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To: Andy Kopplin, Chair
All Members, Mayor's Criminal Justice Working Group

cc: James Austin
Marylou Leary, Principal Deputy Attorney General, Office of Justice Programs, USDOJ
Lynn Overmann, Senior Advisor, Access to Justice Program, USDOJ

From: Michael Jacobson, Director
Jon Wool, Vera New Orleans Office

Tuesday, November 16, 2010

Dear Chairman Kopplin and Working Group Members:

We write to provide some additional perspective on the report produced by Dr. Austin and the underlying considerations that go into determining the appropriate jail size for New Orleans. We do so because your office has in the past asked us to work with Dr. Austin to assist in modeling the effects of developing a comprehensive pretrial services system and because members of the working group have asked us for our input. Please accept these considerations not as criticism of Dr. Austin or of the process you are undertaking; we respect your efforts and recognize the difficulty of the task, having been involved in similar efforts in other jurisdictions. We offer these considerations because we believe they can help focus your deliberations by adding some local knowledge to Dr. Austin's examination of particular initiatives and by adding some additional perspective outside of the scope of his limited mandate.

Our comments are of two sorts. First, we suggest that the jail-size determination you have been asked to make must be informed by considerations beyond those that flow from a standard projection involving the modeling of a limited number of policy initiatives. And, second, we suggest some ways in which the Base Projection and Policy Projection should be amended to better reflect the positive impacts of the practical changes that our criminal justice leaders and civic partners are undertaking.

I. Considerations beyond Standard Projections: Jail-Bed Supply and Demand

New Orleans's use of incarceration is extraordinary and has been for many years. Even fully discounting the use of jail beds to house state prison-sentenced prisoners, New Orleans incarcerates more people per capita than any other urban jurisdiction in the United States by a considerable margin. A standard population projection applied to an extraordinary system such as ours, one that is just beginning to re-examine its heavy reliance on incarceration, will not produce jail size estimates that would allow New Orleans to approach the norm among other US jurisdictions. This is because the system needs to make fundamental adjustments to a new norm of limited jail beds from a norm of unlimited jail beds, a norm it has known for decades now. As important as any set of initiatives are that might be modeled in a standard projection, more comprehensive change is needed. The system needs to wean itself from unlimited demand to a steady state of constrained demand. Our system has become

dependent on the availability of jail beds and acts accordingly in many small ways. The only sure path to make this change is to constrain supply. This is the lesson of Jefferson Parish. There, the citizens and leaders rejected the proposed construction of a larger jail and the result has been a system that has learned to live within its means, with constrained supply and with no reduction in public safety.

One example of how our system loses sight of its consumption of jail beds is its unique habit of arresting persons who have attachments for traffic and misdemeanor offenses from other parishes. Those other parishes, mindful of the use of their jail beds, do not arrest these people but direct them to return to court without incarceration. New Orleans, having become accustomed to unlimited jail beds, has continued to arrest and detain those that the parish of origin would not. To the credit of the new Superintendent, that practice is changing now that it has been brought to his attention (it has taken efforts by many civic groups such as the Metropolitan Crime Commission and two acts of the legislature to bring this single unexamined practice to light). There are many similar ways in which unexamined practices contribute to what seem to be necessary jail bed demand but often are simply not necessary, and sometimes quite harmful.

Jail size planning thus is only somewhat about what particular initiatives can be expected to achieve; it is also about what the will of the community and the vision of its leaders can achieve. We have been heartened by what we see in New Orleans's people and leaders in this time of difficult change. We urge a jail-size planning process that matches their will and vision.

II. Underestimation of the System's Capacity to Improve

In our four years of work with New Orleans's criminal justice leaders we have been struck by their capacity to drive positive system change. For example, working in collaboration, system leaders—principally the District Attorney's office and police department—have driven down the arrest to report filing time for all non-victim cases from 65 to days to five days. A reasonable projection made before that initiative was undertaken might have estimated a 50 percent reduction, to 33 days, and might still have been criticized as overly hopeful. Nor did the system actors stop there. Unsatisfied with these results for misdemeanor cases, they drove down the pretrial period for all nonviolent state misdemeanors to one day for roughly 80 percent of the cases, by instituting prosecution in the Municipal Court. We expect that if the Criminal Justice Working Group sets a system-wide policy of seeking to reap the rewards other jurisdictions have reaped from reducing the unnecessary reliance on incarceration, the city's criminal justice leaders, with support from the Mayor and the City Council, will achieve unexpectedly good results.

Not having had the experience of witnessing these local accomplishments and limited by a narrow mandate and extremely short timeline, we feel Dr. Austin's report underestimates the ability of system leaders, and the executive and legislative officials who support them, to make improvements that will bring New Orleans within national norms. His projections do not account for significant changes we are confident will be made in the near future. The following suggest some ways in which the system will achieve more than is projected in the report.

Suggested Adjustments to the Base Projection

1. "Warrant" Population

The report projects a five percent annual reduction in population for this category of prisoners. We expect a much steeper reduction, followed by static populations in out years.

As was noted by Superintendent Serpas at the November 4 Working Group meeting and reiterated by him in a public statement, NOPD will strongly encourage its officers to cease making custodial arrests for persons with out-of-parish non-felony warrants and attachments. This directive follows the 2010 enactment of HB 107, a statute that was specifically intended to encourage this change in Orleans Parish. Dr. Austin and Superintendent Serpas have estimated the percentage of this population that are non-felony to be from 90 to 98 percent. The Superintendent and his deputy superintendents have made clear that a policy change is in place and results are expected in the very near future.

It is reasonable to project a 90 percent reduction in the "Warrant" population in 2011. We note that Dr. Austin's release and length of stay data suggest a warrant population of 220 beds ($20,111 \text{ releases} @ \text{four days LOS} / 365 = 220$). A 90 percent reduction of that population would produce savings of 198 beds. However, we note that Dr. Austin's stock population data shows 101 warrant beds. We use the smaller of these two figures and therefore estimate a reduction of 90 beds. We then project no further reduction for the remaining out years through 2020.

2. "Pretrial Felony" and "Locally Sentenced" Populations

The report projects no annual reduction in these two categories of prisoners. We expect there to be a reduction due to demographic and crime trends just as there is a reduction projected for the "Misdemeanor Pretrial/Other" category based on these trends. We know of no specific or generally-applicable distinction that would limit the effect of these downward trends only to misdemeanor charges in New Orleans.

Rather than apply the five percent annual reduction used by Dr. Austin for the misdemeanor/other category, it is reasonable to apply a more conservative one percent annual reduction to the "Pretrial Felony" and "Locally Sentenced" categories. We further adjust each year upward or downward based on the report's year-to-year projected change. For example, we reduce the 2011 "Felony Pretrial" figure by one percent of 2010's figure (-14 beds) and then increase that number by the change recorded from 2010 to 2011 (+20 beds) for a net increase of six beds.

3. Rate and Application of "Peaking Factor"

The report applies a 7.5 percent peaking factor to all categories of prisoners. We believe that five percent is sufficient and that there should be no peaking factor applied to fully discretionary categories, such as beds for DPS&C re-entry prisoners.

Five percent provides ample allowance for peak demand in a jail system. Unlike a prison system, where 7.5 percent may be necessary, a jail system always retains considerable flexibility. Jail detainees are pretrial and thus have not been convicted of a crime; system actors therefore can adjust detention policies as the system approaches capacity. Moreover, more than half of jail detainees are

being held on nonviolent charges, including some misdemeanors; this allows for even greater flexibility in detention decisions at times of maximum use. Prison systems, on the other hand, house only persons already convicted and sentenced to incarceration for felony offenses.

It is reasonable to apply a five percent peaking factor for all categories except DPS&C prisoners, to which we apply no peaking factor.

Suggested Adjustments to the Policy Projection

4. "Pretrial Misdemeanor/Other" Population

The report projects no reduction in this population of prisoners due to implementation of a pretrial services program or any of the other initiatives that are soon to be implemented or expanded by the city's criminal justice leaders and their staffs. We are confident that at least three of those initiatives—expansion of summons use, implementation of a sobering center, and prosecution of additional state misdemeanors in Municipal Court—will have a significant jail bed reduction effect beginning in 2011.

Summons use for municipal offenses has been expanding. From October 2009 to September 2010 use of summonses for non-domestic violence, non-public intoxication municipal offenses has increased from 41 to 59 percent. We expect this percentage to reach at least 67 percent by early or mid 2011. There are 16,781 non-domestic violence, non-public intoxication cases annually (according to our latest Misdemeanor Summons Initiative monthly report) with an average length of stay of 6.1 days (according to Dr. Austin's prior data overview). We can reasonably expect, therefore, a bed savings of 5.7 beds due to the increase in the percentage of summonses issued from 59 to 67.

The Criminal Justice Leadership Alliance (CJLA) municipal court working group will recommend on December 8, 2010, that all state misdemeanors now being heard in Municipal Court be prosecuted as municipal rather than state offenses and will recommend four new municipal ordinances be adopted to make that fully possible. Significantly, the misdemeanor offense with the greatest number of arrests, marijuana possession, is among those that will for the first time be prosecuted as a municipal offense. All in all, there will be roughly 2,500 additional misdemeanors annually subject to the summons ordinance and NOPD summons policy. We can reasonably expect, therefore, an annual reduction of admissions by 67 percent of 2,500 (1,675) and a bed savings of 63, based on an average length of stay of 13.7 days.

The CJLA is also planning a small-scale sobering center initiative by which four persons per day who are presently charged with public intoxication and no other charges will be diverted from arrest to a sobering center with no jail admission to follow. There is at present cost-free capacity for seven persons per day. At an estimated average length of stay of two days, we expect a bed savings of eight beds.

Finally, there are developing plans for additional state misdemeanors to be moved to the Municipal Court. Chief among these are domestic violence misdemeanors that do not involve injury; there are roughly 1,000 of these arrests annually. Because the time from arrest to arraignment in Municipal Court is approximately 10 days shorter than in Criminal District Court for persons who are detained, and because most are released at arraignment, there will be significant reductions in bed use

for these detainees. Given an average length of stay of 13.7 days, we estimate that the average reduction in length of stay for these arrestees will be five days (given that perhaps half will not be released at arraignment), generating a bed savings of 14 beds.

It is reasonable to project bed reductions for these three categories of "Pretrial Misdemeanor" prisoners. We conservatively estimate 2011 reductions of four beds for expansion of summonses for present municipal offenses; 55 beds for the expansion of the application of summonses to marijuana possession and other present state misdemeanors heard in Municipal Court that soon will become municipal offenses; eight beds for sobering center diversions; and 10 beds for new state misdemeanors being prosecuted in Municipal Court, for an aggregate reduction of 77 beds.

5. "Pretrial Felony" Population

The report projects a 25 percent reduction in this category over two years, based on the implementation of a comprehensive pretrial services program in New Orleans, resulting in a bed savings of 330 by 2012. We concur with the conclusions reached. However, we have some uncertainty with regard to the data to which those conclusions have been applied and disagree with one "key assumption" used.

The principal area of uncertainty we find is the percentage of pretrial felony defendants being held on violent charges. Because the report appropriately recognizes that release at first appearance will be greater for those arrested for nonviolent charges, this percentage is key to the resulting conclusion. Previous reports note that 49.6 percent of persons held pretrial on felony charges are being held for violent charges. Our estimates have been lower, at approximately 40 percent. This may be due to data difficulties or to a difference in the definition of violent used. We seek to use an objection definition, such as that in the Louisiana statutes because of inevitable disagreement about what constitutes violence. We do not know what definition was used in the report.

The report lists as a key assumption underlying its projection of bed savings due to pretrial services that persons released on recognizance or supervision will nonetheless remain in jail for three days. Pretrial services programs operate at first appearance, which in New Orleans occurs within 24 hours of arrest in the great majority of cases (there are three first appearance sessions in Criminal District Court on weekdays and two each weekend day). In most such programs, when a judge or commissioner orders the release of an arrestee he or she is released immediately. In New Orleans, the arrestee is returned to custody and released some hours later. This time can and should be reduced to a near negligible amount, consistent with other urban jurisdictions. We can conservatively estimate that those released at first appearance will be released within 36 hours of arrest.

Based on these considerations, it is reasonable to project slightly greater bed savings of persons held pretrial on felony charges. We are unable to estimate additional bed savings due to a 40 percent to 60 violent to nonviolent split in the felony pretrial population. We estimate additional bed savings of 30 beds due to a shorter—36 hours rather than three days—length of stay for those who will be released at first appearance, based on 50 percent of 14,950 non-violent felony prisoners released 1.5 days earlier than estimated.

6. "DPS&C" Population

The report concludes that the population of state prison-sentenced prisoners (referred to as "DPS&C" prisoners) could be set at 250. This would allow for 125 work-release DPS&C prisoners and

125 re-entry DPS&C prisoners. We would reduce this figure to 125 by restricting local jail use for DPS&C prisoners to those in a fully-funded and fully-staffed re-entry program, and only if certain binding understandings are reached. If they are not, we would reduce this figure to zero.

As Dr. Austin explained to the working group, housing prison-sentenced prisoners in a local jail is both not the norm and recognized as poor correctional practice for a number of reasons. State prisoners should only be housed in a local jail if strongly justified by the specific purpose for doing so and if properly underwritten by the state. Moreover, beds reserved for DPS&C prisoners must remain for use only for DPS&C prisoners; if these beds are fungible the system will adjust to using them for city prisoners, thus not properly constraining demand.

We have not heard of any justification for building or retaining facilities for housing state prison-sentenced work release prisoners in the local jail.

On the other hand, there is justification for housing state prison-sentenced re-entry prisoners in the final 90 days of their prison sentences if they are returning to New Orleans. Yet, the city should only commit to building jail beds for these prisoners if the following guarantees are in place:

- The state pays the capital costs of this portion of the jail construction or all construction is covered by FEMA reimbursements, that is if no capital costs will be borne by New Orleans taxpayers through the floating of bonds;
- The state guarantees full funding of these re-entry beds at a sufficient level to provide quality services for a period of 20 years; and
- A binding MOU limits the use of these beds for DPS&C re-entry prisoners; no city prisoners can be housed in these beds for the same 20-year period.

It is reasonable to project DPS&C prisoners at levels consistent with these considerations, which would be either 125 or zero.

Also to be Addressed: Racial Disparity

7. Racial Disparity in Length of Stay

Dr. Austin's analysis revealed a high positive correlation between race and length of stay. The report concludes that black New Orleanians spend 47 percent longer (40.7 days instead of 27.6 days) detained in jail during the pretrial phase than do whites charged with the same offense. Although there are many possible causes for this disparity, Dr. Austin explained that none were evident in his analysis. System actors must take steps to examine the causes and to implement appropriate solutions and safeguards to eliminate any disparity based on race; and they must track outcomes over time of adjustments in policies they make to eliminate unwarranted disparity.

The report indicates that if the disparity were eliminated there would be a savings of 250 beds. This suggests a final recommendation of appropriate jail bed size should assume some reduction due to efforts to eliminate racial disparity. The working group might want to consider that half of those beds can be saved by appropriate efforts and plan accordingly, producing jail-bed savings of 125 beds.

III. Conclusion

We urge the Working Group to think broadly about the question of what size jail New Orleans should have. Members should appreciate the opportunity presented to rethink a core governmental practice that impacts so many and has such deep fiscal, public safety, and fairness consequences for the city. Jail size, more than any other factor besides the will and vision of government leaders, will determine whether New Orleans develops a modern criminal justice system that we all can be proud of for years to come. We look forward to continuing our partnership with the city's leaders to help make this happen.

Base Projections with Adjustments

CY	JFA Warrants	Warrants Adjusted	JFA Pretrial Misd/Other	JFA Pretrial Felony	Pretrial Felony Adjusted	JFA Locally Sentenced	Locally Sentenced Adjusted	JFA Sub-Total	Sub-Total Adjusted	JFA DPS&C	JFA Grand Total	Grand Total Adjusted
Sept. 2010	114	114	597	1,359	1,359	169	169	2,239	2,239	950	3,189	3,189
2010	101	101	591	1,364	1,364	162	162	2,217	2,217	950	3,167	3,167
2011	93	10	582	1,384	1,390	161	158	2,220	2,141	950	3,170	3,091
2012	91	10	563	1,381	1,373	166	162	2,200	2,108	950	3,150	3,058
2013	84	10	546	1,396	1,376	165	159	2,190	2,090	950	3,140	3,040
2014	79	10	522	1,383	1,348	162	155	2,147	2,034	950	3,097	2,984
2015	77	10	487	1,357	1,308	163	162	2,083	1,957	950	3,033	2,907
2016	73	10	470	1,349	1,287	161	149	2,053	1,916	950	3,003	2,866
2017	66	10	448	1,372	1,297	168	154	2,054	1,909	950	3,004	2,859
2018	63	10	427	1,350	1,262	165	150	2,005	1,849	950	2,955	2,799
2019	65	10	392	1,349	1,249	158	141	1,965	1,792	950	2,915	2,742
2020	58	10	369	1,360	1,247	165	147	1,953	1,773	950	2,903	2,723
With 7.5% Pe	62		397	1,462		177		2,099		1,021	3,121	
With 6% Peaking		11	387		1,310		154		1,862	950		2,859

Policy Projections with Adjustments (carrying over adjustments to base projections)

CY	JFA Warrants	Warrants Adjusted	JFA Pretrial Misd/Other	Pretrial Misd/Other Adjusted	JFA Pretrial Felony	Pretrial Felony Adjusted	JFA Locally Sentenced	Locally Sentenced Adjusted	JFA Sub-total	Sub-Total Adjusted	JFA DPS&C	DPS&C Adjusted	JFA Grand Total	Grand Total Adjusted
2010	101	101	591	591	1,364	1,364	162	162	2,218	2,218	850	850	3,068	3,068
2011	93	10	582	605	1,228	1,254	161	158	2,064	1,927	250	0 or 125	2,314	1,927 or 2,052
2012	91	10	563	486	1,034	1,013	166	162	1,854	1,671	250	0 or 125	2,104	1,671 or 1,796
2013	84	10	546	489	1,034	1,015	165	159	1,829	1,653	250	0 or 125	2,079	1,653 or 1,778
2014	79	10	522	445	1,034	988	162	155	1,797	1,598	250	0 or 125	2,047	1,598 or 1,723
2015	77	10	487	410	1,034	948	163	152	1,761	1,520	250	0 or 125	2,011	1,520 or 1,645
2016	73	10	470	393	1,034	927	161	149	1,738	1,479	250	0 or 125	1,988	1,479 or 1,604
2017	66	10	448	371	1,034	937	168	154	1,716	1,472	250	0 or 125	1,966	1,472 or 1,597
2018	63	10	427	350	1,034	902	165	150	1,689	1,412	250	0 or 125	1,939	1,412 or 1,537
2019	65	10	392	315	1,034	887	158	141	1,649	1,353	250	0 or 125	1,899	1,353 or 1,478
2020	58	10	369	292	1,034	887	165	147	1,625	1,336	250	0 or 125	1,876	1,336 or 1,481
With 7.5%	62		397		1,112		177		1,748		269		2,017	
With 5% Peaking		11		307		931		154		1,403		0 or 125		1,403 or 1,528