

Re: Public Statement of Support for the Washington Appellate Project by the Unionized Public Defenders of King and Spokane Counties

We, the undersigned public defenders of Washington State, offer this letter in opposition to the Office of Public Defense (OPD)'s current funding proposal for appellate indigent defense. OPD's proposal to abandon the funding model it has maintained for the past ten years represents an existential threat to the Washington Appellate Project (WAP), the state's only nonprofit organization devoted to the representation of indigent people in legal appeals. Moreover, the proposed model, which involves flat-fee compensation for appellate indigent defense, offends the very notions of equal justice and due process upon which our legal system is built.

WAP's mission, work, and organizational structure are similar to those of County-funded public defense agencies across the State— agencies which give meaning to the constitutional promise of effective representation for indigent people facing loss of liberty and parental termination. These agencies, much like the county prosecutor's offices and State Attorney General they oppose in Court, are structured like traditional law firms, with teams of attorneys, investigators, social workers, and legal professionals working on cases. When legal teams work together in a way that allows for division of duties, mentorship, specialization, and collaboration, clients receive better outcomes. This organizational approach is used across so many offices because it is widely known to be the most effective form of legal representation.

In contrast, flat-fee compensation is the worst model for the provision of public defense, producing poorer outcomes for clients.¹ Without an organization dedicated to indigent defense work, siloed attorneys lack peers to pressure-test their legal theories and spot weaknesses in their arguments, and supervisors with deep experience to review briefs, provide rigorous line editing, and offer guidance. They are also forced to spend time formatting, checking citations, formatting appendices, and filing briefs instead of devoting their time to case development, writing, and strategy.

Worst of all, a flat-fee compensation structure for indigent defense creates perverse incentives to rush through cases, financially incentivizing lawyers to spend as little time as possible defending people who cannot afford to hire anyone else. Studies have shown that when trial-level criminal defense is conducted for flat-fee compensation, clients are more likely to be convicted, receive longer sentences, and remain in

¹ See Eve B. Primus, *The Problematic Structure of Indigent Defense Delivery*, 122 MICH. L. REV. 205 (2023). Available at: <https://repository.law.umich.edu/mlr/vol122/iss2/3> .

jail pretrial.² As Chesa Boudin, executive director of UC Berkeley Law's Criminal Law & Justice Center, put it: "Flat-fee contracts fundamentally undermine the constitutional right to effective counsel. Ensuring quality representation for all isn't just a constitutional obligation — it's the bedrock of a fair and equitable justice system."³

Flat-fee or per-case compensation agreements are so problematic as to be explicitly barred by the Washington Bar Association's Standards for Indigent Defense:

1.C. Flat Fee and Per Case Compensation Agreements. Attorneys shall not engage in flat fee or per case compensation contracts or agreements. These compensation structures create an actual conflict for the public defense attorney.⁴

The Standards cite to the American Bar Association's Ten Principles of a Public Defense Delivery System, which states that flat fee contracts "reward counsel for doing as little work as possible."⁵ OPD's proposed funding structure thus flies in the face of the essential ethical guidelines governing the administration and practice of public defense in Washington State.

Under OPD's proposed funding structure, WAP, which is solely funded through OPD, could no longer offer effective or ethical representation to their clients. This loss will disproportionately impact low-income Black, Indigenous and People of Color who face decades in prison or the permanent loss of their children. The proposal also imperils WAP's systems-changing work, which includes cases like *State v. Gregory* (overturning Washington's death penalty) and *State v. Blake* (overturning Washington's simple possession law as unconstitutional). Cases like these require immense, exhaustive legal work, including deep statistical research, meticulous documentation, and collaboration with co-counsel. Quite simply, the

² The Wren Collective, ACLU of Northern California, and UC Berkeley Law Criminal Law & Justice Center, *Contracted to Fail: How Flat-Fee Contracts Undermine the Right to Counsel in California* (The Wren Collective, March 2025), <https://www.aclunorcal.org/publications/contracted-fail-how-flat-fee-contracts-undermine-right-counsel-california/>.

³ David M. Greenwald, *New Report Calls for End to Flat-Fee Contracts for Indigent Defense in California That Are Driving Incarceration and Racial Disparities*, Davis Vanguard, March 21, 2025, <https://davisvanguard.org/2025/03/new-report-calls-for-end-to-flat-fee-contracts-for-indigent-defense-in-california-driving-incarceration-and-racial-disparities/>.

⁴ Washington State Bar Association, *Standards for Indigent Defense Services*, Revised September 7, 2024, https://www.wsba.org/docs/default-source/legal-community/committees/council-on-public-defense/standards-for-indigent-defense-services_2024.09.07_final.pdf?Status=Master&sfvrsn=8bdb19f1_5.

⁵ ABA Ten Principles of a Public Defense Delivery System, Principle 2: Funding, Structure, and Oversight, n. 6 (August 2023) (*citing Wilbur v. Mt. Vernon, No. C11-1100RSL, U.S.D.C. D. Wash., at 15* (Dec. 4, 2013) (district court finding that a flat fee contract "left the defenders compensated at such a paltry level that even a brief meeting at the outset of the representation would likely make the venture unprofitable.")).

comprehensive funding structure that allowed WAP to conduct this work for the last 10 years has saved people's lives.

Unless OPD changes course, WAP will be forced to close its doors by the end of 2026, imperiling the rights of its at least 400 current clients, all of whom face looming appellate deadlines. But the scope of the damage will spill well beyond those 400 people, as appellate indigent defense is contracted to private attorneys who lack the critical infrastructure to appropriately litigate these cases, and who are disincentivized from devoting the amount of time, resources, and attention these cases demand.

We, the undersigned public defenders, work tirelessly for many of the same clients who later receive similarly robust representation from our counterparts at WAP. Our clients are not just cases to us. They are human beings with unique experiences, relationships, and lives who deserve ethical representation in the face of enormous loss. Please reconsider the funding model for the Washington Appellate Project, and allow it to continue to provide the depth of representation that our clients deserve.

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