

## ANALYSIS

### Item 3: Public Defense Services Commission Unrepresented Defendant-Persons Crisis

---

**Analyst:** John Borden

**Request:** Allocate \$10 million General Fund from the Emergency Board for the unrepresented defendant/persons crisis.

**Analysis:** The Public Defense Services Commission (PDSC) is requesting \$10 million General Fund for unspecified purposes to deal with the current unrepresented defendant/persons crisis.

#### Systemic v. Unrepresented Defendant/Persons Crisis

The public defense system in Oregon is facing two crises. The first is a systemic crisis within PDSC itself and which is currently under study by a Three Branch Workgroup. The second is the unrepresented defendant/persons crisis for which PDSC is seeking supplemental funding. The immediacy of the unrepresented defendant/persons crisis is in part a derivative of the systemic crisis facing the state's public defense system. In addition, the unrepresented defendant/persons crisis is not a national crisis or a federal crisis or a city or justice court crisis, but a circuit court crisis and one that is unique to only two or so other states that also face systemic crises in their public defense systems. The unrepresented defendant/persons crisis, while expanding, is also not a statewide crisis impacting all counties.

While there has always been, and will continue to be, a small percentage of unrepresented defendant/persons awaiting the appointment of counsel, the current crisis is different in terms of magnitude and duration, which means that the crisis has progressed to a level that could result in the active denial of counsel, which places the defendant/persons (and the state) in legal jeopardy and poses a threat to public safety. Active denial of counsel and a criminal defendant/person's right to speedy trial leads to the violation of the constitutional rights of a defendant/person under the Sixth and Fourteen Amendments to the United States Constitution. The state can, and currently has been, sued for denying indigent defendant/persons state-funded counsel. At present, one lawsuit has been filed against the state and awaits trial.

#### Causation

The cause of the unprecedented unrepresented defendant/persons crisis facing the state is multifaceted, but understandable and definable. However, most key variables are presumed rather than quantitatively determined, which challenges the accuracy of the problem definition and resulting options for resolution.

The current crisis is driven by a deficit in attorney capacity. The deficit can be largely explained by the backlog of caseloads arising from the pandemic adding to existing caseloads; however, other key factors also come into play such as: (1) increasing caseloads due to higher rates of crime for primarily serious crimes; (2) changes to PDSC contract delivery model that reduced attorney caseload requirements; (3) provider attorney compensation; and (4) increased complexity of cases (e.g., clients with acute behavior health issues; electronic discovery; body camera footage, etc.). To a lesser extent, contributors also include: changes in law; macroeconomic factors, such as increased inflation impacting provider's cost of business; and what has been a more competitive marketplace for legal services, which includes the

hiring of a large number of public attorneys both within and outside the public defense system (e.g., PDSC administration staff, Parent Child Representation Program, Department of Justice - Child Advocacy, etc.). Combined, these factors have led to an inability of providers to recruit, hire, and retain public defense counsel to meet caseload demands.

#### Quantification of the Crisis

In the fall of 2021, PDSC initially became aware of a growing issue with unrepresented defendant/persons. By the winter of 2022, after no intervening action being taken by the Commission, a crisis developed that predominately impacted four counties (Lane, Marion, Multnomah, Washington) and has since spread to 10 additional counties. The crisis impacts defendants who are both in the physical custody of the local jurisdiction and defendants released, with conditions and on their own recognizance, at the direction of a circuit court judge. Persons eligible for court-appointed counsel can be either adult or juvenile and fall under a slate of case-types, including: major and minor felonies, misdemeanors, contempt, civil commitment, habeas, post-conviction relief, delinquency, and dependency (i.e., there also have been a few unrepresented persons in non-criminal cases). Out-of-custody defendant/persons eligible for court-appointed counsel include both those on pre-trial release, probation violations, and non-criminal cases. The following table summarizes the extent of the crisis over time, including a possible increase related to the out-of-custody active warrant population.

<b>Unrepresented Defendant/Persons</b>	<b>January 2022</b>	<b>August 31, 2022*</b>	<b>September 30, 2022*</b>	<b>October 31, 2022*</b>	<b>November 14, 2022*</b>
In-custody	22	45	37	31	35
Out-of-custody - Pretrial	23	762	746	679	693
Out-of-custody - Probation Violation	--	34	32	26	37
Non-Criminal Case	--	47	37	36	34
<b>Sub-Total (active)</b>	<b>45</b>	<b>888</b>	<b>852</b>	<b>772</b>	<b>799</b>
Out-of-custody - Active Warrant**	--	370	428	538	555
<b>Total (possible)</b>	<b>45</b>	<b>1,258</b>	<b>1,280</b>	<b>1,310</b>	<b>1,354</b>
Impacted Counties	4	14	12	12	14

*\*source: Oregon Judicial Department (OJD)*

*\*\*Individuals who were previously unrepresented but did not appear in court and are now in warrant status. These individuals do not need an attorney until they are apprehended and appear in court.*

Alternatively, PDSC believes that the agency has a statewide deficit of approximately 51.21 Maximum Attorney Caseload (i.e., 1.00 full-time equivalent), after taking into the legislature's emergency funds (discussed below), and which is currently fully funded within PDSC's 2021-23 legislatively approved budget. Virtually the entire deficit is attributable to adult criminal cases but does include a few juvenile cases. The deficit is most pronounced in Coos, Douglas, Jackson, Josephine, Klamath/Lake, Linn, Marion, Multnomah, Polk, Umatilla/Morrow, and Washington counties.

The impact of the various initiatives undertaken by the Commission, as discussed below, have yet to achieve complete implementation or have a significant impact on the crisis. However, that is not to say that there has been no favorable impact, which has been the case for at least the temporary increase in

the hourly rate for representation not pursuant to a contract of in-custody individuals from \$75-\$105/hour to \$158/hour.

#### Response to Unrepresented Defendant/persons Crisis

The response to the unrepresented defendant/persons crisis can be categorized as either being either: (a) legislatively directed supplemental funding requested by PDSC; (b) administratively directed actions of the Commission and self-funded within PDSC's existing 2021-23 legislatively approved budget; and (c) administrative actions of various public safety agencies within current state or local budgeted resources.

In early 2022, upon the urging of Chief Justice of the Oregon Supreme Court, the Governor, and Legislative Leadership, PDSC proposed a plan to address the unrepresented defendant/persons crisis. The 2022 Legislature funded PDSC's plan by appropriating \$12.8 million General Fund, on a one-time basis, to address the current backlog of unrepresented defendant/persons in Multnomah, Washington, Marion, and Lane counties and provide increased attorney capacity for the remainder of the biennium for the procurement of indigent defense counsel. PDSC's February 2022 plan was quickly developed in reaction to growing concern, and as such, the agency has deviated significantly from the plan presented to, and funded by, the Legislature. It is unclear what PDSC has implemented with this funding, as there has been no revised plan submitted to the Legislature or the Emergency Board. Since February, PDSC has obligated only \$6.9 million (or 54%) of the \$12.8 million appropriation leaving \$5.8 million unspent.

Administratively, the Commission has authorized, from existing budgeted resources totaling \$14.4 million General Fund, the following six discrete actions: (1) increase temporarily the hourly rate for non-contract attorneys from \$105/hour to \$158/hour (\$2.1 million General Fund); (2) fund temporarily training, supervision, and investigation costs for all public defender offices (\$7.5 million General Fund); (3) increase temporarily the hourly rate for attorneys that are contracted for less than 1.00 FTE caseload from \$105/hour to \$158/hour (\$1.5 million General Fund); (4) provide, temporarily, up to two incentive payments for public defender offices, who did not receive emergency funding, to hire new attorneys (\$800,000 General Fund); (5) provide, temporarily, up to two incentive payments for consortia and private attorney offices to hire new attorneys (\$2.4 million General Fund); and (6) increase temporarily the hourly rate for investigators who work on cases in which the attorney is representing an individual who had been in-custody and unrepresented from \$40/hour to \$75/hour (\$225,000 General Fund). The Commission limited the effective duration of these initiatives. Eligibility for the increased hourly attorney and investigator rates expires on December 31, 2022; however, the increased hourly costs will continue into next biennium, as they are authorized until the conclusion of a case. The remaining initiatives sunset no later June 30, 2023, or at the conclusion of the current biennium. PDSC has not provided an estimate of the 2023-25 cost. Total costs are also understated, as PDSC has been unable to estimate the associated non-attorney expenses (e.g., transcriptionists, investigators, interpreters, mitigators, social workers, psychologists, polygraph examiners, and forensic experts, such as firearm experts, arson experts, deoxyribonucleic acid (DNA) experts, and medical experts). PDSC has not reported discretely on the budget and actual expenditures related to these initiatives.

These actions were done with the explicit direction by the Commission that the actions could be fully absorbed or self-funded within PDSC's 2021-23 legislatively approved budget and that no supplemental funding would be required of either the Emergency Board or the Legislature. However, as noted previously, these actions are premised on either the Emergency Board or the Legislature rebalancing General Fund savings to legally pay for such unbudgeted expenditures.

Lastly, other public safety system partners, including district attorneys and the court system, have been collaborating to identify actions to alleviate, either temporarily or permanently, the unrepresented defendant/persons issue; however, this has been conducted in what appears to be a de-centralized rather than statewide/impacted counties approach. Such initiatives include early resolution/settlement conferences (e.g., Multnomah County's resolution docket, Washington County's Wingspan program, and Marion County's 'Grand' resolution docket).

At present, the financial commitment to the crisis totals \$27.2 million General Fund or about \$49,000 per unrepresented defendant/person (based on 555 defendant/persons as of November 14, 2022).

### Emergent Issues

Current reporting on the number of unrepresented defendant/persons reflects that the current crisis is far from being resolved and will likely extend into the (intermediate) future and may worsen due to unresolved or not fully resolved causation issues discussed previously. More specifically, at least one major public defense provider has expressed concern that contracted caseloads may be met prior to the end of the biennium, which would limit the provider's ability to take on additional cases. This portends the possibility of another wave or increase in unrepresented defendant/persons in the late winter/spring of 2023. In addition, some of the backlog of cases that have or are proceeding through circuit courts may eventually impact state and public defense at the appellate court-level.

### Analysis

The Legislative Fiscal Office (LFO) recommendation is challenged by the absence of a specific proposal by PDSC to further address the unrepresented defendant/persons crisis and support how the agency's \$10 million General Fund request was derived. LFO also remains concerned about the absence of a comprehensive plan by the Commission to address the crisis. Ad hoc decision-making may lead to a further erosion of the public defense system as inequities between the various providers arise, as well as a potential return to provider contract financial incentives that come at the expense of the quality representation for defendant/persons (e.g., contact providers under 1.00 FTE incentive to take on hourly cases). In addition, the Commission has had little substantive discussions surrounding quality of representation and confirming the verification of indigency, which is a predicate for publicly funded services.

Absence of a plan and the general unobtainability of public defense counsel may result in PDSC being unable to expend the \$10 million before the end of the biennium. However, PDSC could undertake one-time efforts to indirectly add provider attorney capacity (e.g., funding case managers, paralegals to increase existing attorney capacity). The Commission could also examine other options within existing budget authority to increase provider attorney capacity, such as diverting, temporarily, or partially, provider attorneys from specialty courts to the unrepresented defendant/persons crisis.

PDSC is requesting an increase of \$10 million General Fund for the Trial Criminal Division (TCD) appropriation, which limits the expenditure of funds to provider contacts, if approved by the Commission. Stated differently, the supplemental appropriation does not provide PDSC with any other means to alleviate the unrepresented defendant/persons crisis (e.g., hourly rate increases, non-attorney expenses, etc.). Additionally, PDSC's Financial Update and Rebalance report (Emergency Board Item #2) notes that the TCD has a projected surplus or unobligated or uncommitted \$12.6 million General Fund (or \$7.6 million General Fund, if the agency's rebalance request is approved), which would be in addition to this \$10 million request. If the unrepresented crisis continues to persist, as the crisis has to-date, and devolves, then the risk is that PDSC may be unable to await the 2023 legislative session early session

omnibus budget measure for supplemental funding. It is also important to note that since PDSC is statutorily exempt from allotment authority, the Emergency Board does not have the option to request the Department of Administrative Services unschedule the requested funds pending the receipt of a plan from PDSC.

Although PDSC has not provided a plan related to this request, LFO is recommending approval of the request due to the risk that the unrepresented defendant/persons crisis will require additional funding to ensure the constitutional rights of access to counsel for indigent defendant/persons prior to the passage of the 2023 early session omnibus budget measure.

**Recommendation:** The Legislative Fiscal Office recommends that the Emergency Board allocate \$10 million General Fund from the Emergency Fund, as a one-time increase, to the Public Defense Services Commission to establish an appropriation for the unrepresented defendant/persons crisis, with instructions that the Commission, prior to the obligation or expenditure of the appropriation, provide to the Senate President and the Speaker of the House a written report detailing the Commission's plan to expend the \$10 million to resolve the unrepresented defendant/persons crisis. The Commission is also directed to report to no later than January 31, 2023 to the Joint Committee on Ways on Means on the unrepresented defendant/persons crisis.

### 3

## Public Defense Services Commission Gibson

---

**Request:** Allocate \$10.0 million from the State Emergency Fund for the Public Defense Services Commission to address the continued crisis of unrepresented persons, increased caseloads, and the recruitment and retention of attorneys and support staffing within the Oregon public defense system.

**Recommendation:** The Public Defense Services Commission is not under executive budgetary authority.

**Discussion:** The Public Defense Services Commission (PDSC) requests \$10.0 million General Fund in the Trial Criminal Division to supplement funding invested in the crisis of unrepresented persons. The commission does not commit to a specific expenditure purpose, nor is a specific outcome being delivered. However, the commission does commit to spend the funding on measurable efforts directly tied to the ongoing crisis of unrepresented individuals, increased caseloads, and the recruitment and retention of legal staff. Some potential expenditure options include providing continued legal education, improving legal technology systems, funding professional liability insurance, developing law student internships, and funding contracts with retired judges.

The commission approved increased contract capacity in the Fiscal Year 2023 contracts; however, the increase in capacity has been slow to generate additional public defenders. It is likely money alone is not the solution. PDSC has enough savings to increase the number of providers, however the ability to gain additional capacity remains limited by provider choice. Over the past few months, the commission has implemented several targeted initiatives to incentivize new legal capacity growth, including the following:

- Increase the hourly pay rate to \$158 per hour for attorneys and \$75 per hour for investigators for cases with unrepresented persons currently in custody.
- Increase training, supervision, and support funding by \$7.5 million to non-profit public defender offices.
- Provide \$40,000 in one-time funding to non-profit public defender offices that hire additional contract attorneys in targeted areas.

As of the October 2022 projections, PDSC is reporting an overall savings of \$15.0 million General Fund.

**Legal Reference:** Allocate \$10,000,000 from the State Emergency Fund to supplement the appropriation made by chapter 444, section 1(4), Oregon Laws 2021, for the Public Defense Services Commission, Trial Criminal Division for the 2021-23 biennium.



# Oregon

## Public Defense Services Commission

*Office of Public Defense Services*  
198 Commercial St. SE, Suite 205  
Salem, Oregon 97301-3489  
Telephone: (503) 378-2478  
Fax: (503) 378-4463  
[www.oregon.gov/opds](http://www.oregon.gov/opds)

October 24, 2022

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

Dear Co-Chairs:

### **Nature of the Request**

The purpose of this letter is to request \$10 million of General Fund for the Oregon Public Defense Services Commission (PDSC) to address the continued crisis of unrepresented persons, increased caseloads and the recruitment and retention of attorneys and support staffing within the Oregon public defense system.

### **Agency Action**

The State of Oregon is on the verge of a constitutional crisis as it pertains to the issue of providing legal representation to individuals who are financially eligible for court-appointed counsel, which is evidenced by the current class action lawsuit that has been filed against the state and the PDSC. Although indigent representation is a multifaceted problem, from the PDSC perspective the state does not currently have enough resources to meet the needs for representation. There are many arguments as to how this situation has manifested, however, one cannot ignore the fact that this is a national conversation and that the only reasonable cure is structural reform. Since structural reform is not possible at this time, the PDSC has introduced what the preliminary costs of where this reform can start in its recently submitted 2023-25 Agency Request Budget, but that does not address the immediate needs that currently exist.

In attempting to address the immediate problems, the PDSC has, to date and with the assistance of the Oregon Legislature, taken the following actions: increased the hourly rate of pay to \$158 per hour for non-contract attorneys who accept cases for unrepresented persons who are currently in custody; provided \$7.5 million in supplemental dollars for training, supervision, and support staff to non-profit public defender offices; increased the hourly pay rate for investigators who work on the \$158 per hour cases; authorized \$40,000 in supplemental dollars for the addition of contract attorneys in targeted areas; and provided \$12.8 million dollars for the addition of contract attorneys and staffing in targeted areas.

Subsequently, the PDSC humbly requests \$10 million to support the continued efforts associated with the ongoing crisis of unrepresented individuals, increased caseloads and the recruitment and retention of attorneys and support staff. The PDSC, through ongoing communication with stakeholders and staff and a lack of full resolution of the problems associated with a lack of sufficient attorney capacity, has ascertained that the above actions are clearly not enough and is requesting the additional funding so that it can continue the assault on the crisis and to provide stop gap solutions to mitigate the issues. The PDSC has made various decisions on initiatives aimed toward increasing capacity and to stop the bleeding of resources. These initiatives are intended to provide an environment where attorneys will stay in the system despite the overburdening and ever-growing caseloads, need for support staffing and the issue of under compensation for services.

The conversation around providing one-time payments or across-the-board increases to all entities may be popular and enticing. However, the PDSC believes that all efforts should be focused on recruiting additional attorneys and retaining existing attorneys and that neither of those goals can be achieved by simply providing additional funding to entities without specific conditions. Such additional funding this biennium could set up false expectations and create further hardship for providers if for any reason it is not continued. Efforts in this biennium should be measurable and tied specifically to helping solve the current crisis.

What could prove more valuable are efforts aimed at improving the overall environment in which public defense providers work. The PDSC would like to use the additional funding to partner with providers, vendors, and stakeholders to create solutions that can make the work more feasible in the near term. Some of the current ideas are, creating and providing without charge Continuing Legal Education opportunities for all attorneys, funding Professional Liability Insurance, upgrading Information Technology Systems, funding temporary staff additions, and funding internships for law school students so that they can receive the experience to develop a further interest in public defense. Lastly, the PDSC has directed the agency to explore development of a program to contract with retired judges and/or retired public defense providers to supervise attorneys from civil law firms. Such a program would likely enhance the number of available attorneys qualified to handle public defense cases and expand the wider legal community's understanding of the critical role public defense providers play in Oregon's public safety system.

The PDSC understands that this is a very unconventional request as there is no black and white deliverable that is being presented. This funding is designed to build trust and focus the conversation on partnership, empathy, and understanding. This funding will help build community, bridge the gaps of dissent and disenfranchisement within the public defense community, and carry the larger issues forward, as the topics of reform and increased compensation are continued by the Commission into the 2023 Legislative Session. These future changes will be very complex and costly, so an investment in trust to help to prepare the enterprise now will be beneficial later.



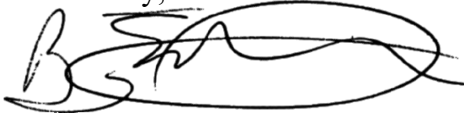
**Action Requested**

The Public Defense Services Commission requests appropriation \$10 million General Fund and expenditure authority to the Public Defense Services Commission Trial Criminal Division.

**Legislation Affected**

Oregon Law 2021 Chapter 444, section 1 (4), \$10,000,000

Sincerely,

A handwritten signature in black ink, appearing to read 'B. DeForest', with a large, sweeping loop at the end.

Brian E. DeForest  
Deputy Director

cc:

Amanda Beitel, Legislative Fiscal Officer  
John Borden, Principal Legislative Analyst, LFO  
George Naughton, Chief Financial Officer  
Wendy Gibson, Policy and Budget Analyst, CFO