

IN THE CIRCUIT COURT OF THE STATE OF OREGON
FOR THE COUNTY OF WASHINGTON

STATE OF OREGON,

Plaintiff,

vs.

SCOTT GARNETT BOYD,
CARLOS SMITH,
JEFFREY MICHAEL APPLGATE,

Defendants.

No. C130935CR (DA 316247)
No. C053243CR (DA 208333)
No. 23CR16895 (DA 420661)

MOTION TO IDENTIFY DEFENSE COUNSEL
WITHOUT DELAY AND INCREASE
DEFENSE ATTORNEY COMPENSATION AS
NEEDED

(Immediate Hearing Requested)

(Oral Argument Requested)

The State by and through Andrew Freeman, Senior Deputy District Attorney, moves the Court for an Order requiring Office of Public Defense Services (OPDS) to identify defense counsel within five (5) judicial days and, in the event OPDS fails to comply, requiring OPDS to raise the hourly compensation rate for qualified counsel on the above-captioned cases until such counsel is identified.

As discussed below, the defendants are currently petitioning the federal courts to issue writs dismissing the above-captioned cases. Therefore, the State requests an immediate hearing on these matters.

I. FACTUAL AND PROCEDURAL BACKGROUND

Defendants Boyd and Smith were each convicted of multiple major sex crimes via non-unanimous jury verdict and sentenced to lengthy terms of incarceration at the Oregon Department of

1 Corrections. Defendant Boyd stands accused of multiple incidents of Rape, Sodomy, and Sexual
2 abuse committed against his stepdaughter when she was 10-14 years old. He was previously
3 sentenced to 400 months in prison after his first trial in 2014. Defendant Smith is charged with Rape,
4 Sodomy, and Sexual Abuse committed against a foster child in his care when she was 9-13 years old.
5 He was previously sentenced to 293 months in prison after his first trial in 2006. Their cases were
6 remanded for retrial under *Watkins v. Ackley*, 370 Or. 604 (2020). Each arrived back in the
7 Washington County Jail on March 9, 2023, and have been held in-custody without counsel since that
8 date, a total of ninety-six (96) days as of the date of this filing. The court granted the State's Motion
9 for Preventative Detention in the Boyd case (C130935CR), and a similar motion is pending
10 consideration in the Smith case (C053243CR). The next court date for each case is on the "OPDS
11 CMC" docket; Boyd on June 20, 2023, at 9:30am, and Smith on June 26, 2023, at 9:30am.

12 Defendant Applegate was arrested on April 10, 2023, and arraigned in-custody the next day.
13 On April 18, 2023, he was arraigned on Grand Jury indictment charging Sexual Abuse in the First
14 Degree and other offenses stemming from allegations he attacked a neighbor. He remained in the jail
15 without counsel for thirty (30) days until his release on May 9, 2023, and the next hearing on his case
16 is scheduled on the "OPDS CMC" docket on July 10, 2023, at 9:30am.

17 On May 26, 2023, attorneys at the Federal Public Defender's Office in Portland filed Petitions
18 for Writs of Habeas Corpus on behalf of each defendant in the United States District Court for the
19 District of Oregon. These petitions, attached as exhibits to this filing, seek relief that includes "an
20 order that the Respondents must dismiss all charges against (Defendant) in any court and remove all
21 restraints on his liberty until Respondents can provide (Defendant) with counsel at court expense."
22 The defendants have sought expedited review of their petitions, which are no less than an effort to
23 supersede this court's authority, violate victim's rights, secure the permanent dismissal of child

1 sexual abuse charges (Defendant Smith's case is beyond the statute of limitations), and release
2 dangerous offenders back into the Washington County community.

3
4 **II. THE COURT IS REQUIRED TO ENSURE INDIGENT DEFENDANTS ARE REPRESENTED**

5 It is a fundamental principal of our American justice system that criminal defendants are
6 entitled to legal representation in court. Oregon courts are obligated and empowered to ensure
7 criminal defendants are properly represented by counsel as required by both the Oregon and United
8 States Constitution. *See State v Langley*, 351 Or 652, 663 (2012) ("A defendant in a criminal case
9 has a constitutional right to adequate assistance of counsel under both Article I, section 11, of the
10 Oregon Constitution and the Sixth Amendment to the United States Constitution.").

11 As discussed more fully below, Oregon courts have inherent authority to appoint members of
12 the bar to represent indigent criminal defendants and to compel those members to accept those
13 appointments. Additionally, the State respectfully asserts that this Court is obligated to act without
14 further delay to ensure this defendant receives representation.

15
16 **A. A criminal defendant has a constitutional right to counsel, including a right to court-appointed counsel, if the defendant is indigent**

17 A defendant in a criminal case is entitled to counsel, including court-appointed counsel. *See*
18 *State v. Stanton*, 369 Or 707 (2022) ("If a defendant is indigent, the right to counsel includes the right
19 to court-appointed counsel."); *see also Gideon v. Wainwright*, 372 US 335, 34 (1963) (holding that
20 the Sixth and Fourteenth Amendment guarantee the right to court appointed counsel in state criminal
21 prosecutions).

22 In Oregon, the Public Defense Service Commission (PDSC) is required by law to establish
23 and maintain a public defense system that ensures the provision of public defense services consistent

1 with constitutional requirements and standards of justice. ORS 151.216(1)(a). Additionally, in order
2 to meet this statutory duty, the PDSC is required to establish the Office of Public Defense Services
3 (OPDS). ORS 151.216(1)(b); *see also* <https://www.oregon.gov/opds/Pages/about.aspx>. It is
4 therefore the duty of OPDS to ensure public defense services are available for indigent criminal
5 defendants in Oregon.

6 There are a variety of ways public defense services may be provided. Inherent in the
7 constitutional requirement of “adequate assistance of counsel” is the fact that there are no “particular
8 requirements of effective assistance” of counsel. *Strickland v. Washington*, 466 US 668 (1984); *see*
9 *also Krummacher v. Gierloff*, 290 Or 867, 876 (1981) (the Oregon constitution “gives no defendant
10 the right to a perfect defense”). Stated differently, the constitutional right to counsel does not require
11 appointment of a specialist in any particular area of criminal law or procedure; rather, it requires an
12 appointed counsel be able to “do those things reasonably necessary to diligently and conscientiously
13 advance the defense.” *Krummacher*, 290 Or at 874. Thus, the constitutional right to counsel can be
14 satisfied by appointment of a competent attorney even if that attorney does not typically practice as a
15 trial level criminal defense lawyer.

16 17 **B. OPDS and the PDSC have failed to meet their legal obligations**

18 As part of its mandate the PDSC is responsible for creating and adopting policies that ensure
19 fair and effective compensation of indigent defense counsel. ORS 151.216. These policies are then
20 implemented by OPDS as the office established to “handle the cases assigned and to carry out the
21 administrative policies and procedures for the public defense system.” ORS 151.211(5). Defense
22 counsel appointed in Oregon Circuit Court cases are then paid under this compensation system. ORS
23 135.055(2).

1 The current indigent defense crisis is rooted, in part, in the failure of the PDSC and OPDS to
2 meet these statutory obligations. The attached declaration of attorneys Robert Harris and James
3 Jensen establish the following: the hourly rate currently offered by OPDS is inadequate compensation
4 for complex or difficult cases such as these, there are qualified defense attorneys in Washington
5 County capable of representing the defendants in the instant cases, and one or more of those qualified
6 attorneys may be able to accept appointment on these cases if compensated in a manner equal to or
7 closer to the hourly rate they receive from clients who retain their services on similar cases. In short,
8 the court could meet its constitutional obligation to the defendants if OPDS first met its statutory
9 obligation to provide “fair compensation.” *See* ORS 151.216(1)(j)(C).

10
11 **C. The Court has authority to address this issue**

12 This court has previously recognized its authority to order OPDS to identify counsel without
13 delay. This power stems from the court’s inherent authority to appoint members of the bar to
14 represent indigent criminal defendants, and to compel those members to accept those appointments.
15 When an “attorney is appointed as a servant of the court and of the public to represent an indigent
16 defendant[,] [l]awyers have always regarded the acceptance and performance of such service as one
17 of the obligations incident to their professional status and privileges.” *Spencer v. Gladden*, 230 Or
18 162, 165 (1962) (quotation marks omitted). For that reason, there is “no doubt that Oregon courts
19 have the inherent power to call upon members of the bar to represent an indigent defendant who has
20 no other means of obtaining counsel.” *State ex rel Acocella v. Allen*, 288 Or 175, 180 (1979). The
21 Oregon Supreme Court has noted that, “[a]n attorney is an officer of the court[,] and it would be a
22 novelty to hold that a court could not appoint one of its officers to assist it in doing justice when it
23 developed that the court could not do justice without the aid of such an officer.” *State v. Delaney*, 221

1 Or 620, 640 (1958); *see also Myatt v. State*, 7 Or App 584 (1972) (per curiam) (rejecting the
2 argument that attorneys have a right to decline court appointments to represent indigent criminal
3 defendants).

4 Should OPDS fail to meet its statutory obligations as ordered this court has further authority
5 to intervene and require the payment of fair compensation in order to secure representation. As the
6 Oregon Supreme Court has noted, “absent some legislative or constitutional impediment, courts
7 possess the inherent authority to issue those rulings necessary to decide the issues before them.” *State*
8 *v. Kuznetsov*, 345 Or. 479, 487 (2008). Here, the statutory impediment and constitutional prerogative
9 are in direct conflict. As discussed above, the legislature entrusted the PDSC with the responsibility
10 to set fair compensation rates for indigent defense. But the court cannot abide by a statutory scheme
11 when doing so would effectively trump the defendants’ constitutional rights. The Oregon Court of
12 Appeals recently affirmed this fundamental principle in *State v. Aranda*, 319 Or. App. 178 (2022). In
13 *Aranda* the court considered a challenge to OEC 609 (codified in ORS 40.355), which states that the
14 court “shall” admit evidence of a witness’s prior convictions for the purposes of impeachment. The
15 defendant challenged application of this *per se* rule as unconstitutional, arguing that Due Process
16 requires the court to first balance the probative value of a defendant’s conviction against its potential
17 prejudicial effect. *Id.* at 180. The Court agreed and reversed the conviction, noting that despite the
18 explicit intent of the statute to prevent such a balancing test, the Due Process Clause “requires the
19 exclusion of evidence that, if admitted, would render a trial fundamentally unfair.” *Id.* at 181, citing
20 *State v. Baughman*, 361 Or. 386, 399 (2017).

21 Together, the State and the defendants face an analogous situation in the instant cases. The
22 defendants have a constitutional right to an attorney, but the PDSC and OPDS are exercising
23 statutory authority in a manner that effectively deprives them of that representation. Due Process

1 requires this court to place the defendant's constitutional rights above the statutory authority of
2 OPDS. The court must therefore order OPDS to do what it has failed to do on its own; set higher and
3 more effective compensation rates so that defense counsel may be identified and appointed.
4

5 III. CONCLUSION

6 It is imperative that the court address this issue or risk further irreparable harm to the
7 defendants and the victims of these crimes. The State therefore requests this Court issue the following
8 order:

- 9 1. The Office of Public Defense Services (OPDS) shall identify qualified defense counsel for
10 appointment in the above-captioned cases and provide that attorney's name and contact
11 information to the Court within five (5) judicial days of this ORDER.
- 12 2. Should OPDS fail to comply with item (1) above, on the sixth judicial day from this order
13 OPDS shall raise the hourly rate for qualified defense counsel on these cases by 25% and
14 publicize that new rate to the criminal defense bar. OPDS shall continue to raise the rate
15 by increments of 25% every five (5) judicial days thereafter until counsel is identified, up
16 to a maximum hourly rate of \$500.

17 DATED: June 9, 2023.

18 

19 Andrew Freeman
20 Senior Deputy District Attorney
21 Oregon State Bar #093555
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