



Office of the Ohio Public Defender

Timothy Young, State Public Defender

Testimony Regarding the Budget of the Ohio Public Defender Commission

Chair Oelslager, Vice Chair Plummer, Ranking Member Crawley, and members of the House Finance Committee. I am Tim Young, the Ohio Public Defender. Thank you for the opportunity to testify regarding the budget of the Ohio Public Defender Commission.

The Ohio Public Defender Commission supports and appreciates Governor DeWine's proposed budget for indigent defense. Thank you as well to the members of this committee for all your work on the budget. I would not normally testify at this stage of the House considering the budget bill, but I thought it important to come today to discuss how the House Substitute Bill would impact the Office of the Ohio Public Defender (OPD) as well as indigent defense reimbursement to Ohio's 88 counties. The OPD had one primary request in our previous budget testimony - we asked for an additional \$1 million in FY2022 and \$1.5 million in FY2023 be allocated to the operating budget of the OPD. This request was supported by amendments offered by Representative Plummer and Representative Skindell. Unfortunately, those amendments were not adopted into Substitute House Bill 110 – rather, the bill provides an additional \$100,000 for our operating budget. Conversely, \$20 million more was appropriated for county reimbursement in the biennium.

The funding in Sub. HB110 not only falls short of the amendments offered by Representative Plummer and Representative Skindell, but also leaves OPD with approximately \$500K less in operating funding than the agency had before COVID. This results in OPD having funding for approximately 6 fewer staff positions than were funded for prior to COVID.

The County Commissioners Association's amendment to get indigent defense reimbursement funding close to 100% was adopted – with an additional \$8 million in FY2022 and \$12 million in FY2023. While OPD is supportive of taking reimbursement close to 100%, Sub. HB110 increases the workload for OPD, but does not allow us to hire the necessary staff. Representative Plummer and Representative

Skindell also sponsored an amendment that would allow OPD to have oversight and limit extreme increases in county spending for indigent defense. This amendment, which had the support of the CCAO, was not included in Sub. HB110. Without the inclusion of that amendment, there is no way to guarantee the appropriation in Sub. HB110 will have the counties at 100% reimbursement.

The request for a \$2.5 million increase over two years is critical for the OPD to meet our statutory duties and will allow OPD to hire 15 necessary additional staff members – half of which were previously provided in the FY20/FY21 budget, but as outlined further below we were unable to hire due to funding cuts and hiring freezes as a result of the pandemic. In candor, this allocation will not allow OPD to hire all the staff that is needed, but it will allow the OPD to meet our basic statutory and constitutional duties and provide oversight and accountability for the significant funding to county reimbursement for indigent defense.

The 133rd General Assembly attempted to address the chronic underfunding of OPD. In the last biennium budget, HB166, OPD received funding to hire 12 new staff members. However, the OPD was forced to cut our operating budget by 35% because of the COVID-19 pandemic, though most agencies took a 20% cut. As of the result of the cut to our operational budget, OPD was only able to hire five new employees during the last biennium. Governor DeWine's recommended budget funds OPD's operations at the COVID-19 reduced amount, lower than this body funded OPD last General Assembly. Funding at this level will not allow OPD to hire any additional staff even though those positions are vitally necessary to fulfill our duties, but which were able to be hire due to the pandemic cuts. Furthermore, OPD's need for staff continues to increase since HB166 was passed.

The Governor's budget includes over \$150 million to reimbursement for the counties in each fiscal year. Of that, \$125 million is general revenue funding. The OPD is grateful to Governor DeWine for his investment in county-level indigent defense by allocating over \$300 million for county reimbursement over the next two fiscal years. Governor DeWine and OPD project that the State will be paying



approximately 96% in FY2022 and 94% in FY2023 of the cost of indigent defense.¹ This is a far cry from the 42% reimbursement rate in FY2019, and a much-needed investment.

But there was no increase in any funding for the operational oversight and distribution of those funds. The reimbursement budget funds do not impact, and are not available for, the operational budget of OPD which is where the responsibility for these funds lies and the distribution is carried out. Before going into more detail regarding the operational funding of OPD it is important to note that OPD oversees four separate budgets:

1. The OPD operational budget funds the State Public Defender's Office, which is primarily used to hire staff to help meet our statutory duties prescribed in Revised Code 120 – among which is oversight and administration of the funds to reimburse the 88 counties for their indigent defense costs;
2. The reimbursement budget funds provide reimbursement to all 88 counties for the county-level costs of indigent defense;
3. The operational budget for OPD's branch offices provides funding for the county public defender offices maintained by the OPD in Athens, Ross, Trumbull, and Washington counties as a result of those four counties contracting with the OPD to provide indigent defense services in those respective counties. Contracting with the OPD to provide a county public defender office is one of five methods available to counties to provide for indigent defense;
4. The fourth budget solely serves as a pass through to the Ohio Access to Justice Foundation, formerly known as Legal Aid, which is an agency that serves needy Ohioans on civil matters. OAJF does not provide indigent defense services, so their budget does not impact defense representation.

¹ The Supreme Court of Ohio issued an opinion on December 22, 2020 in which the Court found indigent parents facing the loss of their parental rights in adoption proceedings in probate court are entitled to a free attorney. Probate courts have only been able to provide anecdotal information to OPD, preventing an accurate assessment of the number of cases that would now qualify for reimbursement pursuant to the Court's holding. Based on this limited information, the OPD estimates that reimbursement in these cases would be a minimum of an additional \$3,000,000 each fiscal year. These cases will impact the reimbursement rate overall, but OPD is not in a position at this time to estimate the exact amount of that impact.



With those four budgets in mind, Governor DeWine's increase funding to indigent defense is for the reimbursement budget and does not address impact this has on the operational budget. Prior to recent attention, OPD's operational budget suffered from severe underfunding for a 15-year cycle that has never been overcome. Despite increasing caseloads, increasing demands, and inflationary costs, funding for OPD's operating budget increased only 7.7% from FY 2000 to FY 2015. During that same period, the Consumer Price Index increased 37%. The cost and size of Ohio's criminal justice system consistently grows 2.5 – 3% annually, but funding was not been allocated accordingly. The agency has never recovered from this dramatic and chronic underfunding during which two different layoffs occurred.

The OPD cannot continue on this path without some change to undo the 15-year period of being underfunded and understaffed. We are extremely appreciative that OPD was able to hire five employees last biennium. But it is not enough. Despite underfunding and understaffing, the quality of the OPD's client services has never faltered. With just 140 total staff, OPD attorneys and staff represent clients across the State of Ohio: we provide orientation to all incoming people at the Department of Rehabilitation and Corrections and the Department of Youth Services, working to answer questions and assist with legal issues; we perform trial work, often in the most difficult cases upon request from courts across Ohio; we represent half of the individuals sentenced to death, working as attorneys of last resort in these most serious of cases; we perform some of the highest quality and innovative appellate representation in criminal and juvenile cases in all of the appellate courts across Ohio; we set the standard for representation in criminal and juvenile justice issues in front of the Ohio Supreme Court; we represented individuals parole and revocation hearings (1171 parole hearings in 2020, a 586% increase since 2013); we host trainings for public defenders and appointed counsel nationally and statewide, providing thousands of hours of CLEs; we actively provide support and policy positions to the legislature; we provide technical and reimbursement assistance to the counties on an increasing and growing basis; we provide a case management system to all county public defenders, providing user support and training; we are one of the most fiscally sound and responsible agencies across the



State, having clean audits with no findings; we staff multiple task forces, boards and commissions, and advisory panels; we provide the highest quality investigation and mitigation work to support our own attorneys as well as outside counsel when requested and when available, we started the nation's first Wrongful Conviction Project devoted to non-DNA exoneration cases; and we support our community through ongoing public service projects. This is a non-exhaustive list, and it is a testament to the excellence of the attorneys, investigators, and staff at the OPD. This body made an investment in OPD in the last budget, that, unfortunately due to the pandemic, never came to fruition. OPD needs the employees we were funded for in HB166, and we need additional staff to meet our statutory duties – including address the increase in reimbursement funding and provide technical assistance to counties.

The proper and diligent oversight of over 300 million taxpayer dollars to appropriately provide for indigent defense is a duty we take very seriously. But at present staffing, this requires oversight and assistance that OPD is currently unable to provide due to the severe underfunding of our operating budget. OPD's reimbursement staff must review county reports to ensure compliance with the standards and guidelines and notify the county if it is not meeting these requirements. This must be done for all of the paper 150,000 requests for reimbursement OPD receives each year. To provide a less expensive and more efficient reimbursement system, the OPD has developed an electronic reimbursement program. We are currently in the process of deploying this system, which will increase our userbase from 900 to approximately 4,000 users. While this will undoubtedly save the counties time and money, it will require additional OPD staff to train county personnel and respond to the technical needs of counties. It is imperative that OPD receive funding for additional staff. It is no longer tenable to process indigent defense reimbursement via 13,000 -14,000 paper bills in total that are mailed to the OPD each month from the 88 counties. Good government administration necessitates that OPD transition this paper system to an electronic one, where transactions may be processed efficiently, and the OPD may gather, assess, and report data on how and where these funds are used. Moving this statewide system from a paper one to an electronic one – in which all court appointed counsel, public defender, judges,



auditors, and clerks complete their respective tasks related to reimbursement – is an imperative, and one that requires adequate staffing.

Further, when the reimbursement rate went from 40% to 70% in HB166, OPD experienced a significant increase in demand from counties for assistance from OPD staff. We anticipate further demand as Substitute House Bill 110 funds reimbursement at close to 100%. Ohio's system of paying appointed counsel, which has wide variances and artificially suppressed rates, results in increased costs in other areas of the criminal justice system, including jail and prison populations and costs.² Good defense attorneys can reduce societal costs and improve public safety. But, as the data shows, good attorneys continue to leave the defense practice because the rates are so low. There are counties in Ohio that have kept rates the same for over 20, even 30 years, with no adjustment for inflation. Recent studies of outcomes in indigent criminal cases have found that Ohio's chronic underpaying of appointed counsel leads to worse outcomes for people who are involved with the criminal justice system.³ This is why the Office of the Public Defender and the County Commissioner's Association of Ohio (CCAO) are supportive of the state providing 100% reimbursement to the counties for indigent defense.

You probably noted that I said Sub. HB110 brings reimbursement funding **close to** 100%. As indicated above, Representatives Plummer and Skindell also sponsored an amendment that would allow OPD to have oversight and limit extreme increases in county spending for indigent defense. This amendment, which had the support of the CCAO, was not included in Sub. HB110. Without the inclusion of that amendment, there is no way to guarantee the appropriation in Sub. HB110 will have the counties at 100% reimbursement. The amendment is necessary to ensure, through the OAC, that reimbursement

²For studies supporting the link between low attorney pay and poor outcomes, see: Lyengar, R. (2007). *An Analysis of the Performance of Federal Indigent Defense Counsel*; and National Bureau of Economic Research – Harvard University and Roach, M. (2010). "Explaining the Outcome Gap between Different Types of Indigent Defense Counsel: Adverse Selection and Moral Hazard Effects," available at Social Science Research Network: <http://ssrn.com/abstract=1839651>.

³Roach, Michael A., *Indigent Defense Counsel, Attorney Quality, and Defendant Outcomes*, American Law and Economics Review, May 2014; and Cohen, Thomas H., *Who's Better at Defending Criminals? Does Type of Defense Attorney Matter in Terms of Producing Favorable Case Outcomes*, Social Science Research Network, 2011. Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1876474.



to the counties for the cost of indigent defense stays equitable throughout the state. When this legislature tell counties that reimbursement will be at 70%, or 96%, or 100% - we want to make sure reimbursement stays at that rate. We want to avoid a repeat of 2013 when a large county gave all of their 150 employees a 12% raise, and reimbursement dropped statewide by 2%. Certainly, counties will be able to give rises, hire new employees, upgrade equipment, etc. However, if the county increases their cost by more than 3.5%, which we know is the amount the system increases by yearly, the county will not receive reimbursed for any expense over the 3.5% increase. This language is urgent as Sub. HB110 intends for 100% reimbursement funding. Counties may want to make significant changes to indigent defense if they believe are paying 0% the costs indigent defense. OPD hopes to ensure that unpredictable unexpected spending does not impact other counties who are planning on 100% reimbursement.

OPD is requesting that an additional \$1 million in FY2022 and \$1.5 million in FY2023 for the hiring of 15 necessary staff members. The OPD's underfunding is inconsistent with good government practices and cannot continue. Further, to ensure OPD is able to maintain equitable distribution of reimbursement to all counties, OPD is asking for some minor statutory language changes. Those changes are attached to this testimony.

Thank you for the opportunity to testify before your committee. I am happy to answer questions at this time.



collection of such sums that the state public defender considers advisable. Except as provided otherwise in division (D) of section 120.06 of the Revised Code, all moneys collected by the state public defender under this chapter and section 2941.51 of the Revised Code shall be deposited in the state treasury to the credit of the client payment fund, which is hereby created. All moneys credited to the fund shall be used by the state public defender to appoint assistant state public defenders and to provide other personnel, equipment, and facilities necessary for the operation of the state public defender office, to reimburse counties for the operation of county public defender offices, joint county public defender offices, and county appointed counsel systems pursuant to sections 120.18, 120.28, and 120.33 of the Revised Code, or to provide assistance to counties in the operation of county indigent defense systems.

(6) With respect to funds appropriated to the commission to pay criminal costs, perform the duties imposed by sections 2949.19 and 2949.201 of the Revised Code;

(7) Establish standards and guidelines for the reimbursement, pursuant to sections 120.18, 120.28, 120.33, 2941.51, and 2949.19 of the Revised Code, of counties for the operation of county public defender offices, joint county public defender offices, and county appointed counsel systems and for other costs related to felony prosecutions;

(8) Establish minimum and maximum amounts that the state will reimburse the counties pursuant to sections 120.18, 120.28, 120.33, and 2941.51 of the Revised Code;

(9) Establish minimum and maximum amounts that the state will reimburse the counties pursuant to section 120.33 of the Revised Code for each specific type of legal service performed by a county appointed counsel system;

(10) Administer sections 120.18, 120.28, 120.33, 2941.51, and 2949.19 of the Revised Code and make reimbursements pursuant to those sections;

(11) Administer the program established pursuant to sections 120.51 to 120.55 of the Revised Code for the charitable public purpose of providing financial assistance to legal aid societies. Neither the state public defender nor any of the state public defender's employees who is responsible in any way for the administration of that program and who performs those administrative responsibilities in good faith is in any manner liable if a legal aid society that is provided financial assistance under the program uses the financial assistance other than in accordance with sections 120.51 to 120.55 of the Revised Code or fails to comply with the requirements of those sections.

(12) Establish an office for the handling of appeal and postconviction matters;

(13) Provide technical aid and assistance to county public defender offices, joint county public defender offices, and other local counsel providing legal representation to indigent persons, including representation and assistance on appeals.

(14) Pursuant to Revised Code 111.15, adopt provisions in Chapter 120 of the Ohio Administrative Code to ensure the state public defender is able to provide fiscal oversight of reimbursement funds and establish equitable reimbursement to the counties.

