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IN THE SUPREME COURT OF THE STATE OF OREGON

STATE OF OREGON,

Plaintiff-Adverse Party,

v.

JOSHUA ADAM HEMION, aka Josh  
Adam Hemion

Defendant

METROPOLITAN PUBLIC DEFENDER,  
INC.,

Relator.

Washington County Circuit Court  
Case No. 24CR34660

SC S072015

MANDAMUS PROCEEDING

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BRIEF ON THE MERITS OF AMICI CURIAE  
OREGON CRIMINAL DEFENSE LAWYERS ASSOCIATION

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Alternative Writ of Mandamus Issued to  
Honorable Rebecca D. Guptill, Washington County Circuit Court Judge

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# BRIEF OF *AMICUS CURIAE* OREGON CRIMINAL DEFENSE LAWYER'S ASSOCIATION

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## INTRODUCTION

The Oregon Criminal Defense Lawyers Association (OCDLA) is a nonprofit organization based in Eugene, Oregon that represents Oregon's criminal defense community. OCDLA's mission statement is "[c]hampioning justice, promoting individual rights and supporting the legal defense community through education and advocacy." Its members are lawyers, investigators, law students, and legal professionals dedicated to defending individuals who are accused of crimes. OCDLA serves the defense community by providing continuing legal education, public education, and networking. OCDLA is concerned with legal issues presenting a substantial statewide impact to defendants in criminal cases.

OCDLA agrees with defendant-relator that the trial court lacked legal authority to order the Metropolitan Public Defender ("MPD") to disclose data and records relating to its representation of indigent defendants in Washington County, including a list of its attorneys and their caseloads, and that this court should issue a peremptory writ of mandamus directing the trial court to rescind its order.

This *amicus* brief proceeds in two sections. First, OCDLA sets out in some detail the history of Oregon's indigent defense system and its current

statutory structure. That history demonstrates a consistent legislative intent, particularly post-2001, to maintain independence of the defense function from the judiciary by removing the judiciary from public defense oversight and placing that supervisory authority in an independent commission. Second, OCDLA argues that the trial court lacked statutory authority to order MPD to disclose its records on motion of the District Attorney's office. Under Oregon's current statutory scheme for public defense, the authority to regulate public defense lies solely in the Oregon Public Defense Commission—not in trial courts, nor District Attorneys' offices.

## **Argument**

### **I. The history of public defense in Oregon shows a consistent legislative intent to ensure independent governance and avoid direct judicial oversight of the defense function.**

OCDLA sets out the history of Oregon public defense, both to place the dispute in this case within its proper historical context, and to show the legislature's consistent attempts over the last century to maintain a degree of separation between the judiciary and the indigent defense function.

#### **A. Statehood to 1937: wide judicial control over indigent defense motivates passage of the first statute requiring paid, appointed counsel for indigent defendants.**

The right to appointed counsel in Oregon traces its roots to statehood. Article I, section 11, of the original 1857 Oregon Constitution provided that, "In all criminal prosecutions, the accused shall have the right \* \* \* to be heard by



himself and counsel.” The legislature soon enacted statutes to effectuate that constitutional guarantee. By 1864, the legislature had enacted statutes requiring trial courts, before arraignment, to inform criminal defendants “that it is his right to have counsel before being arraigned,” and to ask if the defendant “desires the aid of counsel.” General Laws of Oregon, Crim Code, ch IX, § 95, p 353 (Deady & Lane, 1843-1872).<sup>1</sup> The 1864 legislature also provided for similar warnings when a defendant appeared before a magistrate for a preliminary “examination”—analogous to a modern preliminary hearing—and provided defendants with a “reasonable time to send for counsel” before the examination. General Laws of Oregon, Crim Code, ch XXXVI, §§ 379, 380, p 390 (Deady & Lane, 1843-1872). Although those statutes did not expressly discuss the prospect of appointed counsel for indigent defendants, Oregon courts retained “inherent or incidental” authority to appoint counsel for an indigent defendant when necessary, even in the absence of express statutory authorization. Michael Moore, *The Right to Counsel for Indigents in Oregon*, 44 Or L Rev 255, 257 (1965); *see also State v. Delaney*, 221 Or 620, 332 P2d 71 (1958) (“We believe that all courts of this state have inherent power to

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<sup>1</sup> That statute still exists in substantially the same form today. ORS 135.040 (“If the defendant appears for arraignment without counsel, the defendant shall be informed by the court that it is the right of the defendant to have counsel before being arraigned and shall be asked if the defendant desires the aid of counsel.”).

appoint counsel for an indigent person accused of a crime when it is established that a need for counsel exists” and where no statute applies to the situation).

Historical evidence as to precisely how Oregon courts exercised that authority during the late-19<sup>th</sup> and early-20<sup>th</sup> century is limited. However, the historical accounts that do exist—which are largely anecdotal—suggested that courts employed an informal and *ad hoc* approach to appointing counsel using processes that “varie[d] widely from county to county.” Moore, 44 Or L Rev at 265. Oregon had no centralized state public defense office or local county public defense offices from which trial courts could appoint counsel, so counties took different approaches.<sup>2</sup> Some counties used a list of “all but a very few of the active attorneys in the county” and appointed attorneys from that list in rotation; others used a partial list of local attorneys who had agreed to take indigent defense cases and rotated appointments from that list. Moore, 44 Or L Rev at 265-66. Other trial courts took a less formal approach, and “simply appoint[ed] an attorney who [was] in the courtroom at the time of arraignment” for indigent defendants, while other judges walked out into the hallway or

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<sup>2</sup> The city of Portland briefly established a formal office of the “Public Defender” within the Municipal Court in 1915 before eliminating the office in 1917, for what commentators believed were budgetary and political reasons. Thomas A. Larremore, *Portland and Legal Aid*, 1 Or L Rev 1, 7-9 (1921). During that 25-month period, the lone attorney within the Public Defender represented 3,840 criminal defendants. *Id.* at 7.

outside the courthouse and found a nearby attorney to appoint. *Id.*; see also Marc D. Brown, *Humble Roots: Chronicling the State Public Defender's Office*, Oregon State Bar Bulletin, December 2013 (describing the process in a Portland court before the 1960s where “several older attorneys would hang around the court, and a judge, looking for an attorney to appoint, would simply walk out into the hallway and choose one.”).

The informality and variability of those procedures led the Oregon State Bar in 1937 to create a “Committee on Attorney Fees in Indigent-Criminal Cases” to standardize reimbursement for appointed counsel. *Proceedings of the Third Annual Meeting of the Oregon State Bar*, 17 Or L Rev 36, 37 (1938). The committee’s final report found that (1) in the absence of a statute requiring payment, appointed counsel struggled to recover compensation for indigent defense services, (2) some counties allowed compensation for appointed counsel, but others did not, and there was “a great differential and a lack of uniformity” among counties regarding those fees, and (3) in the rare jurisdictions that did allow counsel to recover costs, judges retained significant discretion in determining which fees or costs to reimburse. *Id.*

To resolve those problems, the Oregon State Bar in 1937 proposed Senate Bill 343, which the legislature passed and the Governor signed. Or Laws 1937, ch 14, §§ 1, 2. The bill provided that, when a defendant appeared at arraignment “without funds and unable to retain his or her own counsel, the

court \* \* \* shall, upon the request of the accused, appoint suitable counsel.” Or Laws 1937, ch 14, § 1. The bill also provided that appointed counsel would “receive and be paid by the county in which such proceeding is had, for the services rendered in conducting such defense” according to a fee schedule: a \$5 flat fee for misdemeanors resolved by guilty plea, \$10 a day (two-day limit) for misdemeanors with a not guilty plea, \$15 flat fee for felonies resolved by guilty plea, and \$15 per day (three-day limit) for felony cases with a not guilty plea. Or Laws, ch 14, § 2.

Thus, before 1937, indigent defense in Oregon was nearly entirely a product of judicial discretion. In the absence of statutory guidance, trial courts were left to decide whether to appoint counsel for indigent defendants, whether to pay appointed attorneys, and if so, what specific costs or fees would be reimbursed. After 1937, courts were statutorily obligated to provide counsel to indigent defendants who requested it, but retained authority to approve or disapprove of an appointed lawyer’s reimbursement requests. Or Laws ch 14, § 2. Thus, trial-level public defense in this era still largely “remained under the authority of each judge in the county in which their court was located.” Sixth Amendment Center, *The Right to Counsel in Oregon: Evaluation of Trial Level Public Defense Representation Provided Through the Office of Public Defense Services* at 13 (2019),

<https://www.oregon.gov/opdc/commission/reports/6ACOregonreport2019.pdf>.

**B. 1937 to the 1980s: Heavy cost burdens on counties motivates creation of the first state-funded public defense system in 1983.**

After the passage of Senate Bill 343 in 1937, courts consistently appointed counsel for indigent defendants in both felony and misdemeanor cases. Throughout the mid-20<sup>th</sup> Century, “almost all defendants” in Oregon circuit courts “had counsel appointed in almost all instances,” with many courts appointing counsel in *every case* with an indigent defendant, even over their objection. Moore, 44 Or L Rev at 269. By 1958, this court described appointing counsel for indigent defendants as a “long standing” practice of the state. *See Delaney*, 221 Or at 638 (“Practice of long standing in this state requires that counsel be appointed by the trial bench for an indigent defendant who is charged with crime, unless he waives the right.”). Counties still bore the financial responsibility for compensating appointed counsel. ORS 135.330 (1955) (providing that appointed counsel “shall, if the court so orders, be paid by the county in which the proceeding is had” pursuant to a set fee schedule).

In the 1960s and 1970s, Oregon counties began to feel the financial strain from bearing that responsibility. In 1961, the legislature amended the modest fee schedule by (1) allowing counsel to recover expenses incurred in the case, in addition to the fixed daily fee, and (2) increasing the daily rate for each type of case by a factor of five (*e.g.*, increasing the flat misdemeanor fee from \$5 to \$25, and so on). Or Laws 1961, ch 698 §§ 1, 2. Though those enactments were

necessary to ensure an adequate financial incentive existed for lawyers to take indigent defense cases, they increased the financial burden on local counties.

At the same time, the number of cases requiring appointed counsel steadily increased. In 1963, the United States Supreme Court decided *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963), which held that the Sixth Amendment required the states to provide appointed counsel for indigent defendants in any serious case. Then in 1969, this court extended that right “to all criminal prosecutions, including prosecutions for violations of municipal ordinances,” that risk a jail sentence. *Stevenson v. Holzman*, 254 Or 94, 458 P2d 414 (1969). Those developments, coupled with the 1971 enactment of the criminal code, caused appointed counsel caseloads to steadily grow throughout the 1970s. Ken Rocco and Larry Niswender, *State Funding of Trial Court Representation for Eligible Persons*, Legislative Fiscal Office at 1 (August 2004); see also Paul Levy, Amy Miller, and Eric Deitrick, *The Future of Public Defense in Oregon: The Discussion Continues*, Office of Public Defense Services, at 2-3 (December 13, 2017) (“[A]s the right to counsel expanded beyond criminal felony cases[,] the caseload of appointed counsel steadily increased.”).

As costs rose during the 1970s, “counties were increasingly concerned about their responsibility for costs that they felt they did not control.” Rocco and Niswender at 1. In response to those concerns, the legislature transferred

the cost of public defense from counties to the state as of January 1, 1983. *Id.* The judiciary was intimately involved in the new indigent defense system. The legislature appropriated funds to the office of the State Court Administrator (SCA) to pay for public defense and authorized the SCA to contract with attorneys and firms to provide indigent defense services in trial courts. ORS 151.090 (1983); ORS 151.150(1) (1983). The responsibility for that system was split between the SCA and trial courts. The SCA was responsible for funding indigent defense, and trial courts were responsible for approving compensation requests from appointed attorneys. ORS 135.055 (1983).

Notably, although the judiciary was heavily involved in indigent defense, the legislature limited judicial discretion to deny compensation. Under the 1937 compensation statute, trial courts had discretion to deny payment, and the statute provided no guardrails for that discretion. However, under the new statute, trial courts had less discretion to deny payment: the statutes provided that appointed counsel “shall” be paid “fair compensation” for representation in the case, ORS 135.055(1) (1983) provided for a minimum rate of \$30 an hour, ORS 135.055(2) (1983) provided that an indigent defendant is “entitled to reasonable expenses for investigation, preparation, and presentation of the case,” ORS 133.055(4) (1983) and provided that trial courts “shall” approve all “reasonable expenses” incurred by appointed counsel in preparing the case, ORS 135.055(5) (1983). Those mandatory statutory directives gave courts far

less ability to deny reimbursement to appointed counsel. *See Preble v.*

*Department of Revenue*, 331 Or 320, 324, 14 P3d 613 (2000) (noting that the term “shall” “is a command” and, when used in a statute, denotes a mandatory obligation to act).

Thus, under the 1983 system, the state bore the financial cost of public defense and the judiciary administered those services, and trial courts had less discretion to deny payment and reimbursement to appointed counsel.

**C. 1980s to 2000: judicial entanglement motivates creation of independent commission to oversee indigent defense**

Under the new state-funded system, trial courts approved payments, but the SCA was responsible for making the actual payment. “This arrangement made it difficult for the State Court Administrator to control costs,” and from 1985-87, costs soared by 24%, from \$34 million to \$42.3 million. Rocco and Niswender at 2. In response, the 1987 legislature consolidated nearly all the responsibility over indigence defense within the SCA. *See* ORS 151.430 to 151.465 (1987). Administration of Oregon’s public defense system remained with the state court administrator for decades. But that system drew consistent criticism from attorneys, judges, and independent organizations.

Numerous reports on Oregon’s indigent defense system during this era criticized the system for being administered by the judiciary, which risked creating conflicts of interest and compromised the independence of the defense



function. *See generally* Rocco & Niswender at 2-4 (summarizing findings of 18 independent reports on Oregon indigent defense from 1987 to 2000, many of which criticized the system for its heavy judicial involvement). A 1993 study by the Spangenberg Group of Oregon’s indigent defense system concluded that “the administration of the public defense function should be separated from the judicial function, to reduce potential conflict[s] of interest for judges.” *Id.* The following year, the Oregon State Bar Indigent Defense Task Force submitted a report that recommended “the establishment of a commission (versus the judiciary) to administer public defense services.” *Id.*

Heeding those calls, the 2001 legislature passed Senate Bill 145, which substantially reorganized Oregon’s public defense system and enacted much of the statutory scheme that exists today. The bill merged all responsibility for administering indigent defense services into the Office of Public Defense Services (OPDS), and created an independent commission to govern that Office, the Public Defense Services Commission (PDSC). Or Laws 2001, ch 962.

The change was intended to remove judges from decision making regarding “appoint[ing], evaluat[ing], and approv[ing] the compensation and expenses for attorneys,” a role that drew criticism from both defense attorneys and judges. Testimony, Senate Committee on Judiciary, SB 145, April 16, 2001, at 4 (Statement of Barnes Ellis). The purpose of the new structure was to

“consolidate all decisions on expense requests in administrative rather than judicial hands, which should provide greater consistency, control and accountability, and avoid some of the conflicts felt by the judges.” *Id.* at 5. The PDSC would “assume the current judicial responsibilities and all of the current administrative responsibilities” that had been spread among the judiciary. Testimony, Senate Committee on Judiciary, SB 145, April 16, 2001, at 1 (statement of Ann Christian). The SCA also supported the new structure “because it would eliminate the inherent conflict that presently exists in having the Judicial Department and judges intimately involved in the defense function,” including in administrative and budget decisions. *Id.* at 2.

The Legislature therefore created the PDSC “to handle the cases assigned and to carry out the administrative policies and procedures for the public defense system.” *Former* ORS 151.211(5) (2001) (defining OPDS), *former* ORS 151.216(1)(b) (2001) (instructing the commission to establish OPDS). In creating the PDSC, the legislature specifically authorized that body to determine the qualifications and compensation for court-appointed counsel.

The legislature granted PDSC authority to adopt policies and procedures related to attorney compensation and caseloads, including ensuring that compensation and caseloads are in accordance with national best practices and commensurate with the character of service performed. ORS 151.216(1)(b). The legislature additionally authorized the PDSC to adopt policies and

procedures regarding financial eligibility for when a person is entitled to counsel, non-attorney compensation costs associated with representation, performance standards for representation, and contracting for public defense services. ORS 151.216(1)(h). The legislature tasked the PDSC with setting certain “minimum standards,” such as standards by which appointed counsel are trained and supervised, ORS 151.216(1)(k), standards to ensure that attorneys provide effective assistance of counsel as required by the state and federal constitutions, ORS 151.216(1)(j), and “standard operating expectations for persons and entities providing public defense services.” ORS 151.216(1)(o).

Crucially, the legislature ensured that the administrative functions of the PDSC, and the minimum standards set by the PDSC, were *not* subject to review or approval by the judicial branch. Under the new statutory scheme, the PDSC’s policies, procedures, standards, and guidelines “supersede any conflicting rules, policies and procedures” that were adopted by the SCA, circuit courts, appellate courts, or adopted under previous public defense systems. ORS 151.216(8). And, although the commission was housed in the judicial branch prior to 2025, the employees of the Commission were “not subject to the exercise of administrative authority and supervision by the Chief Justice of the Supreme Court as the administrative head of the Judicial Department.” *former* ORS 151.213(1) (2023).

**D. 2021 and 2022 reforms: adoption of new payment structure and “Maximum Allowed Caseload” (MAC) model.**

Under the 2001 system, PDSC paid a flat fee per case type, but that “pay-per-case” model came under significant scrutiny. In January 2019, the Sixth Amendment Center issued a report concluding that fixed fee contracting for indigent defense services failed to ensure that defendants received the effective assistance of counsel under the Sixth Amendment, because flat fee contracting “cause[s] conflicts of interest between the indigent defense attorney’s financial self-interest and the legal interests of the indigent defendants.” The Sixth Amendment Center, *The Right to Counsel in Oregon* at IV. That is, fixed fee contracting incentivizes “attorneys to handle as many cases as possible and to do so as quickly as possible, rather than focusing on their ethical duty of achieving the client’s case-related goals.” *Id.* at V. Faced with that evidence, PDSC shifted to a “Full- Time Equivalent (FTE)” model in 2021. *Oregon Public Defense Services Commission Reference Document*, 82nd Legislative Assembly, Joint Ways and Means Subcommittee on Public Safety at 4 (2022), <https://olis.oregonlegislature.gov/liz/2023R1/Downloads/CommitteeMeetingDocument/270606>. In 2022, PDSC changed the name to “Maximum Allowed Caseload” contracts, but it functions in the same way as the FTE model.

Under both the FTE and MAC model, attorneys commit to providing a certain percentage of their full-time work to indigent defense cases and the

MAC is used as a proxy for that time commitment.<sup>3</sup> An attorney agreeing to take on a 1.0 MAC is agreeing that they will work full-time on public defense matters and take on no other work. An attorney agreeing to take on a .5 MAC is agreeing that they will work on public defense matters for half of their time. See Oregon Public Defense Commission, *Criminal Contract Terms 2023-25* at 2, B-1 <https://www.oregon.gov/opdc/provider/SiteAssets/Pages/contract-terms/1%202023-25%20Criminal%20Contract%20Terms.pdf> (last visited September 13, 2025).

As relevant here, the failure of an indigent defense provider to meet the MAC is not a violation of the contract. The MAC set out in a contract defines what a maximum caseload is; it is a *limit* on the number of cases to which an attorney provide indigent defense services in a one-year period. *Id.* at B-1. That is, the MAC sets an upper limit on the number of cases that an attorney can take, and is not a quota. The MAC is a ceiling, not a floor. Until an attorney has reached their MAC limit, the attorney must “accept appointments

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<sup>3</sup> MAC is weighted by case type, so a murder case is weighted as a greater portion of a 1.0 MAC than a misdemeanor. OCDLA notes, however, that the MAC figures and weighting are based on national standards set in 1973. New standards have recently been released that are significantly lower and are, therefore, significantly lower than the currently set MAC. Nicholas M. Pace, Malia N. Brink, Cynthia G. Lee & Stephen H. Hanlon, *National Public Defense Workload Study*, Rand Corporation (2023), [https://www.rand.org/pubs/research\\_reports/RRA2559-1.html](https://www.rand.org/pubs/research_reports/RRA2559-1.html) (last visited September 13, 2025).

to case types that they are qualified, competent, and reimbursed” for. *Id.* at B-1. But it does not say that the only way to fulfil the contract is to meet the MAC. A provider fulfills the contract by providing full-time public defense work (or work commensurate with their FTE) pursuant to the terms of the contract. *Id.* Thus, in sum, while the MAC sets an upper limit on case numbers, it does not set a requirement for the number of cases each attorney must handle.

**E. 2023 Senate Bill 337: adoption of additional reforms to ensure greater independence of the public defense function from the judiciary.**

The core structure adopted in 2001—a commission overseeing public defense, with individual commissioners reporting to the Chief Justice while the employees of the PDSC did not—remained Oregon’s public defense delivery model for two decades. The Chief Justice’s control over the commissioners included the ability to remove a Commissioner at any time without cause as well as wide appointment authority. *Former* ORS 151.213 (2001).

In 2023, however, the legislature passed Senate Bill 337, which renamed the PDSC to the “Oregon Public Defense Commission” (OPDC) and implemented reforms to public defense aimed at targeting the well-documented unrepresented persons crisis. In addition to those reforms, 2023 SB 337 also implemented reforms to ensure even greater independence of the public defense function from the judiciary. Or Laws 2023, ch 281. The bill did so in two ways. First, the bill limited the Chief Justice’s authority over Commissioners.

Upon passage of SB 337, the Chief Justice could only remove a commissioner “for cause” and could only appoint commissioners with certain qualifications. Or Laws 2023, ch 281 § 2. Second and more notably, 2023 SB 337 also removed the Commission from the Judicial Branch entirely and placed it within the Executive Branch, beginning January 1, 2025. Or Laws 2023, ch 281 § 77.

That reorganization took place on January 1, 2025. Accordingly, as of that date, the administration of public defense in Oregon is now entirely independent from the judiciary. The Commission is the lone entity tasked with promulgating and enforcing standards for indigent defense providers, for contracting with firms to provide defense services, and for enforcing its standards and the terms of its contracts. The Governor took the Chief Justice’s previous role in appointing and removing commissioners and in selecting an executive director for the commission. Or Laws 2023, ch 281 § 77; ORS 151.213(1), (2). The Commission is no longer housed within the judicial branch and under the authority of the Chief Justice—it is now an independent agency within the Executive Branch.

Thus, the long history of public defense reform in Oregon demonstrates a legislative intent to continually reduce the authority of the judiciary over public defense services to its current fully independent state. At this point, authority over public defense rests wholly in the Executive Branch.

**II. The trial court lacked statutory or inherent authority to conduct an “audit” of a public defense provider and order the provider to disclose its internal attorney-caseload records.**

With that history and structure of Oregon public defense set out, *amicus* turns to the trial court’s order in this case. Oregon is currently in the midst of a well-publicized unrepresented persons crisis: since 2021, Oregon has consistently had more indigent people charged with crimes than it has available lawyers to appoint. *See generally Betschart v. Oregon*, 103 F4th 607 (9th Cir 2024) (describing the scope of the unrepresented persons crisis in Oregon as of May 2024, with particular focus on Washington County). As of April 23, 2025, when the trial court issued its order, there were 3,949 indigent defendants in Oregon without a lawyer to represent them, 767 of whom were in Washington County. *Order*, Rel Br ER-55; Oregon Judicial Department, *Oregon Circuit Courts Unrepresented Individuals Summary*, <https://app.powerbigov.us/view?r=eyJrIjoibNDQ2NmMwYWMTNzhiZi00MWJhLWE3MjgtMjg2ZTRhNmNmMjdmIiwidCI6IjYxMzNIYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWY4ZiJ9> (last visited September 13, 2025).

The challenged order in this case arose out of the Washington County District Attorney’s and Circuit Court’s responses to that crisis. In March 2025, the District Attorney’s office learned that an attorney at Metropolitan Public Defender (MPD) in Hillsboro, counsel Ford, had filed a discovery demand prematurely in a separate case (the *Bregman* case) in which the attorney had not



yet been appointed. *Motion to Address Actions of Unappointed Counsel*, Rel Br ER-3-4. In response, the state filed a motion in the *Bregman* matter for an order (1) requiring MPD to destroy any materials it had received in that case, (2) appointing counsel Ford to comparable cases on the unrepresented case list, and (3) requiring MPD to provide data on counsel Ford's caseload over the preceding months. *Id.*, Rel Br ER-8-9.

On April 2, 2025, the state filed a motion in this case, *Hemion*, in which counsel Ford was also appointed, contending that the case was inactive at the time Ford was appointed. *Supplemental Motion to Address Actions of Unappointed Counsel*, Rel Br ER-10-15. On April 18, 2025, the state filed a second supplemental motion asking the court to order MPD to disclose data on its caseloads as a whole and for each individual attorney, including the "MAC Utilization Rate" for each individual attorney and MPD as a whole. *Second Supplemental Motion*, Rel Br ER 53-54.

In those three motions, the state did not cite *any* statute, constitutional provision, or any other source of law justifying its requests. Yet, after holding a hearing and receiving supplemental briefing, the trial court entered an order partially granting the state's request. Specifically, the court ordered MPD to "provide" the following:

"1. Data from November 1, 2024 through present on MPD caseloads and MAC utilization rates for Counsel Ford and all other

individual MPD attorneys (both subject to MAC and not subject to MAC);

“2. Data from November 1, 2024 through present on open cases for MPD as a whole and for each individual attorney within MPD,

“3. List of criminal cases reported to OPDC for the months of January, February, and March of 2025 to include ‘appointed cases,’ ‘closed cases,’ and ‘open cases.’)

“4. A copy of MPD's current contract for services with OPDC.”

*Order*, Rel Br ER 58.

That order was unsupported by any statutory authority whatsoever. As the above discussion of Oregon’s public defense system shows, the statutes governing public defense leave no room for a trial court to exercise supervisory authority over a public defender’s office in this manner. That authority falls solely to the independent OPDC, not the judiciary branch, and the legislature has consistently taken pains since 2001 to remove the judiciary from its former role of providing public defense oversight.

The legislature has mandated OPDC to “[e]stablish and maintain a public defense system that ensures the provision of public defense services consistent with the Oregon Constitution, the United States Constitution and Oregon and national standards of justice.” ORS 151.216(1)(a). The legislature specifically granted OPDC authority to govern caseloads for providers like MPD: it authorized OPDC to “[a]dopt policies for public defense providers that \* \* \*

[e]nsure compensation, resources, *and caseloads* are in accordance with national and regional best practices.” ORS 151.216(1)(b)(A) (emphasis added). The legislature has not enacted any type of similar statute authorizing trial courts to regulate public defense caseloads, or prosecutors to “audit” them.

OPDC also has the lone authority to adopt policies for providers like MPD to ensure compensation commensurate with services rendered, and to facilitate data collection and training. ORS 151.215(1)(b)(B), (C). OPDC is tasked with “[a]dopt[ing] policies procedures, standards, and guidelines” regarding financial eligibility and fair compensation rates for appointed counsel. ORS 151.216(1)(h). OPDC is required to create “a system, policies, and procedures for the mandatory collection of data concerning \* \* \* public defense providers” such as MPD. ORS 151.215(1)(L). And, as particularly relevant here, OPDC has the sole authority to “[d]evelop, adopt, and oversee” the “minimum standards” for public defense providers like MPD, and the authority to “oversee the \* \* \* enforcement” of those policies and guidelines on defense providers. ORS 151.216(1)(j). Relatedly, OPDC has authority to “[e]nter into contracts” with providers to provide public defense services, and to “maintain compliance with the minimum policies, procedures, and standards, and guidelines” promulgated by OPDC. ORS 151.216(1)(m).

Thus, OPDC has a statutory mandate to promulgate minimum standards for public defense providers like MPD; set the caseloads for providers like

MPD; contract with providers like MPD and ensure compliance with that contract; ensure data collection from providers like MPD; and ensure MPD's compliance with the minimal standards and caseloads requirements.

Trial courts, on the other hand, have no statute granting them any such authority. No statute allows trial courts oversight authority over a public defense provider's compliance with its OPDC contract, its caseload guidelines, a provider's data collection, or its internal assignment of cases. Instead, those topics all fall within OPDC's oversight authority as set out in ORS chapter 151.

To the extent those statutes leave any ambiguity as to whether a court has supervisory or oversight authority over a public defense provider in lieu of OPDC, that is resolved by ORS 151.216(8), which provides:

*“Policies, procedures, standards and guidelines adopted by the commission supersede any conflicting rules, policies or procedures of the Public Defender Committee, State Court Administrator, circuit courts, the Court of Appeals, the Supreme Court and the Psychiatric Security Review Board related to the exercise of the commission's administrative responsibilities under this section and transferred duties, functions and powers as they occur.”*

(emphasis added). Thus, to the extent some latent authority may have existed for trial courts to exercise oversight on a public defense provider, ORS 151.216(8) emphatically provides that OPDC's policies on those topics supersede any prior inconsistent one.

As those statutes make clear, OPDC is the sole entity with authority to govern, supervise, oversee, and regulate public defense in Oregon. OPDC sets the standards and caseloads for defense providers, contracts with the providers, and the statutes in ORS chapter 151 vest OPDC with sole authority to enforce those minimum standards and caseload requirements. The trial court's order here—which touched on all of those topics that fall exclusively to OPDC's governance—unjustifiably intruded into the defense function and is inconsistent with Oregon's statutory scheme for public defense oversight.

## CONCLUSION

From July 2023 to February 2025, the record discloses that MPD handled 8,338 cases in Washington County. Of those, in *four* cases—a paltry .048 percent of MPD's cases—the state alleged that an MPD either requested appointment prematurely or prematurely submitted a filing. The state was not materially prejudiced in any of the cases. Nor did the clerical mistakes interfere with the trial court's ability to perform any of its judicial functions.

And yet the prosecutor (and apparently the trial court) used those clerical mistakes as proof that MPD was somehow misleading the court and prosecutors about its capacity, and the trial court ordered an unprecedented “audit” into MPD's caseload data—without the state ever citing even a single source of authority for such an intrusion in the defense function.

That order has no basis in law. No statute or constitutional provision permits it. It flies in the face of decades of consistent legislative action to remove the judiciary from public defense oversight. It is squarely inconsistent with the statutes in ORS chapter 151 regarding public defense supervision, oversight, and compliance in Oregon—a role that falls solely to OPDC.

This court should issue a peremptory writ of mandamus directing the court to rescind its order, and hold that trial courts lack supervisory authority over public defense providers and cannot order them to disclose internal caseload data.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE WITH ORAP 5.05

### Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 and (2) the word-count of this brief is 5,450 words.

### Type size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes.

## NOTICE OF FILING AND PROOF OF SERVICE

I certify that I directed the original Brief on the Merits of *Amicus Curiae* to be filed with the Appellate Court Administrator, Appellate Courts Records Section, 1163 State Street, Salem, Oregon 97301, on September 16, 2025.

I further certify that, upon receipt of the confirmation email stating that the document has been accepted by the eFiling system, this Brief on the Merits of *Amicus Curiae* will be eServed pursuant to ORAP 16.45 on Laura Graser #792463 and Carl Macpherson #120208, attorneys for defendant-relator; Benjamin Gutman #160599, Solicitor General, attorney for adverse party; and Assistant Attorney General Kirsten Naito #114684, attorney for adverse party.

I further certify that I have this date served the Honorable Rebecca D. Guptill, who is not being served by the appellate courts' eFiling system, by mailing this brief, with postage prepaid, in an envelope addressed to:

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