



APPEARING ON BEHALF OF THE AGENCY:

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COLORADO STATE PUBLIC DEFENDER

KAREN S. PORTER

Chief Financial Officer

Monday, December 18, 2017

JUDICIAL BRANCH
FY 2018-19 JOINT BUDGET COMMITTEE HEARING AGENDA

Monday, December 18, 2017
1:30 pm – 5:00 pm

3:15-3:45 OFFICE OF THE STATE PUBLIC DEFENDER (OSPD)

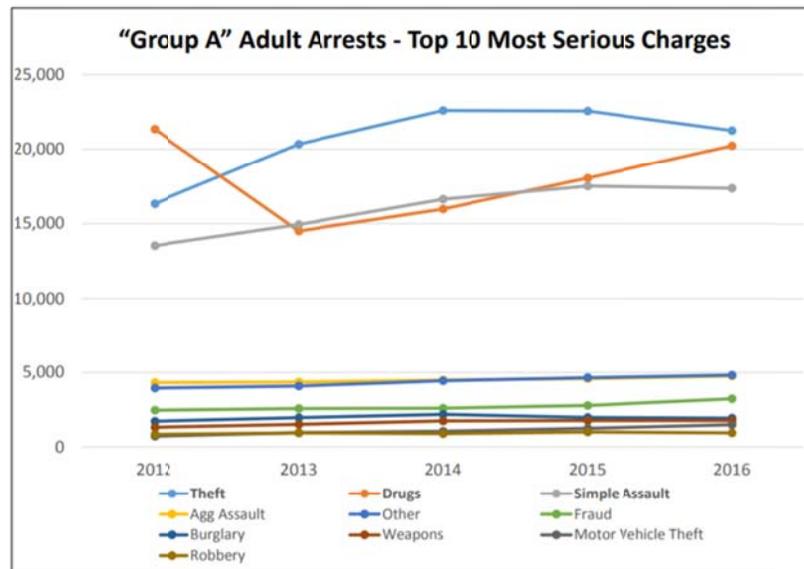
INTRODUCTIONS AND OPENING COMMENTS, AND DISCUSSION OF BUDGET PRIORITIES

- BUDGET PRIORITIES:
 - #R-1, WORKLOAD AND CASELOAD INCREASES
 - #R-2, IT SUPPORT, SECURITY AND DEVELOPMENT
 - #R-3, INTERPRETERS

QUESTIONS FOR THE OSPD

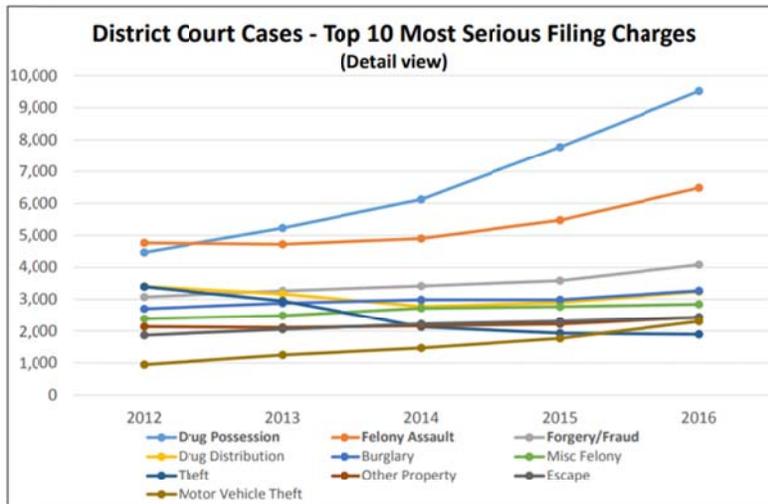
1. What is driving the increase in prosecutions? Is it more crimes or is it more filings that DAs are bringing to court?

The answers to these questions are unclear. There is an increase in the actual number of crimes because of population increases. But the average number of crimes reported per 100,000 of the population is less than it was a decade ago. The charts below, prepared by the Division of Criminal Justice (DCJ), appear to demonstrate a disproportionate increase in filings over the last few years relative to the increase in arrests. They confirm that the greatest increase in arrests and felony filings is for drug possession.



Data Sources: National Incident Based Reporting System (NIBRS) "Group A" Arrest records obtained from the Colorado Bureau of Investigation.

Notes: Arrests may contain multiple offenses. The most serious offense (using a crime hierarchy) was selected.



Data Sources: Court records were extracted from Judicial Branch's Integrated Colorado Online Network (ICON) information management system via the Colorado Justice Analytics Support System (CIASS) and analyzed by DCJ/ORS.

Notes: The most serious filing charge was found by sorting all the filing charges by felony level and selecting the highest felony. This technique was different from selecting the most serious arrest offense because felony level is not present in the arrest data. As a result the most serious offense selected on the arrest may differ from the most serious charge selected on the case filing. In addition, arrest charges and filed charges may differ due to prosecutorial discretion. District court filings include some juveniles (Direct File).

OSP is looking at numbers published by CBI on reported crimes since the number of reported crimes (the actual crime rate) was not considered in the DCJ analysis. Additional information and analysis is not currently available but should be available for the hearing on Monday, Dec 18th.

2. What is driving the increase in misdemeanor cases? Is there any way to contain the costs associated with it? How does this compare with what is happening in other states?

H.B. 14-1032, commonly known as the Rothgerly bill, went into effect January 01, 2014 and resulted in a large increase in misdemeanor cases. FY 2014-15, the first full fiscal year of implementation, saw an increase of 23,345 cases, a 53 percent increase, when compared to FY 2012-13. Since FY2014-15, the number of these cases have leveled off.

OSP Trial Office New Cases Opened										
FY00 & FY2012-FY2017										
Type of Case	2000 Open	2012 Open	2013 Open	2014 Open	2015 Open	2016 Open	2017 Open	2017% of Total Cases	CRG in Cases Since FY00	CRG in Cases Since FY12
Total Felony	36,743	44,396	47,020	50,843	51,028	55,684	60,832	44.2%	3.2%	6.5%
Total Misdemeanor	18,626	43,073	44,299	57,224	67,644	68,437	68,539	49.7%	8.5%	9.7%
Total Juvenile	10,320	7,640	7,218	7,040	8,275	8,267	8,406	6.1%	-1.3%	1.9%
Total All	65,689	95,109	98,537	115,107	126,947	132,388	137,777	100.0%	4.7%	7.7%

However, the number of felony filings have increased dramatically over the past few years. Since FY 2011-12, we have seen a cumulative growth in felony cases of 37 percent. Although felony cases represent 44 percent of our trial cases, they require 63 percent of our resources. Thus, fewer felony cases results in a lower amount of workload needed which ultimately translates to a smaller resource need.

3. Can the caseload carried by a Public Defender be compared with the caseload carried by public defenders in other states? How does Colorado compare?

Caseload is an important factor that is necessary to calculate accurate resource needs but it is not the only factor. Workload is a critical evaluative tool we, and others use for resource requests. For example, large increases in the number of misdemeanor cases will not affect the resources needed nearly as much as if there are large increases in felony cases.

It is difficult to compare caseloads, in part due to dramatic variances among types of public defender and prosecutor offices. But, as more agencies develop workload standards, it is becoming even more evident that indigent defense is underfunded nationwide.

4. What is the range for the costs for cases handled by the public defender? What is the cost of a typical case? That is the average for the different types of cases, for example those that go to trial and those that do not? Juvenile, misdemeanor, felony, etc. What is the highest and lowest?

The average costs of our closed cases range from \$336 for misdemeanors, \$413 for juvenile cases, and \$883 for felonies. The average overall cost per case is \$621.

OSPD R1 Workload and Caseload Increases.

Our number one budget priority is to staff our offices with adequate FTE. Our workload study indicates 34.2 attorney FTE are needed to maintain an 85% staffing level.

5. What is necessitating these increases? Is there any way to contain the costs?

The workload resources required are primarily directed by which case type (felony, misdemeanor, juvenile) is exhibiting caseload increases. The Judicial Department reported 12.5 percent increases in felony filings in each of the past two years. We have seen an increase of 37 percent in our felony cases over the past five years. The OSPD has not requested or received any trial attorney positions due to normal workload increases over this same period of time.

Containment of costs can only be achieved by a decrease in the workload by policy decisions such as:

- *The elimination of incarceration as a possible punishment;*
- *Diversion of those with behavioral health issues;*
- *Increasing the pre-trial release rate.*

6. Where will these FTE be located and how will the locations correspond to caseload and workload?

In order to comply with our statutory function, the Office must have the resources and staffing levels to meet the requirements of providing effective representation. FTE will be distributed as indicated by workload needs, which, in part, are tied to caseloads. Projected placements are shown on the chart below.

District	PD Location	Current # of Attorneys	Attorney Need per Workload Stds - 100% Staffed	Attorney Need for 85% staffing	DI Request
1st	Golden	38	52	43.4	5
2nd	Denver	59.5	76	64.5	5
3rd	Trinidad	4	4	4.1	
4th	Colorado Spgs	60	79	66.1	6
5th	Dillon	5	8	7	2
6th & 22nd	Durango	11	14	12	1
7th	Montrose	8	11	9.1	1
8th	Ft. Collins	22	26	23	1
9th	Glenwood Spgs	6	7	6	
10th	Pueblo	26	28	24.1	
11th	Salida	8.6	13	9.8	1.2
12th	Alamosa	8	12	9.4	1
13th	Sterling	5	6	5	
14th	Steamboat Spgs	6	6	6	
15th & 16th	La Junta	7	10	8.4	1
17th	Brighton	44	59	50.3	5
18th	Arapahoe & Douglas	54	62	54	
19th	Greeley	26	33	28.4	2
20th	Boulder	20	28	23.9	3
Total State		439.1	557	473.1	34.2

7. Why isn't the Public Defender requesting additional social workers?

We absolutely recognize the value social workers can add to a legal team and that using social workers can result in cost avoidance. However, based on existing shortages and the extreme increases we have experienced in the number of felony cases assigned to our office, we determined our highest priority for FY 2018-19 was for attorneys as they are constitutionally required.

8. Does the Public Defender currently use social workers? Have they been effective? How is success measured?

We currently have nine social workers. We have received feedback from various parties (including our attorneys, our clients and Judges) that our social workers are very beneficial to the process and better outcomes are achieved. However, this information has, so far, been anecdotal. The new case management document system we have requested as part of our FY 2018-19 budget item #R-2 is anticipated to capture better data and reports which would be able to document the effectiveness of our social worker program.

Consolidated Appropriations for Health, Life, and Dental Expenditures

9. Judicial Branch agencies have opposed the consolidation of the Branch's appropriations for Health, Life, and Dental (HLD) in the Long Bill. The JBC staff briefing issue on this topic suggests that HLD consolidation problems can be substantially diminished through HLD supplementals and through the overexpenditure authority granted to the Chief Justice. Does this eliminate your objection to HLD consolidation? If not, please explain in detail the problems that you believe will arise from consolidation. If you believe independence would be compromised, please give examples of how it would be compromised.

All Judicial Branch agencies have discussed this issue and are in agreement with the proposed solution as presented below.

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consolidation. If you believe independence would be compromised, please give examples of how it would be compromised.

The OSPD, along with other Judicial Branch agencies, are very sympathetic to staff's desire to simplify H/L/D calculations at figure setting, however, the we all feel very strongly that each entity in the Judicial Department is independent and their budgets should be reflective of that fact. Consolidating H/L/D will impose an administrative burden on the Judicial Department and the independents as it will require the generation of accounting documents to transfer H/L/D allocations to each agency that is currently unnecessary with separate H/L/D appropriations.

Further- the Judicial Department struggles with idea of potentially having to use its over expenditure authority on H/L/D when there may be competing higher priority needs. Last year the ADC used over \$900K of the transfer authority for their purposes and the year before the entire million was used. Based on historic usage of the over expenditure authority, there is not a great deal room to accommodate potential H/L/D transfers.

Another question that may arise is whether the State Controller would view this H/L/D consolidation and correspondent transfers as counting against the Department's \$1 million transfer authority granted in 24-75-110 (it would exceed it). The \$1 million-dollar transfer authority is critical to the balancing of the Judicial budget and the Department is reluctant to use it for H/L/D transfers.

Can't Health, Life, and Dental appropriations that are based on past averages do this? How do Department's with comparable divisions do this?

Past appropriations and averages are not used in the calculation of the request year H/L/D appropriation. Per OSBP instructions H/L/D is calculated utilizing benefit selection choices from the July payroll. Every Department calculates the H/L/D request the same way. How other Executive Department's allocate H/L/D is unknown. It is important to recognize that in the Judicial Branch, the Independent Agencies are not Divisions, they are statutorily separate entities and the transfer of H/L/D would not be the same as it is with an Executive Branch Department transferring H/L/D within its Divisions.

Explain why you opposed this HLD appropriation proposal in your response to the request for information? Does the staff proposal address your concerns?

While staff's proposal is doable, we believe it creates unnecessary work for the Judicial Department. To help with staff's concerns about calculating the H/L/D appropriation, the Judicial Department and the Independent agencies would like to offer the following alternative. The independent agencies could provide the Judicial Department's Budget Office their HLD request if needed for adjustments at Figure Setting. The Judicial Department's Budget Office would then calculate the H/L/D for each agency in the Judicial Branch. Then, only after final approval of the numbers by each of the independent agencies, the JBC staff would be provided the needed information via a single contact point of the H/L/D appropriation. This would continue to allow each agency to have its own H/L/D appropriation as they do now and retain their fiscal independence. The Judicial Department and all Independent agencies are on-board with this alternative and would ask that it be tried at figure setting this year.

Questions from the Office of Behavioral Health Briefing

10. [Staff-suggested] [Background Information]: The Department of Human Services is struggling to address continued increases in the number of court orders for inpatient competency restoration services and to comply with the requirements of a related Settlement Agreement. The Committee is interested in identifying a range of solutions that will ensure that: (a) individuals with behavioral health disorders are diverted from the criminal justice system when possible; and (b) those who do

become involved in the justice system have access to clinically appropriate behavioral health and competency-related services.]

The Committee requests that the Department provide feedback concerning the following potential policy options:

OSPD respectfully requests that the potential policy issues presented by the JBC staff in response to the Office of Behavioral Health briefing be scheduled for a separate hearing before the committee with the presence of any and all departments/stakeholders that intersect with these problems. These are complicated policy issues with no easy solutions. They are policy issues that do not directly impact the present budget request of the OSPD, but might impact future requests if the legislature chooses to implement policy changes in the area of behavioral health.

It should be noted, however, that OSPD will continue to object to the ever-increasing criminalization of individuals with behavioral health disorders, specifically those who suffer with mental illness resulting in incompetency. The jailing of the mentally ill (due to behaviors caused by that mental illness) is, quite simply, an unjust and wrong-thinking policy choice for Colorado families.

- a. Modify current law to expand the minimum information that a competency evaluator must include in a written report to the Court to include:
 - i. Whether the individual who was evaluated has been evaluated for competency or received competency restoration services previously and, if so, any available information about the outcome of the previous evaluation or restoration services.
 - ii. A recommendation concerning the appropriate clinical setting for competency restoration services and whether the individual's competency is likely to be restored within the statutorily allowable timeframe.
- b. Modify current law concerning Court options when a defendant is charged with a low level misdemeanor or petty offense and the competency evaluator's report indicates that the individual is not competent to proceed but competency is likely to be restored within the allowable statutory timeframe. Under this circumstance, provide the Court with two options: (1) allow the defendant to bond out and order restoration services on an outpatient basis; or (2) drop the charges.
- c. Modify current law so that if a defendant is charged with a higher level misdemeanor or a felony and the Court does not release the defendant on bond, the Court must to order restoration services at the place where the defendant is in custody unless the competency evaluator's report recommends a higher level of clinical care. If the evaluator recommends a higher level of care, authorize the Department of Services to determine the most appropriate location for such services.
- d. If the Court orders a competency evaluation to occur on an inpatient basis, require the Court to make findings identifying the relevant statutory criteria (pursuant to H.B. 16-1410). Consider requiring the Court to make similar findings when it orders inpatient competency restoration treatment.
- e. Under current law, the maximum term of confinement for purposes of receiving competency restoration treatment is a period of time equal to the maximum term of confinement that could be imposed if the defendant were to be found guilty of the charges. Consider modifying this

provision to reduce the time allowed for restoration treatment. The Department of Human Services provided two examples from other states:

- i. Alaska permits the Court to commit a person for restoration treatment for a maximum of 360 days. After 360 days, the charges are dismissed without prejudice and the defendant is remanded for civil commitment proceedings.
- ii. Connecticut permits the Court to confine a defendant for restoration treatment for the period of the maximum sentence which the defendant could receive on conviction of the charges against him or 18 months, whichever is less. This limitation does not apply to persons charged with certain crimes (e.g., class A felony, some class B felonies, a crime or motor vehicle violation that causes the death of another person, or a class C felony unless good cause is shown). When this time limit is reached, the Court shall either order the defendant released from custody or order the defendant placed with a specific state agency for the purpose of pursuing civil commitment proceedings.
- f. Direct the Department of Human Services to adopt a practice of advising the Court when a defendant meets civil commitment criteria. This would involve a defendant's treatment team providing a letter to the Court, which would be attached to the competency evaluator's report. This would prompt the Court to move forward with civil commitment proceedings rather than requiring ongoing competency restoration treatment and periodic evaluator reports to the Court.
- g. Expand the existing Jail-based Behavioral Health Services program to allow county sheriffs to use the program funding to provide behavioral health services to inmates who have a mental health disorder, regardless of whether the individual has a co-occurring substance use disorder. Consider expanding funding for the program and prioritizing the new funding for rural and frontier jurisdictions, with an emphasis on multi-jurisdictional proposals that would allow rural jurisdictions to work together to develop creative solutions to provide effective behavioral health services within their region.

Other questions for which solely written responses are requested

11. Provide a list of any legislation that the Department has: (a) not implemented, or (b) partially implemented. Explain why the Department has not *implemented* or has only partially implemented the legislation on this list. Please explain any problems the Department is having implementing any legislation and any suggestions you have to modify legislation.

We have fully implemented all legislation.

12. Based on the Department's most recent available record, what is the FTE vacancy and turnover rate by department and by division? To what does the Department attribute this turnover/vacancy? Do the statewide compensation policies administered by the Department of Personnel help or hinder in addressing vacancy or turnover issues?

The OSPD's attrition rates for FY17 were 13.5 percent for attorneys, 12.1 percent for investigators, 16.8 percent for administrative assistants and 13.4 percent overall. The office had an average vacancy rate of 1.9 percent. Many factors, such as salary, work location, workload/burnout, career progression and personal decisions all attribute to staffing departures.

The statewide compensation policies administered by the Department of Personnel do not help nor hinder our vacancy or turnover issues.

13. Please provide an update on the Department’s status, concerns, and plans of action for increasing levels of cybersecurity, including existing programs and resources. How does the Department work with the Chief Information Security Office (CISO) in the Office of Information Technology (OIT)? Have your information technology infrastructure and policies been audited for cybersecurity capabilities? If so, was the audit completed by the legislative auditor or an outside entity? Do you have dedicated cybersecurity personnel? How do your cybersecurity staff interact with the CISO in OIT? What unique security issues does your Department have? Do you handle private or sensitive data? What unique cybersecurity processes or tools do you use to protect this data?

The OSPD is an independent agency within the Judicial Branch and as such, has limited interactions with the CISO and the Office of Information Technology (OIT).

We deal with private and sensitive data as part of representing our clients but this does not present any unique security challenges in protecting the confidentiality of the data. Our staff manage cybersecurity and implement enterprise-wide security with multiple layers of protection including industry standard firewalls, antivirus software, monitoring, and policies and procedures to protect its systems. Our office has an information security officer who performs these functions in addition to other responsibilities outside of security.

A cybersecurity audit was conducted in FY 2016-17 which indicated actionable items, leading to a related budget request. Our FY 2018-19 budget request asks for additional funding to add another crucial layer of prevention and detection to the security function that protects our systems and information. New applications, programs and other electronic tools now available and employed by our staff have increased significantly over the past few years. Examples of these include mandatory web applications from the Judicial Department and the Colorado District Attorney’s Office for E-filing and E-discovery, video conferencing with clients from remote locations, and the ever increasing types and complexity of information our staff have to deal with on a case such as body cameras, cell phone extracts, financial information and numerous surveillance systems.

14. What impact do the SMART Act and Lean processes have on your budget requests? Could they be used more effectively?

We continue to look at the process of assembling the SMART Act reports as an opportunity to further refine our performance measures, goals, mission and vision to ensure we are continuing to use our resources responsibly and effectively. Although typical performance measures and goals usually center on obtaining specific levels of production, outcomes, or customer service, our strategies are more in line with evaluating the provision of adequate resources in order to fulfill the agencies mission.

15. Does your Department use evidence-based analysis as a foundation for your budget request? If so, please provide a definition for your use of “evidence-based,” indicate which programs are “evidence-based,” and describe the evidence used to support these programs.

Our understanding of evidence-based analysis is that it can serve as a framework for informing policy decisions. Over the last two decades the OSPD has consistently applied an independently developed set of statewide workload standards in analyzing our policy decisions. These workload standards take into account the dynamic judicial and criminal environments, including constant technological advancements.

Our standards have allowed us to show consistency and fairness in our staff allocations beyond what may be indicated by raw caseload numbers. They are a key component of our ability to manage our offices in a manner that demonstrates the highest level of responsibility to the State of Colorado and to our clients.

This approach is in direct alignment with our statutory mandate which is to “provide legal services to indigent persons accused of crimes that are commensurate with those available to non-indigents, and conduct the Office in accordance with the Colorado Rules of Professional Conduct and with the American Bar Association standards relating to the administration of criminal justice, the defense function.” [C.R.S. 21-1-101] Moreover, the mandate to provide legal services is required by the constitutions of Colorado and of the United States. Forty-six years ago, in Gideon v. Wainwright, the United States Supreme Court held that the Sixth Amendment’s guarantee of counsel is a fundamental constitutional right, essential to a fair trial and required appointment of counsel for indigent defendants in both state and federal courts. In order to meet these mandates it is necessary to have a sufficient number of attorneys to provide those legal services commensurate with those provided by the private bar and consistent with relevant state and national standards. The Guidelines for Legal Defense Systems in the United States, developed under a grant from the U.S. Department of Justice, provide that public defender systems should establish maximum caseloads for individual attorneys and that such standards reflect national standards and take into consideration objective statistical data and factors related to local practice.

16. Describe the expected fiscal impact of proposed changes to PERA made by both the Governor’s Office and the PERA Board of Directors. In addition to direct budgetary impacts, please describe any anticipated secondary impacts of an increase in employee contribution rates. For instance, does the Department anticipate a need to increase employee salaries to compensate for the increase in PERA contributions?

Both the PERA Board of Directors and the Governor’s Office proposed many changes that would affect all of our past, current and future employees. The result of which, combined with other increasing costs such as insurance, is that state jobs will become less competitive with federal government and private sector jobs.

The PERA Board of Director’s proposal recommends a 2 percent increase to the State’s share of PERA as well as an additional 3 percent contribution for employees, starting in 2020. It’s estimated this would cost the state an additional 1.1 Million and employees an additional 1.6 Million per year.

The Governor’s Office proposal recommends no increase to the State’s share of PERA but does recommend employees contribute an additional 2 percent, starting in 2019. This change would initially cost our employees an estimated 1.1 Million per year.