

## Analysis

### Item 32: Department of Justice

#### COVID-19 State Habeas Corpus Petitions

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**Analyst:** John Borden

**Request:** Increase Other Funds expenditure limitation by \$674,010 and establish six permanent full-time positions (2.00 FTE) for the Trial Division to respond to habeas corpus petitions related to the COVID-19 pandemic.

**Analysis:** The Department of Justice's (DOJ) Trial Division is organized into three sections: Civil Litigation (jury trials); Criminal and Collateral Remedies (post-conviction relief or federal habeas corpus challenges); and Special Litigation (defending state statutes and policies). The Division has a 2019-21 biennial budget of \$38.8 million Other Funds, including 114 positions (113.25 FTE). Revenue to support this Division is from hourly billings to client agencies and the General Fund for the Defense of Criminal Convictions.

The Civil Litigation Section handles state habeas corpus cases, among other major categories of cases. Habeas corpus is a legal remedy, under state and federal constitutions, available to adults in custody to challenge the conditions of their confinement due to either the failure of a jail or prison to provide adequate care for a serious medical condition or sentencing errors that keep persons incarcerated past a sentence date. Typically, an adult in custody must first exhaust all available administrative processes prior to filing a habeas corpus case in state court unless the risk of harm is so great that a court's immediate action is necessary before all administrative options have been pursued or completed. If an adult in custody prevails in a habeas corpus petition, the court will order the jail or prison to provide the needed care, if a medical case, or in rare cases, order the release of the adult in custody. DOJ only handles those cases arising from adults in custody in the state prison system. District Attorney or city attorney offices handle state habeas corpus cases associated with inmates held in local county or city jails.

A state habeas corpus case is a civil rather than a criminal case and heard in the circuit court where the correctional facility is located. The Oregon Rules of Civil Procedure require the state to file a response to the initial petition within 30 days. Circuit courts do not grant extensions for the state to file a response given an inmate in custody's civil liberty interests are at stake. DOJ reports that state habeas corpus petitions due to the pandemic will begin to be heard in circuit courts in November of this year and that any cases that proceed to trial may begin starting in 2021.

The number of state habeas corpus petitions has averaged 106 cases per biennia over the last three biennia from 2013-15 to 2017-19. DOJ has generally been able to manage this caseload using two Senior Attorney General attorney positions (1.50 FTE), one Legal Secretary (1.00 FTE), and one Paralegal (0.50 FTE) for a combined total of four positions (3.00 FTE). Each case averages approximately 25 hours of billable time, which at the current rate translates to \$5,350 each. DOJ's work is also dependent upon Department of Corrections (DOC) staff providing the medical records associated with each case. The Trial Division estimates that each state habeas corpus case takes an average of 25 hours of legal work. This equates to a Senior Attorney General attorney position managing about 71 cases per biennia. Given the COVID-19 pandemic, there could be an underlying

shift from non-COVID-19 state habeas corpus to COVID-19 state habeas corpus.

The COVID-19 pandemic has resulted in an increase in the filing of state habeas petitions. Each case is unique to the medical condition of the petitioner. For the current biennium to-date, a total of 186 cases have been filed, which is 79 cases over the three biennia average. DOJ attributes the increase to the pandemic and notes that the caseload may continue to increase over the course of the pandemic.

DOJ is requesting to hire three permanent full-time Assistant Attorney General positions (1.00 FTE), two permanent full-time Legal Secretary positions (0.67 FTE), one permanent full-time Paralegal position (0.33 FTE) to manage the increased habeas corpus workload. The start date of the positions would be November 1, 2020 with the three Assistant Attorney General positions being budgeted in the pay range at Step-7, or above the standard second step for new positions. The 2019-21 biennial cost of the request totals \$674,010 Other Funds expenditure limitation, which translates to \$752,549 in hourly billings at \$214 per hour. The difference between the expenditure limitation and the hourly billing amount is associated with support and overhead costs. DOC is the client agency that would be billed for eight months of expenses and which would increase to \$1.6 million for the 24-months of the 2021-23 biennium. The expense may be partially paid for by DOC using Coronavirus Relief Funds, if available, and if federal eligibility requirements are met (e.g., expended by December 30, 2020), and General Fund. While supportive of DOJ's request, DOC is currently forecasting a General Fund deficit for the 2019-21 biennium and indicates that supplemental General Fund resources will need to be requested from the Legislature or the Emergency Board.

The Trial Division currently has 12 vacant positions, including three Legal Secretaries and two Paralegal positions. These positions may be used in lieu of the Emergency Board authorizing additional Legal Secretary and Paralegal positions. Three of the vacant Assistant Attorney General positions were eliminated during the 2nd Special Session of 2020 and there are no other remaining vacant attorney positions within the Division.

The current net increase in state habeas corpus petitions above the historic caseload (79) translates into one additional Assistant Attorney General (AG) position (0.33 FTE). A second Assistant AG position (0.33 FTE) may also be needed to manage what is anticipated to be a further increase in caseload. While the Trial Division does not have any vacant attorney positions, the General Counsel Division has eleven.

The Legislative Fiscal Office recommends transferring two permanent full-time (vacant) Assistant AG positions (2.00 FTE), including associated services and supplies, from the General Counsel Division to the Trial Division for a total of \$664,918 Other Funds (24-months). The Legislature in 2021 may consider transferring the positions back to the General Counsel Division depending upon the workload requirements of both the General Counsel and Trial Divisions or eliminating the positions if unneeded or for other budgetary reasons. DOJ hourly billings to DOC would total approximately \$443,949 Other Funds for eight months of work for the remainder of the current biennium.

**Legislative Fiscal Office Recommendation:** The Legislative Fiscal Office recommends that the Emergency Board authorize the transfer of \$664,918 Other Funds expenditure limitation and two existing permanent full-time Assistant Attorney General positions (2.00 FTE) from the General Counsel Division to the Trial Division, for work related to state habeas corpus petitions filed due to the COVID-19 pandemic.

**Request:** Increase Other Funds expenditure limitation by \$674,010 and establish six permanent positions (2.00 FTE) in the Department of Justice, Trial Division to address the Department of Corrections civil litigation needs.

**Recommendation:** Approve the request with the following modifications: approve the Other Funds expenditure limitation as requested; approve position authority for one permanent Assistant Attorney General (AAG) and two limited duration AAGs (1.00 FTE), one permanent paralegal position (0.33 FTE), and one permanent Legal Secretary and one limited duration Legal Secretary (0.67 FTE).

**Discussion:** The Department of Justice, Trial Division request to increase their Other Funds expenditure limitation and position authority as a direct result of the number of pending cases from the Department of Corrections, adults in custody (AIC), seeking habeas corpus relief in state court. There are currently 219 state habeas cases pending; most of the cases are related to COVID-19.

The request is for six permanent positions, which includes three Assistant Attorneys General positions (1.00 FTE), one paralegal (0.33 FTE), and two Legal Secretaries (0.67 FTE). The agency plans to fill the positions by November 1, 2020.

The Civil Litigation section of the Trial Division is responsible for responding to petitions filed by AICs seeking habeas corpus relief from the courts. Habeas petitions can either challenge the authority for confinement or unconstitutional conditions of confinement. The most common condition brought forward is the allegation of deliberate indifference to serious medical needs. Since the COVID-19 pandemic, filings for state habeas cases have increased dramatically. Prior to the pandemic, there was an average of 13 habeas petitions filed each quarter. In the fourth quarter of fiscal year 2020, there were 95 habeas petitions filed. As of September 1, 2020, another 105 habeas petitions were filed, almost all being COVID-19 related petitions.

The Trial Division has one dedicated full-time attorney and a half-time paralegal dedicated to state habeas cases, and of recent, one full-time Legal Secretary. Currently, the Trial Division is dedicating an equivalent of three full-time positions for this increase in workload, which is creating a backlog and delay in responding to the petitions and other ongoing casework.

**Legal Reference:** Increase the Other Funds expenditure limitation established by chapter 692, section 2(7), Oregon Laws 2019, for the Department of Justice, Trial Division, by \$674,010, for the 2019-21 biennium.



**DEPARTMENT OF JUSTICE**

September 4, 2020

The Honorable Senator Betsy Johnson, Co-Chair  
The Honorable Senator Elizabeth Steiner Hayward, Co-Chair  
The Honorable Representative Dan Rayfield, Co-Chair  
2019-21 Joint Interim Committee on Ways and Means  
900 Court Street NE  
H-178 State Capitol  
Salem, OR 97301-4048

Dear Co-Chairpersons:

**Nature of the Request**

The Department of Justice – Trial Division requests \$674,010 in Other Funds expenditure limitation and position authorization for six permanent positions (2.00 FTE). The funding source is the DOJ Legal Fund with the Oregon Department of Corrections as the client agency.

**Agency Action**

The Civil Litigation Section of DOJ's Trial Division is responsible for responding to petitions filed by adults in custody (AICs) seeking habeas corpus relief in state court. Those AICs are in custody at state correctional facilities. Habeas petitions can either challenge the authority for confinement (e.g. an expired sentence) or unconstitutional conditions of confinement. The most common type of "conditions" case alleges deliberate indifference to serious medical needs, but AICs can allege any ongoing constitutional deprivation. These cases are brought against the Superintendent and can only seek injunctive (e.g. remedial) relief and release from custody. The Oregon Department of Corrections pays DOJ to respond to these petitions.

Over the years, the numbers of state habeas petitions filed on an annual basis have grown but have done so gradually. Since the COVID-19 pandemic started, however, state habeas petitions have been filed at an alarming rate.<sup>[1]</sup> Since 2012, on average, 13 state habeas petitions are filed each quarter. During the final quarter of FY 2020 (ending on June 30, 2020) 95 state habeas petitions were filed, an increase of over 700%. From July 1 – September 1, 2020, another 105 petitions have been filed. At end of FY 2018, there were 58 pending state habeas cases. At the

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<sup>[1]</sup> The Office of Public Defense Services has provided AICs with instructions and form petitions for filing these cases: <https://www.oregon.gov/opds/provider/Documents/habeas1.pdf>.

end of FY 2019, there were 74 cases pending. Currently, there are 219 state habeas cases pending.

Nearly all of this increase is from COVID-19 habeas cases. Specifically, the number of hours of legal services work spent strictly on COVID-19 habeas cases has increased from 69.6 hours in May 2020 to 389 hours in both June and July of 2020. Petitioners allege that due to their medical vulnerabilities and ODOC's allegedly deficient response to the COVID-19 pandemic, they face a substantial risk of serious harm or death, and that ODOC is deliberately indifferent to that risk.

At regular pace, the Trial Division has been able to handle the state habeas case load by dedicating one attorney entirely to the state habeas work, with the assistance of a few other lawyers picking up some state habeas cases with their other workload, approximately 1.50 positions. We also have a paralegal dedicated half time to state habeas work, for an additional .50 position. Finally, the legal secretarial work has amounted to 1 position for a total of 3 full time positions for the state habeas team.

The current workload has become overwhelming for attorneys and staff who are continuing to fall further behind in responding to the petitions, despite regularly working overtime (60 staff hours since July 1). In order to meet the current unprecedented demands on the Trial Division and to get the case load current, an additional 3 Assistant Attorneys General (1.00 FTE), 1 Paralegal (0.33 FTE) and 2 Legal Secretaries (0.67 FTE) are needed. The positions would be effective November 1, 2020.

### **Action Requested**

The Department of Justice – Trial Division requests \$674,010 in Other Funds expenditure limitation and position authorization for six permanent positions (2.00 FTE). The funding source is the DOJ Legal Fund with the Oregon Department of Corrections as the client agency.

### **Legislation Affected**

Oregon Laws 2019 Chapter 692, section 2(7).

Sincerely,



FREDERICK M. BOSS  
Deputy Attorney General

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September 4, 2020

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cc: Steve Lippold, General Counsel of the DOJ Trial Division  
William O'Donnell, DOJ Chief Financial Officer  
Jennifer Friesen, DOJ Senior Budget Analyst  
Dao Vue, DOJ Budget Analyst  
John Borden, Principal Legislative Analyst, LFO  
Michelle Lisper, Policy and Budget Analyst, BAM