 90 percent of consultations, she is able to advise the trial attorneys to forego testing or to test much less than they planned, resulting in significant savings to PDS. CJA attorneys are similarly prone to overly broad testing or retesting requests, a waste of the Superior Court's federal dollars. A full-time permanent forensic scientist would also be available to consult with CJA attorneys. Consultation with the forensic scientist allows PDS and CJA attorneys to help their clients make intelligent and informed

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<sup>22</sup> This is partially the result of what some refer to as "the CSI effect," where juries expect to see the prosecution introduce forensic evidence in cases.

<sup>23</sup> If the expert has to testify, PDS has to incur the additional cost of travel and perhaps accommodation, as none of the experts available to the defense are located in the District of Columbia. Further adding to the expense of hiring an expert to testify, whether the expert is local or must travel, experts bill for the hours necessary to prepare them to testify, and they frequently bill for a full day of testimony even if their actual time on the witness stand is less.

<sup>24</sup> D.C. Code § 22-4131 to 4135.

<sup>25</sup> D.C. Code § 5-1501.06(b).

decisions about waiving or pursuing the biological evidence testing rights they have under the District's Innocence Protection Act.<sup>26</sup>

In addition to advancements in complex DNA testing and the significantly expanded use of DNA and other forensic evidence in criminal cases, other issues related to forensic sciences demonstrate a need for a permanent forensic scientist position. For example, DFS notified PDS in February 2017 of significant problems with their firearms experts' analyses. As a statutorily designated member of DFS's Stakeholder Council,<sup>27</sup> PDS must be able to adequately assess such problems and effectively address them with the lab or with other stakeholders. A permanent, full-time forensic scientist is critical to assisting the trial lawyers, other PDS staff, and PDS as an institution.

### **Resource Request—Potential Relocation of PDS Headquarters (\$4,471 thousand)**

The lease for PDS's headquarters office, located at 633 Indiana Avenue, N.W., expires in September 2020. PDS needs three-year funding of \$4,471 thousand for relocating this office if PDS is unable to renew its current lease.

PDS houses most of its divisions in the headquarters office: the Trial, Appellate, Investigations, Parole, and Special Litigation Divisions; the Human Resources Office; the Budget and Finance Office; the Executive Office; and Administrative Services. Because the lease for a separate office housing PDS's Mental Health Division will expire in June 2018, PDS plans to include that division in any subsequent headquarters relocation. The headquarters office also houses the main reception area, three conference rooms, and PDS's largest LAN (Local-Area Network) room.

Working with the General Services Administration and using its standards, PDS has begun the process of identifying suitable office space, which may ultimately include PDS's current space, PDS's preferred option. If PDS is able to stay at its current location, the relocation funds may not be necessary.

In preparing for this relocation, PDS is not seeking to increase the amount of space used by the organization as a whole.

Three-year funding is requested because PDS historically lacks control over the timing of selecting office space and relocating. GSA estimates that the entire project may take up to four years. Three-year funding will provide flexibility to address project delays.

## **PROGRAM DESCRIPTION**

### **Legal Services**

PDS and private attorneys, both appointed by the District of Columbia courts pursuant to the Plan for Furnishing Representation to Indigents under the District of Columbia Criminal Justice

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<sup>26</sup> D.C. Code § 22-4132.

<sup>27</sup> D.C. Code § 5-1501.13(a)(6).

Act (CJA),<sup>28</sup> provide constitutionally mandated legal representation to indigent people facing a loss of liberty in the District of Columbia. PDS handles a majority of the most difficult, complex, time-consuming, and resource-intensive criminal cases, while private attorneys (CJA lawyers) handle the majority of the less serious felony, misdemeanor, and regulatory offenses. PDS is a model program applying a holistic approach to representation. PDS uses both general litigation skills and specialty practices to provide complete, quality representation in complicated cases. While PDS is a single program, PDS divides its attorneys and professionals into specific functions to promote overall representation in individual cases. PDS staff attorneys are divided into seven practice groups: the Trial Division, the Appellate Division, the Mental Health Division, the Special Litigation Division, the Parole Division, the Civil Legal Services Division, and the Community Defender Division. On a day-to-day basis, the attorneys in the various divisions provide advice and training to each other and often form small teams to handle particularly challenging cases.

Using this team approach, PDS undertook more than 16,400 legal matters in FY 2017. As described below, these matters encompassed a wide range of legal representation, including homicide trials, special education proceedings, parole revocation hearings, disciplinary hearings for detained children and adults, challenges to the treatment of clients under supervision, collateral attacks on wrongful convictions, involuntary civil commitment proceedings, and groundbreaking appellate representation.

### **Trial Division**

Staff attorneys in the Trial Division zealously represent adults in criminal proceedings in the District of Columbia Superior Court or provide zealous legal representation to children in delinquency matters. Attorneys are assigned to specific levels of cases based on experience and performance. As a result of intensive supervision and ongoing training, attorneys generally transition over the course of five to six years from litigating juvenile delinquency matters to litigating the most serious adult offenses. The most seasoned attorneys in the Trial Division handle the most intricate and resource-intensive adult cases. For example, senior PDS attorneys routinely handle cases involving DNA evidence, expert testimony, multiple co-defendants, and novel or complex legal issues. This group of highly trained litigators provides representation in the majority of the most serious adult felony cases filed in the District of Columbia Superior Court each year.<sup>29</sup>

Less senior Trial Division staff attorneys handle the most difficult or resource-intensive delinquency cases (cases involving children with serious mental illnesses or learning disabilities or children facing serious charges), some general felony cases, and a limited number of

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<sup>28</sup> D.C. Code §§ 11-2601 to 2608 (2001). D.C. Code § 11-2601 mandates the creation of a plan to furnish representation to indigent defendants that includes provisions for private attorneys, attorneys furnished by PDS, and qualified students participating in clinical programs.

<sup>29</sup> In FY 2017, PDS was appointed to 72 percent of all homicide cases as well as 61 percent of all assault with intent to kill cases. Subject to conflicts of interest, PDS is also assigned to the majority of offenses that have significant mandatory sentences, including “while armed offenses,” and in FY 2017 took 100 percent of the first degree burglary while armed offenses, 65 percent of the first degree sexual assault cases, 50 percent of the armed robbery cases, and 50 percent of the carjacking cases.

misdemeanor cases.<sup>30</sup> Trial Division staff attorneys also provide representation in a variety of other legal matters through PDS's Duty Day program and the District of Columbia Superior Court's Drug Court program.

### **Appellate Division**

The attorneys in the Appellate Division are primarily responsible for handling direct appeals and other appellate litigation generated in PDS cases, providing legal advice to CJA attorneys in appellate matters, and responding to requests from the District of Columbia Court of Appeals for briefs in non-PDS cases involving novel or sophisticated legal issues. Another important function of the Appellate Division is to provide a wide range of technical assistance and training to other PDS divisions. The Appellate Division attorneys' knowledge and experience allow them to assist the other divisions in complicated cases without having to perform long hours of original research each time difficult legal issues arise.

### **Mental Health Division**

Attorneys in the Mental Health Division (MHD) handle, a significant number of the involuntary civil commitment cases that arise in the District of Columbia Superior Court.<sup>31</sup> PDS is initially appointed when a person is detained in a mental hospital upon allegations that the person is a danger to himself or others as a result of mental illness. MHD lawyers also represent persons in post-commitment proceedings, including commitment reviews and outpatient revocation hearings; in involuntary commitment proceedings of persons found incompetent to stand trial because of mental illness or mental retardation; and in matters relating to persons found not guilty by reason of insanity in District of Columbia Superior Court or in United States District Court cases. The lawyers in this division also provide information to the District of Columbia

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<sup>30</sup> General felony cases include weapons offenses, felony drug offenses, and serious assaults. PDS provides representation in misdemeanor cases on a limited basis, typically in instances involving sex offenses against minors, which have significant collateral consequences; through a specific request from the court when the matter involves a novel issue or a client with a significant mental illness; or in a case involving a systemic issue that PDS is uniquely suited to address. PDS's authorizing statute permits PDS to represent "[p]ersons charged with an offense punishable by imprisonment for a term of 6 months, or more." D.C. Code § 2-1602(a)(1)(A) (1981). Sentences for most misdemeanors in the District of Columbia are for lesser terms.

<sup>31</sup> Based on data collected from FY 2008 through FY 2014, PDS was taking 50 percent of these cases. Since 2014, there has been a slight downward trend in the annual percentage of mental health cases PDS handles; in FY 2015, PDS's percentage of the total mental health cases dropped to 31 percent. At the same time, PDS is handling the same number of cases it handled in 2008. The percentage decline is due to the combined effect of sequestration, a doubling in the number of cases being filed annually since FY 2008, and a change in FY 2012 in PDS's practice that significantly improved case outcomes but requires significantly more resources early in the case. This practice change has led to both a higher percentage of successful outcomes at the initial hearing in these cases and a higher percentage of cases in which the government discharges the client prior to the hearing. Due to staffing constraints, PDS had to delay achievement of its goal of once again handling 50 percent of the cases by FY 2017. PDS has, however, taken 100 percent of civil commitment cases arising from incompetency findings and 100 percent of such cases filed by family members.

Council on proposed mental health and mental retardation legislation, conduct training sessions on the rights of persons with mental illness involved in civil commitment actions, and provide legal assistance to CJA lawyers appointed by the court to handle involuntary civil commitment cases.

### **Special Litigation Division**

The Special Litigation Division (SLD) handles a wide variety of litigation that seeks to vindicate the constitutional and statutory rights of PDS clients and to challenge pervasive unfair criminal justice practices. SLD attorneys practice across division lines, whether civil or criminal, juvenile or adult, pretrial or post-conviction. They collaborate with their PDS colleagues and with members of the broader legal community on matters that will benefit PDS clients. SLD attorneys practice before local and federal trial and appellate courts in the District of Columbia and occasionally as *amicus* in the United States Supreme Court. Along with its other cases and projects, SLD is currently representing clients eligible for resentencing under IRAA,<sup>32</sup> as well as conducting training for pro bono lawyers, CJA lawyers, and trial judges on the new law. Among SLD's achievements has been the end of indiscriminate shackling of juveniles in court; the reform of civil forfeiture practice; and the exonerations of four men who combined spent a century in prison for convictions based in part on the invalid testimony of FBI hair analysts.

### **Parole Division**

The Parole Division provides legal representation to individuals who are facing revocation of their parole or supervised release. PDS represents more than 90 percent of the individuals facing revocation proceedings. The attorneys represent clients at revocation hearings before the U.S. Parole Commission pursuant to local and federal laws. The majority of the revocation hearings are held at local detention facilities; however, through the development of diversion programs, some of the hearings take place at locations in the community.

To leverage its capacity to assist clients, the Division also works in collaboration with community organizations; local, state, and federal paroling authorities; and experts who serve as advocates for incentive-based sanctions that are fair and designed to yield successful outcomes for individuals on parole and supervised release. In addition, the Division provides training to members of the District of Columbia Bar, members of the Federal Bar, attorneys in District of Columbia law firms providing pro bono services, CJA attorneys, students in District of Columbia law school clinics, and law students from throughout the United States clerking at PDS on parole and supervised release matters. This training educates criminal defense lawyers on the collateral impact criminal cases have on clients who are also on parole or supervised release, and expands the pool of available attorneys to handle parole matters that PDS is not permitted to handle under the D.C. Rules of Professional Conduct as a result of conflicts of interest.

### **Civil Legal Services Division**

The Civil Legal Services Division (CLS) provides legal representation to clients in a wide range of civil matters that are collateral or ancillary to the clients' involvement in the delinquency or criminal justice system, or that involve a restraint on liberty (e.g., certain contempt proceedings). The types of collateral and ancillary civil issues these clients face are complex and almost

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<sup>32</sup> See above at 8-10.

limitless in number (adverse immigration consequences, loss of parental rights, loss of housing, seizure of property, loss of employment) and can arise even if the person is acquitted of the criminal charges or has been only arrested and never charged.

A major component of CLS's diverse civil practice is special education advocacy by CLS attorneys with expertise under the federal Individuals with Disabilities Education Improvement Act, which mandates special accommodations in public schools for children who cannot be adequately educated in a traditional classroom setting due to learning disabilities or other physical or intellectual challenges. Special education advocacy is a cornerstone of CLS's civil practice because of the vital importance of education and the pressing special educational needs of many court-involved youth.

All of CLS's legal work is done in close collaboration with PDS's other divisions to identify clients' civil legal needs and to provide effective representation to address and resolve clients' civil legal problems.

### **Community Defender Division**

As part of PDS's holistic approach to public defense, the Community Defender Division provides services to adults and children, primarily those who are in the post-adjudication stage of a criminal or juvenile delinquency case in the District of Columbia Superior Court. CDD provides its services through specialized programs for adult and juvenile clients.

For adult clients, CDD responds to the legal and social services needs of newly released individuals and others with criminal records, assisting them in making a successful transition back into the community. Further, CDD serves as the PDS liaison to individuals convicted of District of Columbia Code offenses and serving sentences in the District of Columbia Department of Corrections, Central Treatment Facility, and Federal Bureau of Prisons facilities. CDD works to monitor their conditions of incarceration and assist them on parole and other release-related matters. For juvenile clients, CDD represents children at administrative due process hearings, provides in-person legal consultations for children at the District's youth detention centers, and maintains relationships with community organizations that develop reentry programs that address the special needs of children.

### **Legal Support Services**

Legal Support Services is composed of various professionals within PDS who work closely with attorneys on individual cases: the Investigations Division, the Office of Rehabilitation and Development (ORD), and the Defender Services Office (DSO). Investigative specialists ensure that each case is carefully investigated prior to a client's decision to accept a plea offer or proceed to trial.<sup>33</sup> ORD's forensic social workers provide presentencing assistance to address mitigation issues and to provide program alternatives for appropriate clients.<sup>34</sup> Other legal

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<sup>33</sup> See, e.g., *Kimmelman v. Morrison*, 477 U.S. 365 (1986) (failure to investigate and present Fourth Amendment claim was constitutionally ineffective assistance of counsel).

<sup>34</sup> See *Wiggins v. Smith*, 539 U.S. 510 (2003) (decision of counsel not to expand investigation of petitioner's life history for mitigating evidence beyond presentence investigation report and department of social services records fell short of prevailing professional standards).

support services include a multi-lingual language specialist to facilitate communication with non-English speaking clients without the need to hire outside translators, a librarian to manage PDS's specialized collection and electronic access to research and to oversee the website PDS maintains for CJA attorneys, and two paralegals who work on cases and projects.<sup>35</sup>

### **Investigations Division**

The Investigations Division supports all the legal divisions of PDS, in particular the Trial Division, by providing thorough and professional investigative work, which includes locating witnesses, conducting field interviews, taking written statements, collecting and assessing digital evidence (e.g., police body-worn cameras, security camera footage, cell phone site location information, "Shot Spotter" (gunshots) technology, and Global Positioning System records), serving subpoenas, collecting police reports, copying court and administrative files, and preparing exhibits for trials and other hearings. In addition to producing exceptional investigative work in PDS cases, the staff conducts initial and ongoing training to court-certified CJA investigators who provide investigation services to CJA attorneys.

### **Office of Rehabilitation and Development**

The Office of Rehabilitation and Development (ORD) is composed of experienced licensed forensic social workers and professional counselors who recommend appropriate sentences to the District of Columbia Superior Court. The ORD staff are skilled "mitigation specialists" who provide the court with information about viable community-based alternatives to incarceration. Because the ORD staff are well-versed in all of the District of Columbia area rehabilitative programs (e.g., drug treatment, job training, education programs, and parenting classes), the forensic social workers are frequently asked to provide consultation for judges, CJA lawyers, and others in the criminal justice system. In addition, the staff of ORD prepare a comprehensive annual *Directory of Adult Services: Community and Confinement Access Guide* and a biennial *Directory of Youth & Families Resource Guide: Community and Confinement Access Guide* that list a wide range of services available to adults and children in the criminal justice system. These directories, available on PDS's website,<sup>36</sup> are used by the Court Services and Offender Supervision Agency, the Federal Bureau of Prisons and its contract prisons, the District of Columbia Superior Court, and many other agencies and organizations working with clients in the criminal justice system. The District's Criminal Justice Coordinating Council (CJCC) has used the adult manual to create and post on the CJCC's website an interactive, electronic map with a "pop-up" feature that allows website visitors to see the location of all the services described in the manual.<sup>37</sup>

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<sup>35</sup> As stated above, PDS operates as a single program, allowing it to shift resources between specialties as needed. Currently, PDS has nine forensic social workers, 29 investigative specialists, three paralegals, one interpreter, and one library technician who support the lawyers in their casework. In addition, 14 administrative assistants support 112 lawyers and the other professional staff who provide direct client services.

<sup>36</sup> <http://www.pdsdc.org/professional-resources/publications-legal-resources>. PDS's website can be found at [www.pdsdc.org](http://www.pdsdc.org).

<sup>37</sup> <http://www.cjccresourcelocator.net/ResourceLocator/ResourceLocatorHome.aspx>.

## **Defender Services Office**

The Defender Services Office (DSO) supports the court appointment of counsel system by determining the eligibility for court-appointed counsel of every child and adult arrested and brought to the District of Columbia Superior Court. DSO coordinates the availability of CJA attorneys, law school clinic students, pro bono attorneys, and PDS attorneys for appointment to new cases on a daily basis.<sup>38</sup> DSO operates six days a week, including holidays. PDS attorneys work the same schedule to be available for client representation and other needs of the court system.

## **Administrative Support**

PDS has a number of divisions that provide technical assistance to PDS staff. Though small, these divisions support the overall effective functioning of PDS using both internal expertise and outside contracts for short-term selective expertise. These divisions include the Budget and Finance Office, Human Resources Office, the Information Technology Office, and Administrative Services.<sup>39</sup> In concert with individual attorneys and the PDS executive staff, these divisions provide such services as procurement of expert services for individual cases, financial accountability,<sup>40</sup> strategies for developing PDS's human capital, recruitment, development of an electronic case management system, maintenance of PDS's IT infrastructure, and copying and supply services.

Though PDS is made up of a number of divisions and legal practice groups, each group and each employee's work are valued for the manner in which they enhance direct client representation. PDS's single-program approach allows PDS to manage and adjust its staffing to bring the ideal mix of general skills and specialized expertise to each case according to the client's needs.

## **PDS PERFORMANCE**

PDS continues to maintain its longstanding tradition of providing exceptional representation to clients and helping to ensure that case outcomes are not driven by an individual's ability to pay for an attorney.

In one noteworthy FY 2017 case, PDS obtained an acquittal on all charges in a homicide trial for an older client, who, at the time of his arrest, was homeless and suffering from an untreated mental illness. The prosecution disclosed to the defense team forensic evidence, eyewitness accounts of the killer's description and movements after the homicide, and video surveillance evidence from different times of the day, concluding with disclosures provided only the weekend before opening statements began in the trial. Thus, it was not until the middle of trial, when the PDS defense team was able to see how all the disclosures fit together, that they realized the

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<sup>38</sup> This office is staffed with 11 professionals who in FY 2017 conducted eligibility interviews and assisted in the appointment process for more than 29,000 cases.

<sup>39</sup> These four divisions are staffed with 27 professionals.

<sup>40</sup> While a clean audit is an expectation and not an accomplishment for PDS's Budget and Finance Office, it is worthy of note that PDS continues to receive clean financial audits.

person who killed the decedent was undeniably not the client and was in all likelihood someone else the police and the prosecution could confirm had been in the area around the time of the homicide.

As a result of his PDS team's advocacy, the client now has his freedom, and because of the work of his ORD forensic social worker, he has housing and mental health treatment through a District of Columbia Department of Behavioral Health community-based group home. Without this advocacy, PDS's client may have been forced to remain in custody for years for a crime he did not commit. Avoiding a wrongful conviction saved the District from a potential expensive judgment against it, saved taxpayers the cost of incarceration for years while post-conviction litigation ensued, and of course saved the client the personal tragedy of being incarcerated for a crime he did not commit.

This case serves as an object lesson and reminder for staff—that the training, supervision, and resources PDS staff receive lead directly to positive outcomes for clients. PDS uses each trial—win or lose—as a learning opportunity for staff, as one means of assessing and improving performance is to undertake a case-by-case review after the representation has concluded. PDS Trial Division supervisors meet with their supervisees after every trial and conduct a thorough review of how the case unfolded and how the attorney performed. For cases where PDS loses, an additional level of review occurs when the Appellate Division scours the record below, assessing the legal issues raised, the objections made, and the overall record produced. PDS has always used this approach to systematically review its performance. More recently, PDS is increasing its ability to perform a systematic review by analyzing aggregate case data.

## **Case Performance Data**

Because PDS's former Atticus case management system was not a data warehouse, PDS historically reported or tracked only certain metrics of the performance of its Trial, Appellate, Parole, and Mental Health Divisions, choosing metrics that informed PDS about key aspects of the divisions' performance. With the upgraded version of Atticus now available, PDS has expanded the number and type of these performance measures for which data are collected. PDS reports the following outcomes<sup>41</sup> and performance data.<sup>42</sup>

### **Trial Division**

Recently, the Superior Court agreed to give PDS a set of electronic court data that will allow PDS to compare its performance against that of the rest of the defense bar for that period of time. Prior to the court's agreement, PDS on its own was able to make some initial comparisons for FY 2007 through FY 2014. During that period, in all felony cases, PDS had a complete acquittal or a mixed verdict result in 77 percent of its cases. In the most serious cases (sex assaults and murder charges), PDS had a complete acquittal rate of 30 percent versus a non-PDS complete acquittal rate of 18 percent. In cases with other serious felony charges (armed offenses,

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<sup>41</sup> The D.C. Rules of Professional Conduct limit the information PDS may reveal about clients' identities and their cases. D.C. Rule of Professional Conduct 1.6.

<sup>42</sup> Because some of the yearly data sets are small, the aggregation includes several years of data.

burglaries, etc.), PDS had a complete acquittal rate of 36 percent versus 24 percent for non-PDS cases.

In FY 2017, PDS continued to be appointed to every serious juvenile case, except those where the child already had CJA counsel as a result of a previous arrest or where there was a conflict of interest. PDS also continued to take on the vast majority of the most serious adult cases, including homicides, assault with intent to kill cases, and sexual assaults. PDS was able to obtain complete acquittals or favorable mixed verdicts in 49 percent of its jury trials in FY 2017. This outstanding acquittal rate is due in large part to the extraordinary efforts of PDS investigative specialists and of lawyers from the Trial, Appellate, and Special Litigation Divisions.

While PDS is pleased to provide the above data to demonstrate the performance of the Trial Division, so many aspects of this Division's work cannot be fully captured by performance data alone. PDS has provided many examples over the years where work that began in the Trial Division has led to systemic or legislative reforms, producing a lasting impact on the fairness of the criminal justice system.

### **Appellate Division**

PDS's Appellate Division has continued to secure significant victories in cases that establish or clarify legal standards in criminal and delinquency cases and protect the integrity of the criminal justice system. For instance, in *Jones v. United States*,<sup>43</sup> PDS secured a victory in the first opinion by an appellate court of last resort in the country to consider the question of whether the use of a cell-site simulator or "stingray" requires a warrant. A cell-site simulator "grabs" the signal from a targeted cell phone and thereby enables police to locate a person whose whereabouts were previously unknown. The Court of Appeals agreed with PDS that the use of such a device to discover a person's location invades a legitimate expectation of privacy protected by the Fourth Amendment, that such use constitutes a search, and therefore that the device constitutionally cannot be utilized without the police first obtaining a warrant. In *Carrell v. United States*,<sup>44</sup> a case that the Court of Appeals reheard *en banc* to resolve a decades-old dispute over the mental state required for the crime of "threats," the Court agreed with PDS that, to obtain a threats conviction, the government must prove not only that the defendant intended to utter the words that constituted the threat, but also that he acted with the purpose to threaten or with knowledge that his words would be perceived as a threat. In *Davis v. United States*,<sup>45</sup> the Court of Appeals agreed with PDS that the crime of "escape"—defined by statute as escaping from a penal institution or from the "custody" of a police officer—does not apply to escaping from an officer during an attempted, but not completed, arrest. Such decisions protecting privacy in the face of technological advances and clarifying the scope of criminal offenses are constitutional bulwarks and improve the efficiency and accuracy of criminal prosecutions in the District of Columbia.

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<sup>43</sup> 168 A.3d 703 (D.C. 2017).

<sup>44</sup> 165 A.3d 314 (D.C. 2017) (*en banc*).

<sup>45</sup> 166 A.3d 944 (D.C. 2017).

PDS has also continued its active *amicus* practice, providing guidance to the Court of Appeals on important issues of first impression. In *Morris v. United States*,<sup>46</sup> PDS urged the Court to adopt formal discovery procedures and protective orders to prevent violations of the attorney-client privilege when the government seeks information from a defense attorney in challenging her former client’s claim of ineffective assistance of counsel. Finally, in *Fleming v. United States*,<sup>47</sup> a case that the Court agreed to rehear *en banc* due to its exceptional importance, PDS urged the Court to abandon the “urban gun battle” theory of causation in murder cases as inconsistent with the traditional law of causation that Congress incorporated into the District’s murder statutes.

The excellence of PDS’s appellate representation is also captured in a statistic that compares PDS’s reversal rate to that of the rest of the defense bar. In published opinions during FY 2017, PDS’s reversal rate was nearly four times higher than that of the rest of the defense bar (39 percent versus 10 percent). As PDS has noted before, this statistic also correlates directly to excellence in trial-level lawyering; reversal on appeal is exceedingly difficult unless the trial lawyers “make a record” in the court below, which means that they must fairly present the legal issue to the trial judge to permit her or him to avert serious error in the first instance.

PDS continues to make significant strides in more speedily filing briefs once the Court of Appeals issues a briefing order. Between FY 2010 and FY 2015, PDS reduced the amount of time between the Court’s issuance of a notice to file and the filing of the brief from 13 months to nine months. Since then, PDS has reduced that period to less than eight months. PDS’s goal, as stated in PDS’s FY 2015 Congressional Budget Justification,<sup>48</sup> is to reduce that time to just 40 days by FY 2019 without sacrificing quality.<sup>49</sup>

Thus, PDS’s Appellate Division well deserves the comment of one appellate judge that “the general quality of the PDS attorneys appearing before the Court of Appeals is very high indeed.”<sup>50</sup>

While PDS is pleased to be a standard-bearer in appellate advocacy, the performance data discussed above prompts PDS to use traditional and more modern means to reach out to and provide support for the CJA appellate bar to improve outcomes for indigent defendants who are not PDS clients. In FY 2013, PDS created a criminal law blog dedicated to following and dissecting the criminal law decisions of the D.C. Court of Appeals that includes concrete examples of how a particular decision can be used effectively at either or both the appellate and trial levels.<sup>51</sup> In its first year, the PDS blog had more than 20,000 visits and in its second year

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<sup>46</sup> No. 17-CO-443 (D.C. 2017).

<sup>47</sup> No. 14-CF-1074 (D.C. 2017).

<sup>48</sup> PDS FY 2015 Congressional Budget Justification, at 24.

<sup>49</sup> PDS’s progress on this goal was hindered by its inability to hire appellate attorneys to replace lawyers who had left the Appellate Division. When PDS is able to hire new appellate lawyers, PDS is confident it can make substantial progress toward the goal of a 40-day turnaround time from the issuance of a briefing order to the filing of the brief.

<sup>50</sup> PDS 2013 Judicial Survey.

<sup>51</sup> <http://pdsdc.blogspot.com/>. The posts also became available on the PDS website in September 2015. <http://www.pdsdc.org/professional-resources/criminal-law-blog>.

received more than 48,000. The number of visits to the blog has grown tremendously—to more than 72,000 in FY 2017.<sup>52</sup>

In FY 2016, PDS began a pilot mentoring and training program devoted to supporting the 100 CJA attorneys who serve on the panel from which appointments are made by the court for non-PDS appeals. The program provides opportunities for the panel attorneys to improve their issue-spotting, brief-writing, and oral argument skills by training the attorneys in ways that are modeled on how PDS attorneys are trained, developed, and supervised. This first-ever training has had a significant impact on the participants' ability to identify viable appellate issues and to present legal arguments in briefs and at oral arguments. Since its inception, cases that were mooted through the pilot program have a reversal rate of close to 33 percent compared to the rest of the non-PDS cases, which have a 10 percent reversal rate. PDS's goal is to continue to improve outcomes in appellate cases handled by CJA attorneys.

### **Mental Health Division**

In FY 2017, PDS's Mental Health Division won 42 percent of the cases that went forward with a contested probable cause hearing. These hearings are presided over by an associate judge of the District of Columbia Superior Court. These initial hearings simply determine whether the government meets the low standard of probable cause before it can proceed to the next stage of the civil commitment process. Of all of PDS's FY 2017 probable cause hearings (contested and non-contested), PDS was able to secure conversions to a voluntary status for 83 percent of their clients. When PDS prevails at these hearings, clients who would otherwise be utilizing hospital resources are released, saving taxpayer funds and making the hospital resources available to those most in need (and, most important, permitting persons who should not be committed involuntarily to retain their liberty).

PDS is appointed to 100 percent of civil commitment cases that statutorily follow a "*Jackson* finding" (a finding by an associate judge of the District of Columbia Superior Court that an individual is incompetent and unlikely to regain competence in their criminal proceeding).<sup>53</sup> These cases are more factually and legally complex and commitment is more aggressively pursued by the Office of the Attorney General. The number of *Jackson* cases resulting in civil commitment petitions is increasing annually. In FY 2017, PDS prevailed in 61 percent of all the cases that went to a contested hearing before the Commission on Mental Health—a panel consisting of a magistrate judge of the District of Columbia Superior Court and two doctors employed by the court—by securing either complete dismissal or mitigation (securing outpatient commitment instead of inpatient commitment). Of the 39 percent in which an adverse finding was made at the Commission, 42 percent are pursuing their right to trial to contest the Commission's finding; final outcomes have yet to be determined. Historically, PDS has been able to mitigate outcomes and secure outpatient treatment for the vast majority of its clients. The cost of treatment in the community is considerably less expensive than inpatient treatment.

### **Parole Division**

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<sup>52</sup> The FY 2017 total combines visits to the blog directly and visits to the posts on the PDS website.

<sup>53</sup> *Jackson v. Indiana*, 406 U.S. 715 (1972).

The Parole Division is the sole source of representation for more than 90 percent of the hundreds of parolees and supervised releasees each year who face revocation proceedings in the District of Columbia. The division's lawyers practice before the U.S. Parole Commission (USPC), which uses federal regulations to govern the revocation process from warrant issuance through sentence imposition. The USPC continues to use federal guidelines to determine the period of incarceration in the event of revocation—guidelines that its own experts have identified as outdated and likely to result in over-incarceration.<sup>54</sup> The vast majority of persons whose parole or supervised release is revoked by the USPC are persons who have minor technical violations and not arrests for new criminal offenses. PDS mitigates the outcomes of violation allegations and of re-incarceration through zealous advocacy, including by giving context to the violations and proposing alternatives to revocation.

PDS represents more than 1,000 clients annually who are facing revocation. In FY 2017, PDS represented 1,141 clients at probable cause hearings before the USPC. Of those clients, 48 percent proceeded to one of three types of revocation proceedings.<sup>55</sup> The remaining cases were resolved by offer and acceptance of expedited pleas, a sentence to treatment within the local jail, or a decision that they were ineligible for a local hearing based on the person's new conviction. Revocation hearings are conducted at the Correctional Treatment Facility before hearing examiners employed by the USPC, and their recommendations are reviewed by a U.S. Parole Commissioner who issues the final decision. In FY 2017, PDS won reinstatement and release in 41 percent of these contested hearings, allowing these clients to return to their communities and families. PDS's advocacy has led the USPC to reassess the need to spend the considerable resources involved in unnecessary re-incarceration in favor of shorter sentences, much-needed treatment, or community-based hearings.

### **Additional Case Accomplishments**

The above performance data demonstrate PDS's success, but data alone give an incomplete picture of that success. PDS not only reduces the costs associated with inpatient versus outpatient treatment and with secure detention versus community supervision, but also makes a difference in individual lives by ensuring clients' fair treatment in the criminal justice system. The cases described below illustrate the impact that PDS has as a well-functioning public defender office.<sup>56</sup>

**Adult trial matter:** PDS's client was charged with killing his very good friend and the friend's wife. Prosecutors were relying almost entirely on one witness: the victims' home health care aide, who reported that the client was at the victims' residence throughout the day on the day of the homicide and that she had seen the client at the residence approximately an hour before the victims were killed. The aide's story hinged on a series of phone calls the aide claimed she had had that day with the victims.

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<sup>54</sup> See Evaluation and Re-Validation of the US Parole Guidelines Risk Instrument, The JFA Institute, by James Austin, Ph.D. and Roger Ocker.

<sup>55</sup> Final revocation hearings, Short-Term Intervention for Success hearings, and Notice to Appear community-based hearings.

<sup>56</sup> PDS obtains client consent or masks the identity of its clients and limits the details of the cases pursuant to the requirements of the D.C. Rules of Professional Conduct.

PDS's investigation showed that, contrary to the aide's report, the series of calls actually occurred two days before the homicide, and that the aide was employed by a company under investigation for welfare fraud, a fraud in which the aide might have been directly involved, giving her a motive to curry favor with law enforcement. PDS's investigation also uncovered the fact that the male victim had been cooperating with law enforcement in an unrelated case, giving the suspects in that case a motive where the client had none. Prosecutors dismissed the case prior to trial.

**Juvenile appellate matter:** In FY 2017, in a same-day decision on an emergency appeal, PDS obtained the release of a juvenile client who had been detained based on an allegation of truancy in violation of his probation and based on an alleged risk of significant harm to persons or property. PDS successfully argued that the trial judge improperly detained the client because the judge had not complied with recent revisions in the juvenile detention statute that the District of Columbia Council made to keep children from being incarcerated for non-dangerous conduct such as truancy. The Court of Appeals also ruled that the judge did not have sufficient facts to conclude that the client posed a risk of significant harm to the person or property of others (a heightened standard passed by the Council in the same legislation).

**Appellate matter:** In FY 2017, PDS obtained a new trial for a client whose non-PDS trial attorney had failed to pursue the investigation of an exculpatory witness. Initially, the trial court denied the client's claim of ineffective assistance of counsel without a hearing, on a procedural ground and on the ground that the supporting affidavit explaining the attorney's failure was insufficient. PDS filed an appeal from the denial and a motion for the trial court to reconsider its decision. Simultaneously, the trial court granted the motion to reconsider and convened an evidentiary hearing, and the District of Columbia Court of Appeals granted the appeal after the prosecution conceded the ineffectiveness of prior non-PDS counsel. PDS then pursued the original ineffective assistance claim and persuaded the trial court to grant the client a new trial.

**Mental health matter:** In FY 2017, a PDS client was unconditionally released from his late 1970s insanity commitment. In the early 2000s, doctors' reports supported his unconditional release on the basis that he was not dangerous. However, because of the onerous procedural structure of the District's insanity statute, he continued to languish and exhaust resources, both legal and clinical, unnecessarily. PDS took on his case, and after months of research and preparation, and with the assistance of a forensic psychologist, persuaded the government and the court that no legal or clinical basis existed to justify this army veteran's continued commitment. The court issued an order releasing him unconditionally. Shortly after his release, the client returned to his home state where he now lives at a retirement center and spends time with friends and family. He recently celebrated a milestone birthday, free for the first time in 38 years—and after 38 years, the District is no longer bearing the cost of his residence and treatment at the city's mental health hospital.

**Juvenile special education matter:** PDS receives numerous calls, letters, and email messages annually from clients and clients' families expressing their gratitude for the hard work that PDS does, and the success that PDS obtains on their behalf. The email below is a typical example of how PDS's advocacy positively affects clients' lives. The writer, the client's mother, is thanking a PDS Special Education Advocate for her diligent and successful efforts to have her client accepted and placed in an appropriate special education program.

“I hope that all is well with you and I just wanted to say that [client] is doing really well. He has landed a job with the Department of Veterans Affairs Medical Center as a[n] Aide. I think that he is getting used to the work environment. I just wanted to tell you and your staff that I cannot thank you guys enough for all that you have done for me and my family and always having [client’s] best interest at front. I can never repay you for what you and the lawyers [have] done for me.”

## Additional Accomplishments

- **Website for Criminal Justice Act Attorneys:** PDS substantially expanded a PDS-designed website that Criminal Justice Act attorneys use to sign up for new case assignments from the court and to obtain court-funded investigative services. With the redesign,<sup>57</sup> the website now makes numerous legal resources available to CJA attorneys electronically, including practice tips on trial skills topics, video demonstrations, sample jury instructions, sample pleadings, sample briefs, and new case law updates. The site has links to legal research resources, including an “Ask the [PDS] Librarian” function for immediate assistance during the business day. The website offers CJA attorneys links to other PDS professionals, including social workers; investigative specialists; and experts on parole issues, record sealing, and re-entry.

The website also includes training information and other resources for CJA investigators and offers several resources to the public at large. The expanded website has been well received. The website was launched in July of 2017, and traffic increased significantly in the first two months alone, with the public part of the website being accessed more than 7,000 times and logged into approximately 4,000 times from a community of approximately 225 court-appointed attorneys and 100 court-appointed investigators.

- **New training program for CJA trial attorneys:** On a pilot basis, PDS reinstated an extended trial skills training program for newly appointed CJA attorneys. The two-week, full-time program, modeled after the skills-based portion of PDS’s own trial training program for its new attorneys, was organized and implemented by PDS’s Training Director. The program included opportunities for a small group of CJA attorneys to participate in mock exercises to develop or improve specific skills, such as opening statements, cross-examinations, direct examinations of expert witnesses, and closing arguments, and receive performance critiques. Based on the attorneys’ positive response<sup>58</sup> and observed improvement, PDS plans to offer the program again.
- **Community Defender Division office relocation:** With resources provided to PDS in FY 2015 and made available through FY 2017,<sup>59</sup> PDS relocated its Community Defender

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<sup>57</sup> <https://www.cjadc.org/Pages/NewDefaultPage.aspx>.

<sup>58</sup> The new program received an overall average rating for content and materials of 5.0 on a 5-point scale. Comments on various sessions included, “Absolutely outstanding!” “Presenters were fantastic,” “helpful and insightful,” “sessions covered everything A-Z,” “practice exercises and feedback were best,” and “good variety of material.”

<sup>59</sup> Pub. L. No. 113-235, Div. E, Title IV (2014).

Division from Northeast Washington, D.C. to the 1400 block of Pennsylvania Avenue, S.E. The new space is much closer to important stakeholders, such as clients who live in Wards 7 and 8 and the Mayor’s Office on Returning Citizens Affairs, and is within walking distance of the District of Columbia Jail. The new office is also located one block from a Metro station and on several major bus lines that cross the city, making it much more convenient and accessible to clients.

- **Automated Staffing Plan System and “End-to-End” Hiring Initiative:** With the design and implementation of the Automated Staffing Plan System (ASPS) in FY 2016, the Office of Human Resources transformed the hiring experience for applicants, candidates, new employees, managers, and human resources. PDS streamlined vacancy announcements, centralized the applicant pool, maintained communications with applicants, and designed an end-to-end “hiring roadmap.”

Despite continuing to use the system while making these enhancements, PDS met the federal government’s 80-day standard for recruiting and hiring top talent. During FY 2017, PDS filled 24 positions with top talent, 23 of which were filled within 45 days of announcing the employment opportunity. As a result, PDS ensured human capital allocation was aligned to meet and exceed PDS’s mission and goals.

- **Cyber security:** PDS’s Information Technology Office has implemented Cisco’s latest generation of firewalls and intrusion detection devices, which perform continuous analysis, retrospective detection, network file trajectory, impact assessment, security automation, adaptive threat management, behavior indicators of compromise (IoCs), next-gen intrusion prevention, integrated advanced threat protection, and malware remediation, all with the goal of protecting PDS client and employee data and information systems.

## Historical Performance

The above FY 2017 accomplishments provide only a snapshot in a long history of high level performance, and the exceptional quality of the advocacy of PDS’s staff is reflected beyond performance data and case outcomes. PDS’s skills have been recognized over time by:

- the seven awards PDS, as an institution, and its staff have received from outside organizations over the past twelve years;
- the one federal appellate court judicial appointment, three federal trial court judicial appointments, two local appellate court judicial appointments, and eight local trial court judicial appointments of PDS attorneys or alumni over the past twelve years;
- the offers of employment by federal public defender offices across the country to PDS staff investigative specialists—seven in FY 2017 alone;
- the reliance of many courts in the District of Columbia, including the U.S. Supreme Court, on PDS *amicus* filings;
- the consistently high ratings District of Columbia trial and appellate judges give PDS when surveyed about the quality of legal representation PDS provides;

- the requests from defender offices around the country for assistance and for pleadings, training guides, and other materials developed by PDS's specialty practice groups;
- the hundreds of applications PDS receives each year from talented individuals seeking to become PDS staff attorneys, law clerks, and interns; and
- the requests from the public defender organizations across the country including in California, Florida, Georgia, Illinois, Kentucky, Mississippi, Missouri, New York, and Virginia for PDS attorneys to present training involving trial advocacy skills, appellate practice, and forensic science.

## **Training**

In FY 2017, PDS continued its commitment to advancing quality defense for those who cannot afford to hire their own attorneys. As in the past, PDS produced a Winter, Summer, and Fall training series on criminal law and procedure topics for CJA attorneys,<sup>60</sup> and training for certified CJA investigators.<sup>61</sup>

Annually, PDS lawyers from each of its legal divisions provide more than fifty hours of training for hundreds of non-PDS attorneys representing indigent clients in the District of Columbia. As described above, PDS has launched two new training initiatives targeted at trial and appellate CJA attorneys. PDS plans to evaluate the effectiveness of the training efforts by surveying the attorneys and the judges, and monitoring outcomes in the attorneys' cases with the goal of improving case outcomes for all indigent persons in the District of Columbia.

## **CONCLUSION**

The core work of PDS is the representation of individual clients facing a loss of liberty. The examples above all flow from the consistent hard work done by PDS lawyers, investigative specialists, social workers, and other staff in thousands of matters each year. The proceedings for involuntary commitment, parole revocation, and criminal and juvenile delinquency cases are adversarial in nature, and PDS has able adversaries in the District's Attorney General's Office and the U.S. Attorney's Office for the District of Columbia. A fair justice system depends on having all components (judges, prosecution, and defense) fulfill their respective roles. PDS plays a central part in ensuring that all cases, whether they result in plea agreements or trials, involve comprehensive investigation and thorough consultation with the client. For those matters that proceed to trial or to an administrative hearing, PDS litigates each matter to the fullest, ensuring that the proceeding constitutes a full and fair airing of reliable evidence. As it has every year since its inception, in FY 2017, PDS won many trials, fought a forceful fight in others, and found resolution prior to trial for many clients. Whatever the outcome or type of case, PDS's goal for each client was competent, quality representation. Adequate financial support for PDS's services is essential to assist the District in meeting its constitutional obligation to provide criminal

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<sup>60</sup> The Fall, Winter, and Summer Series received an overall average rating for content and materials of 4.7 on a 5-point scale. Comments on various sessions included, "Outstanding!," "technical knowledge very impressive," "Extremely informative," "Presentation and organization were excellent!," and "Excellent job of explaining complex material in a simple way."

<sup>61</sup> Due to budget constraints, PDS did not produce its annual Forensic Science Conference in FY 2017.

defense representation in the District's courts, to ensure the reliability of the results, to avoid costly wrongful convictions, and to ensure due process protections are in effect before any loss of liberty.

**PUBLIC DEFENDER SERVICE  
BUDGET REQUEST SUMMARY**

**FY 2019 Summary of Changes**

		<b>FY 2019 PDS Need</b>
	<b>FTE</b>	<b>(\$ in 000s)</b>
<b>FY2018 Full-Year CR</b>	<b>224</b>	<b>41,545</b>
<b>Adjustments to Base:</b>		
Less Efficiency Savings	-	812
<b>Total, Adjustments</b>		<b>(812)</b>
<b>FY 2019 Base</b>	<b>224</b>	<b>40,733</b>
Add- Priority Programs	5	654
Add Non-Recurring Expense (Headquarters Move)		4,471
<b>FY 2019 Request</b>	<b>229</b>	<b>45,858</b>

**FY 2019 Salaries and Expenses**  
**Summary of Requirements by Grade and Object Class**  
(\$ in 000s)

<b>Grades:</b>	<b>2017 Enacted</b>		<b>FY 2018 Full year CR</b>		<b>FY 2019 Request</b>	
	<b>FTE</b>	<b>Amount</b>	<b>FTE</b>	<b>Amount</b>	<b>FTE</b>	<b>Amount</b>
ES	3	485	3	492	3	493
AD-15	18	2,508	18	2,645	21	3,158
AD-14	67	8,128	69	9,103	70	9,345
AD-13	32	3,100	38	3,986	41	4,312
AD-12	29	2,677	30	2,692	29	2,679
AD-11	30	2,387	27	2,101	23	1,803
AD-10	-	-	-	-	-	-
AD-09	20	1,231	21	1,292	23	1,387
AD-08	1	53	3	172	3	176
AD-07	20	859	10	473	12	576
AD-06	3	130	4	191	3	152
AD-05	1	37	1	43	1	45
Total Appropriated Positions	224	21,595	224	23,190	229	24,126
EX/ES FTE		3		3		3
GS FTE		221		221		225
Average EX/ES Salary		162		164		164
Average AD Salary		95		104		105
Average AD Grade		13		13		13
<b>Object Class</b>						
11.1 Full Time Permanent	224	21,595	224	23,190	229	24,126
11.5 Other Pers. Comp.		260		239		53
11.8 Special Pers. Services		1,256		129		0
12.0 Benefits		7,038		7,424		7,716
13.0 Unemployment Comp.		100		45		45
<b>Personnel Costs</b>	224	30,249	224	31,027	229	31,940
21.0 Travel & Training		388		388		280
22.0 Transportation of Things		6		10		10
23.1 Rental Payments to GSA		3,657		3,670		3,402
23.2 Rental Pmts.to Others, & Misc.		240		217		222
23.3 Comm., Utilities & Misc.		462		462		387
24.0 Printing and Reproduction		75		75		30
25.1 Consulting Services		1,080		1,000		966
25.2 Other Services		2,029		1,929		1,650
25.3 Purchases from Gov't Accts.		1,113		1,129		1,217
25.4 Maintenance of Facilities		96		21		31
25.7 Maintenance of Equipment		323		499		697
26.0 Supplies and Materials		391		498		488
31.0 Furniture and Equipment		620		620		67
<b>Non-Personnel Costs</b>		10,480		10,518		9,447
<b>TOTAL</b>		40,729		41,545		41,387
<b>31.0 Non recurring Expense - Headquarters Move Document Retention Project</b>		1,100				4,471
<b>Grand Total</b>		<b>41,829</b>		<b>41,545</b>		<b>45,858</b>
<b>OUTLAYS</b>		<b>41,072</b>		<b>41,411</b>		<b>45,399</b>

## **APPROPRIATION LANGUAGE**

### **Public Defender Service for the District of Columbia**

#### **Appropriation Language Fiscal Year 2019**

For salaries and expenses, including the transfer and hire of motor vehicles, of the District of Columbia Public Defender Service, as authorized by the National Capital Revitalization and Self-Government Improvement Act of 1997, [\$40,082,000] **\$45,858,000**, of which \$4,471,000, shall remain available until September 30, 2021, for costs associated with relocation under a replacement lease for headquarters offices, field offices, and related facilities: **Provided**, That notwithstanding any other provision of law, all amounts under this heading shall be apportioned quarterly by the Office of Management and Budget and obligated and expended in the same manner as funds appropriated for salaries and expenses of Federal agencies.

## ORGANIZATION CHART

