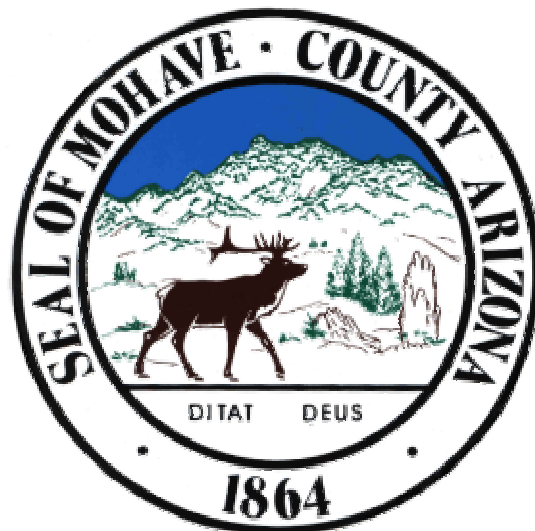


Law Offices of the Mohave County  
Public Defender



FY 2005  
Annual Report

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## Executive Summary

This report is prepared in accordance with A.R.S. §11-584(A)(2) & (3) that require that the Public Defender prepare and file with the Board of Supervisors an annual report of services rendered as well as an annual report with the presiding judge of the superior court, the chief probation officer and the board of supervisors on the average cost of defending a felony case. This report combines the requirements of A.R.S. §11-584(A)(2) & (3) by outlining the number of cases filed which required the appointment of an indigent defense attorney during FY 2005 and providing an accounting of funds expended in FY 2005. The report will also highlight several of our accomplishments during the year. Finally, the report provides an analysis of the statistics for future planning purposes.

FY 2005 represented the twentieth full year of operation for the Law Offices of the Mohave County Public Defender. The Law Offices of the Mohave County Public Defender continues to provide quality legal services to those persons whose cause has been entrusted to this office for representation.

In addition our office continues to strive to fulfill our goal of providing indigent defense services in a cost efficient manner. The staff at the Law Offices of the Mohave County Public Defender remains dedicated to considering the impact of our organizational structure and efficiency on the taxpayers of Mohave County.

While FY 2005 was a very solid year in terms of qualitative and quantitative performances, projected programmatic shortcomings in recruiting and retention incentives as well as extreme physical facilities constraints appear to be leading into an absolute reversal of this trend for FY 2006. Staffing levels as of the date of this report have dropped to the lowest levels in over 4 years. At the same time case loads are at their highest levels ever with continued growth projected. The inevitable result is that private contract assignments will increase significantly during FY 2006, with a resultant overall significant increase to indigent defense costs for the citizens of Mohave County. Initial projections are for an excess \$350,000 - \$500,000 in expenses over and above actual amounts budgeted for FY 2006.

Significant additions must be made to staffing levels as well as recruiting and retention tools in order to reverse a slow drain of talent and the return of outrageous public monies being spent on private contract attorneys, when the knowledge and ability to provide at least as effective a system has been proven to exist within the confines of Mohave County governmental structure.

## Table of Contents

Executive Summary .....	i
Table of Contents .....	2
List of Figures .....	2
List of Tables .....	3
Introduction.....	4
Part I - Indigent Defense Caseload Statistics.....	5
A.    Service Delivery Methods .....	5
B.    Case Classifications .....	5
1.    Felony Cases .....	7
2.    Juvenile Cases.....	9
A.    Delinquent and Incurable Juveniles .....	9
B.    Dependencies .....	9
3.    Misdemeanor Cases .....	10
4.    Appeals and Post Conviction Relief Cases.....	10
Part II - Indigent Defense Costs.....	11
Cost per Case Analysis .....	12
Part III - FY 2005 Highlights and Achievements .....	13
Part IV – Conclusion (Challenges and Trends for the Future) .....	16
Appendix A - Where the Numbers Come From and What They Represent.....	18
Appendix B - Breakdown of Most Prevalent Crimes for FY 2005 By Charge .....	19
General Category Breakdown.....	19
Appendix C - Detailed Budget Report.....	20
Appendix D - Cost per Case Analysis using Weighting Factors .....	21
Appendix E (Page 1 of 7).....	29
Appendix F (Stressors) .....	36
Appendix G ( <i>Miranda v. Clark County</i> ).....	39

## List of Figures

Figure 1 – This table represent the average cost per case for all three forms of legal service providers, as well as the average for all services for fiscal year 2005.....	22
Figure 2 – This Chart shows an annual comparison for all three indigent defense provider systems and the average for the county provided service. ....	23
Figure 3 – This chart shows the growth in the volume of raw cases handled by the respective service provider systems within Mohave County. General decreases in the number of outside contract case assignments is a result of more stringent conflict review, and greater internal efficiencies and optimization of resources. ....	24
Figure 4 – This figure represents the total number of man hours recorded for professional staff during each two week pay period. Totals change dramatically based on the addition and departure of staff.....	25
Figure 5 – This figure represents productivity based on each authorized FTE professional staff member putting in a full 40 hour work week. Vacant FTE positions force productivity to be below 100% in the absence of employees not working hours beyond 40 per week. The significant drop in productivity in roughly period 18 was the result of a significant increase in FTE’s which have taken time to fill. ....	26
Figure 6 – This figure shows the average number of hours per pay period (Standard is 80) for	

professional staff. While occasional spikes can be expected due to extraordinary circumstances such as jury trials and short term caseload abnormalities, consistent periods of more than 40 hour weeks is generally accepted to be a significant contributor to employee burn-out and increased turn-over. .... 27

**List of Tables**

Table 1 – This table shows the raw caseloads assigned to each of the three respective delivery providers of indigent defense for FY 2005. The 7 cases listed as rejected by the Legal Defender’s Office were cases which were assigned to the Legal defender’s office, accepted by that office, but subsequently rejected due to a conflict arising during the handling of the case. These cases were only counted once and credited to the Legal Defender’s office. ....6

Table 2 – This table lists the totality of expenditures under the primary General Fund account which compromises the main budget for the Law Offices of the Mohave County Public Defender. ....11

## **Introduction**

This report is intended to provide an overview of services provided by the Law Offices of the Mohave County Public Defender throughout Fiscal Year 2005.

The first section of this report will discuss indigent defense caseloads and statistics. The caseloads will be broken down by type of case (i.e.: felony, juvenile, misdemeanor) and by major charge (i.e.: assault, theft, etc.).

The second section will discuss costs associated with indigent defense and provide a breakdown of the costs per case on a weighted case basis for FY 2005. The term “weighted case” is used throughout this report to represent an adjustment to raw caseload figures based on acceptable workload standards under State (*Joe U. Smith*) and Federal (*US Department of Justice Compendium of Standards for Indigent Defense Systems*) law. Felony cases are weighted as a complete case and are therefore fully credited (a 1:1 ratio). Misdemeanor cases are weighted as .375 cases (a 3:8 ratio) based on the standard caseload permissible being 400 versus 150 for felonies. Juvenile cases are weighted as .75 cases (a 3:4 ratio) based on the standard permissible caseload being 200 versus 150 felonies. Probation violation cases are weighted as .375 cases (a 3:8 ratio) based on the standard caseload permissible being 400 versus 150 for felonies. Appeals are weighted as 6 cases based on the standard permissible caseload being 25 (a 6:1 ratio) while post-conviction relief proceedings are weighted as 2 cases based on the standard permissible caseload being 70 (a 2:1 ratio).<sup>1</sup>

The third section will highlight several of the office highlights and achievements during the year.

The final section is a conclusion that will discuss challenges and trends that need to be considered in future planning for success.

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<sup>1</sup> Please note that prior year caseloads have been adjusted using the proper case weights for appeals and post-conviction proceedings.

## **Part I - Indigent Defense Caseload Statistics**

### **A. Service Delivery Methods**

In Mohave County, there is one method by which indigent persons<sup>2</sup> accused of committing criminal acts are provided legal services. They are appointed a Public Defender and the case is referred to the Law Offices of the Mohave County Public Defender. As soon as paperwork is received<sup>3</sup> the individuals' name is screened for potential conflicts in representing the individual within the Law Offices of the Mohave County Public Defender. If there is no apparent conflict based on the initial paperwork, a case file is opened and an attorney is assigned to the case<sup>4</sup>. If a conflict is identified, the Legal Defender's Office is contacted and a similar conflict check is performed by that office. If there is a conflict in both the Public and Legal Defender offices, the case is then assigned to a contract counsel based on a rotating schedule and attorney qualifications.

Data is maintained within the Law Offices of the Mohave County Public Defender on all cases to which an individual has been assigned government funded counsel. This data is cross-checked and verified to the greatest extent possible at each year end to ensure the best information is included within this report.

### **B. Case Classifications**

There are three major classifications of indigent defense services: (1) felony cases; (2) juvenile cases (juvenile cases currently include only delinquency cases<sup>5</sup>); and (3) misdemeanor cases.<sup>6</sup>

Prior to reviewing the figures below, please review Appendix A entitled, "Where the Numbers Came From and What They Represent" for a discussion about how the statistics are kept, what they mean and how they may differ from the case statistics kept by the other agencies.

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<sup>2</sup> It is important to note, that there is a very minimal screening process to determine the true financial eligibility of individuals based on income and assets.

<sup>3</sup> The time frame for paperwork to be transmitted varies from court to court, but can range from 12 to 72 hours.

<sup>4</sup> This process usually takes a complete business day.

<sup>5</sup> Statutorily the Board of Supervisors may authorize local indigent defense offices to handle "All juvenile proceedings other than delinquency and incorrigibility proceedings under subdivision (f), including serving as a guardian ad litem, when appointed by the court pursuant to section 8-221, if the court appoints the public defender and the board of supervisors has advised the presiding judge of the county that the public defender is authorized to accept the appointment." A.R.S. § 11-584(H)

<sup>6</sup> Additional representational duties are authorized by statute, but such authorization along with accompanying staffing has not occurred in Mohave County to date. Specifically, local indigent defense services may represent "All mental health hearings regarding release recommendations held before the psychiatric security review board pursuant to section 13-3994, when appointed by the court as provided in section 31-502, subsection A, paragraph 8, if the court appoints the public defender and the board of supervisors has advised the presiding judge of the superior court in the county that the public defender is authorized to accept the appointment." A.R.S. § 11-584(i) and may act "As attorneys pursuant to title 14, chapter 5, article 4 of adults who are allegedly unable to effectively manage their affairs or preserve their estates, if the court appoints the public defender and the board of supervisors has advised the presiding judge of the county that the public defender is authorized to accept the appointment." A.R.S. § 11-584(j).

<b>Caseload Counts FY 2005</b>		
<b><u>PDO</u></b>		
	Misdemeanor	1767
	Felony	2423
	Juvenile	443
	PCR	68
	Appeals	17
	Probation Violations	450
	Subtotal	<b>5168</b>
<b><u>LDO</u></b>		
	Misdemeanor	357
	Felony	584
	Juvenile	104
	PCR	38
	Appeals	8
	Probation Violations	178
	Rejected	7
	Subtotal	<b>1269</b>
<b><u>Private Contract</u></b>		
	Misdemeanor	34
	Felony	263
	Juvenile	117
	PCR	17
	Appeals	2
	Probation Violations	57
	Subtotal	<b>490</b>
	<b>Total</b>	<b>6927</b>

**Table 1** – This table shows the raw caseloads assigned to each of the three respective delivery providers of indigent defense for FY 2005. The 7 cases listed as rejected by the Legal Defender’s Office were cases which were assigned to the Legal defender’s office, accepted by that office, but subsequently rejected due to a conflict arising during the handling of the case. These cases were only counted once and credited to the Legal Defender’s office.

## 1. Felony Cases

A felony is a crime which carries a potential sentence of at least one year in prison. The first type of felony case generally begins with an arrest. An arrested individual must appear before a magistrate or justice of the peace within 24 hours for a determination as to whether there is sufficient reason to believe the person committed an offense for which they can be lawfully arrested. This first hearing is known as an initial appearance. These hearings currently are held without any counsel being present. At the hearing, a decision is made regarding whether the individual should remain in custody and if so what bond should be required for them to be released. If an individual requests counsel during this first hearing, the Law Offices of the Mohave County Public Defender is appointed to represent the individual. The physical paperwork indicating that appointment is forwarded by the court to the Law Offices of the Mohave County Public Defender. The paperwork is generally received between 12 and 72 hours later depending on the court. An individual who remains in custody is entitled to a *preliminary hearing*<sup>7</sup> within 10 days. An individual who is out of custody is entitled to a preliminary hearing within 20 days.

For individuals that are appointed counsel a conflict check is performed to identify any potential conflict of interests which would preclude representation by a member of the Law Offices of the Mohave County Public Defender. If there is a conflict, the case is sent to either the Legal Defender, or a private contract attorney, depending on whether the Legal Defender has a conflict or not. This process usually takes roughly one business day depending on the volume of incoming cases. If the case is retained within the Law Offices of the Mohave County Public Defender it is immediately assigned to the FasTrak supervisor. These cases are all assigned to the FasTrak unit in an attempt to achieve a speedy disposition of the case. The FasTrak unit attempts to mirror the *charging entities*<sup>8</sup> at the Mohave County Attorney's office and negotiate pleas, waiver-bind overs<sup>9</sup>, or dismissals. If none of these resolutions can be achieved, then either the case proceeds to a contested preliminary hearing, or the County Attorney may present the case to the Grand Jury for indictment.

The FasTrak supervisor immediately attempts to contact the appropriate charging entity within the Mohave County Attorneys' Office. The FasTrak supervisor and supporting secretaries attempt to influence the appropriate deputy county attorney to forward all reports and law enforcement documentation regarding the case as quickly as possible. Depending on the individual deputy County Attorney this may occur within a day, or sometimes not for a week or more (in the instance of a case being presented to the grand jury, reports may not be forwarded for several weeks or more ,

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<sup>7</sup> A preliminary hearing is a hearing at which a judge must make a determination as to whether there is probable cause to believe that the individual has committed the offense that they are charged with. The hearing generally consists of a law enforcement officer (who may, or may not, have been involved in the arrest and investigation of the individual) detailing the arresting officers report to the court. The court must view any evidence presented by the State in the light most favorable to sustaining a finding of probable cause.

<sup>8</sup> A charging entity is the individual responsible for making charging decisions about a case. These decisions include what statutory sections to allege have been violated, how the charging should proceed (by information to the justice court, or grand jury presentation), what offers should be made to resolve the case early on (if any), and whether law enforcement has provided sufficient information in reports to base a filing decision on in the first place.

<sup>9</sup> A felony case may only get to Superior Court if there has been a finding of probable cause made either by a Justice of the Peace at a contested hearing, or by a grand Jury. The exception is that an individual may waive their right to a probable cause determination and agree to have their case "bound over" to Superior court for all future proceedings.

causing significant delay in the overall processing time and costs attributable to the case). The delay in receiving reports prevents an attorney from having any meaningful discussion with a client due to the lack of information as to the alleged evidence that would be presented against the client. Ultimately, the goal of the FasTrak unit is to gather information to provide clients with appropriate advice as early in the judicial process as possible and to resolve the status of a felony currently filed in a justice court. This resolution may be by pointing out deficiencies in evidence, or investigation sufficient to convince a deputy county attorney to dismiss either because of a lack of evidence, or because a client is not guilty; pleading the client to a misdemeanor offer if appropriate; having the client agree to waive their right to a preliminary hearing in exchange for a benefit offered by the State<sup>10</sup>; or by conducting a contested preliminary hearing at which the State puts on evidence and the defense may cross-examine on the issue of probable cause. If the court finds probable cause, or the client waives their right to a preliminary hearing, the case is sent to Superior Court for all further proceedings.

Felony cases are divided into two classifications in terms of internal administration. The first group of cases is those which are filed in one of the five outlying Justice Courts<sup>11</sup>.

The second group of felony cases is known as *original indictments*. An original indictment is generally a case in which an individual was not arrested and a complaint was never filed in a justice court, but rather proceeds directly to Superior Court after the indictment is returned. In general, these cases involve more complex factual issues which were presented to the grand Jury for investigative or political reasons. A Mohave County OMB review of Grand Jury costs a year or so back, indicated that each grand jury indictment costs the county approximately \$250. The Law Offices of the Mohave County Public Defender has attempted to reduce the number of grand jury presentations by working more closely with the Mohave County Attorneys' office, but this effort has been only nominally successful. In a significant number of grand jury presentations attempts to move a case to Superior Court through less expensive alternatives such as those previously mentioned have been met by un-returned e-mails, phone calls or other attempts to resolve the matters. Despite this resistance, the FasTrak supervisor remains tasked with attempting to minimize the number of grand jury presentations by working jointly with the various charging entities. If the grand jury finds probable cause to believe an individual committed a criminal offense the grand jury returns a signed Indictment.

In FY 2005 there were a total of 3,270 felony cases to which an attorney was assigned. For fiscal year 2005, the Law Offices of the Mohave County Public Defender averaged 17 attorneys, the Legal Defender averaged 6 and there were ten felony indigent defense contract attorneys at the end of FY 2005.<sup>12</sup> During FY 2005 the Law Offices of the Mohave County Public Defender represented 2423 felony defendants (74%), the Legal Defender represented 584 felony defendants (18%) and contract attorneys represented 263 (8%).

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<sup>10</sup> This benefit can be an offer to a sentencing stipulation which is less than the client is facing based on the charges, an offer to plea to a lesser felony offense, a guarantee of probation if the client pleads to a felony, a reduced bond, or release on their own recognizance.

<sup>11</sup> Kingman, Cerbat, Bullhead City, Lake Havasu City and Moccasin are the 5 justice courts within Mohave County.

<sup>12</sup> Christine M. Brown (Flagstaff), Stephen R. Glazer (Flagstaff), M. Alex Harris (Prescott), Michelle Holden (Kingman), Michael J. Hruby (Williams), Cathy Johnstone (Page), Thomas Jones (Lake Havasu City), Daniel B. Kaiser (Flagstaff), Jason Smith (Phoenix), Rick Williams (Bullhead City), Deborah A. Liverence (Kingman), and Randolph Wolfson (Bullhead City).

The total of 3,270 felony cases, represents a 15.5% increase in total felony cases handled over FY 2004.

## **2. Juvenile Cases**

Juvenile cases consist of juvenile *delinquency* cases (persons under the age of 18 charged with crimes). Legal services are provided to the children whom are charged with criminal offenses.

### **A. Delinquent and Incurrible Juveniles**

A "Delinquent Juvenile" is a juvenile who committed an act which if committed by an adult would be a criminal or petty offense. An "Incurrible Juvenile" is one who has been adjudicated to have committed an offense which can only be committed by a juvenile, such as refusing to obey one's parents, truancy, runaway, etc.

The number of delinquencies cases to which counsel was appointed decreased slightly from 706 in FY 2004 to 664 in FY 2005 (a 6% reduction).

### **B. Dependencies**

Currently legal representation for all parties to a juvenile dependency case is coordinated through the Courts. The Court has separate contracts with private counsel which pays Fifty One Thousand dollars (\$ 51,000) per year for an unspecified number of cases/clients. The Board of Supervisors has directed County Staff to review the efficacy of implementing a contract administrator position and review methods of reducing the cost of providing representation to indigent individuals in dependency actions. It is highly likely that this is an area that will become a primary responsibility for the Law Offices of the Mohave County Public Defender in the future. It is anticipated that cost savings can be accomplished, although contract counsel will always be required due to conflicts of interest in representing adverse parties in a single action.

A "dependent child" is one who is:

1. In need of proper and effective parental care and control and has no parent or guardian, or the parent or guardian is not willing to exercise or incapable of exercising care and control, or
2. a child who is destitute, or is not provided with the necessities of life, including adequate food, clothing, shelter or medical care, or where the home is "unfit" by reason of abuse, neglect, cruelty or depravity by a parent, guardian or other person having care or custody of the child, or
3. A child who is incompetent or not restorable to competency and who is alleged to have committed a serious offense.

The Law Offices of the Mohave County Public Defender is organized in a manner in which the representation of parties to a dependency action will be handled by the organizational unit that currently represents juvenile delinquency clients. There is a high level of cross-over between

juveniles accused of delinquent acts and those that the State<sup>13</sup> seeks to declare dependent.

### **3. Misdemeanor Cases**

A misdemeanor is an offense for which a sentence to a term of imprisonment other than to the custody of the department of corrections is authorized by state law. Jurisdiction for adjudicating these offenses lies with the Justice Courts of Mohave County. Total misdemeanor case assignments during FY 2005 were 2158 as compared to 2206 in FY 2004, a reduction of 2%. The highest concentrations of cases in this area are driving under the influence and domestic violence related cases.

### **4. Appeals and Post Conviction Relief Cases**

This year there were 150 Appeals and Post Conviction Relief (PCR) cases filed as compared to 187 in FY 2004. This is a reduction of 19.7%. An appeal is a case which occurs automatically after a trial results in a conviction of a defendant. Exceptions occur at the sole choice of the defendant and are predominantly limited to instances where the defendant is convicted of only a very minor charge and does not wish to remain entangled in the court system any longer than necessary. Post Conviction Relief cases are filed pursuant to Criminal Rule of Procedure 32 and are essentially a claim that the quality of legal representation was below professional standards. While information is anecdotal, there is an obvious connection between the workload an attorney has and the perceived performance each particular client has of that attorney's ability to work their cause. Higher per attorney caseloads inevitably result in a greater percentage of post-conviction relief proceedings. When you consider that the case weighting is 2 for a post-conviction relief case (Requires attorney to review everything that was originally done, re-do everything that was originally done, and evaluate whether the methodology falls below professional standards) it is certainly less expensive to do it right the first time.

For FY 2005, approximately 50% of the convictions or sentences were overturned and remanded back to Mohave County for additional proceedings. This includes a recent reversal of a homicide conviction that will now proceed to trial for the third time. This case was a contract case, and to date has cost Mohave County in excess of \$25,000.

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<sup>13</sup> Notably these cases are NOT handled by the County Attorney's Office, but rather by the Attorney General's Office.

## Part II - Indigent Defense Costs

The Law Offices of the Mohave County Public Defender was approximately 10% under authorized budget for FY 2005. Most of these savings came from the inability to fill authorized attorney positions.

ACCOUNTS FOR:	ORIGINAL APPROP	REVISED BUDGET	YTD ACTUAL	PCT USED	
40110 SALARIES/WAGES	\$1,533,203.00	\$1,533,203.00	\$1,387,258.97	90.5	%
40130 TEMPORARY EMPLOYEES	\$ 1,000.00	\$ 1,000.00	\$ 1,817.79	181.8	%
40210 EMPLOYEE BENEFIT FICA	\$ 117,290.00	\$ 117,290.00	\$ 103,588.47	88.3	%
40220 UNEMPLOYMENT COMPENSATION	\$ -	\$ -	\$ -	0	%
40230 COUNTY HEALTH INSURANCE	\$ 215,250.00	\$ 215,250.00	\$ 156,661.15	72.8	%
40240 WORKERS COMP	\$ 3,680.00	\$ 3,680.00	\$ 3,009.00	81.8	%
40260 STATE RETIREMENT	\$ 87,393.00	\$ 87,393.00	\$ 79,376.83	90.8	%
41100 OFFICE SUPPLIES	\$ 7,000.00	\$ 7,000.00	\$ 9,029.07	129	%
41140 COPIES DUPLICATING SUPPLIES	\$ 2,286.00	\$ 2,286.00	\$ 2,667.91	116.7	%
41150 DATA PROCESSING SUPPLIES	\$ 3,000.00	\$ 4,137.00	\$ 4,058.18	98.1	%
41400 TOOLS & EQUIPMENT UNDER \$1000	\$ 2,000.00	\$ 2,044.00	\$ 2,044.08	100	%
43110 LEGAL SERVICES	\$ 201,780.00	\$ 201,780.00	\$ 207,844.50	103	%
43115 INVESTIGATION FEES	\$ 8,320.00	\$ 7,183.00	\$ 7,713.80	107.4	%
43120 DATA PROCESSING SERVICES	\$ 51,401.00	\$ 51,401.00	\$ 51,401.04	100	%
43180 TRAINING COSTS	\$ -	\$ 27.00	\$ 27.00	100	%
43210 TELEPHONE	\$ 24,926.00	\$ 24,926.00	\$ 23,822.05	95.6	%
43215 TELEPHONE COMPUTER DATA	\$ 3,867.00	\$ 3,867.00	\$ 3,867.00	100	%
43216 CELL PHONE CHARGES	\$ 1,680.00	\$ 1,680.00	\$ 1,615.04	96.1	%
43230 POSTAGE	\$ 4,500.00	\$ 4,500.00	\$ 6,145.30	136.6	%
43310 TRAVEL EXPENSES	\$ 3,673.00	\$ 3,673.00	\$ 3,496.25	95.2	%
43312 TRAVEL RECRUITING	\$ 3,100.00	\$ 2,949.00	\$ 3,160.98	107.2	%
43320 MOTOR POOL CHARGES	\$ 16,000.00	\$ 16,000.00	\$ 17,831.02	111.4	%
43325 VEHICLE REPLACEMENT	\$ 5,460.00	\$ 5,460.00	\$ 5,460.00	100	%
43430 JOB ADVERTISING	\$ -	\$ 330.00	\$ 330.48	100	%
43510 PRINTING EXPENSE	\$ 1,595.00	\$ 1,645.00	\$ 1,645.00	100	%
43530 COPIER CONTRACT	\$ 7,882.00	\$ 7,882.00	\$ 7,547.98	95.8	%
43730 WATER EXPENSE	\$ 480.00	\$ 480.00	\$ 445.35	92.8	%
43810 OFFICE EQUIPMENT LEASE	\$ 30,810.00	\$ 30,810.00	\$ 30,810.00	100	%
43860 BUILDING LEASES	\$ 5,100.00	\$ 5,100.00	\$ 2,776.00	54.4	%
43910 REPAIRS MAINTENANCE AUTOMOTIVE	\$ 26.00	\$ 26.00	\$ 13.95	53.7	%
43920 REPAIRS OFFICE EQUIPMENT	\$ 550.00	\$ 429.00	\$ 295.16	68.8	%
47910 COURT COSTS INVESTIGATIONS	\$ 5,000.00	\$ 4,420.00	\$ 4,579.13	103.6	%
47930 MEMBERSHIP DUES SUBSCRIPTIONS	\$ 7,834.00	\$ 8,235.00	\$ 8,021.36	97.4	%
47991 SALES TAX / TRANS. PRIV. TAX	\$ 2.00	\$ 2.00	\$ 2.66	133	%
GRAND TOTAL	\$2,356,088.00	\$2,356,088.00	\$2,138,363.00	90.8	%

**Table 2** – This table lists the totality of expenditures under the primary General Fund account which compromises the main budget for the Law Offices of the Mohave County Public Defender.

## **Cost per Case Analysis**

The average cost per case for an appointed attorney from the Law Offices of the Mohave County Public Defender was \$504.76 during FY 2005. This is down about \$2.39 per case from FY 2004 and up \$30.92 per case from FY 2003. By comparison, the average cost per case for an appointed attorney from the Legal Defender's Office was \$722.74 for FY 2005 up from \$691.49 in FY 2004, but down from \$767.68 in FY 2003. The average cost per case for the contract attorneys also dropped almost \$160 per case from FY 2004 (FY 2005 was \$745.95 versus FY 2004 at \$904.59 and FY 2003 at \$655.39). The significant jump in the average cost during FY 2004 was due to a large number of homicide cases that had multiple co-defendants, or other conflicts which required them to be sent to outside contract counsel. The chart in Figure 1 shows the comparative costs of the three delivery methods for FY 2005. The chart in Figure 2 shows a three year comparison of the costs of the three delivery systems and the three year average for all three systems. The chart in Figure 3 shows the change in the raw number of cases handled through each delivery method over a three year period (FY 2003-2005).

It is important to comment briefly on the structure of the conflict contracts. Under the contract, a private attorney can either accept, or decline an offered case. If they accept the case, the price is established as a flat rate for the first 25 hours of work. There are minor exceptions which can reduce the flat rate if the case resolves quickly. However, if the case exceeds 25 hours, the attorney simply asks the court to order the contract administrator (currently the Public Defender) to pay an hourly rate for all work beyond the 25<sup>th</sup> hour. Such converted hourly cases are generally a very small percentage, but when they occur (generally in complex cases) the result is an extreme deviation to the average cost.

The cost per case calculation is a little more complex than may first appear due to the fact that the actual number of cases is derived based upon a weighted average. The reason for this is consistency. Different types of cases as set forth in the Introduction require differing amounts of effort to perform an effective job of representing accused persons. The contract system is set up to recognize this difference by paying more for more complex cases and less for simpler ones. Similarly two similarly paid staff attorneys can handle significantly different caseloads based on the complexity. Therefore the cases are "weighted" to standardize the average work required per case and this weighted figure is used to determine the average case cost.

The numbers speak for themselves. It cost the County more tax dollars, per case, to retain a contract attorney than it does for a staff attorney to handle a case "in-house." The reasons for this include 1) economies of scale; 2) fixed salaried employees versus the variable cost of contract attorneys; 3) centralized management; 4) improved record keeping; 5) organized division of labor; 6) a centralized databank and 7) increased amount of state and federal funding. The costs for the Law Offices of the Mohave County Public Defender are the lowest primarily because of economies of scale that enable an organizational structure which provides a heightened level of efficiency, and therefore, slightly higher caseloads per attorney without an accompanying increase in the time required to provide effective representation.

### **Part III - FY 2005 Highlights and Achievements**

During FY 2005, technology invested in during FY 2002 began to pay huge dividends. Automation played a huge part in the ability to hold costs low while providing quality representation. By utilizing automation capabilities, the averages of 17 attorneys at the Law Offices of the Mohave County Public Defender were able to make 18,910 court appearances during the year. Over 26,000 documents were created through an automated document assembly system which retrieved data from the case management database. Each of these documents was created with a time savings of 30-120 seconds. Individually this seems like a small amount, but collectively this is a time savings of up to almost 900 hours!

During FY 2005 the Law Offices of the Mohave County Public Defender received a \$10,000 grant from the Governor's Council on Developmental Disabilities. The grant's purpose was to assist disabled individuals and their families in learning self-advocacy. Funds were used to identify and assist juveniles at risk of being, or already referred to the juvenile delinquency system and to provide psycho-educational evaluations from a graduate team from Northern Arizona University. The grant has served 12 families to date, with the bulk of these families avoiding entanglement in the juvenile delinquency system and being provided contract advocates to assist them in working with the existing community and educational assets to meet the special needs of the juveniles.

At the annual Arizona Public Defender Association Conference in June of 2005, Mr. Frank Dickey, Senior Attorney with the Law Offices of the Mohave County Public Defender was recognized with the statewide organizations' *Lifetime Achievement* award. This award is given to an individual who has over their career demonstrated an unwavering commitment to the defense of indigent persons accused of criminal acts. Mr. Dickey was recognized for his dedication to the principals of indigent defense for almost 50 years of his career. Frank has been with the Law Offices of the Mohave County Public Defender for 15 years.

FY 2005 represented the 20<sup>th</sup> year that Mohave County has had a formal Indigent Defense office. The Board of Supervisors recognized this milestone by rededicating itself to the principles of *Gideon v. Wainwright* through a public proclamation.

While FY 2003 was a banner year for recruiting in which we added 7 employees and increased our overall experience in the office by 6 years, most of this gain has been lost over FY 2004 and significantly at the end of FY 2005. In FY 2005 alone we lost 2 senior attorneys with over 19 years of combined experience. While we had some success early in FY 2006 in recruiting, we also lost two more experienced attorneys and two of the recruits left after only short stays (One because his wife did not feel comfortable in Kingman after two weeks, and the other left to work in the County Attorney's civil division). The loss of one of the senior attorneys near the completion of this report will have a particularly deleterious impact. She was a brilliant visionary who took over supervision of the juvenile unit and received accolades from clients, families, judicial staff, judges and her peers for her abilities. She was to have been a cornerstone for future growth, recruiting and improvement of the professional standards within the office.

As we went into the budget process for FY 2005, plans had begun to renovate and move into the historic St. Johns church which the Health Department had been occupying, but which was to be vacated in the fall of 2005 when the Health Department moved into the new County Administrative building. Contact was made with the director of the Institute for Small Town Studies in late 2004 to begin the process of designing a professional environment which would compliment and improve the historic nature of this important landmark in the Kingman area. Mr. Robert Dorgan, the executive director of ISTS, happened to be a visiting professor at the University of Nevada-Las Vegas and he agreed to develop complete conceptual plans at the meager cost of \$1,500 (a copy of the plans is attached as Appendix E). Market rates for remodel projects were determined to be roughly \$50 per foot and a project budget was developed to complete the entire project for a cost of \$600,000. To provide high quality professional work space for the employees at a cost of only \$50 per foot versus new construction costs on the administrative building of over \$200 per foot, this was believed to be a great cost savings to the citizens of Mohave County. The utilization of the historic St. John's church would also continue to provide a facility in very close proximity to the courts, which would enable the office to maintain the same or greater level of efficiency that it had developed through organizational restructuring in FY 2002. Unfortunately during the budget process the capital committed to this project was trimmed to \$175,000 and when an attempt to bid the project was made, no one was willing to submit proposals. The common response was that the project was a \$500,000 to \$600,000 project. The manner in which the project is now moving forward is in phases to accommodate the limited funding provided in FY 2005. Phase I will be the architectural design of plans sufficient for acceptance and approval of the remodel by the City of Kingman. Phase II will be the bidding out of the third floor of the building renovation. This floor will house the felony unit and administrative staff. Phase III will be the bidding out of the second floor of the project which will house justice court and juvenile units as well as be the main client based entry and waiting area. Phase IV will be the bidding out of the first floor which will house training facilities, meeting rooms, file storage and the appellate unit. Currently only Phase I and II have been funded. Completion of the project will require full funding of an additional \$400,000 to \$500,000 depending on the increase in construction costs and availability of construction labor since the project was initially slated to begin.

Without development and completion of this construction project, the difficulties in recruiting and retaining quality staff will be continuous and in the long run cost the county even more money than the cost of the remodel. Currently some attorneys have as little as 25 square feet of work space. They have side by side and back to back cubicles which have no privacy for conducting client telephone calls; they lack adequate noise reduction to allow for productive work performance and concentration on tasks which require a high degree of focus. The working conditions are a key component to extremely low employee morale. As one employee put it "If you put enough gerbils in a small cage, they start to nip at each other". Another employee recently expressed the fact that he had been in the office for over two years, was older than *all* of his justice court peers, and had to sit in the same inadequate cubicle for the last two years was simply "demeaning". Failure to move forward on this project in a continued expeditious manner will inevitably result in a return to the cycle of attorneys abandoning their positions for more money and a feeling of professionalism in their environments.

Recruiting deficiencies have been highlighted by the fact that when we are near fully staffed, it is only a matter of time until we lose individuals with significant experience. These individuals can

not be replaced with brand new attorneys because of their lack of experience. This causes a constant need to send cases out to outside counsel at a higher cost to the county. In FY 2007, a significant effort needs to be made to dramatically improve the methodology by which we recruit mid-level and senior-level attorneys who can step immediately into a position that were to become vacant. Additionally, there must be recognition that government defense attorneys, particularly in Mohave County, are both hard to recruit and to retain. Particularly in comparison to other attorney positions within the County. There are several tangible and intangible reasons turn-over and recruiting of defense attorneys are larger issues than for other attorneys in the county. As a general rule being a public defender lacks prestige and is viewed by both government officials and members of the public as somehow a lower class of attorney. On the other hand, being a prosecutor or civil attorney is by comparison significantly better accepted by those same officials and members of the public. This psychological stressor is felt by defense attorneys and begins the process of accumulated stressors which result in a high rate of turn-over and recruiting challenges.

Current physical facilities reinforce this feeling of second class citizenry. The physical facilities also add a natural stress component which comes from individuals being forced into a closer than comfortable physical proximity to each other. A typical article on stressors in the workplace is attached as Appendix F. A cursory review of this article, and virtually any other, indicates that the number of stressors encountered by public defense attorneys is astronomical. From constricted workspace, lack of control over the outcome of their work, degree of responsibility (Convictions, individual liberties and futures at stake), the lack of any definable career path or opportunity for advancement based on performance, and the constant change imposed by limitations on recruiting and retention of quality individuals who are committed to a long term career, or at least an extended period of time to remain in their position, the employees of the Law Offices of the Mohave County Public Defender are subject to an incredibly high level of stress which makes retention even more difficult.

Appropriate caseloads and staffing have a definite role in the level of stress felt by employees. In FY 2005 the weighted caseload of 3825 cases requires a *minimum* of 25.5 attorneys to handle. This work was performed by an average of 17 attorneys and is inevitably a significant source of the discontent and stress among professional staff. Based on past caseload growth, a weighted caseload of 4016 can be projected for FY 2006, and 4217 for FY 2007 based on a 5% annual compounded growth (this is slightly below what actual experience has been over the past 4 years and is a conservative projection for staffing purposes). The projected caseload for FY 2007 would require 28 attorneys to handle (at 150 cases per attorney per year). For every 10 attorneys, DOJ standards require a supervisor (3) and one investigator for every 4 attorneys (7). To maintain appropriate ability to hire sufficient staff to internally handle cases in an effective manner at minimum liability to the County, a total of 30 FTE attorneys will be required in FY 2007 (an increase of 10), 7 investigators (an increase of 3) and an additional 2 legal secretaries. Failure to plan and approve appropriate FTE's to handle the caseloads, will require the continued use of more expensive private contract counsel. While approval and authorization of appropriate staffing levels for FY 2007 will put indigent defense services on a better course, it will take time to recruit and fill those positions.

Failure to provide staff authorizations, **and** the tools to recruit and retain are simply a shifting of costs from one area to another. Instead of paying for employees, and recruiting and retention programs, we have historically systematically recruited who we can, gotten whatever work we could

from them, and then allowed them to burnout and fall to the wayside as replacements were recruited. The soft and hard dollars that go into sustaining this process need to be utilized to create and sustain a more positive system. A positive system will exist when appropriately professional work environment, proper staffing levels, and proper support staffing levels are all in place. Key to the creation of such a system will be the implementation of recruiting and retention tools which recognize that it is much more difficult to recruit and retain a defense attorney than other attorneys in the county. This information will be supplemented during the 4<sup>th</sup> quarter and during the FY 07 budgetary process by Human Resources historical data on turn over rates, and vacancy rates among the various attorney positions in the county.

#### **Part IV – Conclusion (Challenges and Trends for the Future)**

Systemically the Law Offices of the Mohave County Public Defender is light years ahead of where it was in FY 2001. Organizational structure and technological advances have been put in place which can allow near optimal human efficiencies. The lack and delay of providing appropriate physical facilities has caused a significant setback in the advancement of the organization as one which can become self-sustaining. Current staffing losses and recruiting challenges appear to be returning to the 1999-2000 cycle of wholesale desperation in simply filling positions. To avoid a knee-jerk reaction to simply hire “*bodies*” to fill chairs and create additional problems down the line it is imperative that caseloads be maintained with professional standards. This will require that cases which can not be absorbed by remaining staff due to numbers or experience be sent to outside private contract counsel. This will result in a projected budget over-expenditure of roughly \$350,000 - \$500,000 for FY 2006. In order to not exacerbate the use of private counsel at higher cost, it will be imperative to approve and allow for the recruiting of additional FTE staff to maintain professional standards and limit liability to the County. It is important to note that if the County knowingly fails to provide effective counsel by maintaining a system which is known to be ineffective, the county can be held civilly liable for under 42 U.S. C. § 1983 (See, *Miranda v. Clark County*, Appendix G)

On the positive side, the process of remodeling and renovating the historic St. John’s church is underway and it is possible that the design and remodel of the third floor may be done prior to the beginning of the new fiscal year. The completion of this project in a timely manner will be crucial to a successful recruiting season (the period when most law schools graduate students after the end of their third year, and Arizona allows applicants to take the Bar examination, roughly from April – August of each year). The implementation of a salary structure which brings defense counsel on par with other competitive jurisdictions per the *Siegel Study* will definitely enhance recruiting efforts. However, since the budget does not become final until August, which is the end of the recruiting season, it will be imperative that a commitment is made prior to the finalization of the budget as to what tools will be available to increase the recruiting and retention of defense attorneys. These tools should be designed in a manner which will adequately address the realities of significant differences in the ability to recruit and retain staff attorneys in the various attorney positions within the county.

If the positive aspects of the issues raised and addressed in this report can be enhanced and followed through on, the future looks bright for all of the citizenry of Mohave County to know that the justice system in Mohave County will be fair and that they can have faith in the integrity of the results of

that system. Failure to follow through will likely result in continued depletion of quality attorneys in the government defense offices which will result in a significantly lower quality of representation at a higher cost. Lower quality representation as discussed will result in additional costs beyond the initial contract cost of representation due to a likely increase in post-conviction relief cases.

## **Appendix A - Where the Numbers Come From and What They Represent**

In order to best analyze the caseload statistics, it is important to understand where the numbers came from and what the numbers represent.

The caseload/crime statistics contained in this report were compiled from the Public Defender case management database known as *Justware*. This database was implemented in 2001 and was designed to track caseload information at several different levels. Because many crimes are unreported and because many crimes are not solved, the numbers compiled in this report in no way reflect the crime rate in Mohave County. Those figures should be obtained from law enforcement agencies. Similarly, not every reported crime, or arrest becomes a case, so the internal case data is unlikely to directly reflect local law enforcement data.

In addition, the figures represent the number of individuals charged with a crime, not necessarily the number of cases filed in the Superior Court. For example, when a crime is committed by multiple defendants our office records the number of defendants. This is because each defendant will need a lawyer. The Superior Court and the County Attorney, on the other hand, may record that case as a single filing. For this reason, our statistics may differ from those of the Superior Court and the County Attorney.

It is also helpful to understand that the type of crimes recorded represent the crimes *as charged* (ie: assault, theft, etc.), and not the ultimate disposition (not the crime to which the defendant was found guilty of, pled to, or was acquitted of). Many defendants plead to lesser offenses. Sometimes felonies are reduced to misdemeanors or dismissed outright. Sometimes defendants are found not guilty by a jury. For the purpose of staffing, management and planning analysis it is important to know what a defendant is charged with initially. It is the initial charge which determines whether counsel is appointed and how much the County must ultimately spend for the defense.

In addition, the crime figures mentioned in this report reflect only the main crime charged. Many defendants are charged with multiple offenses arising out of a single act. For example, a defendant may be charged with Possession of Marijuana, Possession of Marijuana with Intent to Sell, Possession of Drug Paraphernalia and Underage Drinking. The following statistics would reflect only the main charge, to wit, Possession with Intent to Sell. If we counted all of the multiple charges which the prosecutor decided to file, analysis would prove meaningless, because indigent defense attorneys are not compensated based upon the number of charges filed.

Finally, our statistics reflect only charges filed against indigent defendants. We estimate that 95% of all persons charged with felony and juvenile offenses are found to be indigent and are provided counsel through the Law Offices of the Mohave County Public Defender.

**Appendix B - Breakdown of Most Prevalent Crimes for FY 2005 By Charge**

<b>Statute and Description</b>	<b>Number of cases involving</b>
13-3415 – Possession of Drug Paraphernalia	1450
13-901.C – Probation Violation/Petition to Revoke	655
13-3407 – Possession of Dangerous Drugs	646
13-3405 – Possession of Marijuana	386
13-1203.A.1 – Assault by Domestic Violence	253
28-3473 – Driving w/ DL Suspended	390
28-1381.A.1 – DUI	230
13-2904/13-3601 – Disorderly Conduct by DV	228
13-1602.A.1 – Criminal Damage > \$250 < \$2,000	225
13-2904 – Disorderly Conduct	208
28-1383.A.1 – Aggravated DUI	205
13-1506 – Burglary in the Third Degree	182
13-1802.A – Theft \$250 < \$1,000	172
13-2002 – Forgery	169
13-1203 – Assault	164
13-1814 – Theft of means of Transportation	162
28-1381.A.2 – DUI .08	129

**General Category Breakdown**

<b>Type of Crime</b>	<b>Number</b>
Primary Drug	2482
Domestic Violence	481
DUI	564
Burglary	182
Forgery	169
Assault/Disorderly Conduct	597
Theft of means of Transportation	162

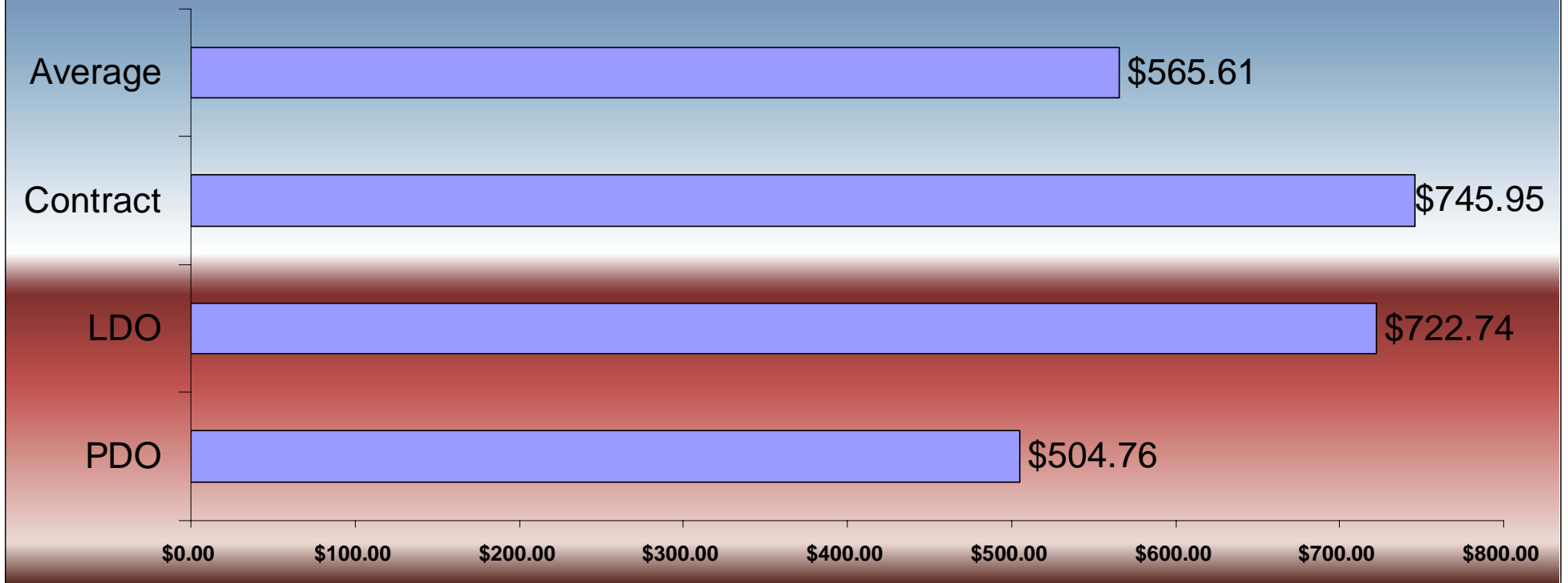
## Appendix C - Detailed Budget Report

	ORIGINAL APPROP	REVISED BUDGET	YTD ACTUAL	PCT USED	
40110 SALARIES/WAGES	\$1,533,203.00	\$1,533,203.00	\$1,387,258.97	90.5	%
40130 TEMPORARY EMPLOYEES	\$ 1,000.00	\$ 1,000.00	\$ 1,817.79	181.8	%
40210 EMPLOYEE BENEFIT FICA	\$ 117,290.00	\$ 117,290.00	\$ 103,588.47	88.3	%
40220 UNEMPLOYMENT COMPENSATION	\$ -	\$ -	\$ -	0	%
40230 COUNTY HEALTH INSURANCE	\$ 215,250.00	\$ 215,250.00	\$ 156,661.15	72.8	%
40240 WORKERS COMP	\$ 3,680.00	\$ 3,680.00	\$ 3,009.00	81.8	%
40260 STATE RETIREMENT	\$ 87,393.00	\$ 87,393.00	\$ 79,376.83	90.8	%
41100 OFFICE SUPPLIES	\$ 7,000.00	\$ 7,000.00	\$ 9,029.07	129	%
41140 COPIES DUPLICATING SUPPLIES	\$ 2,286.00	\$ 2,286.00	\$ 2,667.91	116.7	%
41150 DATA PROCESSING SUPPLIES	\$ 3,000.00	\$ 4,137.00	\$ 4,058.18	98.1	%
41400 TOOLS & EQUIPMENT UNDER \$1000	\$ 2,000.00	\$ 2,044.00	\$ 2,044.08	100	%
43110 LEGAL SERVICES	\$ 201,780.00	\$ 201,780.00	\$ 207,844.50	103	%
43115 INVESTIGATION FEES	\$ 8,320.00	\$ 7,183.00	\$ 7,713.80	107.4	%
43120 DATA PROCESSING SERVICES	\$ 51,401.00	\$ 51,401.00	\$ 51,401.04	100	%
43180 TRAINING COSTS	\$ -	\$ 27.00	\$ 27.00	100	%
43210 TELEPHONE	\$ 24,926.00	\$ 24,926.00	\$ 23,822.05	95.6	%
43215 TELEPHONE COMPUTER DATA	\$ 3,867.00	\$ 3,867.00	\$ 3,867.00	100	%
43216 CELL PHONE CHARGES	\$ 1,680.00	\$ 1,680.00	\$ 1,615.04	96.1	%
43230 POSTAGE	\$ 4,500.00	\$ 4,500.00	\$ 6,145.30	136.6	%
43310 TRAVEL EXPENSES	\$ 3,673.00	\$ 3,673.00	\$ 3,496.25	95.2	%
43312 TRAVEL RECRUITING	\$ 3,100.00	\$ 2,949.00	\$ 3,160.98	107.2	%
43320 MOTOR POOL CHARGES	\$ 16,000.00	\$ 16,000.00	\$ 17,831.02	111.4	%
43325 VEHICLE REPLACEMENT	\$ 5,460.00	\$ 5,460.00	\$ 5,460.00	100	%
43430 JOB ADVERTISING	\$ -	\$ 330.00	\$ 330.48	100	%
43510 PRINTING EXPENSE	\$ 1,595.00	\$ 1,645.00	\$ 1,645.00	100	%
43530 COPIER CONTRACT	\$ 7,882.00	\$ 7,882.00	\$ 7,547.98	95.8	%
43730 WATER EXPENSE	\$ 480.00	\$ 480.00	\$ 445.35	92.8	%
43810 OFFICE EQUIPMENT LEASE	\$ 30,810.00	\$ 30,810.00	\$ 30,810.00	100	%
43860 BUILDING LEASES	\$ 5,100.00	\$ 5,100.00	\$ 2,776.00	54.4	%
43910 REPAIRS MAINTENANCE AUTOMOTIVE	\$ 26.00	\$ 26.00	\$ 13.95	53.7	%
43920 REPAIRS OFFICE EQUIPMENT	\$ 550.00	\$ 429.00	\$ 295.16	68.8	%
47910 COURT COSTS INVESTIGATIONS	\$ 5,000.00	\$ 4,420.00	\$ 4,579.13	103.6	%
47930 MEMBERSHIP DUES					
SUBSCRIPTIONS	\$ 7,834.00	\$ 8,235.00	\$ 8,021.36	97.4	%
47991 SALES TAX / TRANS. PRIV. TAX	\$ 2.00	\$ 2.00	\$ 2.66	133	%
GRAND TOTAL	\$2,356,088.00	\$2,356,088.00	\$2,138,363.00	90.8	%

**Appendix D - Cost per Case Analysis using Weighting Factors**

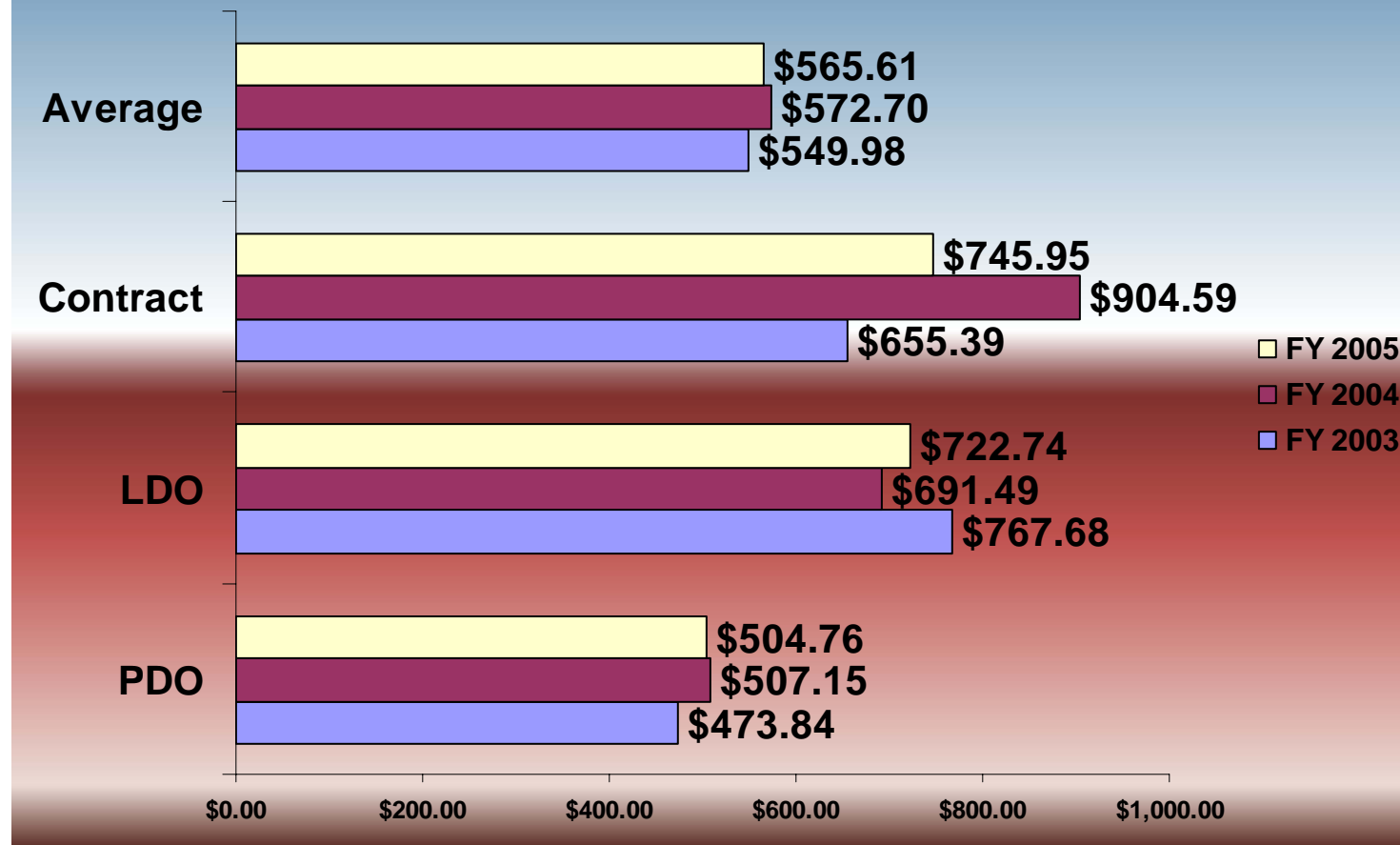
<b>Caseload Counts FY 2005</b>						
		<u>Raw Number</u>	<u>Conversion Factor</u>	<u>Weighted Cases</u>	<u>FY '05 Budget</u>	<u>Per case Weighted Cost</u>
<b>PDO</b>						(Actual Expenditures)
	Misdemeanor	1767	0.375	662.625		
	Felony	2423	1	2423		
	Juvenile	443	0.75	332.25		
	PCR	68	2	136		
	Appeals	17	6	102		
	Probation Violations	450	0.375	168.75		
Subtotal		<b>5168</b>		3824.625	\$1,930,518.00	\$504.76
<b>LDO</b>						
	Misdemeanor	357	0.375	133.875		
	Felony	584	1	584		
	Juvenile	104	0.75	78		
	PCR	38	2	76		
	Appeals	8	6	48		
	Probation Violations	178	0.375	66.75		
	Rejected	7				
Subtotal		<b>1269</b>		986.625	\$713,075.00	\$722.74
<b>Private Contract</b>						
	Misdemeanor	34	0.375	12.75		
	Felony	263	1	263		
	Juvenile	117	0.75	87.75		
	PCR	17	2	34		
	Appeals	2	6	12		
	Probation Violations	57	0.375	21.375		
Subtotal		<b>490</b>		430.875	\$321,413.00	\$745.95
<b>Total</b>		<b>6927</b>		5242.125	\$2,965,006.00	\$565.61

## Indigent Defense Provider Cost Per Weighted Case FY '05



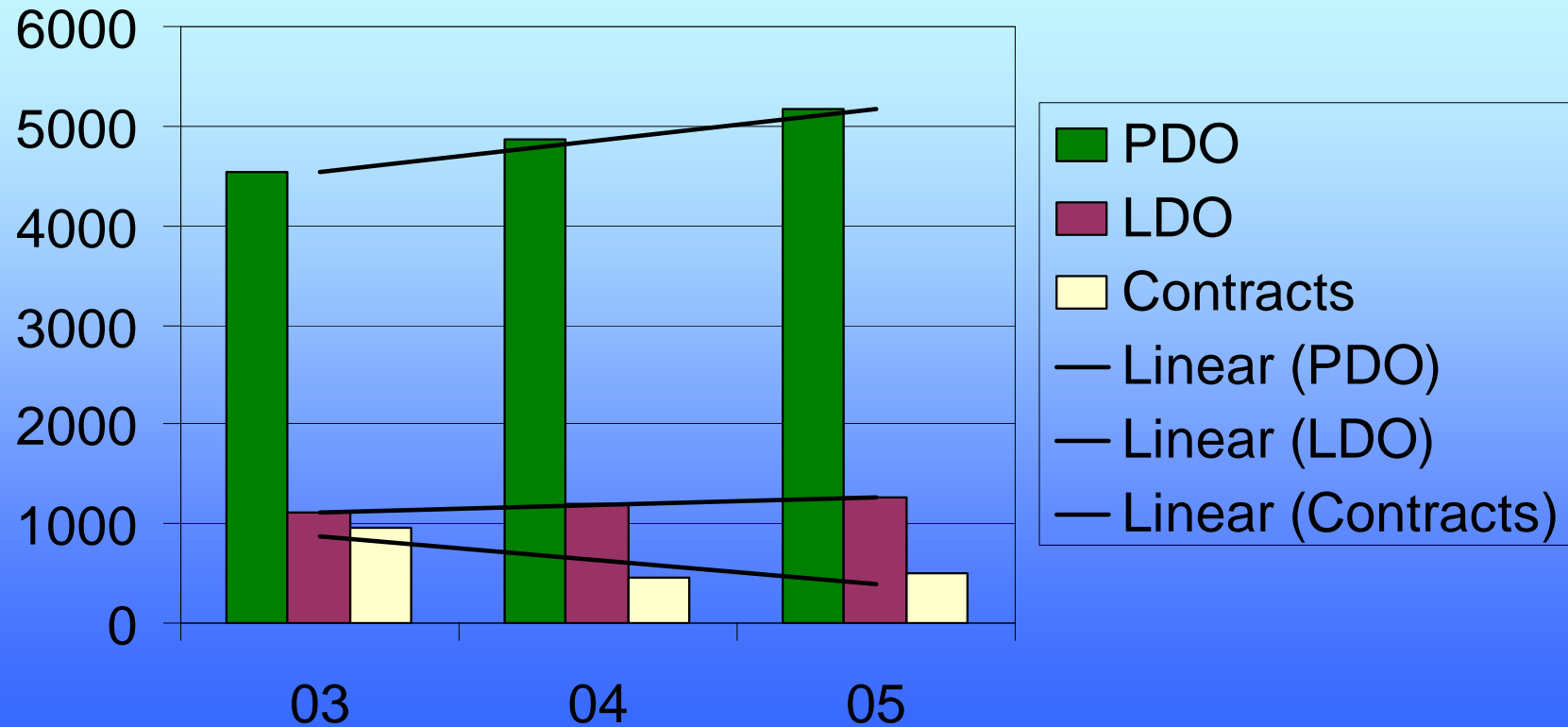
**Figure 1** – This table represent the average cost per case for all three forms of legal service providers, as well as the average for all services for fiscal year 2005.

## Indigent Defense Provider Cost per Weighted Case FY 03 - FY 05

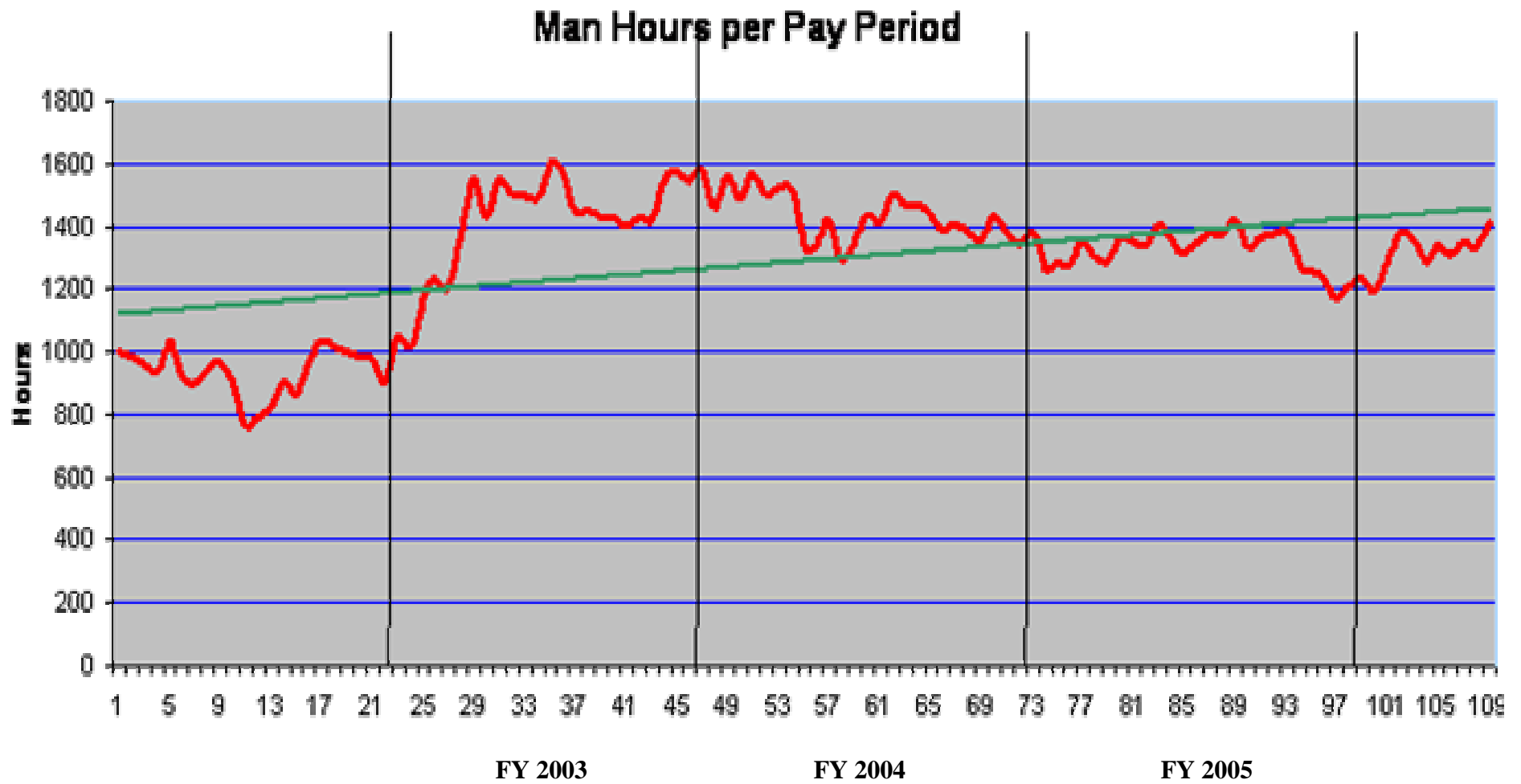


**Figure 2** – This Chart shows an annual comparison for all three indigent defense provider systems and the average for the county provided service.

## Raw Cases Handled by Fiscal year

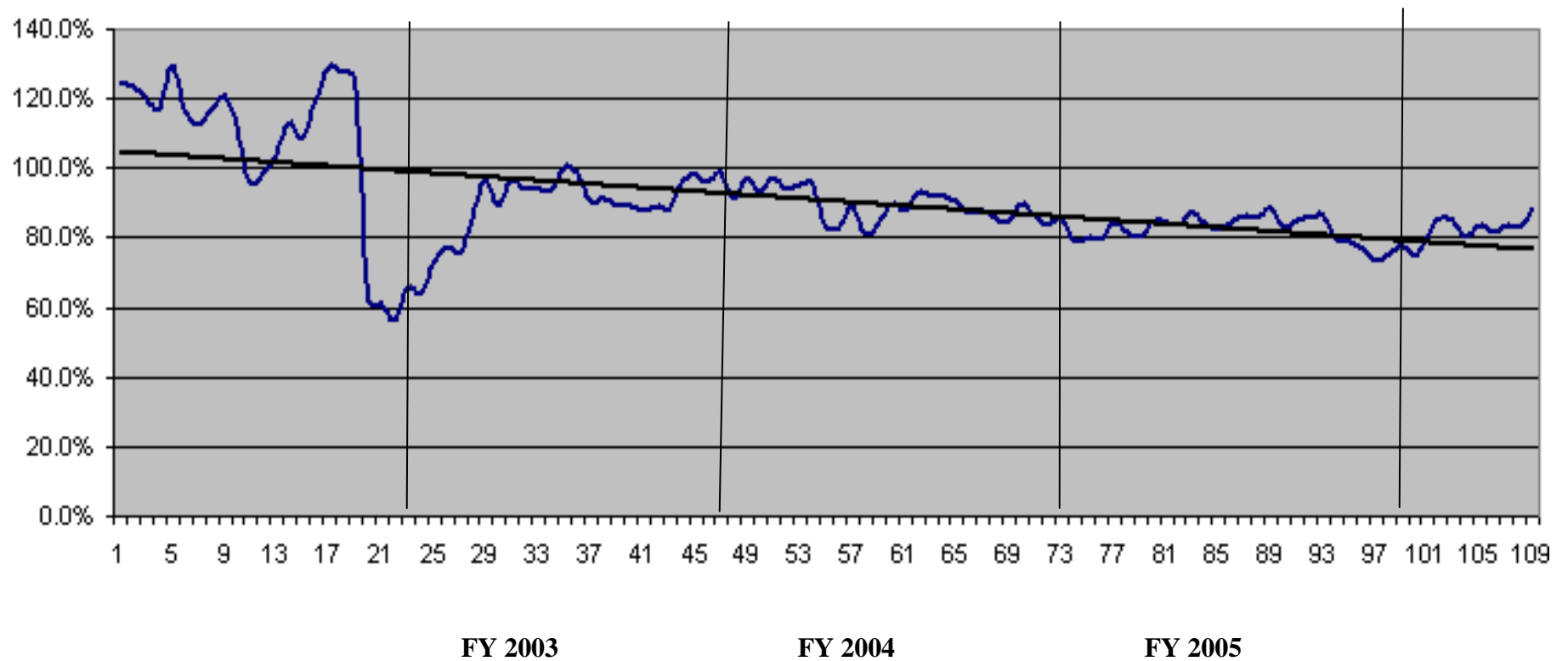


**Figure 3** – This chart shows the growth in the volume of raw cases handled by the respective service provider systems within Mohave County. General decreases in the number of outside contract case assignments is a result of more stringent conflict review, and greater internal efficiencies and optimization of resources.



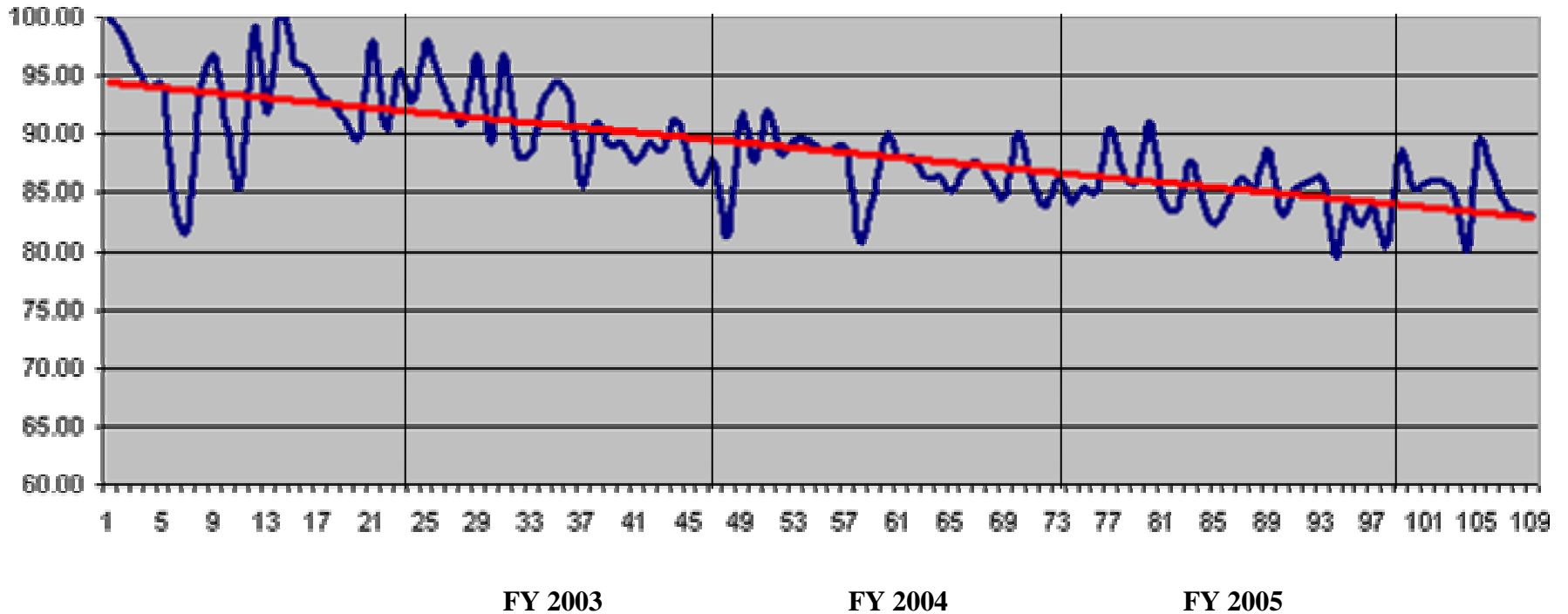
**Figure 4** – This figure represents the total number of man hours recorded for professional staff during each two week pay period. Totals change dramatically based on the addition and departure of staff.

## Work Production Rate



**Figure 5** – This figure represents productivity based on each authorized FTE professional staff member putting in a full 40 hour work week. Vacant FTE positions force productivity to be below 100% in the absence of employees not working hours beyond 40 per week. The significant drop in productivity in roughly period 18 was the result of a significant increase in FTE's which have taken time to fill.

## Average Man Hours per Two-week Pay Period



**Figure 6** – This figure shows the average number of hours per pay period (Standard is 80) for professional staff. While occasional spikes can be expected due to extraordinary circumstances such as jury trials and short term caseload abnormalities, consistent periods of more than 40 hour weeks is generally accepted to be a significant contributor to employee burn-out and increased turn-over.

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Appendix E (Page 1 of 7)



**KEY TO PROPOSED LAW OFFICES**

- 1 Inspect front gable roof ridge beam; repair and stabilize as necessary
- 2 Mohave County Seal added to building pediment
- 3 "MOHAVE COUNTY PUBLIC DEFENDER" added to building frieze
- 4 "Justice" quotation added above main entry  
"Injustice anywhere is a threat to justice everywhere." - Dr. Martin Luther King Jr.
- 5 Building address placed above main entry doors
- 6 Patch and repair ceiling plaster as necessary
- 7 Patch and repair exterior concrete as necessary
- 8 Existing handicap ramp to remain
- 9 Remove existing satellite dish; match, replace and extend existing plantings along Fifth Street
- 10 Existing Rectory / future Law Office expansion
- 11 Add shade trees along south side of public parking lot
- 12 Public parking lot along Fifth Street
- 13 Employee Parking along Spring Street
- 14 Update and relocate Historic Plaque

⬆ north  
not to scale

Law Offices of the Mohave County Public Defender  
Fifth Street Entrance

the Institute for Small Town Studies  
PO Box 13, Fairfield, Iowa 52556

## Appendix E (Page 2 of 7)

### KEY TO PROPOSED LAW OFFICES

- 1 Law Office employee entrance; add Mohave County Seal &/or "justice quote" above doorway
- 2 Patch and repair ceiling plaster and tin cornice details as necessary
- 3 Repair stained glass windows as necessary
- 4 Replace existing light fixtures above doorways
- 5 Repaint existing roof vents to match frieze
- 6 Repaint existing security lamps to match frieze
- 7 Repair and repaint existing roof cupola
- 8 Remove existing satellite dish; add bushes to enclose employee break area
- 9 Existing Rectory / future Law Office expansion
- 10 Existing mechanical units to remain
- 11 Employee parking along Spring Street
- 12 Mohave County Courthouse




⬆ north  
not to scale

Law Offices of the Mohave County Public Defender  
Spring Street Entrance

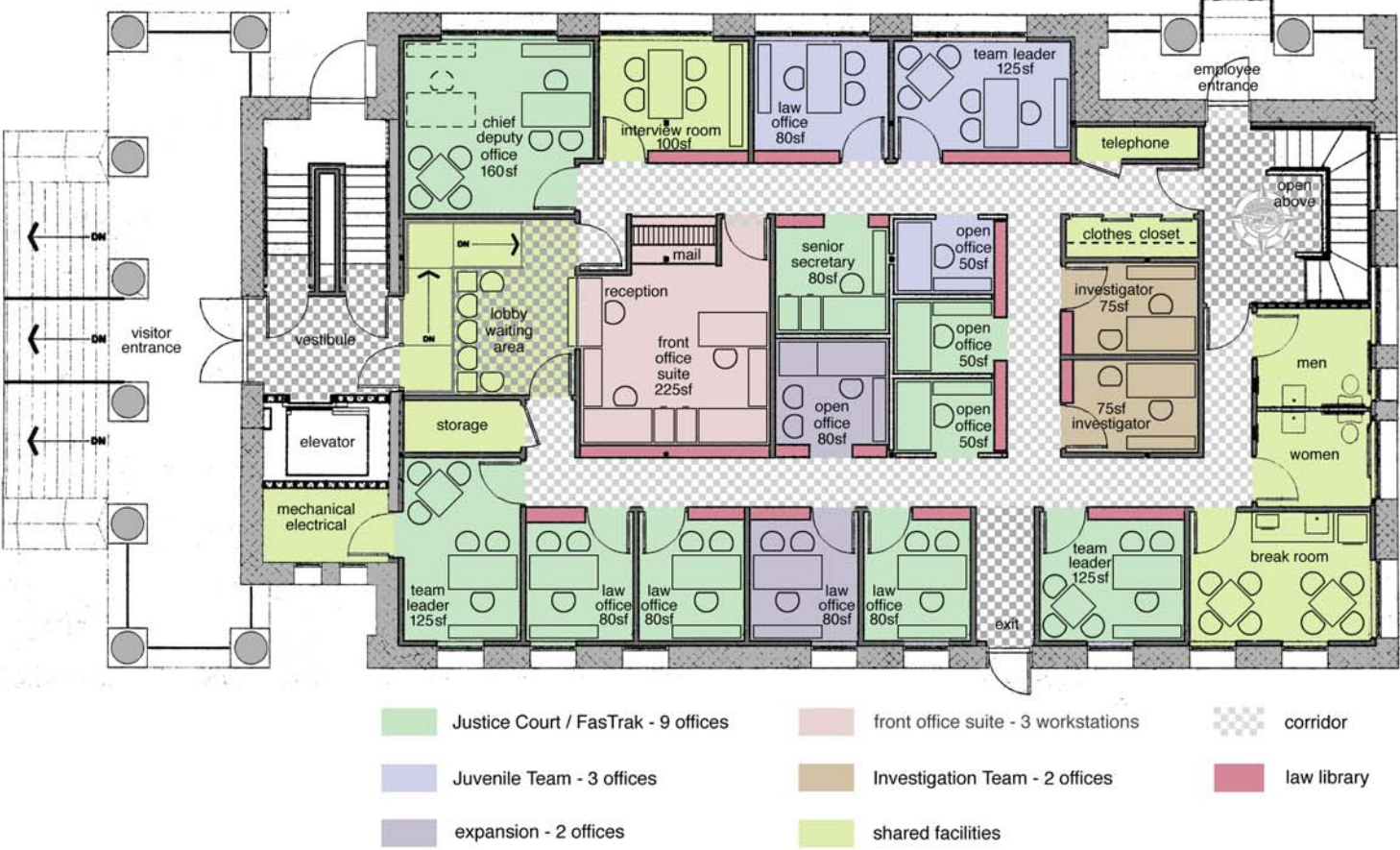
the Institute for Small Town Studies  
PO Box 13, Fairfield, Iowa 52556



 north  
 scale 1/8" = 1'0"

Law Offices of the Mohave County Public Defender  
 First Floor Plan

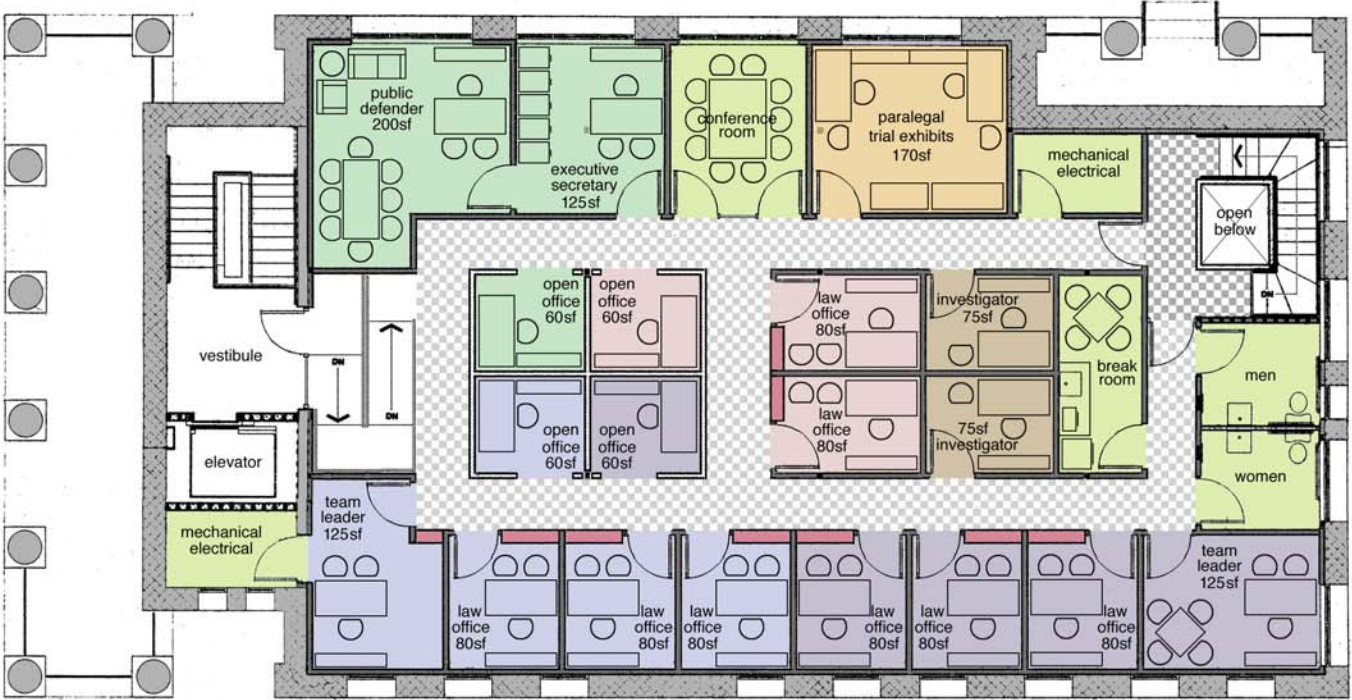
the Institute for Studies  
 for Small Town  
 PO Box 13, Fairfield, Iowa 52556



north  
scale 1/8" = 1'0"

Law Offices of the Mohave County Public Defender  
Second Floor Plan

the Institute Studies  
for Small Town  
PO Box 13, Fairfield, Iowa 52556



- Public Defender - 3 offices
- Superior Court Division VI - 3 offices
- shared facilities
- Superior Court Division III - 5 offices
- Paralegal / Trial Exhibits
- law library
- Superior Court Division V - 5 offices
- Investigation Team - 2 offices
- corridor

north  
 scale 1/8" = 1'0"

### Law Offices of the Mohave County Public Defender Third Floor Plan

the Institute for Studies  
 for Small Town  
PO Box 13, Fairfield, Iowa 52556

Appendix E (Page 6 of 7)



- interior cornice to match exterior cornice detail •
- Clark Gable / Carole Lombard display •
- wall color to match exterior stone color •
- simple, elegant, sturdy period furniture for lobby •



reception / waiting area



public entry / reception desk

- cornice and frieze to match exterior detailing
- secure glass at desk
- column details to match exterior
- secure doors lead to law office space



Clark Gable / Carole Lombard historical displays throughout corridors surrounding mock courtroom

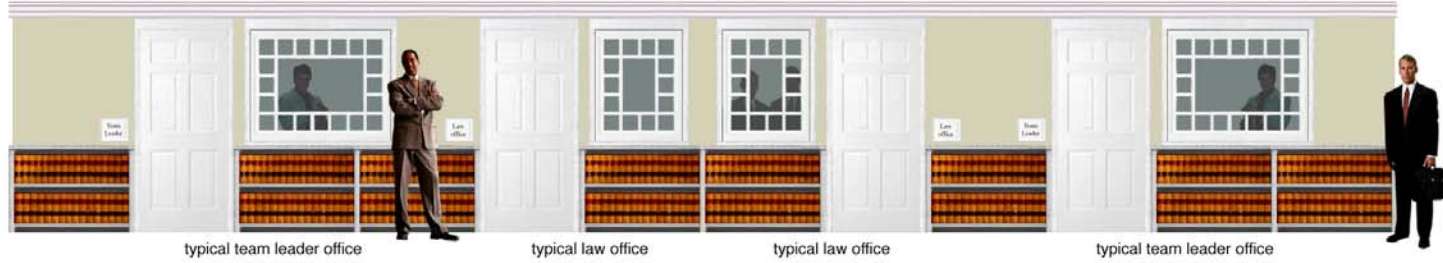
scale 1/4" = 1'0"  
(approximate)

Law Offices of the Mohave County Public Defender  
Interior Elevations

the Institute for Studies  
for Small Town  
PO Box 13, Fairfield, Iowa 52556

# Appendix E (Page 7 of 7)

- interior cornice to match exterior •
- wall color and texture to match exterior •
- office windows open onto open office space •
- name plates for offices •
- law library throughout 2nd & 3rd floor corridors •



typical team leader office

typical law office

typical law office

typical team leader office

- interior cornice to match exterior •
- freize hides light fixtures •
- column detail hides structure and provides electrical chase •
- open offices allow visibility throughout interior of space •
- law library throughout corridors •



typical open office

typical open office

- taller ceilings and clerestory windows illuminate gallery •
- mock courtroom with seats for 52 •
- dark oak finishes throughout courtroom to match County Courthouse •
- whitewashed finishes on second and third floors to match building exterior •



gallery

bench / chambers

mock courtroom

jury box / jury room

vending




scale 1/4" = 1'0"  
(approximate)

## Law Offices of the Mohave County Public Defender Interior Elevations

the Institute for Studies  
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PO Box 13, Fairfield, Iowa 52556

# Appendix F (Stressors)

EduSafe



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Training  
Managing Hazardous Substances

**Key Issues**

- Managing Stress
- Smoking
- Occupational Overuse Syndrome
- Asbestos Management

**Bullying**

Injury Management

EduSafe Resources

Policies

Committees

Emergency Procedures


Other Services

Feedback

## Managing Stress @ Curtin

### What is Stress?

Stress is a state that is experienced by an individual. A stressor is the agent that causes the stress. Stress is usually considered in a negative manner (distress), however a certain amount of stress is necessary and may even be beneficial to a person and assist them in functioning more effectively. (i.e. Stimulation versus negative experience)



If we think of humans as systems made up of interrelating parts which work towards maintaining a balance, stress is an upset in the equilibrium that requires a non routine expenditure of energy to bring the system back into normal operating limits.

### Types of stress:

- **Reactive stress:** Physical emotional state of distress when demands made on a person exceed the person's capacity to cope.
- **Cumulative stress:** A change reaction created by a series of persistent stressors.
- **Critical incident stress:** The reaction to demands that are sudden and unexpected due by specific incidents.
- **Post traumatic stress:** A reaction that relates to dealing with memories of a traumatic incident.

Unnecessary stress can have serious consequences on a person's health and wellbeing. It can be evident in a person's private life, and also a factor in the workplace. With this in mind, stress is a hazard to be identified, assessed and controlled as with other hazards of the workplace.

In order to effectively deal with stress in the workplace, it is important to recognise and understand the potential factors which may contribute to the stress levels of employees.

### Factors inherent to the job:

- **The physical work environment:** This may include operating with inadequate working facilities. For example, inadequate desk space, poor equipment, noise distraction, or working in hot conditions without air-conditioning.
- **Level of stimulation:** For example, this encompasses work overload, or non challenging work requirements.
- **Lack of control over the work activity:** An example of this is where employees lack autonomy and personal control over work demands (i.e. to complete deadlines etc)
- **Lack of meaning in a job or task performed:** This can be evident when tasks become repetitive or monotonous, and the employee lacks stimulation and interest in the task.

### The employee's role in the organisation:

<http://www.edusafe.edu.au/curtin/stress.html>

- **Role conflict:** This may be perceived when there is a difference of the understanding of a person's role in the organisation. That is, management may have certain expectations on what is required from an employee and the employee has their own expectations on how to achieve the objectives of their position.
- **Role ambiguity:** This can occur where there is a lack of clearly defined expectations about a person's duties.

#### Relationships at work:

- In all industries, there is the potential for conflict between staff members, with the presence of different personality types, management styles and attitudes.

#### Organisational structure and climate:

- Organisational politics, management styles, consultation and communication, lack of recognition.

#### Career development:

- Departmental budgetary constraints can have implications on perception of job security and access to ongoing professional education/ support.

#### Taking work home:

- During busy periods, employees may take work home to meet deadlines and to 'keep on top of things'. This can create tension and conflict between work and home responsibilities. It may also lend itself to a feeling of not knowing when the workday ends and when home life begins.

#### Model of work stress

- When the psychological demands of the job are high, and the worker control over the task is low, then the most adverse reactions of psychological strain may occur, such as fatigue, aggression, anxiety, depression and risk of physical illness. Conversely, when control over the stressful task is high, this may enhance learning.

#### How can stress be controlled through intervention?

**Primary interventions:** This level of intervention focuses on structural reform. That is, changing aspects of the work environment so that factors contributing to stress can be prevented or eliminated. For example, performance management programmes, clear job descriptions and clear communication lines between staff and management.

**Secondary interventions:** Involve preventing employees who may already be showing signs of stress from becoming sick. For example, by improving their coping capacity through provision of stress management and education courses, as well as health screening and/ or health enhancement programmes.

**Tertiary interventions:** This includes treating those employees who already have serious health problems, and involves the provision of rehabilitation services. Tertiary interventions are not usually regarded as preventative programs.

Secondary and Tertiary interventions are the most common initiatives that workplaces can schedule to combat factors associated with stress. This is in order to focus on individual management, as opposed to the more complex organisational management. Current research suggests that primary interventions are the most successful initiative, which can be implemented across the whole organisation to reduce stress at the source.

Secondary and Tertiary Interventions available through EduSafe

- **General interventions:** Incident/ accident report forms, work environment assessments and recommendations, OSH reps, fire wardens, hazard identification etc.
- **Referral to Injury Management:** With early referral to injury management, rehabilitation can proceed at a faster rate and increase the likelihood of recovery. Early identification of employees, who may be experiencing difficulties at work due to injury or illness (including stress), and those staff becoming increasingly absent from work, is imperative so that interventions can be initiated to correct the problem.
- **Employee Assistance Programmes:** [University Counselling and Health Services](#) involvement.
- [Healthy Lifestyle Programmes](#)
- Redeployment options
- Stress Management Programmes

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## Appendix G (*Miranda v. Clark County*)

ROBERTO HERNANDEZ **MIRANDA**, Plaintiff-Appellant, v. **CLARK COUNTY**, NEVADA; MORGAN HARRIS; THOMAS RIGSBY, Defendants-Appellees.

No. 00-15734

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

319 F.3d 465; 2003 U.S. App. LEXIS 1778; 2003 Cal. Daily Op. Service 1037; 2003 Daily Journal DAR 1353

September 19, 2002, Argued and Submitted, San Francisco, California  
February 3, 2003, Filed

**SUBSEQUENT HISTORY:** US Supreme Court certiorari denied by [CLARK COUNTY, NV, ET AL. v. MIRANDA, ROBERT H., 2003 U.S. LEXIS 5538](#) (U.S., Oct. 6, 2003)

**PRIOR HISTORY:** [**\*\*1**] Appeal from the United States District Court for the District of Nevada. D.C. No. CV-98-01121-LDG. Lloyd D. George, District Judge, Presiding. [Miranda v. Clark County, 279 F.3d 1102, 2002 U.S. App. LEXIS 2004](#) (9th Cir. Nev., 2002)

**DISPOSITION:** Affirmed in part and reversed in part and remanded.

### CASE SUMMARY

**PROCEDURAL POSTURE:** Plaintiff's [42 U.S.C.S. § 1983](#) suit against defendants, an assistant public defender, the head of the public defender's office, and the county, alleged inexperienced counsel was appointed and no investigation was conducted due to a policy of not allocating resources to defendants failing a polygraph. A three-judge appellate panel affirmed the dismissal by the United States District Court for the District of Nevada. The case was reviewed en banc.

**OVERVIEW:** Plaintiff's murder conviction and death sentence was overturned due to ineffective assistance of counsel and failure to investigate. Plaintiff alleged the public defenders office's head, as a policy maker, allocated resources based upon polygraph examinations, and assigned untrained attorneys to capital cases, in deliberate indifference to plaintiff's Sixth Amendment right to effective assistance of counsel. The assistant public defender represented plaintiff in the traditional role; he was not a state actor amenable to suit under § 1983. But, the function of the head of the public defenders office was administrative, in determining how resources were spent. He was a state actor under § 1983. The county was amenable to § 1983 liability for constitutional deprivations due to a custom or policy. The policy was deliberately indifferent to the effective assistance of counsel requirement regardless of innocence or guilt. Polygraph results could not be determinative in allocating a public defenders office's resources to a particular case. Factual issues on overturning the conviction were beyond the scope of a Fed. R. Civ. P. 12(b)(6) review. No heightened pleading standard applied.

**OUTCOME:** The en banc appellate court affirmed the dismissal as to the assistant public defender, but reversed the dismissal as to the head of the public defender's office and the county.

**CORE TERMS:** public defender, polygraph, training, criminal defense, innocent, inexperienced, innocence, guilt, investigative, deliberate indifference, lying, allocated, assigning, state actor, allocating, effective assistance of counsel, state action, experienced, firing, municipality, ineffective

assistance, polygraph examination, constitutional rights, hiring, law school, isn't, green, effective representation, hired, polygraph test

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[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Failure to State a Cause of Action](#) 

HN1 

When reviewing a dismissal of a complaint under Fed. R. Civ. P. 12(b)(6), all allegations are to be considered in a light most favorable to the plaintiff. Gone is any heightened pleading requirement that may have influenced the district court's disposition of the case. [More Like This Headnote](#)

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HN2 

A public defender representing a client in the lawyer's traditional adversarial role is not a state actor. This is not predicated on whether the lawyer was in fact exercising "independent judgment." Rather, it is emphasized that it is the traditional lawyer role that controls. It is the nature and context of the function that is determinative. It does not matter that the public defender is employed by a public agency. Except for the source of payment, the duties and obligations are the same whether the public defender was privately retained, appointed, or serving in a legal aid or defender program. In that traditional role, the public defender is acting under the ethical standards of a lawyer-client relationship. He is held to the same standards of competence and integrity as a private lawyer. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN3 

Nev. Rev. Stat. 180.080, 260.010, - .040, - .070, - .075, require of state and county public defenders expenditure reports, and provide for the institution and regulation of public defender offices. [More Like This Headnote](#)

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HN4 

A public defender may be a state actor with respect to administrative or investigatory functions. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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HN5 

Counties and municipalities are amenable to [42 U.S.C.S. § 1983](#) liability for constitutional deprivations resulting from the application of governmental custom or policy. [More Like This Headnote](#)

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[Constitutional Law](#) > [Criminal Process](#) > [Assistance of Counsel](#) 

HN6 

The constitutional rights to effective representation of counsel is of effective representation of all defendants, regardless of guilt or innocence. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Constitutional Law](#) > [Criminal Process](#) > [Assistance of Counsel](#) 

HN7 

There is a requirement that every criminal defendant receive adequate representation, regardless of innocence or guilt. This is a core guarantee of the Sixth Amendment and a right so fundamental that any contrary policy erodes the principles of liberty and justice that underpin civil rights. [More Like This Headnote](#)

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[Constitutional Law](#) > [Criminal Process](#) > [Assistance of Counsel](#) 

HN8 

Polygraph results cannot be determinative in determining the extent of a public defenders office's investigative resources to devote to a particular defendant's case. [More Like This Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Objections & Demurrers](#) > [Failure to State a Cause of Action](#) 

HN9 

On an appellate court's review of a Fed. R. Civ. P. 12(b)(6) dismissal, only the allegations of the complaint are relevant. [More Like This Headnote](#)

[Civil Procedure](#) > [Pleading & Practice](#) > [Pleadings](#) > [Heightened Pleading Requirements](#) 

HN10 

No heightened pleading standard applies unless required by the Federal Rules of Civil Procedure. [More Like This Headnote](#) | [Shepardize: Restrict By Headnote](#)

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[Constitutional Law](#) > [Civil Rights Enforcement](#) > [Civil Rights Act of 1871](#) > [Governmental Actions](#) 

HN11 

A failure to train subordinates may result in [42 U.S.C.S. § 1983](#) liability where the failure amounts to deliberate indifference to the rights of persons with whom the subordinates come into contact. [More Like This Headnote](#)

**COUNSEL:** Roy A. Jacobson, Jr., Jackson, Wyoming, for the plaintiff-appellant.

J. Douglas McCalla, Spence, Moriarity & Schuster, Jackson, Wyoming, for the plaintiff-appellant.

Thomas D. Beatty, Law Offices of Thomas D. Beatty, Las Vegas, Nevada, for the defendants-appellees.

Gloria J. Sturman, Edwards, Hale, Sturman, Atkin & Cushing, Ltd., Las Vegas, Nevada, for the defendants-appellees.

Janson F. Stewart, Chief Deputy District Attorney, Las Vegas, Nevada, for the defendants-appellees.

**JUDGES:** Before: Mary M. Schroeder, Chief Judge, Joseph T. Sneed, Harry Pregerson, Stephen Reinhardt, Thomas G. Nelson, Andrew J. Kleinfeld, Michael Daly Hawkins, Sidney R. Thomas, Barry G. Silverman, Kim McLane Wardlaw and Marsha S. Berzon, Circuit Judges. Opinion by Chief Judge Schroeder; Partial Concurrence and Partial Dissent by Judge Kleinfeld; Partial Concurrence and Partial Dissent by Judge Silverman.

**OPINIONBY:** Mary M. Schroeder

**OPINION:**

[\*466] SCHROEDER, Chief Judge:

We took this case en banc to consider whether the head of a county public defender's office, [\* \* 2] as the administrative head of an organization formed to represent criminal defendants, may be held accountable under [42 U.S.C. § 1983](#) for a policy that leads to a denial of an individual's right to effective representation of counsel. We take principal guidance from the leading Supreme Court decisions on state and municipal liability, [Monell v. Department of Social Services, 436 U.S. 658, 56 L. Ed. 2d 611, 98 S. Ct. 2018\(1978\)](#) and [City of Canton v. Harris, 489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197\(1989\)](#), as well as the leading decision considering § 1983 liability of a public defender, [Polk County v. Dodson, 454 U.S. 312, 70 L. Ed. 2d 509, 102 S. Ct. 445\(1981\)](#).

*Polk County* held that when an assistant public defender is performing the traditional role of an attorney for a client, the lawyer is not a state actor. [454 U.S. at 318-19](#). The case left open the possibility, however, that there may be [\*467] liability for "administrative and possibly investigative functions." [Id. at 324-25](#).

The plaintiff in this case is Roberto Hernandez **Miranda**. He was convicted of capital murder [\* \* 3] and served fourteen years in prison until a Nevada state court overturned his conviction in collateral-review proceedings. The Nevada court held that he was not provided effective assistance of counsel because the assistant public defender failed to investigate the case. The state declined to reprosecute.

**Miranda** then filed this action in federal district court against the individual assistant public defender who had represented him, Thomas Rigsby; the head of the **Clark County** Public Defender's Office, Morgan Harris; and **Clark County**, Nevada. The district court dismissed pursuant to [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) for failure to state a claim [\*468] upon which relief could be granted.

According to the complaint, **Miranda** truthfully maintained his innocence, and he provided Rigsby with a list of forty witnesses who could provide information on who actually committed the crime. Rigsby, fresh out of law school and an assistant public defender for a little over a year, had never tried a murder case, much less a capital case. He interviewed only three of the witnesses **Miranda** had listed and subpoenaed none for trial. **Miranda** alleges conduct that fell far short of the minimal requirements [\* \* 4] of effective representation.

In addition, the complaint alleges Rigsby's representation of **Miranda** was doomed to failure because of two policies promulgated by Harris as the head of the Office of Public Defender. The first was a policy of administering a lie detector test to all defendants and allocating minimal resources for preparation of defense to those clients who appear guilty because they failed the polygraph. The plaintiff claims that this policy violates the basic dictates of [Gideon v. Wainwright, 372 U.S. 335, 9 L. Ed. 2d 799, 83 S. Ct. 792\(1963\)](#), to provide all defendants with effective counsel regardless of guilt or innocence. [327 U.S. at 344-45](#). The second policy was to assign the least-experienced

lawyers on the staff to capital cases without training or experience in the special demands of such cases. Plaintiff maintains that such a policy constitutes a lack of training so severe as to establish a "deliberate indifference" to a defendant's constitutional rights. [City of Canton, 489 U.S. at 388-89.](#) Plaintiff alleges that Harris, as a policymaker for the county, made a deliberate choice to follow this course of action rather **[\*\*5]** than to implement an alternative policy, and that the county thus violated **Miranda's** constitutional rights. *Id.*

Thus, contrary to the suggestions of my dissenting colleagues, the complaint effectively alleges that Harris made no particularized decisions through the exercise of independent professional judgment in the defense of a client. The complaint expressly states that "Harris, as a policy maker[] for the **Clark County** Public Defender's Office and **Clark County**, Nevada, . . . "allocated investigative and defense resources based upon a defendant's performance on a polygraph examination" [Complaint P 121] and "assigned inexperienced and untrained attorneys to capital and other felony cases [Complaint P 138]," which policy, custom or practice "was . . . deliberately indifferent to, . . . and in callous disregard for, Mr. **Miranda's** federal constitutional rights, including, but not limited to, his rights to the effective assistance of counsel." Complaint P 138; *see also id.* P 121.

The district court dismissed the complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#) as failing to state a claim upon which relief could be granted against any of the defendants. A three-judge **[\*\*6]** panel of this court affirmed. [Miranda v. Clark County, 279 F.3d 1102, 1112\(9th Cir. 2002\).](#) We affirm as to Rigsby and reverse as to Harris and **Clark County**.

Key to our review is the stricture that <sup>HN1</sup>when reviewing a dismissal of a complaint under Rule 12(b)(6), all allegations are to be considered in a light most favorable to the plaintiff. Gone is any heightened pleading requirement that may have influenced the district court's disposition of the case. [Leatherman v. Tarrant County NICU, 507 U.S. 163, 168, 122 L. Ed. 2d 517, 113 S. Ct. 1160\(1993\); Galbraith v. County of Santa Clara, 307 F.3d 1119, 1121\(9th Cir. 2002\).](#) We therefore consider the allegations of the complaint as they relate first to the conduct of the individual assistant public defender representing **Miranda**, and then as they relate to the Public Defender, Harris, alleged to be the policymaker for **Clark County** in the allocation of public resources for criminal defense.

#### **[\*469]** *The Claim Against the Assistant Public Defender*

According to the allegations of the complaint, the conduct of Rigsby was well below the accepted standard of representation of a capital defendant. **[\*\*7]** Given a client who had pled innocent and provided the names of dozens of witnesses who could provide information about the client's innocence and the guilt of the actual perpetrator, the lawyer did essentially nothing. He subpoenaed no witnesses and mounted no defense. We assume, for purposes of this case, his conduct was deficient and to the detriment of his client.

**[1]** The issue before us, however, is whether in providing inadequate representation to this defendant, Rigsby was acting on behalf of the **Clark County** government, so as to become a state actor within the meaning of § 1983. He was, no doubt, paid by government funds and hired by a government agency. Nevertheless, his function was to represent his client, not the interests of the state or county. The result reached by both the district court and the three-judge panel in this case, in holding he was not a state actor, is required by the Supreme Court's decision in *Polk County*. Rigsby had assumed his role as counsel and thus had begun to perform a "lawyer's traditional functions." [Polk County, 454 U.S. at 325.](#) The Court in *Polk County* found that <sup>HN2</sup>a public defender representing a client in **[\*\*8]** the lawyer's traditional adversarial role was not a state actor. *Id.* The Court did not predicate its holding on whether the lawyer was in fact exercising "independent judgment." *Id.* at 324-25. Rather, it emphasized that it is the traditional lawyer role that controls. [Id.](#) at 322 n.13, 324 n.17, 325; [Georgia v. McCollum, 505 U.S. 42, 54, 120 L. Ed. 2d 33, 112 S. Ct. 2348\(1992\)](#)(holding that it is the "nature and context of the function" that is determinative).

**[2]** It does not matter that Rigsby was employed by a public agency. "Except for the source of payment, . . . the duties and obligations are the same whether [Rigsby was] privately retained, appointed, or serving in a legal aid or defender program." [Polk County, 454 U.S. at 318](#)(internal quotation marks and citation omitted). In that traditional role, Rigsby was acting under the ethical standards of a lawyer-client relationship. He was "held to the same standards of competence and

integrity as a private lawyer." [Id. at 321](#). We therefore affirm the district court's dismissal of the complaint against the Assistant Public Defender, [\*9] Rigsby, on the ground that, as a matter of law, he was not a state actor.

### *The Claim Against Harris, the County Public Defender*

The situation with respect to Harris, the administrative head of the County Public Defender's Office, is different. Insofar as this case is concerned, he was not acting under any of the ethical standards of the lawyer-client relationship to which Rigsby was bound. The nature and context of Harris's function was administrative. He was, according to the complaint, acting solely as the administrative head of the agency, responsible for allocating the office's finite resources. Also according to the complaint, he instituted certain policies as part of his administrative functions that resulted in the miscarriage of justice represented by the plaintiff's death sentence and murder conviction. We deal with each of these policies in turn.

### *The Polygraph Policy*

The policy in question, for purposes of this appeal, is an alleged policy that subjected each client to a polygraph test and then allocated the resources of the office according to the result of that test. According to the complaint, "if a client failed a polygraph examination, as determined by the [\*10] subjective assessment of the polygraph examiner, minimal investigation would be conducted and a limited defense would be provided." Thus, if a client appeared on the basis of a polygraph to be lying about his innocence, he would be provided minimal resources to develop a defense. Construed in a light most favorable to the plaintiff, this allegation means that those clients who claimed innocence, but appeared to be guilty, were provided inadequate resources to mount an effective defense.

In evaluating the viability of the claim, we first must determine whether Harris's implementation of such a standard constitutes state action for purposes of § 1983. As we have seen, Rigsby, in undertaking the actual defense of **Miranda**, entered into an attorney-client relationship that placed him in a role that exempts him from liability under § 1983 as a state actor. Harris, however, is alleged to have been acting as the administrative head of the office in determining how the resources of **Clark County** would be distributed.

[3] In allocating the county's funds, Harris was performing essentially an administrative role on behalf of **Clark County**. It was a function similar to that performed [\*11] by the head of every government administrative office. *See, e.g.,* <sup>HN3</sup> Nev. Rev. Stat. chs. 180.080, 260.010, - .040, - .070, - .075 (requiring of state and county public defenders expenditure reports and providing for institution and regulation of public defender offices). It therefore materially differs from the relationship inherent in a public defender's representation of an individual client. [Polk County, 454 U.S. at 322 n.13, 324-25](#). The conduct alleged falls within the type of administrative action adumbrated by the Supreme Court in *Polk County*, when it recognized the possibility that a public defender's "administrative and possibly investigative functions" would constitute state action. [Id. at 325](#); *see also McCollum, 505 U.S. at 54* (reaffirming that <sup>HN4</sup> the Public Defender may be a state actor with respect to administrative or investigatory functions). We thus conclude that Harris was acting on behalf of **Clark County** in determining how the overall resources of the office were to be spent, and he qualifies as a state actor for purposes of § 1983.

That conclusion also is mandated by principles enunciated in *Monell*, in which [\*12] the Court held that <sup>HN5</sup> counties and municipalities are amenable to § 1983 liability for constitutional deprivations resulting from application of governmental custom or policy. [\*470] The resource allocation policy alleged in this case constitutes a viable claim and subjects Harris to suit as a policymaker on behalf of **Clark County**. [Monell, 436 U.S. at 690-91, 694](#).

[4] The remaining question is whether the alleged policy resulted in deprivation of the plaintiff's <sup>HN6</sup> constitutional rights to effective representation of counsel. That constitutional guarantee is of effective representation of all defendants, regardless of guilt or innocence. *See Gideon, 372 U.S. at 344*; *see also Holloway v. Arkansas, 435 U.S. 475, 489, 55 L. Ed. 2d 426, 98 S. Ct. 1173 (1978)*. Here, according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of the representation by limiting the

investigatory and legal resources provided. The policy, while falling short of complete denial of counsel, is a policy of deliberate indifference <sup>HN7</sup> to the requirement that every criminal defendant **[\*\*13]** receive adequate representation, regardless of innocence or guilt. [City of Canton, 489 U.S. at 389](#). This is a core guarantee of the Sixth Amendment and a right so fundamental that any contrary policy erodes the principles of liberty and justice that underpin our civil rights. [Gideon, 372 U.S. at 340-41, 344](#); [Powell v. Alabama, 287 U.S. 45, 67-69, 77 L. Ed. 158, 53 S. Ct. 55\(1932\)](#); see also [Alabama v. Shelton, 535 U.S. 654, 122 S. Ct. 1764, 1767, 152 L. Ed. 2d 888\(2002\)](#).

**[5]** We recognize, of course, that allocation of resources must be made upon some criteria and not all result in denial of effective representation. We hold only that the determination cannot be based solely or even principally on polygraph results. In so holding, we express no opinion on whether the result of a polygraph test may be used as one of a number of factors employed in determining the extent of investigative resources to devote to a particular defendant's case. We hold only that <sup>HN8</sup> polygraph results cannot be determinative.

The state suggests that there was no actual prejudice to **Miranda** in the representation because a Nevada court **[\*\*14]** did not overturn the conviction until fourteen years after the conviction. The state further suggests that it was the death of witnesses rather than the weakness of the state's case in the first place that caused it to decline to re prosecute. These are factual issues, however, that are beyond the purview of <sup>HN9</sup> our review on a Rule 12(b)(6) dismissal, where only the allegations of the complaint are relevant.

We recognize that the result reached by the district court in dismissing the complaint was in part dictated by heightened pleading standards that are no longer applicable. In [Branch v. Tunnell, 14 F.3d 449, 455\(9th Cir. 1994\)](#), we ruled such standards may apply after the Supreme Court's decision in [Leatherman v. Tarrant County NICU, 507 U.S. 163, 122 L. Ed. 2d 517, 113 S. Ct. 1160\(1993\)](#). However, we recently held that intervening Supreme Court authority has overruled *Branch*. See [Crawford-El v. Britton, 523 U.S. 574, 595, 140 L. Ed. 2d 759, 118 S. Ct. 1584\(1998\)](#); see also [Swierkiewicz v. Sorema N.A., 534 U.S. 506, 512-14, 152 L. Ed. 2d 1, 122 S. Ct. 992\(2002\)](#). We have now held that <sup>HN10</sup> no heightened pleading standard applies unless required by the **[\*\*15]** Federal Rules of Civil Procedure. [Galbraith, 307 F.3d at 1124-25](#).

**[6]** Under the standard that now applies, the complaint states claims against Harris and the County for the policy of allocating resources on the basis of apparent guilt or innocence. The Rule 12(b)(6) dismissal was inappropriate.

#### **[\*471]** *Policy of Assigning Inexperienced Attorneys*

The complaint alleges that the County also had a policy of assigning the least-experienced attorneys to capital cases without providing any training, thus demonstrating callous indifference to the defendant's constitutional rights. The County responds that there was no callous disregard of constitutional rights within the meaning of *City of Canton*, because, as a matter of law, attorneys who have graduated from law school and passed the bar should be considered adequately trained to handle capital murder cases.

**[7]** In *City of Canton*, the Supreme Court held that <sup>HN11</sup> a failure to train subordinates may result in § 1983 liability where the failure amounts to deliberate indifference to the rights of persons with whom the subordinates come into contact. [City of Canton, 489 U.S. at 388](#). The district **[\*\*16]** court found the allegations of the complaint insufficient under the heightened pleading standard then in effect, relying on [Jones v. Community Redevelopment Agency, 733 F.2d 646, 649\(9th Cir. 1984\)](#). The panel essentially applied a similar standard by holding that the assignment of Rigsby to this particular case did not evince a policy of deliberate indifference. [Miranda, 279 F.3d at 1111](#). The complaint, however, construed liberally, alleges not merely an isolated assignment of an inexperienced lawyer, but a deliberate pattern and policy of refusing to train lawyers for capital cases known to the county administrators to exert unusual demands on attorneys. Under pleading standards now applicable, see [Galbraith, 307 F.3d at 1125](#), the allegations are sufficient to create a claim of "deliberate indifference to constitutional rights" in the failure to train lawyers to represent clients accused of capital offenses.

[8] The judgment of the district court dismissing the complaint against Rigsby is AFFIRMED. The judgment in favor of defendants Harris and **Clark County** is REVERSED and the case is REMANDED to the district court for further [\*\*17] proceedings. Each party is to bear its own costs.

**CONCURBY:** Andrew J. Kleinfeld (In part)Barry G. Silverman (In part)

**CONCUR:**

SILVERMAN, Circuit Judge, with whom SNEED and T.G. NELSON, Circuit Judges, join, concurring in part and dissenting in part:

I agree with the majority that by virtue of [Polk County v. Dodson, 454 U.S. 312, 70 L. Ed. 2d 509, 102 S. Ct. 445.](#)(1981), the conduct of Assistant Public Defender Thomas Rigby cannot be considered "state action" for § 1983 purposes. As I see it, however, this is also the case with Public Defender Morgan Harris. I would affirm the dismissal of the complaint against him as well.

I read *Polk County* to hold that a public defender -- be it an assistant P.D. or the head of the office -- does not act under color of state law when exercising independent professional judgment in connection with the defense of a client. [454 U.S. at 324-325.](#) In my view, a decision by the public defender as to which of his or her assistants to assign to a particular client, in a particular case, is directly related to the defense of the client. Therefore, under the rationale of *Polk County*, it is not state action. The same goes [\*\*18] for the use of a polygraph examination and other aspects of trial preparation. These are decisions pertaining to the client's representation, and consequently, are not made under color of state law. Such decisions are in contrast to, say, a public defender's discrimination in hiring, or sexual harassment of an employee -- conduct having nothing to do with the defense of a client. Such non-case-related decisions are not protected by *Polk County*.

As for the claim against **Clark County**, I agree with Judge Kleinfeld and join that portion of his partial concurrence, partial dissent.

**DISSENTBY:** Andrew J. Kleinfeld (In part) Barry G. Silverman(In part(Andrew J. Kleinfeld (In part)Barry G. Silverman (In part)

**DISSENT:** KLEINFELD, Circuit Judge, concurring in part and dissenting in part, in which SILVERMAN, Circuit Judge, joins as to Part II:

I concur in the majority's conclusion that the district court correctly dismissed **Miranda's** section 1983 claim against the assistant public defender, Thomas Rigsby, who represented him. In *Polk County v. Dodson*, n1 the Supreme Court held that because an assistant public defender's relationship to his client is substantially identical to a private defense lawyer's, except for how he gets paid, his malpractice, if any, may subject him to a state law malpractice action but is not state action for purposes of section 1983 liability.n2

- - - - - Footnotes - - - - -

n1 [Polk County v. Dodson, 454 U.S. 312 \(1981\).](#)

n2 [Id. at 325-26.](#)

- - - - - End Footnotes- - - - -

I.

I dissent, and would affirm the district court dismissal, as to Morgan Harris, the head of the county

public defender's office, The majority ruling does not accurately state what the complaint, upon which this 12(b)(6) ruling must be based, actually says. According to the majority, **Miranda** pleaded that if a client "appeared on the basis of a polygraph to be lying about his innocence, he would be provided minimal resources." n3 Thus "those clients who claimed innocence, but appeared to be guilty, were provided inadequate resources." n4 And "according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of representation." n5

- - - - - Footnotes - - - - -

n3 Maj. Op. at 1507.

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n4 *Id.* at 1507-1508.

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n5 *Id.* at 1509.

- - - - - End Footnotes- - - - -

Actually the complaint does not say or imply any of these things. It says "polygraph examinations were administered to defendants to determine the investigative and defense resources that would be allocated to their case," and that if they failed, minimal resources would be allocated to the case.n6 It goes on to allege **Miranda** received a "substandard" defense "as a consequence of the **Clark County** Public Defender's policy of allocating investigative and defense resources based on the client's performance of the polygraph examination." n7

- - - - - Footnotes - - - - -

n6 See Complaint at ¶ 117.

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n7 *Id.* at ¶ 120.

- - - - - End Footnotes- - - - -

The majority opinion assumes that Harris used the polygraph to sort out the innocent from the guilty and allocate the most resources to the innocent, No doubt the lawyers in the office tried their hardest for those clients they thought to be truly innocent, but there's no reason to suppose that the polygraph was used to sort out the innocent from the guilty. The complaint doesn't say that. The only mention of guilt is a letter that Rigsby, not Harris, wrote to his investigator, saying that "with such strong evidence of guilt and deception" he would ordinarily require little of the investigator. n8

- - - - - Footnotes - - - - -

n8 *Id.* at ¶ 118.

----- End Footnotes-----

Maybe to those who haven't done any criminal defense, it isn't obvious why a polygraph examination would be used except to sort the innocent from the guilty. But to an experienced criminal defense lawyer, the distinction between lying and telling the truth is altogether different from (and much more important than) the distinction between guilt and innocence. If the police, prosecutors, and grand jury are doing their screening jobs well, the public defender should have few innocent clients. A criminal defense lawyer occasionally must defend the innocent, a fearfully grave responsibility, but more often defends the guilty. In defending the guilty, criminal defense lawyers perform two noble and just functions: they protect our society from unconstitutional excesses, and they protect criminals from judgments and sentences in excess of what their crimes deserve and ordinarily and properly receive under the law.

The biggest problem criminal defense lawyers face is that their clients often lie to them. Criminal defense clients lie a great deal to their lawyers, they lie to their lawyers more than they lie to the police, they lie about things that don't matter, they lie about things that matter tremendously, they lie in ways that hurt their cases, and most importantly, they lie in ways that disable their lawyers from defending them successfully. Frequently, criminal defendants tell their lawyers some ridiculous fairy tale, even though they have truthfully admitted most of all of what is at issue to the police. It is very difficult for a lawyer to prepare a good defense or negotiate effectively for a plea agreement when the client lies to the lawyer. The polygraph is a high-tech way to scare some of the clients into telling their lawyers the truth, and identifying other clients who won't.

The problem with the lying client isn't that he's guilty. One hopes, if one does criminal defense, that most clients are guilty, because of the terrible risk of an innocent person being convicted. The problem is that the lying client wastes the lawyer's time and his office's resources with a whole lot of rabbit tracks that consume scarce investigative and legal resources but don't lead anywhere. The majority opinion, by carelessly reading into the complaint what isn't there, overlooks what is there. **Miranda** accuses Harris of using the polygraph to sort out which clients get more resources allocated to them due to a perception of truthfulness, not because the polygraph indicates guilt.

It may or may not be a good idea to use the polygraph this way. But it is a lawyer's decision -- a decision that all criminal defense attorneys make in some form or another. Despite the administrative ring of "allocating resources" this is not an administrative decision like hiring or firing. *Branti v. Finkel*, n9the Supreme Court decision subjecting chief public defenders to section 1983 liability in some cases, dealt with a public defender who fired all assistants who, though doing satisfactory work, were Republicans. The Court held that Republican Party affiliation had nothing to do with an assistant public defender's responsibility, "to represent individual citizens in controversy with the State." n10 Because firing Republicans was administrative and was not analogous to what a private lawyer would do in the course of criminal defense work, it amounted to state action.

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n9 [445 U.S. 507 \(1980\)](#).

n10 [Id. at 519](#).

----- End Footnotes-----

Unlike firing a public defender due to his party affiliation, sorting out which clients are telling their

lawyers the truth, to decide which ones get more attention and which investigative leads deserve more resources, is necessary to effectively represent them. Few things are more central to representing criminal defendants than persuading them to tell their lawyers the truth. Every criminal defense lawyer develops routines, scripts, and props, to convince his clients to move away from the lies they ordinarily tell at the first interview toward the truth. Some traditional routines are "why are you telling me that you weren't even there when you told the police that you were," and "if you lie to me and I get caught with my pants down in front of the jury, you go to jail, not me." The polygraph techniques adopted by this public defender's office, was, so far as the complaint indicates, just such a prop. As such, it falls within the "exercising her independent professional judgment" for which *Polk County* holds that section 1983 liability may not lie, n11 as opposed to such administrative decisions as hiring and firing, which *Branti* holds that it may. n12

- - - - - Footnotes - - - - -

n11 [Polk County, 454 U.S. at 324-25.](#)

n12 [Branti, 445 U.S. at 517-19.](#)

- - - - - End Footnotes- - - - -

It should also be noted that the complaint nowhere alleges that Harrison had a policy of providing lying clients with "ineffective assistance of counsel." The policy as alleged is for providing "minimal investigation" and a "limited defense" due to a polygraph. n13 The 52-page complaint is drafted by able counsel and no doubt would allege a policy of providing ineffective assistance if, within the bounds of Rule 11, it could. But it doesn't. The constitutional floor is not massive or substantial resources, it's effective assistance of counsel, which may or may not correlate with minimal resources. If Harris saw to it that sufficient resources were available to assistants to provide effective assistance of counsel, then minimal resources consistent with that floor would not be unconstitutional. The complaint does not plead that resources for clients who failed the polygraph were inadequate to provide effective assistance of counsel. It does plead that the investigation was "inadequate" and that the defense was "substandard" as a consequence of the polygraph use, n14 but does not use the words of the constitutional formula. The only reasonable inference from the nonuse of the necessary words is that they could not be honestly said.

- - - - - Footnotes - - - - -

n13 Complaint at ¶ 117.

n14 *Id.* at ¶ 120.

- - - - - End Footnotes- - - - -

II.

Finally, I also dissent from the majority's reversal of the district court dismissal of the claim against the County for the lawyer assignment policy. The County doesn't have anything to do with assigning work to public defenders and doesn't have anything to do with training or licensing lawyers. The Supreme Court held in *City of Canton, Ohio v. Harrison*<sup>15</sup> that "a municipality can be found liable

under § 1983 only where the municipality *itself* causes the constitutional violation at issue. *Respondeat superior* or vicarious liability will not attach under § 1983." n16 A municipal policy or practice such as inadequate police training "may serve as the basis for § 1983 liability only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police come into contact." n17

- - - - - Footnotes - - - - -

n15 [489 U.S. 378 \(1989\)](#).

n16 [Id. at 385](#) (citing [Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694-95 \(1978\)](#)).

n17 *Id.* at 388.

- - - - - End Footnotes - - - - -

The majority opinion says that "[t]he complaint alleges that the County also had a policy of assigning the least experienced attorneys to capital cases without providing any training." n18 Actually, the complaint doesn't allege that. It says that "[t]he **Clark County** Public defender's office" had such a policy or practice, which was "established by Morgan Harris" and John Does. n19 There's a big difference, because a senior or supervising attorney's assignment fo cases and work within cases to junior lawyers within the office is quintessentially part of his legal representation. Our law clerks will soon be going to work in law firms in which partners, with little or no consultation with their clients, will assign critical work on important cases to them, and the partners will properly regard their assignment and supervision of green associates' work as legal work for which they will bill, as opposed to administrative work, such as hiring new lawyers, for which they will not. There is no reason to think that the **Clark County** Board of Commissioners, as opposed to the county public defender, has any policy, or is allowed any say, as to which lawyers handle which cases in the public defender's office. The complaint doesn't allege it.

- - - - - Footnotes - - - - -

n18 Maj. Op. at 1510.

n19 Complaint at &para;&para; 134, 138.

- - - - - End Footnotes - - - - -

Nor does the complaint allege that the county assigned inexperienced lawyers to try murder cases without assistance. The complaint says that another lawyer, Douglas DeJulio, "assisted Mr. Rigsby at trial, but was not involved in the pretrial investigation or preparation."n20 The complaint doesn't allege any deficiencies in Mr. DeJulio's experience, education, training, and ability. **Miranda** actually pled that the public defender had a policy of using a lawyer with a year and a half of experience to prepare the case, but rather than send him into the courtroom alone, the office policy provided for

experienced counsel to backup the green lawyer and give advice at trial.

----- Footnotes -----

n20 Complaint at ¶ 31.

----- End Footnotes-----

Why does the majority claim that this policy by Harris, the county public defender, is "deliberate indifference" to defendants' rights to competent counsel by the County? I don't know, because the opinion doesn't say. The closest it comes to an argument is saying that the County assigned lawyers "without providing any training."n21 I can't make any sense of this. Since when do lawyers get their training from counties? Most of us get our training from accredited law schools. Is the majority suggesting that it is unconstitutional for governments that provide public defenders not to provide them with free continuing legal education? Who knows? So radical a suggestion would require some explanation, and the majority opinion doesn't contain any.

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n21 Maj. Op. at 1510.

----- End Footnotes-----

The majority suggests, without troubling to construct an argument, that this case is like *City of Canton*, where the Supreme Court held that a policy of failing to give emergency medical training to police officers could amount to deliberate indifference toward arrestees' rights to emergency medical training. n22 But the case at bar doesn't involve training police; there's no analogy. If municipalities hire inexperienced police and don't provide any training, the police may not get any, except as their experience over the years gives it to them, so one would have to expect grave mistakes in their early years. Police don't necessarily go to police school before getting hired as police. But lawyers do necessary go to law school (or in some states read law under supervision) before being hired as lawyers. In Nevada, the Board of Governors of the state bar, not counties, determines whom to admit to the practice of law, n23 and the educational requirement to practice law is graduation from a law school accredited by the American Bar Association. n24 Unless the majority opinion means to suggest that the Nevada Supreme Court Rules governing the practice of law are unconstitutional because they allow admitted lawyers to represent clients in any sort of case with no more than the training required by the rules, there is no basis for its reversal of the district court dismissal of the claim against the County.

----- Footnotes -----

n22 [489 U.S. at 388.](#)

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n23 NV S. Ct. Rule 49, n.1, available at <http://www.leg.state.nv.us/CourtRules/SCR.html> (last visited Dec. 16, 2002).

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n24 *Id.* at Rule 51, n.3.

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The majority's reliance on the County's assignment of an inexperienced lawyer and policy of refusing to train lawyers is also surprising in light of the Supreme Court's holdings in *United States v. Cronin* n25 that ineffective assistance cannot be inferred from assignment of a young inexperienced lawyer to a major felony case, even though he had no criminal experience and had never tried a case to a jury. n26 Similarly, we held in a death penalty case, *Ortiz v. Stewart*, n27 that assigning a green lawyer did not, under *Cronin*, constitute ineffective assistance of counsel. We held the same in *LaGrand v. Stewart*, n28 another death penalty case, because "it is not the experience of the attorney that is evaluated, but rather, his performance." n29 It does not make sense, in the fact of established law holding that assignment to inexperienced counsel with no special training does not support an inference of ineffective assistance even in death penalty cases, for the majority to infer such assignments, made as a matter of policy do support such an inference. If there was some logic to having it both ways, it would be incumbent on the majority to set it out and distinguish the cases. The sounder position is the one the district court adopted, that the complaint does not state a cause of action against the County.

- - - - - Footnotes - - - - -

n25 [466 U.S. 648 \(1984\)](#).

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n26 [Id. at 665](#).

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n27 [149 F.3d 923, 933 \(9th Cir. 1998\)](#).

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n28 [133 F.3d 1253, 1275 \(9th Cir. 1998\)](#).

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n29 *Id.*

- - - - - End Footnotes- - - - -

The policies Harris, as County Public Defender, is alleged to have adopted -- using polygraph examinations of clients to decide how extensively defense resources would be allocated to them and assigning young lawyers to work up murder cases for trial and to try them with experienced lawyers assisting them -- may or may not be a good idea. But as the Court in *Cronin* said, "We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this," because "[w]e address not what is prudent or appropriate, but only what is constitutionally compelled." n30 While these policies may or may not be wise, they are not unconstitutional.

- - - - - Footnotes - - - - -

n30 [Cronic, 466 U.S. at 665 n.38.](#)

- - - - - End Footnotes- - - - -

Criminal defense lawyers ought to have their eyes on the jury. Heavy-handed regulation of public defenders' offices such as we engage in today forces them instead to be looking over their shoulders at us. They know better than we do how to defend all their clients.

KLEINFELD, Circuit Judge, concurring in part and dissenting in part, in which SILVERMAN, Circuit Judge, joins as to Part II:

I concur in the majority's conclusion that the district court correctly dismissed **Miranda's** section 1983 claim against the assistant public defender, Thomas Rigsby, who represented him. In *Polk County v. Dodson*, n1 the Supreme Court held that because an assistant public defender's relationship to his client is substantially identical to a private defense lawyer's, except for how he gets paid, his malpractice, **[\*\*19]** if any, may subject him to a state law malpractice action but is not state action for purposes of section 1983 liability. n2

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I.

I dissent, and would affirm the district court dismissal, as to Morgan Harris, the head of the county public defender's office. The majority ruling does not accurately state what the complaint, upon which this 12(b)(6) ruling must be based, actually says. According to the majority, **Miranda** pleaded that if a client "appeared on the basis of a polygraph to be lying about his innocence, he would be provided minimal resources." n3 Thus "those clients who **[\*472]** claimed innocence, but appeared to be guilty, were provided inadequate resources." n4 And "according to the plaintiff, if the criminal defendant appeared on the basis of the polygraph test to be guilty, the office sharply curtailed the quality of representation." n5

- - - - - Footnotes - - - - -

n3 Maj. Op. at 1507. **[\*\*20]**

n4 *Id.* at 1507-1508.

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Actually the complaint does not say or imply any of these things. It says "polygraph examinations were administered to defendants to determine the investigative and defense resources that would

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n6 See Complaint at P 117.

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- - - - - Footnotes - - - - -

n8 *Id.* at P118.

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Maybe to those who haven't done any criminal defense, it isn't obvious why a polygraph examination would be used except to sort the innocent from the guilty. But to an experienced criminal defense lawyer, the distinction between lying and telling the truth is altogether different from (and much more important than) the distinction between guilt and innocence. If the police, prosecutors, and grand jury are doing their screening jobs well, the public defender should have few innocent clients. A criminal defense lawyer occasionally must defend the innocent, a fearfully grave responsibility, but more often defends the guilty. In defending the guilty, criminal defense lawyers **[\*\*22]** perform two noble and just functions: they protect our society from unconstitutional excesses, and they protect criminals from judgments and sentences in excess of what their crimes deserve and ordinarily and properly receive under the law.

The biggest problem criminal defense lawyers face is that their clients often lie to them. Criminal defense clients lie a great deal to their lawyers, they lie to their lawyers more than they lie to the police, they lie about things that don't matter, they lie about things that matter tremendously, they lie in ways that hurt their cases, and most importantly, they lie in ways that disable their lawyers from defending them successfully. Frequently, criminal defendants tell their lawyers some ridiculous fairy tale, even though they have truthfully admitted most or all of what is at issue to the police. It is very difficult for a lawyer to prepare a good defense or negotiate effectively for a plea agreement when the client lies to the lawyer. The polygraph is a high-tech way to scare some of the clients into telling their lawyers the truth, and identifying other clients who won't.

**[\*473]** The problem with the lying client isn't that he's guilty. One hopes, **[\*\*23]** if one does criminal defense, that most clients are guilty, because of the terrible risk of an innocent person being convicted. The problem is that the lying client wastes the lawyer's time and his office's resources with a whole lot of rabbit tracks that consume scarce investigative and legal resources but don't lead anywhere. The majority opinion, by carelessly reading into the complaint what isn't there, overlooks what is there. **Miranda** accuses Harris of using the polygraph to sort out which clients get more resources allocated to them due to a perception of truthfulness, not because the

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- - - - - Footnotes - - - - -

n9 [445 U.S. 507, 63 L. Ed. 2d 574, 100 S. Ct. 1287 \(1980\).](#)

n10 [445 U.S. at 519.](#)

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Unlike firing a public defender due to his party affiliation, sorting out which clients are telling their lawyers the truth, to decide which ones get more attention and which investigative leads deserve more resources, is necessary to effectively represent them. Few things are more central to representing criminal defendants than persuading them to tell their lawyers the truth. Every criminal defense lawyer develops routines, scripts, and props, to convince his clients to move away from the lies they ordinarily tell at the first interview toward the truth. Some traditional routines are "why are you telling me that you weren't even [\*\*25] there when you told the police that you were," and "if you lie to me and I get caught with my pants down in front of the jury, you go to jail, not me." The polygraph technique adopted by this public defender's office, was, so far as the complaint indicates, just such a prop. As such, it falls within the "exercising her independent professional judgment" for which *Polk County* holds that section 1983 liability may not lie, n11 as opposed to such administrative decisions as hiring and firing, which *Branti* holds that it may. n12

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It should also be noted that the complaint nowhere alleges that Harris had a policy of providing lying clients with "ineffective assistance of counsel." The policy as alleged is for providing "minimal investigation" and a "limited defense" due to a polygraph. n13 The 52-page complaint is drafted by able counsel and no doubt would allege a policy of providing ineffective assistance [\*\*26] if, within the bounds of Rule 11, it could. But it doesn't. The constitutional floor is not massive or substantial [\*\*474] resources, it's effective assistance of counsel, which may or may not correlate with minimal resources. If Harris saw to it that sufficient resources were available to assistants to provide effective assistance of counsel, then minimal resources consistent with that floor would not be unconstitutional. The complaint does not plead that resources for clients who failed the polygraph were inadequate to provide effective assistance of counsel. It does plead that the investigation was "inadequate" and that the defense was "substandard" as a consequence of the polygraph use, n14 but does not use the words of the constitutional formula. The only reasonable

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n13 Complaint at P 117.

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n15 [489 U.S. 378, 103 L. Ed. 2d 412, 109 S. Ct. 1197 \(1989\).](#)

n16 [Id. at 385](#) (citing [Monell v. New York City Dep't of Social Servs., 436 U.S. 658, 694-95, 56 L. Ed. 2d 611, 98 S. Ct. 2018\(1978\)](#)).

n17 [489 U.S. at 388.](#)

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The majority opinion says that "the complaint alleges that **[\*\*28]** the County also had a policy of assigning the least experienced attorneys to capital cases without providing any training." n18 Actually, the complaint doesn't allege that. It says that "the **Clark County** Public defender's office" had such a policy or practice, which was "established by Morgan Harris" and John Does. n19 There's a big difference, because a senior or supervising attorney's assignment of cases and work within cases to junior lawyers within the office is quintessentially part of his legal representation. Our law clerks will soon be going to work in law firms in which partners, with little or no consultation with their clients, will assign critical work on important cases to them, and the partners will properly regard their assignment and supervision of green associates' work as legal work for which they will bill, as opposed to administrative work, such as hiring new lawyers, for which they will not. There is no reason to think that the **Clark County** Board of Commissioners, as opposed to the county public defender, has any policy, or is allowed any say, as to which lawyers handle which cases in the public defender's office. The complaint doesn't allege it.

- - - - - Footnotes - - - - -

n18 Maj. Op. at 1510. **[\*\*29]**

n19 Complaint at PP134, 138.

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Nor does the complaint allege that the county assigned inexperienced lawyers to try murder cases without assistance. The complaint says that another lawyer, Douglas DeJulio, "assisted Mr. Rigsby at trial, but was not involved in the pre-trial investigation [\*475] or preparation." n20 The complaint doesn't allege any deficiencies in Mr. DeJulio's experience, education, training, and ability. **Miranda** actually pled that the public defender had a policy of using a lawyer with a year and a half of experience to prepare the case, but rather than send him into the courtroom alone, the office policy provided for experienced counsel to backup the green lawyer and give advice at trial.

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n22 [489 U.S. at 388.](#)

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n24 *Id.* at Rule 51, n. 3.

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The majority's reliance on the County's assignment of an inexperienced lawyer and policy of refusing to train lawyers is also surprising in light of the Supreme Court's holding in *United States v. Cronin* n25 that ineffective assistance cannot be inferred from assignment of a young inexperienced lawyer to a major felony case, even though he had no criminal experience and had never tried a case to a jury. n26 Similarly, we held in a death penalty case, *Ortiz v. [\*\*476] Stewart*, n27 that assigning a green lawyer did not, under *Cronic*, constitute ineffective assistance of counsel. We held the same in *LaGrand v. Stewart*, n28 another death penalty case, because "it is not the experience of the attorney that is evaluated, but rather, his performance." n29 It does not make sense, in the face of established law holding that assignment to inexperienced counsel with no special training does not support an inference of ineffective assistance even in death penalty cases, for the majority to infer such assignments, made as a matter of policy, do support such an inference. **[\*\*33]** If there were some logic to having it both ways, it would be incumbent on the majority to set it out and distinguish the cases. The sounder position is the one the district court adopted, that the complaint does not state a cause of action against the County.

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n25 [466 U.S. 648, 80 L. Ed. 2d 657, 104 S. Ct. 2039 \(1984\).](#)

n26 [Id. at 665.](#)

n27 [149 F.3d 923, 933 \(9th Cir. 1998\).](#)

n28 [133 F.3d 1253, 1275 \(9th Cir. 1998\).](#)

n29 *Id.*

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The policies Harris, as County Public Defender, is alleged to have adopted -- using polygraph examinations of clients to decide how extensively defense resources would be allocated to them and assigning young lawyers to work up murder cases for trial and to try them with experienced lawyers assisting them -- may or may not be a good idea. But as the Court in *Cronic* said, "We do not pass on the wisdom or propriety of appointing inexperienced counsel in a case such as this," because "we address not what is prudent or appropriate, but only what is **[\*\*34]** constitutionally compelled." n30 While these policies may or may not be wise, they are not unconstitutional.

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n30 [Cronic, 466 U.S. at 665 n.38.](#)

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Criminal defense lawyers ought to have their eyes on the jury. Heavy-handed regulation of public defenders' offices such as we engage in today forces them instead to be looking over their shoulders at us. They know better than we do how to defend all their clients.