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**REPORT OF THE HOUSE JUDICIARY COMMITTEE  
ON THE MANAGEMENT OF EXTRAORDINARY EXPENSES  
IN THE INDIGENT DEFENSE SYSTEM**

The House Judiciary Committee, pursuant to a request of the Emergency Board, has exercised the legislature's inherent powers of oversight by conducting hearings on Oregon's indigent defense system. As part of this process, the House Judiciary Committee conducted hearings on the afternoons of February 13 and 14, 2003, on the issue of extraordinary expenses paid for by the State pursuant to its constitutional obligation to provide adequate legal representation to indigents charged with a crime.

The constitutional right to counsel includes the right to an adequate defense in certain criminal cases. The U.S. Supreme Court has found that within that right to an adequate defense exists the obligation of the State to pay for expenses incurred for such things as trial transcripts, investigators, interpreters, and expert witnesses—including psychologists and psychiatrists. However, the constitutional right to an adequate defense does not mean that Oregon is required to write a blank check.

Over time, there have been complaints that some of the extraordinary expenses associated with defending indigents charged with a crime were either excessive or unnecessary. The purpose of the two-day hearing was to take testimony concerning these claims and, if necessary,

propose legislation or make recommendations to the agency responsible for administering indigent defense.

## Findings

Some Oregon District Attorneys believe the State of Oregon spends funds on extraordinary expenses that are neither warranted nor justified. In two afternoons of hearings, various district attorneys and assistant district attorneys presented specific cases of alleged excessive spending. While there may be differences of opinion regarding certain expenses, we believe there was no evidence of systemic abuse of extraordinary expenses in the indigent defense system. The Committee believes improvements to the indigent defense system can be made and makes the following recommendations:

## Recommendations

1. The Indigent Defense Services Division and its soon-to-be successor, the Public Defense Services Commission, should be directed to establish a peer review system for the approval of extraordinary expenses associated with aggravated murder, murder, and other serious felonies.<sup>1</sup>
2. The Indigent Defense Services Division and its soon-to-be successor, the Public Defense Services Commission, should establish guidelines for the hiring and paying of expert witnesses that include allowing out-of-state expert witnesses if in-state experts cannot be found.
3. Changes to ORS 135.055 should be considered to allow district attorneys and the public more immediate access to non-privileged information on extraordinary expenses.
4. District attorneys and the criminal defense bar should establish better communications with each other concerning the processes and procedures of prosecuting and defending the most expensive aggravated murder cases and other serious felonies. The Committee recommends that the Indigent Defense Services Division and its soon-to-be-

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<sup>1</sup> The Public Defense Services Commission will assume the responsibilities for administering indigent defense from the Indigent Defense Services Division of the State Court Administrator's Office on October 1, 2003. However, there is pending legislation that would move this date up to July 1, 2003.

successor, the Public Defense Services Commission, and the Oregon District Attorneys Association establish a working group on this subject.

5. The Indigent Defense Services Division and its soon-to-be successor, the Public Defense Services Commission, should be directed to establish a complaint process that would allow district attorneys, criminal defense counsel, and the public to file a complaint concerning extraordinary expenses and receive a reply.<sup>2</sup>
6. The Indigent Defense Services Division and its soon-to-be successor, the Public Defense Services Commission, should contact the district attorney in the appropriate jurisdiction to determine the district attorney's charging practices prior to contracting with an indigent defense provider.
7. The Indigent Defense Services Division and its soon-to-be successor, the Public Defense Services Commission, should convene a workgroup consisting of representatives of the Oregon District Attorneys Association, the Oregon Criminal Defense Lawyers Association, and the judicial conference to study and make recommendations concerning the process for selecting jury pools to ensure that the pools represent a fair cross selection of the citizenry, thereby minimizing constitutional challenges to the composition of jury pools.<sup>3</sup>

## **Background**

The Indigent Defense Services Division administers Oregon's indigent defense program. The Division is part of Oregon's Judicial Branch of Government. In addition to providing counsel to indigents charged with crimes, the Division funds extraordinary expenses. Extraordinary expenses include the following:

- Transcripts of trial proceedings;
- Interpreters;

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<sup>2</sup> The Public Defense Services Commission consists of seven members, serving a term of four years, appointed by the Chief Justice of the Oregon Supreme Court.

<sup>3</sup> The issue of selection of jurors for jury pools was not raised with the Committee until just before commencement of the hearing. Consequently, it was not discussed. Nonetheless, the Committee believes the Public Defense Services Commission should address the issue. The selection involves complex constitutional questions. Please see copies of an article from the January 2003 Oregon State Bar Bulletin and a letter in response to that article that appeared in the February/March 2003 Oregon State Bar Bulletin marked as exhibits "X" and "Y." respectively.

- Investigators; and
- Expert witnesses—including forensic scientists, psychologists, and psychiatrists—and necessary tests performed by those experts.

For fiscal year ending 2002, the Division expended \$1,142,503 on trial transcripts, \$3,141,559 on interpreters, \$2,613,709 on investigators, and \$7,183,888 on expert witnesses.

The Constitution of the United States, as well as the Oregon Constitution, guarantees persons charged with a crime the right to an attorney, at state expense, when the sentence includes the possibility of serving jail time. The right to counsel includes the ability of the defendant to obtain expert witnesses, investigators, and other services commonly and collectively known as extraordinary expenses. If the State does not adequately fund indigent defense, it is left with only two choices under the law:

1. Do not prosecute indigent defendants; or
2. Prosecute, but do not impose jail or prison as a penalty, even for subsequently violating probation or conditions of a suspended sentence.

At its January 8, 2003 meeting, the Emergency Board authorized additional funding for indigent defense, but in doing so, requested that the House Judiciary Committee undertake a review of indigent defense services, including extraordinary expenses. As a result of this request, the House Judiciary Committee sent a letter to every district attorney in Oregon, informing them that the House Judiciary Committee would conduct a hearing on extraordinary expenses starting on February 13, 2003, and asking them to report any indigent defense expenses that they believed to be excessive or unnecessary. The Committee requested that the district attorneys coordinate their responses through the Oregon District Attorneys Association. For the purposes of allowing the Indigent Defense Services Division to respond, the Committee asked the district attorneys to state the following:

- Name of the case and case number;
- Circuit court and judge or judges before whom the case was tried;
- Dates the case was before the court;
- Defense counsel involved in the case; and
- Expenses in question and any other relevant information pertaining to indigent defense costs associated with the case.

A copy of this letter is attached and labeled exhibit "A."

Clatsop County District Attorney, Joshua Marquis, responded on behalf of the Oregon District Attorneys Association by letter dated January 29, 2003. A copy of this letter is attached and labeled as exhibit "B."

By letter dated February 4, 2003, the Committee responded to Mr. Marquis thanking him for the information but informing him that some of the material lacked the requested detail that would have allowed the Indigent Defense Services to respond. A copy of this letter is attached and labeled as exhibit "C."

By letter received by facsimile on February 7, 2003, Mr. Marquis supplied the Committee with additional information. A copy of this letter is attached and labeled as exhibit "D." In addition, the Committee received a letter dated January 22, 2003, from Daniel Norris, District Attorney of Malheur County, with one additional case and an e-mail from Norman Frink, Chief Deputy District Attorney of Multnomah County, concerning a case involving, not extraordinary expenses, but serial appointment of counsel. A copy of the letter and e-mail are attached and labeled exhibits "E" and "F," respectively. Mr. Marquis's letters, Mr. Norris's letter, and Mr. Frink's e-mail were all supplied to the Indigent Defense Services Division to allow the Division the opportunity to prepare a response.

On Thursday, February 13, 2003, starting at 1:00 P.M., the House Judiciary Committee began its oversight hearing. Fourteen matters—spanning a period of 17 years—were before the Committee, the oldest a 1985 murder trial and the most recent a 2002 sex abuse matter. Eight cases involved aggravated murder, three murder, two sex offenses, and one a series of lesser offenses. A copy of the agenda is attached and labeled exhibit "G."

Present in the room and ready to testify were district attorneys, assistant district attorneys, and indigent defense counsel—all of whom were involved in one or more cases on the Committee agenda. To set the appropriate tone and to insure that the hearing was conducted fairly and expeditiously, Chair Williams asked the witnesses to discuss only those facts involving extraordinary expenses. A copy of the Chair's opening remarks is attached and labeled exhibit "H."

The first witness before the Committee was Ann Christian, Director of the Indigent Defense Services Division, State Court Administrator's Office. A copy of her written material is attached

and labeled exhibit "I." Ms. Christian stated that counsel for an indigent defendant must obtain prior approval before making an extraordinary expenditure. Until 1995, this approval had to come from the judge hearing the case. In 1995, the Legislative Assembly shifted the responsibility of approval of extraordinary expenses to the Indigent Defense Services Division. As Director, Ms. Christian stated that she reviews all requests for extraordinary expenses in aggravated murder and murder cases, except for those in Marion County. She added that she also reviews all requests in Measure 11 cases, except for those in Marion and Multnomah Counties. The Executive Director of the Marion County Association of Defenders reviews all requests in Marion County and the Chief Criminal Judge reviews Measure 11 case requests in Multnomah County. Ms. Christian stated that when the Public Defense Services Commission assumes responsibility for the administration of indigent defense services, possibly as early as July 1, 2003, it will then review all requests for extraordinary expenses.

For the remainder of Thursday's hearing and for most of Friday's hearing, the Committee heard testimony from district attorneys, assistant district attorneys, and criminal defense lawyers. The Committee first heard testimony from the district attorney or assistant district attorney who prosecuted the case involving extraordinary expenses, and then from the defense attorney on the case.

Generally speaking, the district attorneys questioned whether a particular expert witness or expense was really necessary in the defense of the criminal case in question. Defense attorneys countered that when faced with an aggravated murder charge, it is necessary to raise every possible defense, since failure to do so could constitute grounds for post-conviction relief. They pointed out that in 3 of the cases before the Committee, either the jury had found the defendant not guilty or the conviction had been overturned on appeal.

The last two witnesses to testify before the Committee were Doug Harclerod, Lane County District Attorney, and Ross Shepard, Director of the Public Defender Services of Lane County. They asked to address the Committee with suggestions for modifying the current system for administering extraordinary expenses. Mr. Harclerod stated that ORS 135.055(3)(a) currently prohibits the disclosure of defense counsel's written requests for extraordinary expenses until after the completion of the trial and any possible appeal. He understood that premature release of this information could violate a substantial right of the defendant in that a detailed explanation could give the prosecutor a significant tactical advantage if the defendant's conviction were reversed on appeal and the defendant were retried. *State v. Cunningham*, 161 Or. App. 345 (1999). Nonetheless, he argued that the statute could be modified to allow for the release of

general information, such as how much was spent on extraordinary expenses, while still protecting the constitutional rights of the defendant.

Mr. Shepard stated that he has been a public defender for over 25 years, and that he often reviews requests for extraordinary expenses. He noted that inexperienced attorneys may request expert witnesses that are not needed, so review of the requests would not only allow for a second opinion, but would also serve as an informal mentoring program where more experienced attorneys can assist less experienced ones. Mr. Shepard suggested that a peer review program be formally instituted—particularly for aggravated murder, murder, and the more serious sex offenses. Mr. Harclerod agreed with this suggestion.

It became apparent that both the prosecution and defense feel that the other has a wealth of resources. District attorneys complained that they often do not have the resources to hire “experts” to counter the defendant’s experts. Defense counsel countered that the district attorneys have the resources of local and state law enforcement, including the state crime laboratory and the State Police crime scene team. To a certain extent, they are both correct. These perceived inconsistencies as to resources are particularly strong in aggravated murder cases where there are two distinct phases: a guilt or innocence phase, and a penalty phase. Both the U.S. Supreme Court and the Oregon Supreme Court thoroughly review death penalty cases, particularly the penalty phase. Consequently, failure of defense counsel to provide an expert witness during this phase could easily result in a case being overturned. With so much at stake, law enforcement expends a considerable amount of resources on investigation and prosecution during the guilt or innocence phase, whereas defense counsel relies heavily on expert witnesses, particularly during the penalty phase where the jury determines the question of whether to put a person to death or impose only a life sentence.

The written material includes:

- Two letters from Michele Longo Eder, dated February 10, 2003 and February 14, 2003, concerning the murder trial of Sandra Kaye Jones. These letters are attached and marked exhibits “J” and “K,” respectively.
- A letter from attorney Duane McCabe, dated October 30, 1997, to Ann Christian with a copy of a cancelled check in the amount of \$1,505 for repayment of expenses related to an expert witness. Mr. McCabe was defense counsel in the aggravated

murder trial of Randy Guzek. The letter and canceled check are attached and marked as exhibit "L."

- The affidavit of Mark Rader in the matter of *State v. McKnight*. The affidavit is attached and marked exhibit "M."
- Mr. Frink's letter of February 14, 2003. The letter is attached and marked exhibit "N."
- Chair Williams's letter to Gary Williams, President of the Oregon District Attorneys Association, in response to Mr. Frink. The letter is attached and marked exhibit "O."
- Chair Williams's letter to Mr. Frink in response to Frink's February 14, 2003 letter. The letter is attached and marked exhibit "P."
- Mr. Frink's letter of February 19, 2003. The letter is attached and marked exhibit "Q."
- Chair Williams's letter to Mr. Frink in response to Frink's February 19, 2003 letter. The letter is attached and marked exhibit "R."
- John Potter's letter to Chair Williams, dated February 17, 2003. The letter is attached and marked exhibit "S."
- Doug Harclerod's letter to Chair Williams, dated February 27, 2003. The letter is attached and marked exhibit "T."
- Representative Robert Ackerman's letter to Norman Frink, dated February 25, 2003. The letter is attached and marked exhibit "U."
- Mr. Frink's response to Representative Robert Ackerman, dated March 3, 2003. The letter is attached and marked exhibit "V."
- E-mail communication from Norman Frink to Ann Christian forwarded to House Judiciary Committee staff on February 13, 2003. The communication is attached and marked exhibit "W."
- Article in the January 2003 Oregon State Bar Bulletin by Rose Jade entitled *Jury Pools*. The article is attached and marked exhibit "X."
- Letter that appeared in the February/March 2003 Oregon State Bar Bulletin. The letter is attached and marked exhibit "Y."

## Conclusion

After listening to the two days of testimony, it was obvious to all present that Oregon attorneys who prosecute and defend aggravated murder, murder, and other serious felony cases are highly skilled and passionately dedicated advocates. They do not have an easy job, and they are often underpaid and underappreciated.

The Committee reviewed fourteen cases, spanning a seventeen-year period, involving allegations of extraordinary expenditures. During this time, the state of Oregon has appointed attorneys in two-million cases. Thirteen of these fourteen cases before the Committee involved the most heinous of crimes—aggravated murder, murder, or sexual assault. These high-stake cases are difficult to prosecute and defend, they may take years to do so, and collectively they cost millions of dollars to prosecute and defend. It was obvious during the hearing that even years after the conclusion of the trial, passions between prosecution and defense still run high.

Based on the two days of hearings, the Committee believes there is no evidence of systemic abuse in the indigent defense system. Fourteen cases involving extraordinary expenses were brought to the Committee's attention, the oldest was a 1985 case and the most recent a 2002 case. During this same period, the state of Oregon appointed counsel in two million cases. As for the fourteen cases, although district attorneys and assistant district attorneys raised legitimate issues, defense attorneys and the Indigent Defense Services Division supplied responses that generally satisfied committee members.

The Committee noted that during the course of a criminal trial, both prosecution and defense attorneys must make a substantial number of discretionary decisions. Sometimes these judgment calls turn out to be wrong. For example, inexperienced defense attorneys may feel compelled to request an expert witness when one is not called for, and experienced defense attorneys may feel compelled to request an expert because their client insists upon it. Attorneys in both instances would benefit from a greater degree of peer review as to authorization of expenses. The former would gain the advice of individuals with more experience, and the latter would have the benefit of his or her peers saying "no" to the client. Peer review would not eliminate the existence of incorrect judgment calls from attorneys, but it would significantly reduce their numbers without incurring significant costs to implement the review.

The Committee believes that improvements to the indigent defense system can be achieved by statutory changes as to oversight and by rulemaking actions by the Public Defender Services Commission. During the hearings, several district attorneys expressed frustration with the statutory restrictions set forth in ORS 135.055 that limit their ability to obtain information on extraordinary expenses until after completion of trial and appeals. For aggravated murder cases, this probably means that the information will remain confidential for at least ten years. The frustration felt by the district attorneys is understandable. The Oregon Court of Appeals ruled that a substantial right exists for defendants not have any future trial prejudiced by disclosure of sensitive information. ORS 135.055 can be modified to allow greater disclosure

without violating a defendant's substantial right to keep the details secret until all possible appeals have run their course and this issue should be considered in more detail by the Interim Judiciary Committee.

The Oregon District Attorneys Association and the Oregon Criminal Defense Lawyers Association need to establish better communications with each other on the processes and procedures of prosecuting and defending aggravated murder cases and other serious felonies. The crimes involve heinous acts, the cases can be very complicated, and emotions tend to run high. The criminal justice system would greatly benefit if both associations had collegial discussions regarding mutual problems. The Public Defense Services Commission may be able to facilitate these discussions.

Finally, by October 1, 2003 (and possibly by July 1, 2003), the Public Defense Services Commission will have assumed responsibility for running indigent defense service in Oregon from the Indigent Defense Services Division. The Committee believes that the Public Services Commission will be well suited to implement the recommendations of this report.'

Respectfully submitted,

Representative Max Williams  
Chair, House Judiciary Committee