

## Analysis

### Item 10: Department of Justice

#### Defense of Criminal Convictions

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**Analyst:** John Borden

**Request:** Increase the General Fund appropriation for the Defense of Criminal Convictions by \$3,117,388; increase the Other Funds expenditure limitation for the Appellate Division by \$328,554 and establish two permanent full-time positions (0.84 FTE); and increase the Other Funds expenditure limitation for the Trial Division by \$440,668 and establish three permanent full-time positions (1.26 FTE).

**Analysis:** The Department of Justice's (DOJ) Defense of Criminal Convictions (DCC) funds the cost of defending the state in cases in which sentenced offenders challenge their convictions or sentences. These are challenges to criminal convictions generally arising from cases originated by county district attorney offices. Oregon's approach has been to fund DCC expenses at the state level, using General Fund resources, and at no cost to counties, in order to provide a more uniform, consistent, and cost-effective defense for both lower court and appellate cases in state and federal courts. DCC represents the second largest source of legal services funding in the state after the Department of Human Services. Personnel and resources connected to DCC work are part of DOJ's Appellate and Trial Divisions, which bill the DCC for work on individual cases and which are budgeted and expended as Other Funds.

In general, three types of cases are funded in DCC: (1) direct criminal appeals where the offender's challenge is on alleged legal or factual errors of the trial; (2) post-conviction challenges where the offender challenges the effectiveness of counsel; and (3) federal habeas corpus where the offender challenges violations of constitutional rights in the federal courts. DCC also handles cases where the state appeals the dismissal of a criminal charge or the exclusion of evidence critical to the prosecution of a case. DCC also handles Psychiatric Security Review Board cases whereby DOJ attorneys represent the state in administrative hearings in "guilty except for insanity" cases involving a Ballot Measure 11 crime. DCC cases can be complex with some taking up to a year for briefs to be filed. Such cases can span multiple biennia.

The 2019-21 legislatively approved budget for DCC totals \$24.5 million, which is \$2.3 million less than the legislatively adopted budget due to a 2020 2nd Special Session reduction. The reduction included corresponding Other Funds reductions to the Appellate Division of \$328,554 and two permanent full-time positions (0.83 FTE) and the Trial Division of \$440,668 and three permanent full-time positions (1.25 FTE). The five positions were vacant at the time of the reduction. Of note is that the request does not include any factor related to compensation plan increases as such increases are already factored into the currently hourly or billable rate structure.

DOJ's request totals \$3.1 million General Fund for DCC and Other Funds restoration of the Appellate Division's reduction of \$328,554 and two permanent full-time positions (0.83 FTE) and the Trial Division reduction of \$440,668 and establishment of three permanent full-time positions (1.25 FTE). Since the submission of the agency's Emergency Board request, the Legislative Fiscal Office requested that DOJ re-forecast the DCC budget using a methodology consistent with what has historically been

provided to the Legislature, which resulted in a revised need of \$3.3 million; however, the agency's Other Funds and position/FTE request remained unchanged. DOJ reports having a plan to expedite the hiring of the five requested positions, if authorized by the Emergency Board.

The updated DCC estimate is a combination of surpluses and deficits across case categories, as compared to the close of session forecast on which the legislatively adopted budget was based. For example, budget surpluses or savings are reported in: (a) post-conviction - appeals; (b) federal habeas corpus - appeals; (c) criminal appeals and civil amicus; (d) capital cases - direct appeals; (e) capital cases - post-conviction trial; (f) capital cases - post-conviction relief appeals; (g) capital cases - federal habeas corpus trial; and (h) capital cases - federal habeas corpus appeals. The total surplus or savings is estimated as \$4.1 million General Fund, which is \$1.8 million more than the 2020 2nd Special Session reduction to DCC of \$2.3 million.

The updated DCC estimate is also estimating funding deficits across the following case categories: (i) direct appeals - appellate; (j) district attorney advice/publications - appellate; (k) post-conviction relief - trial; and (l) federal habeas corpus - trial. The total deficit or funding shortfall is being estimated at \$4.5 million General Fund.

While the estimated DCC case category surplus and deficit substantially offset each other, the problem that arises is that the updated DCC estimates fails to directly incorporate the 2020 2nd Special Session reductions by case category. DOJ simply presumes that the \$2.3 million General Fund reduction is needed to be backfilled plus an additional \$1.1 million General Fund in supplementary funding. Further complicating the matter is a substantive change in DOJ's methodology for estimating or forecasting the DCC caseload, which has moved from a case-based to a financial modeling approach that relies heavily upon past actual expenditures for only the current biennium.

A financial estimating approach is less preferable to a case-based forecast model due to the following limitations: (1) overstates the case counts, if a substantially completed case is associated with the next biennium; (2) understates hours worked per case, if a substantially completed case is associated with the next biennium; (3) disregards historic, multi-biennia caseload data; (4) presumes that the current biennium's actual expenditures to-date are a good predictor of expenses for the remainder of the biennium, which given the pandemic, and the 2020 2nd Special Session reductions, may not be a good assumption; and (5) weakens the nexus between the forecast and needed position/FTE authority as well as the allocation of the positions/FTE between the Appellate and Trial Divisions.

Re-forecasting the DCC caseload is a routine part of the biennial budget process in order to either identify and capture natural caseload savings or identify the potential need for supplemental funding; however, shifting to a new forecasting methodology during the middle of a biennium has proved problematic because the shift has produced unexplained deviations between the baseline forecast on which the original budget was built and the updated financial forecast. DOJ is struggling to explain what specifically is driving changes in various case categories. The agency does offer some explanations that the U.S. Supreme Court's Ramos decision (i.e., unconstitutionality of nonunanimous jury trials) is driving caseload increases in post-conviction relief cases in the Trial Division and that the new financial forecasting model is distorting the number of cases (i.e., overstating) and the average hours per case (i.e., understating).

Additionally, other than perhaps the Oregon Court of Appeals, DOJ has been unable to gauge whether Oregon's state and federal courts are able to maintain court schedules during the pandemic

nor has DOJ offered much in the way of correlation between changes in public defense caseloads and that of DCC.

This request is complicated by the fact that the Emergency Board has historically had a deference to legislative decision-making, especially those related to reductions. Setting aside the issues with DOJ's DCC estimating methodology change, substantive public safety risks may be posed to the state by not adequately funding the DCC, which is typically characterized as a "mandated" caseload. Spending less time per case increases the probability that a conviction may be overturned by the court. Delays or postponing cases can give rise to constitutional issues and potentially lead to the dismissal of cases. Declining to respond to some challenges of convictions means conceding the case and the conviction being overturned or returning cases to district attorney offices for new resentencing hearings or new trials. At a minimum, such actions may shift DCC cost into the future and may shift costs from DCC to state or federally funded courts and/or to county governments, who fund a portion of district attorney offices. Of final consideration is the need for DOJ to clear as many DCC cases as possible this biennium, within the constraints of available resources and the court system(s), as funding in the future may become less certain, even for mandated caseloads.

The variance between the adopted budget and the financial forecasts, absent better information, suggests that the DCC General Fund deficit may be closer to \$2.7 million than the reforecast amount of \$3.3 million. The Other Funds expenditure limitation request is also overstated as the limitation request was based on the original position reductions that occurred last fall. A revised estimate has the positions starting January 1st for the remaining six months of the biennium. The Legislature in 2021 will need to re-validate the DCC forecast for both the current 2019-21 biennium as well as the 2021-23 current service level. In anticipation of such requests, DOJ should undertake a concerted effort to re-evaluate how the agency forecasts the DCC caseload. This will place DOJ in a much better position to manage changes, both caseload and budgetary, that are associated with DCC.

**Legislative Fiscal Office Recommendation:** The Legislative Fiscal Office recommends that the Emergency Board allocate \$2,660,000 from the Emergency Fund to the Department of Justice, Defense of Criminal Convictions, and increase the Other Funds expenditure limitation for the Appellate Division by \$200,653 and authorize the establishment of two permanent full-time positions (0.50 FTE); and increase the Other Funds expenditure limitation for the Trial Division by \$269,679 and authorize the establishment of three permanent full-time positions (0.75 FTE) for defending the state in cases in which sentenced offenders challenge their convictions or sentences.

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**Request:** Allocate \$3,117,388 from the State Emergency Fund to the Department of Justice, Defense of Criminal Convictions; increase Other Funds expenditure limitation by \$328,544 and establish two permanent positions (0.84 FTE) for the Appellate Division; and, increase Other Funds expenditure limitation by \$440,668 and establish three permanent positions (1.26 FTE) for the Trial Division to address appeals and related challenges to criminal convictions and sentences.

**Recommendation:** Approve the request.

**Discussion:** The Department of Justice Defense of Criminal Convictions (DCC) is funded with General Fund and is used to pay expenses for the defense of state mandated cases. Both the Trial and Appellate Divisions defend the state when individuals convicted of crimes, choose to bring legal proceedings forward to obtain new trials or sentences. The expense to defend these mandated cases are charged to DCC.

After further follow-up with both the Trial and Appellate Divisions, 20 percent of the request is attributed to matters directly related to the Supreme Court ruling on *Ramos v. Louisiana*, regarding certain criminal verdicts from non-unanimous juries in the state. The balance of the request stems from an increase in post-conviction appeals, post-conviction due to the death penalty, federal and state habeas corpus cases, assistance to county District Attorneys, and other mandated caseload services. It is worth noting the charges to DCC include all legal staff billing, which includes attorneys, paralegals, legal secretaries, and investigators working on the cases.

The request for additional General Fund and position authority is a combination of an increase in projected caseload, the additional time needed to address some of the cases, and compensation increases since the 2019-21 Legislative Adopted Budget.

**Legal Reference:** Allocation of \$3,117,388 from the State Emergency Fund to supplement the appropriation made by chapter 692, section 1(5), Oregon Laws 2019, for the Department of Justice, Defense of Criminal Conviction for the 2019-21 biennium.

Increase the Other Funds expenditure limitation established by chapter 692, section 2(2), Oregon Laws 2019, for the Department of Justice, Appellate Division, by \$328,544, for the 2019-21 biennium.

Increase the Other Funds expenditure limitation established by chapter 692, section 2(7), Oregon Laws 2019, for the Department of Justice, Trial Division, by \$440,668, for the 2019-21 biennium.



## DEPARTMENT OF JUSTICE

November 4, 2020

The Honorable Senator Peter Courtney, Co-Chair  
The Honorable Representative Tina Kotek, Co-Chair  
2019-21 Joint Emergency Board  
900 Court Street NE  
H-178 State Capitol  
Salem, OR 97301-4048

Dear Co-Chairpersons:

### **Nature of the Request**

The Department of Justice requests \$3,117,388 in General Fund support for the Defense of Criminal Convictions, along with corresponding increases in expenditure limitations and position authorization in the Appellate and Trial Divisions.

### **Agency Action**

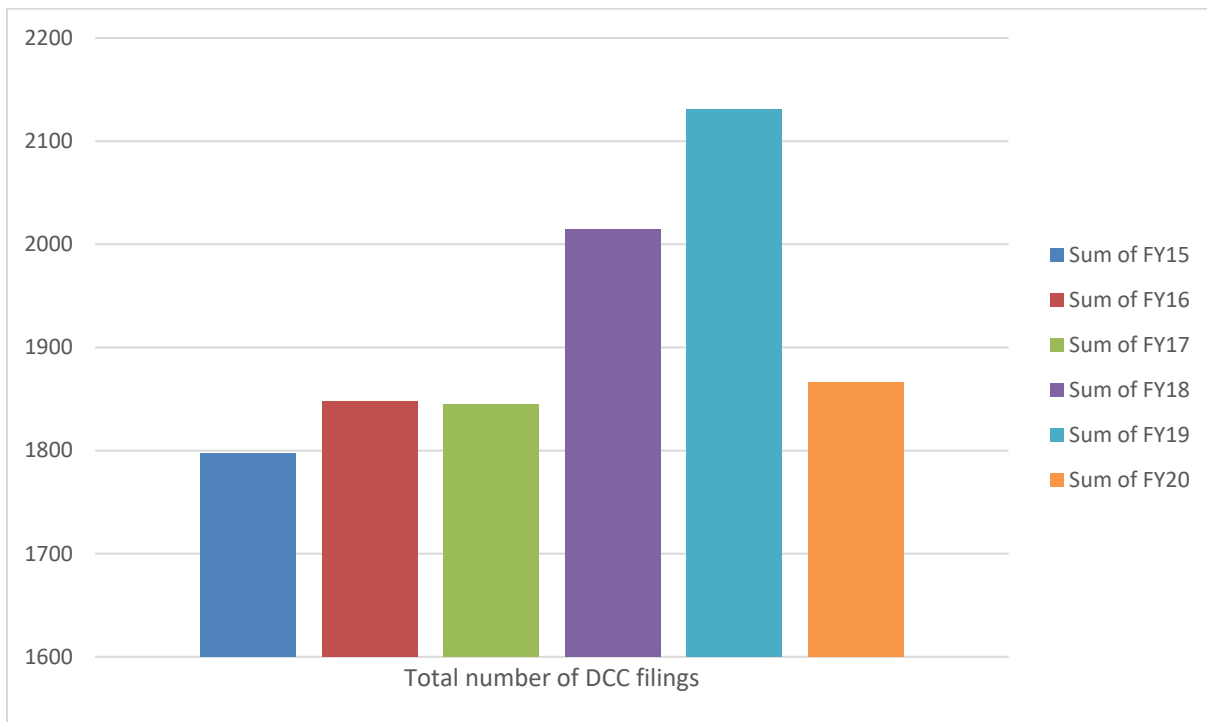
The Defense of Criminal Convictions (DCC) program pays for the work performed by the Department of Justice's Appellate and Trial Divisions when they respond to appeals and related challenges to criminal convictions and sentences. Individuals who were convicted of crimes have a right to bring various kinds of legal proceedings seeking to obtain new trials or sentences. The purpose of the DCC program is to allow the state to defend convictions and sentences that the state's prosecutors properly obtained against those challenges, and to work with the courts to secure just and appropriate outcomes when the challenges have merit. The DCC program improves the functioning of the criminal justice system and is critical to public safety.

The legislature has designated the DCC work as a mandatory caseload, recognizing that the Department of Justice has no control over how many appeals and other challenges are filed and that a fair system of criminal justice requires a timely and considered response to each one. The number and complexity of those cases are driven by the decisions of individuals convicted of crimes to contest those convictions.

The consequences of not funding this work adequately—thereby preventing the Department of Justice from performing all the needed work—are dire. If the Department cannot respond in a timely and considered way to each case, it is much more likely that the courts will erroneously overturn convictions and sentences that they should have upheld. In some cases, individuals properly convicted of serious crimes are likely to walk free, and in other cases, the state will have to invest even more resources in re-prosecuting the crime. The Department's failure to

respond adequately also places unfair burdens on the courts and will add to the delays in the criminal justice system. The Oregon Court of Appeals publicly “admonished” the Department last year for not fully briefing a criminal appeal, saying that it “risks casting a cloud over perceptions of fairness and impartiality.” *State v. Kamph*, 297 Or App 687 (2019).

The roughly \$24.5 million currently appropriated to the DCC is not enough to cover the mandated work that we project for the rest of the 2019-2021 biennium. Even before the recent budget cuts, we projected that there would be a budgetary shortfall this biennium. And then during the second special session, the legislature imposed a cut of roughly \$2.3 million to the DCC as well as cutting a total of five DCC-related positions in the Appellate and Trial Divisions. But there has been no corresponding decrease in the work that the Department needs to perform for this mandated caseload. Cases remain at historically high levels: In FY 2018, new filings were up my more than 9%, and in FY 2019 they increased another 5%. Although FY 2020 filings returned closer to FY 2017 levels, most of our DCC work lags the filings by a couple of years—meaning that we will mostly be working on cases filed in FY 2018 and 2019 for the rest of the biennium, as the defense bar works its way through the enormous backlog from those years.



Our most recent projections reflect that the DCC will need \$3,117,388 more funding for the remainder of the biennium, which reflects over 14,500 hours of attorney work on those cases. We have already taken extraordinary steps to cut our DCC expenditures, such as reducing the resources devoted to editing Oregon Supreme Court briefs and preparing for oral arguments in

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November 4, 2020  
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the Court of Appeals. Those steps carry with them risks, and without additional funding we will be forced to take much more drastic action that will likely cause lasting damage to the criminal justice system.

To prevent those consequences, we request \$3,117,388 in General Fund support for the DCC, along with corresponding increases to the expenditure limitations and personnel authorization for the Appellate and Trial Divisions.

### **Action Requested**

The Department of Justice – Defense of Criminal Convictions program requests \$3,117,388 in General Fund support. The Department of Justice – Appellate Division requests \$328,554 in Other Funds expenditure limitation and position authorization for two permanent positions (.84 FTE) to restore the budget reduction made during the August 2020 Special Legislative Session. The Department of Justice – Trial Division requests \$440,668 in Other Funds expenditure limitation and position authorization for three permanent positions (1.26 FTE) to restore the budget reduction made during the August 2020 Special Legislative Session. The funding source for both Other Funds requests is the DOJ Legal Fund with the Defense of Criminal Convictions fund as the client agency.

### **Legislation Affected**

Oregon Laws 2019, chapter 692, sections 1(5), 2(2), and 2(7); Oregon Laws 2020 Second Special Session, chapter 9, sections 23, 24, and 25.

Sincerely,



FREDERICK M. BOSS  
Deputy Attorney General

cc: Benjamin Gutman, Solicitor General, DOJ Appellate Division  
Steve Lippold, Chief Trial Counsel, DOJ Trial Division  
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