

# Significant Documents and Events in the Indigent Defense Fiscal Crisis

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It is said that if we fail to learn from history, we are destined to repeat it. So in the interest of not repeating the fiscal crisis of the past year, I set forth an outline of some raw material from the past year of legislative, political and legal maneuvering over the State's indigent defense funding.

I'll offer a few observations and context here, saving other interpretation—and lessons—for my talk. However, it will be the determined reader who ploughs through this stuff and draws his or her own conclusions, who will gain most from these materials.

**NOTE TO READER:** In the interest of economy and space in this notebook, much of the referenced material is not duplicated here. Instead, you may find them on the Indigent Defense page at <http://www.ocdla.org/>.

1. The 2001-2003 Biennium Special Sessions
  - a. The reductions to the Indigent Defense Account over the course of five special sessions are well documented. A good discussion and comparisons to reductions to other budgets is found in the **December 16, 2002 Request to the State Emergency Board** for Allocations of Emergency Funds [See Exhibit A].
  - b. The most critical (and curious) of the Special Sessions was the Third Special Session, in June 2002. A **List of the Proposals** during that session is found in Exhibit B.
2. The Public Defense Services Commission (PDSC)
  - a. While the legislature was in the midst of decimating the indigent defense account, the new PDSC continued its progress toward taking over the functions of the State Court Administrator's Indigent Defense Services Division (IDSD), now slated to occur on July 1, 2003.
  - b. In May 2002, the PDSC released a major **Operational Review of Oregon's Public Defense System**, including a history of indigent defense in Oregon and recommendations for the future [Exhibit C]. Although the report recommended against major changes to the existing delivery system for indigent defense without further study, the first recommended improvement was increasing compensation for public defense providers.
  - c. At its July 25, 2002 meeting, the PDSC approved including a **request for public defense pay "parity"** within its 2003-2005 Biennium Budget request [Exhibit D].
3. The "BRAC" Response
  - a. Until July 1, 2003, the administration of Indigent Defense is located within the Oregon Judicial Department, which is headed by the Chief Justice of the Oregon Supreme Court. Thus, the official response to the indigent defense funding crisis came from the Chief Justice's Budget Reduction Advisory Committee (with the nice-sounding "BRAC" for short). A description of the BRAC's work is contained in a **December 3, 2002 Draft**

**Indigent Defense Budget Reduction Plan Proposal for the Remainder of the 2001-2003 Biennium** [Exhibit E].

- b. The "Glidepath." Significantly, the BRAC never suggested simply doing the same number of cases but for less money. Rather, the approach was to not approve appointment of counsel if money was not appropriated to do the work at current compensation rates. Refusing, though, to just do business as usual until all the money ran out, the BRAC proposed ending appointments on less serious cases in order to preserve funds to continue work and appointments on more serious cases. This approach became known as the "Glidepath."
    - i. The **Glidepath** was slated to begin, then revised and postponed a number of times (December 1, 2002; December 16, 2002; January 2, 2003; January 13, 2003.)
    - ii. Finally, on **March 1, 2003, pursuant to the BRAC plan** [Exhibit F], appointments for an estimated 27,000 cases between March 1 and June 30, 2003 were halted. Links to other documents implementing the BRAC plan are found on the Indigent Defense page at <http://www.ocdla.org/>
    - iii. The resulting withholding of nearly \$10 million from indigent defense providers caused layoffs, furloughs, closures and other major disruptions for law firms and individuals involved in provider indigent defense in Oregon. Crime is also said to have increased as a result of suspending prosecutions during this period.
4. Public Safety Interconnectedness
- a. In response to the dramatic cuts to indigent defense, a series of hearings and presentations demonstrated how funding for indigent defense was related and connected to other parts of what is loosely called the "public safety sector." One of the simple–yet extremely critical–lessons was that crime cannot be prosecuted, and offenders cannot be convicted or punished, without paying for indigent defense. Those presentations included:
  - b. Oregon Criminal Justice Commission Hearings on December 10, 2002, which produced "**Public Safety in Oregon and Ballot Measure 28: Prospective Budget Reductions to State Services Affecting Public Safety.**" [See Exhibit G].
  - c. House Committee on Judiciary, January 15, 2003 **Informational Meeting on the Right to Counsel** [See Exhibit H].
  - d. Joint Judiciary and Ways and Means **Hearing on Public Safety System Overview**, February 3-4, 2003 [See Exhibit I].
5. Emergency Board
- a. Following its November 7-8, 2002 meeting, the Legislative Emergency Board deferred an Indigent Defense Services Division request for \$10 million. See **Revised Recommendation of the Legislative Fiscal Office**, November 7, 2002 [Exhibit J].
  - b. The urgency of allocating Emergency Board funds at the January meeting of the Emergency Board was expressed in a **November 18, 2002 letter from Representative Max Williams**, the Chair of the House Judiciary Committee [Exhibit K].
  - c. Following its January 9-10, 2003 meeting, the Legislative Emergency Board allocated \$5 million of the \$10 million requested by the IDSD.
6. Measure 28

On February 28, 2003, Oregon voters defeated **Measure 28**, a temporary income tax increase, triggering the \$5 million in cuts to Indigent Defense from the Fifth Special Session.

10. The Last "Special Session"

- a. On March 4, 2003, the 2003 Oregon Legislature restored \$952,786 to the 2001-2003 Indigent Defense Account in **SB 5548**. As a result, the BRAC plan was revised to remove "unoccupied residential burglaries" from the list of offenses for which courts could not appoint counsel.
- b. With the restorations in SB 5548, the final 2001-2003 Indigent Defense budget was **\$142,220,709**. The original legislatively approved budget was **\$163,731,062**.

11. The Rebuttal

- a. Despite intense scrutiny and effective rebuttal, claims persist that there is waste—and even hidden pots of money—in the expenditure of indigent defense funds.
- b. On February 13-14, 2003, the House Judiciary Committee held an oversight hearing on the non-attorney expenses ( "Extraordinary Expenses") associated with indigent expense. The committee heard from prosecutors and defense attorneys associated with 14 cases from the past 17 years, mostly aggravated murder cases, where prosecutors alleged that defense attorneys incurred unnecessary expenditures. In its "**Report of the House Judiciary Committee on the Management of Extraordinary Expenses**," the committee found no evidence of systematic abuse of such funding [See Exhibit L].

12. The Legal Response

- a. A **legal response committee**, coordinated by Tom Ryan at the Metropolitan Public Defender, worked with OCDLA members and others to draft pleadings in response to the BRAC plan. Most of those documents are available in the Members Only area of <http://www.ocdla.org/>
- b. On February 10, 2003 Oregon ACLU cooperating attorneys Don Marmaduke and Elden Rosenthal filed a **petition for alternative writ of mandamus on behalf of the Metropolitan Public Defender** seeking to compel the Oregon legislature to adequately fund indigent defense. On March 6, 2003, the Oregon Supreme Court denied the writ [See Exhibit M].
- c. Following the implementation of the BRAC plan on March 1, 2003, **petitions for writs of mandamus** were filed by prosecutors in Multnomah and Clackamas County, and by the Metropolitan Public Defender [See Exhibit N]. These petitions were summarily denied without opinion by the Oregon Supreme Court.
- d. On April 7, 2003, **Federal civil rights actions** for declaratory relief were filed in Eugene (on behalf of the Public Defender Services of Lane County and the Lane County DA) and in Portland (on behalf of the Metropolitan Public Defender). [See Exhibit N] These actions were consolidated for hearing in Eugene before Judge Michael Hogan, who denied the claims in a written opinion on May 16, 2003 [See Exhibit O].

13. The 2003-2005 Biennium Indigent Defense Budget

- a. The **Governor's original proposed budget** for Indigent Defense is \$168,662,716, which includes \$35 million reserved to the Emergency Board. Unlike the budget for 01-03, these numbers include funding for the appellate office. This budget now must share a \$10 million "prorata" reduction with the Judicial Department due to lower than expected revenue forecasts.
- b. Ways & Means
  - i. On March 31-April 1, 2003, the Public Safety Subcommittee of Ways & Means held **hearings on the indigent defense budget**. Among the star witnesses: a chief-

- of-police, a county sheriff, the President of the Oregon DA's Association, and a judge, and the head of a citizen's crime fighting group.
- ii. Budget released by the **Co-chair's of Ways & Means**: \$151,662,716, which includes \$18 million reserved to the Emergency Board (this also includes the appellate office).
  - iii. For the purpose of resolving "public safety sector" budget issues, the Co-Chairs of Ways & Means have released a **priority funding list** [See Exhibit P].
  - iv. As of this writing, the budget remains unresolved.

## The Exhibit List

**Exhibit A.** December 16, 2003 Letter from State Court Administrator Kingsley Click Requesting Allocation of Emergency Funds to the State Indigent Defense Account.

**Exhibit B.** Third Special Session (June 2002): Indigent Defense Fund Reduction Proposals.

**Exhibit C.** [May 2002 Operational Review of Oregon's Public Defense System.](#)

**Exhibit D.** PDSC Compensation Adjustments Policy Package.

**Exhibit E.** December 3, 2002 Draft Indigent Defense Budget Reduction Plan Proposal for the Remainder of the 2001-2003 Biennium.

**Exhibit F.** March 5, 2003 Chief Justice's Indigent Defense \$9.1 Million Budget Deficit Reduction Plan.

**Exhibit G.** Oregon Criminal Justice Commission's "Public Safety in Oregon and Ballot Measure 28: Prospective Budget Reductions to State Services Affecting Public Safety." Go to: <http://www.ocjc.state.or.us/BudgetImpactsReport.pdf>

**Exhibit H.** House Committee on Judiciary, January 15, 2003 "Informational Meeting on the Right to Counsel." Agenda and Exhibit.

**Exhibit I.** Joint Judiciary and Ways and Means "Hearing on Public Safety System Overview," February 3-4, 2003. Agenda and Exhibits.

**Exhibit J.** "Revised Recommendation of the Legislative Fiscal Office", November 7, 2002.

**Exhibit K.** November 18, 2002 letter from Representative Max Williams.

**Exhibit L.** House Judiciary Committee, "Report of the House Judiciary Committee on the Management of Extraordinary Expenses." Go to: <http://www.ocdla.org/pdf/Report%20on%20Ind%20Def%20Man.pdf>

**Exhibit M.** Oregon Supreme Court's decision in *STATE EX REL METROPOLITAN PUBLIC DEFENDER SERVICES, INC., v. HONORABLE PETER COURTNEY, President of the Oregon Senate, and HONORABLE KAREN MINNIS, Speaker of the Oregon House of Representatives, for themselves and on behalf of all other members of the Oregon Legislative Assembly, Defendants.* Go to: <http://www.aclu-or.org/litigation/publicdefenders/pubdefe ndmain.html>

**Exhibit N.** Complaint in *Shepard v. Bearden*. Go to: <http://ocdla.org/pdf/Complaint.pdf>

**Exhibit O.** Decision in *Shepard v. Bearden*. Go to: <http://www.ocdla.org/pdf/Shepard.pdf>

**Exhibit P.** Ways & Means Public Safety Funding Priority List. Go to: <http://www.ocjc.state.or.us/>