

THE  
PUBLIC  
DEFENDER  
SERVICE

*for the District of Columbia*



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CHAMPIONS OF LIBERTY

Fiscal Year 2023

Congressional Budget Justification

Avis E. Buchanan, Director

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**PUBLIC DEFENDER SERVICE  
FOR THE DISTRICT OF COLUMBIA  
FISCAL YEAR 2023 CONGRESSIONAL BUDGET JUSTIFICATION**

**TABLE OF CONTENTS**

LEGAL AUTHORITY AND MISSION.....	1
ORGANIZATION AND STRUCTURE.....	3
BUDGET REQUEST SUMMARY .....	4
FISCAL YEAR 2023 BUDGET REQUEST .....	5
SUMMARY OF PDS’S FY 2021 ACCOMPLISHMENTS .....	5
PDS FY 2023 RESOURCE NEEDS .....	9
Resource Request—Summary	9
Resource Request—Positions	10
Resource Request—Rent Costs for PDS Headquarters	22
Resource Request—Relocation Costs for PDS Satellite Office	22
PROGRAM DESCRIPTION .....	23
PDS PERFORMANCE .....	29
Case Performance and Data	29
Additional Case Performance Data	31
CONCLUSION .....	37
BUDGET DISPLAYS .....	38
APPROPRIATION LANGUAGE .....	40

## 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 for 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 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 legal 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 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 children in the most serious delinquency cases, including those children who have special education needs due to learning disabilities. Every year, PDS attorneys represent 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 Superior Court requiring representation at Drug Court hearings. In addition, PDS provides technical assistance to the local criminal legal system, training for CJA and *pro bono* attorneys, and additional legal services to clients in accordance with PDS's enabling statute. On occasion and under special circumstances—e.g., pursuing impact litigation—PDS represents clients in cases related to the above matters in the District's federal courts.

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 legal 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. Since the enactment of the Fiscal Year 2007 Appropriation Act, PDS has received a direct appropriation from the Congress. In accordance with its enabling statute and the

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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.

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

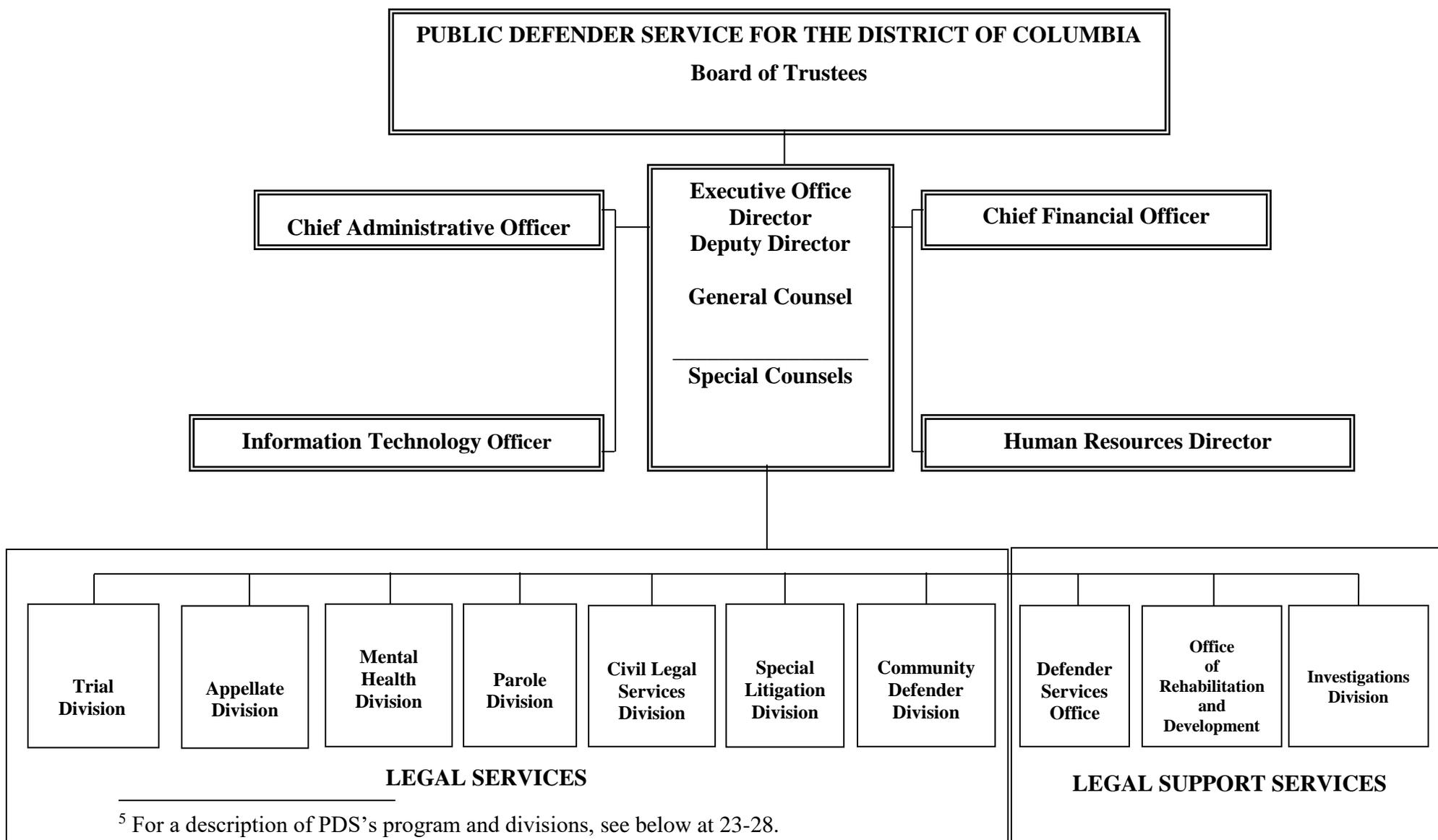
<sup>3</sup> Plan for furnishing representation to indigents under the District of Columbia Criminal Justice Act. D.C. Code § 11-2601 *et seq.*

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

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 legal system for exceptional advocacy. The strength of PDS has always been the quality of the legal services that the organization delivers. Judges, panel attorneys, prosecutors, and especially clients acknowledge and respect the excellent advocacy of PDS's attorneys, as do public defender agencies and criminal justice bars across the nation.

## ORGANIZATION AND STRUCTURE<sup>5</sup>



<sup>5</sup> For a description of PDS’s program and divisions, see below at 23-28.

## BUDGET REQUEST SUMMARY

### PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA FY 2023 Summary of Changes

	<b>FTE</b>	<b>Amount (\$ in 000s)</b>
<b>FY 2022 Continuing Resolution Level</b>	<b>222</b>	<b>46,212</b>
<b>Adjustments to Base</b>		
Add General Inflation Level Adjustments	-	3,864
Add IRAA and Compassionate Release	42	9,943
Add Record Sealing	2	310
Less 3-Year Term Employees	(26)	(8,107)
Less Attrition Estimate	(18)	(1,559)
<b>Total, Adjustments</b>	<b>-</b>	<b>4,451</b>
<b>FY 2023 Base</b>	<b>222</b>	<b>50,663</b>
<b>PROGRAM CHANGES</b>		
Add Additional Demand for Legal Representation	14	1,723
Add Satellite Office Relocation and Build-Out Costs	-	1,072
Add GSA Rent for Add'l Floor in New HQ Location	-	171
<b>FY 2023 REQUEST</b>	<b>236</b>	<b>53,629</b>

## **FISCAL YEAR 2023 BUDGET REQUEST**

The Public Defender Service for the District of Columbia (PDS) requests a total budget of \$53,629 thousand for Fiscal Year (FY) 2023. This will allow PDS to maintain operations and absorb inflationary increases in compensation and other operating expenses, and meet three areas of additional need.

First, PDS seeks a combined \$1,723 thousand for 14 positions to respond to additional demand for legal representation for PDS clients, including:

- appellate representation in the District of Columbia for clients pursuing their resentencing rights under the 2021 amendments to the District of Columbia's Incarceration Reduction Amendment Act (IRAA) and new compassionate release law;
- constitutionally required immigration-related advice and support to non-citizen clients who are pursuing resentencing under the 2021 amendments to the District of Columbia's IRAA and the District's new compassionate release law;
- support for clients whose involvement in the criminal legal system has led to collateral civil consequences;
- expanded representation of clients with Individuals with Disabilities Education Act matters to include the full litigation of those matters in administrative proceedings and in federal court;
- representation of clients facing federal civil commitment after the conclusion of their prison sentences;
- representation of clients charged in an increasing number of homicide prosecutions filed in Superior Court and the expansion of the use of forensic, video, cell site, and other evidence in all cases;
- representation of clients in District of Columbia Drug Court.

Second, PDS seeks \$171 thousand for additional annual rent for PDS's new headquarters.

Third, PDS seeks one-time, three-year funding of \$1,072 thousand for a possible satellite office relocation upon the expiration of a lease in 2024.

These requests, which total \$53,629 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.

### **SUMMARY OF PDS'S FY 2021 ACCOMPLISHMENTS**

In March 2020, due to the coronavirus pandemic, the District of Columbia courts and other criminal, delinquency, mental health, and civil systems drastically curtailed their regular operations, and PDS adapted accordingly. In FY 2021, once vaccines for COVID-19 became widely available, these systems partially resumed their functions. In response, PDS transitioned from having a majority of its employees working remotely to, where possible, gradually increasing the number of in-person court appearances and in-person visits to residential and other institutions. While far from back to normal, PDS adjusted as well as possible to these difficult

circumstances and continued to forcefully advocate for all of its clients. Only three trials were conducted in Superior Court in FY 2021 (one of the three was a PDS case—the only one to obtain an acquittal on the lead charges). PDS continued to file IRAA and compassionate release motions, handle parole and mental health hearings, file and argue appellate cases, and litigate lawsuits in support of PDS clients across all divisions.

PDS also continued to litigate a class action lawsuit regarding conditions at the D.C. Department of Corrections in both the U.S. District Court for the District of Columbia and in the U.S. Court of Appeals for the District of Columbia Circuit, and continued to litigate a class action lawsuit against the U.S. Marshals Service challenging the unconstitutional arrests in arraignment court of people with immigration detainees. PDS lawyers filed a class action lawsuit against the U.S. Parole Commission regarding delayed and inadequate parole revocation procedures. PDS's special education attorneys served as expert consultants to a coalition of attorneys from the Washington Lawyers' Committee for Civil Rights and Urban Affairs, School Justice Project, Advocates for Justice, and Disability Rights DC bringing a class action lawsuit on behalf of confined youth who had been denied special education services during the pandemic. PDS shared its expertise with the coalition regarding D.C. Department of Corrections and D.C. Public Schools practices and policies. The lawsuit resulted in a preliminary injunction entered on June 16, 2021, that requires the District of Columbia to comply with its obligations under the Individuals with Disabilities Education Act. Finally, PDS joined as co-counsel with the ACLU of the District of Columbia to file a lawsuit against the District of Columbia in the U.S. District Court for the District of Columbia for injunctive and declaratory relief to stop the D.C. Department of Corrections from enforcing against a PDS client who is transgender, and others similarly situated, a discriminatory policy that considered only a person's sex assignment at birth for purposes of deciding whether the person is housed on a male or a female unit.

In addition, PDS authored, published, and distributed *The D.C. Reentry Navigator: Empowering You to Succeed with a D.C. Criminal Record*.<sup>6</sup> *The D.C. Reentry Navigator* (the Navigator) is written for currently incarcerated and recently released people to empower them to successfully navigate reentry and reintegration into the community. PDS worked with the Federal Bureau of Prisons (BOP) to distribute hard copies of the Navigator to every person serving a prison sentence on a D.C. Code offense who had a release date within the next ten years of its distribution. In addition, the Navigator is featured on the BOP's homepage as a resource for all residents. The publication was also made available to all District of Columbia residents of halfway houses, to residents and staff of the D.C. Department of Corrections, and to community groups. As the following quotes illustrate, the impact of the Navigator is being felt far and wide.

*"Thank you so much for your D.C. Reentry Navigator. ... It is extremely comprehensive and will be helpful to all of us.... I want to express first and foremost how appreciative we all are to have you and others helping us out. You obviously don't need to. ... Most importantly, thank you for all your hard work. Your book will be viewed by many inmates here and will make a difference (and relieve anxiety)." Resident at Ft. Dixon Prison Camp.*

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<sup>6</sup> [https://www.pdsdc.org/docs/default-source/d.c.-reentry-navigator/the-d-c-reentry-navigator-empowering-you-to-succeed-with-a-d-c-criminal-record\\_1.pdf?sfvrsn=118898d0\\_2](https://www.pdsdc.org/docs/default-source/d.c.-reentry-navigator/the-d-c-reentry-navigator-empowering-you-to-succeed-with-a-d-c-criminal-record_1.pdf?sfvrsn=118898d0_2).

*“It’s as big as a phone book, & very informal with all kinds of information on everything. Even though I will be residing in Waldorf MD I still find it to be very useful to me. They did give everyone here that’s a DC inmate a Reentry Navigator book. I believe it will be very helpful to me when I am released from the BOP.” Resident at LSCI Allenwood.*

*“The D.C. Reentry Navigator is affectionately referred to by me as [...] “the Bible” of reentry for all returning residences. I have been sharing this amazing book with people in other states who are in need of the resources after incarceration. I have asked my friends in other states to look through “the Bible” and find the things that you need today and see if they do not exist in your state, use the other tools in “the Bible” to advocate for them. This book takes us beyond reentry into the areas of self and community advocacy.” DC Returning Citizen.*

*“I downloaded the DC Re-entry Navigator and am really in awe of the magnitude of what you have put together with this! Absolutely well done. This is golden! ...This should be in every state in the country as the standard on Reentry!” National Reentry Coach.*

*“In the last 20 years there hasn’t been a more reliable resource for returning citizens than the Reentry Navigator. Our clients often refer to this book as a key tool to reentry, in just the short time they have been available to us we have distributed close to 150 copies to our clients and partnering organizations as well. Five years of dedicated research and hard work to empower returning citizens to succeed has really paid off, we thank Public Defender Service. . . for their dedicated commitment to reentry.” The National Reentry Network for Returning Citizens.*

As stated above, PDS staff, despite their own ongoing difficulties resulting from COVID-19, continued litigation efforts to protect clients from the impact of the decisions by many of the District’s legal system agencies to shut down or severely curtail their operations and continued to represent clients in hearings across all divisions. PDS reports the following outcomes and performance data for FY 2021:

PDS worked on 2,881 trial matters; 864 parole matters; 2,161 mental health matters; 254 appellate matters; 433 civil matters, including special education matters; 552 pre- and post-disposition institutional and community-based legal matters; 1,716 post-conviction (adult) matters; 740 Drug Court matters;<sup>7</sup> 206 Special Litigation Division matters; and 1,878 adult Duty Day<sup>8</sup> and 1,189 juvenile Duty Day matters.

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<sup>7</sup> This figure is an estimate, as the Superior Court was unable to supply the data due to its staff’s unavailability during the pandemic. Drug Court suspended operations in the middle of March 2020 and resumed hearings in January 2021, so this number reflects cases handled from January 1, 2021, through September 30, 2021.

<sup>8</sup> Due to COVID-19 restrictions PDS offices were closed for Duty Day walk in clients so this number represents clients who called or wrote to request assistance.

- In hearings before the Commission on Mental Health, PDS prevailed in 74 percent of its cases, securing either complete dismissal or mitigation (securing outpatient commitment instead of inpatient commitment).
- PDS won reinstatement and release in 34 percent of the parole and supervised release revocation cases PDS defended in hearings before the U.S. Parole Commission (USPC).
- PDS secured release for 67 percent of all parole and supervised release clients facing probable cause hearings.
- PDS won 80 percent of the IRAA hearings PDS conducted.
- PDS won 50 percent of the community status review hearings<sup>9</sup> PDS conducted.
- PDS continued to take the majority of homicide cases filed in Superior Court.
- PDS’s reversal rate before the District of Columbia Court of Appeals was more than 75 percent higher than that of the rest of the defense bar (35 percent versus 20 percent).

<b>PDS Percentage of Homicide Cases</b>	
<b>Fiscal Year</b>	<b>PDS Cases</b>
<b>FY 2017</b>	<b>72%</b>
<b>FY 2018</b>	<b>72%</b>
<b>FY 2019</b>	<b>72%</b>
<b>FY 2020</b>	<b>67%</b>
<b>FY 2021</b>	<b>60%</b>

<b>Reversal Rates in PDS Appellate Cases vs. Non-PDS Appellate Cases</b>		
<b>Fiscal Year</b>	<b>PDS Cases</b>	<b>Non-PDS Cases</b>
<b>FY 2017</b>	<b>39%</b>	<b>10%</b>
<b>FY 2018</b>	<b>22%</b>	<b>4%</b>
<b>FY 2019</b>	<b>50%</b>	<b>16%</b>
<b>FY 2020</b>	<b>65%</b>	<b>17%</b>
<b>FY 2021</b>	<b>35%</b>	<b>20%</b>

<sup>9</sup> Community status review hearings are the juvenile legal system’s equivalent of parole revocation hearings in the criminal legal system.

- PDS prevailed in compassionate release motions at a rate 45 percent higher than that of the rest of the defense bar (42 percent versus 29 percent).<sup>10</sup>

<b>Outcomes in PDS Compassionate Release Cases vs. Non-PDS Compassionate Release Cases<sup>11</sup></b>		
<b>CR Motions Filed</b>	<b>PDS Cases</b>	<b>Non-PDS Cases</b>
<b>FY 2020-FY2021</b>	<b>150</b>	<b>654</b>
<b>CR Cases Decided</b>	<b>124</b>	<b>345</b>
<b>CR Motions Granted</b>	<b>52</b>	<b>99</b>
<b>CR Motions Win Percentage</b>	<b>42%</b>	<b>29%</b>

## **PDS FY 2023 RESOURCE NEEDS**

### **Resource Request—Summary**

For FY 2023, PDS requests a total budget of \$53,629 thousand, which includes \$50,663 thousand for base operations, \$1,723 thousand in program changes to fund 14 permanent positions, \$171 thousand in rent costs, and \$1,072 thousand in satellite office relocation costs.

Specifically, for FY 2023, PDS seeks:

1. funding of **\$1,723 thousand** for 11 attorney positions, two investigative specialist positions and one forensic social worker position. The positions are listed below in priority order.
  - one appellate attorney position (**\$158 thousand**) to support representation pursuant to the amendments to IRAA and the compassionate release law;
  - one immigration attorney position (**\$148 thousand**) to respond to the newly created demand for legal services for clients who need consultation regarding the immigration consequences of release pursuant to IRAA and the new compassionate release law;

<sup>10</sup> This aggregate data reflects the period between March 1, 2020, through July 31, 2021.

<sup>11</sup> See n. 10.

- one civil attorney position (**\$148 thousand**) to meet the demand for civil legal services for PDS clients across all divisions;
  - one special education attorney position (**\$148 thousand**) to meet the demand for litigation pursuant to the Individuals with Disabilities Education Act for PDS clients with special education needs;
  - one mental health attorney position (**\$168 thousand**) to allow PDS to pursue the complex litigation involved in opposing federal civil commitment of individuals who have completed their terms of incarceration;
  - five trial attorney positions (**\$556 thousand**), two investigative specialist positions (**\$160 thousand**), and one forensic social worker position (**\$118 thousand**) to accommodate the surge in caseloads and work requirements in the Trial Division due to the increased number of homicide prosecutions in Superior Court and the expansion of the use of forensic, video, cell site, and other electronic evidence in all cases; and
  - one Drug Court attorney (**\$118 thousand**).
2. funding of **\$171 thousand** for additional annual rent for PDS’s new headquarters;
  3. one-time, three-year funding of **\$1,072 thousand** for a potential satellite office relocation upon the expiration of a lease in 2024.

## **Resource Request—Positions (\$1,723 thousand)**

### **Appellate Division – One attorney position (\$158 thousand):**

**PDS requests funds for one attorney position to meet the demand for appellate representation created by the amendments to the District’s Incarceration Reduction Amendment Act and the new compassionate release law.**

Through an amendment that took effect in April 2021,<sup>12</sup> the D.C. Council raised the age of eligibility for resentencing pursuant to IRAA from 18 at the time of the commission of the offense to 25 at the time of the commission of the offense. In addition, after first passing emergency legislation in response to the unprecedented public health crisis posed by COVID-19,<sup>13</sup> the District of Columbia Council passed permanent legislation to provide a mechanism

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<sup>12</sup> Omnibus Public Safety and Justice Amendment Act of 2020 § 601, D.C. Act 23-0568, effective from April 27, 2021. *See* D.C. Code § 22-403.03.

<sup>13</sup> Compassionate release legislation was first passed by the D.C. Council in the COVID-19 Response Supplemental Emergency Amendment Act of 2020, D.C. Act 23-0286, and went into effect on April 10, 2020. Subsequent emergency and temporary legislation ensured that the compassionate release statute remained in effect until a permanent version was enacted through the Omnibus Public Safety and Justice Amendment Act of 2020 § 1201, D.C. Act 23-0568, which took effect on April 27, 2021. *See* D.C. Code § 23-403.04.

through which individuals sentenced on D.C. Code offenses could petition for compassionate release and resentencing.

PDS anticipates hiring seven new attorneys in FY 2022 to handle a portion of the many hundreds of new cases arising under these recently expanded release opportunities. These lawyers will be hired for a three-year term. As every client who has their IRAA or compassionate release motion denied may wish to appeal that denial, this massive influx of new cases will generate a commensurate number of appeals and will substantially increase PDS's Appellate Division's caseload. PDS anticipates filing approximately 50 IRAA cases and approximately 20 compassionate release cases every year. While PDS has had great success in its IRAA filings, winning 80 percent of its cases in FY 2021, even if PDS sustains that success rate, the denials will still result in the need to file as many as 13 IRAA appeals every year. In addition, if PDS continues to win 42 percent of its compassionate release cases, PDS would still need to file approximately 12 compassionate release appeals every year, as well as some number of *amicus curiae* (friend of the court) briefs.

Prior to its expansion by the D.C. Council, the IRAA resentencing opportunity applied to individuals who were under age 18 at the time of the commission of the offense and who had already served 15 years of incarceration. The expansion of IRAA eligibility to individuals who were below the age of 25 at the time of the commission of the offense will greatly increase the number of eligible individuals and therefore will create a large number of appeals. PDS expects this appellate litigation to be more intensive and more prolonged than compassionate release appellate litigation. While the District of Columbia Court of Appeals proceeds on an expedited basis in compassionate release cases, requiring them to be litigated through the abbreviated process of motion for summary reversal, IRAA cases require full briefing and oral argument. Because new statutes inevitably present legal issues of first impression, PDS's Appellate Division needs to be involved in any case that presents an important legal issue that affects PDS clients or can establish precedent.

The compassionate release statute was first enacted during the early days of the COVID-19 pandemic, prompted by the need to reduce the spread of COVID-19 in prisons and in the community at large. But the law's provisions are not limited to COVID-19 relief. They will continue to be a vital mechanism for reducing prison populations by enabling the release of elderly and vulnerable individuals who pose no danger to the community. PDS as a whole has been very active in filing compassionate release motions and frequently has been successful in obtaining release on behalf of former clients and other eligible individuals. PDS's Appellate Division, in particular, has been at the forefront of compassionate release litigation at the trial and appellate levels. It has been the division responsible for interpreting the new statute; briefing a multitude of legal issues of first impression facing Superior Court judges; and when motions are lost, appealing the decisions to the Court of Appeals. In FY 2021, the division filed substantive pleadings in 22 compassionate release cases. Approximately 36 percent of those filings were *amicus curiae* briefs, which the division provided to assist the Superior Court and the Court of Appeals in reaching just and correct decisions in cases that may become precedential.

The Appellate Division has been able to play this leading role in compassionate release appellate litigation by screening all compassionate release cases in which a notice of appeal is filed,

whether the petitioner was a PDS client or not, and either accepting appointment to the case or participating as *amicus* when important legal issues are presented. This screening function requires substantial investment of attorney and supervisor time. In FY 2021, PDS lawyers and supervisors have screened more than 200 cases for potential appellate involvement. In addition, the division attorneys' endeavors in compassionate release cases have required one of its two Deputy Chiefs and a staff attorney to work nearly full-time on compassionate release litigation alone. Additionally, virtually the entire division has devoted significant time to these numerous and important cases.

For FY 2023, therefore, the Appellate Division will need one additional staff attorney to handle this increased workload.

**Civil Legal Services Division – Three attorney positions: one immigration attorney position, one general civil litigation attorney position, and one special education attorney position (\$444 thousand):**

**PDS requests funds for one attorney position (\$148 thousand) to respond to the newly created demand for legal services for non-citizen clients who need immigration consultation with respect to petitions for resentencing under IRAA and the new compassionate release law.**

With resources provided in PDS's FY 2019 budget, PDS supported an attorney position responsible for meeting the constitutional demand of advising clients who have immigration issues as a result of their individual charges. In 2010, the U.S. Supreme Court in *Padilla v. Kentucky*<sup>14</sup> found that it is "quintessentially the duty of [defense] counsel to provide her client with available advice about an issue like deportation"<sup>15</sup> when counseling 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>16</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>17</sup>

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<sup>14</sup> 559 U.S. 356 (2010).

<sup>15</sup> *Id.* at 371.

<sup>16</sup> *Id.* at 373.

<sup>17</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 ineffective assistance of counsel in negotiating a plea, a defendant must show that but for the counsel's deficient representation, the result of the proceeding would have been different such that the client would have, for example, rejected the plea offer or negotiated a different plea. *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)).

Passage of the IRAA amendment and the compassionate release law has resulted in substantial new demand for PDS's representation.<sup>18</sup> A large number of these cases are on behalf of noncitizens who have particularly complicated issues related to their motions for resentencing. This newly created demand for consultation on immigration matters has resulted in a need for an additional immigration attorney. These cases almost always require investigating whether and how the clients' immigration status is related to their potential IRAA or compassionate release matter. For example, many clients have significant mental health issues in addition to generally poor physical health which compounds the likelihood that they will face extraordinarily challenging circumstances if they are deported. These cases, therefore, require extensive investigation to assess how those claims might serve as mitigation or otherwise affect the litigation of the IRAA or compassionate release motion.

Considerable time and effort must be expended given the age of these cases and given the fact that the records regarding the client's mental health and other relevant circumstances often no longer exist and must be recreated. In addition, these cases can require extensive investigation tracking down witnesses and criminal records that are decades old. Because clients are held throughout the United States, often in rural Federal Bureau of Prisons (BOP) locations, even attempting to speak with a client directly can be cumbersome.

Additionally, investigating the IRAA and compassionate release matters might reveal that a client has a viable claim for other post-conviction collateral relief, for example based on the client not having been advised or having been incorrectly advised about the immigration consequences of accepting or rejecting a plea offer. Unless these post-conviction claims are successful, upon release from prison, these clients will be deported to countries where they may face dire hardship. Similar to the representation described above for IRAA and compassionate release claims, post-conviction cases require the immigration attorney to obtain and review old records, transcripts, and filings as well as interview witnesses, attorneys, and experts. In cases where the clients suffer from mental illness, experts must be hired to determine if the BOP has failed to adequately treat or document any mental illness and to review medical records. Also, locating experts familiar with a client's specific culture requires considerable research and is absolutely necessary in order to evaluate an individual client's diagnosis and needs.<sup>19</sup>

With the addition of one attorney specializing in immigration law, PDS will be able to meet the continuing demand for immigration assistance for PDS clients eligible for resentencing under the newly enacted IRAA amendment and the new compassionate release law.

**PDS requests funds for one attorney position (\$148 thousand) to meet the demand for collateral civil legal services for PDS clients.**

PDS's Civil Legal Services Division (CLS) currently has three staff attorneys who handle all civil matters generated by, primarily, five of PDS's other legal divisions—the Trial, Parole,

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<sup>18</sup> See PDS FY 2022 Congressional Budget Justification at 13-19 for a full discussion of the new IRAA and compassionate release statutes.

<sup>19</sup> As an example, in a FY 2021 case, PDS's immigration attorney had to identify an expert in neuropsychology with expertise in Ethiopian culture.

Community Defender, Mental Health, and Special Litigation Divisions—as well as by the Office of Rehabilitation and Development. CLS’s work grows out of a client’s pending criminal, parole, or mental health case, which can generate a broad range of matters, such as housing, child custody and support, abuse and neglect, Supplemental Security Income (SSI), employment, civil restitution, civil forfeiture, return of property, civil protection orders (CPO), and civil tort defense cases.

The intertwined nature of these civil matters with the criminal, parole, or mental health cases and with each other can make resolution of any one of them complicated with a discovery process that is much more extensive and protracted than in criminal cases. Due to staffing constraints, PDS has had to decline many of the more complicated and urgent requests on behalf of PDS clients that require speedy case actions, including CPO referrals, abuse and neglect, and eviction cases, because these cases almost always require immediate appearances, investigation, expedited discovery, filings, and hearings. In addition, taking on any one civil case frequently involves representation in more than one case for the same client. Furthermore, the urgent nature of civil clients’ legal needs is often complicated by the client’s detention and creates additional representational needs not present in a conventional civil poverty law representational model.<sup>20</sup>

PDS’s civil cases require significant investigation, retention of experts, and considerable legal research and briefing. PDS’s civil attorneys must also be well-versed in legal areas that cross multiple disciplines. With the addition of one attorney to CLS, PDS will be able to meet the continuing and increasing demand for civil legal assistance for PDS clients.

**PDS requests funds for one attorney position (\$148 thousand) to meet the demand for litigation pursuant to the Individuals with Disabilities Education Act on behalf of PDS clients with special education needs.**

PDS has three special education attorneys who represent PDS clients pursuant to the federal Individuals with Disabilities Education Act (IDEA).<sup>21</sup> The IDEA mandates special accommodations in public schools for students who cannot be adequately educated in a traditional classroom setting due to learning disabilities or other physical or intellectual challenges. Under District of Columbia law, a student found to be eligible for special education services remains eligible through the semester in which the student turns 22 years of age.<sup>22</sup> PDS special education attorneys represent children in the delinquency system, children charged as adults in the criminal system, and young adults in the criminal system. The work of PDS special education attorneys is vital to the Trial Division’s representation of children because many court-involved youth have pressing, and unmet or unidentified special educational needs. Addressing those needs is critical to ensuring that a youth continues to be educated during any period of

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<sup>20</sup> For example, a client who is subject to eviction for alleged criminal activity and who is a housing voucher recipient will usually face eviction proceedings in landlord-tenant court in addition to voucher termination proceedings in an administrative forum, requiring dual representation.

<sup>21</sup> See 20 U.S.C. § 1400 *et. seq.*

<sup>22</sup> 5-E DCMR § 3002.1.

incarceration and to increasing the chances that they will avoid future involvement in the delinquency and criminal legal systems. CLS typically receives an average of 30 referrals every year for new special education cases and often continues to represent clients until they age out of eligibility for special education services.

The work required of the special education lawyers is extensive and involves among other things:

- collaborating with juvenile and criminal attorneys on case strategy;
- meeting and conferring with the parents and juvenile client on an ongoing basis;
- collecting educational, medical, and mental health records;
- meeting and engaging with school officials regularly over the course of the school year on a range of issues, e.g., Individual Education Plan (IEP) compliance, need for different and improved services, and instructional issues;
- attending numerous school related meetings, team meetings, IEP meetings, and disciplinary hearings;<sup>23</sup>
- raising multiple legal issues with school officials, e.g., the failure to provide a Free Appropriate Public Education, problems with the delivery of related services, improper disciplinary action, and needs for accommodations; and
- representing clients in administrative hearings, including due process hearings and disciplinary hearings.

For clients with disabilities who are detained at the D.C. Jail, special education lawyers are essential to making sure that those students have access to services and are able to continue their education. Special education lawyers spend time compiling educational records from the D.C. Jail, charter schools, and D.C. Public Schools in order to ensure that clients receive sufficient credits for graduation or grade promotion. Without this advocacy, many students would lose credit for years of school and would be in danger of never getting a high school diploma simply as a result of their attendance at multiple schools within multiple systems. PDS special education lawyers also play a key role in advocating for clients at release hearings and sentencing. Release plans that include detailed education plans are often helpful to judges, who must determine the appropriate placement and sentence for a client.

It is also essential that a student who is still in the custody of the Department of Corrections receive special education services while incarcerated if the student will later be sentenced and sent to the custody of the Bureau of Prisons. The BOP does not provide any special education services to incarcerated people. It does not adjust the curricula or provide the intensive supports that many students with educational disabilities require in order to access the curricula. A student with an educational disability who is not able to graduate or earn a GED before entering BOP custody may not have another opportunity to do so until their release from custody. If a District resident enters BOP custody without a GED or high school diploma, the resident will be

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<sup>23</sup> Students who are eligible for special education services have specific protections in the school discipline process. Special education attorneys attend school disciplinary hearings to ensure those protections are observed.

ineligible for much of the educational and vocational programming available in the BOP. This will hamper reentry and increase the negative and traumatic effect of the incarceration.

Access to an appropriate education while incarcerated and while in the community has a significant positive impact on individuals' life prospects. Education offers a path to increased employment and a better quality of life, not only for the student, but for the student's future children and the community as a whole. For many PDS clients with educational disabilities who have already missed a significant amount of school or who are incarcerated, the only way for them to access an appropriate education is through the advocacy of a special education attorney.

Trial lawyers, recognizing both the significant needs of their young clients in the adult system and the potential positive impact of special education advocacy at sentencing, have increasingly made referrals to CLS. Particularly in cases where a child is charged in adult criminal court, there has been an increase in the submission to the court of memoranda in aid of sentencing, written by the special education attorneys, addressing the special education services from which the client could benefit and to which the client is legally entitled.

An additional special education attorney would allow CLS to accept more of the special education referrals overall, while also lowering the caseloads of each attorney. With lower caseloads, the special education attorneys could engage in more in-depth, systemic work and advocate for clients' administrative, due process, and appellate rights in both Superior Court and federal court.

#### **Mental Health Division – One attorney position (\$168 thousand):**

##### **PDS requests funds for one attorney position to litigate federal civil commitment cases initiated against clients who have been diagnosed as having a mental illness and who have completed their sentences in the Federal Bureau of Prisons.**

With the enactment of the Revitalization Act of 1997, individuals serving prison sentences following a felony conviction in D.C. Superior Court must serve those sentences in the legal custody of the Federal Bureau of Prisons (BOP), typically in facilities across the country. The federal civil commitment statute allows the BOP to indefinitely detain individuals, even though they have completed their sentence of imprisonment, if officials believe the individual has a mental illness and because of their illness their release would create a substantial risk of bodily injury to another person or serious damage to property of another.<sup>24</sup>

This federal law, however, is explicitly meant only as a last-resort safety net for such residents for whom no available option for custody or treatment exists in their home state.<sup>25</sup> The law

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<sup>24</sup> 18 U.S.C. § 4246(a).

<sup>25</sup> *Id.* Further, as the federal courts have explained:

It is clear to this Court that Congress did not intend for the federal government to care for the mentally ill and to provide for their long-term psychiatric needs. Both the language of the statute and the legislative history emphasize that it is the states that are best equipped to care for the mentally ill. Thus, it is imperative that

recognizes that care for those with mental illness is a state function and therefore requires that the BOP make all reasonable efforts to have state officials assume responsibility for these individuals; the law, however, contains no mechanism by which to compel that result. The mere filing of a petition for federal civil commitment stays an individual's release from prison. Year after year, the District refuses *every single* BOP request to receive into its custody these returning citizens who have served their time, have a mental illness, and have a presumptive right to care and treatment in their home district. When the District declines the request, the federal government initiates civil commitment proceedings. Without effective representation at a commitment hearing, virtually all of these individuals are committed. When the proceedings result in commitment, the person is held at one of the BOP facilities that is designated to handle residents with mental health concerns.

The vast majority of individuals who are civilly committed spend many years, sometimes decades, languishing in federal prisons hundreds of miles from home. They do not receive adequate treatment; in fact, many are held in solitary confinement for extremely long periods,<sup>26</sup> a practice known to have a devastating effect on mental health.<sup>27</sup>

PDS has been a leader in focusing on the intersection between criminal and mental health issues. Currently Mental Health Division attorneys are fully occupied handling involuntary civil commitment cases that arise in Superior Court; post-commitment proceedings, including commitment reviews and outpatient revocation hearings; involuntary commitment proceedings of persons found incompetent to stand trial because of mental illness or intellectual disorder; and matters relating to persons found not guilty by reason of insanity in Superior Court or in U.S. District Court cases.

PDS has already identified dozens of District residents who have completed their sentences of imprisonment but are still detained in federal prison under this federal civil commitment scheme.<sup>28</sup> In addition, there are many more potentially eligible clients whom PDS has yet to

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federal custody pursuant to § 4246 be used as a last resort, “only in those rare circumstances where [he] has no permanent residence or there are no State authorities willing to accept him for commitment.”

*United States v. Ecker*, 489 F. Supp. 2d 130, 137 (D. Mass. 2007) (quoting 98 S. Rpt. 225 at 250).

<sup>26</sup> The incarceration of individuals with severe mental illness “imposes a substantial burden on prisons, which frequently hold such individuals in prolonged solitary confinement out of a desire to prevent their disruptive behavior from interfering with prison administration.” *Amicus* Brief of Former Corrections Directors, *Markelle Seth v. D.C.*, Case No. 19-7057, p. 4 (D.C. Cir., Dec. 24, 2019).

<sup>27</sup> When individuals are “held in prolonged solitary confinement, even mentally resilient individuals inevitably suffer severe psychological pain as a result of such confinement. Study after study around the world and over decades have (sic) shown that the resulting damage is often horrific and exacerbates any underlying mental health issues.” *Id.* at 19.

<sup>28</sup> See below at 32-34 for one example.

identify for various reasons (e.g., some federal district courts seal the records in these cases, making it impossible to search for them in online court records, and both the BOP and the District have thus far been either unable or unwilling to help PDS identify these cases).

PDS requires more resources to litigate the known cases and to identify and litigate the cases not yet known. These cases are extremely complex and require specialized knowledge and expertise in District and federal law, in the litigation of complicated medical and mental health issues, and in the navigation of multiple bureaucratic systems at the local and federal levels. Each of these cases is particularly labor-intensive as they involve the review of many thousands of pages of records, consultation with medical experts, and close coordination with both clients and other interested parties who are located across the country.

The addition of one attorney would enable PDS to continue to identify eligible clients and litigate their cases.

**Trial Division – Five trial attorney positions (\$556 thousand):**

**PDS requests funds for five attorney positions to accommodate the increased caseloads and workload requirements in the Trial Division due to the increased number of homicide cases filed in the Superior Court and the expansion of the use of forensic, video, cell site, and other electronic evidence in all cases.**

PDS requests funding for five trial lawyers to accommodate the increase in trial workloads that is a result of the upsurge in the number of murder and serious felony cases filed in the Superior Court, and the greater amount of work in all cases due to the impact of the expanded use of forensic science in cases and the influx of vast amounts of video and digital evidence. Funding for five attorney positions will give the Trial Division the ability to continue to handle the majority of the most serious felony cases filed in Superior Court<sup>29</sup> as well as a larger percentage of general felony and juvenile delinquency cases.

Funding for the five trial attorney positions is necessary to respond to the District's increased annual murder rate which has increased 95 percent since CY 2017,<sup>30</sup> and resulted in a 44 percent increase in the number of murder cases filed in Superior Court since CY 2017. Because PDS provides representation in almost every murder case except those PDS cannot accept representation in because of a conflict of interest<sup>31</sup> or because a defendant has retained outside counsel, this increase in the number of murder cases filed has strained the Trial Division's capacity.

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<sup>29</sup> PDS considers all homicide, assault with intent to kill, and sexual assault cases, as well as armed offenses with mandatory minimum sentences, to be the most serious cases. These latter cases include armed carjacking, armed burglary, and armed robbery.

<sup>30</sup> In CY 2017 there were 116 homicides in the District compared to 226 homicides in CY 2021. <https://mpdc.dc.gov/page/homicide-closure-rates>.

<sup>31</sup> See, e.g., District of Columbia Rule of Professional Conduct Rule 1.7, Conflict of Interest: General.

In addition, criminal cases now involve significantly more complex litigation than even five years ago, including more frequent use of forensic and electronic evidence. This has increased the Trial Division's workload across the board. In FY 2019,<sup>32</sup> PDS received funding that recognized a need for a forensic scientist to respond to the expanded forensic science issues that arise in all PDS divisions and principally, the Trial Division. Forensic evidence, particularly DNA evidence, is a component of 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, robbery, gun, and drug 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>33</sup>

In every case with forensic evidence, because of an attorney's ethical obligation to provide competent representation,<sup>34</sup> the attorney must understand the lab reports and the conclusions of the analysts. The case file review and preparation for trial by the attorney, assisted by the forensic scientist, might involve hours of preparation. Keeping current on all the advances being made in the forensic sciences (for example new testing available in complex DNA mixture cases) is also time-consuming, and the evidentiary filings required when new science is being introduced is taxing and requires substantial work. This review and corresponding preparation are always necessary when the U.S. Attorney's Office seeks to use such evidence. To respond to the U.S. Attorney's Office's increased use of forensic evidence and to provide ethically and constitutionally required effective representation, PDS needs additional attorney staff.

PDS has also seen a marked increase in the amount of electronic evidence provided in discovery by the U.S. Attorney's Office. Pursuant to the constitutional mandate imposed by the Supreme Court in *Brady v. Maryland*,<sup>35</sup> the U.S. Attorney's Office is now providing documentation concerning individual police officers' misconduct records, which often requires not only investigative specialists to review and analyze voluminous source documentation and interview witnesses to the alleged misconduct but requires that attorneys do so as well.<sup>36</sup> Along with witness statements and police paperwork, discovery from the U.S. Attorney's Office in any one case now typically involves cell phone extractions that can be thousands of pages long, surveillance video evidence that can be hundreds of hours long, recordings of jail residents' phone calls that can be hundreds of hours long, and extensive cell site location data that can be used to incriminate or exculpate a defendant by showing his or her location and direction of

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<sup>32</sup> See PDS FY 2019 Congressional Budget Justification at 10-12.

<sup>33</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>34</sup> See District of Columbia Rule of Professional Conduct Rule 1.1, Competence. ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.")

<sup>35</sup> 373 U.S. 83 (1963).

<sup>36</sup> While almost all of the potential evidence, if not disclosed by the prosecution in discovery, is collected and analyzed by PDS investigative specialists, the attorney must still conduct their own review and analysis to make trial strategy decisions.

travel during the course of a day. In addition, the prevalence of security cameras at commercial entities and personal residences has also increased the amount of time attorneys must spend reviewing the resulting surveillance video.

The District of Columbia Metropolitan Police Department's full implementation of body-worn cameras (BWC) in December of 2016 has also had a tremendous impact on the work of both attorneys and investigative specialists. Most cases now include hours of video footage from several officers at a scene. Review of BWC footage is particularly time-consuming because it typically shows multiple perspectives of a scene or an event. The footage includes audio as well as video and often must be synchronized across video clips in order to present a complete event to the jury.

As technology evolves, the need for training and the sheer number of hours involved in evaluating the information continue to increase. Now that all discovery is stored electronically, the growth in this material can be seen in PDS's increased data storage, which has gone from four terabytes at the end of CY 2014 to 91.1 terabytes as of September 2021, the bulk of which is Trial Division discovery data. All this is material that must be viewed and analyzed by both attorneys and investigators as part of their constitutional and ethical client representation obligations.

**Investigations Division – Two investigative specialist positions (\$160 thousand):**

**PDS requests funds for two investigative specialist positions to manage the anticipated increased caseloads and work requirements in the Trial Division.**

Increasing the capacity of the Trial Division will necessarily require additional support from investigative specialists. As noted above, trial cases now require extensive and time-consuming investigation, such as reviewing hours of body-worn camera footage in almost every case. To meet the demands of the more complex investigations and to support the requested five new trial attorneys, PDS will also need coordinated funding for two new investigative specialists.<sup>37</sup>

**Office of Rehabilitation and Development – one forensic social worker position (\$118 thousand):**

**PDS requests funds for one forensic social worker position to manage the anticipated increased caseloads and work requirements in the Trial Division.**

To manage the new cases that would come with the addition of five new trial attorneys, PDS will also need coordinated funding for one forensic social worker. Funding a forensic social worker would allow PDS's Office of Rehabilitation and Development to provide the required level of sentencing mitigation and client support that would accompany the increased Trial Division workload.

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<sup>37</sup> PDS assigns, on average, one investigator to every two attorneys and one forensic social worker for every ten attorneys.

Funding five trial attorney positions, two investigative specialist positions, and one forensic social worker position would allow PDS to respond to the increase in the number of homicide prosecutions as well as the overall increase in the use of electronic evidence across all cases.

**Drug Court Attorney (\$118 thousand):**

**PDS requests funds for an attorney position to engage in individual and systemic advocacy on behalf of persons suffering from drug addiction and participating in the Superior Court’s Drug Intervention Program.**

The Superior Court Drug Intervention Program, or Drug Court, is managed by the Pretrial Services Agency (PSA) and is a sanction-based treatment and recovery program that offers incentives to eligible individuals charged with misdemeanors and certain felonies who have substance abuse issues. Hundreds of defendants enter the program and have numerous hearings throughout the course of their participation. PDS has supported the program by acting as stand-in counsel, relieving the defendants’ criminal defense attorneys, who are primarily CJA attorneys, of the responsibility of appearing in Drug Court on behalf of their clients. PDS’s responsibilities include representing the participants in review, status, challenge, and sanction hearings. This representation had been provided by PDS Trial Division lawyers on a rotating basis, where they handled more than 3,000 matters annually in Drug Court. Due to staffing and workload constraints, however, it became impossible to continue having trial attorneys devote the considerable time required for Drug Court representation.<sup>38</sup>

In order to maintain PDS’s presence in Drug Court representation, PDS redirected personnel funds to hire a two-year fellow to serve as a full-time representative in Drug Court, allowing PDS to engage in very effective advocacy. PDS protected the interests of participants when Drug Court suspended operations in March 2020. The suspension included review, status, challenge, and sanctions hearings, as well as the treatment groups and drug testing offered by PSA. When the Drug Court Steering Committee convened at the end of 2020 to discuss restarting the program, PDS successfully advocated for the safest possible testing situation for medically vulnerable clients, including individualized testing plans for clients who needed them. This thoughtful reopening allowed clients to resume progressing through the Drug Court program without jeopardizing their health or the community’s health. PDS also successfully advocated for recognition that clients who had maintained their sobriety and participated in volunteer treatment groups during the suspension of Drug Court deserved to accelerate through the phases leading to graduation. This created a path for expedited completion for clients whose progress through the typical stages of Drug Court was delayed during the pandemic.

After nearly a year without Drug Court regularly operating, the needs and circumstances of many clients have changed. Having a single Drug Court attorney in place allowed for ongoing individual advocacy in both program accommodations and alternative agreements with the prosecution to resolve cases. It has improved the overall level of advocacy because the dedicated attorney can focus on system-wide and long-term issues. A dedicated attorney reduces the

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<sup>38</sup> See PDS FY 2022 Congressional Budget Justification at 19-21 for additional information concerning trial workload constraints.

number of appearances required by CJA attorneys, who have to submit additional vouchers for their time. It is also an improvement over a rotating team of trial attorneys because those attorneys no longer have to take time away from their pending cases. A dedicated Drug Court attorney develops a more sophisticated understanding of forensic chemistry and testing protocols, leaving them better equipped to handle challenge hearings. The attorney also develops a deeper understanding of the psychology behind recovery and offers more significant assistance to clients with an ongoing need for support. Clients also have a singular point of contact, allowing them to get continuous support and assistance that improves their performance in Drug Court. Twenty-six clients have either graduated or reached an alternative disposition since the program resumed in January 2021.

PDS can no longer redirect the personnel funds that support the current fellow when their term ends in September 2022, and without the ability to hire a full-time replacement for the fellow, PDS will most likely not be able to represent clients in Drug Court after that time. If PDS no longer handles Drug Court cases, these clients will have to be represented by individual CJA attorneys who will not have the institutional background, training, or expertise in these matters, and clients will not have the advantage of a single point of contact.

PDS therefore requests funding to support an attorney position to provide representation in Drug Court matters.

### **Resource Request—Rent Costs for PDS Headquarters (\$171 thousand)**

**PDS requests funding of \$171 thousand for the annual rent for PDS’s new headquarters.**

PDS expects to relocate its headquarters in March 2023 to federally-owned space identified for PDS by the General Services Administration (GSA). Subsequent to the identification of the 53,000 rentable square feet (sq. ft.) that PDS is due to occupy, GSA offered PDS an additional 4,100 sq. ft. of space in the same building, which PDS has accepted in anticipation of additional staff being assigned to PDS’s headquarters office.

GSA has offered the additional 4,100 sq. ft. to PDS at the same annual rental rate applicable to the 53,000 sq. ft. that PDS will occupy: \$41.69 per square foot. PDS’s first-year annual rent for the 53,000 sq. ft. in the building is \$2,225 thousand. The proportionate increase to the first-year rent for the additional 4,100 sq. ft. is \$171 thousand or eight percent of the rent for the original 53,000 sq. ft.

### **Resource Request—Relocation Costs for PDS Satellite Office (\$1,072 thousand)**

**PDS requests one-time, three-year funding of \$1,072 thousand for relocating a PDS satellite office if PDS is unable to renew its current lease.**

The lease for PDS’s satellite office, located at 601 Pennsylvania Avenue, N.W., expires in September 2024. PDS houses three of its divisions in the satellite office: the Civil Legal Services Division, the Office of Rehabilitation and Development, and the Information Technology Office. The satellite office also houses training and conference room space.

Working with the General Services Administration and using its standards, PDS has begun the process of identifying suitable office space, which may ultimately result in PDS absorbing the satellite office staff in PDS's new headquarters space at Judiciary Square, PDS's preferred option.

Three-year funding is requested because PDS lacks control over the timing of selecting office space and relocating. Should PDS need to relocate this satellite office, three-year funding will also provide the flexibility to address any project delays. Based on GSA's costs for the office space already allocated to PDS for its new headquarters, PDS estimates the build-out costs for a satellite office relocation to be \$1,072 thousand.<sup>39</sup>

## **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 Act (CJA),<sup>40</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 (CJA) attorneys 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. PDS is a single program that assigns its attorneys and professionals to specific, integrated functions to promote overall representation in individual cases. PDS staff attorneys are assigned to one of 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 undertakes a wide array 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**

Attorneys in the Trial Division provide zealous legal representation to adults and youth charged as adults in criminal proceedings in Superior Court and to children in delinquency matters.

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<sup>39</sup> This represents a calculation of cost per square feet based on 2021 dollars and a 2.1 percent inflation factor.

<sup>40</sup> See D.C. Code § 11-2601 *et seq.* 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.

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 Superior Court each year.

Traditionally, less senior Trial Division attorneys handle difficult or resource-intensive delinquency cases (for example, cases involving children with serious mental illnesses or learning disabilities, or children facing serious charges), some general felony cases, and a limited number of misdemeanor cases.<sup>41</sup> Trial Division attorneys also provide representation in a variety of other legal matters through PDS's Duty Day program.

### **Appellate Division**

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 *amicus* 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 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, on average, half of the involuntary civil commitment cases that arise in Superior Court. PDS is initially appointed when a person is detained in a mental hospital upon allegations that the person is a danger to self 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 in a criminal case because of mental illness or intellectual disorder; and in matters relating to persons found not guilty by reason of insanity in Superior Court or in U.S. District Court cases. The lawyers in this division also provide information to the District of Columbia Council on proposed mental health and intellectual disorder legislation, conduct training sessions on the rights of persons with mental

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<sup>41</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 cases 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). Sentences for most misdemeanors in the District of Columbia are for lesser terms.

illness involved in civil commitment actions, and provide legal assistance to CJA attorneys 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 system 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 with whom they can make common cause. SLD attorneys practice before local and federal trial and appellate courts in the District of Columbia and as *amicus* in the United States Supreme Court. Among their recent achievements are the end of indiscriminate shackling of juveniles in court, the reform of civil forfeiture practice, the release of 26 people from life sentences through IRAA, and class action litigation seeking declaratory and injunctive relief to improve conditions at the D.C. Jail during the COVID-19 pandemic.

### **Parole Division**

The Parole Division provides legal representation to individuals who are facing revocation of their parole or supervised release. PDS represents more than 95 percent of the individuals facing revocation proceedings. 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; through the development of diversion programs, however, some of the hearings take place at locations within 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 and students on the collateral impact criminal cases have on clients who are also on parole or supervised release, and expands the pool of attorneys available to handle parole and supervised release 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 array of civil matters that are collateral or ancillary to the clients' involvement in the delinquency or criminal legal 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 limitless in number (adverse immigration consequences, loss of parental rights, loss of housing, seizure of property, probate, civil tort defense, restitution proceedings, child custody,

Supplemental Security Income benefit work, loss of employment) and can arise even if the person is acquitted of the criminal charges or has been only arrested and never charged.

An important component of CLS's diverse civil practice is special education advocacy by attorneys with expertise under the federal Individuals with Disabilities Education Act,<sup>42</sup> 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 closely anchored to the Trial Division's representation of children because of the vital importance of education and the pressing special educational needs of many court-involved youth.

CLS's practice also includes immigration counsel, an integral part of effective representation for clients who are noncitizens. PDS's immigration counsel ensures that these clients are properly advised on how decisions made in their criminal case can affect their immigration status.

### **Community Defender Division**

As part of PDS's holistic approach to public defense, the Community Defender Division (CDD) provides services primarily to adults and children who are in the post-adjudication stage of a criminal or juvenile delinquency case in Superior Court.

For adult clients, CDD's Prisoner & Reentry Legal Services Program (PRLS) responds to the legal and social services needs of people whose lives have been affected by their D.C. criminal record. This includes people who have been arrested, who are charged, who are convicted in the Superior Court of the District of Columbia, who are currently incarcerated, as well as people who have been released from detention and incarceration. PRLS serves individuals housed either at institutions operated by the D.C. Department of Corrections (DOC) or at those operated by the Federal Bureau of Prisons (BOP) throughout the nation. Services include legal representation of clients in administrative hearings in DOC facilities and in parole grant hearings in BOP facilities. The program also represents individuals in the community under the supervision of the U.S. Parole Commission seeking termination of parole or supervised release. CDD also serves as the PDS liaison to individuals convicted of D.C. Code offenses and serving sentences in the DOC and BOP facilities. CDD monitors their conditions of incarceration and assists them on parole and other release-related matters.

Through its Juvenile Services Program (JSP), CDD represents children at administrative due process hearings, provides in-person legal consultations for children at the District's youth detention centers, and works with community organizations to develop reentry programs that address the special needs of children. In addition to staffing legal rights offices inside the District's two secure juvenile facilities,<sup>43</sup> JSP visits local group homes and foster care homes to offer legal assistance to committed youth. JSP also visits young clients placed in long-term residential facilities all over the United States. As these clients rarely, if ever, have post-adjudication legal visits from their appointed attorneys, maintaining this in-person contact with

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<sup>42</sup> See 20 U.S.C. § 1400 *et. seq.*

<sup>43</sup> See D.C. Code § 2-1515.05a.

children who are placed in these facilities far from home ensures that their legal needs are addressed and that they are not subjected to improper treatment.

## **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>44</sup> ORD’s forensic social workers provide presentencing assistance to address mitigation issues and to provide client-tailored program alternatives.<sup>45</sup> Other legal 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 legal research section of the website PDS maintains for CJA attorneys, and three paralegals who work on cases and projects.

### **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, conducting mitigation investigation, collecting and assessing digital evidence (e.g., security camera footage, cell phone records, body-worn camera video, “Shot Spotter” (gunshot locations) 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 defense investigators across the country and to court-certified CJA investigative specialists 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. The ORD staff are skilled mitigation specialists who as part of the defense team, among other services, provide the Superior Court with information about viable community-based alternatives to incarceration. Because 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), ORD staff members are frequently asked to provide consultation for judges, CJA attorneys, and others in the criminal legal system. In addition, the staff of ORD prepare a comprehensive annual *Directory of Adult*

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<sup>44</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>45</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).

*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 legal system. These directories, available on PDS's website,<sup>46</sup> are used by the Court Services and Offender Supervision Agency, the BOP and its contract prisons, the Superior Court, and many other agencies and organizations working with clients in the criminal legal 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>47</sup>

## **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 Superior Court. DSO coordinates the availability of PDS attorneys, CJA attorneys, law school clinic students, and *pro bono* attorneys for appointment to new cases. DSO operates six days a week, including holidays.

## **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, the Human Resources Office, the Information Technology Office, and Administrative Services. In concert with individual attorneys and PDS executive staff, these divisions provide such services as procurement of expert services for individual cases, financial accountability,<sup>48</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's and each employee's work is valued for the manner in which it enhances 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.

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<sup>46</sup> [http://www.pdsdc.org/ord/2016\\_Youth\\_Directory.html#p=1](http://www.pdsdc.org/ord/2016_Youth_Directory.html#p=1). PDS's website can be found at [www.pdsdc.org](http://www.pdsdc.org).

<sup>47</sup> <http://www.cjccresourcelocator.net/ResourceLocator/ResourceLocatorHome.aspx>.

<sup>48</sup> While a clean financial audit is an expectation and not an accomplishment for PDS's Budget & Finance Office, it is worthy of note that PDS continues to receive such audits.

## PDS PERFORMANCE

### Case Performance and Data<sup>49</sup>

Because of the system disruption caused by COVID-19, the story of PDS's FY 2021 performance is largely one of dedication to seeking clients' release from the D.C. Jail and from federal prisons. PDS devoted the majority of its work for clients to litigating IRAA and compassionate release motions, obtaining release for many clients after they had spent decades in prison and watching clients succeed as they took their first steps in freedom. Below are just some examples of clients who were released from incarceration due to the efforts of PDS attorneys.

#### IRAA and Compassionate Release Case Performance

**IRAA:** In FY 2021, M.W. became the first person to be released to the community as a result of the expansion of IRAA's resentencing opportunity to individuals who were under age 25 at the time of the commission of the offense. M.W. had been serving a mandatory 50-years-to-life sentence for an offense committed when he was 20 years old. During the 26 years he was incarcerated, M.W. maintained an outstanding record of conduct: he earned his GED, engaged in more than a thousand hours of programming, earned exemplary work reviews, learned alongside college and graduate students, published a book of poetry, and earned college credits from Georgetown University. Because of M.W.'s character, trustworthiness, and work ethic, BOP staff relied on M.W. to be a leader in the prison, choosing him to be a "Suicide Watch Companion" and to create programming for other residents that focused on reducing recidivism.

When M.W. was transferred to the D.C. Jail to await his IRAA hearing, he was selected by correctional staff to be a founding mentor of the Young Men Emerging Unit (YME), helping to create a rehabilitative and therapeutic environment for young adult residents that provides mentorship, counseling, trauma treatment, and corrective behavior measures. A correctional officer who worked with M.W. described it as a "privilege of [his] professional life to [have] serve[d] with [M.W.] as a leader." One of his Georgetown professors considered it an "honor to be associated with him" because "he brings tremendous character and integrity to every interaction he has." M.W. and his PDS team prepared a comprehensive reentry plan that included housing; employment; and the support of his family, his friends, and the individuals he has impressed along his rehabilitative journey. In light of the abundant evidence of his fitness to reenter society, the positive impact he could have on the greater community, and his demonstrated record of peacefulness, a D.C. Superior Court judge granted M.W.'s motion and released him. M.W. has already started working full-time for the D.C. Department of Corrections to create a mentorship program for at-risk youth in the community by building on his experiences working with mentees in YME.<sup>50</sup>

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<sup>49</sup> Case descriptions are included with the clients' permission but, except where noted, with their identities masked. The D.C. Rules of Professional Conduct prohibit PDS from identifying clients and revealing information about their cases outside of the public record. D.C. Rule of Professional Conduct 1.6.

<sup>50</sup> For an in-depth media story about M.W., see <https://www.nbcwashington.com/investigations/man-released-under-dcs-second-look-act->

**Compassionate Release:** At the trial level, successful compassionate release motions can require complex legal arguments in addition to comprehensive mitigation evidence and thorough reentry planning. In FY 2021, PDS represented A.B., who was serving a sentence for convictions in D.C. Superior Court but also for convictions in a federal case in Maryland. A.B.’s Maryland court-appointed attorney first convinced the federal judge to grant compassionate release. The Maryland attorney then referred A.B. to PDS for representation in his D.C. Superior Court matter. A Special Litigation Division (SLD) attorney filed a compassionate release motion arguing the extensive merits for release and arguing that because the prosecuting authority in the federal case was the same prosecuting authority in the D.C. Superior Court case, it was prevented (“collaterally estopped”) from relitigating the release issue it had already lost in federal court. In a first for compassionate release litigation in D.C. Superior Court, the judge agreed and granted A.B.’s second compassionate release motion. That is when the attorney learned that A.B. had a detainer from the U.S. Parole Commission based on an alleged violation of parole in a single-count unarmed drug distribution case from 28 years ago. While the SLD attorney drafted a third compassionate release motion for the client, a PDS Parole Division attorney joined the case and persuaded the U.S. Parole Commission to lift the detainer, which mooted the third compassionate release motion. A.B. was at finally released in June 2021.

**Compassionate Release:** In an example of how PDS divisions work together to achieve better outcomes for clients, in FY 2021, PDS client W.J. had a long-ago injustice corrected and was released from prison after serving 44 years of a 28-years-to-life sentence. In the mid-1970s, when W.J. was eighteen years old, he was charged in a lengthy indictment that alleged numerous serious violent crimes against multiple victims. PDS did not represent him at the time. The charges in the indictment were split into two separate trials, and W.J. went to trial on the less serious charges first. Shortly after the trial started and without the attorney who represented W.J. on the more serious charges in the indictment being present, the judge intervened to encourage W.J. to take a plea that resolved all of his cases. The judge, promising W.J. that he would not get an indeterminate sentence of more than 28 to 84 years, failed to list the charges against W.J. and failed to explain the elements of those charges and his alleged role in the indicted sprawling criminal venture.

Despite practices that today would be considered highly irregular if not actually in violation of procedural rules and laws, and disregarding W.J.’s youth, his low IQ, his illiteracy, and repeated findings that W.J. was incompetent to stand trial, the judge accepted W.J.’s plea to 36 counts in the indictment. The judge then imposed a prison sentence of 28 years to life. Immediately afterwards and continuously for the next 44 years, W.J. insisted upon his innocence and filed multiple *pro se* motions from prison trying to challenge his convictions. Finally, in 2017, in response to another *pro se* motion, the prosecution was forced to admit that W.J. had pleaded guilty to a crime for which he had not been indicted and had been sentenced on a count in the indictment to which he had not pleaded guilty. When W.J. appealed the trial court’s order that granted only part of his motion but denied the rest, PDS was finally appointed to represent him.

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[sentencing-reform/2785744/](#); last viewed on September 1, 2021. M.W. gave PDS permission to use his actual initials and his full name.

Soon after, the COVID-19 pandemic struck. PDS filed a successful motion for compassionate release accompanied by a comprehensive reentry plan on behalf of W.J. Then, even after W.J.'s release from prison, PDS continued to advocate on his behalf, returning to the post-conviction litigation and hiring an expert witness to explain how W.J.'s cognitive deficiency combined with the coerciveness of the procedural violations of the plea hearing rendered the plea involuntary and unconstitutional. As a result, the judge presiding over the compassionate release case found that the long-ago plea proceedings had resulted in a miscarriage of justice and vacated almost all of the counts to which W.J. had pleaded guilty. Finally vindicated and free, W.J. in accordance with his reentry plan, moved into a group home facility that was dedicated to housing elderly individuals who had been released under compassionate release laws. W.J. is now employed at the facility with a lead role in operations and supports other newly released residents.

**Compassionate Release:** More than 30 years ago, PDS represented M.K., who was charged with very serious violent crimes committed while she was in the midst of a psychotic episode. M.K., filled with remorse, was so depressed that the PDS trial team made the very unusual decision that the PDS forensic social worker working with the team would sit with her at counsel table throughout all the proceedings. To spare the prosecution's main witness (a young relative of M.K.'s) the trauma of testifying in court, M.K. pleaded guilty to the most serious charges against her and received a prison sentence of 25 years to life. While incarcerated, M.K. dedicated herself to creating a healthy life through drug treatment and religious connectivity; earning educational certificates; and knitting blankets, scarves, and hats for foster and homeless children through six non-profit agencies she researched on her own. Often holding two prison jobs simultaneously, M.K. used the money she earned to pay for her knitting projects. Despite M.K.'s outstanding prison record, the U.S. Parole Commission repeatedly denied her parole solely due to the seriousness of her original crime. Despairing of ever getting paroled, M.K. stopped requesting parole hearings, instead focusing on her continued rehabilitation and acts of service.

Throughout the years, the PDS social worker from M.K.'s trial team maintained contact with her. In FY 2021, PDS undertook to represent M.K. again and filed a compassionate release motion on her behalf. The social worker, now the Chief of the Office of Rehabilitation and Development, created a reentry plan, which included plans for housing, employment and job readiness, support groups, and the Chief serving as the client's mentor. Before filing the compassionate release motion and reentry plan, PDS sent them to the original sentencing judge, now retired, asking if he would write a letter in support of M.K.'s release. After reviewing for himself M.K.'s amazing record of success during more than 30 years in the BOP, the judge agreed that she had proven her rehabilitation and wrote a letter of support. The Superior Court granted the compassionate release motion. After learning that M.K. was going to be released, the BOP staff at her assigned prison gathered to celebrate with her.

On M.K.'s second day back in the District, she enrolled in a job readiness program. Since then, she has continued to excel, becoming a model resident in her housing program, and she was recently accepted into a professional certificate program run by the continuing studies division of a local university.

## **Additional Case Performance Data**

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. PDS not only reduces the costs associated with inpatient versus outpatient treatment and with secure detention versus community supervision, PDS also makes a difference in individual lives by ensuring clients' fair treatment in the criminal legal system. The below examples illustrate the excellent work provided across PDS divisions in FY 2021:

### **Trial/Investigations:**

In FY 2021, PDS's client S.B. was charged with first-degree murder while armed. Moments before the decedent was killed, he was captured on surveillance video in the company of the person who shot him. The decedent was dragged off camera but the shooter appeared again on camera moments later, clearly carrying a gun. The surveillance video was shared in police precincts across the District, and an officer in a different precinct from where the shooting occurred reported that he "immediately recognized" S.B. as the shooter. The officer did not disclose this information immediately, however, so the detective assigned to the case did not receive information about the supposed identification until a few weeks later. Six weeks after the shooting, the police arrested S.B., and PDS was appointed to his case.

At S.B.'s insistence that his cell phone would show he was across town at the time of the shooting, the PDS attorney requested that the prosecution download the cell site location data from the cell phone law enforcement had seized from S.B. at the time of his arrest. The PDS trial team, working during the height of the COVID-19 lockdown, was able to conduct only limited investigation of the shooting. Needing to rely on law enforcement investigation more than usual, the trial attorney made strategic requests that the prosecutor disclose exculpatory material as constitutionally required. These requests appeared to guide the detective's further investigation. Repeatedly, after the attorney would ask for certain information, a few days later, the prosecution would answer the questions with the information the detective recently found. Gradually, the continued investigation and the information from the downloaded cell phone combined to convince the prosecution of S.B.'s innocence. The prosecution dismissed the case.

### **Mental Health Division:**

T.M. was born and raised in the District. In 1992, at the age of sixteen, he pleaded guilty to one count of second-degree murder while armed and was sentenced to 14 to 42 years of imprisonment. His mandatory parole release date was in September 2020. By then, he was 44 years old and had spent more than 28 years in prison for a crime he committed as a teenager.

Unfortunately, while in prison, T.M. developed a serious mental illness. A few days before his mandatory release date, the Bureau of Prisons filed a petition in the U.S. District Court for the District of Minnesota—the district in which T.M. was incarcerated—alleging that he was too mentally ill and dangerous to be released and seeking to have him civilly committed under federal law. As noted above, the federal civil commitment statute allows the BOP to indefinitely detain individuals convicted under the D.C. Code in federal prison, though they have completed their sentence of imprisonment.<sup>51</sup> When the BOP sent a request to the District to see if they would care for T.M., who had served his sentence, had a disability, and had a right to care and

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<sup>51</sup> See above at 16-18.

treatment back home in the District, the District did not even respond. The BOP then sent another request, and this time, the District replied with a two-sentence email message refusing, without explanation, to accept T.M. for treatment.

Because PDS learned of T.M.'s federal civil commitment case before his commitment was finalized, PDS was able to intervene. PDS was determined to find a way to require the District to take responsibility for T.M. in time for the federal court in Minnesota to see that there was a viable "state" alternative to federal commitment. PDS identified a psychologist who evaluated T.M. and who then, as the District's local civil commitment statute permits, filed a civil commitment petition in D.C. Superior Court seeking to have him committed to Saint Elizabeths Hospital, the District's secure forensic psychiatric facility. PDS strategized with the parties in T.M.'s federal case in Minnesota to put that case on hold long enough to see if the District would act.

When the District's Department of Behavioral Health (DBH) found out about PDS's efforts on behalf of T.M., they sought to gain control of the case to then dismiss it. Eventually, the court allowed DBH to join T.M.'s psychologist as a co-petitioner. But rather than advocate for T.M.'s commitment in the District, DBH as a supposed "co-petitioner" then spent the next four months repeatedly and aggressively moving to dismiss the petition, eventually arguing that T.M. had to remain in federal prison because he was too dangerous. Fortunately, multiple Superior Court judges agreed that T.M. is a returning citizen who is subject to the District's civil commitment laws.

Ultimately, the Superior Court granted the petition, ordering T.M. to be civilly committed in the District. By that time, he had been held in solitary confinement in Minnesota for more than a year, during which time he appeared for hearings by video, his face peering through the food slot of his prison cell. His federal civil commitment case was then dismissed, and he was transported to Saint Elizabeths Hospital where he has been thriving. T.M. is doing so well that the Hospital is beginning to plan for his eventual discharge to the community where, with appropriate treatment and services, he will experience freedom for the first time in more than three decades.

In addition to its work in T.M.'s case, in FY 2021, PDS's Mental Health Division continued its advocacy on behalf of clients before the Superior Court and the Commission on Mental Health. In FY 2021, MHD 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 Superior Court. These initial hearings simply determine whether the prosecution meets the low standard of probable cause before the case can proceed to the next stage of the civil commitment process. Even when probable cause was found, of all of PDS's FY 2021 probable cause hearing release requests (contested and non-contested), PDS was able to secure the release of 94 percent of clients. When PDS prevails at these hearings, clients who would otherwise be using hospital resources are released, saving taxpayer funds and making the hospital resources available to those most in need (and, most importantly, permitting persons who should not be committed involuntarily to retain their liberty).

In FY 2021, PDS also prevailed in 43 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

Superior Court and two doctors employed by the court—by securing either complete dismissal or mitigation (securing outpatient commitment instead of inpatient commitment). 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 that of inpatient treatment and typically achieves much more favorable outcomes for clients.

## **Appellate Division**

PDS’s Appellate Division continues to lead in the cause of criminal justice in the District of Columbia through its exemplary legal representation and *amicus curiae* assistance to the courts, which frequently results in published opinions that establish or clarify legal standards that protect the integrity of criminal adjudication and foster public trust in the courts. Additionally, in FY 2021, the Appellate Division led the D.C. criminal defense bar in litigating important legal questions of first impression arising under the recently enacted COVID-19 Response Supplemental Emergency Amendment Act of 2020 and its subsequent permanent law.<sup>52</sup>

Since the D.C. compassionate release statute was first enacted in April 2020, the PDS Appellate Division has been at the forefront of identifying and litigating important questions of statutory interpretation, developing model pleadings, and providing resources and advice to CJA and *pro bono* attorneys. In FY 2021, the division continued to play this role as both appellate counsel and *amicus curiae* in numerous cases appealing the denial of compassionate release. Eight of these cases resulted in victories for elderly or medically vulnerable incarcerated people: in two cases, the government confessed error and agreed to a remand;<sup>53</sup> in four other cases, the Court of Appeals reversed the denial of compassionate release and remanded for further findings;<sup>54</sup> and in two other cases, the Court of Appeals took the extraordinary measure of instructing the trial court to grant compassionate release.<sup>55</sup>

One of these PDS appellate victories resulted in the Court’s first published opinion interpreting the District’s compassionate release statute, *Bailey v. United States*.<sup>56</sup> In reversing the trial court’s denial of compassionate release, the Court of Appeals decided two important legal questions of first impression. First, the Court held that a defendant seeking compassionate release “need only demonstrate their non-dangerousness by a preponderance of the evidence,” and not the “higher standard of proof” that the trial court seemed to have applied in finding Mr. Bailey dangerous.<sup>57</sup> Second, the Court held that a trial court must grant compassionate release if it finds that the defendant “is both eligible for early release and non-dangerous,” and may not deny relief based on sentencing factors unrelated to dangerousness, such as the need for

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<sup>52</sup> See n. 13.

<sup>53</sup> *Onley v. United States*, No. 20-CO-0467; *Wynn v. United States*, No. 21-CO-375.

<sup>54</sup> *Watts v. United States*, No. 20-CO-539; *Hill v. United States*, No. 21-CO-178; *Bailey v. United States*, 251 A.3d 724 (D.C. 2021); *Green v. United States*, No. 21-CO-430.

<sup>55</sup> *Richardson v. United States*, No. 21-CO-53; *Moore v. United States*, No. 21-CO-463.

<sup>56</sup> 251 A.3d 724 (D.C. 2021).

<sup>57</sup> *Id.* at 729.

punishment or general deterrence.<sup>58</sup> In applying these rulings on remand, the trial court found that Mr. Bailey was not dangerous and modified his sentence to effectuate his immediate release.

PDS appellate attorneys also advanced the Court’s understanding of the new compassionate release law by filing *amicus* briefs on numerous important legal questions of first impression, including the scope of the “[o]ther extraordinary and compelling reasons” provision in D.C. Code § 24-403.04(a)(3), the standard of review on appeal from a denial of compassionate release, the scope of the trial court’s discretion in determining whether a defendant is dangerous, whether the government has the right to appeal a grant of compassionate release, and whether a medically vulnerable defendant’s vaccination against COVID-19—or decision to forgo such vaccination—eliminates their eligibility for compassionate release.<sup>59</sup> As the pandemic continues to evolve, raising new and complex questions of extraordinary importance to individual and public health, PDS’s expertise in this area of the law continues to serve as an important resource for both the Court and the defense bar.

In *Tilley v. United States*,<sup>60</sup> PDS succeeded in persuading the Court of Appeals that the District’s 70-plus-year-old Sexual Psychopath Act<sup>61</sup> was unconstitutional on its face because it permitted the indefinite civil commitment of persons who do not have a mental illness solely on the grounds of dangerousness. This landmark decision finally brought D.C. law into compliance with the Supreme Court’s holding in *Kansas v. Hendricks*,<sup>62</sup> that civil commitment passes muster under principles of substantive due process only if dangerousness stems from mental impairment. The D.C. Court of Appeals took the extraordinary step not only of striking down an outmoded and unconstitutional statute, but doing so on a plain error standard of review despite the lack of objection by Mr. Tilley’s non-PDS counsel at the trial level. The Court held that it would exercise its discretion to correct a manifest injustice: “This is indeed an exceptional case. The unconstitutional commitment of a person to a mental institution for what could be the rest of his or her life is unquestionably a clear miscarriage of justice.”<sup>63</sup>

In *Golden v. United States*,<sup>64</sup> PDS won a victory for a client and an important precedent for Fourth Amendment rights. The Court held that the police’s tactic of—without cause—surrounding a lone pedestrian at night, asking him if he was carrying a weapon, and then refusing to accept his “no” answer by then asking him to show them his waistband amounted to a Fourth Amendment seizure. As the Court ruled, no reasonable person under such circumstances would

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<sup>58</sup> *Id.* at 732.

<sup>59</sup> *Onley v. United States*, No. 20-CO-0467; *Brown v. United States*, 2007 CF1 007404; *Dancy v. United States*, 20-CO-586; *Wade v. United States*, 20-CO-532; *Watts v. United States*, No. 20-CO-539; *Facon v. United States*, 21-CO-542.

<sup>60</sup> 238 A.3d 961 (D.C. 2020).

<sup>61</sup> D.C. Code § 22-3803 *et seq.* (1948).

<sup>62</sup> 521 U.S. 346 (1997).

<sup>63</sup> 238 A.3d at 969.

<sup>64</sup> 248 A.3d 925 (D.C. 2021).

feel free to terminate the encounter and leave without satisfying the officers' demand. Because police lacked all reasonable articulable suspicion for the seizure, the ensuing recovery of a gun was unlawful, and the trial judge was required to suppress the evidence. This is an important decision in the pantheon of search and seizure cases protecting the citizenry's civil rights in the face of police overreaching.

The excellence of PDS's appellate representation continues to garner a remarkable reversal rate: 35 percent for FY 2021. This excellence is also captured in a statistic that compares PDS's reversal rate to that of the rest of the defense bar. In FY 2021, PDS's reversal rate was seventy-five percent higher than that of the rest of the defense bar (35 percent versus 20 percent). As PDS has noted before, this statistic also correlates directly to excellence in trial-level lawyering: reversal on appeal is exceedingly difficult unless trial lawyers "make a record" in the court below, which means that they must fairly present the legal issue to trial judges to permit them to avert serious error in the first instance.

### **Parole Division**

The Parole Division is the sole source of representation for more than 95 percent of the hundreds of parolees and supervised releasees facing revocation proceedings in the District of Columbia each year. 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 majority of persons facing revocation by the USPC are charged with having committed minor technical violations rather than new criminal offenses. In revocation cases involving new criminal arrests, the USPC pursues terms of incarceration for persons who are convicted of new criminal conduct but also for persons whose new cases resulted in dismissal or acquittal in court. PDS defends against any findings of violation and 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 typically handles more than 1,000 matters annually for clients who are facing parole or supervised release revocation. In FY 2021, PDS represented 687 clients at probable cause hearings before the USPC. Because of the pandemic, all alternative programs were suspended for 2021, meaning all clients held after probable cause hearings had to have their matters resolved through agreements to revocation, revocation hearings, or written advocacy for release short of hearing, or they are still awaiting an opportunity to resolve their cases. For clients who chose to go to final revocation, in 34 percent of the cases, PDS was able to achieve parole or supervised release reinstatement for the client.

Due to the pandemic, after April 2, 2020, all final revocation hearings were suspended, and probable cause hearings were held via video conference. While probable cause hearings are still held via video conference, revocation hearings have resumed partially in person, and partially via video conference. Despite not being able to advocate fully in person at hearings, PDS was able to win release for 233 clients who were being held at the D.C. Department of Corrections for revocation hearings. PDS was also able to secure the release and reinstatement on parole or supervised release of another 250 clients at their first appearance before the USPC.

## Community Defender Division

In FY 2021, the Juvenile Services Program (JSP) represented 16 children in the juvenile delinquency system equivalent of parole revocation hearings (“community status review hearings”). In eight of these hearings, the government’s request to place the youth in a more restrictive setting was denied and the youth remained in community placements. This is an especially impressive outcome given that youth are eligible to have more restrictions imposed on them based on as few as two technical violations, hearsay is admissible at these administrative hearings, and the fact finders are employees of the same juvenile system agency requesting the more restrictive setting.

JSP also represented securely detained youth in 129 institutional disciplinary hearings. The hearing officers (who are also agency employees) imposed additional sanctions in only 45 hearings—just 34 percent of all such hearings—even though multiple incident reports written by facility staff are submitted to support each incident.

In its role as the legal ombudsman for detained youth, JSP also works to address systemic problems that PDS staff observe in the facilities. For example, during most of FY 2021, JSP’s traditional in-facility operations were halted due to the COVID-19 pandemic. JSP operated a confidential hotline where youth in detention were allowed to contact a PDS staff person directly from a phone on their unit. Once JSP returned to in-person duties, however, JSP saw a 290 percent increase in Duty Day consultations from the prior month.

In FY 2021, JSP continued to expand its *habeas corpus* practice to litigate issues of unlawful detention. Through this practice area development, JSP was able to ensure that the Department of Youth Rehabilitation Services ended its practice of obtaining a youth’s consent to being removed from the community and placed in a residential facility by having the youth sign ambiguous, vague, and confusing agreements.

## CONCLUSION

The core work of PDS is the representation of individual clients facing a loss of liberty. Every year, PDS lawyers, investigative specialists, forensic social workers, and other staff assist clients in thousands of matters. 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 Office of the Attorney General and the U.S. Attorney’s Office for the District of Columbia. A true *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. Although FY 2021 was a very different and difficult year due to the COVID-19 pandemic, PDS nonetheless, as it has every year since its inception, fought a forceful fight and found a resolution where possible 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 is essential to assist the District in meeting its constitutional obligation to provide criminal 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 anyone loses their liberty.

## BUDGET DISPLAYS

### PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA FY 2023 Summary of Changes

	<u>FTE</u>	<u>Amount (\$ in 000s)</u>
<b>FY 2022 Continuing Resolution Level</b>	<b>222</b>	<b>46,212</b>
<b>Adjustments to Base</b>		
Add General Inflation Level Adjustments	-	3,864
Add IRAA and Compassionate Release	42	9,943
Add Record Sealing	2	310
Less 3-Year Term Employees	(26)	(8,107)
Less Attrition Estimate	(18)	(1,559)
<b>Total, Adjustments</b>	<b>-</b>	<b>4,451</b>
<b>FY 2023 Base</b>	<b>222</b>	<b>50,663</b>
<b>PROGRAM CHANGES</b>		
Add Additional Demand for Legal Representation	14	1,723
Add Satellite Office Relocation and Build-Out Costs	-	1,072
Add GSA Rent for Add'l Floor in New HQ Location	-	171
<b>FY 2023 REQUEST</b>	<b>236</b>	<b>53,629</b>

**PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA**  
**FY 2023 Summary of Changes by Grade and Object Class**

	FY 2021 Actual		FY 2022 Continuing Resolution Level <sup>1/</sup>		FY 2023 Budget Request		Change FY 2023 - FY 2022	
	FTE	Amount	FTE	Amount	FTE	Amount	FTE	Amount
<b>Grades</b>								
ES/EX	2	327	2	353	2	378	-	25
AD-15	27	4,267	27	4,700	27	4,965	-	265
AD-14	65	8,746	65	10,092	65	10,654	-	562
AD-13	32	3,615	40	4,042	45	5,081	5	1,039
AD-12	25	2,627	26	2,335	26	2,603	-	268
AD-11	22	2,190	24	2,109	31	3,282	7	1,173
AD-10	-	-	-	-	-	-	-	-
AD-09	18	884	17	1,194	17	1,269	-	75
AD-08	3	260	3	192	3	208	-	16
AD-07	8	684	12	834	14	1,037	2	203
AD-06	5	225	5	275	5	289	-	14
AD-05	1	44	1	50	1	53	-	3
Total Positions	208	23,869	222	26,176	236	29,819	14	3,643
EX/ES FTE		2		2		2		-
AD FTE		206		220		234		14
Average EX/ES Salary		163		177		189		12
Average AD Salary		114		117		126		9
Average AD Grade		13		13		13		-
<b>Object Class</b>								
11.1 Full Time Permanent	208	23,831	222	26,126	236	29,769	14	3,643
11.5 Other Pers. Comp,		38		50		50		-
11.8 Special Pers. Services		561		500		650		150
12.0 Benefits		8,470		9,063		10,518		1,455
13.0 Unemployment Comp.		44		45		46		1
<b>Personnel Costs</b>	208	32,944	222	35,784	236	41,032	14	5,248
21.0 Travel & Training		71		100		211		111
22.0 Transportation of Things		13		13		13		-
23.1 Rental Payments to GSA		3,551		3,586		3,794		208
23.2 Rental Pmts.to Others, & Misc.		243		257		257		-
23.3 Comm., Utilities & Misc.		441		508		234		-274
24.0 Printing and Reproduction		31		54		54		-
25.1 Consulting Services		1,567		1,332		1,716		384
25.2 Other Services		1,977		2,218		2,306		88
25.3 Purchases from Gov't Accts.		1,290		1,332		1,479		147
25.4 Maintenance of Facilities		1		6		6		-
25.7 Maintenance of Equipment		797		600		924		324
26.0 Supplies and Materials		858		324		421		97
31.0 Furniture and Equipment		946		98		111		13
<b>Non-Personnel Costs</b>		11,785		10,428		11,525		1,097
<b>TOTAL</b>		44,728		46,212		52,557		6,345
<b>25.3 HQ Relocation</b>		6,020				1,072		1,072
<b>Grand Total</b>		<b>50,748</b>		<b>46,212</b>		<b>53,629</b>		<b>7,417</b>
<b>OUTLAYS</b>		<b>38,903</b>		<b>41,591</b>		<b>48,267</b>		<b>6,676</b>

<sup>1</sup> Excludes a one-time increase of \$8.107 million for 26 temporary FTE.

## APPROPRIATION LANGUAGE

### PUBLIC DEFENDER SERVICE FOR THE DISTRICT OF COLUMBIA Fiscal Year 2023 Appropriation Language

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, [\$57,676,000] **\$53,629,000: 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:

**Provided further**, That the District of Columbia Public Defender Service may establish for employees of the District of Columbia Public Defender Service a program substantially similar to the program set forth in subchapter II of chapter 35 of title 5, United States Code, except that the maximum amount of the payment made under the program to any individual may not exceed the amount referred to in section 3523(b)(3)(B) of title 5, United States Code:

**Provided further**, That for the purposes of engaging with, and receiving services from, Federal Franchise Fund Programs established in accordance with section 403 of the Government Management Reform Act of 1994, as amended, the District of Columbia Public Defender Service shall be considered an agency of the United States Government.

**Provided further**, That the District of Columbia Public Defender Service may enter into contracts for the procurement of severable services and multiyear contracts for the acquisition of property and services to the same extent and under the same conditions as an executive agency under sections 3902 and 3903 of title 41, United States Code.