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STATE OF NEW MEXICO
COUNTY OF LINCOLN
TWELFTH JUDICIAL DISTRICT COURT

FILED IN OPEN COURT ON
September 3, 2014
AT 10:42am
JAMES WAYLON COUNTS
DISTRICT JUDGE DIV. II
TWELFTH JUDICIAL DISTRICT
Cheyne

STATE OF NEW MEXICO,

Plaintiff,

vs.

KEVIN L. KROHN,

Defendant.

Cause No. CR-2011-00084 & CR-2013-00259
Division II

MINUTE ORDER

THIS MATTER came before the Court on May 30, 2014, on Defendant's Motion for Stay of Proceeding Until State of New Mexico Provides Sufficient Money to Conflict/Contract Attorney in Order to Render Effective Assistance of Counsel and if They Fail - Motion to Dismiss. The Court having taken testimony, heard arguments of counsel, and being otherwise fully advised in the premises, FINDS:

1. The Defendant was indicted by the Lincoln County Grand Jury on July 11, 2011, on one count of Embezzlement (Over \$20,000), a second degree felony offense, and one count of Conspiracy to Commit Embezzlement (Over \$20,000), a third degree felony offense, in Criminal Cause Number D-1226-CR-2011-00084.
2. The Defendant initially retained private counsel to represent him in D-1226-CR-2011-00084 and a related civil lawsuit. Dan Bryant, Esq., and the Honorable Angie Schneider, who at the time maintained a private law practice, entered their appearance on July 19, 2011.

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3. On October 10, 2012, S. Doug Jones Witt, Esq. substituted his appearance for Mr. Bryant and Judge Schneider as counsel of record in D-1226-CR-2011-00084 after being privately retained by the Defendant.
4. S. Doug Jones Witt, Esq. filed an Opposed Motion to Withdraw as Counsel in Cause Number D-1226-CR-2011-00084 on January 15, 2014. After holding a hearing on the Motion to Withdraw, the Court entered an Order allowing Mr. Jones Witt to withdraw from his representation of the Defendant on January 31, 2014. Gary C. Mitchell, P.C., entered an appearance on behalf of the Defendant in Cause Number D-1226-CR-2011-00084 on February 24, 2014, pursuant to Mr. Mitchell's contract with the Public Defender Department (hereafter referred to as "PDD").
5. The Honorable Karen L. Parsons was originally assigned to preside over Cause Number D-1226-CR-2011-00084. On July 12, 2011, the State of New Mexico exercised its peremptory excusal pursuant to Rule 5-106, NMRA 2008, and excused the Honorable Karen L. Parsons from presiding over D-1226-CR-2011-00084. The case was reassigned to the Honorable William H. Brogan on July 27, 2011. Following Judge Brogan's retirement, the Honorable Angie K. Schneider was assigned Cause Number D-1226-CR-2011-00084 on September 4, 2013. Based on her prior representation of the Defendant in this matter, Judge Schneider entered an Order recusing herself on September 18, 2013. The Honorable James Waylon Counts was assigned D-1226-CR-2011-00084 on September 24, 2013.
6. The Defendant was indicted again by the Lincoln County Grand Jury on December 13, 2013, on one count of Larceny (Over \$20,000), a second degree felony offense, for conduct that is related to the allegations in D-1226-CR-2011-00084. The new

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indictment was assigned Criminal Cause Number D-1226-CR-2013-00259, and the Honorable Karen L. Parsons was assigned to preside over that case. On April 23, 2014, the State of New Mexico filed a Stipulated Motion to Join Cause Numbers D-1226-CR-2011-00084 and D-1226-CR-2013-00259. On April 29, 2014, the Honorable Karen L. Parsons and the Honorable James Waylon Counts entered an Order joining Cause Numbers D-1226-CR-2011-00084 and D-1226-CR-2013-00259. The Order reassigned Cause Number D-1226-CR-2013-00259 to the Honorable James Waylon Counts.

7. The Defendant filed his Motion for Stay of Proceeding until the State of New Mexico Provides Sufficient Money to Conflict/Contract Attorney in Order to Render Effective Assistance of Counsel and if They Fail-Motion to Dismiss in D-1226-CR-2011-00084 on April 23, 2014. The State of New Mexico filed its Response on May 29, 2014. The Court held a hearing on the Defendant's Motion on May 30, 2014.
8. The PDD (hereinafter referred to as "PDD") is charged with the responsibility of representing indigent individuals charged with criminal offenses in the State of New Mexico. The PDD chooses to also represent clients that are not indigent on a separate fee schedule. The PDD offers representation to all individuals regardless of financial status and no individual is turned away from representation. If the individual does not financially qualify for free representation with the PDD, the individual seeking representation must enter into a contract with the PDD agreeing to pay a predetermined fee amounts based on the individual's charges. Essentially, the PDD is operating just as any other private practice law firm in the State when the PDD is privately retained by these individuals.

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9. Based on the charges the Defendant faces in each case, he could owe the PDD up to \$15,000 for the PDD's representation in the two cases according to Defendant's Exhibit D. There is no evidence in front of the Court that the PDD tried to collect any monies from this defendant, but rather testimony was given from Lee Hood, Esq., the Director of Contract Counsel Legal Services, that they did not seek to collect any monies. In other words, although the resources of the defendant could pay the PDD, they do not seek to be compensated making the schedule of indigency and compensation rates rather meaningless.
10. Defendant has filled out certain forms required by the PDD; the Department has reviewed the application and found him to be indigent.
11. The documents indicating defendant is indigent and appointing defendant an attorney are filed in the pleadings of the Court file.
12. Gary C. Mitchell d/b/a as Gary C. Mitchell P.C. hereinafter referred to as Gary C. Mitchell, is the appointed attorney for defendant pursuant to a contract with the PDD which is now governed by the New Mexico Public Defender Commission. A true and correct copy of the proposal forms and contract for all contract attorneys is attached hereto as Hearing *Exhibit F* and by reference thereto made a part hereof.
13. According to the testimony of Lee Hood, Esq., the Director of Contract Counsel Legal Services, that in order to provide legal representation for defendants in Lincoln County, New Mexico, the PDD solicits bids and proposals from private attorneys to provide legal representation for PDD clients in exchange for a contracted fee. The set fee amounts to be paid to the attorney are listed in contract between the attorney and

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the PDD. According to the sworn testimony of Lee Hood, Esq, there are more than 140 contractual attorneys in New Mexico on this particular contract.

14. Gary C. Mitchell is a licensed New Mexico attorney who pursuant to a contract with the PPD for the County of Lincoln, Twelfth Judicial District, State of New Mexico, represents indigent defendants assigned to him by the Department for cases in the County and District.
15. The rates paid to Gary C. Mitchell P. C. per case by the State of New Mexico are as follows: (*Hearing Exhibit J and by reference thereto made a part hereof*)

Fees

Misdemeanor	\$ 180.00
Juvenile	\$ 250.00
4 th degree	\$ 540.00
3 rd degree	\$ 595.00
2 nd degree	\$ 650.00
1st degree	\$700.00

16. The rate per case is determined by the highest degree crime charged in the Complaint, Information and/or Indictment. It does not matter how many counts are charged there is only one fee paid and that is for the highest count. It does not matter if there is one count or one hundred counts the fee is the same.
17. According to the testimony of Tricia Tully, Office Manager for Gary Mitchell, Mr. Mitchell willingly and voluntarily entered into the Lincoln County Contract with the PDD. Mr. Mitchell was aware of the fee schedule prior to entering into the contract. Mr. Mitchell has maintained a contract with the PDD for over three decades and is

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aware of both his and the PDD's obligations under the contract. A contract similar to the Lincoln County Contract in its entirety was entered into evidence at the hearing as Defendant's Exhibit F. Mr. Mitchell agreed to abide by all of the terms of that contract including the fee compensation schedule. There is no evidence before the Court that Mr. Mitchell was forced or coerced into entering into his contracts with the PDD. Pursuant to his contract, Mr. Mitchell is scheduled to be paid \$650 in D-1226-CR-2011-00084, and an additional \$650 in D-1226-CR-2013-00259, for a total compensation in the amount of \$1,300.

18. Should the State of New Mexico wish to hire an attorney to protect the State from having a money judgment against the State, the State pays rates far higher than those paid to attorneys to protect an essential constitutional right, life and liberty.
19. Contract civil lawyers are paid \$160.00 per hour and their staffs are paid an hourly fee as well.
20. The rates to be paid to civil lawyers (risk management lawyers) per hour from the State of New Mexico to represent the State as copied from page 46 of the latest published proposal are as follows:

Staff Corresponding Hour Rate Paralegals and Law Clerks \$ 35.00 - \$60.00

Attorneys 0 to 1.99 years in practice \$90.00

Attorneys 2 to 4.99 years in practice \$110.00

Attorneys 5 to 9.99 years in practice \$130.00

Attorneys 10+ years in practice \$160.00

This schedule is based on the number of years that an individual attorney has practiced law as of the effective date of this Agreement.

21. In 2013, Gary C. Mitchell was assigned in the County of Lincoln: 2 First Degree felony cases, 24 second degree felony cases, 42 third degree felony cases, 249 fourth degree felony cases, 48 children's court cases and 394 misdemeanor cases for a total of 759 cases. *(Hearing Exhibit J and by reference thereto made a part hereof)*
22. Gary C. Mitchell expended \$579,359.16 in expenses for the 2013 contract year to provide services to the defendants appointed to him through his Public Defender Contract for the County of Lincoln, Twelfth Judicial District, State of New Mexico. *(Hearing Exhibit J and by reference thereto made a part hereof).*
23. Gary C. Mitchell P.C. received \$260,975.00 from the Department for the handling of 759 cases assigned to him in the 2013 year. He spent from his own money an additional \$318,384.16 in an attempt to render effective assistance of counsel. *(Hearing Exhibit J and by reference thereto made a part hereof)*
24. Gary C. Mitchell P.C. employed and still employs two full time attorneys, three paralegals, one investigator and one receptionist to handle the Lincoln County Contract.
25. The expenses for handling the 2013 Lincoln County Public Defender Contract were \$579,359.16. The State of New Mexico paid only \$260,975.00 of those resulting in a loss of \$318,384.16 which Gary C. Mitchell paid and contributed in order to render effective assistance of counsel.
26. Based on the 2013 caseload Gary C. Mitchell was assigned and based on an annual 2000 hours (a normal work year is 40 hrs x 52 weeks-80hours of holidays =2000 hours), Gary C. Mitchell had only 2.6 hours available on average for each client.

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27. Gary C. Mitchell, by having three paralegals, a receptionist and file clerk, an investigator and another attorney, expanded the number of hours available to each client on average to 17 hours. (2000 hrs x 6.5 full time employees divided by 759=17 hrs) He did so at his expense.
28. The two longest serving contract attorneys, Roger Bargas and Gary C. Mitchell, have spent tens of thousands of dollars of their own money to try and render effective assistance of counsel.
29. Roger Bargas testified he in the last two years has borrowed \$75,000 from his savings and retirement in order to finance the loss on the contracts and to assure he was rendering effective assistance of counsel.
30. Gary C. Mitchell in 2013 invested \$318,384.16 of his own money to try and render effective assistance of counsel. (*See Hearing Exhibit J and by reference thereto made a part hereof*)
31. Gary C. Mitchell was paid, based on the total hours spent annually on the contract by 6.5 full time employees (\$260,975 divided by 13,000 hours) twenty dollars and seven cents (\$20.07) per hour for 6.5 employees or three dollars and eight cents (\$3.08) per hour per employee.
32. The New Mexico Public Defender pays more money to experts and investigators than it does to contract lawyers who are the ones in charge of the case. Attached hereto as *Hearing Exhibit E* and by reference thereto made a part hereof is the updated New Mexico Public Defender Vendor's list and the rates listed therein.

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33. Contract/conflict attorneys handle approximately one third (1/3) of the indigent defendants/cases in the State of New Mexico yet only one fourth (1/4) of the Public Defender budget is allotted to them.
34. In the last legislative session, New Mexico legislators, despite a request for an increase of \$800,000.00 for all the contract attorneys combined (which would have been an increase of \$20.00 per case), did not appropriate the \$800,000.00.
35. The State, through the PDD, pays rates far lower than what they charge a defendant who has to reimburse the Department for representation. (*Hearing Exhibit D and by reference thereto made a part hereof*).
36. The rates of reimbursement are much higher than the fee paid to the contract/conflict attorney and none of those reimbursed moneys are paid to the contract/conflict attorney.
37. The reimbursement rates contained in *Hearing Exhibit D (and by reference thereto made a part hereof)* show the PDD does not think the rates paid to contract/conflict attorneys are adequate in that reimbursement rates are far higher. There is a great disparity between them.
38. The State of New Mexico has not, and does not have any plans to provide additional moneys to contract/conflict counsel at this time.
39. Contract/conflict attorneys must in accordance with their proposals and contracts (*Hearing Exhibit F and by reference thereto made a part hereof*) have adequate supportive services, including secretarial, investigation, and social work assistance, computers, telephones, offices, office equipment, copiers and legal research tools.
40. The monies paid to a contract attorney do not include:

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- a. Any funds to provide quarters, facilities, copying equipment, and communications.
 - b. Sufficient funds to provide tape recording, photographic and other investigative equipment of a sufficient quantity, quality, and versatility to permit preservation of evidence under all circumstances.
 - c. Sufficient funds or means of transportation to permit the office personnel and attorneys to fulfill their travel needs in preparing cases for trial and in attending court or professional meetings.
 - d. No funds for each defender lawyer to have his own office that will assure absolute privacy for consultation with clients.
 - e. No funds for the contract office to have immediate access to a law library containing the following basic materials: State Statutes and New Mexico Reports, United States Supreme Court reports, access to other State Reports and Federal Circuit Courts Reports, treatises on criminal law and evidence.
 - f. No funds for an office staff, computer systems, paralegals and process servers.
41. The State systemically in conflict/contract cases does not pay direct case expenses and the meager amount of attorneys fees barely covers the initial first appearances, first interview with client and the obtaining of discovery, if that.
 42. The State passes case costs of representation from the Offices of District Attorneys, the PDD and the Courts to contract/conflict counsel without any compensation.
 43. The State through the Department of the Public Defender will pay for experts and an investigator if a proper request is made and the case warrants an investigator and/or

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experts but the final determination is made not by the contract attorney handling the case but by the Department as to whether an investigator and/or expert is warranted.

44. There has been no significant increase in the rates paid for over 17 years with the exception the State now pays the gross receipts tax on any moneys paid to the contracting attorney.
45. The State does not pay, except in very rare instances, per diem and/or mileage for travel by contract/conflict attorneys from their offices to Detention Centers and/or Courts and they certainly do not do so in Lincoln County.
46. Gary C. Mitchell also has a conflict contract in Otero County, New Mexico. The State does not pay extra fees for those cases, nor do they pay per diem and/or mileage for travel to the Detention Centers and/or Courts out of county.
47. The State does not pay for copies of pleadings and discovery sent to indigent defendants and/or office supplies used in the representation of said defendant(s).
48. The State does not reimburse for computer programs to open and use DA/CMS cites (the computerized system set up by the Offices of District Attorney to provide discovery) and staff costs of running such programs which are now absolutely necessary to receive discovery.
49. The largest new expense that has been shifted to contract lawyers in general is the DA-CMS discovery system. All discovery from the District Attorney is scanned and placed on their CMS program. Once you enter your appearance, emails begin to be sent from the DA to the contract attorney indicating each and every case document added. The Contract Attorney can then open the program for that case. Anytime new discovery and/or a pleading is added, the DA sends an email to contract counsel

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indicating a new document is available for download. One email may contain just one page or a hundred pages of discovery, depending on how and when that discovery was downloaded and scanned into the DA-CMS program. In order to be effective, a contract attorney's office staff opens each email daily, downloads it to their system, makes two hard copies of it, places one in our hard copy file and mails the other to the client. (Please note many courtrooms are not hardwired nor is there a reliable wireless system available, otherwise the contract attorney could get on their system and not have to have a hard copy.) The State has failed to pay for the costs of such systems and the staff it takes to operate such systems. The costs include the cost of computers, computers systems to download the discovery, and, most important, the staff to do it timely. The State pays none of the above, not even copying charges or mailing, much less the employee costs. Prior to the DA-CMS programs, contract lawyers/staffs had time to read the new discovery on a daily basis, pull names and addresses of witnesses from it, and alert one another to key motions, investigative, and/or tactical matters. That is no longer possible due to the additional time required to handle this huge burden shifting.

50. The State passed on to Gary C. Mitchell in 2013 approximately \$90,000.00 in additional costs for the DA-CMS system due to extra employee hours, additional copies, copier costs and mailing costs.
51. The State does not pay any additional fees except in rare circumstances to an attorney if a case is lengthy and/or complex.
52. The State does not pay the same fees to the appointed attorney for retrial or de novo appeals and will only pay a reduced fee.

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53. The State does not pay for collect calls from indigent defendants.
54. The State does not pay for CDs/discs/tapes/flash drives which the District Attorneys require to download discovery and/or the color photographs necessary for trial except in very rare instances.
55. The State does not pay, except in very rare circumstances additional monies for cases which have many counts and/or are complex in preparation and presentation.
56. The State demands contract/conflict attorneys have staff and an office (*see Exhibit F and by reference thereto made a part hereof*), but fails to pay fees sufficient enough to pay for and maintain such staff.
57. The State, through the PDD, claims to have social worker experts available. In fact, the caseloads are so large the contract/conflict counsel must do the social work themselves and/or train their staffs to do it. No compensation is received for such.
58. This Court uses trailing dockets to try and maintain a smooth running and timely docket. Trailing dockets can impose a hardship on attorneys trying to prepare for case they are uncertain will come up for trial.
59. Gary C. Mitchell, for the handling of two cases which have been joined into one case, is paid the sum of \$1,300.00 plus gross receipts tax or \$650 per original case.
60. Defense counsel has indicated to the Court experts will be necessary to provide effective assistance of counsel and to review boxes of financial records.
61. Trial counsel estimates a total of one hundred to one hundred and fifty hours will be spent in preparation and trial.
62. Defendant Krohn will receive effective assistance of counsel if and only if Gary C. Mitchell contributes his own money and resources to Mr. Krohn's defense.

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63. The New Mexico Public Defender Commission is an independent state agency as set forth in the *Constitution of the State of New Mexico, Article 6, Section 39* and has certain powers, duties and responsibilities, chiefly to appoint the Chief Public Defender, exercise independent oversight of the PDD, provide guidance to the chief public defender in the administration of the New Mexico Public Defender and most important the representation of indigent persons. Attached as *Hearing Exhibit A and by reference thereto made a part hereof* is a copy of the entire Constitutional Amendment and by reference thereto is made a part hereof.
64. Pursuant to *NMSA 31-15-2.4*, the Commission has the following duties and powers:
- A. The commission shall exercise independent oversight of the department, set representation standards for the department and provide guidance and support to the chief in the administration of the department and the representation of indigent persons pursuant to the Public Defender Act.
- B. The commission shall develop fair and consistent standards for the operation of the department and the provision of services pursuant to the Public Defender Act, including standards relating to:
- (1) the minimum experience, training and qualifications for appointed, contract and staff attorneys in both adult and juvenile cases in coordination with the state personnel office;
 - (2) monitoring and evaluating appointed, contract and staff attorneys;
 - (3) ethically responsible caseload and workload levels and workload monitoring protocols for staff attorneys, contract attorneys and district defender offices;
 - (4) the competent and efficient representation of clients whose cases present conflicts of interest; and
 - (5) qualifications and performance of appointed, contract and staff attorneys in capital cases at the trial, appellate and post-conviction levels....

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65. The PDD is a Department governed by the Public Defender Commission and in particular has certain powers, duties and responsibilities as set forth in *Hearing Exhibit A*, attached hereto and by reference thereto made a part hereof.
66. There is in New Mexico an "Indigent Defense Act" which states in pertinent part:

§ 31-16-1. Short title

Sections 58 through 68 of this act may be cited as the "Indigent Defense Act".

31-16-2. Definitions

As used in the Indigent Defense Act:

- A. "detain" means to have in custody or otherwise deprive of freedom of action;
- B. "expenses", when used with reference to representation, includes the expenses of investigation, other preparation and trial;
- C. "needy person" means a person who, at the time his need is determined by the court, is unable, without undue hardship, to provide for all or a part of the expenses of legal representation from available present income and assets; and
- D. "serious crime" includes a felony and any misdemeanor or offense which carries a possible penalty of confinement for more than six months.

§ 31-16-3. Right to representation

- A. A needy person who is being detained by a law enforcement officer, or who is under formal charge of having committed, or is being detained under a conviction of, a serious crime, is entitled to be represented by an attorney to the same extent as a person having his own counsel and to be provided with the necessary services and facilities of representation, including investigation and other preparation. The attorney, services and facilities and expenses and court costs shall be provided at public expense for needy persons. (Emphasis mine.)

§ 31-16-9. Contractual services of counsel

In order to facilitate representation in matters arising before appearance in any court in matters covered by the Indigent Defense Act, the director of the administrative office of the courts may, upon direction of the supreme court with respect to habeas corpus proceedings initiated in the supreme court, or upon request of a district court, enter into contracts with attorneys designated by these courts whereby the attorney shall undertake to

perform the services of assigned counsel in all or any specified portion of the cases originating within the judicial district. All contracts shall be approved by the chief justice of the Supreme Court and all payments provided therein shall be made by the Supreme Court or in the appropriate district court requesting the contract, but in no instance shall contract payments exceed the maximums set out in Section 65 of the Indigent Defense Act.

31-16-10. Counsel not subject to liability

No attorney assigned or contracted with to perform services under the Indigent Defense Act shall be held liable in any civil action respecting his performance or nonperformance of such services.

67. The New Mexico Supreme Court has clearly stated the acts (Public Defender and Indigent Defense Act) are to be read and considered together. *State v Brown*, 139 N.M. 466, 134 P3d 753, 2006-NMSC-023 (2006).
68. The New Mexico Public Defender Commission by its Constitutional Mandate, The *Constitution of the State of New Mexico Article 6 Section 39* and *NMSA 31-15-2.d et. seq.*, must and has set standards of representation for all the employed lawyers and conflict/contract attorneys. The announcement of such is marked *Hearing Exhibit G* and by reference thereto made a part hereof.
69. The standards of representation which must be met in every case, for every defendant and by every employed Public Defender attorney, conflict and contract attorney are set forth in *Hearing Exhibit I* attached hereto and by reference thereto made a part hereof.
70. Standards of caseloads and standards of representation from other jurisdictions and or from learned treatises and studies include Standard 13.12 Workload of Public Defenders set forth in *Hearing Exhibit B and H* (and by reference thereto made a part hereof) and contain the following highly relevant information:

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The caseload of a public defender office should not exceed the following: felonies per attorney per year: not more than 150; misdemeanors (excluding traffic) per attorney per year: not more than 400; juvenile court cases per attorney per year: not more than 200; Mental Health Act cases per attorney per year: not more than 200; and appeals per attorney per year: not more than 25.

For purposes of this standard, the term case means a single charge or set of charges concerning a defendant (or other client) in one court in one proceeding. An appeal or other action for post judgment review is a separate case.

71. If a contractor determines that because of excessive workload the assumption of additional cases or continued representation in previously accepted cases by his office might reasonably be expected to lead to inadequate representation in cases handled by him, he should bring this to the attention of the Public Defender Employee in charge of the contract/conflict attorneys. Gary C. Mitchell has done so.
72. The system in place for contract representation of indigent clients can create an atmosphere where standards of representation are violated due to the necessity contract/conflict lawyers take as many cases as they possibly can. The more cases they have the more likely they must "*meet and plead*" defendants. The very low amounts paid necessitate contract attorneys take as many cases as they can so they may take care of the expenses of running an office and providing staff.
73. The very proposals required by the PDD requires the contract/conflict attorney to be experienced and provide information as to their ability to provide services to clients including jail visits, telephone services, office staff, computers, library, social workers, sending pleadings and discovery to clients, discussing trial tactics with other lawyers, dealing with the mentally ill and incompetent and even provides a list of

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- items you may use in your practice. (see *Hearing Exhibit F at pages 60-63 and by reference thereto made a part hereof*)
74. The Performance Standards required of the contract/conflict attorneys by the New Mexico Public Defender Commission, if followed would require several hours of work on each case. (See *Hearing Exhibit I and by reference thereto made a part hereof*)
 75. National standards as well as the Standards of Representation set forth by the New Mexico Public Defender Commission determine a standard of effective assistance of counsel.
 76. Standards of representation and how a case should be handled taken from the standards of the National Legal Aid and Defender Association are contained in *Hearing Exhibit B*, attached hereto and by reference thereto made a part hereof, setting forth in detail what is expected.
 77. The standards of representation are well written, well-meaning, and, most importantly, the defendants deserve to have an attorney representing them who complies with those standards and especially the Standards of Representation, (*Hearing Exhibit I and by reference thereto made a part hereof*) now set forth by the New Mexico Public Defender Commission which all contract/conflict attorneys must comply with.
 78. The Chairman of the Commission Michael Stout, the head of Contract Services Lee Hood and a long-term contract attorney Roger Bargas are of the opinion, based on the compensation now paid, those standards of representation cannot be complied with

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unless the contract/conflict attorney contributes his/her own money, time and resources and in significant and substantial amounts.

79. The Head of Contract Services for the New Mexico Public Defender termed the procedure of assigning large numbers of cases to contract attorneys the "*hamster wheel*". Due to such low rates, attorneys must take more and more cases to pay the bills, expenses and maintain offices.
80. The Head of Contract Services testified a number of contract attorneys simply did not provide a number of services to clients, such as an office, office personnel, phone services and copies of discovery.
81. Michael Stout, Chairman of the New Mexico Public Defender Commission, indicated that Commissioners at their first meeting upon learning of the low rates paid to contract/conflict counsel were shocked at how low the rates were.
82. Michael Stout, also an expert on effective assistance of counsel, was of the opinion based on the rates, absent devoted contract/conflict counsel using their own monies and resources, the contract/conflict attorney could not meet the standards of representation set forth by the Commission.
83. Contract services counsel Lee Hood was of the opinion an attorney could not render effective assistance of counsel based on the low rates unless they used their own resources.
84. The small flat fees paid to defense counsel and their method of payment are in violation of the Constitution of the State of New Mexico and places contract/conflict counsel constantly in violation of their Code of Ethics and Professional Responsibility. See *Hearing Exhibit C and by reference thereto made a part hereof*,

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the New Mexico Criminal Defense Lawyers Association's statement regarding the flat fee issue, which is attached hereto and by reference thereto made a part hereof.

85. Flat fee contracts especially of such low rates cause contract/conflict attorneys to plead the vast majority of their clients and try very few cases if they are to survive economically solely on the rates paid by the State.
86. Flat fee contracts foster neglect of the majority of clients in order to assist a few clients.
87. Due to the very low sums of money paid by the State of New Mexico to contract attorneys a defendant's right to effective assistance of counsel depends on the largesse or charity of his appointed contract attorney.
88. The fees are so inadequate they are earned within the time period of initial contact with the defendant, an entry of appearance being filed and discovery obtained which generally occurs before a check is sent for payment. Once advised of appointment, the work by the contract attorney of initial contact with the defendant, filing the entry and discovery motions and review thereof exhausts the nominal flat fee paid on the contract by the State.
89. Gary C. Mitchell asked, due to the large case load, he not receive appointments on misdemeanor, fourth and third degree felonies so as to lower the number of cases and thereby attempt to render effective assistance of counsel. Contract Services Counsel Lee Hood expressed that ethically that was the proper decision to make.
90. Contract/conflict attorneys have no representative on the Public Defender Commission. *NMSA 31-15-1 et. sec.* prohibits such, but the point is the contract/conflict lawyer has no representation per se on the Commission.

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91. The Chief Public Defender has a conflict of interest in providing adequate funds to the contract/conflict attorneys because employees of the Department must be fairly paid thus with limited monies appropriated by the Legislature his/her priority is to take care of the employees of the Department.
92. Standards of representation which are set by the New Mexico Public Defender Commission will cause a shortage of contract/conflict attorneys. Contract attorneys in violation of the standards may be subject to Disciplinary action by the Supreme Court of the State of New Mexico. They most certainly will have to answer questions regarding standards of representation when a Disciplinary complaint is filed by a defendant.
93. Despite the State of New Mexico being aware of the great crisis, all branches of government have failed to correct the problems and have chosen instead to count on the charity of the contract/conflict attorneys but costs have become so great it is impossible for even the most charitable contract attorneys to continue to attempt to render effective assistance of counsel.
94. Gary C. Mitchell, who has been appointed to represent the above named defendant and other defendants charged in the County of Lincoln, Twelfth Judicial District, State of New Mexico, has for over thirty years handled Lincoln County indigent defendant appointments.
95. The independence of the contract attorney is greatly diminished when the Department controls whether the contract attorney may have an investigator and/or expert witnesses. The Department in the past few years has been good about approving

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investigators and/or expert witnesses unless the end of the fiscal year is upon them but the contract attorney and most important the defendant is at their mercy.

96. The State, by law, is required to pay not only the costs of the attorney but the costs of representation. They have not.
97. Social work, especially obtaining rehab programs for clients, has been passed on to Contract Attorneys, when such work was previously the responsibility of Adult Probation Offices. The State fails to reimburse for such additional work.
98. Due to trailing dockets, the practice of sending subpoenas to the Sheriff's Department for free service in public defender cases does not work if you need a witness to be present. Most Sheriff's Departments require subpoenas be at the Sheriff's Department at least ten days before the date the witness has to appear. Even then and with good information they often fail to locate them. Gary C. Mitchell pays an investigator unless he is assigned to the case via his public defender contract or a staff member to serve subpoenas out of his Gary C. Mitchell's own pocket to get the witness served timely.
99. The contract system provides no relief for the above mentioned problems, and unless the contract attorney is willing to spend thousands of his or her own dollars, there is no relief for the indigent defendant.
100. Implicit in the Contract is the requirement the attorney is licensed, in good standing and above all must render effective assistance of counsel.
101. The present system of payment and assignment of cases to contract/conflict lawyers cannot be sustained.

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102. It is difficult to render effective assistance of counsel under the present system of pay and assignment.
103. The standards of the Commission are reasonable and should be followed.
104. Because of the manner in which contract/conflict attorneys multiply flat fees in order to make ends meet, the system presently in use for contract/conflict counsel provides a disincentive for providing effective assistance of counsel.
105. The present system of engaging contract/conflict counsel with flat fees and multiple clients on a single contract may not provide adequate counsel as guaranteed by *Gideon* nor effective assistance of counsel as guaranteed by the United States and New Mexico Constitutions.
106. The mandatory standards of performance that have been ordered by the Commission are difficult to meet under the present system of engaging contract/conflict counsel with flat fees and multiple clients on a single contract.

THE COURT'S CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and the controversy between them.
2. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense. *Constitution of the United States, Amendment VI.*

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3. In all criminal prosecutions, the accused shall have the right to appear and defend himself in person, and by counsel; to demand the nature and cause of the accusation; to be confronted with the witnesses against him; to have the charge and testimony interpreted to him in a language that he understands; to have compulsory process to compel the attendance of necessary witnesses in his behalf, and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed. Constitution of New Mexico Article II, Sec. 14.
4. Pursuant to NMSA 36-6-11 1978 and NMRA 5-302 A, a person who is a target of a Grand Jury has the right to assistance of counsel.
5. Where a provision of the Bill of Rights of the federal Constitution is fundamental and essential to a fair trial, it is made obligatory on states by Fourteenth Amendment. U.S.C.A.Const. Amends. 6; Gideon v Wainwright, 372 U.S. 335, 83 S. Ct. 792 (1963).
6. The Sixth Amendment to the Constitution provides that in all criminal prosecutions the accused shall enjoy the right to assistance of counsel for his defense and is made obligatory on the states by the Fourteenth Amendment, and indigent defendant in criminal prosecution in state court have the right to have counsel appointed for him. *Gideon*, supra.
7. The proper standard for attorney performance is that of reasonably effective assistance. U.S.C.A. Const.Amend. 6. Counsel's function in representing a criminal defendant is to assist defendant, and hence counsel owes client a duty of loyalty and a duty to avoid conflicts of interest. From counsel's function as

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assistant to a defendant derives the overarching duty to advocate defendant's cause and more particular duties to consult with defendant on important decisions and to keep defendant informed of important developments in course of the prosecution. U.S.C.A. Const.Amend. 6.

8. Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. Counsel's function is to make adversarial testing process work in the particular case. *Strickland v Washington*, 466 U.S. 668, 104 S.Ct. 2052 (1984).
9. The Sixth Amendment guarantee of the right to assistance of counsel requires that an indigent criminal defendant be provided with counsel at public expense in order to ensure fairness in his or her trial. The Indigent Defense Act and the Public Defender Act comprise the statutory framework for providing counsel to indigent criminal defendants and must be read in pari materia. West's NMSA §§ 31-15-1 et seq., 31-16-1 et seq. Taken together, the Indigent Defense Act and the Public Defender Act are complementary; the purpose of the Indigent Defense Act is to ensure the protection of a defendant's Sixth Amendment constitutional rights and the Public Defender Act provides the administrative framework for accomplishing that objective. U.S.C.A. Const.Amend. 6; West's NMSA §§ 31-15-1 et seq., 31-16-1 et seq.
10. The Sixth Amendment right to counsel includes the right of a criminal defendant to the effective assistance of counsel and the obligation of states is to provide indigent prisoners with the basic tools of an adequate defense. *State v Brown*, 139 N.M. 466, 134 P3d 753, 2006-NMSC-023 (2006).

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11. The Right to effective assistance of counsel is the right of the accused to put the prosecution's case to meaningful adversarial testing. U.S.C.A. Const.Amend. 6;
West's NMSA Const. Art. 2, § 14.
12. Defendant has shown that the current system of payments to contract public defenders may create a situation wherein criminal defendants may receive inadequate counsel, but there has been no showing that this defendant has received inadequate assistance of counsel.
13. A remedy is discussed in *State v Young*, 2007-NMSC-058, but said remedy wasn't ordered therein nor made the law of New Mexico.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that:

- A. Defendant's motions are denied.



JAMES WAYLON COUNTS
DISTRICT COURT JUDGE

CC: John P. Sugg, ADA
Gary C. Mitchell, Esquire