

ANALYSIS

Public Defense Services Commission Unrepresented Defendant/Persons Crisis

Analyst: John Borden

Request: Acknowledge receipt of a revised report.

Analysis: The Public Defense Services Commission (PDSC) was directed by the Emergency Board in December of 2022 (Item #3) to report to no later than January 31, 2023 to the Joint Committee on Ways on Means on the unrepresented defendant/persons crisis. After reporting to the Joint Committee on Ways and Means - Public Safety Subcommittee (February 2, 2023), material discrepancies were identified in PDSC's report that necessitated the resubmission of the report.

In December of 2022, PDSC requested \$10 million in supplemental General Fund to address an urgent funding need related to the unrepresented defendant/persons crisis in the current biennium; however, PDSC's request was not accompanied by an expenditure plan. The Emergency Board approved supplemental funding even with this deficiency 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.

The Emergency Board, after allocating the \$10 million General Fund to PDSC on a one-time basis, directed that the Commission, prior to the obligation or expenditure of a \$10 million allocation, to 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 crisis. PDSC provided the requested report on January 13, 2023, and after receiving no further direction, the Commission voted on January 19, 2023 to implement the agency's proposed supplemental crisis funding plan. The Commission, however, did not approve the revised crisis funding plan's submission to the legislature.

Quantification of the Crisis

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. Since January 2022, the crisis has expanded from four to 20 counties and the number of in-custody defendants/persons has increased from 45 up to potentially 86.

PDSC notes that a portion of the increase is due to a change in the way in which Judicial Department defines an in-custody unrepresented person. Starting in December of 2022, the Judicial Department began counting persons on the in-custody unrepresented list if they are in-custody in one county where they have a lawyer with a hold from another county where they do not have a lawyer. To date, 11 of the

persons who are in custody and unrepresented have a court appointed lawyer on at least one of their cases in one county.

Unrepresented Defendant/Persons	January 2022	August 31, 2022*	September 30, 2022*	October 31, 2022*	November 14, 2022*	January 31, 2023*	February 28, 2023*
In-custody	22	45	37	31	35	65	86
Out-of-custody - Pretrial	23	762	746	679	693	631	658
Out-of-custody - Probation Violation	--	34	32	26	37	49	45
Non-Criminal Case	--	47	37	36	34	38	62
Sub-Total (active)	45	888	852	772	799	783	851
Out-of-custody - Active Warrant**	--	370	428	538	555	559	610
Post-Disposition	--	--	--	--	--	--	3
Total (possible)	45	1,258	1,280	1,310	1,354	1,342	1,464
Impacted Counties	4	14	12	12	14	16	20

*source: Oregon Judicial Department (OJD); however, past data is as of the specified date and has not been updated.

**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.

Impact of Commission-Approved Initiatives

Previously, PDSC reported in December of 2022 that the agency has a statewide deficit of approximately 51.21 Maximum Attorney Caseload (MAC or 1.00 full-time equivalent) for mostly adult criminal cases, after taking into consideration the legislature’s emergency funding from February of 2022 (\$12.8 million General Fund), and which is fully funded within PDSC’s 2021-23 legislatively approved budget.

Current reporting by PDSC indicates that this deficit has been reduced by 41.67 MAC to only 9.54 MAC due to the filling of vacant contracted positions, success of various unrepresented defendant/persons crisis initiatives, and the letting of new contracts. The impact of this added capacity has yet to be reflected in the number of unrepresented defendants/persons awaiting representation; however, it is important to note this new capacity’s qualification level may be limited to primarily to misdemeanor cases. Eventually, this new capacity, given experience, may be up qualified to handle felony caseloads.

Supplemental Crisis Funding Plan

PDSC’s supplemental crisis funding plan for *one-time* funding includes six new initiatives, which are in addition to the six crisis initiatives previously approved and implemented by the Commission. All six new initiatives are slated to sunset on June 30, 2023, or the conclusion of the biennium, with the exception of any hourly cases that continue into the 2023-25 biennium. The 2023-25 biennium cost related to these carryover cases is estimated to be \$3.4 million General Fund.

The following table outlines PDSC’s original supplemental crisis funding plan, dated February 2, 2023, versus the Commission’s revised plan, dated February 23, 2023.

#	PDSC's Supplemental Crisis Funding Plan	Original Plan	REVISED 2021-23	REVISED 2023-25
	2021-23 One-time Emergency Board Allocation for Crisis Funding (December 2022)	\$10,000,000	\$6,638,419	\$3,361,581
1	Add a new, five-tiered hourly rate structure with rates varying by \$125 to \$200 per hour depending on case type.			
a)	\$200 per hour for murder and Jessica's Law cases.	\$2,530,640	\$445,612	\$2,085,028
b)	\$175 per hour for Ballot Measure 11 and felony sex offense cases.	\$1,397,774	\$786,247	\$611,527
c)	\$164 per hour for Class A and B felony, juvenile dependency, termination-of-parental-rights, juvenile delinquency, habeas corpus, post-conviction relief, civil commitment, and Psychiatric Security Review Board cases.	\$449,396	\$449,396	--
d)	\$158 per hour for Class C felony and felony drug possession cases.	\$1,200,187	\$1,200,186	--
e)	\$125 for misdemeanors [not includes in report]	\$21,338	\$21,338	--
2	Statewide retention incentive payments totaling \$15,000 per full-time attorney, with 12.5% of the funds dispersed each month between February and May 2023 and 50% of the funds dispersed in June 2023. Receipt of retention incentive payments would be conditioned on contractors being current in their caseload reporting obligations and reporting back to PDSC about how the funds were spent, whether on attorney compensation, staff compensation, additional staff hours, or other overhead and expenses (440.12 adult criminal and 100.27 juvenile/non-Parent Child Representation Program = 540.39 MAC x \$15,000 = \$8.1 million, of only \$2.1 million funded by supplemental crisis funding plan with remaining \$6 million self-funded by budget savings).	\$2,105,800	\$2,105,800	--
3	Supervised Civil Bar Attorney Program for civil or private bar attorneys to provide uncompensated compensated at \$105/hour for legal representation in misdemeanor cases. Attorneys shall be supervised by contracted Supervising Attorneys who provide oversight of attorneys appointed to represent financially eligible persons in misdemeanor cases.	\$394,200	\$395,000	--
4	Hold in reserve a portion of the appropriation to augment any existing initiative that proves successful in reducing the unrepresented defendant/persons crisis.	\$2,500,000	\$518,955	--
5	Increased hourly rate for investigators (\$75/hour)		\$421,441	\$251,466
6	Nonroutine expenses		\$294,444	\$413,560
	Total	\$10,599,335	\$6,638,419	\$3,361,581
	Difference from approved budget (overage)	+\$559,335	--	--

Material changes from the original plan include:

- Balances to the \$10 million allocation;
- Assumed \$3.4 million of the allocation will not be expended in the 2021-23 biennium but carried forward into the 2023-25 biennium;
- Reduces in the contingency reserve from \$2.5 million to \$518,955;
- Adds associated nonroutine 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);
- Adds an increased to the investigator hourly rate (application of an earlier crisis program increase);
- Modifies the Supervised Civil Attorney Program from uncompensated to compensated; and
- Aligns with rebalance actions in the 2021-23 early session omnibus measure (HB 5045, 2023).

Fundamentally, the concern with PDSC's revised crisis plan is that the Emergency Board unknowingly

approved what was expected to be one-time crisis funding for the 2021-23 biennium, when in fact \$3.4 million (or 34%) was for the 2023-25 biennium. Emergency Board actions are to fund future biennia costs, but current biennium emergencies. PDSC relied upon the fact that, by statute, the agency retains unspent General Fund carryforward (i.e., reversions) at the end of each biennium or that the agency can repurpose the savings. This was never made evident to the Emergency Board.

Apart from the \$10 million in supplemental crisis funding, the Commission approved using \$6 million of projected General Fund savings in the Trial Criminal Division's (TCD) 2021-23 legislative approved budget to increase further the retention incentives to existing contract attorneys (Table Item #2). When combined with the \$2.1 million in crisis funding, the total amount for contract attorney retention incentives is \$8.1 million General Fund. At the time of this analysis, PDSC was unable to provide updated current biennium financial projects (budget vs. actuals) in support of what savings may be available to the agency to fund the \$6 million component of the crisis funding plan.

The quantification of the impact of the new initiatives to reduce unrepresented defendant/persons crisis was left unspecified by PDSC. In addition, aside from confirming that attorneys accepting appointment on unrepresented persons' cases meet the minimum qualification standards for each case type, the Commission has had no discussions surrounding quality of representation and continues to rely upon the circuit courts to confirm the verification of indigency, which is a predicate for publicly funded services. The continued lack of quality standards related to the crisis, especially given the legislature's investment in a Compliance, Audit, and Performance Division, is disconcerting. The legislature not only wants to know that moneys are being appropriately and timely spent to resolve the crisis, but that outcomes are being achieved for the unrepresented defendant/person population (i.e., assurance of adequacy of counsel).

The Commission has now been provided \$22.8 million in supplemental funding for the unrepresented defendant/persons crisis by the legislature (\$12.8 million) and the Emergency Board (\$10 million) this biennium and has committed another \$20.4 million in savings from the agency's 2021-23 legislative approved budget for a total commitment to the crisis of \$43.3 million General Fund. The financial commitment equates to an estimated \$51,000 per unrepresented defendant/person (based on 851 defendant/persons as of February 28, 2023).

Continued concern exists that PDSC is not reporting discretely on the budget, actual expenditures, and outcomes related to each of the Commission unrepresented defendant/persons crisis initiatives. There exists the possibility that the agency has overcommitted, or double-counted, General Fund savings used to fund the crisis. If PDSC projected savings fail to materialize, the agency will be at risk of overspending the agency's 2021-23 current law budget. Under such a scenario, PDSC does not have the ability to deficit spend and immediate, remedial budgetary action would be required by the Commission, which could compromise Commission-approved crisis funding initiatives.

Additional concern remains regarding the absence of a comprehensive plan by the Commission to address the crisis as well as the absence of any formal convening by the Commission of public safety system partners to bring a standardized focus to the crisis, such as is commonly done when the state has faced other extraordinary crises (e.g., wildland firefighting).

Emergent Issues

Current reporting on the number of unrepresented defendant/persons reflects evidence 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. With this said,

prior concerns regarding contract provider capability running out prior to the end of the biennium appear to have lessened, as some providers are now reporting or forecasting excess capacity in current biennium contracts and the ability to take on additional cases; however, other providers may still attain contract capacity prior to the end of the biennium, which would limit such provider's ability to take on additional cases.

Concern also exists around cases related to the Oregon Supreme Court ruling in *Watkins v. Ackley* (December 2022). This ruling applies the U.S. Supreme Court ruling in *Ramos v. Louisiana* retroactively to nonunanimous jury convictions and allows for post-conviction relief of cases challenging their nonunanimous jury conviction. Persons with nonunanimous jury felony conviction have up to two years from the date of the *Watkins v. Ackley* court decision to challenge their conviction. At present, PDSC estimated that there are 225 to 250 existing post-conviction relief cases, with approximately 83 possibly returning for new trial in the next 60 days. The total number of post-conviction case, and their timing, is unknown at this time, but could total up to 2,000 cases.

The 2021-23 legislatively approved budget for PDSC already included \$1.9 million General Fund for the U.S. Supreme Court ruling in *Ramos v. Louisiana* for only those persons currently in custody. The 2023 Legislature is anticipated to provide supplemental funding to PDSC for *Watkins v. Ackley* cases.

Legislative Fiscal Office Recommendation: The Legislative Fiscal Office recommends acknowledging receipt of the resaved report.

Public Defense Services Commission Gibson

Request: Revised report on December 2022 Emergency Board appropriation spending plan by the Public Defense Services Commission.

Recommendation: The Public Defense Services Commission is not under Executive Branch budgetary authority.

Discussion: As requested by the Emergency Board, the Public Defense Services Commission (PDSC) submitted a report in January 2023, outlining the agency’s intended spending plan for the \$10 million General Fund allocated from the Emergency Fund during the December 2022 meeting. PDSC is submitting a revised version of the report due to the agency’s anticipated expenditures differing from the originally reported plan.

The report starts with a high-level summary of the unrepresented persons crisis and notes 835 people are entitled to court-appointed counsel and are without representation as of February 2023, including 73 in custody. The report attributes the high number of unrepresented persons to a need for more public defense attorneys due to high caseloads and low compensation. Additionally, the report outlines the recent efforts PDSC has taken to address the issue, including:

- Increasing contracted capacity by adding 32.63 more maximum attorney capacity (MAC) to the 2022 provider contracts,
- Implementing a tiered contracting model designed to incentivize attorneys to take felony cases by increasing compensation as the complexity increases,
- Establishing an incentive bonus for new public defenders entering the provider community,
- Increasing hourly compensation for attorneys and investigators who accept cases with unrepresented persons currently in custody,
- Adding funding to provider contracts for increased training and supervision needs, and
- Collaborating with system partners to problem solve the issues across the state.

The report outlines PDSC’s intention to utilize the \$10.0 million allocation. The following is a high-level breakdown of PDSC’s spending plan.

Initiative	ORIGINAL Expected Cost	Proposed Revision	NEW Expected Cost
Increase hourly rates for all non-contract attorneys accepting unrepresented persons cases using a tiered rate structure	\$5,000,000	+\$1,980,245	\$6,980,245
Set aside in reserve for investment in initiatives proven successful through data analysis	\$2,500,000	-(\$1,981,045)	\$518,955
Fund a Supervised Civil Attorney Program	\$394,200	+\$800	\$395,000
Develop a retention incentive program to reduce current workforce attrition rates	\$2,105,800	--	\$2,105,800
Total:	\$10,000,000		\$10,000,000

The report notes an additional \$6.0 million of agency funding will be added to the retention incentive program to continue stabilization efforts in the public defense workforce for a total of \$8.1 million. Additionally, the revised report addresses the need for \$3.4 million of the \$10.0 million General Fund to carry forward into the 2023-25 biennium, pursuant to ORS 151.225. PDSC reports the funding will not be expended by June 30, 2021, but is essential to reimburse the actual costs incurred during 2021-23, along with cases started in the 2021-23 biennium at the higher salary rates, but not completed until after the biennial close.



Oregon

Public Defense Services Commission

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February 23, 2023

The Honorable Senator Elizabeth Steiner, Co-Chair of Ways and Means
The Honorable Representative Tawna Sanchez, Co-Chair of Ways and Means
900 Court Street NE
Salem, OR 97301-4048

Dear Co-Chairs of the Legislative Joint Committee on Ways and Means:

Nature of the Request

The Public Defense Services Commission seeks to amend the report that it submitted to the Joint Committee on Ways and Means in January 2023.

On December 9, 2022, the Legislative Emergency Board allocated \$10 million from the Emergency Fund to Public Defense Services to address the unrepresented persons crisis. The Emergency Board directed Public Defense Services to provide to the Co-Chairs on the Joint Committee on Ways and Means a written report detailing the plan to expend the \$10 million. The agency presented a plan to the Senate President and the Speaker of the House on January 30, 2023. However, the agency's actual anticipated expenditures differ from the original plan.

Public Defense Services proposal differs from the original report in the following ways:

- Tiered Hourly Rate Program expenditures of \$6,980,245, including enhanced hourly rate funding for attorneys, investigators, and other court support services costs and spanning both the 2021-23 and 2023-25 biennium.
- Supervised Civil Attorney pilot program funded up to \$395,000, to be spent on civil lawyers who support public defenders by researching, writing, and litigating motions, as well as, on public defenders who supervise civil lawyers to represented persons charged with misdemeanors.
- Reduction of the strategic reserves \$518,955 reflecting the total costs of the Tiered Hourly Rate Program

Action Requested

Public Defense Services requests that the Joint Committee on Ways and Means accept this letter of intent and revised report regarding Public Defense Service's plans for expending the \$10 million Emergency Fund Allocation.

Sincerely,

A handwritten signature in cursive script, appearing to read 'JK', is positioned below the word 'Sincerely,'.

Jessica Kampfe
Executive 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

Revised Unrepresented Persons in Oregon

Public Defense Services

February 2023

Scope of the Problem

Oregon is experiencing a public safety crisis, one symptom of which is the unrepresented persons crisis. Over the last 18 months, Oregon has seen a rise in the number of people who are financially eligible for court-appointed counsel in criminal or juvenile cases but remain without an attorney due to a lack of available qualified attorneys willing to accept the appointment. As of this writing, 835 people are entitled to court-appointed counsel but do not have lawyers; 73 of them are in custody.

The systemic under resourcing of public defense has led to these numbers. Significant numbers of attorneys—many of whom are qualified to handle at least minor felony caseloads—are leaving Oregon public defense practice, particularly nonprofit public defender offices, due to low pay and high caseloads. At the same time, felony case filings have increased, particularly in high population jurisdictions such as Multnomah and Washington Counties. Compounding this capacity issue is Public Defense Services' implementation of the Sixth Amendment Center's recommendation to move away from an unconstitutional fixed fee model of contracting for public defense representation and to a maximum attorney caseload model where the agency contracts for attorney time.

High caseloads for public defense attorneys have caused them to be overworked and burnt-out, and ultimately to leave public defense. When an attorney leaves, it has a ripple effect throughout the public defense system, because that attorney's cases must be reassigned to other public defense attorneys, thereby reducing or eliminating those attorneys' capacity to accept new case appointments. This increases the capacity issue more, creating more strain on existing public defense attorneys, leading to faster burnout and quitting. It is a cycle that Public Defense Services is working to break.



Figure 1 - Public Defense "Churn"

Breaking this cycle means increasing capacity while decreasing workloads for public defense attorneys, which can be a difficult balance. Increasing capacity means bringing on additional attorneys and retaining and training the attorneys we have. More efficiently managing demanding public defense workloads means providing support to attorneys so they can focus on representing their clients and closing their cases, thereby allowing them to take on new cases.

Efforts to Address the Problem

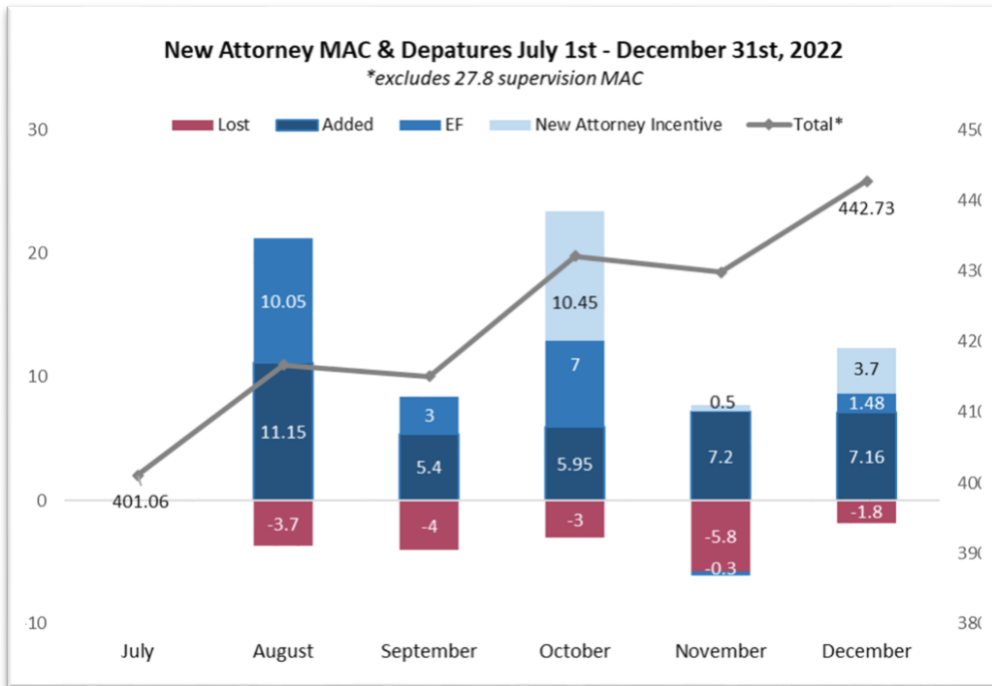
In its efforts to break the cycle of overwork, burnout, and attrition, Public Defense Services has implemented the following initiatives.

Actions to Increase Capacity

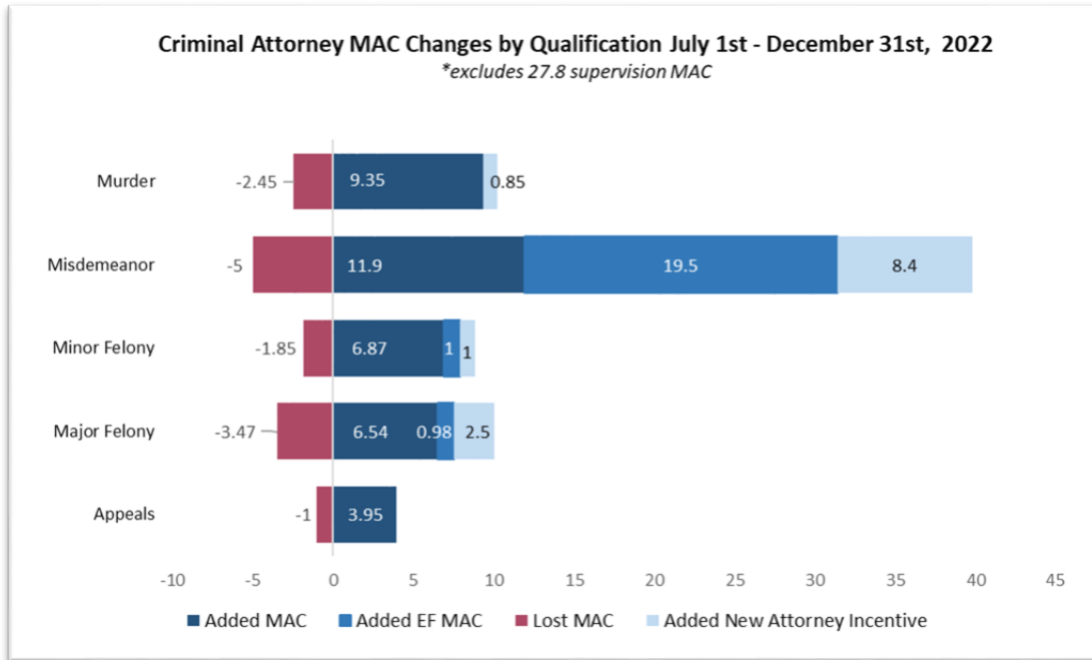
- Increased the pre-July 2022 contracted attorney workforce by entering into new contracts to add 32.63 Maximum Attorney Caseload (MAC), using emergency funding allocated during the 2022 legislative session;
- Implemented a tiered contracting model intended to incentivize attorneys to become qualified to represent persons charged with felonies by providing greater compensation for increasing their case seriousness qualification;
- Attracted new public defense attorneys to practice in Oregon through a new attorney incentive payment program in which contractors receive two lump sum

payments in March and June for the addition to their contracts of attorneys who are new to public defense; and

- Increased hourly compensation rates for attorneys accepting appointments to represent persons who are in custody and unrepresented, as well as for the investigators providing support in those cases.



Source: Public Defense Services Contracting Data



Source: Public Defense Services Contracting Data

Actions Taken to Mitigate the High Caseloads

- Invested in training and supervision for nonprofit public defender offices to adequately resource public defenders who are advocating for individuals on increasingly complex cases;
- Resourced resolution dockets to empower local jurisdictions to find creative solutions for communities with out-of-custody unrepresented persons.
- Met with system stakeholders including, public defense attorneys, district attorneys, judges, and court staff, in counties experiencing the prosecution of unrepresented persons to increase our understanding of that judicial district's needs and explore collaborative solutions; and
- Partnered with the Oregon Judicial Department to improve the quality of data to better quantify the unrepresented person's crisis and improve the agency's ability to respond to this problem that has varied over time and by county.

Proposed Use of \$10 Million Emergency Board Funds

While the programs implemented by Public Defense Services to date have mitigated the growth of the unrepresented persons crisis, many of the underlying factors listed above still exist. Public Defense Services intends to invest the \$10 million Emergency Fund

allocation in the December Emergency Board, as well as existing agency funds, to stabilize the public defense workforce, increase accountability, and add efficiencies.

The Public Defense Services Commission is using the \$10,000,000 in emergency board funding to run three programs and retain a strategic reserve that can be deployed to address the ongoing crisis this biennium.

1. Sunset the current \$158 hourly program as of January 31st and replace it with a new, five-tiered hourly rate structure with rates varying by \$125 to \$200 per hour depending on case type. This program includes continuing the enhanced \$75 per hour investigator rate, as well as funding other case support services expenses associated with these cases.
2. Statewide retention incentive payments totaling \$15,000 per full-time attorney, with 12.5% of the funds dispersed each month between February and May 2023 and 50% of the funds dispersed in June 2023.
3. Supervised Civil Bar Attorney Program for civil or private bar attorneys to provide legal representation in misdemeanor cases and legal support to public defenders. Attorneys shall be supervised by contracted Supervising Attorneys who provide oversight of attorneys appointed to represent financially eligible persons in misdemeanor cases.
4. Hold in reserve a portion of the appropriation to augment initiative that reduce the unrepresented defendant/persons crisis.

Public Defense Services is a Judicial Branch agency whose financial obligations carry over from one biennium to the next. As such, pursuant to ORS 151.225, Public Defense Service's savings do not revert to general fund at the end of the biennium because they are necessary to reimburse the actual costs and expenses incurred in administration and support of the public defense system. Public Defense Services' tiered hourly rate program will incur costs and expenses to represented individuals in this biennium which carry over into the next biennium. Public Defense Services is relying upon its ability to carry forward our savings in order to allocate funding for these unrepresented persons cases to be litigated to resolution.

PDSC's \$10 Million Crisis Funding Plan	General Fund Total Cost		Total minus 21-23
2021-23 One-time Emergency Board Allocation for Crisis Funding (December 2022)	\$10,000,000	21-23 Biennium Costs	23-25 Biennium Costs
Add a new, five-tiered hourly rate structure with rates varying by \$125 to \$200 per hour depending on case type.			
\$200 per hour for murder and Jessica's Law cases.	\$2,530,640	445,612	\$2,085,028
\$175 per hour for Ballot Measure 11 and felony sex offense cases.	\$1,397,774	786,247	\$611,527
\$164 per hour for Class A and B felony, juvenile dependency, termination-of-parental-rights, juvenile delinquency, habeas corpus, post-conviction relief, civil commitment, and Psychiatric Security Review Board cases.	\$449,396	449,396	\$0
\$158 per hour for Class C felony and felony drug possession cases.	\$1,200,186	1,200,186	\$0
\$125 for misdemeanors [not includes in report]	\$21,338	21,338	\$0
Investigation at the enhanced rate of \$75 per hour	\$672,907	421,441	\$251,466
Additional CSS costs in support of these cases	\$708,004	294,444	\$413,560
Statewide retention incentive payments totaling \$15,000 per full-time attorney, with 12.5% of the funds dispersed each month between February and May 2023 and 50% of the funds dispersed in June 2023. Receipt of retention incentive payments would be conditioned on contractors being current in their caseload reporting obligations and reporting back to PDSC about how the funds were spent, whether on attorney compensation, staff compensation, additional staff hours, or other overhead and expenses (440.12 adult criminal and 100.27 juvenile/non-Parent Child Representation Program = 540.39 MAC x \$15,000 = \$8.1 million, of only \$2.1 million funded by supplemental crisis funding plan with remaining \$6 million self-funded by budget savings).	\$2,105,800	2,105,800	
Supervised Civil Bar Attorney Program for civil or private bar attorneys to provide uncompensated legal representation in misdemeanor cases. Attorneys shall be supervised by contracted Supervising Attorneys who provide oversight of attorneys appointed to represent financially eligible persons in misdemeanor cases.	\$395,000	\$395,000	
Hold in reserve a portion of the appropriation to augment any existing initiative that proves successful in reducing the unrepresented defendant/persons crisis.	\$518,955	518,955	
Total	\$10,000,000	6,638,419	\$3,361,581
Total Spent over 21-23 and 23-25 Biennium			10,000,000

Increased and Tiered Hourly Rate Structure for All Unrepresented Persons

Goal: Increase capacity by investing \$ 6,980,245 of the Emergency Fund allocation to increase the hourly rates for non-contract attorneys and investigators who accept assignment of cases from the Oregon Judicial Department's "OPDS Unrepresented" list and implementing a tiered rate structure to target the greatest needs.

Public Defense Services' hourly rates for attorneys are not competitive at the rate of \$105 per hour for murder cases and \$75 per hour for all other case types. From July 2022 – January 31, 2023, Public Defense Services implemented a program to address the unrepresented persons crisis by authorizing \$158 per hour for case assignments for any in-custody unrepresented person. While this program has reduced the number of in-custody unrepresented persons, the number of in and out-of-custody unrepresented persons continues to grow. The \$158 hourly rate program ended on January 31, 2023, and the commission supplemented it with a more aggressive rate schedule and broadened

the categories of qualifying cases. Public Defense Services' new tiered hourly rate program began on February 1, 2023 and applies to unrepresented persons cases appointed in this biennium until June 30, 2023. This program implements the following tiered rate structure to address all unrepresented persons whether they are in or out of custody:

- \$125 per hour for misdemeanor, contempt, and probation violation cases
- \$158 per hour for Class C felony and felony drug possession cases
- \$164 per hour for Class A and B felony, juvenile dependency, termination-of-parental-rights, juvenile delinquency, habeas corpus, post-conviction relief, civil commitment, and Psychiatric Security Review Board cases
- \$175 per hour for Ballot Measure 11 and felony sex offense cases; and
- \$200 per hour for murder and Jessica's Law cases.
- \$75 per hour for investigation

Public Defense Services will continue to fund the investigator rate under this program at the higher hourly rate of \$75.00.

Public Defense Services is asking that the \$6,980,245 be allocated such that \$ funds increased rates for attorneys through our court mandated expense budget, and that \$1,380,000 be allocated to fund case support services on these cases. The case support services allocation will fund hourly investigation at a rate of \$75 per hour as well as other services like interpreters, transcriptionists, and expert witnesses.

Public Defense Services proposal immediately targets the unrepresented list and this \$5 million dollars will only be applied to cases appointed from the unrepresented persons list from February 1, 2023 until June 30, 2023. The hourly costs will be billed in fiscal years 2023, 2024, and 2025 as these cases will not all close within the biennium.

Strategic Reserves

Goal: Set the Agency up to be as strategic and adaptable as possible for the remainder of the biennium by setting aside \$518,955 of the Emergency Fund allocation for investment in programs that have proven to reduce unrepresented people, and programs to address emerging issues related to the unrepressed crisis.

Over the past 6 months Public Defense Services has created and funded various programs to reduce the unrepresented population. Now that these programs have been running for anywhere between 3-6 months, the agency needs to reevaluate the data available to determine what programs have been successful. As the unrepresented crisis continues it is also likely that the Agency will need to make strategic investments between now and the end of the biennium. For example, some providers are reaching their contract maximum before then end of their contract cycle and may need additional resources to ensure contracts are not 'shut off'.

Supervised Civil Attorney Program

Goal: Increase capacity by expanding the pool of attorneys available to represent out of custody persons charged with misdemeanors and minor felonies by investing up to \$395,000 of the Emergency Fund allocation in a Supervised Civil Attorney Program

The Supervised Civil Attorney Program intends to allocate the remainder of emergency funds to build a pilot utilizing civil attorneys desire to help in reducing the number of unrepresented persons . The Supervised Civil Bar Attorney Program will fund civil or private bar attorneys to support public defenders by researching, writing, and litigating pretrial motions on public defense cases, and provide legal representation in misdemeanor cases.

Public Defense Services will accept requests for civil attorneys to be added as alternative counsel to public defense cases to support public defenders in more efficiently litigating their case by assisting with researching, writing, and litigating motions. The public defender initiated request will be paired with a civil attorney who can either perform the tasks pro bono or at a rate of \$105 an hour depending upon the civil firm's stated and agreed upon memorandum of understanding with PDSC.

Additionally, civil attorneys who accept appointment on misdemeanor level public defense cases shall be supervised by contracted Supervising Attorneys who provide oversight and supervision for the civil attorney. Attorneys who accept assignment of cases are required to comply with the policies and procedures for the representation of clients under supervision, including training and performance requirements, evaluation procedures, record-keeping, and data collection. Attorneys accepting court-appointed cases under supervision shall maintain time records and shall report to Public Defense Services on their work, including client communications, hearing and trial preparation, and time in court.

This program will be financed from Public Defense Services court mandated expenses budget because all civil attorneys will be appointed as alternate counsel of record in Oregon Judicial Department's system.

Existing Attorney Retention Incentive Program

Goal: Stabilize existing contractors and increase accountability by investing \$6,000,000 of existing agency funds and \$2,105,800 of the Emergency Fund Allocation in a retention incentive program

High levels of attorney attrition in the provider community resulted in the agency retaining attrition saving in our budget designated to fund public defense contractors. Attorney attrition is a leading cause of the unrepresented person's crisis. The attrition savings will be deployed to retain existing contractors through a retention incentive payment program focused on contract public defense attorneys funded out of Public Defense Services' existing budget. Each package of retention incentive payments will total \$15,000 per full-time attorney, with 12.5% of the funds dispersed each month between February and May 2023 and 50% of the funds dispersed in June 2023. Receipt of retention incentive payments would be conditioned on contractors being current in their caseload reporting obligations and reporting back to Public Defense Services about how the funds were spent, whether on attorney compensation, staff compensation, additional staff hours, or other overhead and expenses.

Conclusion

Oregon must ensure that Public Defense Services meets its constitutional mandate to provide public defense services consistent with the Oregon Constitution, the United States Constitution, and Oregon and national standards of justice. Failure to provide legal representation to those charged with crimes violates the mission of Public Defense Services to ensure that eligible individuals have timely access to legal services, consistent with Oregon and national standards of justice. Moreover, that failure creates a bottleneck in the system which prevents cases from moving forward. Failure to provide constitutionally effective representation creates additional problems, including wrongful convictions, worse public safety outcomes, an increased number of cases returning to trial several years later after post-conviction relief is granted, lack of final resolutions, and a loss of trust in the justice system's ability to handle cases fairly.

While these actions will not solve the unrepresented persons crisis, it will mitigate the exodus of attorneys and bring on new capacity directly targeted at those on the unrepresented peoples list. Looking ahead to the 23-25 biennium, cases will continue to grow, and this crisis may get worse. Public Defense Services will continue to report back to Legislative leadership and Ways and Means throughout the 2023 session. We are dedicated to finding a solution and ensuring that all Oregonians have access to justice and representation.

Appendix

	PDSC's \$10 Million Crisis Funding Plan 2021-23 One-time Emergency Board Allocation for Crisis Funding (December 2022)	General Fund Total Cost	This model shows total projected cost, subtracts 21-23 Biennium cost to show carry forward expense.	21-23 Biennium Costs	Total minus 21-23 23-25 Biennium Costs
1	Add a new, five-tiered hourly rate structure with rates varying by \$125 to \$200 per hour depending on case type.	\$10,000,000			
a)	\$200 per hour for murder and Jessica's Law cases.	\$2,530,640	Total Amount projected for these cases (23-25 Biennium). Should carry forward for \$200 hourly.	445,612	\$2,085,028
b)	\$175 per hour for Bailout Measure 11 and felony sex offense cases.	\$1,397,774	Total Amount projected for these cases (23-25 Biennium). Should carry forward for \$175 hourly.	786,247	\$611,527
c)	\$164 per hour for Class A and B felony, juvenile dependency, termination-of-parental-rights, juvenile delinquency, habeas corpus, post-conviction relief, civil commitment, and Psychiatric Security Review Board cases.	\$449,396	Total Amount projected for these cases (23-25 Biennium). Should carry forward for \$164 hourly.	449,396	\$0
d)	\$158 per hour for Class C felony and felony drug possession cases.	\$1,200,186	Total Amount projected for these cases (23-25 Biennium). Should carry forward for \$158 hourly.	1,200,186	\$0
e)	\$125 for misdemeanors (not includes in report)	\$21,338	Total Amount projected for these cases (23-25 Biennium). Should carry forward for \$125 hourly.	21,338	\$0
1.1	Investigation at the enhanced rate of \$75 per hour	\$672,907	Total Amount projected for these cases (23-25 Biennium). Should carry forward for investigation.	421,441	\$251,466
1.2	Additional CSS costs in support of these cases	\$708,004	Total Amount projected for these cases (23-25 Biennium). Should carry forward additional CSS.	294,444	\$413,560
2	Statewide retention incentive payments totaling \$15,000 per full-time attorney, with 12.5% of the funds dispersed each month between February and May 2023 and 50% of the funds dispersed in June 2023. Receipt of retention incentive payments would be conditioned on contractors being current in their caseload reporting obligations and reporting back to PDSC about how the funds were spent, whether on attorney compensation, staff compensation, additional staff hours, or other overhead and expenses (440.12 adult criminal and 100.27 juvenile/non-Parent Child Representation Program = 540.39 MAC x \$15,000 = \$8.1 million, of only \$2.1 million funded by supplemental crisis funding plan with remaining \$6 million self-funded by budget savings).	\$2,105,800	Amount should be fully spent in 21-23 Biennium.	2,105,800	
3	Supervised Civil Bar Attorney Program for civil or private bar attorneys to provide uncompensated legal representation in misdemeanor cases. Attorneys shall be supervised by contracted Supervising Attorneys who provide oversight of attorneys appointed to represent financially eligible persons in misdemeanor cases.	\$395,000	Amount spent in 21-23 Biennium is dependant on the amount of hourly billings received.	\$395,000	
	Hold in reserve a portion of the appropriation to augment any existing initiative that proves successful in reducing the unrepresented defendant/persons crisis.	\$518,955		518,955	
	Total	\$10,000,000	Total Spent over 21-23 and 23-25 Biennium	6,638,419	\$3,361,581
	Total Spent over 21-23 and 23-25 Biennium			10,000,000	