

Tracy A. Prall

Presiding Circuit Court Judge

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Circuit Court of Oregon

Third Judicial District

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June 13, 2022

Stephen Singer, Executive Director
Office of Public Defense Services (OPDS)
198 Commercial Street SE, Ste. #205
Salem, OR 97301
VIA EMAIL ONLY

RE: OPDS Appointments

Dear Mr. Singer,

Over the past nine months, Marion County has been experiencing a shortage of defense attorneys. During the pandemic, defense attorneys left our area or left the practice of law all together. In the early days of the crisis, our local defense attorneys were able to cobble together coverage plans. Yet, by October 2021, the local coverage was not enough. We no longer had enough contract defense attorneys to cover our felony cases.

In October, in an effort to reduce the felony caseloads and increase capacity for new cases, the court scheduled the first ever settlement conferences inside the Marion County Jail. I, along with two trial team leaders from the District Attorney's Office, and the defense attorneys went into a vacant pod at the jail to conduct the settlement conferences. Any defendant that agreed to accept an offer was taken directly to the courtroom attached to the jail for our annex judge to accept the plea and sentence the defendant. While these settlement conferences were tremendously successful and we were able to create some additional capacity, we quickly found it was not enough.

In November 2021, Linda Hukari and I began working with OPDS leadership, including the Interim Director and then you, and our local public defense leadership, including Olcott Thompson, Executive Director of the Marion County Association of Defenders (MCAD) and Shannon Wilson, Executive Director of Public Defenders of Marion County (PDMC) to ensure that all Marion County defendants promptly received suitable counsel. For a time, we were having weekly video conference meetings with you and Amy Jackson, our OPDS Analyst, to problem solve and plan. On days when no felony contract lawyer was available to accept appointments, the

court agreed to provisionally appoint “OPDS” at the first appearance to identify the need and to give Ms. Jackson time to find suitable available contract attorneys. The court regularly shared a list of defendants needing counsel with Ms. Jackson. In line with the court’s expectation, attorneys were generally identified by the next court date. Ms. Jackson was diligently reaching out to contract attorneys in neighboring counties to assist. Most of the cases without counsel were out-of-custody cases at that time but we were beginning to struggle to timely find attorneys for in-custody defendants. To keep our unrepresented in-custody cases down, we conducted another round of settlement conferences in the jail.

In early January 2022, in an effort to increase capacity for handling major in-custody felonies, Ms. Wilson proposed that OPDS approve some of PDMC’s attorneys to be BM11 only attorneys and that OPDS find substitute counsel for the misdemeanor and low-level felonies those lawyers were carrying. You were able to get that plan approved by the end of January. Our OPDS analyst then reached out to MCAD and contract attorneys in neighboring counties and found attorneys willing to take the PDMC cases. Yet we still had days when no contract lawyers were available to take felony case; most were out-of-custody, but as the weeks went on, more and more were in-custody. Ms. Jackson continued to reach out to MCAD attorneys and other contract attorneys across the state to assist.

In March, the court conducted another round of settlement conferences in the jail and a round of out-of-custody settlement conferences at the courthouse. While the settlement conferences resulted in an over 70% settlement rate, we could still not keep up with the rising felony case load. Additional attorneys announced they were leaving our local bar to practice elsewhere or retire.

In late March, Ms. Wilson advised Ms. Jackson that PDMC soon would not have capacity for any additional felony cases and asked Ms. Jackson for guidance. By mid-April, Ms. Wilson’s fears were a reality. On March 14, 2022, Ms. Wilson notified the court that PDMC only had capacity for six more in-custody felony cases and only two BM11 cases. PDMC has taken only a few felony cases since that time.

On April 22, 2022, you attended a meeting of Oregon’s Presiding Judges and Trial Court Administrators. At that meeting, I told you that Marion County continued to struggle to find attorneys to take our felony cases and asked you what OPDS’s plan was to ensure representation for all defendants in the counties most affected by the attorney shortage and specifically asked what was going to be done from that date through June 30th. No solutions were proposed at that time.

By May 3, 2022, PDMC reached saturation for any felony cases. At that time, the court was continuing the practice of appointing “OPDS” at the first appearance to identify the need and to give Ms. Jackson time to find suitable available contract attorneys. However, it was getting more

and more difficult for Ms. Jackson to identify counsel by the next court date, and it was never happening on in-custody cases when the next court date was only seven days later. The court was left to tell in-custody defendants that counsel still had not been identified and to set the case for further proceeding.

On May 25, 2022, Mr. Thompson informed the court that MCAD would not be able to accept felony appointments on nine days in June. That, in addition to PDMC not being able to take any felony appointments in June, meant the court would not have any contract attorney available to accept felony appointments on 13 out of 22 days in June.

On May 25, 2022, I contacted you to inform you directly of the situation and we scheduled a meeting for June 2, 2022. On June 1, 2022, our Criminal Court Annex Judge, Jennifer Gardiner, sent an email to Lorie Bender and Shannon Flowers, both attorneys working for OPDS, to inform them of the cases needing immediate attention. You then emailed me trying to confirm the courts expectations. I informed you that the court continued to expect OPDS would identify suitable counsel by the next court date. The problem at that time was that the defendants OPDS was trying to find lawyers for were not out-of-custody with return dates 30 days out, but in-custody with return dates only 7 days out.

By early June, Marion County had 15 in-custody defendants without counsel. Two of those had been in custody for nearly 30 days. The defendants had been arraigned on an Information without appointed counsel, arraigned on Indictment without appointed counsel, and had attended at least one additional court appearance before the judge without appointed counsel. While a local attorney was able to stand by, they were not appointed counsel and were not ethically available to answer any questions the defendants might have had. This has been an untenable situation.

Since May, OPDS has failed to identify suitable counsel by the next court date for both in-custody and out-of-custody defendants. In early June, Judge Gardiner began appointing OPDS staff and appellate counsel to Marion County's in-custody cases as OPDS had failed to identify any suitable attorney or make any effort to appear on behalf of the in-custody defendants. We have stopped that practice for now.

Going forward, the court will consider OPDS's failure to timely identify suitable counsel to mean that no contract attorney is available for appointment on that case. The court understands OPDS does not currently have any contract attorneys available for appointment on the first judicial day of any week (PDMC days) or the following days in June: 13, 15, 24, 28, or 29. Should OPDS fail to provide the court with a list of contract attorneys available for appointment by 1:30 pm on those days or any day, the court will understand that to mean that no contract attorneys are available for appointment and will immediately appoint private bar counsel, which could include a contract attorney outside the attorney's contract, to the case on an hourly rate basis.

If private bar counsel is not available to accept the appointment, the court will sign an Order provisionally appointing “OPDS” at the initial appearance for any defendants who qualifies for court appointed counsel when no contract attorney is immediately available to accept the appointment. The Order will serve to notify OPDS of the appointment and will give OPDS an opportunity to identify suitable counsel by the next court date; the next court date will be roughly 7 days from the initial appearance on in-custody cases and 30 days from the initial appearance on out-of-custody cases. If suitable counsel is not identified by the next court date, the court will schedule a hearing in 14 days requiring OPDS to appear and show cause why OPDS should not be held in remedial contempt of court.

The Marion County Circuit Court will continue to work with OPDS and our local public defense leadership to problem solve and identify solutions to this crisis.

Sincerely,



Tracy A. Prall, Presiding Judge
Marion County Circuit Court

TAP:cd

Cc: Marion County Circuit Court Judges
Linda Hukari, Trial Court Administrator
Chief Justice Martha Walters
Nancy Cozine, State Court Administrator
O’lcott Thompson, MCAD Executive Director
Shannon Wilson, PDMC Executive Director
Laurie Bender, OPDS