Members:

Robert Harris, Chair
Susan Mandiberg, Vice Chair
Stephanie Engelsman
Alton Harvey, Jr.
Leslie Kay
Philippe Knab
Tom Lininger

Oregon Public Defense Commission

Nonvoting Members:

Rep. Paul Evans
Haley Olson
Caitlin Plummer
Sen. Floyd Prozanski

Interim Executive Director:

Kenneth Sanchagrin

Oregon Public Defense Commission
*Meeting will occur virtually via Zoom.**
Wednesday, February 18, 2026
9:00 AM – approx. 11:30 AM PST

Administrative Announcement
This is a public meeting, subject to the public meeting law and it will be recorded. Deliberation of issues will only be conducted by Commission members unless permitted by the Chair. Individuals who engage in disruptive behavior that impedes official business will be asked to stop being disruptive or leave the meeting. Additional measures may be taken to have disruptive individuals removed if their continued presence poses a safety risk to the other persons in the room or makes it impossible to continue the meeting.

AGENDA

Approx. Time	Item	Lead(s)
9:00-9:05	Welcome – Call to Order	Chair Harris
9:05-9:20	Public Comment	
9:20-9:30	**Update:** Unrepresented Persons in Oregon Courts: Attorney Shortage	Ken Sanchagrin Maddy Ferrando
9:30-9:50	**Update:** Director's Update • Financial Case Management System (FCMS) • Agency Terminology • Budget Update • Accounts Payable Dashboard • Upcoming Commission Action Items	Ken Sanchagrin
9:50-10:10	**Discussion:** State v. Roberts	Chair Harris

10:10-10:20	****Break****	
10:20-10:35	**Possible Action Item:** • Habeas Performance Standards • Post-Conviction Relief Attorney Performance Standards	Steve Arntt
10:35-11:05	**Action Item:** Board Bylaws Update	Susan Mandiberg
11:05-11:15	**Discussion:** Board Subcommittees	Chair Harris
11:15-11:30	**Update:** Legislative	Lisa Taylor
11:30 (Approximately)	****Adjourn****	

**To join the Zoom meeting, click this link: https://zoom.us/j/91265352245. This meeting is accessible to persons with disabilities or with additional language service needs. Our Zoom virtual meeting platform is also equipped with Closed Captioning capabilities in various languages, which agency staff can assist you with setting up ahead of meetings.*

Requests for interpreters for the hearing impaired, for other accommodations for persons with disabilities, or for additional interpreter services should be made to info@opdc.state.or.us. Please make requests as far in advance as possible, and at least 48 hours in advance of the meeting, to allow us to best meet your needs.

Listed times are an estimate, and the Chair may take agenda items out of order and/or adjust times for agenda items as needed.
The Commission welcomes public comment. Verbal and written comments must be directly related to agenda items. Please click here to review the guidelines for providing public comment on our website.

Next meeting: ***March 18, 2026, 9am – 2pm via Zoom.*** *Meeting dates, times, locations, and agenda items are subject to change by the Commission; future meetings dates are posted at*: *https://www.oregon.gov/opdc/commission/Pages/meetings.aspx.*

STATEWIDE

Unrepresented Report

January 2026

Unrepresented Numbers

Statewide, there are 2,494 unrepresented individuals as of January 31, 2026, including adults and juveniles in and out of custody, post-disposition, and non-criminal cases. This is a decrease of 65, or 2.5%, since December.

Category	1/31/25	12/31/25	1/31/26
Out-of-Custody	3,304	2,167	2,164
In-Custody	208	158	102
Probation Viol.	317	181	161
Non-Criminal	127	53	67
Total	**3,956**	**2,559**	**2,494**

Out-of-custody individuals **decreased by 3,** or **0.1%**, and in-custody individuals **decreased by 56, or 35.4%**, in January compared to December.

Year over year, the number of unrepresented individuals has fallen by 36.9%.

Caseload Capacity

2025-27 provider contracts started on October 1, 2025. Case counts and MAC utilization for contractors have reset as of that date. As the Oregon Trial Division is not on a contract cycle, its data is reported for the 25-27 biennium. OPDC's real-time OTD data is current as of January 31, while contractors' data is current as of December 31.

Provider Type	Total Cases	Monthly Cases	MAC Utilization
Contractors[1]	**22,387**	**7,762**	**94.9%**
Consortia	9,938	3,384	96.2%
Non-Profits	8,688	3,060	91.0%
Individuals/Firms	3,761	1,318	101.7%
OPDC Trial Div[2]	**1,252**	**194**	**86.7%**
Northwest	283	37	93.2%
Central Valley	386	92	76.3%
Southern	583	65	90.1%

[1] OPDC Criminal Contract Data, December 2025

[2] Oregon Trial Division, MAC excludes Chiefs, July 2025-January 2026

Case Assignments

OPDC assignment coordinators identified counsel for 620 unrepresented cases, including 123 cases subject to *Betschart*, in January. Below are case assignments made by OPDC staff for unrepresented cases in January 2026.

Provider	December	January	Total Since 7/1/25
Contractor	115	156	843
Hourly	395	378	3,805
OTD	45	86	449
Total	**554**	**620**	**5,065**

Unrepresented Trends

Figure 1 shows the number of unrepresented individuals in custody and out of custody over the past 12 months, broken into case categories. **Figure 2** shows the trend line for both in-custody and out-of-custody pretrial individuals over the past 12 months.

Figure 1: Pretrial Unrepresented Cases & Individuals

Source: OJD Unrepresented Data

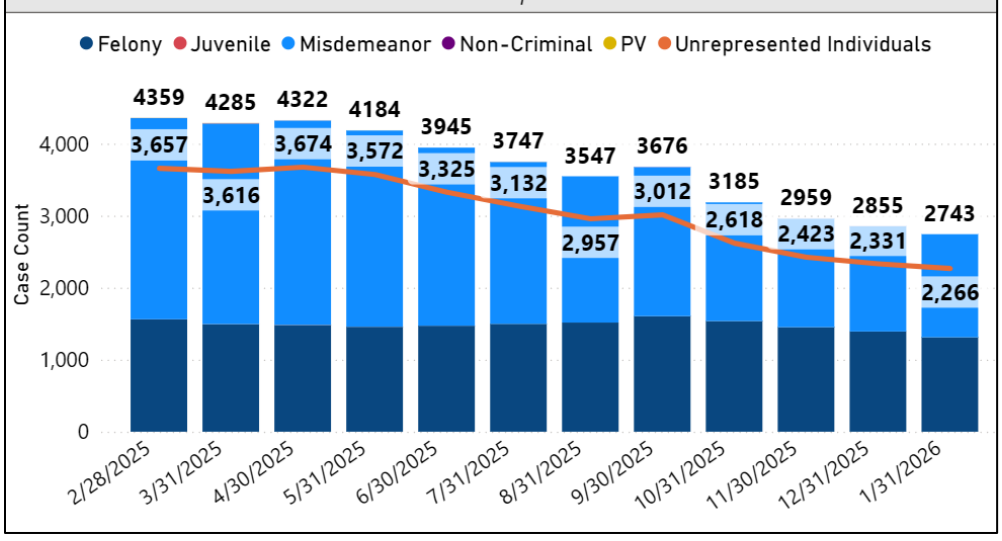
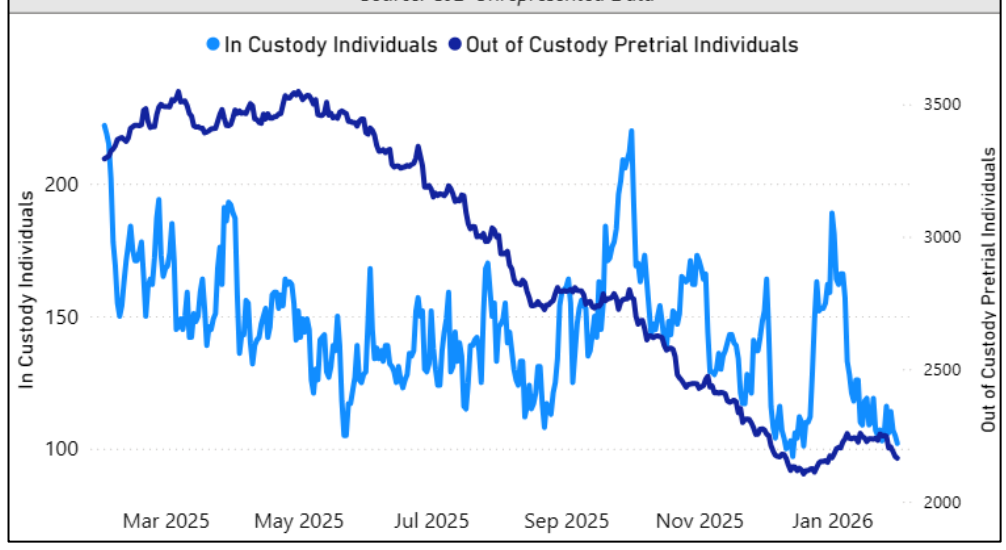


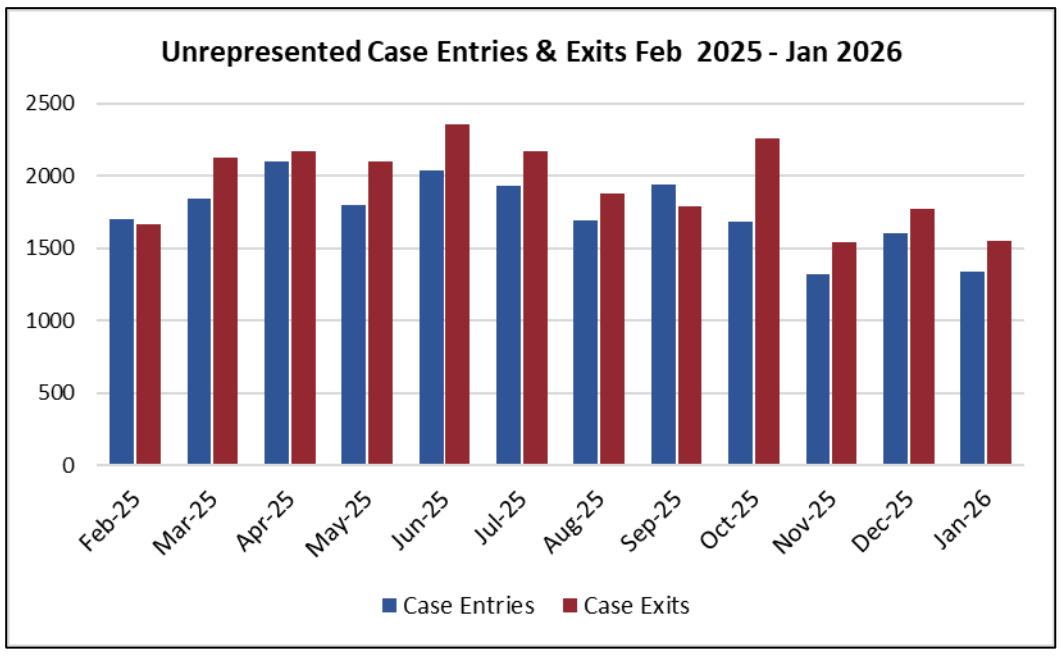
Figure 2: Pretrial Unrepresented Individuals Trends

Source: OJD Unrepresented Data



Entries and Exits

In the past 12 months 20,981 cases entered unrepresented status and 23,374 cases exited unrepresented status. Cases can enter and exit unrepresented status multiple times. There have been more exits than entries in 10 of the past 12 months.



Oregon Public Defense Commission

DOUGLAS

Unrepresented Report

January 2026

Unrepresented Numbers

Between December and January, the number of in-custody individuals decreased by 8, and out-of-custody pretrial individuals increased by 11, or 7%.

Category	1/31/25	12/31/25	1/31/26
Out-of-Custody	239	165	176
In-Custody	9	12	4
Probation Viol.	6	12	16
Non-Criminal	2	1	2
Total	**256**	**190**	**198**

Providers

Providers took 202 cases in December and are currently at 100.8% MAC utilization.

Provider Type	MAC Utilization
Consortia	96.3%
Non-Profits	107.6%
Other	83.9%
All	**100.8%**

Oregon Trial Division

Since July 1, 2025, the OTD has taken 33 cases in Douglas County.

Region	December	January	Total Since 7/1/25
Central	0	0	3
Southern	1	6	30
Total	**1**	**6**	**33**

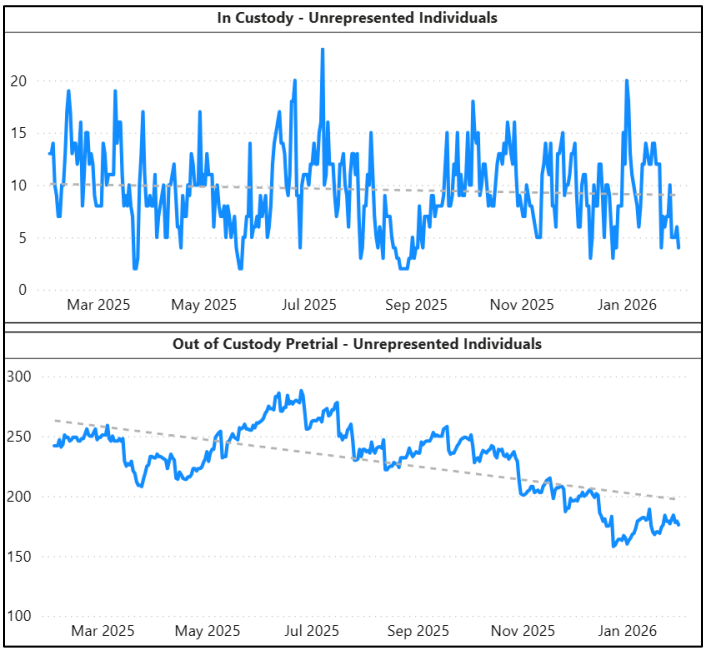
Case Assignments

In January, OPDC assignment coordinators identified counsel for 63 unrepresented cases, including 31 cases subject to *Betschart*. Below are unrepresented case assignments made by OPDC assignment coordinators in January.

Provider Type	December	January	Total Since 7/1/25
Contractor	51	32	246
Hourly	25	25	291
OTD	0	6	26
Total	**75**	**63**	**558**

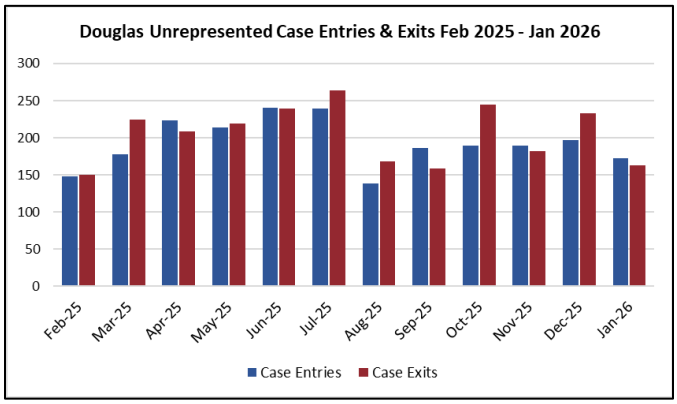
Unrepresented Trend Lines

The total number of unrepresented individuals is down 23% compared to January 31, 2025.



Entries and Exits

In the past 12 months in Douglas County, 2,315 cases entered unrepresented status and 2,456 cases exited unrepresented status. The county has seen more exits than entries in 7 of the past 12 months.



JACKSON

Unrepresented Report

January 2026

Unrepresented Numbers

Between December and January, the number of in-custody individuals decreased by 19, and out-of-custody pretrial individuals increased by 47, or 16%.

Category	1/31/25	12/31/25	1/31/26
Out-of-Custody	643	293	340
In-Custody	43	37	18
Probation Viol.	67	58	69
Non-Criminal	15	14	10
Total	**768**	**402**	**437**

Providers

Jackson County has five attorneys participating in the Enhanced MAC Program. Contractors took 312 cases in December and are at 99.3% MAC utilization.

Provider Type	MAC Utilization
Consortia	103.6%
Non-Profits	93.7%
Other	86.3%
All	**99.3%**

Oregon Trial Division

Since July 1, 2025, the OTD has taken 539 cases in Jackson County.

Region	December	January	Total Since 7/1/25
Southern	119	61	539
Total	**119**	**61**	**539**

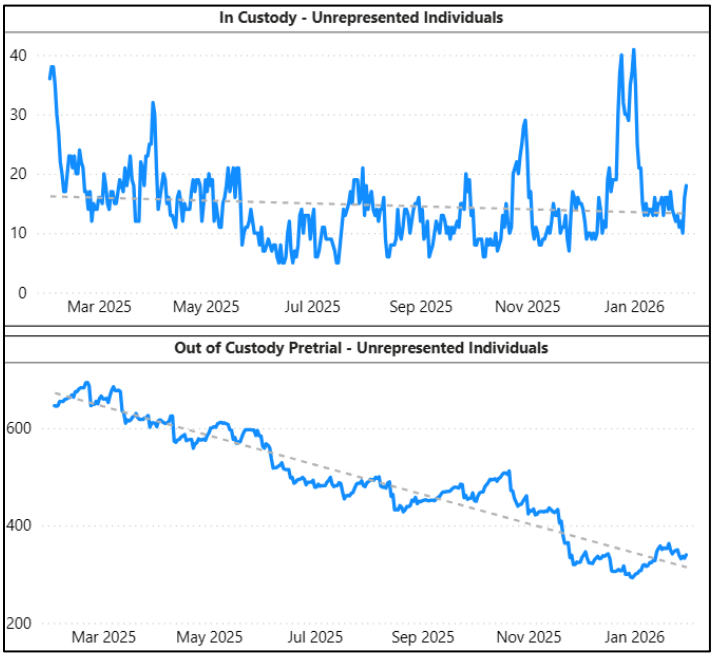
Case Assignments

In January, OPDC assignment coordinators identified counsel for 48 unrepresented cases, including 15 cases subject to *Betschart*. Below are unrepresented case assignments made by OPDC.

Provider Type	December	January	Total Since 7/1/25
Contractor	8	27	112
Hourly	65	21	158
OTD	13	0	73
Total	**86**	**48**	**339**

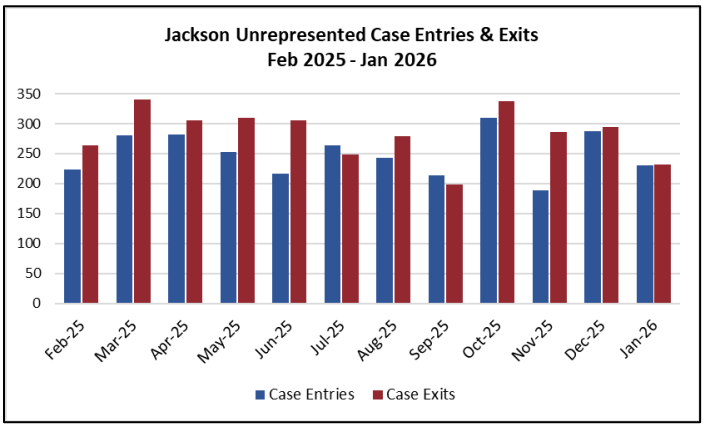
Unrepresented Trend Lines

The total number of unrepresented individuals is down 43% compared to January 31, 2025.



Entries and Exits

In the past 12 months in Jackson County, 2,992 cases entered unrepresented status, and 3,401 cases exited unrepresented status. The county has seen more exits than entries in 10 of the past 12 months.



MARION

Unrepresented Report

January 2026

Unrepresented Numbers

Between December and January, the number of in-custody individuals decreased by 3 and out-of-custody pretrial individuals decreased by 83, or 82%.

Category	1/31/25	12/31/25	1/31/26
Out-of-Custody	563	101	18
In-Custody	18	5	2
Probation Viol.	161	62	24
Non-Criminal	17	6	9
Total	**759**	**174**	**53**

Providers

Contractors took 574 cases in December. OPDC entered into a contract with Public Defender of Marion County as well as a new law firm in December.

Provider Type	MAC Utilization
Consortia	99.8%
Non-Profits	19.1%
Other	185.9%
All	**69.1%**

Oregon Trial Division

Since July 1, 2025, the OTD has taken 251 cases in Marion County.

Region	December	January	Total Since 7/1/25
Northwest	0	0	2
Central	32	74	249
Total	**32**	**74**	**251**

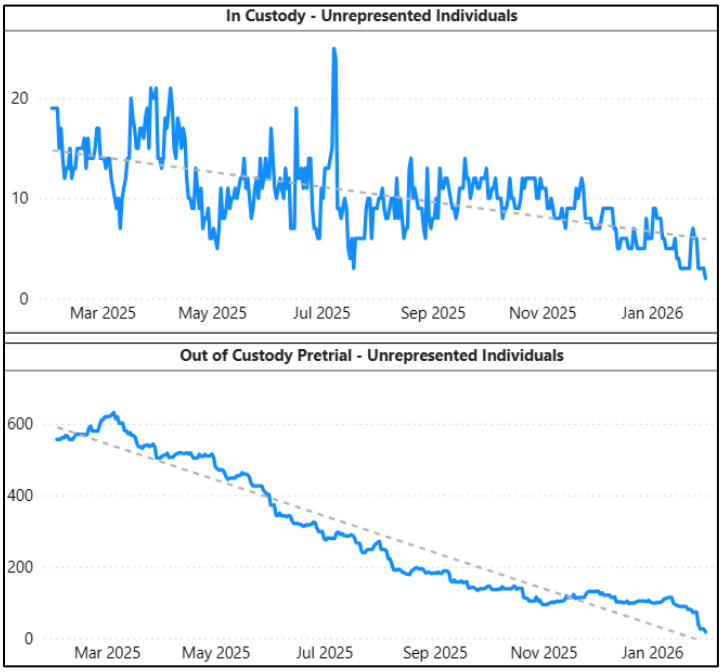
Case Assignments

In January, OPDC assignment coordinators identified counsel for 72 unrepresented cases (0 cases were subject to *Betschart*). Below are unrepresented case assignments made by OPDC assignment coordinators in January.

Provider Type	December	January	Total Since 7/1/25
Contractor	12	25	83
Hourly	22	18	283
OTD	0	29	86
Total	**34**	**72**	**450**

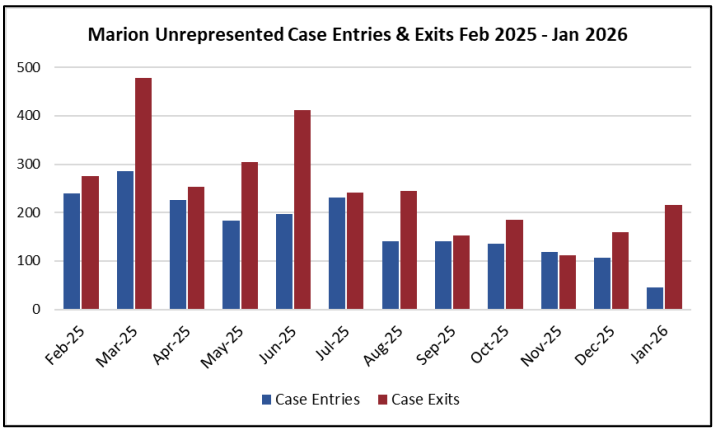
Unrepresented Trend Lines

The total number of unrepresented individuals is down 93% compared to January 31, 2025.



Entries and Exits

In the past 12 months in Marion County 2,047 cases entered unrepresented status and 3,032 cases exited unrepresented status. The county has seen more exits than entries in 11 of the past 12 months.



MULTNOMAH

Unrepresented Report

January 2026

Unrepresented Numbers

Between December and January, the number of in-custody individuals decreased by 3 and in-custody pretrial individuals decreased by 2, or less than 1%.

Category	1/31/25	12/31/25	1/31/26
Out-of-Custody	1,080	1,093	1,091
In-Custody	81	53	50
Probation Viol.	16	5	6
Non-Criminal	7	5	5
Total	**1,184**	**1,156**	**1,152**

Providers

Multnomah County has three attorneys participating in the Enhanced MAC Program with the 2025-2027 contracts. Contractors took 1,257 cases in December and are at 98.2% MAC utilization.

Provider Type	MAC Utilization
Consortia	88.6%
Non-Profits	100.6%
All	**98.2%**

Oregon Trial Division

Since July 1, 2025, the OTD has taken 213 cases in Multnomah County.

Region	December	January	Total Since 7/1/25
Northwest	31	24	213
Total	**31**	**24**	**213**

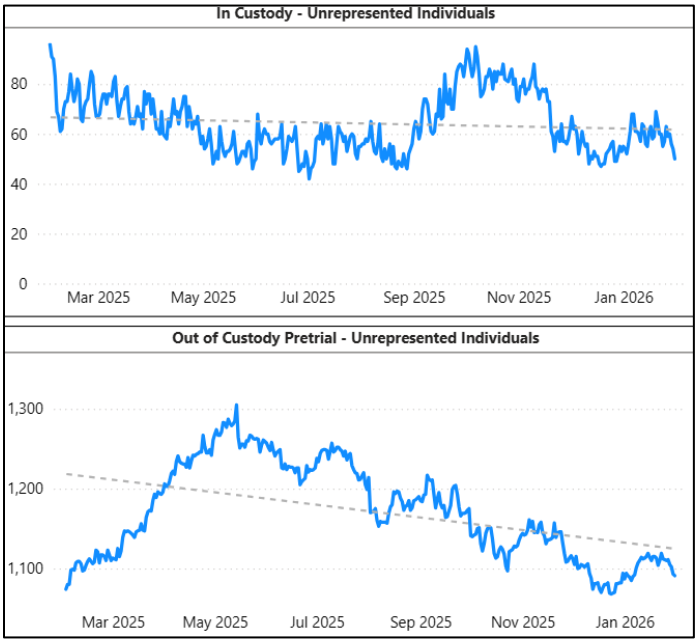
Case Assignments

In January, OPDC assignment coordinators identified counsel for 101 unrepresented cases, including 48 cases subject to *Betschart*. Below are unrepresented case assignments made by OPDC assignment coordinators in January.

Provider Type	December	January	Total Since 7/1/25
Contractor	4	11	58
Hourly	88	68	605
OTD	14	22	95
Total	**106**	**101**	**756**

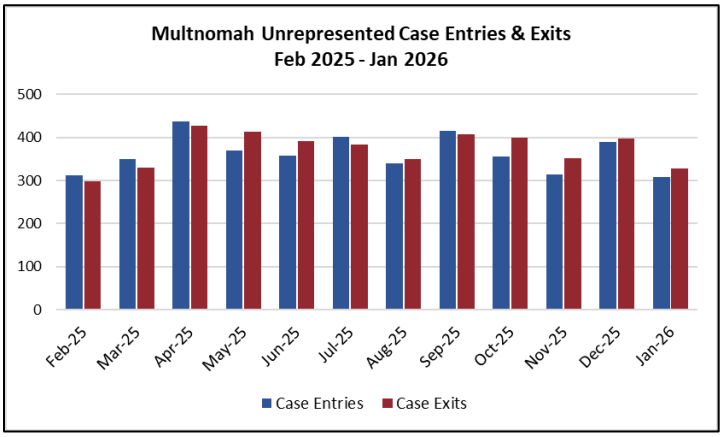
Unrepresented Trend Lines

The total number of unrepresented individuals is 3% lower than January 31, 2025.



Entries and Exits

In the past 12 months in Multnomah County 4,343 cases entered unrepresented status and 4,478 cases exited unrepresented status. The county has seen more exits than entries in 7 of the past 12 months.



WASHINGTON

Unrepresented Report

January 2026

Unrepresented Numbers

Between December and January, the number of in-custody individuals decreased by 1, and out-of-custody pretrial individuals increased by 38, or 9%.

Category	1/31/25	12/31/25	1/31/26
Out-of-Custody	540	412	450
In-Custody	24	19	18
Probation Viol.	49	35	36
Non-Criminal	9	0	8
Total	**622**	**466**	**512**

Providers

Washington County has four attorneys participating in the Enhanced MAC Program with the 2025-2027 contracts. Contractors took 1,196 cases and are at 111.6% MAC utilization.

Provider Type	MAC Utilization
Consortia	129.2%
Non-Profits	113.2%
Other	101.2%
All	**111.6%**

Oregon Trial Division

Since July 1, 2025, the OTD has taken 61 cases in Washington County.

Region	December	January	Total Since 7/1/25
Northwest	13	9	56
Central	1	3	5
Total	**14**	**12**	**61**

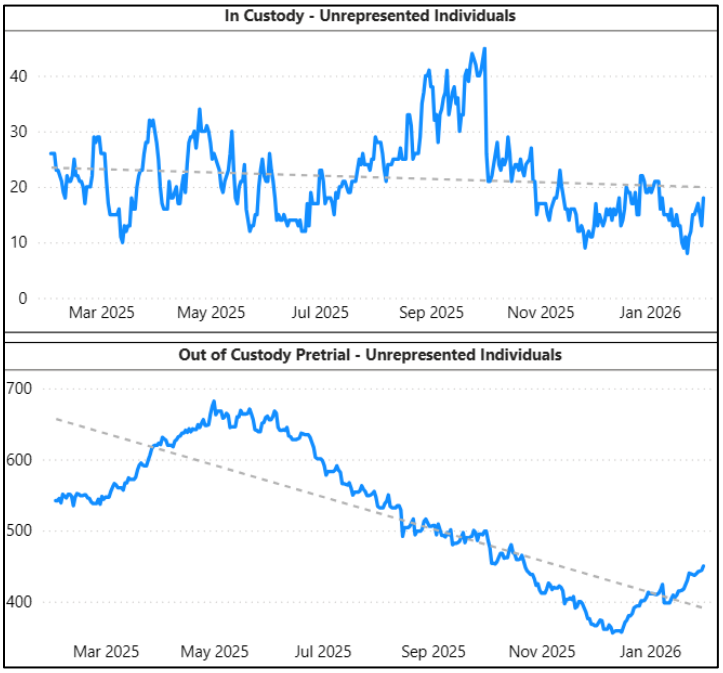
Case Assignments

In January, OPDC assignment coordinators identified counsel for 91 unrepresented cases, including 13 cases subject to *Betschart*. Below are unrepresented case assignments made by OPDC assignment coordinators in January.

Provider Type	December	January	Total Since 7/1/25
Contractor	8	10	88
Hourly	87	69	653
OTD	3	12	52
Total	**108**	**91**	**791**

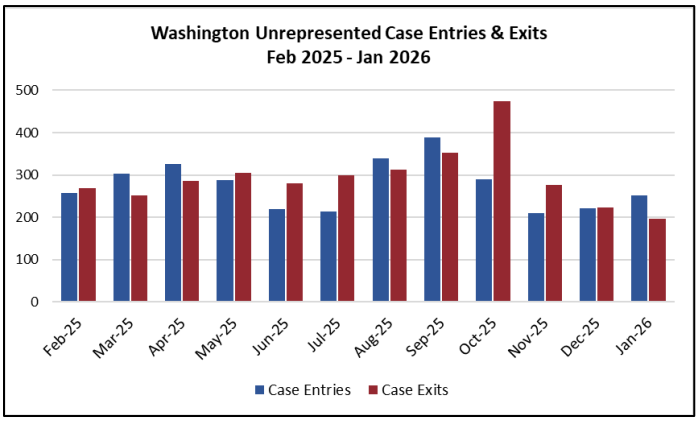
Unrepresented Trend Lines

The total number of unrepresented individuals is down 18% compared to January 31, 2025.



Entries and Exits

In the past 12 months in Washington County, 3,307 cases entered unrepresented status and 3,528 cases exited unrepresented status. The county has seen more exits than entries in 7 of the past 12 months.



IN THE SUPREME COURT OF THE
STATE OF OREGON

STATE OF OREGON,
Plaintiff-Adverse Party,
v.
ALLEN REX ROBERTS,
Defendant-Relator.
(CC 21CR38424) (SC S071661)

Original proceeding in mandamus.*

Argued and submitted April 17, 2025.

Nadia H. Dahab, Sugerman Dahab, Portland, argued the cause and filed the briefs for defendant-relator.

Kirsten M. Naito, Assistant Attorney General, Salem, argued the cause and filed the briefs for plaintiff-adverse party. Also on the brief were Dan Rayfield, Attorney General, and Benjamin Gutman, Solicitor General.

Amy E. Potter, Angeli & Calfo LLC, Portland, filed the brief for *amicus curiae* Oregon Public Defense Commission. Also on the brief was Joanna T. Perini-Abbott.

Jessica Snyder, Julie Vandiver, Assistant Federal Public Defenders, and Stephen R. Sady, Chief Deputy Federal Public Defender, District of Oregon, Portland, filed the brief for *amicus curiae* Oregon Federal Public Defender.

Lindsey Burrows, O'Connor Weber LLC; Garner Kropp, Fenwick & West LLP, San Francisco, California; and Kelly Simon, American Civil Liberties Union of Oregon, filed the brief for *amici curiae* Criminal Law & Justice Center and American Civil Liberties Union of Oregon. Also on the brief were Todd Gregorian and Kathryn Hauh, Fenwick & West LLP.

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* On petition for writ of mandamus from an order of Multnomah County Circuit Court, Benjamin Souede, Judge.

Before Duncan, Garrett, DeHoog, Bushong, James, and Masih, Justices, and Pagán, Judge, Justice pro tempore.**

DUNCAN, J.

The alternative writ of mandamus is dismissed as moot.

** Flynn, C. J., did not participate in the consideration or decision of this case.

DUNCAN, J.

This case is before this court on a petition for a writ of mandamus filed by relator, Allen Rex Roberts. It arises out of a criminal case the state brought against him.

In the criminal case, relator was arraigned on a grand jury indictment. He requested, and was eligible for, appointed counsel, but no lawyer was available to represent him. After being without counsel for months, relator filed a motion to dismiss the criminal case, asserting, among other things, that the state had violated his right to counsel under Article I, section 11, of the Oregon Constitution. That provision requires that, "[i]n all criminal prosecutions, the accused shall have the right *** to be heard by himself and counsel." The trial court denied the motion.

Relator then filed a petition for mandamus relief in this court, and we issued an alternative writ directing the trial court to either vacate its order denying relator's motion or show cause for not doing so. The trial court did not vacate its order, and this mandamus case proceeded to briefing. In his brief, relator raises three legal issues: (1) whether the state's failure to appoint counsel violated his right to counsel under Article I, section 11; (2) if it did, whether dismissal of the criminal case without prejudice was an appropriate remedy; and (3) if it was, whether relator was entitled to dismissal of the criminal case without prejudice because he had been unrepresented for a certain period of time.[1]

While the parties briefed this mandamus case, relator's criminal case remained pending in the trial court and relator remained unrepresented. Then, almost a year after relator's arraignment, the trial court dismissed the criminal case because of the unavailability of counsel. This court asked the parties to submit supplemental briefing regarding

[1] Trial courts and the Oregon Public Defense Commission (OPDC), which is part of the executive branch, have roles in the appointment of counsel. *See* ORS 135.045(1)(b) ("If the defendant does wish to be represented by counsel, the court, in accordance with ORS 135.050, shall appoint counsel to represent the defendant."); ORS 151.216(1)(h)(B) (providing that one of OPDC's duties is the adoption of "policies, procedures, standards and guidelines regarding[,]" among other things, "[t]he appointment of counsel"). Thus, throughout this opinion and for ease of reference, we refer generically to the obligation of the "state" to appoint counsel to represent eligible criminal defendants.

whether the dismissal of the criminal case rendered this mandamus case moot and, if so, whether this court should exercise its discretion to decide the case under ORS 14.175, which provides that courts may decide certain moot cases that present legal issues that are "capable of repetition" and "likely to evade judicial review."

For the reasons explained below, we conclude that this mandamus case is moot, but that we should exercise our discretion under ORS 14.175 to decide it. We also conclude that this is the type of case in which mandamus relief is possible because relator does not have a "plain, speedy, and adequate remedy in the ordinary course of law." *See* ORS 34.110 (stating that a writ of mandamus shall not be issued in any case where the relator has such a remedy).

On the merits, we answer the three questions raised by relator's petition, as follows:

(1) The state violated relator's Article I, section 11, right to counsel. The right to counsel is fundamental to our criminal justice system. It helps ensure that criminal prosecutions are conducted fairly and in accordance with the law by guaranteeing that a defendant has access to a legal advocate to respond to the state's exercise of its prosecutorial powers. When the state fails to appoint counsel, a defendant's legal interests are at risk of prejudice because the defendant is without anyone to advise them, address pretrial restrictions on their liberty, assert their rights, and prepare their defense. In short, the defendant is subjected to the state's prosecutorial powers and all the accompanying consequences but left without the means to effectively respond. Allowing such a situation to persist for an extended period, as in relator's case, violates Article I, section 11.

(2) Dismissal without prejudice—which ordinarily allows the state to refile the charges later—can be an appropriate remedy for the state's failure to appoint counsel in violation of Article I, section 11. A failure to appoint counsel results in several pretrial harms that are independent of the ultimate resolution of the criminal prosecution. First, the defendant is subject to restraints on their liberty but lacks counsel to challenge or modify them. Second, the defendant

is deprived of the means necessary to move their case forward. The defendant is without a legal advocate to review the state's charges and evidence, gather and preserve defense evidence, and take steps to advance their case toward resolution, whether through dismissal, plea, or trial. Meanwhile, the state has counsel to protect its interests and prepare its case. Third, the failure to appoint counsel can have a coercive effect. An extended delay in the appointment of counsel can cause a defendant to abandon their right to counsel. As the burdens of having an open case without counsel grow, so does the likelihood that a defendant will waive their right to counsel just to be able to move their case forward. That undermines the purpose of the right to counsel, which, as mentioned, is to help ensure that criminal prosecutions are conducted fairly and in accordance with the law.

Dismissal without prejudice can mitigate those pretrial harms. It relieves the defendant from being subject to liberty restrictions and criminal charges while being unable to respond. It also reduces the pressure on a defendant to waive their right to counsel and proceed without representation. At the same time, it allows the state to refile the charges later, when the defendant has access to counsel as the constitution requires.

(3) Relator was entitled to dismissal of the criminal case without prejudice. We conclude that, as a general rule, dismissal without prejudice is required when, at any point post-arraignment, the state has failed to provide counsel to an eligible defendant for a period of more than 60 consecutive days in a misdemeanor case or more than 90 consecutive days in a felony case. There must be a limit to the amount of time that the state can maintain a criminal prosecution without appointing counsel for an eligible defendant. We acknowledge that setting such a limit involves a judgment call. Oregon's current public defense crisis requires us to make that call and establish a general rule that can be applied consistently across the state. We base the general rule on the pretrial harms identified above: that the defendant is subject to restraints on their liberty but lacks counsel to challenge or modify those restraints, that the defendant cannot move their case forward, and that an extended delay

in the appointment of counsel puts pressure on a defendant to waive their right to counsel. We also base it on laws, practices, and standards relating to criminal cases, which support a conclusion that leaving a defendant without counsel for longer periods is unreasonable in light of the time within which many cases can be, and are expected to be, completely resolved. Finally, because in setting the limit we are determining the appropriateness of a particular remedy, we base the rule on our best assessment of the relationship between the violation and the requested relief. Applying the general rule, we conclude that relator, who was unrepresented for more than 90 days while appearing for court as required, was entitled to dismissal of his criminal case without prejudice.[2]

I. BACKGROUND

A. *Oregon's Public Defense Crisis*

Before turning to the facts of this case, we begin by briefly describing the context in which they arise. For several years, Oregon has experienced a systemic, statewide public defense crisis that has resulted in thousands of pretrial, out-of-custody defendants lacking counsel to assist them.[3]

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[2] Relator also contends that the failure to appoint counsel violated the Sixth Amendment to the United States Constitution, which provides, in part, that "[i]n all criminal prosecutions, the accused shall enjoy the right *** to have the Assistance of Counsel for his defence." Because we conclude that, under the circumstances of this case, the failure to appoint counsel to represent relator violated Article I, section 11, of the Oregon Constitution, and because relator does not contend that he is entitled to additional or greater relief under the Sixth Amendment, we need not, and do not, address his arguments under the federal constitution. *See State v. Gray*, 370 Or 116, 128, 515 P3d 348 (2022) (so reasoning).

[3] In May 2024, the Ninth Circuit Court of Appeals upheld a federal district court injunction, requiring, in general terms, that *in-custody* defendants who had not been appointed counsel within seven days had to be released from custody subject to reasonable conditions imposed by state trial courts. *Betschart v. Oregon*, 103 F4th 607, 613 (9th Cir 2024); *see also Betschart v. Garrett*, 700 F Supp 3d 965 (D Or 2023) (describing injunction); *Betschart v. Garrett*, No CV-01097-CL (D Or Nov 14, 2023) (amending injunction and describing exceptions, including that the order did not apply to defendants who were charged with murder or aggravated murder, who fired their attorneys, who failed to execute a release agreement, or who were released under the order but had their releases revoked).

As noted, relator was not subject to that federal injunction because he was not in custody, having been released pending trial subject to restrictive conditions. As of February 2, 2026, there were over 2000 out-of-custody defendants without counsel. *See* Oregon Judicial Department, *Oregon Circuit Courts Unrepresented Individuals Summary*, https://app.powerbigov.us/view?r=eyJrIjoiNDQ2NmMwYWMtN-zhiZi00MWJhLWE3MjgtMjg2ZTRhNmNmMjdmIiwidCI6IjYxMzN

According to *amicus curiae* the Oregon Public Defense Commission (OPDC), the state agency responsible for establishing and maintaining Oregon's public defense system, there are "simply not enough defense attorneys in the state to represent every indigent defendant." Although "OPDC's goal is to provide counsel promptly for all indigent defendants," meeting that goal "for every defendant has not been achievable in recent years" for a variety of reasons. The agency acknowledges that, "at least in the near term," it will be unable promptly to appoint counsel for all indigent defendants and that "many may be without counsel for weeks if not months." Both parties acknowledge that the legislative and executive branches of our state government are working on systemic reforms to address the immediate effects of this crisis and establish policies to ameliorate it.

Our role in this case is not to suggest which policies those branches should adopt. *Cf. Bellshaw v. Farmers Ins. Co.*, 373 Or 307, 328, 567 P3d 434 (2025) ("[A] court cannot faithfully carry out [legislative] intent by choosing for itself how best to accomplish legislative goals, ignoring the means by which the legislature has chosen to do so."). Instead, our role here is quite limited. We must determine whether the failure to appoint counsel to represent an eligible defendant post-arraignment for an extended period of time violates the state constitutional right to counsel and, if so, whether a trial court is required to grant a defendant's motion to dismiss the criminal case against them after the passage of a certain period of time. *See State v. Rodriguez/Buck*, 347 Or 46, 79, 217 P3d 659 (2009) ("[T]he Oregon Constitution represents the fundamental expression of the people regarding the limits on governmental power. And it is the obligation of the courts to ensure that those fundamental principles are followed."); *State ex rel. Ricco v. Biggs*, 198 Or 413, 430, 255 P2d 1055 (1953), *overruled in part on other grounds by State ex rel Maizels v. Juba*, 254 Or 323, 327, 460 P2d 850 (1969) ("The constitutional rights of an individual are fundamental and inalienable rights. *** The duty of seeing that they are protected and preserved inviolate falls squarely upon the shoulders of the judiciary.").

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lYzg5LWU1MWItNGExYy04YjY4LTE1ZTg2ZGU3MWY4ZiJ9 (last accessed February 2, 2026).

B. *Facts*

With that understanding of the current crisis and this court's role, we turn to the facts of this case, which are procedural and undisputed. In 2021, relator was charged by indictment with two crimes—specifically, unauthorized use of a vehicle, ORS 164.135(1), and possession of a stolen vehicle, ORS 819.300—both of which were alleged to have been committed on August 9, 2021. Those charges were ultimately dismissed without prejudice in October 2022 because the state was unable to appoint counsel for relator.

Then, in April 2024—about a year and a half after the dismissal of the previous indictment—relator was re-indicted on the same two charges that had been dismissed. Relator was arraigned on the new indictment and released on conditions, including that he "[a]ppear at all times and places ordered by the Court until discharge or final order of the Court" and "not leave the State of Oregon without permission of the court."[4] The trial court determined that relator had requested and was eligible for appointed counsel and appointed "OPDC"—not a named attorney—to represent relator. Over the next few months, several hearings were held for the purpose of appointing counsel, but no attorney was available.

In December 2024, a volunteer lawyer filed a notice of limited representation in the trial court, stating that she represented relator only in connection with a motion to dismiss for lack of counsel. In that motion, relator argued,

[4] Relator's release agreement required that he comply with the general release conditions in ORS 135.250(1), which provides:

> "If a defendant is released before judgment, the conditions of the release agreement shall be that the defendant will:
>
> "(a) Appear to answer the charge in the court having jurisdiction on a day certain and thereafter as ordered by the court until the defendant is discharged or the judgment is entered;
>
> "(b) Submit to the orders and process of the court;
>
> "(c) Not depart this state without leave of the court; and
>
> "(d) Comply with such other conditions as the court may impose."

The agreement also imposed two other conditions: (1) that relator "[k]eep in contact with [his] attorney once one is appointed or retained" and notify the attorney of any updates to his phone number and mailing and residential addresses; and (2) that relator comply with "Pretrial Monitoring and report to Pretrial Release Services immediately after [his] next court hearing." (Boldface omitted.)

among other things, that the state's failure to appoint an attorney to represent him violated his right to counsel under the state and federal constitutions. On January 2, 2025, the trial court denied the motion to dismiss, noting that relator had been "represented at the critical stages" that the case had reached to that point and that the case was in "suspended animation" due to "a failure of the system" that prevented the case from proceeding to "the next critical stage."

Relator timely sought mandamus relief in this court. By that point, relator had been without named counsel on the current indictment for about nine months. On January 29, we issued an alternative writ, commanding the trial court to vacate its order denying relator's motion to dismiss or to show cause for not doing so. The trial court did not vacate its order, so the mandamus case proceeded to briefing.

The final hearing for appointment of counsel in the criminal case, which the trial court described as the sixth setover for the appointment of counsel on the current indictment, was scheduled for April 17, 2025. That date was almost a year after relator's arraignment on the indictment and the same day as oral argument in this court. Following the hearing, the trial court entered a judgment dismissing the criminal case against relator without prejudice "due to lack of attorneys."[5]

II. ANALYSIS OF PRELIMINARY ISSUES

Before we can address whether, as relator claims, the trial court erred in denying his motion to dismiss his criminal case, we must address three preliminary issues: (1) whether this case is now moot; (2) if so, whether the case is nevertheless justiciable under ORS 14.175, which allows this

[5] Notwithstanding the trial court's dismissal of the charges *without* prejudice, the parties agree that the dismissal in this case was *effectively* a dismissal *with prejudice*, because the statute of limitations for the charged crimes precludes the state from refiling the charges. *See* ORS 131.125(8)(a) (providing generally that "prosecutions" for unenumerated felonies "must be commenced" within three years "after their commission"). Other crimes may have different limitations periods. *See* ORS 131.125(2) (20 years or longer, depending on age of victim); ORS 131.125(3) (six years or longer); ORS 131.125(4) (four years or longer); ORS 131.125(6), (7) (six years); ORS 131.125(8) (three years for unenumerated felonies, two years for unenumerated misdemeanors).

court to resolve certain moot cases that involve challenges to acts that are capable of repetition but likely to evade judicial review; and (3) if so, whether we can and should resolve the case, given that it is a mandamus case and mandamus relief is appropriate only if, among other things, the relator lacks a plain, speedy, and adequate remedy in the ordinary course of law.

A. *Mootness*

As described above, after relator initiated this mandamus case, the trial court dismissed underlying criminal case without prejudice. As a result of that dismissal, we must determine whether this mandamus case is now moot. The state asserts that it is, and relator does not argue otherwise.

"Whether a case is moot depends on whether a justiciable controversy exists." *Rogue Advocates v. Board of Comm. of Jackson County*, 362 Or 269, 272, 407 P3d 795 (2017). A justiciable controversy is one in which the "interests of the parties to the action are adverse" and "the court's decision in the matter will have some practical effect on the rights of the parties to the controversy." *Rains v. Stayton Builders Mart, Inc.*, 359 Or 610, 624, 375 P3d 490 (2016) (internal quotation marks omitted). Thus, "[g]enerally speaking, a case becomes moot when a court's decision will no longer have a practical effect on the rights of the parties." *State v. K. J. B.*, 362 Or 777, 785, 416 P3d 291 (2018) (internal quotation marks omitted). In this case, relator has already received the relief he is seeking from this court—specifically, the dismissal of his criminal case without prejudice. The state has not appealed that dismissal, and the time for it do to so has passed. Therefore, this mandamus case will have no practical effect on the parties and is moot.

B. *Justiciability under ORS 14.175*

Although this case is moot, it is nevertheless justiciable if it meets the requirements of ORS 14.175. As relevant here, ORS 14.175 allows a court to adjudicate a moot case if (1) a party is challenging the legality of an act of a public body, (2) the party had standing to commence the case, (3) the challenged act is capable of repetition, and (4)

the challenged act is likely to evade review in the future.[6] If those four requirements are satisfied, a court may choose to adjudicate the case. *Couey v. Atkins*, 357 Or 460, 522, 355 P3d 866 (2015) (explaining that ORS 14.175 "leaves it to the court to determine whether it is appropriate to adjudicate an otherwise moot case under the circumstances of each case"); *see also Penn v. Board of Parole*, 365 Or 607, 613, 451 P3d 589 (2019) ("[C]ourts are not *required* to decide any and every moot case that falls within the terms of ORS 14.175." (Emphasis in original.)).[7]

In this case, the parties agree that the first three requirements of ORS 14.175 are satisfied, as do we. First, relator is challenging the legality of an act of a public body; he is asserting that the state's failure to appoint named counsel to represent an eligible defendant violates Article I, section 11, of the Oregon Constitution. Second, relator had standing to commence this case; at the time he filed his mandamus petition, relator had moved to dismiss his criminal case based on the state's failure to appoint counsel and that motion had been denied. Third, the challenged act is capable of repetition; the failure to appoint counsel is a recurring issue in this state and will continue to affect defendants in the same way it affected relator. *See Penn*, 365 Or at 622 (holding that the "capable of repetition" requirement does not demand a showing that same party will be

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[6] ORS 14.175 provides:

"In any action in which a party alleges that an act, policy or practice of a public body *** is unconstitutional or otherwise contrary to law, the party may continue to prosecute the action and the court may issue a judgment on the validity of the challenged act, policy or practice even though the specific act, policy or practice giving rise to the action no longer has a practical effect on the party if the court determines that:

"(1) The party had standing to commence the action;

"(2) The act challenged by the party is capable of repetition, or the policy or practice challenged by the party continues in effect;

"(3) The challenged policy or practice, or similar acts, are likely to evade review in the future."

[7] As we have previously noted, "ORS 14.175 may not represent 'the full scope of a court's constitutional authority to decide moot cases.'" *Woodland v. Dept. of Rev.,* 371 Or 334, 336 n 2, 536 P3d 985 (2023) (quoting *Penn*, 365 Or at 613 n 2). However, when the requirements of ORS 14.175 are satisfied, there is no need to look beyond the statute for authority to decide a moot case. *Penn*, 365 Or at 613 n 2.

affected again; it requires only that the challenged act "be reasonably susceptible to repetition as to someone").

But the parties disagree about whether the fourth requirement of ORS 14.175—that is, that the challenged act is likely to evade review—is satisfied. Relator argues that the state's failure to appoint counsel to represent eligible defendants in their criminal cases is likely to evade review because the defendants are unlikely to be able to timely and effectively assert that their constitutional right to counsel is being violated and that they are entitled to dismissal of their cases as a remedy. He asserts that unrepresented defendants "cannot be expected to know when and how to seek a dismissal remedy," and he points out that his challenge to the state's failure to appoint counsel is before this court only because of his volunteer counsel's limited-scope representation. In response, the state argues that the challenged act is not likely to evade review because, in some cases, eligible defendants will eventually have counsel appointed in their criminal cases and, if those defendants are convicted, they can bring direct appeals in which they can challenge the constitutionality of the delay in the appointment of their counsel.

When determining whether "[t]he challenged policy or practice, or similar acts, are likely to evade judicial review in the future," ORS 14.175(3), we focus on "whether the general type or category of challenge at issue is likely to evade being fully litigated—including by appellate courts—in the future," *Eastern Oregon Mining Association v. DEQ*, 360 Or 10, 17, 376 P3d 288 (2016). As the text of ORS 14.175(3) requires, the focus of the "general type or category" inquiry is on the challenged "policy, practice, or act" itself and whether "the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration." *Penn*, 365 Or at 615 n 4 (quoting *Weinstein v. Bradford*, 423 US 147, 149, 96 S Ct 347, 46 L Ed 2d 350 (1975)); *see generally Actions*, 1A CJS § 82 (2024) (explaining that the "evading review" inquiry concerns whether the duration of the challenged action is too short to be fully litigated before it ceases); *id.* ("[T]he inquiry is whether the activity itself is by nature so short in duration that it will

not be fully litigated before the objected to activity ends, as where the duration of the challenged action is short and the time required to complete an appeal is lengthy." (Footnote omitted.)). For example, in *Penn*, this court concluded that the relator's challenge to a post-prison supervision condition was likely to evade review because most post-prison supervision terms would expire before such a challenge could be resolved by this court. *Penn*, 365 Or at 623.

In addition, whether a challenge is likely to evade review depends on whether "it is *probable* that a similar challenge will evade judicial review in the future. *Certainty is not required*." *Couey*, 357 Or at 479 (emphases added). Consequently, a court may determine that a challenge is likely to evade review even when there are other instances in which parties were able to complete litigation of the same or similar challenges before those challenges went moot. *Penn*, 365 Or at 623. As this court has stated, "the fact that there are a few reported cases in which a party in similar circumstances was able to complete the litigation before the challenged act ceased or expired is insufficient to establish that the act is not likely to evade review." *Id.*

Applying those principles here, we conclude that the challenged act—*viz.,* the failure to appoint named counsel to represent an eligible defendant post-arraignment—is likely to evade review. Because of the public defense crisis, trial courts across the state are frequently unable to appoint counsel to eligible defendants. Generally, a defendant needs counsel to litigate whether an act violates their constitutional rights. Consequently, most indigent defendants will be unable to timely and effectively challenge the state's failure to provide them counsel. As relator points out, he was able to file his motion to dismiss and then bring this mandamus case only because a lawyer volunteered to represent him on a limited basis. Unlike relator, most indigent defendants will be unable to challenge the state's initial failure to appoint counsel in their criminal cases until the state eventually appoints counsel for them in those cases. But by that time, the challenged act will have ended. So, the challenged act is likely to evade review because, by its nature, it is likely to end before a challenge can even be initiated,

much less fully litigated. And, even in the unusual situations where an indigent defendant is able to initiate a challenge, either on their own or through volunteer counsel, the challenged act could still end before the challenge is fully litigated because, while the challenge is pending, the state could appoint counsel or dismiss the criminal case, as happened here.

As mentioned, the state argues that the challenged act is unlikely to evade review because, *if* counsel is appointed and *if* the defendant is ultimately convicted, the defendant can file a direct appeal and the effects of any delay in the appointment of counsel can be reviewed then. However, as we have explained, whether a challenged act is likely to evade review requires an assessment of whether the act itself is likely to end before the challenge is fully litigated, and the challenged act at issue here, which is the failure to appoint counsel, will necessarily end when counsel is appointed.

Moreover, the state's argument assumes that relator's challenge is the type that can be addressed on direct appeal of a defendant's conviction. But that assumption is based on a misunderstanding of relator's claim, which is that the failure to appoint counsel is a constitutional violation that causes harms independent and irrespective of the ultimate judgment in the defendant's case but that nevertheless require a remedy. As such, relator's claim is similar to a defendant's claim that they are being subjected to pretrial restraints that violate their rights, which this court has held to be a type of claim that will evade review if it is not addressed pretrial. *See, e.g.*, *State v. McDowell*, 352 Or 27, 32, 279 P3d 198 (2012) (allowing petition for writ of mandamus to compel pretrial release of defendant whose pretrial detention exceeded the statutory maximum).

To be sure, there may be harms that result from the delayed appointment of counsel that affect the ultimate outcome of the criminal case. For example, the delay could result in the loss of evidence and thus prevent the defendant from having a fair trial. Those types of harms can be the basis for motions to dismiss a case with prejudice, and if a trial court denies such a motion, the denial can be challenged through

a direct appeal. But those harms are different from what relator is alleging here. Relator is asserting that his constitutional right to counsel was violated, and that the violation caused pretrial harms distinct from any effects that the lack of counsel might have on the outcome of the trial. At bottom, he is claiming that the state cannot maintain a criminal case against him—thereby subjecting him to contemporaneous, negative consequences—for an extended period of time without providing him counsel to resolve the case. That is a type of claim that is likely to evade review because the pretrial situation that relator is challenging is likely to end before a challenge to it can be initiated, much less fully litigated.[8]

Consequently, we conclude that the four requirements for review under ORS 14.175 are satisfied here: relator is challenging an act of a public body; he had standing to do so when he initiated this mandamus case; the act is recurring; and act is likely to end before challenges to it can be fully litigated.

Given that conclusion, the question becomes whether this is the type of case in which it is appropriate for this court to exercise its discretion under ORS 14.175. *See, e.g.*, *Penn*, 365 Or at 624 (exercising discretion under ORS 14.175 because the petitioner raised a "serious challenge" to the constitutionality of the board's imposition of a supervision conduct and a decision in the case would have "broader relevance"). We conclude that it is. The legal issues in this case concern a core constitutional right that is essential for the functioning and integrity of our legal system, and they arise out of an ongoing public defense crisis, which affects many persons and institutions throughout the state. Moreover, as relator points out, there is no consistent approach among the state's trial courts when an attorney is unavailable to

[8] As noted, in this court, relator seeks dismissal of his criminal case *without* prejudice. When a criminal case is dismissed *without* prejudice, the state can bring a later case against the defendant for the same crimes, provided that that case is not barred for other reasons, such as the expiration of the applicable statute of limitations. But if a case is dismissed *with* prejudice, the state cannot bring a later case for the same crimes. As relator himself acknowledges, whether a delay in the appointment of counsel requires dismissal *with* prejudice will depend on the case-specific effects of the delay on the defendant's ability to present a defense and receive a fair trial.

be appointed to represent an eligible criminal defendant.[9] Exercising our discretion under ORS 14.175 to resolve the legal issues in this case will help ensure that the right to counsel is protected consistently across the state.

C. *Availability of Mandamus Relief*

Because this case comes to this court on relator's petition for a writ of mandamus, we must address one more preliminary matter: whether this is the type of case in which the extraordinary remedy of mandamus relief is available. This court may issue a writ of mandamus to compel a lower court to perform a legally required act. ORS 34.110; *see HotChalk, Inc. v. Lutheran Church—Missouri Synod*, 372 Or 249, 255-56, 548 P3d 812 (2024) (explaining that mandamus relief is available if the trial court had a "legal duty to act in a certain way"). But "the writ shall not be issued in any case where there is a plain, speedy and adequate remedy in the ordinary course of the law." ORS 34.100.

The state contends that mandamus relief is not available here because relator has a plain, speedy, and adequate remedy in the form of a direct appeal. Generally, direct appeal is regarded as a plain, speedy, and adequate remedy in criminal cases. *State ex rel Automotive Emporium v. Murchison*, 289 Or 265, 267, 611 P2d 1169, *reh'g den*, 289 Or 673, 616 P2d 496 (1980); *see also State ex rel Maizels v. Juba*, 254 Or 323, 333, 460 P2d 850 (1969) (explaining that challenges to denials of demurrers and motions to suppress can be raised on direct appeal, as opposed to mandamus). But that general rule does not apply when a direct appeal will not vindicate a relator's rights. *See, e.g.*, *State v. Moore*, 361 Or 205, 212, 390 P3d 1010 (2017) (holding that a mandamus action is an appropriate means to challenge a trial court's denial of defendant's motion to dismiss on double-jeopardy grounds because "the right to appeal after

[9] Relator asserts that trial court responses to the unavailability of counsel for indigent defendants vary "from court to court, from judge to judge, and from case to case." Relator describes three different approaches: (1) in Multnomah County, trial courts appear to have had a policy of dismissing cases where defendants were unrepresented for a period of time, but then to have changed that policy; (2) in Washington County, trial courts did not dismiss cases, but would allow defendants to "jump the line" when they pursued other avenues to challenge their lack of counsel; and (3) in Marion County, trial courts appointed public defenders despite their assertions that they lacked the capacity to take additional cases.

a conviction would not vindicate his constitutional right to be free from a second prosecution for the same offense"); *State ex rel Anderson v. Miller*, 320 Or 316, 322, 882 P2d 1109 (1994) (holding that a mandamus action is appropriate under certain circumstances where "direct appeal will not sufficiently serve to vindicate a party's rights with regard to discovery"). As explained above in our discussion of why relator's challenge is the type that will likely evade review, direct appeal of a judgment of conviction, in the event that a defendant is convicted, will not provide an opportunity to address the alleged pretrial harms resulting from the failure to appoint counsel. Consequently, we conclude that relator does not have a "a plain, speedy and adequate remedy in the ordinary course of the law," ORS 34.110, that would preclude mandamus relief.

Whether relator is entitled to mandamus relief depends on whether, as he asserts, the trial court had a legal duty to grant his motion to dismiss. The answer to that question is inextricably intertwined with the answers to the constitutional questions to which we now turn.[10]

III. ANALYSIS OF CONSTITUTIONAL ISSUES

As noted, this case presents three legal questions: (1) whether the failure to appoint counsel to represent relator violated his right to counsel under Article I, section 11, of the Oregon Constitution; (2) if it did, whether dismissal of the criminal case without prejudice was an appropriate remedy; and (3) if it was, whether the trial court was required to dismiss the case after relator had been unrepresented for a certain period of time. Because the parties' competing arguments help to more precisely frame the issues that we need to resolve, we start there.

A. *The Parties' Arguments*

Relator argues that, having been arraigned on the current indictment, his Article I, section 11, right to counsel had attached and continued "uninterrupted" thereafter. He

[10] The constitutional questions are novel, but "mandamus can be used to decide a novel legal question." *State ex rel Kristof v. Fagan*, 369 Or 261, 285, 504 P3d 1163 (2022); *see also, e.g.*, *Gray*, 370 Or at 135-36 (announcing, in a mandamus case, that the scope of the state constitutional right to counsel includes the right to have counsel present when the defendant testifies before a grand jury).

further argues that, once that right had attached, the failure to appoint named counsel within a reasonable period thereafter violated his right to counsel under the state constitution.

According to relator, Article I, section 11, does not permit "the complete deprivation of counsel for *any* period of time," let alone the indefinite deprivation of counsel "for months and, in some cases, years, " while criminal charges remain pending. (Emphasis in original). Noting that the right to counsel is the right through which other constitutional rights are given effect, relator explains that his lack of counsel prevented him from being able to respond to the state's exercise of its prosecutorial powers over him and prepare a defense. All the while, relator continues, he remained subject to "restraints on his individual liberties" as a consequence of the pending charges.

Relator contends that such a complete, indefinite denial of counsel calls for the court to fashion a bright-line remedy to restore a criminal defendant to the position that the defendant would have been in had the state remained within the limits of its authority. As a general proposition, relator argues that the "only constitutionally adequate remedy" in these circumstances is dismissal of the criminal charges without prejudice after no more than 30 days without counsel.

For its part, the state agrees that relator's right to counsel had attached in this case. It also concedes that "the trial court was required to appoint counsel" for relator "after determining that he was financially eligible" and that the court "did not satisfy that requirement by appointing 'OPDC' *** as a placeholder for an actual lawyer."

However, according to the state, the scope of relator's right to counsel following its attachment was limited: it guaranteed only the right to have counsel present at a "critical stage" and appointed "within a reasonable time before a critical stage occurs." Put simply, the state's position is that there is no constitutional problem if an eligible criminal defendant lacks appointed counsel post-arraignment as long as the defendant is not required to participate in a

"critical stage" without the presence of counsel and the trial court "continue[s] the case (and any critical stages in the case) until" counsel can be appointed.

The state further contends that, contrary to relator's argument, "[a] trial court is not compelled to dismiss the charges [against an eligible criminal defendant] any time there is a 30-day gap in representation." Instead, the state argues that "[d]ismissal is required only if an unreasonable delay causes incurable prejudice to an individual defendant." The state reasons that delays in the appointment or substitution of counsel that, in turn, create delays in scheduling or holding a critical stage, including trial, can be "assessed in the speedy trial context on a case-by-case basis." In that context, the state explains, a defendant who can establish that the "delay in the appointment of counsel result[ed] in prejudice to [the] defendant's ability to prepare a defense" would be entitled to a "dismissal *with prejudice*." (Emphasis added.)

B. *Whether Relator's Article I, Section 11, Right to Counsel Was Violated*

With the issues framed by the parties' arguments, we turn to the relevant law, beginning with the law relating to the nature of the right to counsel and then turning to the law relating to the scope of the right. We then apply the law to the facts of this case to determine whether relator's right to counsel was violated.

1. *The nature of the right to counsel*

Article I, section 11, guarantees criminal defendants rights that are intended to ensure that criminal prosecutions are fair and reliable. It provides, in part:

> "In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him, and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor[.]"[11]

[11] The quoted portion of Article I, section 11, is the full text of the original section. It was amended in 1932 and 1934 to add provisions relating to jury trials, which are not relevant to the issues in this case.

The portion of Article I, section 11, that is at issue here is the guarantee that, "[i]n all criminal prosecutions, the accused shall have the right *** to be heard by himself and counsel[.]" That guarantee is a core component of our criminal justice system, which is an adversarial one. *State v. Craigen*, 370 Or 696, 704, 524 P3d 85 (2023). In an adversarial system, opposing parties conduct their own investigations, develop competing legal and factual theories, and present evidence and arguments to support those theories in court. Adversarial systems are premised on the belief that the best way to resolve legal disputes correctly is through a competitive process, with each party making its own case. *State v. Lacey*, 364 Or 171, 180, 431 P3d 400 (2018). Consequently, in an adversarial system, each party plays an essential role in ensuring that the legal rulings are correct and factual findings are accurate. If one party is unable to develop and present its case, then the system is compromised. By guaranteeing criminal defendants the right to counsel, Article I, section 11, helps ensure that our adversarial criminal justice system functions properly. As this court has observed, without the right to counsel, "a trial court cannot reliably serve its function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair." *State v. Cotter*, 373 Or 381, 387, 567 P3d 1034 (2025) (internal quotation marks omitted).

The right to counsel under Article I, section 11, serves as a check on governmental powers. Oregon's founders were concerned that governmental powers could be misused, and—like many other provisions of the Oregon Constitution—Article I, section 11, exists to protect against such misuse. *See Stevenson v. Holzman*, 254 Or 94, 101-02, 458 P2d 414 (1969) (stating that the purpose of the right to counsel "is to give assurance against deprivation of life or liberty except strictly according to law" (internal quotation marks omitted)). The founders gave the state the power to prosecute persons for crimes while simultaneously giving such persons the right to counsel to defend against the prosecutions. The right to counsel helps ensure that "the state abides by the legal limits on its authority, that criminal proceedings are fair, and that verdicts are reliable." *Craigen*, 370 Or at 705.

Criminal prosecutions carry significant consequences for defendants. Obviously, for those who are convicted, the potential consequences include fines, restitution, probation, jail, and prison. But other consequences flow simply from being charged. Although they are entitled to a presumption of innocence until they are convicted, defendants who are charged may nonetheless be subjected to restrictions on their liberty and incur costs in time and money to attend court and respond to the charges. In addition, pending criminal charges can affect many aspects of a defendant's life, including their personal and employment relationships. Article I, section 11, reflects the founders' recognition that, given the significant and often life-altering consequences of a criminal prosecution, it is essential that criminal defendants have the right to call upon counsel to help them respond to the state's prosecutorial actions against them.

The right to counsel is necessary because it can be difficult for persons who are untrained in the law to respond to the state's actions in a criminal prosecution. They are likely to be unfamiliar with the substantive law defining crimes and defenses and the procedural law governing how cases must be litigated. As this court has stated,

> "'[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence.'"

Stevenson, 254 Or at 100 (quoting *Powell v. Alabama*, 287 US 45, 68-69, 53 S Ct 55, 77 L Ed 158 (1932)); *see also id.*

("The assistance of counsel will best avoid conviction of the innocent[.]"). The right to counsel "is meant to counteract the handicaps of a suspect enmeshed in the machinery of criminal process." *State v. Sparklin*, 296 Or 85, 92, 672 P2d 1182 (1983) (internal quotation marks omitted); *see also Craigen*, 370 Or at 704 ("The state utilizes trained professionals to represent its interests in prosecutions, and Article I, section 11, guarantees defendants the right to do the same."). Thus, the right to counsel is particularly important because it affects a defendant's ability to assert their other rights, both substantive and procedural. *Craigen*, 370 Or at 705.

The right to counsel in a criminal prosecution is guaranteed to all persons, including those who cannot afford to retain their own counsel. That is so for the reasons that the United States Supreme Court explained in *Gideon v. Wainwright*, 372 US 335, 83 S Ct 792, 9 L Ed 2d 799 (1963), which this court has repeated in connection with Article I, section 11. *Craigen*, 370 Or at 704 n 7. In *Gideon*, the Supreme Court stated that its "well-considered precedents" and "reason and reflection" required it "to recognize that in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him. This seems to us to be an obvious truth." 372 US at 344; *Craigen*, 370 Or at 704 n 7 (quoting same). The Court pointed out that, in criminal prosecutions, governments are represented by lawyers, as are most defendants who can afford to hire their own lawyers:

> "Governments, both state and federal, quite properly spend vast sums of money to establish machinery to try defendants accused of crime. *Lawyers to prosecute are everywhere deemed essential to protect the public's interest in an orderly society. Similarly, there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses. That government hires lawyers to prosecute and defendants who have the money hire lawyers to defend are the strongest indications of the wide-spread belief that lawyers in criminal courts are necessities, not luxuries.* The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and

> laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him."

Gideon, 372 US at 344 (emphasis added); *see Craigen*, 370 Or at 704 n 7 (quoting *Gideon*, 372 US at 344).

Recognizing the importance of counsel, this court has ruled that Article I, section 11, "mandates the appointment of counsel for all indigent defendants whose conviction may result in a loss of liberty." *Stevenson*, 254 Or at 103-04. In doing so, we explained that the rule was consistent with "our commitment to individual liberty and equality before the law." *Id.* at 104.

Although defendants are the immediate beneficiaries of the right to counsel, they are not the only beneficiaries. As discussed above, defense counsel help ensure that our adversarial system functions properly. In doing so, they protect the integrity of, and public confidence in, our criminal justice system. *See Craigen*, 370 Or at 705 (stating that the constitutional rights of individuals, including the right to counsel, "help preserve the rule of law and the integrity of the legal system"). They also protect the interests of the community at large, including the interests in ensuring that the persons who have committed crimes are correctly identified; that legal requirements for investigations, detentions, pleas, trials, convictions, and sentences are satisfied; and that sentences are structured to promote rehabilitation and protect the community not only through incarceration but also upon eventual release, which occurs in most criminal cases.

In sum, the Article I, section 11, right to counsel is a fundamental Oregon right. It is essential to the fairness of our adversarial legal system, in which disputes are resolved through competing presentations of law and evidence. It guarantees criminal defendants access to advocates who can protect their substantive and procedural rights, and it is necessary given the significant consequences and complexities of criminal prosecutions. It protects the interests of

individual defendants, as well as the community at large, by helping to ensure that criminal prosecutions are conducted in accordance with the law and that the results of those prosecutions are reliable.

2. *The scope of the right to counsel*

Generally, a defendant's Article I, section 11, right to counsel "begins when criminal proceedings have been initiated, at which point the right is said to attach." *State v. Gray*, 370 Or 116, 129, 515 P3d 348 (2022). In this case, the parties agree that relator's right to counsel attached in connection with the current indictment when relator was arraigned. But they disagree about the scope of the right. That is, they disagree about whether the scope of the right includes the right to have the assistance of counsel at a stage when, as in relator's case, a defendant has been arraigned, but the state is not conducting any court proceedings regarding the merits of the charges.

The scope of the right to counsel depends on the particular circumstances at issue. *See State v. Davis*, 350 Or 440, 478, 256 P3d 1075 (2011) ("After the right attaches, the court may evaluate the particular circumstances *** to determine the scope of the right[.]"); *see, e.g.*, *Gray*, 370 Or at 130-35) (determining whether the scope of the right to counsel includes the right to have counsel present at when a defendant testifies before the grand jury). When determining the scope of the Article I, section 11, right to counsel, this court has applied the methodology described in *Priest v. Pearce,* 314 Or 411, 415-16, 840 P2d 65 (1992), for construing state constitutional provisions. *See, e.g.*, *Davis*, 350 Or 446 (summarizing steps); *id.* at 462-77 (applying steps). Under *Priest,* "we examine the text of the constitution in its historical context, along with relevant cases interpreting it." *Couey*, 357 Or at 490 (citing *Priest*, 314 Or at 415-16). "In conducting that examination, our purpose is not to freeze the meaning of the state constitution to the time of its adoption, but is instead 'to identify, in light of the meaning understood by the framers, relevant underlying principles that may inform our application of the constitutional text to modern circumstances.'" *Id.* (quoting *Davis*, 350 Or at 446).

This court has reviewed the history of the right to counsel in prior cases. *E.g.*, *Davis*, 350 Or at 464-72; *State v. Prieto-Rubio*, 359 Or 16, 24, 376 P3d 255 (2016). In *Davis*, this court traced the right to counsel from English common law through the adoption of the Oregon Constitution. 350 Or at 464-72. We explained that, "[a]t English common law, a defendant accused of a felony was actually prohibited from being represented by counsel" but that the American colonies charted a different course. *Id.* at 465. Early colonial governments "enact[ed] statutory guarantees to the assistance of counsel in serious criminal cases." *Id.* at 465-66. And, after the Declaration of Independence, "a majority of states adopted constitutions that explicitly recognized a right to the assistance of counsel." *Id.* at 466. The right was based on a recognition that persons accused of crimes were often unequipped to respond to the state's actions against them. *Id.* at 467-68. As the Louisiana Supreme Court explained in a passage quoted in *Davis*,

> "[the right] was a reproach to the Common Law of England that prisoners were not allowed the aid of counsel when accused of crimes. Their ignorance and timidity when prosecuted by the high officers of government, their want of self possession when life and liberty was put in jeopardy rendered them incapable of defending themselves, and often the greatest injustice and oppression occurred. This led to the guarantee of the right to counsel in our liberal constitutions, and the right should be liberally construed."

Id. at 468 (quoting *State v. Cummings*, 5 La Ann 330, 331-32 (1850)).

In *Davis*, this court observed that the historical context of the right to counsel indicates that, before the Civil War, the right "would have been understood to guarantee a right to counsel at trial, and, perhaps, some measure of preparation for trial following the commencement of formal adversary proceedings." *Id.* at 472. That is because, "before the Civil War, organized police forces as we know them did not exist, professional prosecutors were rare, criminal investigations of the sort that we are familiar with did not occur, and the evidence against a criminal defendant was marshalled during the trial itself." *Id.* at 469. But "[a]s the nature of law enforcement and public criminal prosecution

[have] changed," courts have had to consider whether the scope right to counsel includes the right to the assistance of counsel at stages other than trial. *Id*. at 469. Generally, issues regarding the scope of the right to counsel have been presented in cases where the defendant has asserted a right to have counsel present during a particular nontrial event, like police questioning.

This court has ruled that, after a defendant's right to counsel has attached, the defendant has the right to have counsel present at certain nontrial events, including out-of-court events at the beginning and end of a prosecution. For example, in *Sparklin*, this court ruled that a defendant who is represented by counsel on charged crimes has the right to have counsel present during police questioning about those crimes. 296 Or at 93 ("Once an attorney is appointed or retained, there can be no interrogation of a defendant concerning the events surrounding the crime charged unless the attorney representing the defendant on that charge is notified and afforded a reasonable opportunity to attend.") Later, in *Prieto-Rubio*, this court ruled that, in addition to having the right to have counsel present during police questioning about *charged* crimes, a represented defendant has the right to have counsel present during police questioning about *uncharged* crimes when "it is objectively reasonably foreseeable that the questioning will lead to incriminating evidence" concerning the charged crimes. 359 Or at 18.

When determining the scope of the right to counsel, this court has focused on the principles underlying the right and the purposes of the right. *See Prieto-Rubio*, 359 Or at 36 (focusing on the purpose of the right); *id.* at 25 (stating that a defendant has the right to have counsel present when "counsel's presence could prevent prejudice to [the] defendant"); *see also Gray*, 370 Or at 129 (observing that this court in *Davis* and *Prieto-Rubio* analyzed the history and purposes of the right in ways that are instructive when determining the scope of the right). As discussed above, the basic principle underlying the right is that criminal prosecutions should be fair, reliable, and conducted in accordance with the law. *See, e.g.*, *Cotter*, 373 Or at 387 (without the right to counsel, "a trial court cannot reliably serve its

function as a vehicle for determination of guilt or innocence, and no criminal punishment may be regarded as fundamentally fair"); *Craigen*, 370 Or at 705 (explaining that the right to counsel helps ensure that "the state abides by the legal limits on its authority, that criminal proceedings are fair, and that verdicts are reliable"). The primary purpose of the right is to give effect to that basic principle by guaranteeing defendants the assistance of counsel to protect their legal interests when the state exercises its prosecutorial powers over them. *See, e.g.*, *Stevenson*, 254 Or at 100 (generally, a defendant "'has small and sometimes no skill in the science of law'" and "'requires the guiding hand of counsel at every step in the proceedings against him'" (quoting *Powell*, 287 US at 69)); *Sparklin*, 296 Or at 93 (the right to counsel "is meant to counteract the handicaps of a suspect enmeshed in the machinery of criminal process" (internal quotation marks omitted)). Consequently, in cases involving whether a defendant's right to counsel includes the right to have counsel present at a particular event, this court has considered whether the defendant's legal interests would be at risk of prejudice if counsel was not present. When doing so, this court has considered the nature of the event at issue and how counsel could protect the defendant's rights during the event.

State ex rel Russell v. Jones, 293 Or 312, 647 P2d 904 (1982) is illustrative. In *Russell,* a mandamus case, the relator—who had pleaded "no contest" to a criminal charge and was awaiting sentencing—asserted that the scope of the right to counsel under Article I, section 11, includes the right to have counsel present during presentence interviews. *Id.* at 314; *see generally* ORS 137.530 (governing presentence investigations); ORS 137.090 (authorizing trial courts to designate persons to conduct presentence investigations). This court agreed. *Russell*, 293 Or at 317. In doing so, we considered the nature of presentence interviews and how counsel could assist a defendant during an interview. *Id*. at 317-20. We acknowledged that presentence interviews do not relate to whether a defendant is guilty of the charged crimes. *Id.* at 318 ("After guilt is no longer in issue, the inquiry is into defendants' background, present situation and attitude."). We also acknowledged that a presentence

interviewer is required to prepare a report, which defense counsel can challenge and supplement at sentencing, and, therefore, there "rarely" would be a "risk of irremediable harm" if counsel was not present at a presentence interview. *Id*. at 318. Nevertheless, we concluded that Article I, section 11, guarantees a defendant the right to have counsel present during presentence interviews because "circumstances are conceivable where the presence of counsel would be helpful." *Id*. at 319. In some cases, counsel could be "helpful to the fact-gathering process or to the protection of the clients' rights[.]" *Id*. at 320. Given those possibilities, we ruled that "counsel cannot be barred" from presentence interviews. *Id*.[12]

This court's most recent case concerning the scope of the right to counsel under Article I, section 11, is *Gray*, 370 Or 116, another mandamus case. In *Gray*, one of the issues was whether a defendant who exercises their statutory right to testify before a grand jury has a right, under Article I, section 11, to have their counsel present in the grand jury room. *Id.* at 128. Consequently, this court had to consider the scope of the Article I, section 11, right to counsel. We began by noting that, as evidenced by our analyses in *Davis* and *Prieto-Rubio*, when determining the scope of the Article I, section 11, right to counsel, we are guided by the principles underlying the right and purposes of the right. *Gray*, 370 Or at 128-29. Accordingly, our cases have "always focus[ed] on whether the absence of counsel would risk prejudice to the defendant's legal interests." *Id*. at 130 (citing, *inter alia*, *Russell*, 293 Or at 315 ("[A] criminal defendant's guarantee of the assistance of counsel exists at least at all court proceedings from arraignment through probation revocation as well as all post-indictment out-of-court critical stages where, without the assistance of counsel, the legal interests of the defendant might be prejudiced."); *Prieto-Rubio*, 359 Or at 25 ("Under Article I, section 11, the

[12] In *Russell*, this court made it clear that, although we were holding that the scope of Article I, section 11, includes the right to have counsel present at presentencing interviews, we were "not hold[ing] that the presence of counsel is required at every presentence interview or that [their] absence would constitute ineffective assistance of counsel"; rather, we were holding that Article I, section 11, requires "that counsel may not be barred from attendance at a presentence interview." 293 Or at 318.

scope of the right to counsel encompasses stages in criminal proceedings in which counsel's presence could prevent prejudice to a defendant.")).

Applying that standard, this court held that a defendant's right to counsel under Article I, section 11, includes the right to have counsel present in the grand jury room when the defendant testifies. *Id.* at 132-33. It did so because counsel's presence "would lessen the risk of prejudice" to the defendant's interests. *Id.* at 132; *see also id.* (explaining that in *Russell*, it "found a constitutional right to the presence of counsel when there was only a low chance that counsel would be able to protect a defendant's interests"). As it had in earlier cases, this court considered the nature of the circumstances at issue and what counsel could do in those circumstances to protect a defendant's interests. *Id.* We concluded that counsel's presence in the grand jury room could be helpful to the relator because, "[a]t a minimum, counsel's presence means that relator may consult with a fully informed counsel, who will have directly heard the question and can provide relator with informed advice." *Id.*

In sum, because the primary purpose of the right to counsel is to protect a defendant's rights in a criminal prosecution, a defendant has the right to the assistance of counsel in circumstances where, without that assistance, the defendant's legal interests would be at risk of prejudice.

3. *Application*

Having reviewed the relevant law regarding the nature and scope of the Article I, section 11, right to counsel, we now apply that law to determine whether relator's right to counsel was violated.

As mentioned, the parties do not dispute that defendant was arraigned on the current indictment or that his Article I, section 11, right to counsel had attached by that time. Nor do the parties dispute that the trial court was required to appoint named counsel for relator after determining that he was financially eligible and that the appointment of OPDC—as a placeholder for a named attorney—was insufficient. In fact, the state concedes that point, and we accept its concession.

Instead, the parties' dispute centers on the *scope* of the right to counsel under the circumstances of this case, in which an eligible criminal defendant invoked his right to counsel but the state failed to appoint named counsel to represent him post-arraignment. As described above, relator argues that his right to counsel was violated because the state failed to appoint counsel within a reasonable period after his right to counsel attached. The state counters that the failure to appoint counsel did not violate defendant's right to counsel because the scope of that right is limited. According to the state, the right guarantees the assistance of counsel only in connection with "critical stages," by which the state appears to mean adversarial contacts between the state and a defendant, such as police questioning or court hearings. Therefore, according to the state, as long as relator's case did not proceed to any critical stages, his right to counsel was not violated.

The state is correct that a defendant has a right to have counsel present at "critical stages." But, as this court has held, a defendant's Article I, section 11, right to counsel is not that limited. *Davis*, 350 Or at 475; *see Sparklin*, 296 Or at 92 n 9 ("When Article I, section 11 is implicated '[t]he right of an accused under Article I, section 11, to be heard by himself or counsel, *** , is guaranteed in "all criminal prosecutions," not limited to "critical stages" of such prosecutions.'" (Quoting *State ex rel Russell v. Jones*, 293 Or 312, 321, 647 P2d 904 (1982) (Lent, J., concurring) (brackets and ellipses in *Sparklin*).)). Consequently, rather than frame the question as whether the stage in the proceedings in which relator was without counsel constitutes a "critical stage," we ask whether the absence of counsel would risk prejudice to the defendant's legal interests, or stated differently, whether the absence of counsel would undermine the purposes of the right to counsel.

To answer that question, we consider what assistance counsel could provide to a defendant, even outside of an adversarial contact like police questioning or a court hearing. Generally stated, defense counsel's role is to respond to the state's exercise of its prosecutorial powers over a defendant. That role is not limited to being present at certain

events. There are numerous actions that defense counsel can take to protect a defendant's rights and to prepare and present a defense. Many of those actions can be taken on defense counsel's own initiative, outside of court, and before any trial.

Defense counsel has a role to play as soon as a defendant is charged with a crime. Defense counsel needs to promptly contact the defendant to explain the defendant's rights and options and to gather information from the defendant. Many defendants do not understand what is happening to them and how their cases will proceed. And they may need to speak candidly to a lawyer about the events underlying the charges while those events are still recent and to have those discussions protected by the attorney-client privilege.

In addition, defense counsel needs to assess the charges against the defendant. As mentioned above, Article I, section 11, guarantees a defendant the right "to demand the nature and cause of the accusation against him[.]" That is something that counsel can help a defendant do. Indeed, it is something that a defendant will probably need counsel to do. *See Stevenson*, 254 Or at 100 ("'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad.'" (Quoting *Powell*, 287 US at 69.)). If a defendant receives a charging instrument that is deficient, they can move against it by filing a demurrer. That can be done at the outset of a criminal prosecution because a demurrer is based on the charging instrument itself. ORS 135.630(2) (authorizing demurrers based on "the face" of the charging instrument). There are several bases for demurrers, including that "the facts stated [in the charging instrument] do not constitute an offense" and that the charging instrument "contains matter, which, if true would constitute a legal justification or excuse of the offense charged or other legal bar to the action." ORS 135.360(4), (5). If a demurrer is allowed, then the state cannot proceed on the charging instrument. Thus, at the outset of a criminal prosecution, a defendant has rights that defense counsel can assert based solely on

the charging instrument and that can result in the termination of case.

Defense counsel also can assist a defendant by investigating the alleged crimes. *See Sparklin*, 296 Or at 92 n 9 ("There can be no question that the right to an attorney during the investigative stage is at least as important as the right to counsel during the trial itself."). Defense counsel can assert a defendant's right to discovery under ORS 135.815, which requires the state to provide information and materials. *See also* ORS 135.845 (requiring the state to provide discovery to a defendant "as soon as practicable" following the filing of the charging instrument). Defense counsel can also take steps to secure physical evidence before it is lost and to record witness statements before memories fade. They may also be able to arrange for medical and psychological examinations of the defendant close in time to the alleged crimes, when the examinations will be most relevant. In addition, defense counsel can determine whether the defendant has any defenses, such as self-defense or defense of others, that the defendant could present to the grand jury. *See* ORS 132.320(12) (providing that a defendant, who is represented by counsel, has a right to appear before the grand jury, if—prior to the filing of an indictment—counsel files a written notice requesting the appearance). Thus, if a defendant has counsel early in a criminal prosecution, counsel can arrange to have the defendant testify before the grand jury, and the defendant's testimony could cause the grand jury to decide not to indict the defendant.

Defense counsel can also take steps to resolve a criminal prosecution by negotiating a civil compromise or arranging for the defendant to participate in a diversion program, each of which could result in the eventual dismissal of the charges against the defendant. *See* ORS 135.703 - ORS 135.709 (civil compromises); ORS 135.881 - ORS 135.925 (diversion agreements); ORS 813.200 - ORS 813.270 (DUII diversion charges); ORS 430.450 - ORS 430.555 (diversion to treatment programs).

Defense counsel can also resolve cases through plea negotiations. If counsel reviews the charging instrument, conducts any necessary investigation, and assesses potential

sentences, counsel may be able to negotiate a plea in a fairly short time, especially in cases where there is little dispute about the relevant facts, law, and potential sentences.

In addition to taking steps to resolve the charges against a defendant, defense counsel has a role to play in protecting a defendant's rights by ensuring that any prosecutorial powers that the state is exercising over the defendant are being exercised lawfully. The state's prosecutorial powers include its power to exercise control over a defendant's liberty pending resolution of the defendant's case, which the state does when it holds a defendant in jail, puts a defendant on supervision, or otherwise restricts the defendant's freedoms. Defense counsel can ensure that the state's exercise of those controls is lawful. For example, defense counsel can make sure that any release conditions comply with the law.

In sum, defense counsel's role is not limited to being present at events when the state is confronting the defendant. It is not merely reactive; it is proactive. There are many actions that defense counsel can take to protect a defendant's rights in the context of a criminal prosecution, including actions that counsel can (and may have to) take early in a prosecution. But in cases like this one, defendants are left without anyone to take those actions.

The failure to appoint counsel within a reasonable time harms defendants in several ways. First, defendants with charges pending against them are subjected to restraints on their liberty, while being deprived of the ability to challenge or modify them. Every defendant with an open case is required to appear when ordered by the trial court. ORS 135.290 (governing contempt); *see also* ORS 135.250 (governing pretrial release). If a defendant fails to do so, the court can issue a warrant for the defendant's arrest, and the defendant can be criminally prosecuted. ORS 162.195 (defining second-degree failure to appear); ORS 162.205 (defining first-degree failure to appear). If the defendant posted funds to obtain a security release, they could lose those funds. ORS 135.280(3) (providing for the forfeiture of funds or property posted for security release). Consequently, in cases like relator's, defendants must continue to appear

for hearings, under threat of arrest and criminal prosecution, only to be told that the state is unable to appoint counsel and that they will have to return again later.

In addition to being subject to the control of the court, most defendants are subject to other restrictions on their liberty. All defendants who are released from custody pending resolution of their cases are subject to mandatory conditions, including that they not leave the state without permission of the court. ORS 135.250(1). Many of those defendants are subject to additional restrictions, including restrictions on contacting certain persons or going to certain places. *See* ORS 135.260(1)(b) (authorizing restrictions on the defendant's "activities, movements, associations and residences"); ORS 135.247 (requiring courts to prohibit defendants from contacting alleged victims of certain types of crimes). Defendants who are on release may also have affirmative obligations, including reporting to a release supervisor. ORS 135.260(1)(a). If a defendant breaches a release restriction, they can be arrested and detained, and they may lose any money posted as security. ORS 135.280. They may also be held in contempt of court. ORS 135.290.

Although pretrial restraints on a defendant's liberty are permissible and usually appropriate, what is different for relator and others is that they are subject to those restraints while being denied the means they need to respond to them.

Second, the defendant cannot move their case forward. In addition to restraints on their liberty, defendants experience other consequences as a result of being charged with a crime, regardless of the presumption of innocence. These include effects on a person's relationships, employment, and housing opportunities. Although these consequences exist for all criminal defendants, with or without counsel, defendants like relator experience them for an extended and indefinite time while being unable to respond to the charges against them. They do not have a legal advocate to review the state's charges and evidence, gather and preserve defense evidence, and take steps to advance their case toward resolution, whether through dismissal, plea, or trial.

Meanwhile, the state has counsel to continue to collect evidence, interview witnesses, and take other steps to prepare its case. In addition, the failure to appoint counsel undercuts the protection of the statute of limitations. The statute requires the state to initiate a criminal prosecution within a certain period of time after the alleged crime.[13] One of the ideas underlying the statute is that the passage of time can harm a defendant's ability to respond to the charges. If the state charges a crime after the limitations period has passed, a defendant is entitled to dismissal with prejudice. That is, the defendant has a simple, statutory basis for dismissal with prejudice because of the delay. When the state charges a defendant within the applicable limitations period but fails to appoint counsel, the defendant is disadvantaged. Because the state's filing is timely, the defendant cannot move to dismiss on statute-of-limitations grounds. But, because the defendant is without counsel, defendant is still exposed to harms that result from delay that the statute is intended to protect against.

Third, the failure to appoint defense counsel can have a coercive effect. As just discussed, having an open criminal case without counsel harms a defendant because they cannot respond to the restraints on their liberty or the charges against them. Being in such a situation can put pressure on a defendant to waive their right to counsel, and that pressure mounts over time. As the burdens of having an open case without counsel grow, so does the likelihood that a defendant will waive their right to counsel just to move their case forward. Thus, an extended delay in the appointment of counsel can cause a defendant to abandon their right to counsel and proceed at a disadvantage.

As discussed above, when determining the scope of the state constitutional right to counsel, this court is guided by the principles underlying the right and the purposes of the right. It considers whether the denial of the assistance of counsel in the particular circumstances at issue would "risk prejudice to the defendant's legal interests." *Gray*, 370 Or at 130; *see also, e.g.*, *Russell*, 293 Or at 317-20 (considering

[13] As noted above, different crimes have different limitations periods, ranging from two years to more than 20 years, 374 Or at 829 n 5, and some crimes have no limitation period, ORS 131.125(1).

the nature of presentence interviews and how counsel could assist a defendant during an interview); *Gray*, 370 Or at 132-33 (considering how counsel could be helpful to a defendant testifying before a grand jury).

Applying that approach to the circumstances at issue here, we conclude that when, as in relator's criminal case, the state fails to appoint counsel for an eligible defendant for an extended period of time, the state violates Article I, section 11. Such a failure undermines the purposes of the right because it denies the defendant the means necessary to respond to the state's exercise of its prosecutorial powers, creates an imbalance in the adversarial system, and puts pressure on a defendant to waive the very right that is intended to help ensure the fairness and legality of criminal prosecutions.

C. *Whether Dismissal Without Prejudice Is the Appropriate Remedy*

Having concluded that relator's Article I, section 11, right to counsel was violated, we must now determine whether relator is entitled to the remedy he requests. As a general proposition, this court tailors remedies for the violation of the right to counsel under Article I, section 11, to the nature and effects of the violation. *See, e.g.*, *State v. Stanton*, 369 Or 707, 715, 511 P3d 1 (2022) (holding that, where the record failed to establish that a defendant had made an intentional and knowing waiver of his right to counsel and the court could not determine what the outcome of the case would have been had the defendant been represented, remand for a new trial was appropriate); *Prieto-Rubio*, 359 Or at 38 (holding that, where a detective questioned a defendant in violation of Article I, section 11, the remedy was "the exclusion of any prejudicial evidence obtained as a result of that violation").

The nature of the violation in this case is unlike those that we have previously encountered. This is not a case in which the violation of the right occurred in the context of a hearing or a trial that can be conducted again. Nor is this a case in which the violation resulted in the state obtaining evidence that can be excluded. Instead, the state

arraigned relator on criminal charges but then denied him the appointed counsel to which he was entitled.

As described above, when the state maintains a criminal prosecution against a defendant while failing to appoint defense counsel for an extended period of time, the defendant is harmed in several ways. Dismissal without prejudice is an appropriate remedy for those harms. It terminates the imbalanced situation where the state is asserting its prosecutorial power over the defendant, but the defendant is without counsel to help them respond to that assertion. It also releases the pressure on a defendant to waive their right to counsel. At the same time, it does not preclude the state from prosecuting the defendant later, when the state is able to provide the counsel to which a defendant is entitled.

D. *When Is a Trial Court Compelled to Dismiss the Criminal Charges*

Having concluded that dismissal without prejudice is an appropriate remedy, the question becomes: At what point is a defendant entitled to that dismissal? As mentioned, relator urges us to announce a bright-line rule that a defendant is entitled to dismissal after a certain number of days. We agree that, in this situation, a bright-line rule is appropriate. It will help ensure that similarly situated defendants are treated consistently across the state. And it will be a tool for courts to remedy denials of counsel efficiently.

Where the "bright line" should be set is a novel question. To answer it, we take into account the fact that the burdens and pressures of having an open case without the assistance of counsel will increase over time. As time goes on, the risks of harm to the defendant's rights and to the integrity of the proceeding increase and dismissal becomes appropriate.

We also look to the statutes that govern criminal procedures. As we discussed above, those statutes reflect that certain actions are expected to be taken early in a criminal case. *See, e.g.*, ORS 135.815 and ORS 135.845 (governing discovery); ORS 135.360 (governing demurrers); ORS 135.703

- ORS 135.709 (civil compromises); ORS 135.881-135.925 (diversion agreements). They also show that it is possible for some criminal prosecutions to be resolved relatively quickly, which indicates that maintaining an open case against a defendant for an extended period, while denying the defendant the ability to move the case forward, is unreasonable.

The time-to-disposition standards adopted by the Chief Justice in 2018 also provide guidance. *See* Oregon Judicial Department, *Time to Disposition Standards for Oregon Circuit Courts* (2018), https://www.courts.oregon.gov/rules/Pages/other.aspx (accessed January 26, 2026) (Time to Disposition Standards). The workgroup that recommended the standards was guided by the principle that they were to be "both realistic and aspirational." Time to Disposition Standards at 2. To that end, the workgroup considered "recent data from Oregon circuit courts" and "relevant statutes and rules pertaining to the timely disposition of cases in Oregon." *Id.* Separate standards were established for felony and misdemeanor cases. *Id.* at 4. The standard for misdemeanor cases is to resolve 75 percent of cases within 60 days, 90 percent within 90 days, and 98 percent within 180 days.[14] *Id.* at 4-5. The standard for felony cases is to resolve 75 percent of cases within 90 days, 90 percent within 180 days, and 98 percent within 365 days. *Id.* at 4. Our understanding is that those time standards account for the variety of different ways that criminal cases may be resolved (*e.g.*, dismissal, plea, trial), some of which may result in a faster disposition than others. The standards indicate that most cases (75 percent) are expected to be resolved in less than 60 days (misdemeanors) or 90 days (felonies).

[14] The Oregon Judicial Conference originally had adopted Standards for Timely Disposition in 1990. Time to Disposition Standards at 2. The 2018 standards reduced the time to disposition when compared to the 1990 standards. For felony cases, the 1990 standard was to resolve 90 percent of cases within 120 days, 98 percent within 180 days, and 100 percent within one year. Time to Disposition Standards at 3. For misdemeanor cases, the standard was the disposition of 90 percent of cases within 90 days, 98 percent within 180 days, and 100 percent within one year. *Id.* The 2018 standards appear to reflect, at least in part, changes to docket management and case processing that had occurred since 1990. Those changes included "[t]echnological advancements" that had "dramatically changed how courts process filings, schedule hearings, and track cases," which was "especially the case with the advent of electronic filing, sophisticated case and document management systems, and automated workflow." *Id.* at 2-3.

The Time to Disposition Standards are not dispositive of the length of time that a defendant may be denied counsel under Article I, section 11, before a trial court is required to remedy that denial. But they are instructive. According to the state, "[b]efore 2019, Oregon's indigent defense system—although overtaxed—was able to provide prompt legal representation to eligible criminal defendants." Thus, the 2018 standards reflect the time-to-disposition goals absent a statewide public defense crisis in which, according to OPDC, there simply are not "enough defense attorneys in the state to represent every indigent defendant" and, "at least in the near term," it will be unable promptly to appoint counsel for all indigent defendants, many of whom "may be without counsel for weeks if not months."

Viewed in that light, the state's failure to appoint a named attorney to represent an eligible criminal defendant for a period of 60 days or more in a misdemeanor case, or 90 days or more in a felony case, would be starkly inconsistent with the current dispositional standards of resolving 75 percent of misdemeanor cases within 60 days and 75 percent of felony cases within 90 days. It would leave a defendant without counsel for all or most of the time that the standards set for resolution of most criminal cases.

There must be a limit on the amount of time that the state may maintain a criminal prosecution without appointing counsel for an eligible defendant, and this case requires us to set that limit. We do so based on the pretrial harms described above; the relevant statutes and rules contemplate that some cases can be resolved at early stages of a prosecution; and the time to disposition standards reflect the goals for resolving most criminal cases within 60 or 90 days. In light of those considerations, as well as our own assessment of when the pretrial harms justify the remedy of dismissal without prejudice, we conclude that, when an eligible criminal defendant lacks appointed counsel after arraignment for a period of more than 60 consecutive days in a misdemeanor case, or 90 consecutive days in a felony case, dismissal of the criminal charges without prejudice is ordinarily required.[15]

[15] By "misdemeanor case," we mean a case in which the most serious crime charged is a misdemeanor. By "felony case," we mean all cases in which a felony is charged.

Applying that rule in this case, the trial court had a legal duty to grant relator's motion to dismiss because relator had been without named counsel post-arraignment for over 90 days.

IV. CONCLUSION

To summarize, although this case is moot, it qualifies for adjudication under ORS 14.175 because it presents questions regarding an act of a public body that is capable of repetition but likely to evade judicial review in the future, and it is appropriate for us to exercise our discretion to adjudicate it because it presents important constitutional questions that affect many cases across the state on a daily basis. Regarding those questions, we conclude that (1) the state violates Article I, section 11, if, as in relator's criminal case, it fails to appoint counsel for an eligible defendant after arraignment for an extended period of time; (2) dismissal without prejudice can be an appropriate remedy for such a failure; and (3) a defendant is entitled to that remedy when, at any point after arraignment, the state fails to appoint counsel for a period of more than 60 consecutive days in a misdemeanor case or 90 consecutive days in a felony case.

Applying those conclusions to the facts of this case, relator was entitled to mandamus relief. But, because the trial court has now dismissed the criminal case, there is no additional relief we can provide to relator.

The alternative writ of mandamus is dismissed as moot.

Dismissal is not required if, during the 60- or 90-day period, the defendant failed to appear for court as required.

Our decision does not foreclose a trial court from determining that there are case-specific reasons to dismiss the criminal charges against an eligible defendant who has been denied appointed named counsel post-arraignment at an earlier point. And, because we cannot foresee all the possible circumstances that may arise in the future, we leave open the possibility that, in truly extraordinary circumstances, a court could decline to dismiss a case after the 60- or 90-day period for exceptionally good cause.

Date: **February 18, 2026**

To: **Robert Harris, Chair, OPDC**
Susan Mandiberg, Vice Chair, OPDC
OPDC Commissioners

Cc: **Kenneth Sanchagrin, Executive Director**

From: **Steve Arntt, Trial Support & Development Manager**

Re: **Draft *Habeas* Attorney Performance Standards**

Nature of Presentation: Possible Action Item

Background:

The Oregon Legislature has directed the Oregon Public Defense Commission (OPDC) to establish minimum standards that ensure public defense attorneys provide effective assistance of counsel consistently to all clients, as required by statute and by the Oregon and United States Constitutions. ORS 151.216(1)(j), as amended by Senate Bill 337 (2023). The agency's authority to monitor and enforce attorney performance standards was a central component of the legislative review and restructuring of the public defense system, which included a tri-branch workgroup with participation from several highly respected public defense attorneys.

To fulfill this mandate, OPDC drafted public-defense-specific performance standards across all OPDC-funded practice areas. In 2024, the Trial Support and Development (TS&D) Division invited practitioners interested in participating in the drafting process to contact the agency.

TS&D requested volunteers from the public defense community and maintained communication with interested attorneys. After an application process, TS&D selected workgroup members with significant expertise in the relevant practice areas. This includes the Habeas Corpus Workgroup. The workgroups were intentionally composed to reflect geographic diversity, different compensation models, and a range of professional experiences. All members are highly regarded attorneys with substantial practice experience. The attorneys on the Habeas Workgroup are Tara Herivel, Meg Huntington, Edward Neusteter, Ginger Mooney,

and Joe Westover. The group began meeting on November 6, 2024, to work on the qualification standards previously adopted by the Commission and continued through development of the performance standards presented today.

All workgroup meetings were recorded and posted on the agency's website under Standards & Best Practices, where they were available for public review. The workgroup continues to exchange emails and review feedback on the proposed standards. In some instances, the workgroup has adopted suggested changes; in others, the group has determined that the proposed changes should not be incorporated.

OPDC has introduced practice-area standards to this Commission over the past several months. Each practice area follows the same general structure, with formatting and baseline requirements intentionally kept consistent while allowing for practice-specific adjustments. For example, all standards require attorneys to make initial contact with clients after appointment and maintain meaningful communication throughout representation. However, timelines and expectations vary by practice area. The Commission has already reviewed and adopted standards for criminal, dependency, delinquency, civil commitment, and Psychiatric Security Review Board cases. In developing these standards, the workgroups drew from their members' experience, previously adopted OPDC standards, and standards from other states.

Each set of standards includes two components: black-letter expectations and commentary. The black-letter expectations establish the minimum requirements for practice. The commentary provides additional context and guidance, recognizing that not all commentary will apply in every case.

Following the presentation of the draft standards to the Commission on January 21, 2026, TS&D presented them to a Commission Workgroup on February 5, 2026, for review and comment. TS&D also received feedback from habeas providers who were not part of the initial workgroup. As is TS&D's standard practice, all comments were brought back to the workgroups, including the Habeas Corpus Workgroup, for review and consideration. After revisions, the updated drafts are now presented to the Commission. Changes from the January drafts are highlighted in yellow and reflect modifications adopted by the Habeas Workgroup in response to feedback from staff, the community, and the Commission.

Purpose:

OPDC intends to use the proposed performance standards to improve attorney practice throughout the state, assess the validity of complaints made against providers, and ensure clients are receiving effective representation.

Agency Recommendation:

The Agency recommends the Commission adopt the *Habeas Corpus* performance standards.

Fiscal Impact:

No immediate impacts. Full implementation of these standards will likely require investments in OPDC infrastructure and staff, to implement training programs and other supports contemplated by these standards. Such investments were not part of the agency's requested budget for 2025-27, and the agency will address in future legislative sessions.

Agency Proposed Motion:

The agency proposes the commission adopt the Habeas Corpus performance standards.

Habeas Performance Standards With Commentary

January 2026

TABLE OF CONTENTS

INTRODUCTION

Oregon Revised Statute 151.216(1)(j) mandates that the Oregon Public Defense Commission (OPDC) "[d]evelop, adopt and oversee the implementation, enforcement and modification of policies, procedures, minimum standards, and guidelines to ensure that public defense providers are providing effective assistance of counsel consistently to all eligible persons in this state as required by statute and the Oregon and United States Constitutions. The policies, procedures, standards, and guidelines described in this paragraph apply to employees of the commission and to any person or entity that contracts with the commission to provide public defense services in this state."

The following standards were developed by OPDC staff with input from a *habeas* provider workgroup. Per OPDC policy, these standards will be reviewed and revised one, two, and five years from adoption. OPDC welcomes ongoing provider input regarding the content and efficacy of these standards.

Each standard sets a baseline for practice of appointed defense work and is followed by commentary that supplements the baseline standards. OPDC recognizes that in any given case, some standards and commentary might be inapplicable or even mutually exclusive.

Commentary is particularly challenging as there are many times when the commentary is impractical or even against a client's best interest or desire. OPDC acknowledges that to practice law, exceptions to these baseline rules and their commentary must apply. The commentary provides additional considerations for counsel performing public defense. There are times when items listed in the commentary may be useful or helpful during representation. They are not meant to establish baseline minimum performance standards.

OPDC is grateful to Oregon Public Defense Commission *Habeas* Standards Workgroup for the extensive work OPDC drew upon in the development process.

Standard 1.1 Role of Lawyer in *Habeas* Cases

The lawyer for a Plaintiff in a *habeas* case should provide quality and zealous representation at all stages of the case, advocating at all times for the client's expressed interests. The lawyer should be familiar with applicable statutes, caselaw, and local court practices, and should stay aware of changes and developments in the law. The lawyer shall abide by the Oregon Rules of Professional Conduct and applicable rules of court. The lawyer should understand difference between Postconviction Relief (PCR), Extradition, Direct Appeal, *habeas* (authority for confinement), and *habeas* (conditions of confinement).

Commentary:

1. *Habeas* lawyers should be aware of other available remedies to assure that they are exhausted prior to seeking *habeas*.

2. In abiding by the Oregon Rules of Professional Conduct, a lawyer should ensure that each client receives competent, conflict-free representation in which the lawyer keeps the client informed about the representation and promptly responds to reasonable requests for information.

3. A lawyer is bound by the client's definition of their best interests and should not substitute the lawyer's judgment for that of the client regarding the objectives of the representation. If a client lacks capacity to assist in their own litigation or if a lawyer reasonably suspects that they lack that capacity, the lawyer should follow Standard 2.3.

4. A lawyer should provide candid advice to the client regarding the probable success and consequences of pursuing a particular position in the case and give the client the information necessary to make informed decisions. A lawyer should consult with the client regarding the assertion or waiver of any right or position of the client.

5. A lawyer should exercise reasonable professional judgment regarding technical and tactical decisions and consult with the client on the strategy to achieve the client's objectives.

6. A lawyer should exercise reasonable professional judgment regarding the need for expert witnesses in the case, be familiar with and able to work with experts as defined in Standard 3.2 and should immediately and continually assess the need for experts starting at appointment.

7. A lawyer assigned to actively assist a pro se plaintiff should be fully prepared about the matter. The lawyer should be prepared to advise the plaintiff and the court if a full representation role should be transferred to the lawyer at some point during the proceedings.

STANDARD 1.2 EDUCATION TRAINING AND EXPERIENCE OF *HABEAS* COUNSEL

A. A lawyer must be familiar with the statutes, the applicable substantive and procedural law, and its application in the jurisdiction where counsel provides representation. A lawyer has a continuing obligation to stay abreast of changes and developments in the law and with changing best practices for providing quality representation in *habeas* cases.

B. Prior to handling a *habeas* matter, a lawyer must have sufficient experience or training to provide quality representation. Prior to accepting appointment in a *habeas* case, a lawyer must be certified for that case type by OPDC.

Commentary:

1. A lawyer should remain proficient in the law, court rules and practice applicable to *habeas* cases and, regularly monitor the decisions of Oregon Appellate Courts.

2. Lawyers should maintain membership in state and national organizations that focus on educating and training lawyers in *habeas* law. Lawyers should subscribe to professional listservs, if available, consult online resources, and attend continuing legal education programs relating to the practice of *habeas* law. A lawyer practicing *habeas* law should complete an average of at least 10 hours of continuing legal education training in civil procedure, civil rights, prisoner's rights, or related area each year. Lawyers practicing authority

to confine *habeas* cases may supplement this requirement with criminal law CLEs specific to sentencing or extradition.

3. Before undertaking representation in a *habeas* case, a less experienced lawyer should obtain training in the relevant areas of practice and should consult with others in the field, including nonlawyers. Less experienced lawyers should observe or serve as co-counsel with more experienced lawyers prior to accepting lead counsel responsibility for *habeas* cases. More experienced lawyers should mentor less experienced lawyers.

4. A lawyer providing representation in *habeas* cases should be familiar with key agencies and services typically involved in those cases or should know how to familiarize themselves as needed for their cases, such as the Oregon Department of Corrections, the Oregon Youth Authority, local juvenile departments, local community corrections programs, and private medical or treatment facilities and programs.

5. A lawyer should stay informed of the practices of the specific judge before whom a client they are representing is appearing.

6. Lawyers representing youth in *habeas* cases should be educated on and understand the additional trauma that youth in the prison system go through and should be prepared to provide resources to their clients to help them cope with that trauma.

STANDARD 1.3 OBLIGATIONS OF *HABEAS* COUNSEL REGARDING WORKLOAD

Before seeking appointment to act as counsel or accepting appointment, a lawyer has an obligation to ensure that they have sufficient time, resources, knowledge, and experience to offer quality representation to a Plaintiff in a *habeas* matter without hampering their representation of existing clients. Lawyers should be cognizant of ORS 34.362, that petitions claiming deprivation of a constitutional right require "immediate judicial attention", when evaluating their ability to accept representation in a

case. If, after accepting representation, the lawyer is unable to offer quality representation in the case, the lawyer must move to withdraw.

Commentary:

1. A lawyer should have access to sufficient support services and resources to allow for quality representation, including investigation resources (*see* Standard 3.1).

2. A lawyer should evaluate their ability to appear in court with clients when deciding whether to accept an appointment in a case. Lawyers should not overly rely on other lawyers to cover their appearances. A lawyer should appear personally for all critical stages of the case.

3. When possible, lawyers should appear in person or in the same manner as their clients.

STANDARD 2.1 OBLIGATIONS OF *HABEAS* COUNSEL AT APPOINTMENT

Lawyers are frequently appointed to *habeas* cases after the initial filings. As such, a lawyer must be familiar with the laws regarding amending petitions, the timelines for proceeding with a *habeas* case, and the available immediate remedies that can be sought. Lawyers should immediately begin gathering information needed for the Plaintiff's Replication. *See Standard 5.1.*

Commentary:

1. Initial petitions should contain a need for immediate judicial scrutiny and a lack of any other adequate and timely remedy. Lawyers should seek to amend pleadings/file the plaintiff's replication (*see* Standard 5.1).

2. Lawyers should be prepared to assist prospective clients with application for counsel as needed in the furtherance of justice.

3. A lawyer should promptly conduct client conflict checks and notify the appointing body of the need for substitution of counsel if it arises.

4. A lawyer should be familiar with the local practices including case docketing and processing, expected case events, the dates for upcoming court appearances, and the ability to expedite the proceedings under ORS 34.362.

5. As soon as practicable after appointment the lawyer should arrange to have client sign releases to get needed information early in the case. such as medical information in conditions of confinement cases.
    a. For authority for confinement cases the lawyer should seek the following information:
        i. The underlying criminal judgment;
        ii. The Oregon Department of Corrections' (ODOC) sentencing calculations;
        iii. Transcripts from the sentencing hearing.
    b. For extradition cases the lawyer should seek the following information:
        i. The Demand from the demanding state;
        ii. The Governor's Warrant;
        iii. Transcripts from the extradition hearing.

6. A lawyer should be prepared to preserve the client's rights and demand due process. A lawyer should make clear that the plaintiff reserves the following rights in the present matter and any other matter:
    a. Statutory right to request counsel with the court's discretion whether to make appointment;
    b. Right to decision on the motion to appoint counsel;
    c. Right to an expedited evidentiary hearing.

7. Within one day of appointment the lawyer should file motions to disqualify judges as needed. Motions should be filed according to local practices. There are varied practices regarding what constitutes a substantive pleadings and lawyers need to act immediately to

disqualify any judge they believe cannot act fairly and impartially in the case.

STANDARD 2.2 CLIENT CONTACT AND COMMUNICATION

A lawyer should always use clear communications, in developmentally appropriate language, and using an interpreter, as needed. A lawyer must conduct a client interview as soon as practicable after appointment but no longer than seven days after appointment. Thereafter, a lawyer must establish a procedure to maintain regular contact with the client in order to explain the nature of the proceedings, meet the ongoing needs of the client, obtain necessary information from the client, consult with the client about decisions affecting the course of the litigation, conduct a conflict check, and respond to requests from the client for information or assistance concerning the case.

Commentary:

1. A lawyer should provide a clear explanation of the role of both the client and the lawyer and demonstrate appropriate commitment to the client's expressed interests in the outcome of the proceedings. A lawyer should elicit the client's point of view and encourage the client's full participation in the litigation of the case.

2. Client communication should be in a private setting that allows for a confidential conversation. If a client requests in person contact, counsel should make reasonable efforts to accommodate that request. Counsel should meet in person as needed to prepare the client for testimony and evidentiary hearings.

3. At the initial meeting, the lawyer should review the initial petition filed by the client and be prepared to discuss the necessary elements of *habeas*, the procedure the client will be facing in subsequent court appearances, possible remedies if the client prevails, and should inquire if the client has any immediate needs regarding securing evidence or obtaining interim relief.

4. At the initial meeting the lawyer should discuss the need for releases of information (ROI) and assure the client signs and returns them.

5. A lawyer should advise the client of the consequences of prevailing on the *habeas* as well as the consequences of not prevailing.

6. A lawyer should use any contact with the client as an opportunity to gather timely information relevant to preparation of the case. Such information may include, but is not limited to:
    a. The facts surrounding the client's petition or case;
    b. Any possible witnesses who should be located;
    c. Any evidence that should be preserved, specifically including video recordings that might be overwritten;
    d. Where appropriate, evidence of the client's competence.

7. During an initial interview with the client, a lawyer should.
    a. Obtain information concerning the following as applicable to the type of case:
        i. The client's history within the institution including how long they have been incarcerated at a particular institution, family history of health conditions including mental health conditions, client's disciplinary history;
        ii. The client's history of service in the military, if any;
        iii. The client's current and historical physical and mental health concerns;
        iv. Where to locate necessary records;
        v. Prior incarcerations, current place of incarceration, and place of incarceration at the time of filing;
        vi. The client's immediate medical needs, if any;
        vii. The client's expected release date, length of time in custody, eligibility for early release;
        viii. Contact information for clients, their family, or other resources where the client can be contacted in the event they are released from custody.
        ix. The names of individuals, or other sources, that counsel can contact to verify the information provided by the client or who could provide other background information and the client's permission to contact these individuals;
        x. For extradition cases, the lawyer should consider asking their

client for information regarding:

A. Challenges to identity;
B. Challenges to fugitive status;
C. The client's presence or lack thereof in the demanding state at the time of the alleged incident.

b. Provide to the client information and advice including but not limited to:
   i. An explanation of the lawyer-client privilege and instructions not to talk to anyone about the facts of the case without first consulting with the lawyer;
   ii. A warning to keep confidential communication between themselves and the lawyer/lawyer's staff. Everything they say may become part of their case;
   iii. The petition and any potential ramifications of its filing;
   iv. The ability to amend the initial petition;
   v. A general procedural overview of the progression of the case, where possible;
   vi. That communication with people other than the lawyer's team is not privileged and may be monitored;
   vii. That all calls and video visits not using the attorney phone are recorded and not confidential and emails are never confidential;
   viii. That the client should make and keep written records of communication with the institution through filing kites regarding:
      A. Sentence calculations in authority for confinement cases;
      B. In conditions of confinement cases, any condition relevant to the case -such as medical care requested, received, or denied, air quality, access to services, etc.- encountered while incarcerated.

8. Frequency and Manner of Client Contact
   a. Following their initial contact with the client, lawyers should speak with their clients no less than once per month to obtain information and update the clients on the status of their case.
      i. All calls should use the attorney line;
      ii. If feasible, at least once during the pendency of the case the lawyer should meet the client in person;

iii. Lawyers should meet with their client in person as needed throughout the case;

iv. Letters are not a substitute for client contact.

b. Lawyers should continue having contact with their clients as required throughout the case and following the cases' resolution according to Standards 8.2, 9.1, and 9.2.

STANDARD 2.3 WORKING WITH CLIENTS WHO HAVE DIMINISHED CAPACITY

A lawyer must be able to recognize the symptoms of clients with diminished capacity and should follow the Oregon Rules of Professional Conduct, Rule 1.14, when representing those clients. Lawyers should act to preserve all their client's rights and should seek expert assistance as needed. In extreme cases lawyers should consider seeking the appointment of a Guardian Ad Litem or Conservator as needed to fully protect the client's rights. Lawyers representing clients with diminished capacity should continue to seek the lawful objectives of their client and not substitute their judgment for that of their client.

Commentary:

1. A lawyer should assess whether the client's level of functioning limits their ability to communicate effectively with counsel, as well as their ability to have a factual and rational understanding of the proceedings.

2. In deciding whether to request a competency determination, a lawyer should consider, among other things:
   a. Their obligations, under Oregon Rule of Professional Conduct 1.14, to maintain a normal attorney-client relationship, to the extent possible, with a client with diminished capacity; and
   b. The likely consequences of a finding of incompetence and whether there are other ways to resolve the case, such as dismissal upon obtaining services for the client or referral to other agencies.

3. If the lawyer decides to proceed with a competency hearing, they should secure the services of a qualified expert.

4. A lawyer should continue to evaluate a client's fitness throughout the case and should take appropriate action if a client's mental health deteriorates.

STANDARD 3.1 INVESTIGATION

A lawyer has the duty to conduct an independent review of the case, regardless of the client's admissions or statements to the lawyer. Where appropriate, the lawyer should engage in a full investigation, which should be conducted as promptly as possible and should include all information, research, and discovery necessary to assess the strengths and weaknesses of the case, to prepare the case for hearing, and to best advise the client as to the possible outcomes of the case. A lawyer has a duty to be familiar with the process to request funding for an investigator from OPDC if they do not have access to an in-house investigator. The lawyer should not knowingly use illegal means to obtain evidence or instruct others to do so.

Commentary:

1. Retain investigator as soon as possible after appointment in conditions of confinement cases. In authority to confine and extradition cases a lawyer should retain an investigator as soon as possible if the lawyer determines an investigator is needed.

2. A lawyer should obtain copies of the petition, order to show cause, defendant's response, and writ and should examine them to determine the specific issues that the client raised and the elements of each.

3. A lawyer should conduct an in-depth interview with the client as described in Standard 2.2.

4. A lawyer should carefully review all documents received as part of their investigation or discovery and should assess their value to the client. Lawyers should create a system for organizing or cataloging documents and note taking at the beginning of their case to facilitate document review throughout the case.

5. A lawyer should consider whether to interview potential witnesses, whether adverse, neutral, or favorable, and when new evidence is revealed during witness interviews, the lawyer should locate and assess its value to the client. Witness interviews should be conducted by an investigator or in the presence of a third person who will be available, if necessary, to testify as a plaintiff's witness at the evidentiary hearing. When speaking with third parties, the lawyer has a duty to comply with the Oregon Rules of Professional Conduct, including Rule 3.4 (Fairness to Opposing Party and Counsel), 4.1 (Truthfulness in Statements to Others), 4.2 (Communication with Person Represented by Counsel), and 4.3 (Dealing with Unrepresented Persons).

6. A lawyer should obtain all relevant prior records of the client and witnesses, including criminal, juvenile, disciplinary, education, mental health, medical, and drug and alcohol use or treatment, where appropriate.

7. A lawyer should always consider whether to reduce investigation to writing and should instruct their investigators to only do so after consultation with the lawyer.

8. A lawyer may not intentionally destroy evidence in a case and should comply with all statutes governing discovery to the defense.

STANDARD 3.2 EXPERTS

A lawyer should immediately and continually evaluate the need for experts in the case and should obtain any necessary expert for either consultation or testimony or both. A lawyer must be aware of available types of experts that may be needed to properly litigate their case. A lawyer has a duty to be familiar with the process to request funding for experts from OPDC.

Commentary:

1. Experts will be used more often in conditions of confinement cases and practitioners should utilize experts in most of their conditions of

confinement cases. Lawyers in authority for confinement and extradition cases may not need to employ experts, but practitioners in those cases should be aware of the rules for experts.

2. Lawyers should not overly rely on their own knowledge of a given subject and should use experts to offer consultation on viability of claims as early in the case as possible and to offer testimony as needed to prove their case.

3. Lawyers should consider using engagement letters for any expert used on their case which clearly outline the lawyer's expectations of the expert, privilege rules, and an understanding of the expert's duty of confidentiality.

4. A lawyer should be aware of the appeals process in the event that OPDC denies funding the lawyer believes is reasonably required for the case.

5. A lawyer should be aware of how to seek needed experts if the lawyer does not have one readily available. A lawyer should be familiar with the process of obtaining lists of experts in a given field from OPDC.

6. Lawyers should independently evaluate the quality of an expert prior to engagement and should consider any evidence that would be available to the defense to impeach that expert. Lawyers should review this evaluation regularly, even with often used experts.

7. A lawyer should understand the difference between an expert used to advise the Plaintiff's team and an expert used to testify and how to assure that an advisory expert does not unintentionally shift to a testimonial expert requiring disclosure to the defense.

8. A lawyer may choose whether to disclose the identity of experts pre-hearing and should, prior to disclosure, consider whether maintaining the expert's anonymity is advantageous. Lawyers may use anonymous declarations where appropriate to maintain anonymity of experts. *See Stevens v. Czerniak,* 336 OR 392, 403-404 (2004).

9. A lawyer should adequately prepare all experts for testimony, including likely questions on cross-examination.

STANDARD 4.1 DISCOVERY

A lawyer has the duty to pursue formal and informal discovery in a prompt fashion upon appointment and to continue to pursue opportunities for discovery throughout the case. A lawyer must be familiar with all applicable statutes, rules, and case law governing discovery including those concerning the processes for filing motions to compel discovery or to preserve evidence, as well as those making sanctions available when the defense has engaged in discovery violations.

Commentary:

1. Lawyers should assure that the Defendant has been served with the petition or order to show cause prior to filing discovery demands in accordance with Oregon Rules of Civil Procedure (ORCP) 43(B)(1).

2. A lawyer should make a prompt and comprehensive demand for discovery pursuant to applicable rules and constitutional provisions as soon as possible following appointment. The lawyer should continually seek all information to which the client is entitled. Requests should specify the timeframe and type of records sought.

In Conditions of Confinement cases discovery should include, but is not limited to, the following:

a. All ODOC documents regarding the client's medical and mental health care while under the jurisdiction of the ODOC;
b. All ODOC documents regarding discipline and/or complaints while under the jurisdiction of ODOC;
c. All kytes or grievances from the client to the ODOC and responses to client's kytes.
d. Names and addresses of defense witnesses.
e. Prison Rape Elimination Act (PREA) records or records related to PREA requests including Special Investigation Unit (SIU) files.
f. Client's DOC400 file (the plaintiff's electronic prison record from DOC)

3. The lawyer should follow up on all discovery or requests for production regularly to assure that they have all the needed information.

4. Lawyers should follow all scheduling orders issued by the court and should consider actively proposing favorable timelines for discovery.

5. A lawyer should be familiar with and observe the applicable statutes, rules and case law governing the obligation of the plaintiff to provide discovery. A lawyer should file motions for protective orders or otherwise resist discovery where a basis exists to shield information in the possession of the plaintiff from disclosure.

6. A lawyer should be familiar with the applicable remedies for defense failing to provide discovery and should pursue the applicable remedies in their cases. A lawyer should file motions to compel in order to secure defendant's compliance with the discovery rules and motions to exclude if the defense fails to provide discovery according to their obligation.

7. A lawyer should take appropriate actions seeking to preserve evidence where it is at risk of being destroyed or altered.

8. Lawyers should not rely on discovery to provide all information in the case and should not assume that defense lawyers are compliant with discovery obligations unless the lawyer has verified the compliance.

STANDARD 4.2 THEORY OF THE CLAIMS FOR RELIEF

A lawyer should develop and continually reassess a theory of the client's claims for relief that advances the client's goals and encompasses the realities of the client's situation.

Commentary:

1. A lawyer should use the theory of the claims for relief when evaluating strategic choices throughout the course of the representation.

2. A lawyer should be able to concisely explain the theory of the claims for relief to a lay person.

3. A lawyer should allow the theory of the claims for relief to focus the investigation and hearing preparation, seeking out and developing facts and evidence that the theory makes material.

4. A lawyer should expect the claims to change as the case progresses and the plaintiff's team receives new information. Lawyers should remain flexible enough to modify or abandon claims or theories if they no longer serve the client.

STANDARD 5.1 PLAINTIFF'S REPLICATION

To draft the replication a lawyer should review the plaintiff's initial *pro se* filing. Once the lawyer has thoroughly interviewed the plaintiff, had sufficient discovery, and had sufficient time for experts to review the claims in the *pro se* filings, the lawyer should file a Replication that clearly gives notice of the client's claims for relief.

Commentary:

1. Claims for relief may change after the Replication is filed. If the claims change the lawyer should promptly seek to amend the Replication.
2. Lawyers should adhere to all court timelines for filing the Replication and should not miss filing deadlines.
3. Lawyers should be aware of the preferences of the court and the applicable laws for the citation of law in the Replication and should comply with those standards.

STANDARD 5.2 PRE-HEARING MOTIONS

A lawyer should research, prepare, file, and argue appropriate pre-hearing motions whenever there is reason to believe they would benefit their client. A lawyer must be knowledgeable of all motion deadlines that may apply to their case. Lawyers may not miss filing deadlines.

Commentary:

1. A lawyer should respond to Defendant's Motion to Dismiss within the statutory timeframe. In *habeas* cases, motions to dismiss are the equivalent to motions for summary judgment, though the standards are different in some ways. Lawyers should know the rules of summary judgment as well as the rules for responding to motions to dismiss. Lawyers should demonstrate facts in controversy necessary to win a motion to dismiss.

2. The decision to file a particular pre-hearing motion should be made by the lawyer after thorough investigation, discussion with their client, and considering the applicable law in light of the circumstances of the case.

3. Among the issues the lawyer should consider addressing in pre-hearing motions are:
   a. Motions for Summary Judgment;
   b. The removal of a judicial officer from the case through requests for recusal or the filing of an affidavit of prejudice if filed within 24 hours of the judicial officer receiving the case;
   c. The discovery obligations of both the plaintiff and the defense, including:
      i. Motions for protective orders;
      ii. Motions to compel discovery;
      iii. Motions to exclude for violation of discovery rules;
      iv. Motions for access to records of other Adults in Custody which may be requested for 'Attorney Eye's Only' Protective Order to access unredacted records.
   d. Requests for, and challenges to denial of, funding for access to reasonable and necessary resources and experts;
   e. The plaintiff's right to an expedited hearing;
   f. The right to a continuance in order to adequately prepare and present the plaintiff's case or to respond to defense motions;
   g. Motion for extension of time for pleadings
   h. Matters of evidentiary hearing evidence that may be appropriately litigated by means of a pre-hearing motion in limine, including:
      i. The relevance of evidence that is expected to be presented by or objected to by the defense;
      ii. The admissibility of particular witnesses, including experts, lawyers may also litigate this issue during an evidentiary hearing; and

iii. The use of reputation or other character evidence;

4. Before deciding not to file a motion or to withdraw a motion already filed, a lawyer should consult with their client and carefully consider all facts in the case, applicable law, case strategy, and other relevant information.

STANDARD 5.3 OBLIGATION TO RENEW MOTIONS

During an evidentiary hearing or subsequent proceedings, a lawyer should be prepared to raise any issue which is appropriately raised pre-hearing but could not have been so raised because the facts supporting the motion were unknown or not reasonably available. Counsel should also be prepared to renew a pre-hearing motion if new supporting information is disclosed in later proceedings.

Commentary:

None

STANDARD 6.1 EXPLORATION OF SETTLEMENT

A lawyer has the duty to explore with the client the possibility, advisability, and consequences of reaching a negotiated disposition of the client's case. A lawyer has the duty to be familiar with the laws, local practices, and consequences concerning dispositions without an evidentiary hearing. A lawyer cannot accept any negotiated settlement without the client's express authorization.

Commentary:

1. A lawyer should explain to the client the strengths and weaknesses of the defense's case, the timeframes for addressing the client's claims through settlement and through an evidentiary hearing, the benefits and consequences of considering a non-hearing disposition, any investigation which has been or could be conducted, and discuss with the client any options that may be available to the client and the rights the client gives up by pursuing a non-hearing disposition.

2. A lawyer should assist the client in weighing whether there are strategic advantages to be gained by settlement or continuing to an

evidentiary hearing including the impact of settlements on future claims for damages.

3. With the consent of the client, a lawyer should explore with the defense available options to resolve the case without an evidentiary hearing. Throughout negotiation, a lawyer should zealously advocate for the expressed interests of the client, including advocating for some benefit for the client in exchange for settlement.

4. A lawyer should keep the client fully informed of continued negotiations and convey to the client any offers made by the defendant. The lawyer should attempt to ensure that the client has adequate time to consider the settlement. A lawyer should advise clients about their opinion of any settlement offers but may not substitute their judgment for that of their client.

5. A lawyer should continue to take steps necessary to preserve the client's rights and advance the client's case even while engaging in settlement negotiations.

6. Before conducting negotiations, a lawyer should be familiar with:
   a. The types, advantages, disadvantages, enforceability and applicable procedures and requirements of available settlements;
   b. Whether agreements between the client and the defendant would be binding on the court, the parties, or other interested people or organizations; and
   c. The practices and policies of the particular defending authorities and judge that may affect the content and likely results of any negotiated settlement.

7. A lawyer should identify negotiation goals with the following in mind:
   a. Concessions that the client might offer to the defense, including an agreement;
   b. Benefits to the client from making an agreement with the defense.

8. A lawyer has the duty to inform the client of the full content of any tentative negotiated settlement or non-hearing disposition, and to

explain to the client the advantages, disadvantages, and potential consequences of the settlement or disposition.

9. A lawyer should not recommend that the client enter a settlement unless an appropriate investigation and evaluation of the case has taken place, including an analysis of controlling law and the evidence likely to be introduced if the case were to go forward.

STANDARD 6.2 ENTRY OF SETTLEMENT

The decision to enter into a settlement agreement rests solely with the client. A lawyer must not unduly influence the decision to enter a settlement and must ensure that when a client enters a settlement they do so voluntarily. Counsel must ensure the client has an intelligent understanding of the terms, conditions, and consequences of the settlement, including what rights the clients will forfeit.

Commentary:

1. A lawyer has the duty to be familiar with local detention practices as well as statewide detention practices such as time served calculations, work release, alternatives to incarceration, etc.

2. A lawyer has the duty to explain to the client the process that the client will go through to enter a settlement and the role that the client will play in the process. The lawyer should explain to the client that the court may in some cases reject the settlement.

STANDARD 7.1 GENERAL EVIDENTIARY HEARING PREPARATION

A. An evidentiary hearing is a complex event requiring preparation, knowledge of applicable law and procedure, and skill. A plaintiff's lawyer must be prepared on the law and facts and competently plan the litigation of the client's case.

B. A lawyer should develop, in consultation with the client and members of the litigation team, an overall strategy for the conduct of the evidentiary hearing.

C. A lawyer must, in advance of the evidentiary hearing, subpoena necessary witnesses, and develop outlines or plans for opening, closing, and anticipated direct and cross examinations.

D. A lawyer should file a hearing memorandum outlining the plaintiff's case including the expected witness testimony and arguments in their favor. Hearing memorandums need not disclose the testimony of experts unless doing so would be advantageous. If lawyers chose not to disclose their experts pre-hearing, they should be prepared to cite *Stevens vs. Czerniak*, 336 OR 392, 403-404 (2004). Lawyers should file hearing memorandums in a timely manner according to the court's scheduling order.

Commentary:

1. A lawyer should consider how much time the case will require for evidentiary hearing and make scheduling requests accordingly.

2. A lawyer should be aware of the court's available time for hearings and that if a longer than average hearing duration is requested it may delay the hearing.

3. A lawyer should assure that any witnesses provide declarations to the lawyer far enough in advance of the evidentiary hearing.

4. A lawyer should ordinarily have the following materials available for use at the evidentiary hearing:
   a. Copies of all relevant documents filed in the case;
   b. Relevant documents prepared by investigators;
   c. Outline or draft of opening statement;

d. Direct examination plans for all prospective plaintiff's witnesses;
e. Cross-examination plans for all possible defense witnesses;
f. Copies of plaintiff's subpoenas;
g. Prior statements of all witnesses (e.g., transcripts, reports, etc.);
h. Reports from experts;
i. The CVs of any experts expected to testify at the evidentiary hearing;
j. Training and other available records for any professional witnesses who are expected to testify;
k. A list of all exhibits and the witnesses through whom they will be introduced;
l. Originals and copies of all documentary exhibits;
m. Proposed bench instructions with supporting authority;
n. Copies of all relevant statutes and cases;
o. Evidence codes and relevant statutes and/or compilations of evidence rules most likely to be relevant to the case;
p. Outline or draft of closing argument; and
q. Evidentiary hearing memoranda outlining any complex legal issues or factual problems the court may need to decide during the evidentiary hearing.

5. Lawyers should have these documents prepared for use in a digital format and should be prepared to use the share screen function of a virtual hearing as needed for presentation of evidence.

6. A lawyer should be fully informed as to the rules of evidence, the law relating to all stages of the evidentiary hearing process and be familiar with legal and evidentiary issues that can reasonably be anticipated to arise in the evidentiary hearing. The lawyer should analyze potential defense evidence for admissibility problems and develop strategies for challenging evidence. The lawyer should be prepared to address objections to plaintiff's evidence or testimony. The lawyer should consider requesting that non-expert witnesses be excluded from the evidentiary hearing.

7. A lawyer should decide if it is beneficial to secure an advance ruling on issues likely to arise at the evidentiary hearing and, where appropriate, the lawyer should prepare motions and memoranda for such advance rulings in accordance with Standard 5.2.

8. If the ability of the lawyer to provide live witness testimony is challenged the lawyer should file motions to allow live testimony, cross examination, and rebuttal testimony according to the applicable statutes allowing such.

9. A lawyer should consider the advantages and disadvantages of entering pre-hearing stipulations concerning evidence. Lawyers should only enter stipulations to evidence in circumstances where there are clear benefits to the client.

10. Throughout the evidentiary hearing process, a lawyer should endeavor to establish a proper record for appellate review. As part of this effort, a lawyer should request, whenever necessary, that all evidentiary hearing proceedings be recorded.

11. A lawyer should plan with the client the most convenient system for conferring privately throughout the evidentiary hearing. Where necessary, a lawyer should seek a court order to have the client available for conferences. A lawyer should, where necessary, secure the services of a competent interpreter/translator for the client during all evidentiary hearing proceedings.

12. As soon as practicable after appointment, a lawyer should consider whether the assistance of a co-counsel, associate counsel, or second chair would be beneficial to the client and, if so, attempt to obtain approval for the same as soon as possible.

STANDARD 7.2 OPENING STATEMENTS

An opening statement is a lawyer's first opportunity to present their case. The lawyer should be prepared to present a coherent statement of the plaintiff's theory based on evidence likely to be admitted at the evidentiary hearing.

Commentary:

1. A lawyer's objective in making an opening statement should include the following:
   a. Provide an overview of the plaintiff's case, emphasizing the plaintiff's

theme and theory of the case;
b. Identify the weaknesses of the defense's case;
c. Discuss the plaintiff's burden of proof and how it is met;
d. Summarize the testimony of witnesses and the role of each witness in relationship to the entire case;
e. Describe the exhibits which will be introduced and the role of each exhibit in relationship to the entire case;
f. State the ultimate inferences which the lawyer wishes the court to draw; and
g. Humanize the client.

2. A lawyer should listen attentively during the defense's opening statement to note potential promises made by the defense that could be used in summation.

3. A lawyer should give an opening statement unless not doing so would allow more time for the presentation of the case, the issues were well briefed in the evidentiary hearing memorandum, and the judge read the evidentiary hearing memorandum.

STANDARD 7.3 PRESENTING THE PLAINTIFF'S CASE

A lawyer should present evidence at the evidentiary hearing which will advance the theory of the case that best serves the interest of the client, meets the requirements of proof for the claim, satisfies the plaintiff's burden of proof, and is convincing to the trier of fact.

Commentary:

1. A lawyer should be aware of the elements required to prove their claims and of the burden of production.

2. A lawyer should develop, in consultation with the client and plaintiff's team, an overall strategy for the case.

3. In preparing for presentation of a plaintiff's case, a lawyer should:
   a. Develop a plan for direct examination of each potential plaintiff's witness and assure each witness's attendance by subpoena;

b. Determine the implications that the order of witnesses may have on the case; and
c. Consider the best use and order of expert witnesses.

4. A lawyer should offer expert testimony through live presentation of the expert witness and should not rely on written declarations to the exclusion of live testimony.

5. A lawyer should carefully advise their client on whether to offer testimony in their own case. The decision to testify rests with the client. Clients may rely on a declaration in proving their case.

6. A lawyer should prepare all witnesses for direct and possible cross-examination. Where appropriate, a lawyer should also advise witnesses of suitable courtroom dress and demeanor.

7. In developing and presenting the plaintiff's case, a lawyer should consider the potential cross examination topics of the defense lawyer.

8. A lawyer should conduct redirect examination as appropriate.

STANDARD 7.4 CONFRONTING THE RESPONDENT'S CASE

The lawyer should rely on the theme and theory of the case to direct the confrontation of the respondent's case. Whether it is refuting, discrediting, or diminishing the respondent's case, the theme and theory should determine the lawyer's course of the evidentiary hearing.

Commentary:

1. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. A lawyer should be prepared to question witnesses regarding prior statements which they may have made or adopted, documents subject to disclosure, and to develop further

material for impeachment beyond what was found during pre-hearing investigation.

2. As needed, but particularly in conditions of confinement cases, lawyers should review the licensing for medical staff or other witnesses with professional licenses. Lawyers should review previous publications of witnesses and request all disciplinary actions involving the witnesses from their licensing boards. Some licensing information may only be available if specifically requested from the licensing board.

3. Lawyers should fully question Defense witnesses qualifications to act as experts and the truth of the declaration or affidavit prepared on their behalf by defendant's counsel.

4. Lawyers should thoroughly prepare for cross examination of all the defense's witnesses, in preparation for cross examination lawyers should consider:
   a. The need for factual development;
   b. The need to meet the plaintiff's burden;
   c. The need to discredit the defense witnesses.

5. In preparing for cross-examination, a lawyer should:
   a. Consider the need to integrate cross-examination, the theory of the plaintiff, and closing argument into questions for cross examination;
   b. Anticipate those witnesses the defense might call in its case-in-chief or in rebuttal;
   c. Consider whether cross-examination of each individual witness is likely to generate helpful information;
   d. Consider an impeachment plan for any witnesses who may be impeachable including needed exhibits or transcripts;
   e. Be alert to inconsistencies in a witness' testimony;
   f. Be alert to variations in witness testimony;
   g. Review all prior statements of the witnesses and any prior relevant testimony of the prospective witnesses;
   h. If available, review investigation reports of interviews, depositions, and other information developed about the witnesses;
   i. Review relevant statutes, procedural manuals, and regulations for possible use in cross-examining professional witnesses;
   j. Be alert to issues relating to witness credibility, including bias and motive for testifying;

k. Be prepared with all necessary impeachment documents, including having properly certified and authenticated documents in accordance with evidentiary rules;
l. Be mindful of ways that certain topics could "open the door" to information that might otherwise be excluded;
m. Avoid asking questions that do not advance a plaintiff's theory, that allow the witness to provide unhelpful explanations, or questions that the lawyer does not know the answer to.
n. Whenever possible, ask closed ended leading questions.
o. Lawyers should seek out other sources of information on cross examination as needed to fully prepare.

6. A lawyer should be aware of the applicable law concerning admission of expert testimony and raise appropriate objections.

7. Before beginning cross-examination, a lawyer should ascertain whether the discovery rules have been complied with. If not, the lawyer should request, at a minimum, adequate time to review these documents before commencing cross-examination.

STANDARD 7.5 CLOSING ARGUMENTS

A lawyer should be prepared to deliver a closing summation that presents the trier of fact with compelling reasons to render a judgment for the client. Lawyers should also use their closing arguments to assure that the court does not consider irrelevant or immaterial information harmful to the client in determining the case's outcome.

Commentary:

1. A lawyer should be familiar with the substantive limits on both plaintiff's and defense's summation.

2. Lawyers should be prepared to file supplemental briefing or a closing memorandum if it would benefit the client and the court permits.

3. Counsel should provide remedies sought under Standard 8.1 in their closing arguments.

4. A lawyer should prepare the outlines of the closing argument prior to the evidentiary hearing and refine the argument throughout the

evidentiary hearing by reviewing the proceedings to determine what aspects can be used in support of plaintiff's summation and, where appropriate, should consider:

a. Highlighting witness testimony that supports plaintiff's theory of the case.
b. Highlighting weaknesses in the defendant's case;
c. Demonstrating how favorable inferences may be drawn from the evidence; and
d. Incorporating into the argument:
    i. Helpful testimony from direct and cross-examinations;
    ii. The standards of review for *habeas*; and
    iii. Responses to anticipated defense arguments.

5. Whenever the defense lawyer exceeds the scope of permissible argument, the lawyer should object, request a mistrial, or seek cautionary instructions unless tactical considerations suggest otherwise.

STANDARD 8.1 OBLIGATION OF *HABEAS* COUNSEL CONCERNING DISPOSITION

A lawyer must work with the client and plaintiff's team to develop a theory of disposition or disposition plan that is consistent with the client's desired outcome. The lawyer must present this plan in court and zealously advocate on behalf of the client for such an outcome. Lawyers should review the accuracy of any judgments of the court and move the court to correct any errors.

Commentary:

None

STANDARD 8.2 ONGOING COMPLIANCE MONITORING

A lawyer must stay in regular contact with the client following successful disposition of the case in order to monitor defendant's compliance with the judgment. Lawyers must be prepared to resume litigation in the event of breaches. A lawyer's monitoring should continue as long as there is cause.

Commentary:

1. If defendant is non-compliant lawyers should prepare and file a motion for finding of non-compliance or contempt and should request remedies or sanctions including plaintiff's release.

2. Lawyers may request attorney fees when the defendant is non-compliant.

3. Lawyers should be familiar with post release remedies that their clients may have. This is an emerging field of law, *See White v. Reyes*, 335 Or App 124 (2024). *See also Fox v. Peters*, District Court of Oregon Case No 6:16-cv-01602-MC, 2016 WL 4265736. (D. Or. Aug. 11, 2016).

STANDARD 9.1 PRESERVATION OF ISSUES FOR APPELLATE REVIEW

A lawyer should be familiar with the requirements for preserving issues for appellate review.

Commentary:

1. A lawyer should know the requirements for preserving issues for review on appeal and other options to challenge lower court rulings.

2. A lawyer should review with the client those issues that have been preserved for appellate review and the prospects for a successful appeal.

STANDARD 9.2 UNDERTAKING AN APPEAL

A lawyer must be knowledgeable about the various types of appellate relief and their application to the client's case and should impart that information to the client. Throughout the evidentiary hearing proceedings, but especially upon disposition not favorable to the client, a lawyer should discuss with the client the various forms of appellate review and how they might benefit the client. Notices of appeals must be filed within 30 days of the date of the final judgment. Lawyers may not miss appellate deadlines. When requested by the client, a lawyer should

ensure that a notice of appeal is filed, and that the client receives information about obtaining appellate counsel.

Commentary:

1. Lawyers are responsible for knowing the procedure for securing appellate counsel through OPDC. Lawyers may refer a case for appeal prior to the judgment being issued.

2. If the client chooses to pursue an appeal, a lawyer should take appropriate steps to preserve the client's rights, including requesting reconsideration, moving for a new evidentiary hearing, moving for a judgment notwithstanding the verdict, and referring the case to an appellate lawyer through OPDC. Lawyers are responsible for knowing the impact of each of these actions on the timeline for filing the appeal and should work with appellate counsel to assure that no deadlines re missed.

3. When the client pursues an appeal, a lawyer should cooperate in providing information to the appellate lawyer concerning the proceedings in the evidentiary hearing court. A trial lawyer should provide the appellate lawyer with all records from the trial case, the court's final judgment and any other relevant or requested information.

4. If the defendant appeals a judgement granting relief, lawyers should be prepared to cooperate with appellate counsel in litigating defense requests to stay the judgment pending appeal.

Date: **February 18, 2026**

To: **Robert Harris, Chair, OPDC**
Susan Mandiberg, Vice Chair, OPDC
OPDC Commissioners

Cc: **Kenneth Sanchagrin, Executive Director**

From: **Steve Arntt, Trial Support & Development (TS&D) Manager**

Re: **Draft Post-Conviction Relief (PCR) Attorney Performance Standards**

Nature of Presentation: Possible Action Item

Background:

The Oregon Legislature has directed the Oregon Public Defense Commission (OPDC) to establish minimum standards that ensure public defense attorneys provide effective assistance of counsel consistently to all clients, as required by statute and by the Oregon and United States Constitutions. ORS 151.216(1)(j), as amended by Senate Bill 337 (2023). The agency's authority to monitor and enforce attorney performance standards was a central component of the legislative review and restructuring of the public defense system, which included a tri-branch workgroup with participation from several highly respected public defense attorneys.

To fulfill this mandate, OPDC drafted public-defense-specific performance standards across all OPDC-funded practice areas. In 2024, the Trial Support and Development (TS&D) Division invited practitioners interested in participating in the drafting process to contact the agency.

TS&D requested volunteers from the public defense community and maintained communication with interested attorneys. After an application process, TS&D selected workgroup members with significant expertise in the relevant practice areas. This includes the Post Conviction Relief (PCR) Workgroup. The workgroups were intentionally composed to reflect geographic diversity, different compensation models, and a range of professional experiences. All members are highly regarded attorneys with substantial practice experience. The attorneys on the PCR Workgroup are Tara Herivel, Meg Huntington, Edward Neusteter, Ginger Mooney, and Joe

Westover. The group began meeting on November 6, 2024, to work on the qualification standards previously adopted by the Commission and continued through development of the performance standards presented today.

All workgroup meetings were recorded and posted on the agency's website under Standards & Best Practices, where they were available for public review. The workgroup continues to exchange emails and review feedback on the proposed standards. In some instances, the workgroup has adopted suggested changes; in others, the group has determined that the proposed changes should not be incorporated.

OPDC has introduced practice-area standards to this Commission over the past several months. Each practice area follows the same general structure, with formatting and baseline requirements intentionally kept consistent while allowing for practice-specific adjustments. For example, all standards require attorneys to make initial contact with clients after appointment and maintain meaningful communication throughout representation. However, timelines and expectations vary by practice area. The Commission has already reviewed and adopted standards for criminal, dependency, delinquency, civil commitment, and Psychiatric Security Review Board cases. In developing these standards, the workgroups drew from their members' experience, previously adopted OPDC standards, and standards from other states.

Each set of standards includes two components: black-letter expectations and commentary. The black-letter expectations establish the minimum requirements for practice. The commentary provides additional context and guidance, recognizing that not all commentary will apply in every case.

Following the presentation of the draft standards to the Commission on January 21, 2026, TS&D presented them to a Commission Workgroup on February 5, 2026, for review and comment. TS&D also received feedback from PCR providers who were not part of the initial workgroup. As is TS&D's standard practice, all comments were brought back to the workgroups, including the PCR Workgroup, for review and consideration. After revisions, the updated drafts are now presented to the Commission. Changes from the January drafts are highlighted in yellow and reflect modifications adopted by the PCR Workgroup in response to feedback from staff, the community, and the Commission.

Purpose:

OPDC intends to use the proposed performance standards to improve attorney practice throughout the state, assess the validity of complaints made against providers, and ensure clients are receiving effective representation.

Agency Recommendation:

The Agency recommends the Commission approve the Post-Conviction Relief standards.

Revisions:

Changes are tracked in highlighting in the briefing packet.

Fiscal Impact:

No immediate impacts. Full implementation of these standards will likely require investments in OPDC infrastructure and staff, to implement training programs and other supports contemplated by these standards. Such investments were not part of the agency's requested budget for 2025-27, and the agency will address in future legislative sessions.

Agency Proposed Motion:

The agency proposes the commission approve the Post-Conviction Relief standards as presented.

Post-Conviction Relief Attorney Performance Standards with Commentary

January 2026

Table of Contents

INTRODUCTION

Oregon Revised Statute 151.216(1)(j) mandates that the Oregon Public Defense Commission (OPDC) "[d]evelop, adopt and oversee the implementation, enforcement and modification of policies, procedures, minimum standards, and guidelines to ensure that public defense providers are providing effective assistance of counsel consistently to all eligible persons in this state as required by statute and the Oregon and United States Constitutions. The policies, procedures, standards, and guidelines described in this paragraph apply to employees of the commission and to any person or entity that contracts with the commission to provide public defense services in this state."

The following standards were developed by OPDC staff with input from a post-conviction relief (PCR) provider workgroup. Per OPDC policy, these standards will be reviewed and revised one, two, and five years from adoption. OPDC welcomes ongoing provider input regarding the content and efficacy of these standards.

This iteration of the Standards was drawn heavily from the existing Oregon State Bar Post-conviction Relief Performance Standards. OPDC has adopted those standards to make them specific to public defense PCR casework and has added language that reflects evolving standards of practice. Each standard sets a baseline for practice of appointed post-conviction work and is followed by best practices that supplement the baseline standards. Best practices are aspirational. OPDC recognizes that in any given case, some standards might be inapplicable or even mutually exclusive; OPDC acknowledges that to practice law, exceptions to these baseline rules must apply in certain situations.

OPDC is grateful to the prior work of the Oregon State Bar and to the Oregon Public Defense Commission PCR Standards Workgroup for the extensive work OPDC drew upon in the development process.

Standard 1.1 – General Expectations of Post-Conviction Counsel

Counsel should not undertake representation in a post-conviction relief proceeding unless counsel fully understands the requirements of a collateral challenge to a criminal conviction, and how that differs from a record-based direct appeal of a criminal conviction.

Commentary:

1. Counsel should treat a post-conviction relief proceeding as both the first and last meaningful opportunity to present evidence not contained in the trial record on a variety of constitutional violations that may have taken place in the underlying criminal case, including but not limited to: claims involving the competence of the defendant; police and prosecutorial misconduct; judicial misconduct; faulty eyewitness evidence; unreliable informant testimony; coerced confessions; flawed forensic methods; juror misconduct; juror qualifications; ineffective and inadequate assistance of trial and appellate counsel; and whether a plea of guilty is entered knowingly, intelligently, and voluntarily.

2. Counsel should understand that while a client's innocence may or may not itself constitute a cognizable claim for state post-conviction relief, its relevance to the case is important. *See Perkins v. Fhuere*, 374 Or 575 (2025). Claims of innocence are typically intertwined with other recognized bases for post-conviction relief. For example, a meritorious "*Brady* claim" is typically based on suppression of evidence pointing to innocence. Similarly, a claim of inadequate or ineffective assistance of counsel may be predicated on trial counsel's failure to investigate sources of important evidence that support the client's assertion of innocence. Accordingly, post-conviction counsel should be prepared to carefully evaluate the need to investigate evidence of innocence that can support a claim for post-conviction relief.

3. Counsel should not have represented the petitioner during the underlying criminal case or direct appeal except in extraordinary circumstances, since the post-conviction proceeding may be the only opportunity to raise claims of ineffective or inadequate assistance of trial and appellate counsel. Trial or appellate counsel who seek to represent their clients in post-conviction relief proceedings should do so with caution and must abide by the conflict of interest provisions of Oregon Rule of Professional Conduct 1.7 and consult OSB Formal Ethics Op. No. 2005-160.

4. A lawyer should have adequate time and resources to provide competent representation to every client.
   a. A lawyer should not accept caseloads that by reason of size and/or complexity interfere with the provision of competent representation.
   b. A lawyer should have access to support services and other resources necessary to provide competent representation.

5. Counsel should understand the difference between seeking relief pursuant to a post-conviction relief petition and a petition for DNA testing pursuant to ORS 138.690.

6. Counsel should ensure at the outset of appointment that post-conviction is ripe and that the matter is not still on appeal. If a *pro se* petition was filed while the matter was still on direct appeal, counsel should take appropriate measures to ensure that a timely post-conviction petition is properly filed.

7. Counsel should understand, prior to undertaking representation of any client in post-conviction relief proceedings, that ordinarily any meritorious claim not contained in a first original or amended petition will likely be waived or otherwise unavailable as a ground for relief in a second petition for post-conviction relief, or in subsequent federal habeas corpus litigation. Any lack of diligence, mistake, or other omissions by counsel will ordinarily be borne by the client. Those claims and other pleadings to be signed by counsel must comply with Oregon Rules of Civil Procedure (ORCP) 17 C, requiring a factual basis and support in existing law or in a non-frivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

8. Counsel is bound by the client's definition of their best interests and should not substitute counsel's judgment for that of the client regarding the objectives of the representation, in accordance with Oregon Rules of Professional Conduct 1.2 and 1.14.

Standard 1.2 – Client Communication

A lawyer should meet with their client within 30 days of appointment. This meeting need not be in person. A notice of appointment and releases of information should be sent to the client within 14 days of appointment. Contact must be maintained throughout the representation, including

before and after filing of the amended petition and to ensure the client can file a motion pursuant to *Church v. Gladden*, if desired.

Commentary:

1. If a client requests in person contact, counsel should make reasonable efforts to accommodate that request. In person meetings should take place as needed to prepare the client for any testimony or trial preparation.

2. The lawyer should keep the client informed about the progress of investigation, the development of post-conviction claims, litigation timelines and deadlines, and consult with the client concerning amendments and challenges to the pleadings, discovery, pretrial hearings, and other preparations for trial. This should include providing a clear explanation of the claims included in the amended petition. If the lawyer decides, based on ORCP 17 C or other strategic reasons, not to include a claim that client has requested be included, the lawyer should provide a full explanation to the client.

3. The lawyer should advise the client concerning the consequences of prevailing on a petition for post-conviction relief, including the likelihood—in cases where petitioner has previously entered a plea of guilty pursuant to a plea agreement with the state—that the petitioner would face conviction on additional charges and/or a lengthier period of incarceration upon a new trial. Lawyers should make sure their client is aware of the remedies and claims available in post-conviction proceedings.

4. Counsel should mail client a copy of the trial memorandum and reply memorandum no later than the date they are filed.

5. Counsel should contact client to discuss the trial memorandum prior to trial and, if available, review with the client defendant's trial memorandum and any reply to the trial memorandum.

6. Counsel should ensure client is aware of the trial date and the client's right to attend the trial.

Standard 2 – Obligations of Defense Counsel regarding *Church v. Gladden* Motions

A lawyer must send client a copy of the filed amended petitions and include with it information on how to raise issues under *Church v. Gladden*, 244 Or 308 (1966). The lawyer must be aware of Uniform Trial Court Rules and Supplementary Local Rules regarding the time limitations on filing *Church* motions to properly advise their client.

Commentary:

1. The lawyer should advise the client in writing how to raise a *Church* motion, the format in which the motion should be filed, relevant timelines and deadlines, and the remedies sought.

2. Counsel must not reveal confidences or take an adversarial position in response to *Church* motions. *See Lopez v. Nooth*, 287 Or App 731 (2017).

Standard 3 – Independent Investigation

A lawyer who undertakes to represent a petitioner in a post-conviction proceeding should independently review and investigate the trial proceedings. The review should begin with review of the complete file of trial and appellate counsel and the prosecution file. The lawyer should read the official trial record, obtain all discovery material from the trial lawyer, and meet with the client to explore all aspects of representation and the trial proceedings, including whether an appropriate investigation was conducted pursuant to the OPDC Criminal Performance Standard 3.1.

Commentary:

1. Lawyers should be familiar with the ORCP and should use subpoena power, depositions, requests for production of documents, and requests for admission.

2. Lawyers should be familiar with the Uniform Trial Court Rules for post-conviction, including but not limited to witness disclosure timelines.

3. Lawyers should be familiar with the victim's rights provisions of the Post-Conviction Statute.
   a. Lawyers or their investigators cannot approach a victim without providing a clear explanation, preferably in writing, regarding victim's rights;

b. Lawyers must obtain court approval to subpoena victims. *See* ORS 138.627.

3. Lawyers should obtain the services of qualified investigators and mitigators.

4. In most cases, lawyers should obtain:

   a. The trial attorney file, regardless of the age of the file;
   b. The district attorney file;
   c. Any law enforcement files;
   d. CARES reports and other child reporting agency files;
   e. The appellate attorney file (if applicable);
   f. The trial court file and transcript;
   g. The appellate court file and transcripts (if applicable);
   h. Client medical records, if applicable;
   i. Any Oregon Department of Corrections file, if applicable;
   j. Records from any relevant jail facility in which client was held, including medical files and visitation logs;
   k. Any Oregon Public Defense Commission file; and
   l. Files related to a co-defendant or government informant (including district attorney and United States Attorney files).

5. The lawyer should speak with trial counsel and appellate counsel and their investigators regarding issues in the trial that may not be apparent from the face of the record.

6. The lawyer should be familiar with protective orders regarding the use of any records obtained in post-conviction in future prosecutions as well as protective orders related to any necessary child abuse, mental health, or other statutorily required protective orders.

7. Counsel should seek expert witnesses where necessary for the investigation, preparation, and presentation of the case, and be familiar with the process to obtain expert funding from OPDC.

Standard 4 – Asserting Legal Claims

Counsel should be familiar with all legal claims potentially available in post-conviction relief proceedings and assert claims permitted by the facts and circumstances of a petitioner's case to protect the client's rights against later contentions that the claims have been waived, defaulted, not exhausted, or otherwise forfeited.

Commentary:

1. A properly pleaded amended petition must generally be filed within 120 days from the date of appointment unless the Court has authorized additional time.

    a. The lawyer should be aware of any timelines for filing and amending petitions set forth in the Uniform Trial Court Rules, Supplemental Local Rules, and the ORCP.
    b. The amended petition should encompass all claims properly raised from the discovery obtained at the time of filing unless counsel has a specific strategic reason for not including a claim, has explained this to the client, and has explained to the client how to file a *Church* motion if the client disagrees with the strategic decision.
    c. The lawyer should review the original *pro se* petition to ensure that the client's interests are preserved.

2. A lawyer should plead alternative theories to claims so that all avenues of relief are possible (e.g., ineffective assistance of counsel regarding a specific action can, at times, also be pleaded as failing to properly execute the trial strategy).

3. A lawyer should plead any evidence necessary to support the legal claim made. *See Horn v. Hill*, 180 Or App 139, 138-49 (2002) ("Where evidence omitted from a criminal trial is not produced in a post-conviction proceeding . . . its omission cannot be prejudicial").

4. A lawyer should plead any relevant exceptions to any procedural bars that might be raised by the defendant, including successiveness, timeliness, or that claims could have been raised on appeal. *See North v. Cupp*, 254 Or 451 (1969) (setting forth exceptions to the trial preservation rule).

5. A lawyer should request to amend the formal petition when the need for new claims or amended claims arises—even if this is during trial—and should make every effort to amend rather than concede error in omitting

the claims in the formal petition. *See Ogle v. Nooth* 365 Or 771 (2019); ORCP 23 B.

6. Petitions should request whatever remedies are proper and just. *See* ORS 138.520.

7. A lawyer should not argue the law in the petition. *See* ORS 138.580.

Standard 5.1 – Litigating Claims

Before and during the trial on the petition for post-conviction relief, a lawyer should develop a factual basis through the presentation of evidence to establish the claims asserted in the petition. A lawyer must be sufficiently familiar with the procedural rules of post-conviction to properly file witness disclosures, exhibits, objections, and trial memoranda.

Commentary:

1. Lawyers must disclose witnesses pursuant to ORS 138.615 and be aware of and comply with the specific disclosure requirements regarding expert witnesses. Witness disclosures must be made no later than 60 days before trial unless otherwise ordered by the court. UTCR 24.060.

2. Lawyers should be familiar with the case law regarding the use of experts in post-conviction. Experts testifying regarding ineffective assistance of counsel must have been experts at the time of the original trial, available at the time of the original trial, and must indicate they would have testified substantially similarly at the time of the original trial as they would in the post-conviction proceedings. *See Hale v. Belleque*, 255 Or App 653, 681, 298 P3d 596 (2013) (To satisfy a petitioner's burden of proof on a claim that trial counsel was constitutionally inadequate in failing to call a witness to testify, the petitioner must show that (1) the witness would have been available to testify, (2) would have appeared at the time of trial, and (3) would have provided testimony likely to have changed the result of the trial.)

3. If a claim involves the failure to call a witness (expert or lay), lawyers must present evidence, either through declarations or live testimony, of how that witness would have testified at the time of trial and that they were available to testify at the time of trial. *See New v. Armenakis*, 156 Or App

24, 29 (1998) ("Without an affidavit from Gable, there is no evidence about what Gable would have testified to, had he been called as a witness.).

4. Lawyers should file exhibits in compliance with UTCR 24.040.

5. A lawyer must file a comprehensive trial memorandum. Trial memoranda should include but are not limited to:

    a. Assertions regarding the facts and arguments regarding the law as to each claim set forth in the petition. Claims not supported in the trial memorandum will likely be dismissed as abandoned.
    b. Any additional elements set forth in any scheduling order from the court.

6. A lawyer should file a response to the defendant's trial memorandum unless counsel has a specific strategic reasons for not filing a response. This memorandum should include but is not a limited to:

    a. A rebuttal of the defendant's arguments;
    b. A response to the defendant's objections;
    c. Objections to defendant's exhibits, unless otherwise specified by the trial court.

Standard 5.2 – Client's Presence at Trial

Counsel may not waive client's right to attend trial unless waiver is authorized under ORS 138.620 and approved by the client.

Commentary:

Counsel should object to any attempt to limit client to solely telephonic appearance unless client directs otherwise. Counsel should be aware of ORS 138.622 and ensure availability of a method of confidential communication during hearing. *See also* ORCP 58 E.

Standard 5.3 – Obligations During Trial

Counsel must subpoena all necessary witnesses—including those necessary to cure hearsay objections—to trial and be prepared to present and argue all active claims. Counsel should offer all necessary exhibits into the record.

Commentary:

1. Counsel should be prepared to argue new claims or alternative claims If testimony at trial supports them. Counsel should note such claims for the court and request to amend petition to reflect any changes.

2. Counsel should be prepared to argue against defendant's possible responses to any petitioner's trial memorandum.

3. At trial, Counsel should re-assert all relief requested.

4. A lawyer should be aware of the elements required to prove their claims and of the burden of production.

5. In preparing for cross-examination, a lawyer should be familiar with the applicable law and procedures concerning cross-examination and impeachment of witnesses. A lawyer should be prepared to question witnesses regarding prior statements which they may have made or adopted, documents subject to disclosure, and to develop further material for impeachment beyond what was found during pre-trial investigation.

6. Counsel should be prepared to file supplemental briefing or a closing memorandum if it would benefit the client and the court permits.

7. Counsel should be familiar with and utilize, where necessary, ORCP 39 I (Perpetuation of testimony after commencement of action), ORCP 38 B(3), and UTCR 5.130 for use in locations that have not adopted the Uniform Interstate Depositions and Discovery Act.

Standard 6 – Obligations of Counsel After Trial

Counsel must ensure that the court has addressed each claim for relief in its judgment. Immediately following the issuance of a judgment, counsel should send a copy of the judgment to the client. If there are adverse rulings, counsel should notify appellate counsel and ensure that a notice of appeal is filed if the client would like to appeal. Following a favorable judgment, counsel must file a certified copy of judgment with the trial court for the underlying conviction and serve a certified copy on the district attorney of the county of the original conviction and sentence. *See* ORS 138.640.

Commentary:

1. After trial, if the court has not issued a judgment within 60 days the attorney should call the court's attention to the matter, in writing pursuant to UTCR 2.030.

2. If the court provides an opportunity for objections to a judgment prior to publication, counsel should object where appropriate.

3. Following the issuance of a judgment, counsel should send the client a closing letter explaining, among other things, file retention, appellate rights, and any rights to federal collateral review.

4. Lawyers are responsible for knowing the procedure for securing appellate counsel through OPDC.

5. Following a favorable judgment (in full or in part), counsel should file a supplemental judgment seeking the return of any filing fees and costs assessed and for prevailing party fees. ORS 138.550(1); ORS 20.190(1)(b)(B).

Date: **February 18, 2026**

To: **Robert Harris, Chair of OPDC**
OPDC Commissioners

Cc: **Kenneth Sanchagrin, Executive Director**

From: **Susan Mandiberg, Chair, Governance Subcommittee**

Re: **Amended Bylaws for Discussion and Possible Adoption**

Nature of Presentation: Action Item

Background:

This Memo explains the changes to the OPDC Bylaws that are presented for discussion and possible adoption after work by the Governance Subcommittee. The amended bylaws aim to:

- reflect and incorporate developments over OPDC's two years of operation
- clarify protocols and operations to increase transparency
- clarify role distinctions between the volunteer commissioners and the state employees (as all of us are labeled "OPDC" by the governing statutes)

In aid of the last of these goals, the amended bylaws adopt specific definitions of some key terms, and this Memo uses the new definitions.

The OPDC Bylaws govern the way the Board of Commissioners carries out our oversight responsibilities and our interactions with the agency and the public. In addition to providing guidance to commissioners, the Bylaws help guide the expectations of the public, the agency staff, the Executive Director, and the other government entities with which the Board interacts.

OPDC began operation in January 2024, taking over from the former Public Defense Services Commission. It approved interim bylaws from the defunct Public Defense Services Commission (PDSC) on January 5 of that year. The Governance Subcommittee drafted new bylaws, which the Board adopted in April 2024.

The OPDC has now been in operation for two years and has been part of the Executive Branch of state government for one year. The Governance Committee has been tasked with proposing new bylaws that draw on the experiences of the last two years and that reflect the current status of the Commission.

This Memo summarizes the most important proposed changes to the 2024 Bylaws.

New organization

The proposal consolidates material now scattered throughout various parts of the current bylaws by organizing material into 7 sections:

I. Agency Name, Authority, Mission, and Basic Definitions
II. OPDC Commission
III. OPDC Executive Director and Staff
IV. Meetings
V. Other Commission-Related Activities
VI. Communications With Government Entities and the Public
VII. Amending the Bylaws

Section I: Agency Name, Authority, Mission, and Basic Definitions

- *Agency Name, Authority, Mission*. These sections organize material from the 2024 bylaws into separate paragraphs to increase clarity.

- *Basic Definitions*. The proposed Bylaws add several new definitions to prevent ambiguity: action item, agency, board, commission, commissioner, executive director, oversight, quorum, staff, and writing.

Section II: OPDC Commission

- The proposed bylaws organize material from the 2024 bylaws into separate paragraphs to increase clarity.

- Section II.B.2.f. reflects a statutory change.

- Section II.C.1. clarifies the selection and role of the Chair and Vice Chair.

- Section D. (Ethics & Conflicts of Interest) incorporates the 2024 bylaw language. The language in section D.3 allows a commissioner with a potential conflict to be transparent and to exercise the commissioner's own discretion whether to abstain from a vote.

Section III: OPDC Executive Director and Staff

- Section A.5 is new. It addresses the internal audit function, not the role of the Audit Committee.

(The Agency's Chief Audit Executive is on the Audit Committee, which provides a connection between that committee and the internal audit function.)

- Section B incorporates into one place items found in various sections throughout the 2024 Bylaws.

Section IV: Meetings

This section is entirely new and is based on (1) the Board's evolving approach to organizing meetings and (2) the desire to retain flexibility to alter the meeting structure as needed going forward.

- Section A: procedures applicable to all Board meetings.
- Section B: modifications applicable to regular meetings of the entire Board.
- Section C: modifications applicable to work sessions. (The 2024 Bylaws do not address work sessions.)
- Section D: modifications applicable to emergency meetings.
- Section E: modifications applicable to subcommittees. (The 2024 Bylaws address subcommittees, but do not clearly make them subject to normal Board procedures.)

The 2024 Bylaws also have a section on "Informational Meetings." In the proposed bylaws, the variety of authorized meetings combined with the ability of the Chair to include new meeting dates makes a special provision for information gathering unnecessary.

Section V: Other Board-Related Activities

This section addresses the Board's need to engage in a variety of activities that are not Board meetings.

- Section A: On-site inspections. OPDC "meetings" are subject to state public meeting laws. ORS 192.630. Because the "on-site inspection of any project or program" is not a "meeting" (ORS 192.610(7)(b), the Bylaws should address inspections separately.
- Section B: Audit Committee. The Audit Committee consists almost entirely of non-Board members: volunteer outside auditors, the agency's Chief Audit Executive, and one voting commissioner. Audit Committee meetings do not need to be subject to the formal Board procedures, but the Board has a responsibility to ensure that it operates lawfully.

The Audit Committee provision in the 2024 Bylaws is short, and the proposal adds some needed clarification:

  - Section B.2 clarifies that the Audit Committee is not a formal Board subcommittee.
  - Section B.3. The Oregon Department of Justice currently advises that our Audit Committee is subject to public meeting laws, although that requirement is unwelcome to many members of the committee. Discussions are continuing. While this section may need amending in the future, the language reflects the current situation.

- Section C: Advisory and Workgroups. This section incorporates the 2024 provisions.

Section VI. Communications with Government Entities and the Public

- Sections A, B., and C. incorporate material found in various sections of the 2024 Bylaws. Section B.3. clarifies the role of individual commissioners with regards to communication of Commission policies and perspectives.
- Section D, Complaint Procedure, incorporates the material in Art. 6 of the 2024 Bylaws. The term "complaint" is substituted for the term "grievance" so as not to create confusion with ORS 192.705 and OAR 199-050-0070 (regarding formal grievances about a governing body).

Fiscal Impact:
None.

Recommendation:
The Governance Subcommittee recommends that the Board discuss the amended Bylaws and adopt them either as written or with revisions verbally approved by a quorum of voting commissioners. If approved, the new Bylaws will take effect immediately and will be added to the OPDC external website.

Proposed Motion:
The Governance Subcommittee proposes a motion to approve the amended Bylaws, as presented or with revisions verbally approved by a quorum of voting commissioners.

OREGON PUBLIC DEFENSE COMMISSION BYLAWS

I. AGENCY NAME, AUTHORITY, MISSION, AND BASIC DEFINITIONS

A. The name of this agency is the Oregon Public Defense Commission ("OPDC").

B. The OPDC was established pursuant to ORS 151.213, as amended by SB 337 (2023), effective January 1, 2024 and by 2025 Oregon Laws Ch. 569 (H.B. 2614).

C. The OPDC is governed by a 13-member Board, which includes nine voting commissioners and four non-voting commissioners. The OPDC is housed in the executive branch of government and is subject to the administrative authority and supervision of the Governor.

D. Mission.

1. The OPDC's mission is to establish and maintain a public defense system that ensures the provision of public defense services consistent with the requirements of the Oregon and United States Constitutions and Oregon statutes.

2. To achieve this mission, the commissioners, the Executive Director, and the staff shall ensure furtherance of the goals articulated in ORS 151.216 by adopting policies, procedures, standards, and guidelines regarding those mandates.

3. The Commission adopts the principles outlined in the Oregon DEI Action Plan in all areas under its jurisdiction and strives to ensure systems that recognize diversity and afford justice equitably and inclusively to all persons.

4. To further achieve OPDC's mission, commissioners, Executive Director, and staff shall consider the perspectives of public defense providers, persons with lived experience in, or from communities impacted by the programs in areas under OPDC's jurisdiction, and other members of the public with an interest in the provision of services provided by those programs.

E. The Following Definitions Govern Usage in These Bylaws:

1. "Action item" means an item on the agenda regarding whether the Commission should formally undertake a course of conduct or adopt a policy.

2. "Agency" means the publicly employed staff working for the Commission.

3. "Board" means the appointed volunteer members of the Commission.

4. "Commission" refers to the Oregon Public Defense Commission consisting of the volunteer Board and the State agency.

5. "Commissioners" means voting and non-voting Board members acting in their oversight capacity.

6. "Executive Director" means the person selected under ORS 151.213 to carry out the duties set forth in ORS 151.219 and in these Bylaws.

7. "Oversight" means exercising governance, supervision, direction, and guidance to the Oregon Public Defense Commission pursuant to ORS Chapter 151; it does not include interactions between the Executive Director and staff or between Executive Director, staff, and non-voting Members in their individual, contract, or legislative capacities.

8. "Quorum" is a majority of voting members of the Board or of any subcommittee of the Board.

9. "Staff" and "OPDC Staff" mean OPDC employees other than the Executive Director.

10. "Writing" includes letters, memoranda, emails, and text messages but does not include audio messages.

II: OPDC BOARD OF COMMISSIONERS.

A. Membership

1. Membership is defined by ORS 151.213.

2. Terms of office are four years, except for the initial terms created by SB 337 (2023) to stagger appointments. Terms begin on January 1 in the first year and expire on December 31 in the final year. Positions that become vacant during a term shall be filled pursuant to ORS 151.213(3).

3. Appointments are made pursuant to ORS 151.213.

4. A commissioner may be removed pursuant to ORS 151.213(3) and ORS 182.010.

5. A commissioner who seeks to resign shall provide written notice to the appointing authority, the Chair of the OPDC, and the Executive Director.

6. New appointees shall attend an onboarding session as determined by the Executive Director. Commissioners shall timely complete all trainings as required by Oregon law.

B. Roles and Responsibilities of Commissioners

1. Commissioners are responsible for governing and providing oversight to the OPDC, pursuant to the requirement of ORS 151.213 and 151.216.

2. Commissioners Shall:

a. Review and provide input prior to an approval vote, the policies, procedures, standards, and guidelines required by ORS 151.216.

b. Review the agency request budget of the Commission and provide input before any approval vote;

c. Review the Commission's annual report prior to the vote by voting commissioners;

d. Meet as needed to carry out their responsibilities.

e. Inform the Executive Director and the Chair as soon as practicable of an inability to attend a scheduled, special, or emergency meeting. The Chair shall maintain a record of absences and any stated reasons for such absences and may communicate the information to the appointing authority.

f. Consult with the Governor regarding appointment of an Executive Director as set out in ORS 151.213(9).

3. Voting Commissioners Shall:

a. Approve by majority vote the policies, procedures, standards, and guidelines required by ORS 151.216 before they take effect;

b. Approve by majority vote the agency request budget of the Commission before submission to the Oregon Department of Administrative Services.

c. Set biennial performance expectations for the Executive Director and require a performance review at least as required by the Department of Administrative Services.

d. Approve by majority vote the Commission's annual report prior to its submission pursuant to ORS 151.219.

4. Commissioners shall not make any decision regarding the handling of any individual case; have access to any case file or interfere with the Executive Director or OPDC staff in carrying out professional duties involving the legal representation of public defense clients.

C. Chair and Vice Chair

1. Voting commissioners shall elect, by majority vote every two years, a Chair and Vice Chair of the Board, with such functions as the Board may determine. A commissioner is eligible for reelection as Chair or Vice Chair.

2. The Chair shall lead and manage Board meetings, shall coordinate the planning of Board meeting agendas with the Executive Director, and shall join with the Executive Director to present the OPDC's annual budget to the Legislative Assembly.

3. The Vice Chair shall assume the Chair's duties in the Chair's absence.

D. Ethics and Conflicts of Interest.

1. Commissioners shall comply with the government ethics provisions of ORS Chapter 244.

2. A commissioner has an actual financial conflict of interest if the proposed action would provide a financial benefit or detriment to the commissioner, the commissioner's relative, or any business with which the commissioner or their relative is associated.

   a. When met with an actual conflict of interest, the commissioner must announce publicly the nature of the conflict and refrain from discussion on the issue.

   b. The commissioner may not vote on the issue from which the conflict arises unless the commissioner's vote is necessary.

3. A commissioner has a potential conflict of interest if the proposed action could provide a financial benefit or detriment to the commissioner the commissioner s relative, or any business with which the commissioner or their relative is associated.

   a. When met with a potential conflict of interest, the commissioner must announce publicly the nature of the conflict but may continue to discuss and vote on the issue from which the potential conflict arises.

E. Compensation and Expenses

1. Voting and non-voting commissioners are entitled to compensation and expenses as provided in ORS 151.213(8) and ORS 292.495.

2. Commissioners entitled to compensation shall submit the information required by standards and procedures adopted by the Executive Director.

3. OPDC commissioners, officers, staff, and agents shall be indemnified in the manner provided by ORS 30.285.

III: OPDC EXECUTIVE DIRECTOR AND STAFF

A. Executive Director.

1. The Executive Director is the chief executive officer for the Commission and the primary liaison between the commissioners (voting and non-voting) and OPDC staff. The Executive Director shall ensure the agency carries out the policy directives established by the Commission.

2. The Executive Director is appointed and retained as provided by ORS 151.213.

3. The Executive Director shall carry out the duties set out in ORS 151.219.

4. The Executive Director shall prepare an annual report covering the topics listed in Art. 3(1)(a)(i) and (ii) and submit it by December 31 of the calendar year as required by ORS 151.219 .

B. The Executive Director shall ensure that OPDC staff present an internal audit report to the Board at least yearly.

C. OPDC Staff.

1. OPDC staff is responsible for agency administration and operations as set out in ORS 151.216.

2. The Board has no direct responsibility for OPDC staff, which performs its actions through the authority of its Executive Director, as defined by ORS 151.219.

IV: MEETINGS

A. Meetings Generally

1. The provisions in this section apply to all meetings unless specifically provided otherwise.

2. Definition & Types of Meetings

   a. The bylaws adopt the definition of "meeting" found in ORS 192.610.

   b. The Board may hold regular meetings, work sessions, emergency meetings, executive sessions, and subcommittee meetings.

3. All meetings shall comply with public meeting laws pursuant to ORS Chapter 192 and Oregon Administrative Rules Chapter199 Division 50.

4. Scheduling and Notice

   a. At or before the first meeting of each calendar year, commissioners shall establish a schedule of meetings.

   b. The Chair of the Board, in consultation with the Executive Director and in accordance with these bylaws, may adjust meeting schedules as necessary throughout the year, including the addition of new meeting dates.

   c. Meeting notices and agendas shall be provided to commissioners and posted on the OPDC website as early as practicable.

5. Agendas

   a. Agendas shall be prepared by the Executive Director in consultation with the Chair or Vice Chair except as set out in subsections below.

   b. Agendas shall be determined with a focus on furthering the Commission's mission as set out in Art. I of these Bylaws.

   c. Any voting or non-voting commissioner may request the Chair to include an item on the agenda of an upcoming meeting no later than 10 business days prior to the meeting. If the item does not appear on the agenda, a majority of voting commissioners may place the item on the agenda for the subsequent meeting. Commissioners may request items for future agendas.

   d. Items requiring a vote shall be identified as action items and include discussion time.

e. Agendas shall be published to commissioners and the public one week prior to each meeting unless good cause is jointly determined by the Executive Director and Chair (or Vice Chair).

f. Action items should ordinarily be posted one week in advance but can be posted later if in the Chair's sound discretion the situation requires this.

6. Materials

a. OPDC staff shall publish materials to commissioners and the public one-week in advance of the meeting in which they are to be considered unless good cause is shown, as jointly determined by the Executive Director and the Chair.

b. OPDC staff shall prepare meeting materials in plain English. Technical language shall be defined and clarified for ease of access to non-technical readers. All acronyms shall be explained in full the first time they are used in a document.

c. The final meeting agenda and all meeting materials, minutes, transcripts, and public comment shall be stored by OPDC and placed on the OPDC website for public access as soon as practicable. A link to the meeting video shall be published on the website within five days after the meeting.

7. Conduct of Meetings

a. The Board may conduct meetings in-person, virtually, or through a combination of in-person and virtual attendance. All meetings shall afford the public the opportunity to access and attend the meeting virtually.

b. The Chair shall conduct regular meetings, work sessions, emergency meetings, and executive sessions; the subcommittee chair shall conduct subcommittee meetings.

c. The Board will not use Robert's Rules of Order in conducting a meeting but will follow the procedural rules set out in these bylaws.

d. Deliberation of issues will be conducted only by commissioners, but the Board may authorize OPDC staff or members of the public to provide information and to engage in discussion on any topic.

e. A quorum is not required to receive testimony and similar input from staff or stakeholders, to ask questions of the person presenting, or to discuss items on the meeting agenda; a quorum is required to decide an item designated on the agenda as an action item.

f. To ensure accurate assessment of a quorum during virtual meetings, commissioners shall have their names posted and, to the extent practicable, their cameras on. All voting commissioners should attempt to have cameras on during a vote. Commission staff shall have names posted but may turn cameras off.

8. Action Items and Voting.

   a. Any voting commissioner may make a motion regarding a posted action item, and that motion must receive the endorsement of a second voting commissioner before a vote can occur.

   b. Once a motion has been made and received an endorsement from a second voting commissioner, there shall be a period for discussion.

   c. Following the discussion, the motion must be voted upon unless (1) the commissioner who made the motion withdraws the motion, or (2) the commissioner who provided the second endorsement withdraws that endorsement and the motion fails to get another second endorsement.

   d. Commissioners must be present to vote.

   e. Commissioners must vote yea or nay or may abstain. A commissioner who abstains shall state on the record the reason for the abstention.

   f. At a virtual meeting, or if any commissioner is attending virtually, the Chair shall conduct a roll-call vote. If all commissioners who are attending are in person, the Chair shall inquire whether there are any objections to adopting the motion under consideration. If no objections are made, the motion will pass, and it will be recorded as endorsed by all voting commissioners present. If any commissioner of the OPDC objects to the motion, a roll call vote will be held.

9. OPDC staff shall provide and publish one or more mechanisms whereby persons requiring reasonable accommodations to fully participate in a meeting may request such accommodations no later than the close of business 48 hours prior to the meeting. OPDC staff shall take all reasonable steps to ensure that such accommodations are provided.

B. Regular Meetings

1. The provisions of IV.A. apply to regular meetings except as provided in this section.

2. A majority of voting commissioners constitutes a quorum of the Board for the adoption or rejection of action items at regular commission meetings.

3. Public Comment.

   a. Public comment may be allowed and shall be posted on the agenda when authorized. Rules and guidelines for public comment shall be posted or linked on the OPDC website and on the published meeting agenda. The Chair of the Board may modify posted or linked time limits to accommodate time constraints or other considerations.

   b. Oral. Members of the public may apply to the Board for the opportunity to comment at Board meetings. Such applications must be received by the Commission by the close of business two business days prior to the date scheduled for the meeting. The Chair shall allow all reasonable requests for public comment.

Oral public comment shall be limited to 3 minutes unless, in the Chair's sole discretion, more or less time is allowed.

c. Written. Members of the public may submit written comments regarding items on the agenda of upcoming meetings.

d. Comment regarding action items shall be submitted no later than two (2) business days prior to the meeting at which the item is to be considered.

i. Submissions received by the close of business two (2) business days in advance of the meeting in which they are to be considered shall be submitted to voting and non-voting commissioners and posted to the public on the OPDC website prior to the meeting.

ii. Submissions received after a meeting and within 48 2 business days hours from the posted meeting time. shall be submitted to voting and non-voting commissioners and posted to the public on the OPDC website as soon as practicable; in addition, such comments shall be posted to the public on the OPDC website prior to the meeting.

C. Work Sessions

1. The provisions of IV.A. apply to regular meetings except as provided in this section.

2. A majority of voting commissioners constitutes a quorum of the Board for the adoption or rejection of action items at commission work sessions.

3. Public comment will not be taken at work sessions.

4. The Chair of the Board, in consultation with the Executive Director, may invite staff or members of the public to provide information at a work session.

5. If necessary, the Chair of the Board may refer a matter discussed at a work session to the consideration of the Board at a meeting in which the notice and quorum requirements for voting have been observed.

D. Emergency Meetings

1. The provisions of IV.A. apply to regular meetings except as provided in this section.

2. Scheduling and Notice

a. The Chair may call an emergency meeting in a situation in which adhering to notice requirements for other types of meetings increases the likelihood or severity of injury or damage to persons or property, immediate financial loss, or disruptions to the provision of public defense services that require an immediate response.

b. Notice of the meeting, the agenda, and any meeting materials shall be provided to all commissioners and posted to the public on the OPDC website as early as practicable prior to the meeting.

c. The emergency meeting notice shall state the nature of the emergency and provide, at a minimum, the meeting date, time, place, and (in the event of a virtual meeting) access information. Notice of the meeting shall be posted on the OPDC website as quickly as possible.

3. Agendas.

a. Emergency meeting agendas will be finalized by the Executive Director and the Chair of the Board. OPDC staff shall publish the agenda to commissioners and the public in conjunction with the notice of the emergency meeting unless good cause is shown, as jointly determined by the Executive Director and the Chair.

b. The reason for the emergency meeting shall be stated at the outset of the meeting.

c. Members of the public may apply to the Board for the opportunity to comment in person at an emergency meeting. Such applications must be received by the Board by two (2) hours prior to the emergency meeting. Members of the public may submit written comments regarding matters discussed at the emergency prior to the meeting or up to 2 business days from the posted meeting time.

E. Subcommittee Meetings.

1. The provisions of IV.A. apply to regular meetings except as provided in this section.

2. Organization of Subcommittees.

a. The Board Chair, in consultation with OPDC staff and voting and non-voting commissioners, may create standing or ad hoc subcommittees to advise the Board. The Chair shall appoint subcommittee members and a subcommittee chair and may ask for volunteers from among voting and non-voting commissioners. The Chair shall put on the record the members of the subcommittee and the nature of the subcommittee's charge.

b. The subcommittee chair may invite voting and non-voting commissioners, OPDC staff, legislators, staff of Oregon executive, judicial and legislative agencies, and members of the public to attend subcommittee meetings in an advisory capacity.

3. Scheduling.

a. At or before the first meeting of each calendar year, subcommittee members shall establish a schedule of meetings.

b. The Chair of the Subcommittee, in consultation with the Executive Director and in accordance with these bylaws, may adjust meeting schedules as necessary throughout the year, including the addition of new meeting dates.

4. Agendas.

a. Subcommittee meeting agendas will be finalized by the subcommittee chair with a focus on furthering the Commission's mission as set out in Art. I of these Bylaws.

b. Any voting or non-voting commissioner on the subcommittee may request the subcommittee chair to include an item on the agenda of an upcoming meeting.

c. OPDC staff shall publish the agenda to commissioners and the public three business days in advance of the meeting unless good cause is shown, as determined by the Subcommittee Chair.

d. The Subcommittee Chair may amend the agenda up until the start of the meeting. No action items may be added within one week of the meeting.

V. OTHER BOARD-RELATED ACTIVITIES

A. On-site Inspections. The Chair, in consultation with the Executive Director, may schedule on-site inspections of projects or programs.

B. Audit Committee.

1. OPDC may approve an audit committee charter and audit committee to advise the Board and to assist OPDC auditors in their audit function.

2. An audit committee is not a subcommittee of the Board, but one voting commissioner shall serve on the audit committee.

3. The Audit Committee meetings are subject to public meeting laws.

C. Advisory Committees and Workgroups.

1. The Executive Director may, after consultation with the Chair, create and staff advisory committees and workgroups as needed. The Executive Director should communicate creation of such groups to the Board.

2. Advisory committees and workgroups may include voting and non-voting commissioners, OPDC staff, legislators, staff of Oregon executive, judicial and legislative agencies, and members of the public. Consideration should ordinarily be given to gathering input from OPDC providers and persons with lived experience in, or communities impacted by, programs under OPDC's jurisdiction.

VI. COMMUNICATIONS WITH GOVERNMENT ENTITIES AND THE PUBLIC

A. Except as noted below, commissioners' oral and written communications will follow the requirements and guidelines in ORS Chapter 192 and Oregon Administrative Rules Chapter199 Division 50.

B. Official Communications

1. The Chair and the Executive Director are the public liaisons of the Commission. It shall be the responsibility of the Chair and the Executive Director, in coordination with one another, to speak on behalf of OPDC.

2. An individual commissioner may not act as spokesperson for the Board in any venue unless authorized to do so in writing by the Chair.

3. An individual Staff member may not act as spokesperson for OPDC in any venue unless authorized to do so by the Executive Director.

4. Individual commissioners, in their personal capacities, may advocate for or against legislation before the Legislative Assembly; when doing so commissioners shall make it clear that they do not speak for the Commission.

5. Individual commissioners, in their personal capacities, may communicate with the press, members of the public, or both; when doing so commissioners shall make it clear that they do not speak for the Commission.

C. Commissioners' Communications with OPDC staff.

1. Commissioners may communicate orally or in writing with OPDC staff on non-substantive issues, such as scheduling and IT support.

2. Commissioners' oral and written communications with OPDC staff members regarding agency oversight or other substantive commission business shall adhere to the guidelines and procedures set out in writing by the Executive Director.

3. Individual commissioners, in their personal capacities, may communicate orally or in writing with OPDC staff members; when doing so they shall make it clear that they do not speak for the Board.

4. Nothing in this section is meant to prohibit OPDC staff members from disclosing to commissioners information the staff member reasonably believes to be evidence of a violation of any federal, state, or local law, rule, or regulation or mismanagement, gross waste of funds, or abuse of authority, or substantial and specific danger to public health and safety resulting from OPDC action.

D. Complaint Procedure.

1. OPDC staff shall make the following information available on the OPDC website.

a. Persons with a complaint regarding OPDC policy should address a letter to the Chair of the Board requesting the complaint to be placed on the Board's meeting agenda; subject to the provisions of section IV.A.5., the Chair shall have the sole discretion either to place the item on the agenda of an upcoming meeting or to refer the matter to the Executive Director for investigation.

b. Persons with a complaint related to administrative practices of the OPDC should address a letter to the Executive Director of the OPDC; a complainant who is unsatisfied with how the complaint is handled may address a letter to the Chair of the Board requesting the complaint to be placed on the Board's meeting agenda; the Chair shall have the sole discretion either to place the item on the agenda of an upcoming meeting or to refer the matter to the Executive Director to report to the Chair on resolution of the complaint.

2. If a voting or non-voting commissioner is approached by a person with a complaint, the commissioner should direct the person to the correct course of action to be pursued; the commissioner shall not discuss the complaint with the complainant.

VII. PROCESS FOR BYLAW AMENDMENT

These bylaws may be amended by a two-thirds vote of the voting commissioners at any meeting provided the topic is posted as an action item and the proposed language is provided to all voting and non-voting commissioners one week prior to the meeting.

Oregon Public Defense Commission

Financial & Case Management System Update

February 18, 2026

Kenneth Sanchagrin, Interim Executive Director
kenneth.sanchagrin@opdc.state.or.us

David Martin, CIO, FCMS

Oregon Public Defense Commission

FCMS February 2026

Agenda

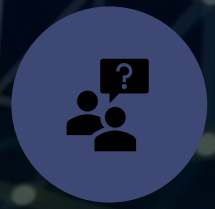
CONTRACT AWARD STATUS

SCHEDULE

ACCOMPLISHMENTS

UPCOMING MILESTONES

BUDGET



Q&A

FCMS February 2026

Implementation Planning Phase Approval & Procurement Status

Procurement:
Leadership elected to enter into Contract Negotiations and Execution. OPDC received a protest in response to public notice of its Intent to Award a Contract, and with Dept of Justice concurrence, denied the protest. That proposer has the option to seek judicial review through the date a contract is executed.

OPDC's negotiation team hosted an introductory meeting with DAS EIS, IQMS, and the proposer on November 5, 2025. Contract negotiations were initiated the following week and are in Round 4. OPDC anticipates completion of negotiations by March 16, with Dept of Justice and DAS EIS review and approval completed by April 21, 2026.

Implementation Planning:
Documentation on Data, Reporting, and Compliance continued through January 2026. Data and Reporting SIPOCs consisting of dashboards and data tables are currently being reviewed by IT Data Architecture and by CAP Data teams. IT Data Architecture has reviewed 60% of the tables and 42% of the dashboards. CAP Data has reviewed 27% of the tables and 25% of the dashboards. Initial analysis of identifying duplicative data and external data sourcing has begun. Refresh of Scope, Schedule, Budget continue through February alongside Contract Negotiations.

FCMS February 2026

Procurement Schedule

Phase 2: Potential for Judicial Review of Contract Award Protest Disposition
Protesting proposer has the ***option*** to seek judicial review until the contract is approved by the Office of the Attorney General and executed by OPDC.
Began October 2025.

Phase 3: Contract Negotiations
Contract negotiations began in November 2025

Contract Review
Nov 5, 2025, thru Apr 8, 2026

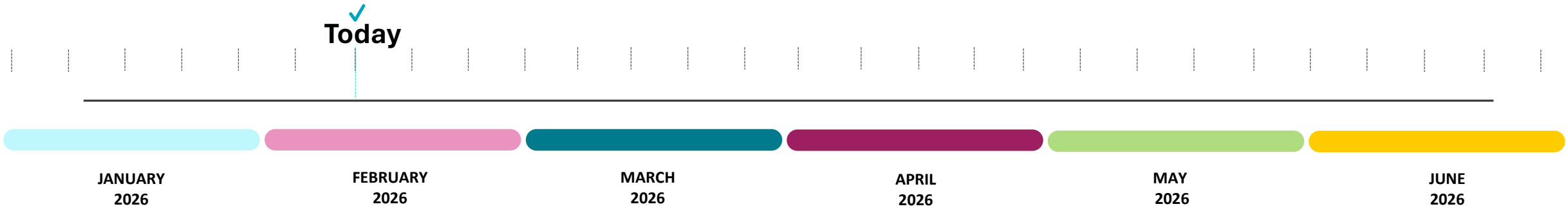
Contract Execution
Nov 5, 2025, thru Apr 21, 2026

Cost Negotiation
Mar 25 thru Apr 8, 2026

SOW Development Completion Mar 6, 2026
Project Management plan included

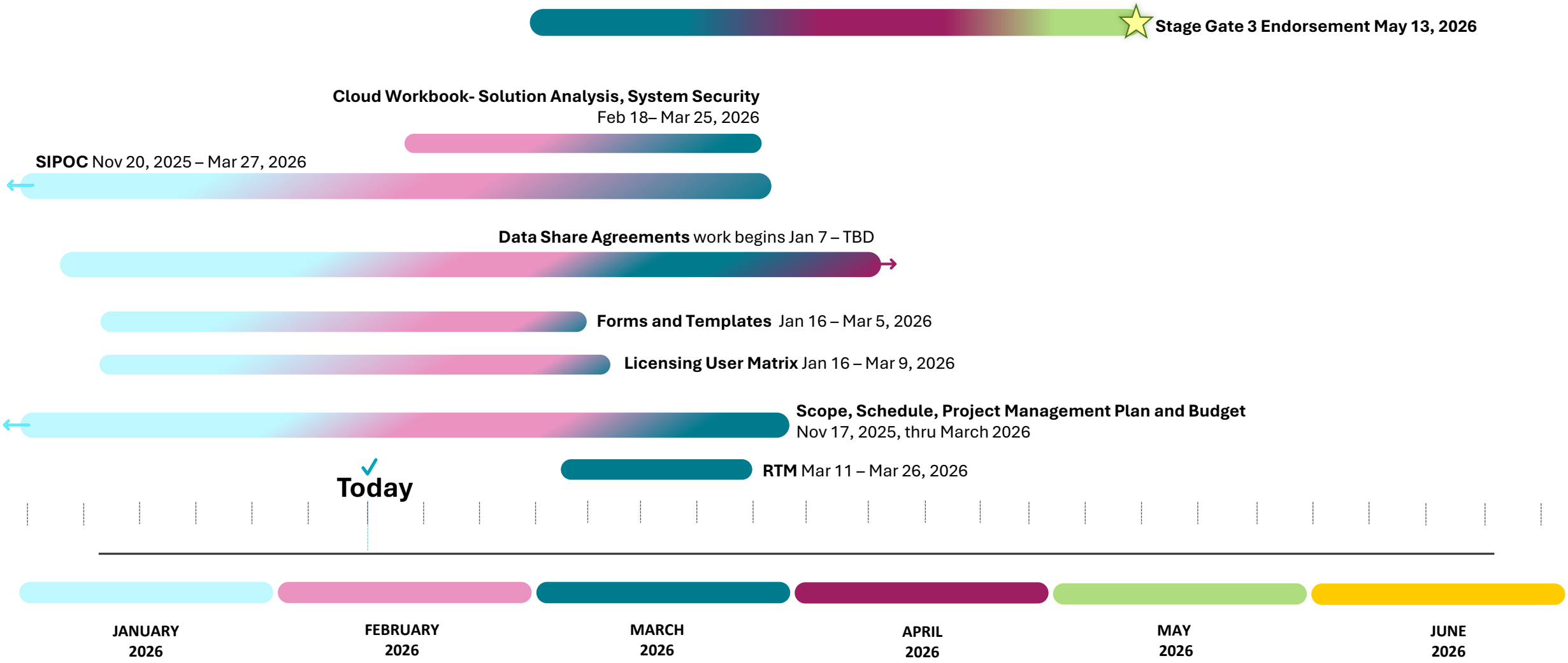
Licensing, Maintenance, and Hosting Agreements
Nov 2025 thru Mar 4, 2026

Schedule Development
Jan 14 thru Apr 17, 2026



FCMS February 2026

Implementation Planning Timeline



FCMS February 2026

Accomplishments

Implementation: Completed 6 process flow diagrams related to Gap Analysis work. At least 2 processes remain to be completed. Continued SIPOC documentation with IT Data Architecture (42% complete dashboard reviews) and CAP Data Team (25% complete dashboard reviews. Began process documentation for Compliance including Trial Support & Development.

Procurement Phase 3: Contract negotiations are in Round 4. OPDC anticipates completion of negotiations by March 16, with Dept of Justice and DAS EIS review and approval completed and contract execution by April 21, 2026.

Change Management: Delivered finalized internal change champion and change sponsor list. Developed a change champion toolkit with information about the change champion program, anticipated questions and answers, and FCMS roles and responsibilities. Preparing for change champion and change sponsor program kick-off in late February.

Upcoming Milestones

01

FCMS 4th round draft of SOW and FCMS Project Management Plan (pre-SOW development) complete.

02

Contract execution **April 21**.

03

Implementation Planning document revision continues for Scope, Schedule, Budget Alignment. Training Strategy being developed.

04

Identifying Forms and Templates used in FCMS processes will complete in March 2026. Documentation of External Provider Portal Framework begins mid-February to continue through March.

FCMS February 2026

Budget

Current funding is being covered by ASD General Fund until the Bond sale in late spring 2026.

The bond funding spending plan was finalized January 30th.

Hosting/Licensing Cost Review upcoming February.

SOW Cost review upcoming in February.

Thank you

Oregon Public Defense Commission